

Thinking Ahead on International Trade (TAIT) – 2nd Conference
Climate Change, Trade and Competitiveness: Issues for the WTO

Questions in Search of Answers: Trade, Climate Change, and the Rule of Law¹

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I begin by confessing my bias.

I am for trade. I am for the rule of law. I am for concerted global action yesterday against climate change.

How best to serve each of these ends while serving them all? How best to spur the flow of trade, stand for the rule of law, and, at the same time, slow and stop the melting of the icecaps, the rising of the tides, and the savaging of the seasons from man-made climate change?

On the topic of climate change, trade, and competitiveness, urgent questions are raised for the nations of the world, as Members of the World Trade Organization, and as negotiators in search of a global agreement to address climate change.

In particular, there is immediate need to ask how best the world can avoid a collision between efforts to advance trade and efforts to combat climate change.

There is no way of avoiding linkage between trade and climate change. Economically, environmentally, and, not least, politically, they are linked inextricably. But somehow we must find a way to continue to lower barriers to trade while also combating climate change. We must prevent a collision between trade and climate change that would be disastrous for both.

In considering how best to do so, questions arise.

What will be the consequences for trade and for the WTO-based multilateral trading system if the nations of the world are successful in concluding a comprehensive global treaty on climate change? What will be the consequences if they are not?

Are there ways WTO rules can be used affirmatively to help fight climate change? Are there ways in which the WTO can be a model for how the world structures the international effort to address climate change?

These are questions in search of answers as we confront the challenges we face in both trade and climate change. I shall address -- if not answer -- each of these questions in turn.

First of all, what will happen to trade and to the trading system if the world concludes a global treaty on climate change?

As the economists would say, a global treaty on climate change is the "first-best" solution to what is the ultimate global issue. We must set an international price on the carbon emissions that are causing the many calamities of climate change.

Not only would this be by far the best solution in dealing with climate change. It would also be by far the best result for trade and for the trading system.

Like many millions of others, I had hoped the world would conclude a global treaty in Copenhagen last December. I am hopeful the world will conclude one in Cancun this coming November.

I am hopeful. And I am, as always, optimistic. I am not, however, as optimistic about this desired result as I would like to be.

But what if these hopes are fulfilled? What would this global result mean for trade and for the WTO?

Would a comprehensive global climate treaty include the possibility of trade restrictions or trade sanctions as a means of ensuring compliance with climate commitments? If so, then, perhaps most simply, the Members of the WTO could, using existing WTO rules, adopt a "decision" stating that any measures taken by WTO Members that were consistent with the global climate treaty would be deemed also to be consistent with WTO obligations for purposes of WTO dispute settlement.

The world could then continue to lower barriers to trade while also combating climate change. And it could do so within the framework of the international rule of law.

Simple enough. But who would judge consistency with the climate treaty?

If a legal mechanism is established under the global climate treaty for judging treaty compliance in the event of a dispute, then such a judgment should be binding in the WTO. If not, unavoidably, WTO panelists and, ultimately, the WTO Appellate Body will have to judge whether a WTO Member has complied with the climate treaty before they will be able to conclude whether that Member is excused from compliance with what would otherwise be WTO obligations.

What will happen to trade and to the trading system if the world does not conclude a global treaty on climate change?

This is the question that most concerns many who are for trade, and this concern has intensified since the disappointing impasse in Copenhagen.

For, in the absence of a global climate treaty, countries throughout the world will be left with the “second-best” solution of something less than comprehensive global action on climate change. They will act nationally, sub-nationally, and, perhaps also, internationally through creative bilateral but not fully multilateral measures. And many of these measures will affect trade in ways that will fall within the scope of the various “covered agreements” that comprise the WTO treaty.

The Members of the WTO could simply let events take their natural course, and hope to resolve the international disputes that surely will arise from the enactment and the application of such measures within the WTO dispute settlement system.

No one has more confidence in WTO dispute settlement than I do. WTO panelists and my former colleagues on the WTO Appellate Body are more than capable of clarifying WTO obligations in ways that will help resolve such disputes. They almost always do.

But the world does not have the time to await judgments on disputes about the potential conflicts between trade and climate change on a case-by-case basis.

Moreover, the political sensitivity about this issue in every part of the world is such that leaving WTO jurists to judge such disputes on a case-by-case basis may result in a perilous political overload of the WTO dispute settlement system.

So I agree with those who have urged the Members of the WTO to address this issue through negotiation now, so that we can minimize the likelihood of politically controversial litigation later. But what specific action should the Members of the WTO take through negotiations on climate change?

In their impressive recent assessment of “Global Warming and the World Trading System” for the Peterson Institute for International Economics, Gary Hufbauer, Steve Charnovitz, and Jisun Kim have suggested a number of possible practical approaches to negotiations on the nexus between trade and climate change. Others have also made helpful suggestions.

We could “green” the GATT and other WTO agreements by rewriting longstanding WTO rules to take climate change and other environmental considerations more fully into account. Whatever the merits may be of doing this, agreeing on such a revision of WTO rules would require a consensus of WTO Members. It seems highly unlikely that we could even contemplate such a consensus at a time when WTO Members cannot even find consensus on the infinitely easier task of concluding the long-deadlocked Doha Development Round of global trade negotiations.

Instead, a “coalition of the willing” forming a subset of WTO Members could commit to a set of rules on climate change that would be binding solely on them and would be enforced in WTO dispute settlement. This could take the form of a Plurilateral Agreement under Annex 4 of the WTO agreement. A consensus of all WTO Members would be required to add it formally to the WTO treaty.

