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# **Presidential Candidates' Key Proposals on Health Care and Climate Will Require WTO Modifications**

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***Overreach of WTO Highlighted by  
Potential Conflicts with  
Candidates' Non-Trade Proposals***

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## EXECUTIVE SUMMARY

Implementation of a dozen of the key domestic non-trade policies to lower health care costs or reduce carbon emissions proposed by the current presidential candidates will require modifications to the expansive rules of the World Trade Organization (WTO). Many WTO rules have little or nothing to do with international trade, yet WTO signatory countries are required to “ensure the conformity of its laws, regulations and administrative procedures with its [WTO] obligations.”<sup>1</sup>

Domestic policies that extend beyond the WTO constraints are subject to challenge by other WTO signatory countries – often at the behest of their affected industries – before WTO tribunals. The tribunals, which operate behind closed doors and are composed of trade experts even when a case concerns health care or environmental policy, are empowered to order countries to eliminate or alter domestic policies that violate WTO rules. A country that fails to comply is subject to trade sanctions until it changes its laws.<sup>2</sup> Of the 137 cases decided to date at the WTO, challenges to domestic laws have been successful nearly 90 percent of the time,<sup>3</sup> with countries moving to alter their laws as ordered except in a single instance, where a country instead chose to pay indefinite trade sanctions to keep its policy in place.<sup>4</sup>

This purpose of this report is to identify what aspects of the WTO a future president must renegotiate to create the policy space necessary for implementation of key domestic policy proposals at the center of their campaigns. As described in this report, it is not possible to “work around” the WTO rules in addressing certain health care and climate challenges, because the scope of the constraints that WTO rules impose on signatory countries’ non-trade policies is so broad.

Trying to work within the tiny policy space permitted by the existing WTO rules would result in the challenges surrounding America’s health care debacle and the global climate crisis being defined so narrowly as to ensure real redress is impossible. For instance, no candidate proposes to establish a single payer health care system, yet many of the “market-based” regulatory reforms candidates do propose could conflict with existing WTO constraints. Further, failure to change the existing WTO rules and commitments up front will result in an unacceptable “chilling effect,” in which WTO incompatibility problems will be touted by corporate special interests as an excuse to attack policies that may deliver broad public benefits.

Changes to the WTO’s existing terms will be necessary. Indeed, even the WTO’s own director general, Pascal Lamy, has recognized that existing WTO rules may need to be “adapted” to create the policy space needed to address major non-trade challenges like climate change.<sup>5</sup> That such changes are necessary highlights the problem of policy “standstill” inherent to the WTO: unless a government could foresee that it would need to take future action on an unimaginably broad swath of policy areas when it made its initial WTO commitments in 1994, it now faces unacceptable WTO constraints on new non-trade policies deemed necessary.<sup>6</sup>

Many policymakers remain unaware of the WTO’s expansive limits on domestic policy space and the changes that must be made to existing WTO rules to implement their most prominent policy proposals. Over the past dozen years, U.S. policymakers continue to express surprise when domestic non-trade policies – including recently the U.S. ban on Internet gambling and in the past various environmental policies – have been ruled to be WTO violations. In part, this lack of awareness stems from the way in

which the WTO was initially approved. As newspaper reports indicated when a bipartisan coalition approved U.S. membership in the WTO by wide margins in 1994 during a lame-duck session, hardly a single member of Congress even read the 800-plus pages of WTO text.<sup>7</sup>

For this report, we reviewed the health care and climate change proposals of Sens. Hillary Clinton (D-N.Y.), John McCain (R-Ariz.), and Barack Obama (D-Ill.) – the three principal presidential candidates. Our methodology was simple: we analyzed proposals outlined in documents on the candidates’ campaign websites, specifically in the issue-specific sections on health care and the environment. In general, the two Democrats had very detailed proposals in both areas, while the Republican did not. Our report thus unavoidably dedicates more page space to analysis of the Democratic plans. However, we make no recommendations on *what* health care or climate proposals should be pursued by the candidates, nor take any positions in support of or opposition to any candidate.

