The Climate Security Act of 2008 and other Carbon-based Trade Restrictions: Are They Legal under International Law?

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THE CLIMATE SECURITY ACT OF 2008 AND OTHER CARBON-BASED TRADE RESTRICTIONS: ARE THEY LEGAL UNDER INTERNATIONAL LAW?

Jasper L. Ozbirn

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I. Introduction

In 1997, the world's most prominent leaders came together in Kyoto, Japan to find a solution to the problem of global warming. That meeting resulted in a treaty—the Kyoto Protocol—that requires the developed nations that sign the treaty to decrease their carbon emissions to 5% below 1990 levels by 2012.1 Unfortunately, today in 2009, it appears that most parties to the Kyoto Protocol will not be able to meet the reduction goals of that treaty.2 For example, New Zealand is expected to have increased emissions 40% above what they were in 1990.3 Similarly, most countries in Europe are not expected to meet the mark, save Britain and Sweden.4 Thus, it appears that little real progress has been

1 J.D. 2009, University of the Pacific, McGeorge School of Law; LL.M. in Dispute Resolution expected 2010, Pepperdine University School of Law.


3 Id.

4 Id.
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made toward achieving the substantial reduction of carbon emissions called for by the Kyoto Protocol.5

Not only are the parties that agreed to the Kyoto Protocol having a difficult time realizing their reduction goals, but critics of the Kyoto Protocol also point out that developing countries are not required to make any effort to reduce carbon emissions.6 This is significant because some of these “developing” countries are major emitters of greenhouse gases (GHGs). China, for example, is considered a developing nation under the Kyoto Protocol, and is therefore exempt from implementing any pollution reduction scheme.7

The fact that China is not required to reduce its pollution is significant for a number of reasons. First, as of 2007, China was building a new coal-based power plant every week to ten days8 and has surpassed the United States as the world’s leading GHG emitter.9 Second, China’s pollution affects not only China, but the international community as well. Satellites have tracked clouds of pollution crossing the Pacific Ocean, and monitoring stations in the Sierra-Nevada Mountains of California have detected traces of residue from China’s coal-fires.10 Meanwhile, California recently passed legislation that prohibits the renewal in the state of coal-based energy contracts.11 Nonetheless, California is still subject to the coal-pollution that China is producing and, under the Kyoto Protocol,12 the United States would have no recourse against China because China is not yet required to mitigate its coal pollution.13 Thus, under the rules of the Kyoto Protocol, developed countries have no recourse against developing countries’ pollution.

But this is not to say that multilateral agreements to reduce pollution cannot be effective. The Montreal Protocol,14 for example, was extremely effective in

6 See Kyoto Protocol, supra note 1.
7 Id.
12 In all fairness to the drafters of the Kyoto Protocol, the enormity of China’s pollution contribution was not in the 1990s what it is now. See Ho-Zheng Tian et al., Recent Trends of Energy Consumption and Air Pollution in China, 133 J. ENERGY ENGINEERING 4, (Apr. 2007).
13 See Kyoto Protocol, supra note 1.
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achieving its purpose of reducing ozone-depleting substances. In the opinion of former Secretary-General of the United Nations Kofi Annan, the Montreal Protocol has been “perhaps the single most successful international agreement to date.” This gives credence to the argument that multilateral agreements can be effective when states agree to take measures to reduce pollution.

But what happens if countries refuse to agree? It is pretty well-settled that global warming is occurring, and humans are a major contributing factor. The U.N. Intergovernmental Panel on Climate Change (IPCC) declared in its November 2007 Report that global warming was the greatest threat we face today as a civilization. The Secretary-General of the U.N., Ban Ki-moon, has designated climate change as the “moral challenge of our generation.” These facts demonstrate at least a moderate consensus that global warming is a pressing issue requiring immediate action. The policy behind the Kyoto Protocol’s exclusion of developing countries is certainly commendable, and the problems of international poverty and inequality between states should not be ignored by a plan to combat global warming. Nonetheless, slowing global warming will require immediate action. This paper looks at the possibility of enacting climate change legislation that uses trade as an enforcement mechanism to encourage negotiations.

Specifically, this paper will look at an existing bill in the Senate that attempts to require other countries to adopt GHG reduction plans or submit carbon-credits in order to access the U.S. markets. The goal of the bill is to encourage major exporting countries to take steps to clean up their emission portfolios. Part I introduces the specifics of the Climate Security Act of 2008 (CSA,) which seeks to regulate GHGs in part through international trade. Part I also proposes an amendment to the CSA that aims to bring the CSA into conformity with existing international law under the General Agreement on Tariffs and Trade (GATT).

Part II will analyze the CSA under the GATT and concludes that, as written, the CSA would probably fail to meet the requirements of Article XX(g). Part III will then discuss how the amendment to the CSA proposed in Part I may be used to bring the CSA into conformity with the requirements of Article XX(g). Part III then argues that XX(g) should apply to permit the CSA, as amended, subject to certain limitations. This paper concludes that the CSA, as written, probably vio-

15 For graphs showing the decrease of various CFCs, see U.S. DEP’T OF COMMERCE, NAT’L OCEANIC & ATMOSPHERIC ADMIN., TRENDS OF CONTROLLED OZONE DEPLETING CHEMICALS, http://www.esrl.noaa.gov/gmd/hats/graphs/graphs.html.