Or WTO Members could approve a “waiver” to WTO obligations for certain specified actions to deal with the threat of climate change. This would require approval of at least three-fourth of WTO Members.

Or WTO Members could approve a “peace clause” to the WTO treaty that would prohibit any challenges in WTO dispute settlement to certain national actions taken to address climate change while the world works toward conclusion of global climate change treaty. This could be by adoption of a “decision” by WTO Members interpreting the WTO treaty, which would require the support of three-fourths of the Members.

There is compelling need for serious negotiation now on finding some way to create a “green space” for WTO Members to proceed with other countries on the essential work of climate change without running afoul of WTO rules. The alternative is a collision between the competing goals of trade and climate change in WTO litigation. For it is not at all clear that many of the national measures that are being enacted and contemplated by WTO Members to address climate change would survive legal scrutiny in WTO dispute settlement.

In every country in the world, one of the major obstacles to imposing mandatory limits on harmful greenhouse gas emissions through national legislation is the potential impact of such limits on the international competitiveness of local firms. This is particularly so in those energy-intensive industries -- such as steel, glass, cement, aluminum, paper, pulp, chemicals, and others -- that necessarily depend on carbon emissions in the process of producing their products. And it is especially so during this time of continuing worldwide economic distress. Understandably, these domestic industries in every WTO Member do not want to face emission limits or other carbon restrictions that their foreign competitors do not.

Equally, throughout the world, environmentalists and others who ardently favor such restrictions fear that merely imposing restrictions on domestic producers will do nothing to reduce overall emissions because “greener” domestic products will simply be supplanted in the domestic marketplace by “dirty” foreign products. The air we breathe knows no borders.

The common domestic fear is that if we act nationally, and not internationally, to address climate change, domestic producers may ship jobs to another country where emission rules are more lax, and domestic consumers may buy imported products that are cheaper because the emission rules in another country are more lax.

There is widespread and increasing concern about the possibility of such “carbon leakage.” Economists disagree about the likely extent of carbon leakage. All the same, this concern is inspiring consideration in many countries of border measures that would restrict trade in less than climate-friendly products as part of pending national measures to address climate change.

The danger is that border measures by one country could lead to counter-measures by other countries, and that the battle against climate change could descend into the mutual self-defeat of tit-for-tat “trade wars.”

Could a national measure be enacted to address climate change that could assuage domestic concerns about carbon leakage in a way that could be consistent with existing WTO obligations? Conceivably, this could be true of a carbon tax.

I will not delve here into all of the endlessly delightful nuances of the report of the GATT Working Party on Border Tax Adjustments. Suffice it here to say:

WTO rules permit a charge as a border tax adjustment on imported products. Likewise, WTO rules permit a remission as a border tax adjustment on exported products.

Only indirect taxes on products (such as sales taxes) may be adjusted at the border. Direct taxes on producers (such as income taxes) may not be.

To date, there is no WTO case law that clarifies for us whether an energy tax such as a carbon tax is a direct tax or an indirect tax. Nor is there any WTO case law that tells us whether a tax on inputs -- such as fossil fuels -- that are not physically incorporated into a final product is a tax that can be adjusted at the border under WTO rules.

Ideally, these unanswered questions should be answered by consensus of WTO Members through negotiation. Necessarily, they may have to be answered by WTO jurists in litigation.

Depending on how these questions are answered, it could be possible to craft a carbon tax in a way that would make offsetting border tax adjustments consistent with WTO rules.

Alas, there seems to be less than a groundswell among legislators worldwide to enact carbon taxes. I was once a legislator myself, and I know: No one wants to vote for anything that may be called a “tax,” and especially not in an election year. Instead, legislators everywhere seem intent on enacting “cap and trade” regimes and other means of addressing climate change. Some aspects of the means they are suggesting could prove to be inconsistent with WTO rules.

Among those rules are those in the GATT.

To ease local fears of carbon leakage, there is a universal temptation to restrict trade in “dirty” imported products as part of national efforts to address climate change.

Set aside for the moment a fact that is often forgotten in domestic debates about applying border measures, which is: if we are free to apply border measures to products imported from other WTO Members, then other WTO Members are equally free to apply border measures to products we export to them. There is one book of WTO rules for all WTO Members. Do any of us think otherwise?

Set aside also the immense practical difficulties that would exist in calculating the carbon content of various products made in various countries by various means and involving various pricing methods under various regulatory regimes. Anyone who has ever enjoyed the pleasure of the process of calculating anti-dumping duties or countervailing duties to subsidies can truly relish the prospect of such an imposing task. How would we measure carbon content?

Even assuming that such a task can be fairly fulfilled, domestic measures aimed at minimizing carbon leakage by imposing restrictive border measures on imports of carbon-intensive products pose numerous potential problems under the GATT.

I will not plunge headlong here into the murky terrain that separates border measures from internal regulations, or into every single esoteric intricacy of discerning the “likeness” of products. There are some benefits to being a former Chairman of the Appellate Body; I need no longer “address each of the issues raised.” Enough here to say:

Applying customs duties or any other duties or charges of any kind on imported products at levels above those that are bound by a WTO Member in its WTO “schedule of concessions” will be inconsistent with GATT obligations.

Applying an import ban, a quota, or any other prohibition or restriction on the import of a product from another WTO Member -- “other than duties, taxes or other charges” -- will be inconsistent with GATT obligations.

