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Lessons Already Learned: An Analysis of Waxman-Markey under Current WTO Case Law

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INTRODUCTION

In 2009, the House of Representatives, responding to rising concerns over anthropogenic contributions to climate change, passed the first major piece of climate legislation in U.S. history.¹ This bill, the “American Clean Energy and Security Act of 2009” (ACESA), would cap U.S. carbon emissions and establish a national carbon market where regulated parties trade carbon dioxide emissions rights.² However, because many in the developed world fear that carbon markets will hurt domestic industries and lead to job losses and “leakage” of carbon emissions to less-regulated markets in the developing world,³ ACESA imposes severe quality controls on the importation of energy-intensive manufactured goods that face the highest prospective carbon reduction costs.⁴ This provision could dramatically affect trade, and thus could be challenged under the World Trade Organization (WTO), an intriguing possibility given the WTO’s controversial status in the trade community.⁵

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1. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) [hereinafter ACESA] (co-sponsored by Reps. Henry Waxman (D-CA) and Edward Markey (D-MA)).

2. *Id.* § 341.

3. Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 109 COL. L. REV. 1531, 1542–43; Joost Pauwelyn, *U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law* 41 (Nicholas Inst. for Envtl. Policy Solutions, Working Paper 07-02, 2007), available at <http://nicholas.duke.edu/institute/internationaltradelaw.pdf>.

4. ACESA, *supra* note 1, ¶¶ 701, 761.

5. For more on the debate over the WTO dispute settlement system, see generally Susan Esserman & Robert Howse, *The WTO on Trial*, 82 FOREIGN AFF. 130 (2003); Daniel J. Ikenson & Robert E. Lighthizer, *Council on Foreign Relations, Debate: Is the WTO Dispute Settlement System Fair?*, COUNCIL ON FOREIGN RELATIONS, Feb. 26, 2007, available at <http://www.cfr.org/publication/12665>.

This Article takes ACESA through a theoretical WTO review, ultimately finding that ACESA would probably pass WTO review with some modifications. WTO consideration of ACESA could serve as an indication of how future unilateral action can be effectively and legally taken. However, the lesson from this analysis goes further; WTO retains the ability to overturn environmental protections, and its decisions are respected (if not always appreciated or adhered to) by the international community. As countries negotiate a balance between economic fears in the developed world and economic growth in the developing world, they may find that norms established and enforced by the WTO provide useful insights.

I. ACESA RELEVANT INTERNATIONAL PROVISIONS

The ACESA measure most likely to face WTO review is the International Reserve Allowance Program (IRAP).⁶ IRAP would require countries exporting goods to the U.S. to purchase allowances for these goods from a specially created reserve of international allowances to match the emission cost that would be faced by similar domestic manufacturers.⁷ The Administrator would price and sell IRAP credits to “minimize[] the likelihood of carbon leakage” to countries with lower carbon costs.⁸ IRAP would apply only if the United States does not reach “binding agreements... committing all major greenhouse gas-emitting nations to contribute equitably to” greenhouse gas (GHG) reductions or otherwise fails to avoid leakage issues.⁹ It cannot be activated before 2020¹⁰ and activates only if the President finds IRAP necessary to prevent leakage.¹¹ IRAP covers sectors with high GHG and trade intensity and sectors with particularly high energy intensity.¹²

II. GATT/WTO DISPUTE SETTLEMENT FRAMEWORK

This analysis will necessarily center on a few relevant General Agreement on Tariffs and Trade (GATT) provisions. To pass any WTO review ACESA must demonstrate “most favored nation” treatment among all trade partners (Article I)¹³ and then must demonstrate fair treatment of foreign goods. To provide such fair treatment, “national treatment” of imported goods (regulating them equivalently to their

6. See ACESA, *supra* note 1, ¶ 768.

7. *Id.* ¶ 768.

8. *Id.* ¶ 768(a)(2).

9. *Id.* ¶¶ 765, 768(a)(1)(E)(i).

10. *Id.* ¶¶ 768(c).

11. *Id.* ¶¶ 767(b).