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lates international obligations under the GATT, but that it may be amended to comply.

II. Carbon-Based Trade Restrictions

A number of bills have recently been introduced by senators on the topic of global warming. A brief search on www.congresswatch.com turns up at least five bills that refer to climate change in their title.\textsuperscript{20} At least two of these bills seek to regulate not only U.S. emissions, but emissions "imported" by the U.S.\textsuperscript{21} While no such bill has yet been passed by the Senate, the issue is ripe and it seems very likely to continually come before Congress until the U.S. enacts some sort of emission reduction scheme.

A. The Climate Security Act (CSA)

The Climate Security Act of 2008 (CSA), has been in the Senate for over a year and is in its second revision. The first version was killed in the Senate by a cloture motion.\textsuperscript{22} However, the current revision withstood a cloture motion not long after, which shows that it is enjoying at least moderate support by senators. As written, the CSA seeks to impose a cap-and-trade system on domestic GHGs and provides for the regulation of imported products based on their carbon-footprint as well.\textsuperscript{23}

Domestically, the CSA seeks to regulate GHG emissions in the U.S. by imposing a cap-and-trade system that would apply to over 80% of emitting entities.\textsuperscript{24} The CSA seeks to regulate direct emitters, such as power plants and factories, but also permits regulation of products based on the GHG emissions that result from production.\textsuperscript{25} It also permits regulation of imported products in an attempt to limit the GHGs that are imported by the U.S.\textsuperscript{26}

The CSA provides that regulation of imported products would only apply to countries that do not have a GHG reduction program in place that is comparable to the domestic regulations of the CSA.\textsuperscript{27} However, "least-developed" nations,

\textsuperscript{20} These are: (1) the Low Carbon Economy CSA of 2007; (2) the Global Warming Pollution Reduction CSA; (3) the Safe Climate CSA of 2007; (4) the Climate Stewardship and Innovation CSA, and (5) the Lieberman-Warner Climate Security CSA of 2008.


\textsuperscript{23} CSA, S. 3036, § 1301(1)(A) (defining the foreign goods that are covered by the CSA).


\textsuperscript{25} CSA, S. 3036, § 4(16).

\textsuperscript{26} Id. § 1301(1)(A).

\textsuperscript{27} Id. § 1306(b)(2).
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as determined by the U.N., are expressly excluded from regulation. For the countries that are covered, the CSA establishes a carbon-certificate program for imports. This program requires that countries wishing to sell their goods to the U.S. obtain “international reserve allowances” (carbon-credit) from the U.S. Environmental Protection Agency (EPA). The CSA requires that the Administrator of the EPA collect a carbon-credit that accounts for the GHGs emitted by production of the imported goods. The CSA permits the U.S. to ban any imports not accompanied by a certificate, but does not require such a ban. Thus, the CSA potentially allows the U.S. to ban the import of a product if the exporting country refuses to comply with the certificate program.

This is only a potential ban of products because the CSA states no limit on the number of credits that can be given out by the Administrator. This means that the CSA may not actually result in any reduction in GHGs from imports, because it is possible for the Administrator to sell as many credits as would be needed to allow all the products in, even if the products result in the same, or even more, emissions than they do now. The result of the CSA in that case would be a mere carbon tax on the products imported from the covered countries but not from other countries importing the same goods that have a GHG reduction program in place. As will be addressed, this will raise concerns for a World Trade Organization (WTO) Panel that has to decide whether the CSA complies with the requirements of Article XX(g) of the GATT. It seems likely, as will be discussed in Part II below, that the CSA would fail the “related to conservation” requirement of Article XX(g) because the CSA does not in fact require or result in conservation. Part II will discuss this in further detail, but before proceeding to that analysis, it will be useful to describe the proposed amendments.

B. Proposed Amendment to the CSA

This paper proposes several major amendments to the CSA. First, instead of allowing the Administrator to distribute an infinite number of carbon-credits, the CSA should place a cap on the number of credits that may be distributed. This cap would initially be based on the current data of how many emissions the U.S. imports. It would not be industry specific, but would look at all imported products to establish a grand total. That grand total would then be categorized, to make clear how many emissions the U.S. imported from each country. The first year of implementation would limit those countries to the average per-year emis-

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28 Id. § 1306(b)(2)(A)(ii).
29 Id. § 1306.
30 Id. § 1306(a).
31 Id. § 1306.
32 Id. § 1306(c)(1).
33 Id.
35 See CSA, S. 3036, §§ 1301 – 1307.
sions of the last five years. This cap would then be lowered by the same amount that the U.S. cap was lowered in the same year. The cap would be country specific, so that the maximum emissions imported from each country would be lowered by the same amount that the U.S. cap-and-trade cap was lowered each year.