Applying a measure that accords an advantage to some foreign products over other like imported foreign products will be inconsistent with the obligation of “most-favoured-nation treatment” in the GATT that is one of the fundamental rules of non-discrimination at the heart of the multilateral trading system.

And applying a measure that treats imported products less favorably than like domestic products will be inconsistent with the obligation of “national treatment” in the GATT that is the other basic rule of non-discrimination.

Some have suggested that such discriminatory measures will satisfy GATT and other WTO rules if they are not applied immediately, but rather are applied only prospectively, conditionally, and as a matter of discretion -- at some distant time in the future, if other countries refuse between now and then to adopt comparable limits on their carbon emissions.

But isn't it possible that even a prospective, conditional, and discretionary measure could modify the “conditions of competition” in the domestic marketplace to the detriment of an imported product here and now? For example, would not the chances of the producer of

an imported product of securing a long-term contract in competition with the producer of a like domestic product be adversely affected by the prospect that the imported product could become significantly more expensive to ship into the domestic market during the term of the contract? What may be most expedient politically back home is not always defensible legally in Geneva.

Some have suggested, too, that such discriminatory measures could be justified because “green” products and “dirty” products are not “like” products, and that therefore these GATT obligations would not apply to trade in them.

Are climate-friendly products “like” carbon-intensive products? The “process and production methods” (the “PPM’s”) that enter into making a product can have a significance under WTO rules. But will PPM’s be considered in determining whether there is a violation of a GATT obligation; or will they only be considered in determining whether there is a defense that excuses a violation?

Is there, in fact, a defense under the existing rules that could excuse such GATT violations? In principle, yes. A potential defense exists in the GATT. It has existed for as long as there has been a GATT. In practice, though, it will be difficult for a WTO Member to prove entitlement to this defense in WTO dispute settlement.

When challenged in dispute settlement, a Member of the WTO will have the burden of proving entitlement to the GATT defense. That Member will have to prove, first, that the challenged measure is of a kind for which the defense is intended; then it will have to prove, next, that the measure has been applied consistently with the requirements for the defense.

First, most likely, that Member would bear the burden of proving that the measure was one “relating to the conservation of exhaustible natural resources” and was “made effective in conjunction with restrictions on domestic production or consumption.” (An alternative would be to argue that the measure was one “necessary to protect human, animal or plant life or health,” but this would be a more difficult course to follow in asserting a defense.)

Unquestionably, air is an “exhaustible natural resource.” That’s what much of all our agonizing about climate change is all about.

Undoubtedly, any challenged measure would be “made effective in conjunction with restrictions on domestic production or consumption.” Otherwise, there would be no concern domestically about carbon leakage.

A much bigger challenge would be to prove that such a measure was one “relating to” the conservation of exhaustible natural resources. The measure would have to be an environmental measure. It could not be a measure applied to protect the competitive position of domestic industries in the global marketplace.

Take a real hard look at the lawmaking processes underway in legislatures all over the planet, and at the border measures and other trade-restricting measures that are being proposed and enacted worldwide as part national climate change legislation. Are these measures in which there is a “substantial relationship” between the legislation and the conservation of the air as a natural resource? Or are these measures that are being proposed and enacted for reasons largely “relating to” competitiveness? Is the cause or rationale of the discrimination in the measure the protection of the environment, or is it really something else?

Second, even if a WTO Member is able to prove in dispute settlement that the measure is such an environmental measure, to be entitled to a defense to any GATT violations, that Member will then have to prove also that the measure is “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....”

Can this be done if, for instance, foreign countries and foreign producers are presented with a *fait accompli* in the form of trade restrictions on foreign products? Can it be done if, for example, they have had no opportunity to be heard, and they have had no say in

establishing the applicable standards for determining carbon content? Can it be done if the Member applying the measure fails to take into account the local conditions in other countries, or if that Member requires other countries to adopt its own policies as a prerequisite to entry into its domestic marketplace?

Furthermore, how should the statements about the need for sustainable development in the WTO treaty be taken into account in determining entitlement to this defense? How does this consideration relate to assessing whether the “same conditions prevail” between countries? And, importantly, is there a territorial jurisdictional limit on the right of a WTO Member to assert this defense?

Similar issues of inconsistencies with WTO obligations are raised by such national measures under the WTO Agreement on Technical Barriers to Trade. The TBT Agreement applies to standards and to technical regulations “which lay down product characteristics” and “their related process and production methods.”

Importantly, for technical regulations, the TBT Agreement contains “most-favoured-nation” and “national treatment” obligations virtually identical to those in the GATT. It also applies to “labeling requirements”; so a carbon-label for energy-intensive products, including imports, would seem to fall under the scope of the TBT Agreement.

In addition, substantial concerns are raised by many suggested national measures of consistency with obligations in the WTO Agreement on Subsidies and Countervailing Measures. Grants. Loans. Tax breaks. Sector-specific concessions on regulatory requirements. Free carbon emissions allowances. All of these are being considered as ways for encouraging the reduction of greenhouse gas emissions in national legislation, and all could raise issues of compatibility with WTO rules on subsidies.

Conceivably, subsidies issues could be raised by inaction as well as by action nationally. Some have suggested that the failure of a WTO Member to act nationally to control greenhouse gas emissions could be characterized as a “subsidy” under WTO rules, and so could be subject to countervailing duties. Professor Joseph Stiglitz has argued, “Not paying the cost of damage to the environment is a subsidy, just as not paying the full costs of workers would be.”