Candidates committed to ensuring their proposals become policy must address these WTO problems. Among the needed changes is the withdrawal of certain key health- and environment-related sectors from WTO coverage. Redressing WTO limits on U.S. health care policy space could not be more urgent. Currently there are very few foreign insurance firms or health care providers in the U.S. market, thus a withdrawal of existing U.S. GATS commitments in this area – which requires compensation under WTO rules – will be less costly now than when there are more foreign firms operating here in the future. Additionally, specific provisions of WTO agreements that limit domestic policy space and flexibility regarding non-trade policies must be modified. And, elements of U.S. offers to commit new policy space to WTO jurisdiction in the WTO Doha Round negotiations that would impose new limits on non-trade policies must also be withdrawn. Finally, while not a central focus of the report, we also identify as requiring renegotiation the North American Free Trade Agreement (NAFTA) and other “Free Trade Agreement” (FTA) foreign investor rules that empower companies to directly sue governments in foreign tribunals for taxpayer-funded compensation if health, environmental or other domestic policies interfere with their future expected profits.

## **CHANGES TO EXISTING WTO RULES ARE NECESSARY TO IMPLEMENT CANDIDATES’ HEALTH CARE PROPOSALS**

The WTO, which became operational in 1995, administers 17 different agreements, a minority of which actually have to do with traditional trade issues like tariffs and quotas. For the purpose of analyzing the candidates’ health care proposals, the most important of the WTO agreements is the General Agreement on Trade in Services (GATS).<sup>8</sup> Because the demand in the late 1980s by U.S. government and industry to include the service sector of the economy in a trade agreement was so controversial around the globe,<sup>9</sup> GATS is structured as a “bottom-up” agreement. This means that the agreement applies only to the service sectors each nation volunteered to bind (or “commit” in WTO parlance) to the obligations and constraints set forth in the GATS text.

In 1994, the United States committed almost 100 service sectors – such as banking, insurance, telecommunications, construction and gambling – to GATS constraints with little public discussion, congressional debate, or understanding.<sup>10</sup> U.S. GATS commitments include (and thus constrain) many health services, including:

- **financial services, including health insurance;**
- **health services provided by hospitals, HMOs and other health care facilities;**
- **distribution services, including wholesale and retail distribution of prescription drugs and tobacco;**
- **telemedicine for certain nursing services listed under the category of “placement and supply of services personnel”;**
- **construction services related to health care facilities;<sup>11</sup>**
- **data processing services, including medical records and insurance claim processing.<sup>12</sup>**

Removal of U.S. health care services from WTO jurisdiction is a vital element of implementing many of the candidates’ health care proposals (listed below) which otherwise would conflict with U.S. WTO commitments. In general, the Democratic candidates have offered detailed policy proposals on health care while the Republican candidate has not put forward many concrete policy measures he would seek the federal government to adopt if elected, other than tax credits and tax deductibility for health care consumers. Thus, the discussion below is directed primarily at Democratic reform initiatives.

How could U.S. WTO commitment limit the policy space for domestic health care policy reforms? The WTO labelled the GATS the world’s first “multilateral investment agreement”<sup>13</sup> because GATS rules cover every conceivable way that a service might be delivered, not only traditional cross-border trade in services. The GATS delineates “modes” of services delivery, with “Mode 3” granting foreign corporations the rights to buy, establish, invest in or otherwise operate service-sector companies *within the territories* of other countries. Such foreign service-providers operating within the United States may be regulated only under policies that do not extend beyond the constraints set by the GATS. The GATS scope of coverage is extremely broad. When a service sector is bound to the agreement, the GATS requires that all policies “affecting trade in services”<sup>14</sup> “taken by central, regional or local governments and authorities” and “non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities”<sup>15</sup> conform to GATS rules.

GATS rules extend beyond requiring that domestic and foreign firms be treated the same. Some GATS rules simply forbid certain policies, such as those that limit the number or size of service suppliers “in the form of numerical quotas, monopolies, exclusive service suppliers” or policies that limit the “value of a service transaction or asset.”<sup>16</sup> The GATS also forbids the use of economic needs tests, which are frequently used in health care policy. Also, the GATS forbids “measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service,”<sup>17</sup> which would forbid requirements that certain health services be provided only on a not-for-profit basis.