The obvious question raised by this hypothetical amendment to the CSA is whether a program that places quantitative restrictions on imports based on the GHGs emitted through production of the imported product violates the GATT. Part III offers an analysis of this question and concludes that the CSA, as currently written, probably violates the GATT. Part III also addresses how this violation may be remedied by the addition of the minor amendments suggested above. There are two parts to this analysis: (A) would it violate the GATT, and (B) if so, is there an exception? Part IV will then suggest minor amendments to bring the CSA closer to compliance with the requirements of GATT Article XX(g).

III. GATT Analysis

A. Does the CSA Violate the Substantive Provisions of the GATT?

Without detailing the substantive provisions of the GATT, this section will briefly discuss the two GATT provisions that are most likely violated by the CSA as written or as amended.

1. Article I – Most Favored Nation

The “most favored nation” principle is contained in Article I of the GATT. It requires that members not favor one exporting nation over another. For example, a country would violate this provision by giving a tariff reduction to country A for a particular product while refusing to give that same tariff reduction to country B for that product. The CSA, both as written and with the proposed amendment, would almost certainly violate this Article. By requiring exporter A to purchase carbon certificates to gain access to the U.S. market, while not requiring exporter B to do so because exporter B has a comparable GHG reduction program, would certainly make it more difficult and expensive for exporter A to sell its goods to the U.S. While this is not a direct “tariff,” the “most favored nation” provision is not limited to “tariffs,” but applies equally to “any advantage, favour, privilege or immunity. . .” Thus, the CSA seems to do exactly what Article I was designed to prevent—allow a country to favor products from one country over another. Therefore, this Article of the GATT is probably violated.

37 Understanding the WTO, supra note 36.
38 GATT, supra note 36, art. I.
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2. Article XI – No Quantitative Restrictions

Article XI of the GATT provides for the “general elimination of quantitative restrictions.”39 This prohibits quotas on goods imported, and states that only duties, taxes, or other charges may be used to regulate trade.40 The CSA, as written, requires exporting countries to purchase carbon-credits from the United States in order to export goods to the U.S. Because the CSA does not contain a set number of carbon-credits that the EPA Administrator may issue,41 it probably would not violate Article XI.

However, the amendment to the CSA proposed by this paper would rather clearly violate Article XI by limiting the amount of a product the U.S. will import.42 It probably does not matter that the quantitative restriction is based on reducing GHGs, because the end result is a quantitative restriction on goods. Therefore, it appears almost certain that the CSA as amended would violate this provision.

In summary, it is very likely that the CSA, as written, would violate at least Article I, and the CSA, if amended as this article proposes, would violate at least Article XI. Therefore, at least one of the substantive provisions of the GATT would probably be violated under either version of the CSA. This raises the question of whether there is an applicable exception to these substantive provisions that would permit the U.S. to enact the CSA without violating the GATT. The U.S. can argue that Article XX(g) provides such an exception; this argument will be discussed next. This paper concludes that the CSA as written would probably not meet the requirements of Article XX(g), but that an amended CSA, as proposed here, would probably bring it within the exceptions provided by Article XX(g). It also argues more generally that any carbon-based import restriction system will need a provision similar to that proposed by this paper as an amendment to the CSA.

B. Does Article XX(g) Apply?

This paper argues that Article XX of the GATT provides a vehicle for the United States to enact the CSA, as amended, without violating the GATT. The problem for such measures in the past has been the WTO’s frequent interpretation of the GATT to strongly disfavor any unilateral action by a member.43 This interpretation has resulted in a very narrow application of Article XX that has

39 Id. art. XI.
40 Id.
41 See CSA, S. 3036, §§ 1301, 1306.
42 See infra Part II.B for proposed amendment.
43 See e.g. Report of the Panel, United States—Restrictions on Imports of Tuna, DS29/R (June 16, 1994) [unadopted] (hereinafter Tuna II Panel] (stating it disfavored the coercion of other nations by enacting trade restrictions).
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allowed almost no unilateral act under Article XX, even though that Article expressly permits unilateral action in some situations.44

The plain language of Article XX(g) clearly states that the substantive provisions of the GATT do not apply to measures that “relat[e] to the conservation of exhaustible natural resources.”45 Further, the Marrakesh Agreement—the founding document of the WTO—explicitly states the twin goals of “allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development” and “seeking both to protect and preserve the environment and to enhance the means for doing so.”46

Based on the language of Article XX(g) and the statements in the Marrakesh Agreement, it is rather surprising that even though the GATT has been in effect for over sixty years, Article XX has only been applied to justify a unilateral measure twice.47 This section will briefly describe the requirements of Article XX(g) as they have been interpreted and applied by the WTO,48 and it will explain why the CSA as written would probably not satisfy the requirements of Article XX(g). The next section, Part IV, will describe how the proposed amendments to the CSA would help to bring it within the purview of Article XX(g).

1. Article XX, Subsection (g)

The first step in justifying a measure under Article XX is to demonstrate that the measure fits within a subsection of Article XX.49 The language of subsection (g) of Article XX requires that a measure be: “relat[ed] to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”50 This language has

44 See, GATT, supra note 36, art. XX (the language, “subject to the [following] requirement[s] . . . nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures . . .” denotes that unilateral activity is permitted in certain circumstances).