On economics, I bow to Professor Stiglitz. He has won one more Nobel Prize in economics than I have. Economically, there may well be a subsidy. But legally? Where is the provision in current WTO rules that would allow a WTO Member to apply countervailing duties to offset such so-called “environmental dumping”?

More likely is the possibility that subsidies issues will be raised by the creation of national “cap and trade” regimes. For example, what if a government makes some producers pay for carbon emissions allowances but gives other, favored producers emissions allowances for free? Does this create a situation in which “government revenue that is otherwise due is foregone or not collected,” and there is, therefore, a “financial contribution” under WTO rules?

If so, if this “financial contribution” provides a “benefit” in the marketplace, and if it is “specific to an enterprise or industry or group of enterprises or industries,” then it is a “subsidy.”

And if this “subsidy” has “adverse effects” to the interests of other WTO Members, then it must be withdrawn or face the prospect of countervailing measures.

Further, if this “financial contribution” is somehow conditioned on export performance, or on the use of domestic over imported goods, it need not be “specific” to be inconsistent with WTO rules. No “adverse effects” need to be shown. It is, by definition, a prohibited subsidy.

To be sure, there is no definitive case law on this issue. But Hufbauer, Charnovitz, and Kim have suggested that “there would be strong trade policy grounds for treating emissions allowances as subsidies covered by (WTO rules) because, if not, governments in the future carbon-conscious world would be able to avoid all subsidy disciplines by using the form of tradable emissions allowances to confer aid on favored industries or agricultural producers.”

Could such subsidies -- if they exist -- be successfully defended and justified under WTO rules even if they are inconsistent with those rules? It has been suggested by some that the

defense available to violations of the rules relating to trade in goods in the GATT is available also to violations of the rules relating to subsidies in the SCM Agreement. Is this so? This question, too, has yet to be answered in WTO dispute settlement.

It has been suggested as well that developing countries that are only now beginning to receive the economic benefits of industrialization should, for this reason, receive “special and differential” treatment under WTO rules where climate measures are concerned. To what extent do the current rules provide them with such “special and differential treatment”? In what other ways should their special needs be taken into account in WTO councils and in WTO dispute settlement? And how does the concept of “special and differential treatment” under WTO rules relate to the concept of “common but differentiated responsibilities” under internally agreed environmental rules?

Thus, in numerous ways, we can see how WTO rules constrain discriminatory and other actions in the enactment of national climate change measures. Unilateral actions are perilous. Multilateral actions are much to be preferred. All of this serves to underscore the “first-best” solution of concluding a global climate treaty.

Are there ways WTO rules can be used affirmatively to fight climate change?

Indeed there are. Trade can be green, and world trade rules can be tools to make it so.

Those looking for ways to speed global action to combat climate change should look in part to the WTO, for WTO rules can be used to hasten the spread of green technologies worldwide.

To date, most of all the all-too-little attention paid thus far to the connection between trade and climate change has focused on how trade rules constrain national actions that would restrict international trade in products based on the excessive carbon emissions in their production.

As we have seen, in the absence of a global climate treaty, or possibly of an evenhanded national carbon tax, such tempting defensive border measures could be inconsistent with WTO rules. But WTO rules offer opportunities as well as constraints in the struggle to slow climate change, and these opportunities are being missed.

Global implementation of climate-friendly technologies is a key to the success of global efforts to confront climate change. Access to green technologies by developing countries is central to this task. In particular, it is vital to increase energy efficiency in developing countries, which are only one-third as energy efficient as developed countries.

Trade negotiators have been trying to address this need for some time in the prolonged Doha Development Round of global trade negotiations. On the WTO agenda in the trade round are efforts to reduce or eliminate tariff and nontariff barriers to trade in dozens of environmental goods and services, including everything from wind turbines to solar water heaters to the thermostats and the generators needed to operate renewable energy plants.

Eliminating the barriers to trade in green goods and services would help diffuse them worldwide at the lowest possible cost by reducing their prices. In addition, it would provide incentives and expertise needed to enable developing countries to expand their production, use and export of climate-friendly technologies.

But there is much more that ought to be on the global trade negotiating agenda that could also further the cause of fighting climate change.

New green technologies are everywhere subject to mandatory technical regulations and to voluntary standards of all kinds. They are submitted to “conformity assessment procedures” used to determine whether technical requirements have been fulfilled. They can be affected by labeling schemes, by bans, and by other prohibitions.

All of this falls under WTO rules. Those rules encourage the international harmonization of standards and technical regulations. Such harmonization would spur the distribution of green technologies worldwide and would enhance energy efficiency.

Harmonization should not be merely encouraged by WTO rules; it should be a specific goal of the WTO agenda.

In the past decade, more than 200,000 patents were registered worldwide for solar, biomass, fuel cell, ocean, wind, geothermal, and other new green technologies. These innovations would not exist without the legal assurance that intellectual property rights will be protected.

WTO rules protect patents and other intellectual property rights worldwide, and rightly so. Those rules also aspire to an appropriate balance between encouraging innovation and allowing reasonable access to innovation through the transfer and dissemination of new technologies. Striking the best balance between innovation and access should likewise be a specific goal for WTO negotiations.

Significant opportunities for spreading clean technologies and reducing carbon emissions exist worldwide in untold billions of dollars of government procurement. Government purchases must favor climate-friendly goods and services. Toward this end, we should “green” the WTO’s Government Procurement Agreement and extend it to apply to all WTO Members.