Additionally, the GATS national treatment or “nondiscrimination” rules require that public subsidies and grants given to service providers be shared with foreign service suppliers on the same footing as U.S. service suppliers, unless those funds were specifically exempted from the terms of the agreement within the U.S. schedule of commitments. The GATS non-discrimination rules are extremely broad, allowing challenge of domestic policies that are facially identical for domestic and foreign firms, but that may have a different effect on them.<sup>18</sup>

Current WTO Doha Round talks include proposals to further limit signatory countries’ domestic service sector policy space, including talks to establish new “disciplines on domestic regulation” in the service sector to ensure that domestic licensing, qualification and technical standards are not “more

burdensome” or more trade restrictive than necessary.<sup>19</sup> The draft text that has been generated in these talks, if adopted, would impose another layer of WTO constraints on U.S. health care services.

### **Extending “Trade” Rules to Constrain Domestic Regulation and Service Sector Policy Was a Goal of Various Corporate Interests and “Free Market” Think Tanks**

In the mid-1980s, global trade negotiations coincided with the Reagan-Thatcher “revolution” attack against the role of government in regulating economies and providing essential services. Corporate lobbyists, *laissez faire* think tanks and GOP politicians with varying agendas but common extreme policy proposals were being stymied by opposition in Congress and the public. Simultaneously, the framework was being developed for the Uruguay Round General Agreement on Trade and Tariffs (GATT) negotiations. Past GATT talks had focused on tariffs cuts and drew little public, press or policymaker attention.

In contrast, these GATT talks were transformed into establishment of a new global commerce agency, the WTO, which could serve as a global delivery mechanism for an experiment in imposing the very “neo-liberal” policies that were being rejected in democratic fora domestically. Often called the “Washington Consensus,” this policy package became the core of the WTO, and included establishing a framework in which services like health were treated not as rights but as new commodities providing new opportunities to expand business opportunities and profits. Many of the 17 agreements enforced by the WTO redefined government regulations promoting environmental and consumer protection to be “barriers to trade” to be strictly disciplined or eliminated. “A lot of services that have traditionally been done by the government, such as education, and social services, may become something that we’ll have to deal with in international commerce,” argued one health insurance executive that had a leading role in advancing this notion.<sup>20</sup>

In order to create and lock in this new regime, the group worked first to build an intellectual framework that would make the change seem both inevitable and beneficial, and then built political support to push the policies through Congress under the appealing label of “free trade.”<sup>21</sup> As an intellectual history of the corporate lobbyists’ services “movement” noted, “The very act of defining services transactions as ‘trade’ established normative presumptions that ‘free’ trade was the yardstick for good policy against which regulations, redefined as nontariff barriers (NTBs), should be measured and justified only exceptionally. Members believing there to be many justifiable exceptions thus had to defend what their counterparts label ‘protectionism.’... [the services trade lobby’s] body of work took on the attributes of a social science literature in which authors cited, critiqued, and built on each other’s analyses. But unlike most academic debates, in which contending theories and assumptions remain contested, the services discussion produced broad and lasting consensus on core concepts and objectives. Community members were by now unanimous in their dedication to the common policy project of placing services on the GATT agenda, and this relevance test precluded meta-theoretical differences of the sort familiar to political scientists. Disagreements were confined to the issue of which GATT principles and processes were right for which transactions, rather than to the question of whether services should be treated as trade in the first place.”<sup>22</sup>

### **Creation of Health Insurance Risk Pooling Mechanisms**

A common aspect of both Democratic candidates’ health care cost containment proposals includes establishing risk pools for health insurance.<sup>23</sup> Both Obama’s “National Health Insurance Exchange”<sup>24</sup> and Clinton’s “Healthy Choices Menu”<sup>25</sup> include this commonsense cost-control mechanism advocated by health care reform experts. The purpose of risk pooling is to offset the high costs of unhealthy clients by placing them in a plan with numerous young and healthy clients. Typically, such a system sets requirements on the level of coverage that all firms seeking to provide services to members of a risk pool must minimally meet as a condition for being qualified to have access to the pool of prospective customers.