45 Id. at art. XX(g) (carving out exceptions where unilateral activity is permitted).


47 See Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (Oct. 22, 2001) (adopted Nov. 21, 2001) [hereinafter Shrimp Appellate Body] (holding that the U.S.’s discriminations were justified because they were trying to protect sea turtles); see also Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (Mar. 12, 2001), [hereinafter Asbestos Appellate Body] (holding that the European Communities acted in accordance with Article XX(b) when it limited imports from Canada because they contained traces of asbestos).

48 For an extensive discussion of the WTO cases that address GATT Article XX(g), see Jasper L. Ozbirn, An Analysis and Synthesis of the Decisional Law Applying Article XX(g) of the General Agreement on Tariffs and Trade, 21 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 371 (2008).

49 Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, ¶¶ 120-127, WT/DS58/AB/R (Oct. 12, 1998), [hereinafter Shrimp-Turtle Appellate Body] (labeling whether the measure is concerned with the conservation of “exhaustible natural resources” as the “threshold” question).

50 GATT, supra note 36, art. XX(g).
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been separated into three individual requirements. Each requirement will be discussed separately below under subheadings “a” through “c.”

a. Exhaustible Natural Resource

First, the measure must aim to conserve an “exhaustible natural resource.” It is logical to begin the analysis of subsection (g) with the requirement that conservation be aimed at an “exhaustible natural resource” if for no other reason than it is the easiest analysis and may be dispositive.

To meet this requirement, the U.S. may present a number of exhaustible natural resources. The U.S. may claim that the CSA seeks to slow global warming, and therefore seeks to conserve the exhaustible natural resource of the world’s current climate balance. This is somewhat attenuated, and it is hard to anticipate how the WTO Panel and Appellate Body would resolve this argument. It is clear that dolphins, turtles, and clean air are exhaustible natural resources, but this language has not been interpreted so broadly as to include the climate generally.

There is an easier justification for the U.S. than arguing to protect the mean global temperature. The WTO Panel Report, United States—Standards for Reformulated and Conventional—Gasoline (United States—Gasoline), held that clean air was an exhaustible natural resource. Therefore, instead of arguing for an expansion of “exhaustible natural resources,” the United States can simply point out that the CSA is aimed at conserving clean air. It is easily ascertainable that burning coal is a major contributor to pollution, since it can be seen by the naked eye. Therefore, their holding in United States—Gasoline makes it likely that the panel would hold that clean air is an exhaustible natural resource, and this element of XX(g) is almost certainly satisfied by the CSA, as written or amended.

b. Related to Conservation

The second requirement of subsection (g) is that the measure be “related to conservation” of the “exhaustible natural resource.” As applied here, the question is whether the CSA is “related to conservation” of clean air. This is where the CSA would likely fail.

51 Ozbirn, supra note 49, at 386-403.
52 GATT, supra note 36, art. XX(g).
53 See Ozbirn, supra note 49, at 386.
55 Shrimp-Turtle Appellate Body, supra note 50.
57 Id. ¶ 6.37.
58 GATT, supra note 36, art. XX(g).
The WTO has stated that before undertaking the “related to” analysis of subsection (g), it is important to define very clearly the “measure” that is at issue.\(^{59}\) The WTO has held that the “measure” is the specific provision in a law that is found to violate the substantive provisions of the GATT.\(^{60}\) In the case of the CSA, the “measure” that would violate the substantive provisions of the GATT would be the requirement that countries buy carbon-credits in order to access the U.S. market.\(^{61}\)

Once the measure is clearly defined, the Panel must then ask whether that “measure” is “related to conservation.” The analysis of “relate[d] to... conservation” contains two separate requirements: there must be a legitimate conservation policy, and there must be a sufficient relationship between the “measure” and the “legitimate policy of conserving.”\(^{62}\) The legitimate conservation policy requirement will be discussed first, followed by a discussion of the “sufficient relationship” requirement.

The best illustration of the difference between these requirements appears in the Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle). There, the Appellate Body said that the “related to conservation” language required analyzing the loose “means” and the desired “ends” test.\(^{63}\) The two distinct parts of the test are the “means” and “ends.” In other words, the ends (policy) must be appropriate, and the means (measure that pursues that policy) must be “primarily aimed at” that policy.\(^{64}\)

To give an example of how a measure may fail the “policy” part of the analysis, the Unpublished Panel Report, Canada—Measures Affecting Exports of Unprocessed Herring and Salmon (Herring-Salmon), is useful. There, Canada passed a law that prohibited the export of herring or salmon unless it was “processed” in Canada.\(^{65}\) Even though the law was effective in conserving fish stocks, the law did not satisfy the “related to” requirement of subsection (g) because its goal was not conservation.\(^{66}\) The Panel found the “end” pursued by Canada’s measure was trade protection, not conservation.\(^{67}\)

Regarding the CSA, the United States can easily show that the CSA, both as written or as amended, is not aimed at trade protection. The explicit purpose of the CSA is to reduce GHGs and address climate change.\(^{68}\) The WTO has already


\(^{60}\) Id. at 13-14.

\(^{61}\) CSA, S. 3036, § 1306.

\(^{62}\) Shrimp-Turtle Appellate Body, supra note 50, ¶ 135.

\(^{63}\) Id. ¶¶ 136-142.