Lastly, there are opportunities for “greening” trade in the WTO rules on subsidies. Those rules ensure that international trade is not distorted unfairly by governmental support that is conditioned on exports or on the use of domestic instead of imported goods, or that is targeted to favored domestic industries.

Governmental subsidies lower costs for local producers and thus let them sell their products for lower prices. This can reduce access to local markets for competing foreign producers, and it can give local producers an unfair advantage in exporting to other markets.

At the same time, and unquestionably, grants, tax breaks, and other governmental subsidies can help accelerate success in the struggle against climate change by inspiring innovation and by jump-starting the development and deployment of clean technologies.

Widespread public subsidies that encourage continued high-carbon consumption should be curtailed nationally. Subsidies that ease the necessary transition to low-carbon economies should be encouraged internationally.

We must continue to be careful not to distort trade through production subsidies. At the same time, we should explore ways of encouraging climate-friendly subsidies without permitting them to become pretexts for protectionism.

This is not a new idea. As agreed in the Uruguay Round of trade negotiations that established the WTO fifteen years ago, subsidies rules allowed “assistance to promote adaptation of existing facilities to new environmental requirements,” and provided that no trade actions could be taken against such assistance.

Regrettably, this enlightened WTO permission slip for environmental subsidies expired after five years, despite having significant support for renewal in the WTO. It got lost (ironically) a decade ago amid the negotiating clutter occasioned by the environmental and other protests against the WTO in Seattle.

Today the challenge of climate change, to say the least, justifies the restoration of space under WTO rules to meet “new environmental requirements.” An exemption for environmental subsidies that further the fight against climate change should be created anew by the Members of the WTO.

Lastly, are there ways in which the WTO can be a model for how the world structures the international effort to address climate change?

Copenhagen was indeed a disappointment to all of us who fervently hope for a comprehensive global treaty on climate change.

As Professor Scott Barrett reminds us, “The Copenhagen Accord is not a treaty, and it does not address the fundamental weaknesses in the Kyoto Protocol.” The Copenhagen Accord is not a binding legal agreement. It includes no binding commitment to reduce

greenhouse gas emissions, and no binding agreement by any country to any specific emissions target. It includes no timetable for concluding such a binding agreement.

But do the three terse pages of the Copenhagen Accord nevertheless point the way forward on climate change?

Contrary to many pessimistic predictions in the immediate aftermath of the Copenhagen summit, China, India, and dozens of other countries met the January 31 deadline set out in the accord for listing their voluntary targets for limits on carbon emissions in an international registry. Buoyed by these national commitments, international attention has increasingly turned since to determining how developing countries will pay for meeting these targets.

Under the accord, the United States and other developed countries agreed to provide additional resources totaling \$30 billion during 2010-2012 to support "mitigation" and "adaptation" activities to contain climate change in developing countries. If meaningful actions are taken by developing countries with transparent results, the developed countries have committed further to a goal of jointly mobilizing \$100 billion annually by 2020. The accord calls for the establishment of a Copenhagen Green Climate Fund and a high-level panel to look at ways of meeting this ambitious financing goal.

To be sure, many uncertainties remain about all of this. Nevertheless, in Bonn, in Paris, in Oslo, and elsewhere, efforts to identify and secure this needed financing are continuing even as pessimism prevails about the prospects for early conclusion of a comprehensive climate treaty.

Few expect the conclusion of such a treaty through the UN process in Cancun. Few believe that fully multilateral progress will be possible unless and until the United States takes national action to limit its carbon emissions. And such action in my country continues to seem unlikely in this election year.

Amazingly, the legislative process toward passage of essential energy legislation remains gripped in gridlock in the US Congress. Sadly, this gridlock persists even as unprecedented quantities of spilled oil approach the shores of my beloved Florida and other American coastal states.

Will we be more likely to find the way forward internationally on climate change if we learn from the international experience, over long decades, of building the multilateral trading system?

We all hope for practical reform of the United Nations process so that the UN can be a more effective forum for concluding a global climate treaty. But is the best way forward more likely, at least initially, to be through separate agreements on some but not all of the issues of climate change among some but not all of the countries of the world? Is a series of partial agreements on key aspects of climate change more realistic as a strategic approach toward an ultimate global climate treaty? Given the urgency of climate change, should we try to go forward with some countries if we cannot muster the needed consensus to go forward now with all of them?

If so, then the gradual historical evolution of the General Agreement on Tariffs and Trade -- with just 23 original "contracting parties" in 1948 -- into today's World Trade Organization -- with 153 member countries and other customs territories, and counting -- may be a worthy model in many respects for the emerging international legal architecture for climate change. As we have done during the decades with trade, we could construct an effective global approach to climate change by proceeding issue by issue, country by country, and case by case, toward the shared end of global agreement on a comprehensive and effective international system that will bind and serve all.

A plural approach seems to be contemplated in the Copenhagen Accord. Language in those three pages establishes the basis for addressing important climate-related issues such as deforestation, mitigation funding, and technology transfer through separate mechanisms among "coalitions of the willing." These could function side-by-side with an emissions agreement and with a more focused and more limited UN process in a plural approach toward attaining a shared global end.

One good place to start could be the forests. Between 15% and 20% of all greenhouse gases worldwide result from deforestation. Eighty thousand acres of tropical rainforest are lost every day. An area the size of Costa Rica is lost to deforestation every year.

There was near consensus in Copenhagen on the need to move forward immediately with an agreement to halt deforestation -- without waiting on conclusion of an overarching global agreement on climate change. Since then, additional early funding has been promised by the United States and others to save the forests. Investors around the world are eagerly awaiting a concrete forest plan with financing to support it.

