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A Way Through the Impasse in U.S. Climate Change Legislation: A GHG Tax that Possesses Political and Administrative Feasibility and Conforms to International Law

*Sean Lowe**

Discussions in Congress about what is generally known as Climate Change have morphed into a “third rail” of politics – where engaging such a topic can seem like an admission that massive inter-governmental cooperation and drastic cutbacks in energy usage are necessary. Unfortunately, that fear has stifled the conversation about creative solutions – because without a problem, who needs a solution?

This Comment posits a novel, congressional response to Climate Change with three particular aims: political feasibility, administrative feasibility, and conformity with international law. More specifically, this proposal uniquely operates by taxing producers of “carbon-intensive goods,” including importers, through two newly-created entities and procedures: the Climate Change Reduction Committee (“CCRC”) sets the requisite percentage cutbacks for the relevant categories of producers and the Inter-governmental Panel on Climate Change (“IPCC”) exacts penalties on imported goods that fail to comport with the CCRC’s mandates. Notably, the nine-member IPCC would reserve five seats for randomly chosen WTO Members while retaining four seats for United States officials. And, voilà! The United States has a partial

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solution to its looming national deficit through a significant new revenue source.

Why not cap and trade? This Comment concludes that the governmental revenue lost, the utter dearth of any persuasive political arguments surrounding it, the additional, inherent regulatory complexities, the high probability of “cap busting,” and the likely failure to comport with international law makes a cap and trade regime an inferior alternative.

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I.

INTRODUCTION

Most political campaign advertisements featuring guns refer to a candidate’s position regarding the Second Amendment. Governor Joe Manchin, the freshman senator from West Virginia, found another creative and jarring use for a weapon: literally shooting through the likeness of the “Democrats’ now defunct

cap-and-trade bill.”¹ More significantly, his use of that ad – and more specifically, his opposition to a cap and trade bill – is widely credited with helping him win as a democratic candidate in a year when Democrats lost big nationwide.² Most relevantly for the response to climate change, the sentiment encapsulated by that television commercial demonstrated a strong aversion to an energy policy resulting in raised prices – or a hidden tax. Thus the challenge: construct legislation that necessarily raises energy prices, in order to reduce greenhouse gas emissions, while also convincing the democratic polity that higher prices – and the resulting lower taxes through increased government revenues! – are a good thing.

While political feasibility dominates the discourse surrounding U.S. climate change legislation, upholding international treaty obligations does not receive a level of attention corresponding to its importance for resolving global climate change. This Comment will focus primarily on the latter issue precisely because achieving a significant net reduction in greenhouse gas (“GHG”) emissions cannot occur without international support. Acting in spite of international treaties, such as the General Agreement on Tariffs and Trade (“GATT”), ignores potential consequences such as World Trade Organization (“WTO”) sanctioned trade retaliation and foments an international reluctance to craft a future multi-national agreement. Moreover, even if the United States could miraculously eliminate all of its GHG emissions through unilateral action, more than 78% (and counting) of current global GHG emissions would continue from other countries.³ That kind of governmental action also assumes away the problem of international leakage, which this Comment will spotlight as a primary reason for moving within current international legal regimes.

This Comment will then navigate through the critiques against carbon tax regulation, including an analysis of the political and administrative feasibility of taxing GHG emissions. Administrative feasibility remains a top priority because, unlike other taxation programs, the potential complexities here could present a

1. Katy Steinmetz, *Best Viral Campaign Ads of 2010, Joe Manchin's Dead Aim*, TIME (Oct. 19, 2010), http://www.time.com/time/specials/packages/article/0,28804,2012290_2012286_2026496,00.html.

2. See David Brooks, Op-Ed., *Midwest at Dusk*, N.Y. TIMES, Nov. 5, 2010, at A33, available at <http://www.nytimes.com/2010/11/05/opinion/05brooks.html>.

3. See GARY CLYDE HUFBAUER, STEVE CHARNOVITZ, & JISUN KIM, *GLOBAL WARMING AND THE WORLD TRADING SYSTEM* 7 (2009).

near-impossible task; this partly explains why this Comment's proposal relies on a simpler approach. Finally, this Comment will examine why a cap and trade system ("cap and trade") remains a flawed alternative.

This Comment also assumes the veracity of scientific findings concerning climate change, even as the extent to which action is necessary remains hotly contested.⁴ While certainly interesting, space limitations require the omission of any substantive discussion revolving around those issues. Instead, this Comment will act on the premise that climate change is happening and that reducing global GHG emissions is an important societal aim.

A. *The Proposal*

The GHG emissions tax recommended would require importers and domestic producers of fossil fuels, aluminum, cement, glass, paper, and steel ("carbon-intensive goods or products") to reduce the amount of GHGs they emit by implementing percentage cutbacks based upon historical emissions from each source. The inclusion of these sectors stems from the fact that they account for about three-fourths of all GHG emissions.⁵ Additionally, the political palpability of a smaller regulatory introduction makes the case for governmental expansion, albeit small, an easier sell to the American people.⁶ A five-member Climate Change Reduction Committee ("CCRC"), appointed by the President of the United States ("President") and confirmed by the Senate during off-year elections for four years terms, will decide the optimal percentage cutbacks for each industry, which Congress may override with majority passage of a contrary joint resolution.⁷ This reduction committee will publish requirements two years in advance, with these recommendations taking legal force one year before required compliance. While most climate change proposals include statutorily-mandated cutbacks, this proposal seeks to

4. See Jon Birger Skjaereth & Tora Skodvin, *Climate Change and the Oil Industry: Common Problems, Different Strategies*, 1:4 GLOBAL ENVTL. POL. 43 (2001).

5. See HUFBAUER ET AL., *supra* note 3, at 8.

6. This proposal also rejects the suggestion of calculating the so-called carbon footprint of every item sold. While—at least theoretically—administratively possible, this paper suggests that instituting this kind of concept would not prove politically possible at this time. Furthermore, the potential fraud and the (presumably) thousands of new government employees to calculate and verify these totals make this proposal too radical and probably unnecessary because most GHG emissions stem from only a few products.

7. If the President chose to veto this joint resolution, a congressional supermajority would be necessary.

establish a proper balance between effective administration and congressional oversight. Additionally, lawmakers will not have to take a stand on specific percentage reductions for any given industry unless it seeks to override the CCRC. There will be more on how that provision might affect political palpability later in this Comment.⁸

If a particular carbon-intensive producer fails to satisfy these requirements, the federal government will levy a per-ton GHG tax on amounts above the mandated percentage requirement. Sophisticated monitoring equipment, if not already in place, will be required at all production sites of carbon-intensive products. New plants would be subject to GHG emission levels of similarly situated domestic producers. Thus, under this proposal, the United States would collect taxes from producers of carbon-intensive goods that exceeded their GHG emission threshold.

This Comment suggests at least a few year phase-in period to reach the first set of mandated cut-backs, with incentives for reaching these goals early. One carrot could include a small reduction in corporate income taxes should a corporate entity successfully meet these goals for an individual plant, and a bit larger percentage tax break for a larger company's reduction of GHG emissions corporation-wide. These breaks would phase out upon implementation of the mandatory reductions.⁹ In providing these incentives, a company would recognize a financial gain in return for helping conserve the atmosphere faster, while also providing momentum to achieve the ultimate goal: optimal GHG emissions.

Regarding importers, this proposal establishes the Inter-Governmental Climate Commission ("IGCC") to decide whether other countries' GHG emission regulations serve a similar function to the relevant United States' regulations; or, alternatively, an importer from a WTO member country ("Member(s)") could take similar voluntary and verifiable measures. If an importer could not demonstrate compliance under either of those two provisions to the IGCC, the IGCC would then calculate how much of an equivalent import charge ought to exist in lieu of the required actions. By design, this plan would vest authority in an

8. See *infra* Part III.A.

9. These breaks would extend to any income taxes paid by foreign corporations, assuming the requisite level of evidence shown detailing those reductions to the Inter-Governmental Climate Committee ("IGCC")—which is discussed in subsequent paragraphs.

international commission—if properly established in the judgment of the President. But before that occurs, Members would have the opportunity to serve on five seats of a nine-member IGCC through random selection, in which four seats always belong to the United States.¹⁰ The IGCC would decide not only whether Member importers complied with the purposes of the regulations, but also the appropriate¹¹ amount of GHG emissions taxable per imported unit, with a twenty-percent maximum charge. The IGCC would additionally provide importers notice of these decisions with an accompanying rationale, if any. In the event of a disputed ruling, the United States Court of International Trade would have jurisdiction on appeal with the Court of Appeals for the Federal Circuit available for further review.

Crucially, this proposal seeks to minimize carbon leakage to countries that fail to recognize the need for global conservation of the exhaustible natural resource: air. A recent example demonstrates why leakage would likely unravel any sort of unilateral conservation agenda. Even while coal-fired power plants close in countries like Australia, the United States and Canada, development of more coals mine within these same countries are in process.¹² Why? Because China's imports of coal have jumped ten-fold within the last two years and India's coal imports have likely doubled.¹³ While this burgeoning industry certainly provides much needed economic assistance in the form of jobs, it illustrates why reductions here cannot accompany expansions elsewhere. Collecting taxes for the United States' market of carbon-intensive product consumption provides not only the optimal conservation outcome, but also ensures that United States' cut-backs on GHG emissions are not negated by increases elsewhere.