\(^{64}\) See Ozbirn, supra note 49, at 390-398 (discussing the Appellate Body’s various attempts to explain these requirements).


\(^{66}\) Id.

\(^{67}\) Id.

\(^{68}\) CSA, S. 3036, § 1302.
decided that a measure enacted to conserve clean air was within subsection (g). So, as long as the CSA is enacted with the express policy of pursuing environmental conservation, the WTO will probably find that this element is met. While this policy may be easily inferred from the CSA, it is not explicit.

In order to increase the chances that a WTO Panel would conclude that the CSA in fact pursues a legitimate policy, this paper recommends that the CSA be amended to clearly state a purpose of GHG reduction. As currently written, the stated purpose of the CSA is “to promote a strong global effort to significantly reduce” GHGs. With this minor amendment, the U.S. would almost certainly be able to demonstrate that the end pursued by the CSA is a legitimate policy for the purposes of Article XX(g).

Once it is determined that the policy of the CSA is legitimate, a Panel will next consider whether the CSA is “related to”—i.e. of a sufficient relationship to—that policy. The United States has the burden of demonstrating that the CSA is sufficiently related to its policy of conserving clean air. It is clear that the measure at issue is the specific requirement that “covered foreign countries” comply with the carbon-certificate program. The policy pursued by the CSA is the conservation of clean air. The question, then, is whether the means of the carbon-certificate program are substantially related to the ends of conserving clean air.

The CSA, as written, is probably not sufficiently “related to” conservation to satisfy this element of subsection (g). Although the purpose of the CSA may be the conservation of clean air and the prevention of global warming, it is not clear that the international means set forth by the CSA will achieve that purpose. While XX(g) does not require a causal connection between the means and ends, there must be a relationship of some certainty between the means and the ends. If a state challenges the CSA, it will point out that as written, the CSA will not necessarily result in any reduction in GHGs from imports because there is no cap on the number of credits that the Administrator may issue. Thus, the challenging party can argue that in order to be effective, the CSA depends on other countries adopting similar GHG reduction schemes.

This was precisely the same situation presented to the GATT Panel in United States—Restrictions on Imports of Tuna (Tuna II). In that case, the GATT Panel stated that the United States’ law, the Marine Mammal Protection Act (MMPA), could not meet the “related to” requirement because the MMPA depended on other countries adopting a policy similar to the MMPA in order to have a conser-
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The CSA, as written, would fail for the same reason the MMPA failed—it does not appear the CSA will reduce GHGs unless other WTO members adopt similar policies. Therefore, it will be very difficult for the U.S. to show that the international regulations of the CSA are “related to” the conservation of clean air. As written, the CSA does not necessarily take steps to preserve clean air because there is no limit on the number of international reserve allowances that may be sold. The WTO Panel would probably conclude that, like the MMPA in the *Tuna II* dispute, the international rules of the CSA do not embody a “close and genuine relationship of ends and means” as is required by the “related to” language of XX(g).

Although the CSA, as written, almost certainly fails the “related to” test, this paper proposes an amendment to the CSA that would probably bring the CSA within the “related to” requirement. If the CSA were amended to place a cap on the number of credits that may be issued by the administrator under Section 6006(d) or 6006(a)(2), and it established that the cap would slowly be lowered each year, a claim that the measure was not sufficiently related to the conservation of clean air would probably fail. With the proposed amendment, the CSA would reduce the emissions imported by the U.S.—rather than merely requiring that they be accounted for by a certificate. This reduction in allowances would necessarily result in less GHG emissions being imported, which would reduce the GHG emissions being produced, and this would further the CSA’s purpose of conserving clean air. So, although the CSA as written likely fails subsection (g)’s “related to conservation” requirement, the amendment to the CSA proposed by this paper would help the CSA satisfy this requirement.

c. Made Effective in Conjunction with Restrictions on Domestic Production or Consumption

Once the Panel concludes that the CSA is “related to conservation,” the final requirement of subsection (g) is that the measure be “made effective in conjunction with restrictions on domestic products or consumption.” This is an easy requirement to meet, and the CSA likely meets it as written. This language of subsection (g) merely requires that a country not attempt to use Article XX(g) as a means of imposing environmental regulations on other countries without imposing such regulations domestically. Because the CSA puts into place a domestic cap-and-trade system that, as written, is stricter than the regulatory scheme for imports because there is a cap, this element is almost certainly met by the CSA, as written. Similarly, the CSA, as amended to include a cap on imported GHGs, will probably meet this requirement as long as the cap on imported

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77 Tuna II Panel, supra note 44, ¶ 5.24.
78 See CSA, S. 3036, §§ 1301-1307; see also Shoyer, supra note 34, at 2 (stating that “[t]here would be no limit to the number of international reserve allowances made available for purchase by importers. . .”).
79 Shrimp-Turtle Appellate Body, supra note 50, ¶ 136.
80 GATT, supra note 36, art. XX(g).
81 United States–Gasoline Appellate Body, supra note 60, at 20-21
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GHGs is comparable to the cap placed on domestically regulated entities. Finally, under the CSA, as amended, the U.S. could reduce the cap placed on imports under the proposed amendment no faster than the rate at which the cap on domestic emissions was lowered.