The "REDD" effort -- on reduced emissions from forest degradation and deforestation -- seeks to save the forests by encouraging flows of financial assistance from developed to developing countries that agree to preserve their existing forests. There is opportunity for moving forward with "REDD" as what the WTO would call a "plurilateral agreement."

At least one world leader seems to think that, at least to some extent, the trading system can be a model for a global structure to confront climate change. In Copenhagen, the United States and others highlighted the fact that the accord calls for "provisions for international consultations and analysis under clearly defined guidelines that will ensure that national sovereignty is respected." When asked what form the "international consultations and analysis" will take, President Barack Obama gave as an example: "What takes place when the WTO is examining progress or lack of progress that countries are making on various commitments."

Evidently, he was referring to the "trade policy review mechanism" of the WTO, which involves periodic reviews and recommendations relating to compliance by WTO Members with their WTO obligations. Is the WTO practice of trade policy reviews, in fact, a useful model for our efforts to address climate change?

And what would be the consequences if such a review concluded that there was no compliance with a climate commitment? What of enforcement? What enforcement provisions would be included in a comprehensive climate treaty or in any plurilateral agreements? What obligations would there be for reporting and transparency? What penalties and sanctions would there be? Who would judge? And how? Would there be a dispute settlement system for climate change? If so, how would it relate to the WTO dispute settlement system so as to avoid collisions and incompatibilities between the climate and trade regimes?

For trade, for climate change, for the rule of law -- what can we conclude from all of these unanswered questions?

I promised at the outset to address questions, not to answer them. I have kept that promise. I have addressed many. I have answered few.

The search for answers to these questions must continue. Answers are needed. Answers must come from our ongoing work together worldwide.

I confess to another bias. I am biased toward optimism. I am a stubborn optimist.

And, stubborn optimist that I am, I am confident in concluding that we can find the will and the wisdom to answer all of the many questions I have asked here about trade and climate change. We can advance trade. We can address climate change. We can do both best through continued allegiance to the international rule of law.

Floor Discussion

Steve Charnovitz, George Washington University:

On the trade policy review mechanism at the WTO, what do think about using that model for the climate system? Of course, there is the role of the secretariat in preparing its report, the lack of transparency and the lack of private sector and NGO participation. What are your further thoughts on the efficacy of the WTO model for Trade Policy Review?

Response by James Bacchus, Former chair of the Appellate Body; Former member of the U.S. House of Representatives; International Chamber of Commerce

The GATT experience offers more instruction for the initial frame of clima regime. The trade police review process is improving. The report on China is superb. The process has improved and can be more useful for members going forward. It might become more frequent even if it adds more administrative burden to the house, and is becoming more encompassing.

With respect to the climate regime, I think they started from nothing and this could be very good. Transparency is, of course, an issue. Countries will demand transparency, and will find some way to review this guarantee. It is potentially a good starting place for a climate regime.

Richard Newfarmer, World Bank's Special Representative to the UN and WTO.

I would like to pick another model, which is quite similar: the Article IV Consultation, of the IMF. It has more responsibility built into it, it is more comprehensive and maybe, at the end of the day, more transparent.

Response by James Bacchus, Former chair of the Appellate Body; Former member of the U.S. House of Representatives; International Chamber of Commerce

I think that is a good point. It is going to be important in looking for models to find something that will be trusted by developing countries. I think the IMF has done good things lately to improve its track record. I think that developing countries rightly see the WTO as a place they can be heard, and they will be more inclined to look to WTO and GATT as a model, given the kind of concessions they have been asked to make as part of the climate regime.

Jean-Pierre Lehmann, Evian Group and International Institute for Management Development:

I want to ask a question about optimist. What are your sources of optimism? In the political environment, do you think one can be optimist in a context where the political leadership of the major countries is tightened to knots? I am pessimistic because I do not really see in the course of the foreseeable future any kind of political leadership that I believe is necessary, whether it is for Doha or for an international treaty on climate change.

Response by James Bacchus, Former chair of the Appellate Body; Former member of the U.S. House of Representatives; International Chamber of Commerce

I think my optimism is genetic; I am genetically destined with optimism. Let me speak first on climate change, and then I will speak on trade. On climate change, the world is waiting for the U.S. to do what it needs to do. Congress is still gridlocked on energy issues. There is no excuse for this. My cause of optimism is that Barrack Obama is in the White House and somehow he will deal with this issue, to do something positive on climate change. I am also emboldened by the history of my country. I think it was Mr. Churchill who said that the Americans always end up doing the right thing after they exhausted all the other alternatives. My former colleagues in Congress are exploring all those alternatives right now. In the end, I am confident that we Americans will do the right thing. The problem is that we do not have a lot of time on climate change, as we hard often today. I think also that President Obama wants to do the right thing on trade, and wants to conclude the Doha Development Round. I do not think that this is a high priority to him as the climate, but he wants to move forward. His biggest challenge is negotiating with the democrats in the U.S. House of Representative in an election year on a trade issue. I am an oxymoron in my country, as a democrat for trade.

I think the President is as well, but he has the responsibility to move with trade now. I have the luxury of being a private citizen.