In seeking to conserve – but not over-serve – exhaustible natural resources, exporters of such products from the United States would be eligible to receive a rebate on any taxes originally paid as a result of domestic production. This policy antici-

10. The four U.S. seats would be allocated to each of these agencies: the UST, the Dept. of Agriculture, the Dept. of Commerce, and the Dept. of the Treasury.

11. This proposal explicitly charges the IGCC with establishing an "appropriate" GHG importers charge in an effort to establish parity between those taxes levied on like domestic production exceeding the mandatory reductions specified by the Climate Change Reduction Committee ("CCRC").

12. See Elisabeth Rosenthal, *Booming China is Buying Up World's Coal*, N.Y. TIMES, Nov. 22, 2010, at A1, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0DEFDD153FF931A15752C1A9669D8B63>.

13. See *id.*

pates and encourages other countries to adopt similar GHG regulations in an effort to reduce GHG emissions to an optimal global output, as opposed to maintaining a system of cutbacks with economic relevance to the United States market alone. At the risk of sounding redundant, by rebating these taxes American producers would not sustain a further disadvantage in their ability to compete globally.

Finally, an important question remains surrounding the destination of these funds collected by the United States. Seeing how adding a tax generally encounters strong resistance from those affected, the political feasibility of this proposal likely rests on whether the American populace appreciates the usage of these new revenues.¹⁴

Because the GHG tax targets increased emissions beyond a specified percentage reduction for GHG emitters, an arbitrary annual limit of ninety percent of median previous-year emissions¹⁵ would likely earn at least \$10 billion dollars from domestic producers alone.¹⁶ Importers of carbon-intensive products, notably fossil fuels, will cause that number to rise higher. The magnitude of this figure explains the chorus of complaints that accompanies any suggestion of a GHG or carbon emission tax: because all of these revenues will likely translate into high prices for consumers. In order to placate these increased prices experienced by American consumers, this Comment suggests a fifty-fifty split of the funds between lowering income taxes and paying down the federal deficit.

B. *Why not Cap and Trade?*¹⁷

A more thorough treatment explaining why cap and trade serves as a deficient alternative to a GHG tax will come later in this Comment,¹⁸ but a few initial thoughts are appropriate here. First, assuming a regulatory scheme that also includes only car-

14. See *infra* Section III.A. for treatment of the possibilities of resistance and the likelihood of overcoming these obstacles.

15. The consequential nature of the calculation of this number explains why care and detail must surround this formula. In the interests of fairness, historical data must be used, with outliers thrown out in an attempt to avoid gaming.

16. Based upon the arbitrarily chosen tax of \$100 per metric ton of GHG equivalent, during the year 2000, HUFBAUER ET AL., *supra* note 3, at 8. Notably, this proposal does not include specific GHG emission reduction targets, but instead leaves that task to the CCRC.

17. Or "Cap and Tax," as many have fondly described it.

18. See *infra* Section III.C.

bon-intensive goods (as this proposal operates), the government may lose out on a great deal of revenue if it allocates permits without cost, thereby destroying much of the economic argument appealing to American citizens forced to pay higher prices (i.e., no new governmental revenues, but a shortage of permits would force private companies to purchase permits through trading: which would increase business expenses and, consequently, consumer prices). Second, the administrative challenges of cap and trade present questions of regulatory sustainability. For instance, how would the government handle new construction? If it auctioned off permits, would it do so annually in order to account for new entries, or would those new enterprises need to buy permits from someone else? Just imagining how the government would design and implement such a complex market evokes visions of administrative infeasibility.

Additionally, if the government offers a free allocation of permits, a strong challenge under the Agreement on Subsidies and Countervailing Measures ("ASCM") exists for whether those free permits equate to an illegal subsidy. By disallowing any free handouts under this Comment's proposal, a GHG tax almost entirely avoids issues under the ASCM. Because previous legislative proposals have always included such handouts,¹⁹ it is reasonable to assume that special interests would demand those again. And lastly, the European Union's ("EU") lack of success ought to be demonstrative of why this system looks better on paper than in practice.²⁰

II.

THIS GHG TAX CONFORMS TO INTERNATIONAL LAW

This section seeks to persuasively exhibit that this proposal's GHG tax does not run afoul of international treaty obligations. To begin, this discussion must examine the main international treaty obligations implicated herein. The GATT regulates trade in goods, including the conditions placed upon trade by an importing country.²¹ While it does so in a number of different ways, this Comment will examine the five relevant Articles that need

19. See HUFBAUER ET AL., *supra* note 3, at 22-29.

20. See *infra* Section III.C

21. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (incorporated by reference in General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1153, 1867 U.N.T.S. 187).

addressing in order to comply with the GATT.²² If a WTO dispute panel analyzes this proposal, it will also look to other international agreements ratified by Members under the 1994 GATT. In that vein, this Comment will discuss how this proposal conforms to the requisites of the ASCM and the Agreement on Technical Barriers to Trade (TBT).

In order to properly guide this analysis, a quick word on WTO treaty interpretation is necessary. The Vienna Convention on the Law of Treaties (VCLT) provides a few important interpretative principles relevant to this Comment. First, “ordinary meaning” will be given to the terms and surrounding language of a treaty itself, keeping in mind its “object and purpose.”²³ In other words, the plain meaning of the text and its surrounding context will prevail when judged in light of its objective. Next, VCLT provides that the context will be shaped from the preamble, any annexes, as well as any agreement made in connection with the treaty.²⁴ VCLT also allows for any subsequent agreement “regarding the interpretation of the treaty,” as well as “subsequent practice in the application of the treaty,” to inform the overall contextual inquiry.²⁵ Based upon the premise that context can make quite a bit of difference in any interpretative exercise, VCLT allows information from a few particular sources to inform the meaning of the terms in question. Nonetheless, subsequent practice remains irrelevant, as those observations first require an enacted law, which this proposal is not.

Should this interpretative analysis result in ambiguity or lead to a result “manifestly absurd or unreasonable,” VCLT allows for a narrow class of supplemental materials to confirm or to determine treaty language at issue.²⁶ It does so by providing for “recourse “to supplementary means,” including a treaty’s “preparatory work” and the “circumstance of its conclusion.”²⁷

As a practical matter, the Vienna Convention places great emphasis on interpretation of the treaty text first, before resolving ambiguities with other relevant portions of the treaty itself. Only

22. These five Articles include the four cornerstones of the GATT: Articles I, II, III, and XI; in addition to Article XX.

23. The Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention], available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

24. *Id.* at art. 31.

25. *Id.*

26. *Id.* at art. 32.

27. *Id.*

after these steps, and a continuing vagueness, does the convention direct the interpreter to include subsequent practice within the examined context. Finally, if this analytical framework results in a “manifestly absurd” result, then VCLT directs the interpreter to materials consisting of “secondary means.” These principles will inform the ensuing analysis of the proposal under international trade law.

A. *GATT Article I*

The Most Favored Nation rule (“MFN”) stipulates that countries treat all imports of “like products” without favoritism.²⁸ In other words, a violation of Article I occurs when countries treat importers of similar products differently to the detriment of another Member.²⁹ A threshold question always exists in whether “like products” are at issue. Otherwise, MFN does not apply. If a panel finds “like products” at issue, then the inquiry moves to whether “duties or charges” have or have not been extended to benefit another Member without condition.³⁰ In determining whether discriminatory benefits accrued, MFN considers any “advantage, privilege, or immunity.”³¹ As such, advantageous disparate treatment to “like” imports from only some Members violates MFN.

The WTO Appellate Body has provided key insights for carrying forth this analysis through the interpretative lens provided in VCLT.³² First, in a case surrounding whether Canada violated, among other treaty provisions, Article I:1 by giving preferred manufacturers an import duty exemption, it noted that MFN did not remain confined only to “de jure” discrimination.³³ The Appellate Body instead found that MFN also included “de facto” discrimination. In coming to this finding, it rejected Canada’s argument that “origin-neutral” regulations, which provided for the

28. See GATT, *supra* note 21, at art. I:1.

29. Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶ 84, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000) [hereinafter Appellate Report on Canadian Automotive Industry], available at http://www.wto.org/english/tratop_e/dispu_e/6100d.pdf.

30. Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, ¶ 14.138, WT/DS54/R (July 2, 1998), available at http://www.wto.org/english/tratop_e/dispu_e/54r00.pdf.

31. See GATT, *supra* note 21, at art. I:1.

32. Vienna Convention, *supra* note 23, at art. 31:1 (in light of the language’s “ordinary meaning, context and purpose”).

33. Appellate Report on Canadian Automotive Industry, *supra* note 29, ¶¶ 1, 2, 78.

importation of certain cars without a duty charge, somehow did not discriminate against other car importers who had to pay a duty, even as it granted some preferred manufacturers an “advantage.”³⁴ a type of behavior explicitly banned by Article I:1.³⁵ In doing so, the Appellate Body recognized MFN as an expansive provision seeking to eliminate discriminatory practices favoring only certain Members.