In summary, this section concludes that the CSA, as written, would probably fail to satisfy the requirements set forth by subsection (g). This is so because it appears that the CSA, as written, would not be able to satisfy the "related to" requirement of subsection (g) because the international regulations do not, by themselves, result in conservation. While XX(g) does not require an "effects test," it is clear that a substantial relationship is required and the CSA, as written, probably fails that test by not requiring any reduction in imported GHGs. To overcome this failure, the proposed amendment to the CSA would impose an affirmative cap on the amount of GHGs that may be imported. If the U.S. limits the GHGs it permits to be imported, the CSA would be much more closely related to conservation and would probably pass the requirements of subsection (g). If subsection (g) is met, the analysis will proceed to whether the chapeau of Article XX is met. This discussion is undertaken in the following subsection.

2. Article XX – Chapeau

Once the U.S. has demonstrated that the CSA is justified under subsection (g), it must also demonstrate that its measure complies with the requirements of the chapeau—the introductory language—of Article XX. This section concludes that the CSA, as written, may satisfy the chapeau, and the CSA with the proposed amendment most likely satisfies the chapeau. The chapeau, or introductory language, of Article XX reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures.

This language has a number of requirements. First, application of a measure may not constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail." This will be discussed further in subsection (a) below. Second, the application of the measure must not constitute "a disguised restriction on international trade." This will be discussed in subsection (b) below.

Before proceeding to analyze the specific language of the chapeau, it is important to consider that the chapeau's general purpose is to prevent abuse of the justifications provided by the subsections of Article XX. Is the CSA an abuse

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82 See GATT, supra note 36, art. XX(g) (prohibition on favoring domestic goods).
83 Id. art. XX.
84 United States–Gasoline Appellate Body, supra note 60, at 22.
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of the justification provided by subsection (g)? The U.S. can argue it is not for a number of reasons. First, the policy of the WTO is to encourage sustainable development. That was also one of the goals embodied by the drafters of the GATT in 1947. The measure that the U.S. is seeking to enact here, the CSA, is aimed directly at promoting sustainable development. Specifically, its intention is to reduce the amount of GHGs that are imported into the U.S. Though the U.S. is attempting to utilize the provisions of XX(g), it is in no way seeking to abuse them, so this policy of Article XX is probably met. The U.S. must also demonstrate that the CSA does not offend the specific language of the chapeau, which will be discussed next.

a. Arbitrary or Unjustifiable Discrimination Between Countries Where the Same Conditions Prevail

The language of the chapeau expressly proscribes measures that, as applied, result in “arbitrary or unjustifiable discrimination.” The cases that have discussed this requirement after finding subsection (g) was satisfied, have failed to analyze separately whether there was “discrimination” before proceeding to decide whether such discrimination was “arbitrary” or “unjustifiable.” However, one WTO Panel has separated the analysis of discrimination from whether such discrimination is arbitrary or unjustifiable. Based on the language of the chapeau, it seems logical to follow that analysis, and this paper will address first whether the CSA results in discrimination before assessing whether such discrimination is arbitrary or unjustifiable.

(i) Discrimination

It is rather clear that the CSA, as applied or amended, will result in discrimination. China, for example, will probably argue that it is being discriminated against for its use of coal. The U.S. may rebut this argument, by pointing to the fact that the CSA applies universally to all countries. However, this argument is not sufficient because the issue to be addressed here is whether the measure as applied results in discrimination. To argue that the CSA applies to all countries misses the point; what matters is that the CSA states different requirements for different countries.

85 Final Act, supra note 47, pmbl.
86 This is evident by the fact that they included Article XX in the GATT.
87 GATT, supra note 36, art. XX.
88 See, e.g., United States—Gasoline Appellate Body, supra note 60, at 23 (listing arbitrary and unjustifiable discrimination as a one-step analysis).
89 See Report of the Panel, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R (Sept. 18, 2000) [hereinafter Asbestos Panel Report] (indicating that a particular kind of discrimination is prohibited, namely arbitrary or unjustifiable).
90 See, e.g., CSA, S. 3036, § 1306(b)-(c) (2008) (designating lists of countries that would be excluded from the GHG conditions, and foreign countries receiving different treatment based on written declarations).
In the Panel Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (Asbestos), the Panel found there was no discrimination where a measure was applied evenly to all member countries. However, the effect of the application of that measure was the absolute refusal to import asbestos—it did not result in some countries being allowed to import “clean” asbestos and some not, as the CSA would dictate. Nonetheless, the U.S. can argue that the measure is not “discriminatory” as applied, even though it may result in different results for different countries, because the same standards apply to all countries. But the requirement is not universal application; that would negate any function of Article XX because the substantive provisions would not have been violated in the first place. Instead, the Panel must ask whether there is discrimination. Because of the disparity of treatment afforded to countries that have enacted comparable GHG reduction programs and to those that have not, it seems clear that the CSA discriminates against countries that have not enacted such programs. Countries that do not have comparable GHG reduction programs are required to adhere to more administrative burdens to access the U.S. markets than countries that have comparable programs in place. Therefore, the CSA will probably be found to discriminate against some countries.