U.S. “life, accident, and health insurance services (except workers compensation insurance)” is under WTO GATS’ jurisdiction.<sup>26</sup> Absent the necessary changes to existing U.S. GATS commitments, health care reform proposals which affect foreign insurance firms operating within the United States must conform to GATS rules. The GATS rules also apply to foreign insurance firms that seek to enter the U.S. market, even if they are not yet operating here.

GATS rules forbid “limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, [or] **exclusive service suppliers**”<sup>27</sup> [emphasis added]. Outside the world of the WTO, there is a clear distinction between policies that set requirements that *may* knock certain firms out of the market, and policies which name specific exclusive providers and allow them only to provide a service. However, the GATS rules make clear that a specific listing of named exclusive suppliers is not required for a policy to create GATS-prohibited quantitative limits. GATS Article 8 on “Monopolies and Exclusive Service Suppliers” includes circumstances in which “a Member, formally or **in effect**, authorizes or establishes a small number of service suppliers” [emphasis added].<sup>28</sup>

Thus, under these expansive WTO rules, a new risk pooling system that has the effect of stopping foreign insurance firms from establishing new insurance businesses – for instance, because as a start up they cannot meet the requirements set for access to a risk pool of prospective U.S. clients – qualifies as a WTO-forbidden restriction on market access, even though that is not the intent of such a policy.

### **Requirements that Large Employers Provide Health Insurance and Creation of Tax Credits for Small Employers as an Incentive to Provide Health Insurance**

Under both Clinton and Obama’s reform proposals, large employers in the United States would be required to provide health insurance to their employees or to make some contribution to the cost of employees’ coverage. Both candidates’ proposals include exemptions from this requirement for small employers. Clinton’s health care reform proposal also includes a refundable tax credit for small businesses as an incentive to offer employee coverage. Obama’s proposal would not provide direct tax credits to small employers, but would allow them to buy into a new public health insurance plan created as part as his overall reform proposal.

The United States submitted many service sectors other than insurance to WTO jurisdiction, including banking, retail, communications/media, energy, construction, engineering, and transportation. There are many large foreign service-providers now operating in the U.S. market in these service sectors. GATS requires that domestic policies affecting service sectors under WTO jurisdiction do not discriminate against foreign firms providing such services within the United States. This GATS requirement is extremely broad, extending well beyond policies that directly discriminate: “Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.”<sup>29</sup>

Although the *intent* of the candidates’ proposals is to get larger firms more able to pay for insurance to do so, and to help small firms find affordable ways to provide health coverage, the *effect* of these proposals would be to create favorable “conditions of competition” for a category of business that are most often locally owned (small employers) relative to a category of firms (large employers) that encompass many foreign service-providers competing to provide the same retail, construction, financial, engineering or communications services.

Further, the requirement for all large U.S. employers to provide health insurance would create *specific* instances of less favorable treatment for large foreign service-firms relative to small U.S. employers operating in the same service sectors who would be exempt from the obligation to provide coverage, and who would additionally have access to programs to assist them if they chose to do so.

Whether large and small firms operating in the same service sector are “like” would be decided by a WTO tribunal. However, past jurisprudence suggests that such size distinctions would not be accepted as an excuse for specific instances of preferential treatment, even if unintentional, for domestic firms. Indeed, when the United States made its original GATS commitments in 1994, negotiators operated under the assumption that U.S. policies that resulted in small businesses obtaining favorable treatment had to be explicitly protected from application of the WTO rules.<sup>30</sup> U.S. negotiators specifically excluded from WTO coverage loans only available to small businesses and lesser filing requirements for small businesses, indicating that the trade lawyers of the Office of the U.S. Trade Representative (USTR) believed that differences in treatment of businesses based on size had to be specifically exempted from WTO coverage.