The Appellate Body has also found regulations delineating different banana import duties, depending on origin [through a competitive policy in what was the European Community (“EC”)], as failing to legitimize the discriminatory nature of those policies.³⁶ These policies sought to give certain countries favorable treatment by allocating zero-duty export certificates to the so-called “traditional ACP states.”³⁷ In other words, banana exporters to the EC from other countries who did not fall into that category would have to pay a higher duty.³⁸ The Appellate Body agreed with the panel by finding that a competition policy did not exempt a Member from its MFN obligations.³⁹

What both *Canada-Automotive Industry* and *European Communities-Regime for Bananas* mean for this proposal boils down to two principles. First, any governmental policy providing favorable treatment to only some Members violates MFN when it discriminates against another Member.⁴⁰ While perhaps intuitive, the Appellate Body’s refusal to recognize a policy clearly favoring only some Members has broad implications for this Comment. Second, and equally as significant, discrimination can occur outside the text of a statute or law, thereby indicating that MFN broadly reaches governmental acts themselves – beyond simply facial trade discrimination.⁴¹ Thus, as a practical matter, the Appellate Body has signaled a willingness to take issue with forms of trade discrimination on the basis of discriminatory effects.

34. *Id.* ¶¶ 78, 80–81.

35. See GATT, *supra* note 21, at art. I:1.

36. Appellate Body Report, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas*, ¶ 206, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter Appellate Report on European Community Bananas], available at [http://www.wto.org/english/tratop_e/dispu_e/27abr.pdf](http://www.wto.org/english/tratop_e/dispu_e/dispu_e/27abr.pdf).

37. *Id.* ¶¶ 206–207.

38. Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 3.8-3.11, WT/DS246/R/USA (May 22, 1997).

39. Appellate Report on European Community Bananas, *supra* note 36, ¶ 206.

40. *Id.*

41. Appellate Report on Canadian Automotive Industry, *supra* note 29, ¶ 78.

Assuming a panel does not reject this Comment's reliance on the Appellate Body's reasoning from these prior decisions, it will find a violation of MFN. Inevitably, a Member will not adopt laws similar to this proposal. Exporters from that country will attempt to sell their goods in the United States, and will receive an additional GHG emissions charge not assessed on "like goods" from other Members who comply with adequate domestic GHG emission mandates.⁴² These countries will complain that they do not receive the same favorable treatment, constituting a clear violation of MFN. And in that case, barring some sort of unlikely event, such as a waiver procured from affected Members, a panel will ultimately find a violation of MFN.

From a litigation standpoint, this would offer the United States two options. The first involves dismantling this proposal insofar as it relates to a GHG import charge. It could also attempt to invoke GATT Article XX as a defense. This Comment will discuss the latter possibility in great depth in a subsequent section.⁴³ As to the former, the political feasibility of this proposal rests partly on the argument that domestic producers of carbon-intensive goods will not find themselves at a greater competitive disadvantage to foreign importers.⁴⁴ Additionally, GHG emissions leakage to countries without GHG emission mandates externalize production costs associated with GHG emissions upon the rest of the globe. Thus, excising the GHG import charge would likely defeat the conservation effort as a whole. For these reasons, this proposal refuses to drop provisions related to the determination of import charges.

B. GATT Article II

The Schedules of Concessions requires that Members collect tariffs, duties,⁴⁵ charges, or fees on imports from Members in conformity with the Schedule and without giving any favorable

42. See generally GATT, *supra* note 21, at art. I:1 (forbidding the imposition of all customs duties and other charges that would work to the disadvantage of member countries if such charges are not applied to all importers).

43. See *infra* Section II.E.

44. Based on the widely-accepted notion that globalization has already eroded much of the American manufacturing industry. See generally Gilbert B. Kaplan et al., *Recent Developments and Trends in Unfair Trade Laws: Antidumping and Countervailing Duties*, 510 Practising Law Inst. 57, 79 (Sept. 18, 1989).

45. While the provision of anti-dumping and countervailing duties remain an important aspect of the GATT Art. II, these duties remain outside the scope of this paper and will not be discussed further.

treatment to one Member while failing to extend this same treatment to all other Members.⁴⁶ Additionally, if a member collects an internal tax on like domestically sold items, an importing member may exact an “equivalent” charge from the exporter.⁴⁷ Members must also stay within their tariff bounds when assessing tariffs to imports of Member countries.⁴⁸ Further, Members must not add additional duties or charges to import tariffs beyond those provided for in Article II:2.⁴⁹ These rules explicitly apply MFN to the context of tariffs, fees and charges on imports, while also requiring that Members apply any additional charges consistently with domestic taxes in the importing member’s country.⁵⁰ In other words, Members cannot drive up border taxes on imports via charges not imposed upon like domestic products.

One important observation and another significant inquiry stem from these rules. First, this Comment recognizes that the meaning of “equivalent”⁵¹ has important implications for the proposal. In terms of this significant inquiry, this Comment notes that while this proposal seeks to modify the GHG emissions import charge based upon GHG emissions during production, the question remains whether this application of charges would contravene either the WTO Understanding on the Interpretation of Article II:1(b) of the 1994 GATT, or another portion of Article II itself.

On the meaning of “equivalent,” the Appellate Body has provided some guidance in light of VCLT.⁵² In a trade dispute between the United States and India, the United States alleged that

46. GATT, *supra* note 21, at art. II:1(a).

47. *Id.* at art. II:2(a).

48. *Id.* at art. II:1(b).

49. See Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, ¶ 276, WT/DS207/AB/R (Sept. 23, 2002), available at <http://www.worldtradelaw.net/reports/wtoab/chile-agproducts%28ab%29.pdf> (noting that “charges equivalent to internal taxes” do not fall within the “other duties or charges” prescribed by GATT Article II:1).

50. See GATT, *supra* note 21, at art. II:2(a) (allowing an importing country to impose “a charge equivalent to an internal tax” as required for a like domestic product, including “an article from which the imported product has been manufactured or produced in whole or part”). This provision appears to provide flexibility in targeting goods due to their individual parts. While this proposal does not suggest taxing every good made with materials subject to a domestic tax (such as an automobile made with steel pieces if domestic steel were taxed), at least not in the first phase of this climate change regulatory regime, it could likely do so in conformity with current international trade law.

51. GATT, *supra* note 21, at art. II:2.

52. Vienna Convention, *supra* note 23, at art. 31:1 (derived from a term’s “ordinary meaning,” “context,” and “purpose”).

India's required "Additional and Extra-Additional duties" were not "equivalent" to internal taxes.⁵³ The Appellate Body found that the "concept of equivalence" includes elements of "effect" and "amount."⁵⁴ The gravity of this delineation comes from the fact that had "equivalence" been interpreted narrowly as a solely "functional" concept, significant differences between internal taxes and border charges could have passed muster under Article II.⁵⁵ Thus, it found that when determining whether a border charge is "equivalent" to an internal tax, an assessment of the relevant charge and an internal tax must also include "quantitative considerations," in addition to those qualitative in nature.⁵⁶ By doing so, it decided that India's "Additional" and "Extra-Additional Duty" on alcohol and other goods were not justified under Article II:2(a),⁵⁷ given the disparity between these charges and internal taxes on like domestic products.⁵⁸

The Appellate Body recognized that Article II:2 only provided for equalization between the relevant internal taxes and those import charges collected on like imported products. The relevant question for this Comment's proposal rests on how the Intergovernmental Climate Commission ("IGCC") will assess GHG emissions taxes on like imported products. While a WTO legal challenge on this point remains likely, this Comment suggests that two key characteristics of the IGCC give it the legal credibility necessary to demonstrate that the charges assessed are indeed "equivalent,"⁵⁹ and not discriminatory or punitive. These include the structure of the IGCC, given its international membership, as well as the fact that it implements the mandates set by the CCRC.

The WTO Understanding on the Interpretation of Article II:1(b) of the 1994 GATT provides for a moratorium on "newly applied charges" by ensuring that the scope of the Schedule includes all aspects of ordinary customs duties.⁶⁰ On its face, it may appear to prohibit the kind of GHG charge on like imported

53. Appellate Body Report, *India—Additional and Extra-Additional Duties on Imports from the United States*, ¶¶ 6-7, WT/DS360/AB/R (Oct. 30, 2008), available at [www.worldtradelaw.net/reports/wtoab/india-additionalduties\(ab\).doc](http://www.worldtradelaw.net/reports/wtoab/india-additionalduties(ab).doc).

54. *Id.* ¶ 172.

55. *Id.* ¶ 171.

56. *Id.* ¶ 175.

57. *Id.* ¶ 231(e)-(f).

58. *Id.* ¶¶ 214, 221.