But the chapeau does not prohibit discrimination outright; it only prohibits discrimination that is “arbitrary” or “unjustifiable.” Therefore, it is necessary to decide whether the discrimination imposed by the CSA is “arbitrary” or “unjustifiable.”

(ii) Arbitrary

It seems highly unlikely that a Panel would decide the measure here is arbitrary. The CSA clearly states its purposes and its reasons for discriminating, and states explicit rules regarding imported products. The only case so far decided by a WTO Panel or Appellate Body that has discussed “arbitrary discrimination” was the Shrimp-Turtle dispute. There, the Appellate Body concluded that the inflexibility of the measure at issue, combined with the fact that there was no check on the system that enforced the measure, resulted in arbitrary discrimination. In contrast, here, the CSA is flexible in that it permits countries to adopt their own GHG reduction program.

91 Asbestos Panel Report, supra note 90.
92 Id. ¶¶ 8.228-230.
93 See id. ¶¶ 8.225-.230.
94 See CSA, S. 3036, § 1306(b)(2) (creating a separate category for countries that do not take similar action as the U.S. to limit GHGs).
95 See id. (indicating that some countries are exempt from the annual emission allowance procedures).
96 Shrimp-Turtle Appellate Body, supra note 50, ¶¶ 177, 180.
97 See CSA, S. 3036, § 1306(b)(2)(A)(i) (requiring comparable action to that of the U.S., not the exact same procedure).
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However, one issue of concern is that there is no appeal process in place under the CSA. In order to ensure that the CSA is not found by a Panel to be arbitrarily applied, this paper proposes that the CSA should include a review process that provides an arbitration proceeding for countries that wish to challenge any aspect of the application of the CSA. Without such a review process, the CSA operates much like the measure found to violate the GATT by the Shrimp-Turtle Appellate Body because there is no way for the exporter to obtain review of the application of the CSA. While the U.S. may be able to show that the CSA, as written, does not arbitrarily discriminate, it would be beneficial to this argument to install a review process to ensure that it is not found to be “arbitrary.”

(iii) Unjustifiable

The U.S. must also show that the discrimination that results from the application of the CSA is not “unjustifiable.” As applied, this element has been held to require good faith negotiations before unilateral action is taken. The CSA meets this requirement because it expressly states that it favors negotiations, and requires the U.S. to maintain negotiations. While this narrow requirement of pursuing negotiations may be met, it is not clear what else might be required to show that the discrimination is “justifiable.” The following paragraphs will discuss some possible arguments the U.S. should anticipate.

From a linguistic point of view, it seems clear that in order to be “justified”, the conservation policy of a measure should outweigh the mal-effects on trade that result from the discrimination. It seems likely, based on the wealth of scientific knowledge regarding climate change and the increasing agreement that the situation may be dire, that the discrimination applied by the CSA is justifiable by its goal of reducing GHGs and conserving clean air. Nonetheless, there is certainly an argument to be made that even in the face of the threat of global warming, environmental concern does not justify unilateral trade restrictive measures.

While a full presentation of this dispute is beyond the scope of this paper, one author argues that such discrimination is justifiable based on the “tragedy of the commons.” If the discrimination embodied by the CSA leads to a better situation for the global community by protecting clean air and helping to slow global warming, the WTO should permit the unilateral measure. If it refuses, the tragedy continues. If trade receives priority, and environmental concerns are secondary, then countries will be encouraged to irresponsibly continue using the commons because it is to their economic advantage to do so. This paper ar-

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98 See id. §§ 1301-1307.
100 CSA, S. 3036, § 1303.
102 Id. at 4-6.
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gues that in order to remove this motivation to pollute, the WTO should recognize the application of XX(g) to permit measures such as the CSA that strive to reduce GHG emissions.

The tragedy is caused by overuse of the commons, and this overuse can only be transcended through coordinated action. The WTO should not allow countries to refuse to take action based on economic concerns. The U.S. is seeking to lead the way in such coordination before the goods of the commons are exhausted. To prohibit this affirmative step toward protection of the global commons would not only be bad policy, it would contradict the foundational premises of the GATT and the WTO.

(iv) Same Conditions Prevail

It is not clear whether the question of whether the “same conditions prevail” language would be pertinent to the analysis of the CSA, but it appears it would not. If there is discrimination, and it is found to be arbitrary or unjustifiable, the U.S. could argue that the same conditions do not prevail in the U.S. and the country challenging the CSA. Unfortunately, the WTO has not yet had occasion to discuss the proper interpretation of this language. It is certainly true that the conditions in all countries are not the same, for example, as to the number of coal-plants in operation, pollution, and density population. However, this language is arguably intended to address the conditions the measure is aimed at, not the conditions generally. If this more narrow interpretation is used, then every country in the world faces the exact same condition—drastic change in climate with unknown effects. This is the interpretation the WTO should adopt.

b. Disguised Restriction on Trade.