12. *Id.* ¶ 763(b)(2)(A).

13. General Agreement on Tariffs and Trade, art. I(1), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

domestic counterparts) is allowed if the measure being challenged is deemed to be a product-based tax or charge (Article III), but any *other* non-tax restrictions directly regulating imports are banned under the WTO (Article XI).¹⁴ If it fails these requirements, ACESA still survives WTO review if it is justifiable (Article XX) either to protect human and natural health (paragraph b) or to protect natural resources (paragraph g), and its actions are not arbitrary or unjustifiably discriminatory (introductory paragraph, also called the “Chapeau”).¹⁵

Looking at ACESA, there is little question that the United States treats all foreign countries equally, except for its exemption of least-developed nations from IRAP requirements (almost certainly justifiable as good international development policy). Consequently, Article I will not be a major concern. Conversely, if Article III is found not to apply to IRAP (see below), then ACESA almost certainly violates Article XI. Thus, the following analysis necessarily hinges on whether ACESA is justifiable under Article III (as an indirect product-based tax), and, if not, whether Article XX nevertheless protects it. As this Article demonstrates, it is more likely than not that ACESA can be justified under both Articles III and XX.

A. Article III

Article III requires that all nations give “national treatment” to imported goods: no measures should be taken “so as to afford protection to domestic production.”¹⁶ Importantly, Article III allows some taxation and regulation,¹⁷ but only applies to regulations on products “as such.”¹⁸ The charge must be at least indirectly on the product itself and not just on foreign activities, which means there must be a “nexus” between tax and product.¹⁹ As stated above, other regulations are subject to far more stringent Article XI prohibitions.

There is conflicting precedent on what constitutes regulation of products “as such,” but there is some precedent to regulate substances indirectly through taxes on products for which they are inputs.²⁰ Thus, to achieve Article III jurisdiction, ACESA must portray IRAP as merely an

14. *Id.* art. III(1)–(2), XI(1).

15. *Id.* art. XX, ¶ 1, XX(b), (g); *Pauwelyn, supra* note 3, at 33–37.

16. GATT, *supra* note 13, art. III(1).

17. See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R (adopted Oct. 4, 1996), at 16 [hereinafter *Japan-Alcohol*].

18. GATT Panel report on *United States – Restrictions on Imports of Tuna*, DS21/R, (Sept. 3, 1991), BISD 39S/155, ¶¶ 5.13–5.14 [hereinafter *Tuna-Dolphin*].

19. *Pauwelyn, supra* note 3, at 21.

20. Compare *Tuna-Dolphin, supra* note 18, ¶ 5.15 (“Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product.”), with GATT Panel Report on *United States – Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136, ¶¶ 2.1, 3.1.1–9 [hereinafter *US-Superfund*] (applying Article III to regulation placing higher taxes on imports produced with certain chemicals).

application of internal charges to imported products “as such.” The intuition for justifying IRAP would probably rely on the *US-Superfund* application of Article III to taxes on chemical inputs and hinge on the view of carbon taxes as internalizing the social cost of carbon into the cost of the product itself.²¹ This justification is made more difficult by the presidential IRAP trigger, which makes IRAP seem less like an indirect tax on carbon, and more like a disguised form of WTO-discouraged trade protectionism.

If Article III applies, it requires that imported products must not be subject to taxes or regulations “in excess of” those applied to “like” domestic products.²² The definition of “like” is a case-by-case determination focused on “the nature and extent of a competitive relationship between and amongst products.”²³ This definition is construed narrowly,²⁴ but here imported goods will likely be considered “like” products to their domestic equivalents.