59. GATT, *supra* note 21, at art. II:2(a).

60. HUFBAUER ET AL., *supra* note 3, at 38.

products which this proposal seeks to require from importers whose production methods fail to make the GHG emission reductions mandated. Article II:2(a), however, declares that “nothing in this Article” prevents a WTO Member from imposing “equivalent” charges (for domestic taxes) on imports from another Member concerning like domestic products.⁶¹ Accordingly, Article II does not facially prohibit this proposal insofar as it adheres to the meaning of “equivalent.”⁶²

C. GATT Article III

National Treatment on Internal Taxation and Regulation (“National Treatment”) prohibits unfavorable treatment toward imported goods resembling like domestic products.⁶³ While much of the litigation surrounding National Treatment stems from whether a Member treats an imported good less favorably than a like domestic product, this proposal advocates similar treatment to imported goods as a means for increasing its international legitimacy and expanding its atmospheric conservation goals globally.⁶⁴ Accordingly, this Comment focuses on whether the other relevant aspects of National Treatment coincide with the proposal’s mandates: including the internal taxes, other charges, laws, regulations, and requirements allowed by Article III.⁶⁵

In developing principles by which to view this Comment’s proposal, the explicit purpose of National Treatment bears mentioning: avoiding protectionism of domestic products.⁶⁶ With that in mind, the provisions from Article III:2 & 4 provide the legal framework by which a Member may enforce the purpose of National Treatment against another Member. These legal tools include language designed to prohibit virtually all sorts of unfavorable discriminatory treatment accorded to imported goods but not to like domestic products. Two relevant categories of protections exist: those which bar extra taxes and other charges beyond those levied upon like domestic products, as well

61. GATT, *supra* note 21, at art. II:2.

62. *See id.* at art. II:2(a).

63. *Id.* at art. III:1.

64. Imposing a GHG importing charge as a means of protectionism would surely decrease the chances for wide-scale international cooperation. Given the importance of discouraging GHG emissions leakage, this proposal developed the IGCC as a means of establishing international legitimacy and furthering global atmospheric conservation.

65. GATT, *supra* note 21, at art. III:2, 4.

66. *Id.* at art. III:1.

as those which guard against discriminatory treatment via laws, regulations, and requirements beyond taxes and other charges.

Interpretative definitions of “internal taxes and others internal charges” help clarify the targets of this first category in Article III:2, which the Appellate Body read in light of VCLT.⁶⁷ In a case that rested largely on whether different kinds of liquor were like products,⁶⁸ the Appellate Body described the scope of Article III:2, concluding that it extended to all taxes or charges levied against imports.⁶⁹ Rather significantly, this finding ensured that like domestic liquor did not enjoy a significant competitive price advantage via its Liquor Tax Law, which had effectively raised prices on the importation of other types of liquor not produced domestically.⁷⁰

In a case about the importation of auto parts into China, the Appellate Body reaffirmed the principles set forth in *Japan—Taxes on Alcoholic Beverages*, finding that charges imposed upon goods after they have entered a territory remain within the domain of Article III:2.⁷¹ China did so by levying a twenty-five percent charge on auto parts that could be characterized as “complete vehicles.”⁷² Since the average tariff on auto parts sat at around ten percent, the Appellate Body found that this extra charge violated Article III:2 because it did not apply to like domestic auto parts.⁷³

These rules recognize that all taxes or charges, wherever levied on imports, will fall under the auspices of Article III:2. This nonsense delineation of the treaty language explains why this proposal goes to great pains to ensure that foreign importers receive the same tax treatment as domestic producers. And by presenting other Members with the majority of seats on the

67. Vienna Convention, *supra* note 23, at art. 31:1 (stemming from a phrase’s “ordinary meaning, context and purpose”).

68. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 2, WT/DS8 / AB/R (Oct. 4, 1996), available at <http://www.worldtradelaw.net/reports/wtoab/japan-alcohol%28ab%29.pdf>.

69. *Id.* at 21.

70. *See id.* at 4.

71. Appellate Body Report, *China—Measures Affecting Imports of Automobile Parts*, ¶ 161, WT/DS339/AB/R (Dec. 15, 2008), available at <http://www.worldtrade law.net/reports/wtoab/china-autoparts%28ab%29.pdf>.

72. *Id.* ¶ 2. While it varied, these would generally include “complete vehicles[,] . . . the body and the chassis fitted with [an] engine[,] . . . parts and accessories[,] . . . and parts and accessories of motor vehicles.” *Id.* ¶ 2 n.9.

73. *Id.* ¶ 253(b).

IGCC,⁷⁴ an attempt is made not to favor like domestic production via taxes levied against importers who fail to demonstrate compliance with the mandatory GHG emission reductions.

The scope of Article III:4 remains broader than Article III:2 by its prohibition of “laws, regulations or requirements” that provide “no less favorable treatment” to imports than to like domestic products by “affecting” numerous aspects of an imported product’s route to sale.⁷⁵ Most relevantly for this Comment, two issues rise to the surface. First, what does “no less favorable treatment” mean? Second, what does “affecting” mean? Interpreting these phrases utilizing the principles of VCLT,⁷⁶ the Appellate Body has provided guidance as to the definition of this treaty language.

Beginning with “no less favorable treatment,”⁷⁷ the Appellate Body has opined that the noun “treatment,”⁷⁸ necessarily has broad meaning in light of its Article III context.⁷⁹ While the Appellate Body noted that different treatment did not necessarily comprise “less favorable treatment,”⁸⁰ it found that providing “conditions of competition” less favorable to importers did violate this provision.⁸¹ In this case, Korea’s establishment of a dual

74. Because United States agencies will conceivably vote together, this proposal is susceptible to criticism that the U.S. will simply buy off one of the other members—especially given the odds of a small country taking one of the five seats. This criticism partly explains why another provision allows for the President to outsource this authority to an appropriate international institution. At bottom though, too much influence in the other direction could make import charge calculation too lax—thereby laying waste to the entire purpose of the proposal.

75. GATT, *supra* note 21, at art. III:4.

76. *See generally* Vienna Convention, *supra* note 23, at art. 31:1 (in light of its ordinary meaning, context, and purpose).

77. GATT, *supra* note 21, at art. III(4).

78. *Id.*

79. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 135; WT/DS161/AB/R (Dec. 11, 2000) [hereinafter Appellate Report on Korean Beef], available at <http://www.worldtradelaw.net/reports/wtoab/korea-beef%28ab%29.pdf> (given that the “broad and fundamental purpose of Article III is to avoid protectionism”) (quoting Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 14, WT/DS8/AB/R (Oct. 4, 1996) [hereinafter Appellate Report on Japanese Alcoholic Beverages], available at <http://www.worldtradelaw.net/reports/wtoab/japan-alcohol%28ab%29.pdf>).

80. *Id.* ¶ 136 (quoting Panel Report, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.11, L6439–36S/345 (Jan. 16, 1989), available at <http://www.sice.oas.org/dispute/gatt/87TA3373.asp>).

81. *Id.* ¶ 135 (quoting Appellate Report on Japanese Alcoholic Beverages, *supra* note 79, at 14–15).

retail system for imported and domestically produced beef effectively cut off any importer's access to its beef market.⁸²

The Appellate Body has read the term "affecting" to mean an expansive connection between state actions and less favorable competitive conditions for imported goods.⁸³ In so reasoning, it adjudicated a case surrounding portions of the United States Internal Revenue Code, which appeared to give favorable tax treatment based upon United States export production.⁸⁴ In the course of its reasoning, the Appellate Body determined that "affecting" meant having "an effect on," indicating a "broad scope of application."⁸⁵

For purposes of this Comment, the following principles provide the necessary analytical framework for a legal analysis of the proposal. *Korea-Measures Affecting Beef* teaches that a government's differing actions towards an importer of a like domestic product, if detrimentally affecting the competitive market of the imported product, will violate National Treatment.⁸⁶ While a Member must show the connection between governmental action and competitive disadvantage to imports, *United States-Tax Treatment* indicated that a Member must only show a negative "effect."⁸⁷ This is a far cry from a higher standard such as "primary purpose."

As a result of this broadly interpreted language, the proposal seeks to avoid this section entirely by only taxing imported goods at the border, which is in accordance with similar regulations on like domestic products. Precisely because the Article III:4 standard prohibits regulatory and legislative actions that impair the competitive environment for importers of like domestic products, this proposal recognizes that it would serve as the vehicle for sanctions if protectionism of this kind crept into it.⁸⁸ By giving

82. *Id.* ¶ 146.

83. Appellate Body Report, *United States—Tax Treatment for Foreign Sales Corporations*, ¶ 208, WT/DS108/AB/RW (Jan. 14, 2002) [hereinafter Appellate Report on American Tax of Foreign Sales Corporations], available at www.wto.org/english/tratop_e/dispu_e/108abr_w_e.doc.

84. *Id.* ¶ 38.

85. *Id.* ¶ 209.

86. Appellate Report on Korean Beef, *supra* note 79, ¶ 135.

87. Appellate Report on American Tax of Foreign Sales Corporations, *supra* note 83, ¶ 209.

88. The doctrine of conflict preemption would prevent states and localities from implementing differing climate change policies that would violate national treatment, thereby requiring further congressional legislation or an executive promulgation or act to violate Article III.

calculation authority of import charges to the IGCC, the most effective outcome for achieving optimal atmospheric conservation may be reached by working towards international cooperation – and diminishing unfavorable treatment to imports is crucial for achieving that end. By giving the CCRC percentage reduction authority of GHG emissions, domestic priorities remain a focus of the conservation effort. How the IGCC carries out its mandate, however, could jeopardize the proposal under this rule. But, as a design matter, this proposal does not violate Article III.