Steve Beck, OECD:

You talked about the possibility of reinstating Article 8 with respect to environmental subsidies. Personally, I think that Article 8 elapsed for a reason. And one reason was that it wasn't actually used, because in order to get into the safe haven, you would need to pre-notify the subsidies, and that just never happened. Maybe also there were some worries about that it could be abused, but the issue, in any case, is that it was really aimed at basically subsidies to help companies adjust to new environmental regulations. Those kinds of subsidies continued to be provided, and I don't think there has ever been a case taken against a country for those kinds of subsidies. They probably won't because they are generally small in the grand scheme of things and everybody provides it. If they were to challenge another country, there would be probably a counter-challenge. I have heard many people invoke this idea of reinstating article 8 specifically for climate-related technologies but when you probe their ideas, often what they have in mind are basically production subsidies for clean technologies. I think we need a debate and more discussion on that. For years, there has always been this kind of impression that what we are talking about here is really small industries. Global wind turbine industry is just about to surpass the global civilian aircraft industry. We know where subsidies to that industry ended up: one of the biggest and longest disputes in the WTO. These things are traded. There are a lot of countries that are investing their hopes for their industrial future. We cannot ignore the fact that such subsidies have trade implications. I do not know if that is what you have in mind, but what would be the adaptation. We would need more debate on the merits of the safe haven for these kinds of subsidies that have been so far.

Response by James Bacchus, Former chair of the Appellate Body; Former member of the U.S. House of Representatives; International Chamber of Commerce

I agree we need a debate. I agree there is a potential for abuse, and I don't disagree with anything that you said, but I think that if we define things carefully and constructively, then this might well be something we should do. I spent a decade here drawing lines trying to establish issues relating to definitions. It was my job to discern the lines Members had drawn in the rules through their negotiation. The Appellate Body does not try to be green, does not try to be trade. They try to look at the rules and find out what they mean and clarify them. There is always a drawing-line exercise as a matter of negotiation that will then be reflected in the rules. The Members of WTO need to come together and have this debate and draw the lines. If there are subsidies that can mitigate climate change, they probably should be permissible under WTO rules. If we talk on huge subsidies that are only a pretext to protectionism in detriment to competition in a way that distort trade, then they should not be permissible. If they draw the lines in negotiation, there is no reason why we should not. It is similar to the issue of environmental goods and services, which is more complicated. What is an environmental good? They are talking about it in this house now and hopefully they will draw a line, and they are more than capable of doing it, and they need to do that to conclude Doha. We need to have that debate. You understood me correctly.

Gabrielle Marceau, WTO:

I have a legal question, almost a moral question, since you left after many years of being an Appellate Body member. You gave the example of one solution, for instance, if a country complies with the Copenhagen Agreement or another environmental agreement, they could be considered to be ok at the WTO using a kind of TBT parallel (If the WTO members agree that they should). Because of the compulsory nature of the WTO Dispute Settlement System — and I recall you sat on the *US – Shrimps* case where the Appellate Body said maybe things are not clear but I am sorry I have to answer the question — don't you think that there is an issue of having a WTO judge always being the one who is deciding whether a defense is ok based on environment, and eventually soon is going to be a defense based on labor?

Response by James Bacchus, Former chair of the Appellate Body; Former member of the U.S. House of Representatives; International Chamber of Commerce

Absolutely. As some of you know, I spent a decade in the Dispute Settlement. I think fewer issues should be resolved in the Dispute Settlement. I think the greatest threat to the continuous success of the WTO Dispute Settlement System is the absence of success in doing anything else in the WTO. We need a more effective way as WTO Members of negotiating new rules, deciding what existing rules mean, rather than dumping all these issues in the Dispute Settlement. Just because panelists and Appellate Body are capable of deciding these issues – I believe they are – does not mean that they should decide. Any former or current Appellate Body member would say the same thing. But it is politically often convenient. I remember back in Congress, we got a very popular bill, but had a little problem: it was unconstitutional. But everybody voted for this, and let the courts decide. That temptation exists everywhere in politics and, of course, diplomacy is just another means of politics, more glorified and more polite, but it is political. There is a temptation in the WTO, as in any other political setting, to let someone else decide. On the issue of trade and environment, the *Shrimp/Turtle* ruling maybe is not the right ruling, I hope it was, we did the best we could, but it is not an universal answer to every issue of trade and environment that might be raised. The Members of the WTO have a committee that needs to make some decisions, and should have made some decisions long ago. Unless we are able to get a consensus to create new rules, and clarify the existing rules through legal interpretation by the members themselves, we are going to end up with more Dispute Settlement than we need. Eventually, there would be a political overload of the WTO Dispute Settlement System.

Joost Pauwelyn, Professor, Graduate Institute, Geneva, and Co-Director, Centre for Trade and Economic Integration:

My question is a follow-up on your previous answer. Of course we can all agree that a political solution should be the best but, as you pointed out, we need consensus on all the issues you have just mentioned, and it is incredibly hard to get there. Do you think that panels and the Appellate Body can offer answers here? Or as many people said, when the GMO dispute came up, when the aircraft dispute came up, would this really break the system? Or alternatively, it would actually be a good opportunity to offer some guidance? We have had many conferences on all of these issues. Wouldn't it be good at some point to have some guidance? You mentioned yourself that one of the difficulties would be for the Appellate Body Members to check whether some post-Copenhagen accord was complied with or to go into environmental issues. From your experience, what can we do to make that exercise better? How can essentially trade dispute settlers engage more efficiently with more expertise into these environmental questions? Should they ask questions to these other international organizations? Should they have interactions with other dispute settlement mechanisms?