There are two ways to show a difference in treatment that would violate the ban on excess regulation of foreign goods—*de jure* (legislated) or *de facto* (in practice). *De facto* treatment is generally more complicated, because “distinctions between products” do not necessarily constitute “less favorable treatment.”²⁵ The relevant test is whether imported products as a group are affected more than domestic products; a law cannot systematically favor domestic products.²⁶ However, some cases allowed a “detrimental effect on a given imported product” if it could be “explained by factors or circumstances unrelated to the foreign origin of the product.”²⁷

IRAP only applies to imports, but this alone probably does not constitute differential treatment—the WTO has arguably “accepted that carbon taxes or regulations can be adjusted at the border” and still fall within Article III.²⁸ Because IRAP is an outgrowth of the (domestic)

21. See *US-Superfund*, *supra* note 20, ¶¶ 2.1, 3.1.1–9; see *Pauwelyn*, *supra* note 3, at 20–21.

22. GATT, *supra* note 13, art. III(2).

23. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 99, WT/DS135/AB/R (adopted Mar. 12, 2001) [hereinafter *EC-Asbestos*]; see Working Party Report, *Border Tax Adjustments*, ¶ 18, L3464 (Dec. 2, 1970) (examining “the product’s end-uses in a given market; consumers’ tastes and habits . . . [and] the product’s properties, nature and quality”).

24. *Japan-Alcohol*, *supra* note 17, at 21.

25. *EC-Asbestos*, *supra* note 23, ¶ 100.

26. *Pauwelyn*, *supra* note 3, at 30.

27. Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 96, WT/DS302/AB/R (April 25, 2005) (adopted May 19, 2005) [hereinafter *Dominican Republic-Cigarettes*]; see generally *EC-Asbestos*, *supra* note 23.

28. *Pauwelyn*, *supra* note 3, at 21, 28 (noting that the GATT allows internal charges to be applied equally to imports, but is unclear on whether this application can come via separate legislation); GATT, *supra* note 13, art. III(2); see, e.g., *US-Superfund*, *supra* note 20 (allowing higher taxes on imports produced with certain chemicals under Article III, and thus implicitly accepting border tax adjustments as Article III regulations).

carbon market, as long as all manufacturers pay the same price for allowances, the de jure effect on all products is probably identical. Turning to ACESA's de facto effects, countries with carbon-intensive manufacturing might argue that they face institutional discrimination, with consistently higher carbon fees. However, IRAP's carbon-related charges should be sustained under recent case law, as long as there is no charge on carbon used to transport products into the United States (which would unfairly disadvantage foreign manufacturers).²⁹

ACESA does not fit the mold of regulations that would normally fall under Article III regulation and so would be viewed suspiciously by any WTO panel. However, recent precedent has probably expanded the notion of what constitutes a regulation on a product, and expanded the range of allowable discriminatory effect on foreign products, sufficiently to regulate and justify ACESA.

B. Article XX

Article XX provides a general-purpose exception to other WTO provisions for environmental measures that are either "necessary to protect human, animal or plant life or health," or "relat[e] to the conservation of exhaustible natural resources."³⁰ Also, such measures must satisfy the Chapeau paragraph, which bans "arbitrary or unjustifiable discrimination."³¹

C. Article XX, Paragraph (b)

Article XX(b) excepts measures "necessary to protect human, animal or plant life or health."³² Such measures must not just promote health (generally straightforward) but also must be necessary to this goal.³³ This necessity "is not limited to that which is 'indispensable' or 'of absolute necessity'" but is not far off.³⁴ WTO, as established in a dispute between Korea and the United States and Australia over beef standards, considers three factors to establish necessity ("Korean Beef test"): (1) the importance of the interests/values protected by the measure; (2) the

29. See *EC-Asbestos*, *supra* note 23; *Dominican Republic-Cigarettes*, *supra* note 27.

30. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 113, 118, WT/DS58/AB/R (adopted Oct. 12, 1998) [hereinafter *Shrimp-Turtle-1998*]; GATT, *supra* note 13, art. XX(b), (g).

31. GATT, *supra* note 13, art. XX, ¶ 1.

32. GATT, *supra* note 13, art. XX(b).

33. See, e.g., Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/D52/AB/R (adopted Apr. 29, 1996) [hereinafter *US-Gasoline*]; *EC-Asbestos*, *supra* note 23; but see Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* 50, WT/DS26/AB/R (adopted Jan. 16, 1998) (requiring a "rational relationship" between the policy and the risk that goes beyond perceptions).

34. Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161, WT/DS161/AB/R (adopted Dec. 11, 2000) [hereinafter *Korea-Beef*].

measure's contribution to the end pursued; and (3) the measure's effects on international commerce.³⁵ The more "vital or important" its protected interests are, the more likely a measure is to be certified as "necessary."³⁶

The basic justification for IRAP is simple: mitigating climate change prevents harm to human, animal, and plant health.³⁷ Running the Korean Beef test above, the first factor would probably be straightforward: the interests protected are quite strong, because climate change is a globally recognized problem, and preventing climate-related human deaths is "important in the highest degree."³⁸ The second factor, IRAP's contribution to these interests, is less clear—it must emphasize that it prevents "leakage" of domestic emission gains by increased emissions abroad and avoid being classified as a competitive safeguard against competition. Turning to the third factor, ACESA certainly restricts international commerce as an effective tariff, which makes it less likely to be justified as necessary under the Korean Beef test.³⁹ The United States' best, although weak, argument is that it equalizes domestic and foreign costs and thus only preserves current global trade patterns.

Importantly, no measure is considered necessary if there is a reasonably available alternative consistent with GATT provisions.⁴⁰ This query considers the domestic costs of alternatives, how difficult they would be to implement, and how effectively they would achieve the desired result.⁴¹ Here, until there is a defined administrative plan, it is hard to imagine obvious alternatives that could prevent leakage without similarly implicating WTO review.

35. *Korea-Beef*, *supra* note 34, ¶ 164.

36. *EC-Asbestos*, *supra* note 23, ¶ 172 (holding that, in the case of asbestos poisoning, human life and health is "important in the highest degree").

37. *See generally* Ulisses Confalonieri et al., *Human Health*, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 391–431 (M.L. Parry et al. eds., 2007) [hereinafter CLIMATE CHANGE 2007: IMPACTS]. Threats to coastal populations of humans and tropical alpine species are particularly well documented. *See* Robert J. Nicholls et al., *Coastal Systems and Low-Lying Areas*, CLIMATE CHANGE 2007: IMPACTS, *supra* note 37, at 315–356.

38. *EC-Asbestos*, *supra* note 23, ¶ 172.

39. *Korea-Beef*, *supra* note 34, ¶ 163.

40. GATT Panel report on *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, adopted 7 Nov. 1990, DS10/R - 37S/200, ¶ 74, *quoting* Report of the panel on "United States - Section 337 of the Tariff Act of 1930" (L/6439, ¶ 5.26, *adopted* 7 Nov. 1989).

41. *Korea-Beef*, *supra* note 34, ¶ 173; *EC-Asbestos*, *supra* note 23, ¶¶ 170, 174; However, administrative difficulties and slight quality control losses cannot prevent an alternative from being "reasonably available." *US-Gasoline*, *supra* note 33, at 16–17.

D. Article XX, Paragraph (g)

Article XX(g) excepts measures “relating to the conservation of exhaustible natural resources” in conjunction with domestic restrictions.⁴² It asks whether rules are “primarily aimed at” the conservation of natural resources, but is less stringent than the “necessary” standard in XX(b): one must only establish a “substantial relationship” to conservation goals.⁴³

The most restrictive definition of exhaustible would only include non-living natural products.⁴⁴ However, tying paragraph (g) to sustainability and environmental norms in the Preamble to the WTO⁴⁵ has allowed the concept of “natural resources” to expand with expanding notions of resource protection.⁴⁶ Living species have been classified as exhaustible natural resources, because they can be depleted and/or driven to extinction and thus “are just as ‘finite’ as... non-living resources.”⁴⁷ Recently, even clean air has been found to be an exhaustible natural resource, because it is “natural” and can be “depleted.”⁴⁸

Looking at ACESA, climate change is primarily an environmental protection issue, implicating resource usage only indirectly. However, relying on paragraph (g)’s conceptual evolution, two arguments could connect climate change to natural resource concerns. One focuses on climate change’s effect on established exhaustible natural resources, particularly water, oil and gas, and economically important species.⁴⁹ The

42. GATT, *supra* note 13, art. XX(g). For a discussion of how this requirement applies, see *US-Gasoline*, *supra* note 33, at 12–13.