D. *GATT Article XI*

This proposal explicitly rejects tariff quotas (“Quantitative Restrictions”). Nevertheless, another Member may charge the United States with non-compliance if the proposal operates to effectively keep out imported goods. Here, though, the proposal only adds a GHG import charge capped at twenty-percent, which cannot be said to actually bar imports of like domestic products precisely because even a 100 percent tariff would still allow importing into the United States. Under Article XI, the question does not revolve around profitability, but whether actual impediments block importation.⁸⁹ In other words, when the IGCC calculates this number, it will not have the authority to bar imports of carbon intensive goods based upon their production. Insofar as WTO panels have found Article XI to cover any type of import restriction, this proposal avoids the strictures of this provision.⁹⁰

E. *GATT Article XX*

Any form of unilateral climate change regulation that relies upon trade to enforce its provisions will likely run afoul of some provision in the GATT. Here, this proposal likely avoids violating the provisions of Article II, Article III, and Article XI. It does not, however, avoid the dictates of Article I. Without discriminatory treatment against non-complying Members, adherence to Article I would emasculate the enforcement mechanisms necessary to avoid GHG emissions leakage and to effectively conserve the atmosphere. Accordingly, this proposal relies upon

89. National Treatment and the Schedule of Concessions, however, would pose a problem in the event of an exorbitant and unjustified import charge.

90. See HUFBAUER ET AL., *supra* note 3, at 47.

the absolute defense of Article XX even while it bears the burden of proof in satisfying Article XX's requisites.⁹¹

The Appellate Body has clarified the proper analysis for a claimed exception under Article XX. In a case revolving around whether the United States could invoke Article XX(g) or (b) in an effort to justify discriminatory treatment against countries that failed to require turtle-excluder devices while fishing for shrimp,⁹² it noted that the analytical framework of Article XX required first identifying the proper exception invoked.⁹³ Once successfully classified, the analysis would then move to a second phase: asking whether the Member who invoked Article XX also satisfied the chapeau of Article XX.⁹⁴ The rationale for this two-step approach, according to the Appellate Body, rested in recognition that the Chapeau would operate differently depending upon both the facts of the measure and the exception the measure invokes.⁹⁵

Stemming from the different nuances within each analytical step, this Comment will break this examination of Article XX(g) into two parts to obtain maximum clarity. Following these sections, a discussion concerning the merits of both routes under Article XX(b) or (g) will occur, while keeping in mind that paragraph (g) possesses the strongest arguments.⁹⁶

1. GATT Article XX Paragraph (g) Analysis

In determining whether a measure falls underneath an exception allowed by Article XX, the Appellate Body has instructed that a panel must decide whether its general design falls within the contours of one of Article XX's delineated exceptions.⁹⁷ To

91. Appellate Body Report, *United States—Standards for Reformulated and Performance Gasoline*, 47, WT/DS2/AB/R (April 29, 1996) [hereinafter Appellate Report on American Performance Gasoline Standards], available at <http://www.worldtradelaw.net/reports/wtoab/us-gasoline%28ab%29.pdf>.

92. Appellate Body Report, *United States—Import Restriction of Certain Shrimp and Shrimp Products*, ¶ 3, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Appellate Report on American Shrimp Restrictions], available at <http://www.worldtradelaw.net/reports/wtoab/us-shrimp%28ab%29.pdf>.

93. *Id.* ¶ 118.

94. *Id.*

95. *Id.* ¶ 120.

96. This assertion follows from the higher standards required by GATT Article XX(b) (covering only those governmental actions "necessary to protect human, animal, or plant life or health").

97. Appellate Report on American Shrimp Restrictions, *supra* note 92, ¶ 116.

that end, it noted that Article XX must be examined through the lens of VCLT.⁹⁸

For a measure to qualify under paragraph (g), it must satisfy a few requirements. First, it must seek to conserve “exhaustible natural resources.”⁹⁹ The Appellate Body has explained the meaning of this phrase by holding that “exhaustible mineral or other non-living natural resources” refers both to “*living* or *non-living*” natural resources.¹⁰⁰ It arrived at this conclusion by observing that the term “natural resources” is not “‘static’” but, rather, “‘evolutionary.’”¹⁰¹ One important question left unanswered by the Appellate Body about the term, “exhaustible natural resources,” asks whether an implied jurisdictional limitation exists under Article XX(g). The Appellate Body has explicitly not passed upon that question;¹⁰² and given the transitory nature of GHG emissions in the context of a shared global atmosphere, an affirmative answer would not derail this Comment’s proposal under paragraph (g).

The next inquiry asks whether the measure is reasonably related to the previously delineated “exhaustible natural resources.”¹⁰³ To answer, the Appellate Body has suggested substituting the phrase, “primarily aimed at,” for, “relating to,” while explicitly noting this language is not the “single litmus test for inclusion or exclusion” under Article XX(g).¹⁰⁴ With the satisfaction of those two prior elements, one last textual requisite remains for a Member to cloak itself in paragraph (g).¹⁰⁵ The second clause of Article XX(g) requires that “measures are made effective in conjunction with restrictions on domestic production or consumption.”¹⁰⁶ In explicating this clause, the Appellate Body has found that a requisite for “even-handedness” exists in the execution of the challenged measure(s) in relation to “do-

98. See generally Vienna Convention, *supra* note 23, at art. 31:1 (in light of its “ordinary meaning, context, and purpose”).

99. GATT, *supra* note 21, at art. XX(g).

100. Appellate Report on American Shrimp Restrictions, *supra* note 92, ¶ 131.

101. *Id.* ¶ 130.

102. *Id.* ¶ 133.

103. *Id.* ¶ 135.

104. Appellate Report on American Performance Gasoline Standards, *supra* note 91, at 18-19.

105. Notwithstanding a favorable chapeau analysis in order for a measure to invoke an Article XX defense.

106. Appellate Report on American Shrimp Restrictions, *supra* note 92, ¶ 141.

mestic consumption or production.”¹⁰⁷ As such, a Member must satisfy three conditions in order to avail itself of paragraph (g) under the first phase of Article XX analysis.

To begin this three-step analysis, the threshold inquiry necessitates a showing of an “exhaustible natural resource.”¹⁰⁸ This Comment’s proposal explicitly attempts to reduce GHG emissions in order to conserve the atmosphere. The Appellate Body has already read this phrase broadly to include living organisms,¹⁰⁹ but this reading remains unnecessary under the proposal. Because the atmosphere would qualify under virtually any definition of this phrase, given the atmosphere’s non-living nature, as well as its status as a natural resource that many currently argue is being exhausted.¹¹⁰ This first step in the analysis takes little effort.

The second step requires a connection between the measure itself and the “exhaustible natural resource” conserved. One way the Appellate Body has suggested answering that inquiry involves asking whether the measure “is primarily aimed at” the specific conservation delineated by the measure.¹¹¹ Another differently: does a “substantial relationship” exist?¹¹² Here, the proposal targets carbon-intensive imports in order to reduce the incentives for GHG emissions leakage. The narrow focus of the proposal, as well as its sanctions – should a foreign company fail to take the same action required from domestic manufacturers of like products – all seek to accomplish one goal: global GHG emissions reductions. While increased governmental revenues help sell the practical advantages of the proposal, the point of those entreaties has little to do with any protectionist tendencies and everything to do with building support for less GHG emissions.

These facts also help demonstrate the “even-handedness” of the proposal as it relates to domestic production or consumption.¹¹³ By requiring the same percentage reduction of foreign

107. Appellate Report on American Performance Gasoline Standards, *supra* note 91, at 20-21.

108. GATT, *supra* note 21, at art. XX(g).

109. Appellate Report on American Shrimp Restrictions, *supra* note 92, ¶ 131.

110. See Anthony Costello et. al, *Managing the Health Effects of Climate Change*, 373 *Lancet* 1693, 1697-1700 (2009).

111. Appellate Report on American Performance Gasoline Standards, *supra* note 91, at 19.

112. *Id.*

113. *Id.* at 21.

importers and a similar tax, as calculated by the IGCC, for those who exceed the mandated threshold, this proposal ensures that fundamental fairness exists. And by deputizing the IGCC for these determinations, foreign nations are granted assurance that protectionist elements in America will not hijack this process to their detriment. Furthermore, this proposal grants the President the authority to outsource this decision-making power to an international body, thereby indicating the equitability at the core of this proposal. Accordingly, given the satisfaction of this third and final element, this proposal has successfully fallen under the auspices of paragraph (g). Next, the Comment will explore whether the proposal can satisfy the more stringent standards of the chapeau.

2. GATT Article XX Chapeau

As articulated by the Appellate Body, the chapeau serves as one expression of the “principle of good faith.”¹¹⁴ In other words, it attempts to establish a “line of equilibrium” between the right of a Member to invoke an exception and the duty to uphold the treaty rights of other Members.¹¹⁵ Moreover, analysis underneath the chapeau proceeds based upon the design and *application* of a measure.¹¹⁶ Two inquiries thus present themselves: does the measure constitute unjustified or arbitrary enforcement between countries where the same conditions prevail; and does the measure operate in a fashion so as to otherwise operate as a “disguised restriction on trade”?¹¹⁷ In order for a Member to avail itself of an Article XX defense, it must affirmatively demonstrate “no” answers to both of these inquiries in light of the fact that it represents a “limited and conditional exception.”¹¹⁸ To promote coherence, this Comment will examine the meaning of “unjustified and arbitrary discrimination” separately, before determining the contours of a “disguised restriction on trade.”