In addition, Obama’s proposal on large firms’ health insurance responsibilities includes obligations based on the percentage of a firm’s payroll. Even though it is not intended to do so, this mechanism as applied to foreign service-providers could conflict with the GATS bans on policies which set “limitations on the total value of service transactions or assets in the form of numerical quotas.”<sup>31</sup>

### **Electronic Medical Record-Keeping**

Both Clinton and Obama’s health care reform proposals include requirements and incentives for electronic medical record-keeping. These proposals are aimed at making medical care more efficient, resulting in cost savings that would pay for other aspects of their reform plans. However, under existing U.S. WTO commitments, these proposals could also foster increased overseas offshoring of medical record-keeping and insurance claim processing and exacerbate health care information privacy problems related to offshoring to countries without consumer privacy protections.

Absent changes to existing U.S. GATS commitments, policies that bar the offshoring of work related to sensitive medical records – even those that receive privacy protection under U.S. federal law – could run afoul of WTO requirements. The United States committed to GATS jurisdiction the category of cross border “computer services” without any “limitations” or exclusions. This category includes “data processing services” as a subcategory. Covered by this commitment is a vast array of data processing, including sensitive data that is subject to consumer privacy protections here, such as medical records, insurance claims, tax records and banking records. Even without requirements that such data be kept in electronic form, over the past decade, the rate of offshoring of this work via the Internet has greatly accelerated, raising tremendous concerns about privacy, liability and consumer redress.<sup>32</sup>

Under GATS, such data processing offshoring is considered “Mode 1” of service delivery (trade across borders). Thus, absent changes to existing U.S. GATS commitments, efforts by the states or federal government to secure consumer privacy – say, by banning the offshoring of currently privacy-protected medical record keeping or insurance claim processing work – would be deemed a constraint on market access in “cross border trade” in data processing. This is the case because “regulatory bans” in a GATS-committed service sector have been interpreted by WTO tribunals as a forbidden “zero

quota” that denies “market access” rights.<sup>33</sup> The GATS includes an exception for measures “necessary” to protect privacy.<sup>34</sup> However, whether this would be sufficient to safeguard the diversity of domestic laws and regulations that may arise to protect consumer privacy in this area is doubtful. In past WTO challenges, the necessity defence has rarely been permitted, with WTO tribunals requiring that a domestic policy be deemed necessary only if it can be proved to be the “least trade restrictive” policy option available to obtain a policy goal.<sup>35</sup>

### **Policies to Reduce Pharmaceutical Prices**

Both the Clinton and Obama proposals promote lowering the cost of medicines by allowing the government to negotiate lower prices through bulk purchasing. Currently, other programs in the federal government such as the Veterans Administration (VA) use a combination of bulk purchasing and formularies to dramatically lower the cost of prescription drugs.<sup>36</sup> Formularies are a preferred list of drugs covered by a health care plan. Drugs are listed on the basis of being safe and effective, and costing less, so, for instance, equally effective drugs available as generics are preferred to equivalent new patented medicines. Formularies are used as leverage in bulk price negotiations with drug manufacturers and have been credited with keeping down health care costs in many countries.<sup>37</sup>

U.S. wholesale and retail “distribution services” are under GATS jurisdiction. Included in these categories is the distribution of thousands of items, including pharmaceuticals. Programs that interfere with or limit the distribution of pharmaceuticals are prohibited.

The Pharmaceutical Research and Manufacturers of America (PhRMA), the powerful drug company lobby group, lists formularies, less restrictive preferred drug lists (PDL) and similar mechanisms as “market access barriers of concern” because they “fail to recognize the value of patented innovative medicines.”<sup>38</sup> Unfortunately, the USTR has worked closely with PhRMA to attack the efforts of U.S. trade partners to utilize formularies. For instance, the USTR has attacked South Korea’s new Drug Expenditure Rationalization Plan, which included a positive list formulary, as “discriminating against and limiting the access of Korean patients and doctors to most innovative drugs in the world.” The USTR launched its attack even as the U.S. Food and Drug Administration (FDA) and the State Department warned the USTR that the majority of U.S. states utilize PDLs.<sup>39</sup> While PhRMA has sued many states in an effort to overturn their PDLs, it has largely failed in U.S. domestic courts.