43. *US-Gasoline*, *supra* note 33, at 12; *Korea-Beef*, *supra* note 34, ¶ 104.

44. *Shrimp-Turtle-1998*, *supra* note 30, ¶¶ 127–28 (mentioning oil and minerals as basic examples of exhaustible natural resources, and outlining recent arguments that the conception of “exhaustible natural resources” should be limited to these examples).

45. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instrument – Results of the Uruguay Round, 1867 U.N.T.S. 187, 33 I.L.M. 1125 (1994) (explicitly acknowledging “the objective of sustainable development, seeking both to protect and preserve the environment”).

46. *Shrimp-Turtle-1998*, *supra* note 30, ¶ 130, quoting Namibia (Legal Consequences) Advisory Opinion (1971) I.C.J. Rep., ¶ 31 (noting that the term “natural resources” is “by definition, evolutionary”).

47. *Shrimp-Turtle-1998*, *supra* note 30, ¶ 128; see, e.g., GATT Panel Report on *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted 22 February 1982, BISD 29S/91, ¶ 4.9; GATT Panel Report on *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted 22 March 1988, BISD 35S/98, ¶ 4.4 (recognizing fish stocks as exhaustible natural resources); *Shrimp-Turtle-1998*, *supra* note 30, ¶ 135 (recognizing sea turtles as an exhaustible natural resource even though they are themselves of no significant economic value).

48. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶¶ 6.36–37, WT/D52/R (adopted Jan. 29, 1996) (noting also that “the fact that the depleted resource [is] defined with respect to its qualities [is] not . . . decisive”), affirmed by *US-Gasoline*, *supra* note 33.

49. See, e.g., Zbigniew W. Kundzewicz et al., *Freshwater Resources and Their Management*, CLIMATE CHANGE 2007: IMPACTS, *supra* note 37, at 173–210 (discussing climate effects on water scarcity); Brian Helmuth et al., *All Climate Change is Local: Understanding and Predicting the*

other relies on the holding that clean air is an exhaustible natural resource because it is “natural” and can be “depleted.” The United States could argue that the concentration of carbon dioxide was “natural” before we started emitting carbon 150 years ago, “depleting” natural air concentration supply. Reducing carbon emissions could then be seen as “preserving” the natural air column composition. If the above arguments do hold, IRAP could probably justify its policies as having a “substantial relationship” to climate change prevention.

Finally, Article XX(g) also requires that any trade measures be taken “in conjunction with” domestic measures. This essentially requires “even-handedness in the imposition of restrictions”—equal treatment.⁵⁰ Here, IRAP is certainly established in conjunction with domestic measures, because it ties compliance costs explicitly to domestic compliance costs.⁵¹

E. Article XX Chapeau

Article XX’s Chapeau bans measures that enact “arbitrary or unjustifiable discrimination... or a disguised restriction on international trade” between countries with the same conditions.⁵² This requirement has “both substantive and procedural” components.⁵³

Substantively, Article XX should not be “applied as to frustrate or defeat” other nations’ general WTO rights.⁵⁴ As laid out below, the main factors it considers are serious and equitable efforts to negotiate international solutions, procedural fairness, and infringement on other countries’ laws.

Countries are expected to try to resolve trade conflicts through multinational agreements,⁵⁵ and to extend these efforts equally to all

Effects of Climate Change from an Organism’s Point of View, 2 STAN. J.L. SCI. & POL’Y 18, 26–28, 30 (2010) (showing threats to, and migrations among, marine ecosystems and fish stocks from warming waters and ocean acidification); A.L. Carroll, S.W. Taylor, J. Regniere & L. Safranyik, *Effects of Climate Change on Range Expansion by the Mountain Pine Beetle in British Columbia*, NATURAL RESOURCES CANADA, CANADIAN FOREST SERVICE, PACIFIC FORESTRY CENTRE INFORMATION REPORT BC-X-399, 223–32 (2004) (T.L. Shore, J.E. Brooks & J.E. Stone, Eds.) (discussing the threat to lumber stocks in North America from expanding beetle ranges).