Unjustified discrimination assumes a finding of discrimination based upon something different than the rights protected under

114. Appellate Report on American Shrimp Restrictions, *supra* note 92, ¶ 158.

115. *Id.* ¶ 159.

116. Appellate Report on American Performance Gasoline Standards, *supra* note 91, at 22.

117. GATT, *supra* note 21, at art. XX.

118. Appellate Report on American Shrimp Restrictions, *supra* note 92, ¶ 157.

substantive provisions of the GATT.¹¹⁹ The Appellate Body has not given a concrete analytical framework for this analysis, but it has provided principles to spotlight “unjustified discrimination.” These include: the Preamble to the 1994 GATT, which advocated for “optimal use” of the environment;¹²⁰ whether a measure took into account the conditions in another Member’s country;¹²¹ whether other Members had an opportunity to negotiate a bilateral or multilateral agreement;¹²² whether negotiations over such an agreement took place in good faith;¹²³ and finally, the appropriateness of a unilateral response in the event negotiations broke down.¹²⁴ All of these factors serve as indicators of the discrimination’s justifiability under the chapeau.

With those in mind, this Comment crafted a proposal to push towards an international agreement. The proposal does not wait, however, for a future agreement. Instead, it establishes the IGCC to serve as a quasi-international body to ensure equity in the actual determination of import charges. It does so, in the hope that other Members will put it out of service, by giving the President authorization to move quickly upon an international institution’s genesis.¹²⁵ Of course, a new treaty could not skirt the constitutional course of ratification, but the intentions of this proposal should exemplify the ideals of good faith and international cooperation. More significantly, however, rests the possibility that the application of this proposal could end up looking “unjustified.” And the chapeau targets that sort of behavior, so the Comment cannot say with certainty what the Appellate Body might do without detailed knowledge surrounding the application of the proposal. Nevertheless, so long as the United States continues to negotiate in good faith, this unilateral action ought not to draw the ire of a dispute panel.

A panel may find fault with the percentage reductions mandated by the CCRC (wholly managed by the United States). A

119. Appellate Report on American Performance Gasoline Standards, *supra* note 91, at 23 (explaining that they “cannot logically refer to the same standard(s)”).

120. GATT, *supra* note 21, at Preamble.

121. Appellate Report on American Shrimp Restrictions, *supra* note 92, ¶ 164.

122. *Id.* ¶ 166.

123. *Id.*

124. *Id.*

125. This provision of the proposal may never be utilized, which could put the entire proposal at risk for violating the chapeau in the event a substitute-international institutional presents itself. Alternatively, an entirely new treaty may be required to create much more than a commission that helps determine GHG emission charges owed, if any.

few important variations in this program make it look and operate differently than the regulatory system in *United States-Import Restrictions of Certain Shrimp*, which the Appellate Body found in violation of the GATT and without a defense under Article XX.¹²⁶ First, and most importantly, the CCRC does not set the import charges – the IGCC does. This prevents American nationalism from essentially creating a de facto import ban. Second, the import charges have a twenty-percent maximum threshold per imported product. This charge-ceiling further provides for an equitable penalty should import producers fail to take steps to reduce GHG emissions. Excluding the unforeseen application of this proposal, the design attempts to increase the chances of an international agreement, not lessen them, in addition to immediately taking steps to start conserving an environmental resource that has been neglected since the industrial revolution. Moreover, given the current impasse as it relates to an international climate change agreement, public effort in a multilateral agreement has certainly not been lacking.¹²⁷ Finally, the phrase, “between countries where the same conditions prevail,” refers to all situations where an alleged violation has occurred, including between an importing and an exporting Member.¹²⁸ These conditions, where occurring, have immediate relevance to the IGCC. By providing an exception to the import charge for countries with similar GHG emission caps, or through voluntary and verifiable emissions reductions, importers of like products have a clear pathway for having their individual concerns recognized and rectified. Here, while the application remains unforeseen, nothing in the design dooms its chances for compliance with the GATT.

In explicating the phrase “arbitrary . . . discrimination,” the Appellate Body has asked whether the measure has built-in “flexibility.”¹²⁹ Within this standard, it has sought to determine whether import producers receive due process protections.¹³⁰ In light of these principles, this proposal has sought to provide the ultimate level of flexibility by crafting a quasi-international body with the authority to set the actual import charges, if any. Second, the proposal gives a route offering notice and appeals. Un-

126. Appellate Report on American Shrimp Restrictions, *supra* note 92, ¶ 187).

127. Perhaps private effort, though, has been lacking.

128. Appellate Report on American Performance Gasoline Standards, *supra* note 91, at 23-24.

129. Appellate Report on American Shrimp Restrictions, *supra* note 92, ¶ 177.

130. *Id.* ¶ 180.

like a system that provides no notice or appeal, as seen in *United States-Import Restrictions of Certain Shrimp*,¹³¹ this proposal provides importers both. In short, this proposal goes to great lengths to ensure that no “arbitrary discrimination” is designed. Of course, its application could change that. But given the built-in safeguards to ensure fairness and equity, it remains more than possible that its application would not operate arbitrarily.

The chapeau of Article XX also prohibits measures resembling a “disguised restriction on international trade.” The Appellate body has described this phrase as proscribing “concealed or unannounced restrictions,” in addition to a general prohibition on abusive or illegitimate uses of Article XX.¹³² In some ways, this appears as a catch-all for behavior that falls outside of what the Appellate Body finds appropriate under Article XX. In any case, this proposal seeks to do business in the daylight. Of course, a governmental actor could hijack that intent by adding regulatory provisions that do nothing towards the conservation of the atmosphere and everything towards protecting a particular national interest. This proposal rejects those potential abuses, and seeks to prevent them by outsourcing the import charge calculations to the IGCC. Given the stalled reality of climate change talks, as well as the potential for this proposal to provide the motivation to do something on the international level, this hardly appears as a “disguised restriction on international trade.”¹³³ But later regulatory promulgations, for instance, could change that.

Accordingly, this Comment argues that in design, and hopefully in application, this proposal avails itself of paragraph (g) and the chapeau of Article XX. Because paragraph (b) looks like a much higher bar to clear, and because the inherent difficulty for this proposal lies in the satisfaction of the chapeau, this Comment will briefly note the issues that could make it difficult for the proposal, let alone any other climate change measure, to cloak itself in that exception.

131. *Id.*

132. Appellate Report on American Performance Gasoline Standards, *supra* note 91, at 25.

133. GATT, *supra* note 21, at art. XX. *But see* HUFBAUER ET AL., *supra* note 3, at 88–89 (presenting serious doubt that the Appellate Body would extend the rationale of *United States-Import Restriction of Certain Shrimp*, to a much larger amount of trade regulated due to climate change concerns)

3. GATT Article XX Paragraph (b) Analysis

The treaty text of this provision reads as follows: “necessary to protect human, animal or plant life or health.”¹³⁴ The first textual distinction between this paragraph and paragraph (g) lies in the term “necessary.” Instead of a mere “relation,” or even “primary aim,” as the Appellate Body has interpreted paragraph (g),¹³⁵ this paragraph requires a direct connection between a measure and its necessity. The Appellate Body has commented, with somewhat more flexibility, on the use of paragraph (b) within the context of climate change. In a deviation regarding its findings about an entirely different subject matter, it noted that even if not “immediately observable,” an import ban could satisfy paragraph (b) if it provided a “material contribution to its objective.”¹³⁶ Thus, the possibility remains that measures that seek to mitigate this sort of future harm may find recourse under this paragraph. If the proposal could do so, then it would face the same searching scrutiny of the chapeau. The term “necessary,” however, belies any ease in convincing a dispute panel to accept a climate-change rationale under paragraph (b). Moreover, because this proposal would likely fall underneath paragraph (g), finding another exception remains redundant and unnecessary.¹³⁷ Accordingly, this Comment will proceed to examine other WTO treaties under which this proposal would find itself challenged.

F. *Agreement on Subsidies and Countervailing Measures (ASCM)*

If this proposal passed Article XX muster, it would still face the ASCM without any other defense available. The question here goes to whether the proposal provides for any illegal subsidies. Under this proposal, the only targets for this charge lie in the rebates for the domestic GHG taxes paid. While the remission of these certainly comprises a financial contribution, footnote one of the ASCM appears to provide an exemption for this sort of governmental action. It reads as follows: “the exemption of an exported product . . . or remission of such duties or taxes

134. GATT, *supra* note 21, at art. XX(b).

135. Appellate Report on American Performance Gasoline Standards, *supra* note 91, at 18.

136. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 151, WT/DS332/AB/R (Dec. 3, 2007), available at <http://www.worldtrade-law.net/reports/wtoab/brazil-tyres%28ab%29.pdf>.