Presuming the WTO Panel concludes that the CSA does not result in “arbitrary or unjustifiable discrimination between countries where the same conditions prevail,” the U.S. must then show that the CSA is not a “disguised restriction on trade.” This requirement seems to be met. The CSA states that its requirements are to be published, which would provide other countries the opportunity to see the rules that will apply. The expressed policy of the CSA is to slow GHG emissions and to favor negotiations. There is no evidence that the rules of the CSA are in any way geared toward regulating trade; rather, trade is an enforcement mechanism to encourage negotiations. Presumably, once an agreement is reached, there will be no need to regulate trade from the agreeing country. Because the CSA is to be published, and it expressly states its policy of

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103 See id. at 4 (stating that from a viewpoint of a group, individually using a resource as much as possible becomes irrational).
104 See, e.g., Final Act, supra note 47, pmbl. (stating goal of WTO to be sustainable development, and protection and preservation of the environment).
105 CSA, S. 3036, § 1105(b)(3).
106 Id. § 1101(2).
107 Id. § 1303.
conservation, the U.S. can rather easily show that it is not a "disguised restriction on trade."

C. Conclusion Regarding the CSA, as Written, Under XX(g)

As discussed in the preceding section, the CSA, as written, is subject to a number of complaints by affected states. This paper concludes that, as written, the CSA violates at least Article I of the GATT. Further, this paper concludes that Article XX(g) would probably not justify the violation of the substantive provisions of the GATT for the following reasons.

First, it is not clear that the international provisions of the CSA are "related to" conservation because, as written, it does not appear that any conservation will be achieved. This would probably lead a Panel to conclude that the CSA does not meet the requirements of subsection (g). Second, even if the Panel concluded that subsection (g) was met, the CSA is vulnerable to the challenge that, as written, it results in arbitrary and unjustifiable discrimination. It is arguably arbitrary because there is no check on the administration of the trade restrictive measures. It is arguably unjustifiable because the trade restrictions imposed are not outweighed by environmental concerns. Thus, the CSA, as written, probably would not be justified under Article XX(g). The next section proposes minor amendments to the CSA that, if made, would greatly increase the chances that the CSA would be found to be justified under Article XX(g).

IV. Proposal

It is possible for the United States to make a strong argument, based on WTO precedent, that the CSA as amended should be permitted to regulate imported products based on the GHG emissions associated with the production of those products. However, to successfully argue that point, the U.S. must carefully trace the previous WTO decisions interpreting Article XX(g) and be sure to meet all of the requirements that have been set forth by the WTO in those previous decisions. While the CSA, as written, is probably inconsistent with Article XX(g) as discussed above, this section will suggest minor amendments that will greatly increase the chances that the U.S. can justify the CSA under Article XX(g).

First, the CSA should be amended to place a cap on the number of international reserve allowances that the U.S. will import. This will greatly support the argument that the CSA is "related to" conservation. Without such a cap, it is possible to argue the CSA is not related to conservation because it will not have any impact on conservation and is simply a charge imposed on some exporters but not others. If a cap were placed on the import of GHGs, however, there would be an absolute conservation scheme and the amended CSA would almost certainly be "related to conservation."

Second, the CSA should be amended to include a review process for the decisions made by the Administrator or the President. As the Appellate Body stated in Shrimp-Turtle, a law that has no check on its application is more likely to be
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found arbitrary in violation of the chapeau of Article XX. Providing a process by which affected countries can challenge various aspects of the CSA, such as the classification of the challenging country as not having a comparable GHG reduction program, reduces the arguments that the CSA is "arbitrary."

Third, the U.S. must pursue negotiations with the countries that will be impacted by the CSA. While it is good to state the policy of preferring negotiations in the CSA, the U.S. must actually pursue negotiations in good faith. Fourth, the CSA should expressly state a conservation goal.

If these four amendments are incorporated into the CSA, the only major issue that would be left to litigate before the WTO would be whether the CSA results in "unjustifiable discrimination." Importantly, as the term "unjustifiable discrimination" has been applied so far, it only requires that a country wishing to take unilateral action first pursue negotiations. If this is all that is required, the CSA, as amended, would probably be justified by Article XX(g). But it is foreseeable that "unjustifiable discrimination" may be interpreted to require the environmental protection pursued by the unilateral measure to outweigh the trade restriction imposed. This interpretation is possible from the express language of the chapeau, and the U.S. should contemplate a defense in enacting the CSA. Though this is a big issue that cannot be fully resolved in this paper, the U.S. should take action in enacting the CSA to forestall the argument that the CSA is unjustifiable by including in the legislative record the evidence it is relying on to conclude that concerns of global warming justify the trade measures enacted by the CSA.

V. Conclusion

Global warming has become a reality, and it is encouraging that the United States Congress is considering regulations aimed at slowing global warming. The CSA seems to provide an effective scheme to reduce GHG emissions within the United States as well as to provide an incentive to countries that do business with the U.S. to pursue similar strategies to combat global warming. Though it is very likely that the CSA would violate the substantive rules of the GATT, this paper argues that, with some slight modifications, the CSA would meet the requirements of Article XX(g) and therefore be consistent with the GATT.

108 Shrimp-Turtle Appellate Body, supra note 50, ¶ 177, 180, 183.
109 This has been held to be an explicit requirement of the application of Article XX(g) of the GATT. Shrimp-Turtle Panel, supra note 100, ¶ 5.66.