50. *US-Gasoline*, *supra* note 33, at 13.

51. ACESA, *supra* note 1, ¶ 768(a)(1)(B) (requiring that “the price for purchasing the international reserve allowances . . . [be] equivalent to the auction clearing price for [domestic] emission allowances”).

52. GATT, *supra* note 13, art. XX, ¶1.

53. *Shrimp-Turtle-1998*, *supra* note 30, ¶¶ 150, 160.

54. *US-Gasoline*, *supra* note 33, at 14. This language comes from the doctrine of *abus de droit*, which prohibits the abusive exercise of a state’s rights. *Shrimp-Turtle-1998*, *supra* note 30, ¶¶ 158–59.

55. Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, Rio de Janeiro, June 3–14, 1992, principle 12, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) (“Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.”); *see also Shrimp-*

members of the WTO. For example, a U.S. law banning imports from countries that did not require Turtle Excluder Devices (TEDs) in shrimp nets was overturned because of U.S. (“plainly discriminatory”) failure to engage Asian countries as it had Latin American countries.⁵⁶ However, good faith negotiations satisfy this requirement and no successful resolution is required.⁵⁷ Similarly, equivalent agreements are not required. Rather, negotiations for which “comparable efforts are made, comparable resources are invested, and comparable energies are devoted” are adequate.⁵⁸

For ACESA, the WTO’s emphasis on international agreements could cut either way. Climate negotiations have not yielded emissions reduction agreements, and unilateral action has become a diplomatic reality. Also, ACESA explicitly cooperates with international carbon markets. However, the United States bears much of the blame for failure and, specifically, has not addressed the leakage concerns that motivate IRAP in any agreement. Currently, the best solution, developing world emission limitations, is politically infeasible. A WTO decision would depend on the extent to which it views U.S. negotiating efforts as sincere.

The procedural requirements in Article X(3)(a) of GATT require that each country administer its laws “in a uniform, impartial and reasonable manner.”⁵⁹ In *Shrimp-Turtle*, the United States was scolded for failing to give countries notice of decisions or a formal opportunity to be heard, respond to allegations, and appeal decisions.⁶⁰

Two major IRAP provisions raise procedural questions, with the first being the presidential “finding” that triggers IRAP. Here, Congress gives clear standards for the President to follow, so if countries are involved and informed throughout, procedural safeguards will probably be sufficient.⁶¹ By contrast, the Administrator’s authority to establish, price, and sell IRAP allowances is not subject to congressional guidelines other than to match domestic carbon costs.⁶² The Administrator’s

Turtle-1998, *supra* note 30, ¶ 169 (referencing the Convention on Biological Diversity and the WTO’s Report of the CTE out of Singapore).

56. *Shrimp-Turtle-1998*, *supra* note 30, ¶¶ 169–70, 172.

57. The United States satisfied its obligations three years later after trying, but failing, to negotiate an agreement with Malaysia. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 124, WT/DS58/AB/RW (adopted Oct. 22, 2001) [hereinafter *Shrimp-Turtle-2001*] (“It is one thing to prefer a multilateral approach . . . it is another to require the conclusion of a multilateral agreement.”).

58. *Shrimp-Turtle-2001*, *supra* note 57, ¶ 122.

59. GATT, *supra* note 13, art. X(1), (3); *Shrimp-Turtle-1998*, *supra* note 30, ¶ 183.

60. *Shrimp-Turtle-1998*, *supra* note 30, ¶ 180; *see also* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101–162, § 609, 103 Stat. 988, 1037–38 (1989) (codified at 16 U.S.C. § 1537 (2006)) [hereinafter MMPA § 609]; However, when the United States changed its country certification process to fix its procedural errors, its law was upheld in 2001. *Shrimp-Turtle-2001*, *supra* note 57, ¶¶ 147–48, 152.

61. *See ACESA*, *supra* note 1, § 767(c).