137. See HUFBAUER ET AL., *supra* note 3, at 50.

[borne by like domestic products] . . . shall not be deemed a subsidy.”¹³⁸ If the Appellate Body found this exemption as non-applicable, then the proposal would likely be found as conferring a financial benefit specifically upon United States exporters of carbon-intensive goods. In which case, the analysis would then turn towards whether “serious prejudice” or any threat thereof exists.¹³⁹

Much like the Article XX chapeau analysis, this issue also revolves around the effects of the particular measure challenged. Here, not knowing the proposal’s actual consequences makes answering this analysis difficult. On its face, it will only prejudice those Members in a market where exports from the United States face no GHG import charge and another Member fails to rebate their domestic GHG taxes: thus disadvantaging those Member’s exports. Whether that qualifies as “serious prejudice” remains uncertain. This proposal seeks to take the international lead in implementing firm mandates for GHG emission reductions while still promoting international cooperation in that endeavor. In doing so, the proposal reduces the protectionism that might result hewing to the normative values of the ASCM. If the proposal eliminated those rebates, building domestic support in any country, given first-mover disadvantages, might well prove impossible.

One additional wrinkle under the ASCM surrounds the uncertainty of whether a country may rebate a GHG domestic tax, as opposed to a consumption or sales tax, upon its export.¹⁴⁰ In other words, are internal taxes related to the energy used in the production of a particular good, and not simply a tax on its transportation or consumption, permitted as rebates for exports under the ASCM?¹⁴¹ Without Appellate Body comment on this question, given the complexities surrounding both positions, this Comment will pass with little comment. Suffice it to say, that were these kinds of rebates not permitted for that reason, then the problems listed in the previous paragraph would likely prevent this proposal from moving forward domestically.

138. Agreement on Subsidies and Countervailing Duties, art. 1 n.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 14 (1994), available at http://www.wto.org/english/tratop_e/scm_e/scm_e.htm.

139. *Id.* at art. 5 n.13.

140. See HUFBAUER ET AL., *supra* note 3, at 39.

141. See *id.* at 44-46.

G. *Technical Barriers on Trade (“TBT”)*

The last relevant WTO agreement that could serve as a substantive obstacle to this proposal attacks protectionism by way of barring restrictions based upon “product characteristics or their related processes and production methods (PPM).”¹⁴² In doing so, it provides a rebuttable presumption that no “unnecessary” trade obstacle exists for any standard adopted internationally.¹⁴³ Without this international standard, however, the TBT requires that these regulations “shall not be more trade-restrictive than necessary to fulfill a legitimate objective.”¹⁴⁴ It further explains that these objectives may include national security requirements, the prevention of deceptive practices, the protection of human health or safety, animal or plant life or health, or the environment.¹⁴⁵ This Comment will focus on the last suggested objective: the environment.

First, the TBT grants an international standard special status. Under this proposal, however, no such international standard would exist at its outset. Obviously, the hope is that it will spur the development of an international standard for the reduction of GHG emissions in carbon-intensive goods production. For now though, the standard remains domestic and does not hold the status of a rebuttable presumption.

The analytical framework, then, requires this analysis to proceed under Article 2.2 of the TBT. In order to avoid violation of the TBT, a Member cannot possess a PPM restriction any more than necessary for the environment.¹⁴⁶ The proposal seeks to impose limited regulations that attempt to diminish the amount of GHG emissions. It proceeds as simply as possible, with ultimate import charge authority sitting in the quasi-international body of the IGCC. Throughout this entire effort, the purpose remains focused on the environmental resource that the United States shares with other Members: the global atmosphere. Moreover, this proposal does not attempt to ban imports produced from GHG emitting sources, but instead sets the standards for appropriate regulating. All of these steps, while seeking to curb trade

142. Agreement on Technical Barriers to Trade, art. 1.2, Apr. 15, 1994. Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1868 U.N.T.S. 120 (1994) [hereinafter TBT Agreement], available at http://www.wto.org/english/tratop_e/tbt_e/tbtagr_e.htm.

143. *Id.* at art. 2.2.

144. *Id.*

145. *Id.*

146. *See id.*

through the least restrictive means possible, recognize that some restrictions *must* occur for any effective incentives to encourage GHG emission reductions. Thus, this proposal properly balances the concerns and mandates of the TBT in accomplishing a legitimate objective.

III. CRITIQUES

The basic premise of a GHG tax faces criticisms on a number of fronts. These include the two main contentions addressed below: the impossibility of passing a GHG tax in today's political climate, and the unrealistic, or unwieldy, nature of the federal government's administration of a GHG tax. Finally, this Comment will address why a cap and trade system would serve as an inferior alternative to a GHG tax.

A. *The Political Feasibility of a GHG Tax*

In addressing the issue, this Comment seeks to debunk the proposition that climate change legislation – in any form – cannot effectively address global warming and find approval in Congress in the near-term.¹⁴⁷ While many politicians chalk up political failures to a communications problem (usually following a narrative that accuses the other side of anonymously bombarding the public with, at best, misleading fear mongering), this Comment argues that with an emphasized message concerning the use of the governmental revenues amidst no net increase in governmental spending, as well as the attempt to internalize GHG emitters costs accurately, the previous roadblocks may not derail the congressional path to passage.

The political narrative could look like something along these lines. First, the government seeks to lower citizens' taxes while simultaneously reducing the deficit. And in doing so, it attempts to accurately price GHG emissions that American citizens have absorbed previously via increased illnesses and a more volatile climate, with potentially catastrophic consequences in the future.¹⁴⁸ Accordingly, this plan seeks to internalize the costs of

147. See Cristine Russell, *From Copenhagen to Cancun: A Challenging Year for the Climate Story*, COLUM. JOURNALISM REV. (Nov. 24, 2010), http://www.cjr.org/the_observatory/from_copenhagen_to_cancun.php.

148. See generally Margalit Younger et al., *The Built Environment, Climate Change, and Health: Opportunities for Co-Benefits*, 35 AM. J. PREVENTIVE MED. 517 (2008) (discussing public health impact of GHG).

GHG emissions, while lowering individual income taxes and improving the fiscal position of the United States government. This would all occur without strangling the economy, because there is no net increase in what consumers will pay versus what they will receive back or what will necessarily pay down the deficit. But in doing so, the proper price signals will attach to carbon-intensive goods in terms of their true cost of production. Additionally, this proposal also upholds international treaty obligations, thereby encouraging a global response for conserving the atmosphere and discouraging “free riders.”

In order to understand the nuanced political dynamics, the disparities between GHG emissions as they relate to the proportion of a particular fossil fuel utilized must first be addressed. Certain types of coal, notably Anthracite and Bituminous, release almost twice as much GHG as Lignite coal.¹⁴⁹ Assuming away technological innovations that effectively close that gap, certain types of coal would immediately have a competitive disadvantage under this proposal. Lignite and the sub-bituminous varieties of coal (these produce about 33-35% less GHG emissions than equivalent amounts of Anthracite and Bituminous), originate mostly in the western United States.¹⁵⁰ The dirtier forms of coal, Anthracite and Bituminous, originate mostly in the eastern United States.¹⁵¹ In 2009, West Virginia’s state budget relied on the coal industry for about nine percent of its tax revenues.¹⁵² While a seemingly small percentage, replacing over \$300 million¹⁵³ in revenues likely explains why West Virginia, as well as Pennsylvania, Kentucky, Ohio and others will oppose any measures that attempt to limit GHG emissions. This boisterous opposition partly explains why climate change legislation remains stalled in Congress, and requires that this proposal’s use of governmental revenues must be extolled and emphasized.

These special interests also explain why this proposal out-sources the percentage reduction decisions to a presidential com-

149. See HUFBAUER ET AL., *supra* note 3, at 17.

150. See Leslie Ruppert et al., *The US Geological Survey’s National Coal Resource Assessment: The Results*, 50 INT’L J. COAL GEOLOGY 247 (2002).

151. *See id.*

152. See Mannix Porterfield, *Study: Coal Costs West Virginia Taxpayers More Than it Provides*, FAYETTE TRIB. (June 24, 2010), <http://www.fayettetribune.com/local/x1703937813/Study-Coal-costs-West-Virginia-taxpayers-more-than-it-provides> (citing a study that the State actually experiences a net loss of revenue due to expenditures related to coal mining—which may one day provide the inducement for less coal industry support).

153. *Id.*

mission, which will still allow Congress plenty of time to reject anything a majority – or if subsequently vetoed by the President, a supermajority – of lawmakers disapprove. As a practical matter, these kinds of political considerations may matter to a congresswoman who feels more comfortable defending her vote on legislation designed to internalize the costs of GHG emissions without defined percentage cutbacks. Why? While reducing the deficit and lowering taxes for her constituents, the lack of a statutorily delineated decrease that applies to a particular industry in her district will prevent that figure from appearing in a commercial suggesting the legislation's negative monetary impact on her district. In other words, smart legislating remains equally as important as smart policy if Congress will pass a bill mandating a reduction in GHG emissions.

B. *Administrative Feasibility of a GHG Tax*

Anytime politicians suggest that the federal government house a new bureaucracy, demands for smaller government zero-in on that policy.¹⁵⁴ This proposal, however, seeks to utilize governmental resources currently in place in order to efficiently carry out the mandates of this proposal. Chief among these include the Environmental Protection Agency (“EPA”), the Department of Energy (“DOE”), the Internal Revenue Service (“IRS”), and the Department of Commerce (“DOC”). All of these agencies would probably require a small boost in resources, but would not likely need a large expansion of their current bureaucracy.