However, absent changes, GATS and other “trade” agreements would provide a new avenue and new grounds for multinational pharmaceutical firms and their allies to attack these important governmental policies, which have generated billions of dollars in taxpayer and consumer savings and could save more if nationally implemented as the Democratic candidates propose. To the extent that formularies may result in limiting the distribution of medicines by foreign pharmaceutical firms, including giant Swiss, French and German firms operating within the United States, they could be considered a GATS-prohibited “exclusive service suppliers” list.<sup>40</sup>

It is likely, but not certain, that the existing U.S. Veterans Administration plan is exempt from the GATS because it is considered military procurement, which is generally excluded from the GATS under a national security exception.<sup>41</sup> The proposals to use similar programs outside of the military could be covered by the GATS. The GATS language that exempts some “government procurement” activities from the application of commitments covers only services purchased “for governmental purposes” and “not with a view to commercial resale or with a view to use in the supply of services for

commercial sale.”<sup>42</sup> These latter terms are not defined. Since drugs under new formulary or other cost-cutting regulations would likely be sold to consumers nationwide at pharmacies for a fee, GATS rules which prohibit limits on market access for distribution by foreign drug firms would then apply.

### **McCain Proposal for National Health Care Market Would Raise Cost of Removing U.S. Health Care from WTO Jurisdiction**

McCain has proposed the development of a “national health care market” that would facilitate entry of more foreign health care providers and thus make it far more costly for the United States to withdraw the health care sector from WTO jurisdiction. While McCain has provided few details about the proposal, implementing a real national insurance market would inherently require greatly reducing the role of states, for instance with the federal government taking control of licensing and standards now under state authority.

Pre-empting the authority of U.S. states in this area is a key demand of foreign insurance companies in the context of the WTO’s Doha Round of negotiations.<sup>43</sup> European and other foreign insurance firms have long considered U.S. state-level regulation of the insurance market to be a market access barrier because it requires that they must obtain licenses in each of the 50 states in order to provide insurance services on a national basis.<sup>44</sup> Since the insurance sector and health services are already covered under the GATS, new federal law that would preempt such existing state authority would facilitate the entry of foreign service-providers into the U.S. market. Once the flood gates are open and many foreign health insurance and health service providers are in the U.S. market, it would be significantly more costly for future administrations to remove the health care sector from WTO coverage, as all WTO nations with firms in the U.S. market or with an interest in the market would have to be compensated under WTO rules.<sup>45</sup>

**Unless U.S. health care services are withdrawn from coverage under various trade rules, federal and state governments’ future abilities to effectively regulate the delivery of health care services, implement health care reform measures designed to expand access, and reduce the cost of health care could be stymied. Because the United States must provide compensation under WTO rules before removing U.S. health care policy from WTO jurisdiction, quick action to do so will be much less costly, before more foreign insurance and health care providers enter the U.S. market.**

## **CHANGES TO EXISTING WTO RULES ARE NECESSARY TO IMPLEMENT CANDIDATES’ CLIMATE POLICY PROPOSALS**

Creating effective policies to address the global climate emergency will be a priority of any future U.S. president. Few question the contribution of human activity to global warming,<sup>46</sup> but no one doubts the difficulty of quickly obtaining international – let alone national – consensus on the means to solve the problem.<sup>47</sup> Thus, it is highly probable that nations will vary in their responses to global warming over the short- to medium-term, if not indefinitely. Many trade law experts believe that current WTO rules pose serious constraints on how nations may respond to this critical challenge.<sup>48</sup> For instance, Mitsuo Matsushita, a member of the WTO tribunal that ruled against the U.S. Clean Air Act in the WTO’s first dispute resolution case in 1996, notes that by signing the WTO, governments have already empowered the WTO to “allow Member Nations to challenge almost any measure to reduce greenhouse gas emissions enacted by any other Member.”<sup>49</sup>

Implementation of the climate policy proposals promoted by Clinton, McCain and Obama – and policies promoted by leaders of other nations as well – will require changes to WTO rules. Some aspects of the current proposals may be defensible under existing WTO rules under certain circumstances. However, because the existing WTO rules overreach into many non-trade issues, even if there were such a climate treaty, changes to the WTO will be needed to create the policy space for an array of energy efficiency and carbon reduction measures.