62. *See id.* § 768(a).

determinations here may well be highly contentious, and a lack of guidelines could prove troublesome. Again, extensive foreign involvement, as well as clear agency regulations, will be critical to survive the Chapeau.

Finally, Article XX exceptions should not be used to force other countries to adopt the regulating country's policy of choice. Again in *Shrimp-Turtle*, the problematic U.S. law required "essentially the same" turtle protection policies (specific fishing practices)—it did not just require similar-strength policies.⁶³ Further, it banned *all* shrimp imports until the entire country qualified, strengthening the intuition that it sought to force its regulatory regime on other countries and not just to promote turtle protection. The follow-up to this case in 2001 upheld a rule that required only "comparable effectiveness,"⁶⁴ which allowed countries to develop programs that met U.S. substantive goals but also suited those countries' specific conditions.

Given IRAP's potential to exert a strong coercive effect on other countries' economies, the balance between U.S. Article XX rights and other countries' right to sovereignty is delicate. However, IRAP would likely fare well here because it makes no attempt to regulate other countries' climate programs by only seeking to match compliance costs. It also rewards individual actors for carbon reductions regardless of their country's laws. Thus, IRAP's methods seem necessary for its stated policy objective, and it is probably sufficiently flexible and non-coercive in its application to satisfy the standards of Article XX.

F. Summary of WTO Analysis

ACESA's IRAP program avoids serious Article I issues, with only minor exceptions. It will have trouble justifying its reserve allowance requirements as charges "on products" to achieve Article III review. If it succeeds, ACESA has a fair chance of WTO support under Article III given its "green" swing in recent case law, but if it fails to reach Article III, ACESA certainly violates Article XI. Article XX constitutes a second way to justify ACESA, with paragraph (b) the more likely justification as long as the United States wins the framing battle describing IRAP as an anti-leakage measure. However, paragraph (g) is a real option given the evolution of the term "natural resources" and/or the climate's effect on resource availability. Finally, if the WTO believes the United States has approached climate negotiations in good faith, and the Environmental Protection Agency's implementation remains open-access, the Chapeau

63. In this case, the United States required TEDs in all shrimp nets. *Shrimp-Turtle-1998*, *supra* note 30, ¶¶ 164–65; MMPA, *supra* note 60, § 609.

64. *Shrimp-Turtle-2001*, *supra* note 57, ¶¶ 135, 141 ("if, in practice, the implementing measure provides for 'comparable effectiveness' . . . lack of flexibility will have been addressed.") (emphasis removed) (internal citations omitted).

should not be an issue. IRAP is probably flexible enough to avoid sanction.

CONCLUSION

ACESA may not pass in its current form, let alone be challenged under WTO law. Nevertheless, the issues inherent in a WTO legal review encompass major sources of disagreement at the international scale. ACESA's IRAP program reflects widespread fear that, in responding to climate change, developed countries will be undermined by transfer of heavy manufacturing activities abroad, and will lose jobs in the process.⁶⁵ The WTO remains a widely respected institution for resolving these concerns over access to world markets and, in many ways, represents where the line between these competing interests is acceptably drawn.

As countries consider unilateral climate activity, they should consider not just the economic but also the legal implications of their actions and proactively resolve issues looming on the horizon. One solution to the WTO's deterrent effect on climate legislation may be a global pact not to challenge climate provisions under the WTO (though this may leave too many loopholes for disguised protectionism). Another may be an explicit legal standard, unique to climate legislation, for the WTO to follow (the WTO actively relies on drafting notes in international negotiations to help guide its decisions, when such notes are available, and also considers negotiation history when available).⁶⁶ The negotiating parties should *not* ignore the looming prospect of WTO challenges. Aside from potentially undermining emission reduction efforts across the world, such challenges are often contentious and could undermine the good faith necessary to negotiate the deeper cuts in carbon emissions that will be required into the future.

65. David B. Hunter & Nuno Lacasta, *Lessons Learned from the European Union's Climate Policy*, 27 WISC. INT'L L.J. 575, 598-600 (2009); see also Freeman & Guzman, *supra* note 3, at 1542-43.

66. Esserman & Howse, *supra* note 5, at 139.