Response by James Bacchus, Former chair of the Appellate Body; Former member of the U.S. House of Representatives; International Chamber of Commerce

They would have to make that decision on a case-by-case basis. As the Appellate Body said in its very first appeal, *US – Gasoline*, trade law is part of a broader endeavor of public international law. WTO jurists are more than capable of looking at another international law outside the covered agreements, and do so every day. And they have done so successfully. They can make judgments about international environmental law. I raised that question because if there is not going to be a climate dispute settlement mechanism, then these questions are going to come to the WTO. There is compulsory jurisdiction at the WTO, as we lawyers say, for matters that are trade-related and covered by the covered agreements. You are required to take those issues to the WTO for dispute settlement. Now, can WTO jurists decide? They are more than capable of deciding. As far as I am concerned, WTO panelists and Appellate Body members are the finest jurists in the planet. Does this mean that they should decide? It can be helpful to have guidance in terms of a particular ruling, and that is often very helpful in a particular dispute, not only to resolve that dispute but also to give other countries guidance going forward on a more general basis even though, of course, there is no *stare decisis*, nor a precedent, and national treatment does not mean the same thing every day in every way in every part of the world, so members look to the system to help them do that. While it maybe helpful, some truly politically explosive issues where the future of the world is at stake, such as climate change, I think it is much better that duly appointed designates of 150 countries come together and reach a consensus, than to ask seven

appellate jurists, however distinguished and wise they may be, to make that decision. It is a political issue. One final point: it is hard to find a consensus. Gary Hufbauer and Jean-Pierre and others have just published a paper talking about the opportunity to pursue plurilateral agreements within the WTO, where there could be coalitions of the willing to go ahead in the absence of consensus. I would draw your attention to that. I think that can be more of an effort to make to use Annex IV in a constructive way going forward, without changing the overall consensus rule.

Muthukumara Mani, World Bank:

You mentioned that plurilateral agreements could be a way forward on climate negotiations. Do you think the U.S. would be inclined to use G-20 to get a climate breakthrough, given that the major countries are there, before taking it back to the UN system for a broader consensus? The second question again is on plurilateral approaches. In terms of NAMA, goods and services, would you think the U.S. would take that approach to reach a consensus before going through with the Doha Round?

Response by James Bacchus, Former chair of the Appellate Body; Former member of the U.S. House of Representatives; International Chamber of Commerce

I think we should conclude the Doha Round tomorrow, and therefore I would like to see environmental goods and services concluded as part of the Doha Round, ideally. I would be concerned if we took these issues out of the Doha Round. It would diminish the empathy we have for concluding the Round. In terms of the G-20, I have not decided how is the G-20 useful to move us going forward. They seem to make a lot of pronouncements, and certainly G-20 includes most of the major countries. I think that there can be some political understanding that can resolve there, and that some progress can be made. However, I share the concerns that a lot of developing countries have about the G-20. We know it is not the G-7. It is the G-20. But it is not G-50 or G-100, or the G-150, and it is not the UN. There needs to be some way, if not to every single country in the world to have a personal representative at the table, or to have them rotate, or to work regionally, or to come together, so that they can be heard as part of the process and feel accountable to it. You cannot have a situation in which developed countries come together, even with some of the emerging economies among the developing countries, and reach a deal and present it to the rest of the countries of the world, especially on this issue, where the rest of the countries of the world are certainly not the ones who created the problem. I would draw an analogy to the mistake that was made on investment: a decade or so ago, when a decision was made to try to incubate the issue on the OECD and not involve developing countries. That was a mistake. I love the OECD, and I think it is a great place, but why in the world would the developing countries, which were not at the table, accept something that was negotiated there and presented to them as a *fait accompli*? It is a fallout that should not be taken into the WTO.

Ricardo Meléndez-Ortiz, ICTSD:

My question is very similar to the previous one. I want to push you a little further to elaborate on your suggestion that plurilaterals may be possible not only under Annex 4, but outside the WTO itself. For instance, do you think it could be imaginable that 4, 5 or 6 of the world's major economies come together around a very specific list of climate-friendly goods and technologies to start a plurilateral outside the WTO, but under principles and sort of modalities that could be easily be brought back into the WTO. From there, invite others to join under a MFN basis, or something similar? What do you think of that idea?

Response by James Bacchus, Former chair of the Appellate Body; Former member of the U.S. House of Representatives; International Chamber of Commerce

The short answer is yes. The slightly longer answer is that, in order to have a plurilateral agreement under Annex 4, you would have had a consensus of WTO members that there would be a plurilateral agreement. This would make it a WTO covered agreement to the extent that it would apply to those members who had agreed to the agreement. But also give you the opportunity, as we have done in the government procurement agreement, to uphold that agreement in possible WTO Dispute Settlement, which is a great advantage within such an agreement. What you seem to be asking me is whether it might be possible for a coalition

of the willing to come together and try to negotiate something that begins outside the WTO, reach some conclusions, put together an agreement, and then take it to the WTO and ask for a consensus to bring the agreement into the WTO under Annex 4, and make it enforceable in the WTO Dispute Settlement. That could be done, and it might be one way forward with some of these issues. As far as climate issues go, there I see a plurilateral agreement as a model; I do not see those climate agreements ever becoming part of the WTO. The issue there would be: who would be in these agreements, how would they fit together with an overall global climate regime, how would this relate legally to the WTO regime? If they impose some trade restrictions on their members, how would this relate to other WTO Members who are not part to that particular sectorial or plurilateral climate agreement? These would be issues that would soon come up in the WTO Dispute Settlement System and we have to think those things through. That would involve considerable work together by those who know something about both trade and climate.