In addition to the GATS, other WTO agreements such as the GATT, the Agreement on Technical Barriers to Trade (TBT), the Agreement on Subsidies and Countervailing Measures (SCM), and the Agreement on Government Procurement (AGP) must be modified to accommodate domestic climate change proposals offered by various presidential candidates and by leaders of many other nations. The major areas of conflict are detailed below.

### **Cap-and-Trade Policy Proposals**

In the United States, the leading presidential candidates promote national “cap-and-trade” programs, through which the U.S. government establishes a cap on the amount of carbon that can be emitted here and then auctions off permits or allowances that entitle corporations and other entities to emit set amounts of carbon. Clinton and Obama advocate such plans on their campaign websites, but offer few details.<sup>50</sup> McCain, along with Sen. Joe Lieberman (I-Conn.), introduced cap-and-trade legislation in January 2007, which Obama and Clinton additionally cosponsored.<sup>51</sup>

But these and other cap-and-trade programs could be challenged under existing WTO rules. Indeed, this is far from a hypothetical problem: in January 2008, the Bush administration pressured the European Union to drop the import provisions of its cap-and-trade program. According to *Inside U.S. Trade*,

“Backing U.S. opposition to the proposal is the possibility it could retaliate under the WTO ...Under existing jurisprudence on the General Agreement on Tariffs and Trade (GATT), tariffs imposed based on the means of production constitute WTO violations. Therefore, the EU proposal, which like tariffs also would have increased the price of imports, could in the end constitute a WTO violation because it was directed to products that used large amounts of carbon in their production.”<sup>52</sup>

In response, the European Commission’s new package of carbon control policy package “did not contain a proposal opposed by the U.S. to require European importers of carbon-intensive products to buy carbon allocations in the EU’s cap-and-trade system.” Instead, the new plan shelves the import aspects of the plan “in favor of a study to be completed in 2011,”<sup>53</sup> thereby postponing vital international policy innovation in that area for at least several more years.

The debate around the proposal has highlighted the obvious trade-related issues inherent in any cap-and-trade system. First, in a highly integrated global economy, how does the United States or any country effectively cut carbon emissions from its own producers without promoting “carbon leakages,” whereby companies simply move their activities to other regions of the world without carbon control programs where they can continue to emit the same amount of carbon?<sup>54</sup> This problem threatens the effectiveness of any country’s policies to reduce carbon. Plus, a large percentage of goods in any one

country's market are imported from other countries. How can a country reduce the carbon emissions of its own producers without undermining such producers relative to their competitors in countries without such carbon control policies? Unless every country is operating under the same carbon control system, which certainly will not be the case soon if ever, then some system of border adjustment is necessary to avoid both the carbon leakage and domestic competitiveness problems. Unfortunately, to the extent that conflicts between WTO rules and cap-and-trade proposals are being discussed, it is in the context of what can be done *within* WTO rules, rather than the *alterations needed to WTO rules* to effectively address a global emergency. (A fuller description of the cap-and-trade WTO compatibility issues can be found in Appendix I.)

There is currently a very live debate in Washington over whether cap-and-trade systems currently proposed in about a dozen bills supported by the candidates and other members of Congress<sup>55</sup> would violate WTO rules. Many of the existing proposals have only weak support from many environmental groups and other climate experts who would expect a more effective proposal from a future Democratic president. Environmental Defense contends that only a measure that “afforded importers the opportunity to meet their border carbon obligation by tendering *the same range* of allowances and offsets that U.S. emitters can tender” would pass WTO muster, and that a “carbon intensity standard approach suffers from, among other things, being a process based regulation, which falls into a gray and controversial area of WTO jurisprudence” [emphasis added].<sup>56</sup> The Boilermakers union – backed by a detailed WTO analysis of the prominent Sidley Austin law firm – argues that a U.S. international reserve allowances system (based on average carbon intensity of overseas production that differentiates between countries that have and do not have cap-and-trade systems) can pass WTO muster.<sup>57</sup>