The most challenging part of this regulation rests in the accurate calculation of GHG emissions from each covered facility, as well as the imposition of taxes levied on those companies that exceed their mandated allowances. Because this proposal computes reductions based upon historical emissions, this further adds to the difficulty for precisely assessing GHG taxes. In spite of these obstacles, this proposal recognizes that some of the implementation and execution challenges have already been solved. First, under the Clean Air Act, originators of these pollutants already have to receive permits, in addition to monitoring and reporting their GHG emissions.¹⁵⁵ Under this proposal, while more

154. Cf. George Scaggs, *A Case Against “Compromise,”* TEXAS INSIDER (Nov. 24, 2010), <http://www.texasinsider.org/?p=38345> (arguing that conservative compromise has contributed to governmental expansion).

155. See Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1808 (1991).

sophisticated equipment may be needed, the EPA will continue to ensure that GHG emitting plants will accurately measure and report their GHG emissions. The IRS would continue to audit the tax returns in which companies reported and paid these tax obligations. The DOC will administer the IGCC until the President chooses to approve an international commission to better serve the goal of international GHG emissions assessment and import charges calculation. And perhaps most important to the carbon-intensive good producers, the DOE, alongside the EPA, will assist the CCRC in advising members concerning the optimal percentage reductions necessary in any of these industries for optimal conservation of the atmosphere, perhaps in a committee.¹⁵⁶

While a bit of complexity accompanies this proposal, this Comment suggests that these nuances remain manageable in light of the goal served: atmosphere conservation.

C. *Cap and Trade: A Flawed Alternative to a GHG Tax*

Cap and trade, by and large, serves as a compromise between liberals and libertarians. On the one hand, progressives want to use the power of the government to institute GHG emission cut-backs to mitigate global warming. Libertarians, on the other hand, care about the environment but fervently believe that a free market would most efficiently accomplish efforts related to conservation. Carbon-intensive good producers like cap and trade, too, because it at least provides opportunities for the lobbying of GHG emission permits. Thus, the (still small) coalition behind cap and trade. This Comment posits that, while trying to create free markets remains a noble goal, when the government potentially hands out over half the permits without cost, the market is no longer “free.”¹⁵⁷ Instead, the government intervenes heavily in picking winners (firms receiving free permits) and

156. Notably, the qualifier “optimal” continues to appear as the goal of this proposal. In theory, this word represents an equilibrium where GHG emission reductions occur in a manner that effectively effectuates atmosphere conservation. This proposal assumes that GHG leakage could undermine the sustainability of this atmosphere conservation initiative, and therefore suggests that GHG emissions should not be switched off instantaneously. In other words, while atmosphere conservation remains the goal, the right amount of reduction is crucial for building international consensus to make this effort a success; and that can only happen if the right incentives exist for other countries to participate.

157. See Global Warming Pollution Reduction Act, S. 309, 110th Cong. § 706 (2007) (detailing how the bill allows for allocation of emission allowances at no cost to recipients). Many commentators suggest fifty percent or more of the initial allocation will be at no cost to recipients.

losers (firms having to buy permits). Lastly, the political opposition to cap and trade, the difficulty administering such a program, as well as the numerous potential international law violations, suggest an inferior approach in comparison to a GHG tax.¹⁵⁸ All of these issues will be taken in turn.

The introduction to this Comment explained the rancor that helped doom cap and trade in the 111th Congress. "Cap and Tax," as it was fondly labeled, found little support in the Senate. This Comment suggests that this proposal, juxtaposed against cap and trade, actually looks quite different. First, a GHG tax would collect no money for the government to spend, while instead directing the new revenues toward deficit reduction and lower taxes. Under cap and trade, unless auctions occur regularly, much of these revenues will be lost and new businesses may find it quite expensive to buy permits to pollute. Second, and perhaps most significantly, it mostly avoids "rent-seeking" by removing the power to set the mandated percentage cutbacks to the CCRC. With those bureaucrats more insulated from political pressure, the best possible formula exists for the reduction of "special interest give-a-ways." Because these mandates must occur industry-wide, the potential to game the system through "rent-seeking" is reduced. Cap and trade, on the other hand, relies upon the assumption of a GHG emissions cap. The experience of the EU's Emissions Trading System ("ETS"), however, has demonstrated another problem with current cap and trade legislation: its vulnerability to "cap busting." Likely stemming from political pressure, the EU has actually allocated more permits than emissions, thereby preventing the financial incentives from curbing GHG emissions by effectively removing any emissions cap.¹⁵⁹ The ETS also has serious administrative problems.

Accordingly, while not certain to please everyone at the table, a truthful narrative exists that consumers face no new net taxes (unless those that would otherwise be raised to pay off the deficit count). Instead, every dollar paid in the form of increased prices is returned, except for those slated for deficit reduction, and now prices accurately reflect the costs associated with pollution. Under cap and trade, it is not clear whether that money will re-

158. See Reuven S. Avi-Yonah & David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax Is a Better Response to Global Warming than Cap and Trade*, 28 STAN. ENVTL. L.J. 3, 5-6 (2009).

159. See Dan Lewis, *The Great Carbon Credit Swindle*, ENG'RING & TECH. MAG. (Jan. 20, 2009), <http://eandt.theiet.org/magazine/2009/01/carbon-swindle.cfm>.

turn to consumers' pockets, or more likely, to shareholders, which will not help selling the plan to the American people if they perceive that already wealthy CEO's capture most of the profit from increased prices. And if the EU ETS is any guide, no real GHG reductions may result, thereby thwarting the actual purpose of the regulation. Moreover, this proposal rests on what will likely prove acceptable to the democratic polity.

In terms of administrability, the increased bureaucracy from cap and trade might not require too many more thousands of federal workers, depending upon the contours of the permit allocation, but the regulation of the permit trading would likely create great complexity open for fraud. Under the EU ETS, the private sector has recognized that if it can show that a particular carbon-reduction project could not succeed without carbon credits, the door opens to financing not otherwise available.¹⁶⁰ Theoretically speaking, that would defeat the whole purpose of the ETS, if they are not offsetting their own GHG emissions through GHG reductions that would not otherwise occur. As a practical matter, a – reportedly – whopping two-thirds of these credits have been found to make no real GHG reduction.¹⁶¹ Proponents of this system also note that potential for international cooperation, especially given that reducing GHG emissions in developing countries may be cheaper than in developed countries. Of course, this leads to an uncomfortable narrative: the rich pollute while they pay the poor to cut back.¹⁶²

Another little talked about consequence revolves around the price volatility of GHG emission permits. In order for large-scale GHG emitters to plan ahead by (hopefully) emitting less GHG, they will need to have a clear picture of pollution costs in advance of business decisions. But as has been seen through the rolling out of the EU ETS, price volatility remains a big problem.¹⁶³ In all likelihood, a futures market like Chicago's carbon

160. *See id.*

161. *See id.*

162. Although not everyone finds this narrative uncomfortable; *but see* Tina Rosenberg, *Opinionator: Clean Water at No Cost? Just Add Carbon Credits*, N.Y. TIMES (Nov. 15, 2010), <http://opinionator.blogs.nytimes.com/2010/11/15/clean-water-at-no-cost-just-add-carbon-credits/?n=Top%2fReference%2fTimes%20Topics%2fSubjects%2fW%2fWater>.

163. *See generally* Claudia Kettner et al., *The EU Emission Trading Scheme: Insights from the First Trading Years with a Focus on Price Volatility*, (Austrian Institute of Economic Research, Working Paper No. 368/2010), available at http://www.wifo.ac.at/www/jsp/index.jsp?fid=23923&id=39003&typeid=8&display_mode=2 (discussing the price volatility problems experienced by the EU ETS).

trading market may effectively fill this void; but in the meantime, the price signal incentivizing GHG reductions remains uncertain, and, with the current rock-bottom prices, ineffective.¹⁶⁴ Without a stable price signal, investment and development in an effort towards lower GHG emissions will remain limited.

Assuming a resurrected cap and trade bill could find both congressional and presidential support, and it could overcome the numerous administrative issues previously listed, more problems loom ahead in the form of international treaty obligations. Potential violations include: (presumably) MFN, Schedule of Concessions (does an additional permit fall within the allowed additional import charges?), National Treatment (do free permits for domestic produces equate to favorable treatment?), and Quantitative Restrictions (can a WTO member ban imports without the requisite permit?). If so, every violation must find a defense under Article XX – not an easy thing to accomplish. Additionally, how about the ASCM (could free permits be classified as a specific, beneficial financial contribution, causing serious prejudice to another WTO member?)? The TBT would likely serve as less trouble for cap and trade (although free allocations not given to like imports would produce this inquiry: did the mandated (purchased) permits for like imports serve as more trade-restrictive than necessary if the objective was being served domestically with free permits?).

IV.

CONCLUSION

In the end, the GHG tax constructed herein operates with greater fairness, enhanced certainty, and a more manageable amount of complexity than the competing alternative, all while exacting a low net cost on the United States, thereby making it marketable domestically. It also takes great strides towards increased international cooperation by helping alleviate most, if not all, relevant international law concerns. And it does so by remaining acutely focused on its original purpose: a net reduction in global GHG emissions.

164. *See id.* This ineffectiveness likely has great consequences for investment and development.