The challenge moving ahead for whoever is the next U.S. president will be to act quickly on a problem that gets harder to remedy with each passing month, while addressing competitiveness and equity concerns. Unfortunately, even the import provisions of the better climate change proposals before Congress do not kick in until 2020 – providing backwards incentives for industries that emit the most carbon to relocate with impunity to countries without carbon control measures. Such a 12-year amnesty for carbon-emitting producers to relocate to dodge their carbon control responsibilities, and then import their goods back here could also destroy what remains of U.S. manufacturing – a sector in which one out of every five jobs has already been lost since WTO and NAFTA went into effect.<sup>58</sup> For the sake of effectively addressing the global climate emergency and ensuring that the United States maintains a manufacturing sector (something vital to national security and economic wellbeing), less focus should be placed on the WTO compatibility of climate change proposals, and more focus placed on what is needed to address the climate crisis and how the WTO can be changed to accommodate this course of action.

### **CAFE (Corporate Average Fuel Efficiency) Standards**

As well as capping carbon emissions, both Democratic candidates propose various policies to increase energy efficiency. Clinton advocates raising automobile fuel efficiency standards to ensure “continued production of small cars here in the United States.”<sup>59</sup> Obama calls for the same “while protecting the financial future of domestic automakers [and] giving industry the flexibility to meet those targets.”<sup>60</sup> Unfortunately, there is already one GATT ruling against U.S. CAFE standards stemming from a challenge brought by the European Community.<sup>61</sup> In 1994, prior to the WTO's establishment, a GATT panel ruled that the U.S. method for calculating fuel efficiency requirements for automobiles sold in the United States violated the GATT non-discrimination rules. The GATT panel found that the U.S.

policy, which was facially neutral – meaning there was one rule for both imports and exports –, had the *effect* of putting a larger burden on some foreign automakers. The WTO ruled that the U.S. method of calculating fleetwide efficiency standards advantaged U.S. automakers in practice.<sup>62</sup> The WTO tribunal bolstered its case against the U.S. law by citing *Congressional Record* statements concerning the competitive benefits for U.S. autos of the fleetwide calculation,<sup>63</sup> despite the fact that small Japanese cars also benefited from the system.<sup>64</sup> U.S. attempts to use two GATT environmental exceptions described in the appendix were rejected.

### **Ban of Incandescent Light Bulbs**

Both Clinton and Obama propose a phase-out of incandescent light bulbs as part of a move towards more energy-efficient light bulbs. Their campaign websites do not offer many details on how a phase-out would be accomplished, but it could be done in at least two ways: first, by prohibiting the sale of incandescents directly; or alternately, by raising energy efficiency requirements (i.e. technical standards) for all light bulbs sold in the United States to such a high level that incandescent light bulbs would as a practical matter not be able to be sold.

In either case, changes to existing WTO rules would be needed to permit such a reasonable policy. GATT Article XI prohibits quantitative restrictions, which would include a ban of a good.<sup>65</sup> Such a ban may be justified using the GATT Article XX exceptions noted in the appendix, but only to the extent that such a ban meets all of the onerous tests required for these exceptions to apply.

The approach of setting a high efficiency standard for all light bulbs sold in the United States could also run afoul of the WTO's TBT agreement even though such a regulation would also apply to U.S.-made light bulbs.<sup>66</sup> The TBT Agreement, among other things, requires that:

- “members shall ensure that technical regulations are not prepared, adopted or applied with a view to or **with the effect of** creating **unnecessary obstacles** to international trade...”<sup>67</sup> and
- “technical regulations shall not be maintained if [their] objectives can be addressed in a **less trade-restrictive manner**.”<sup>68</sup> [emphasis added in both bullets].
- “Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.”<sup>69</sup>

The phase-out of incandescent light bulbs supported by both Clinton and Obama is definitionally the *most* trade restricting technical standard imaginable. Moreover, any regulations of *other* kinds of lightbulbs – such as compact fluorescents (CFLs), could run into similar problems. As nearly all CFLs and many incandescents are currently produced in WTO-member China<sup>70</sup> – not known for its environmental sensibilities<sup>71</sup> – a WTO challenge to this policy is a real possibility. Further, the WTO requirement that the United States must use an international standard if one exists could pose an additional problem. The TBT Agreement recognizes standards set by private industry groups, and to the extent that technical standards for lightbulbs have been set there, the only acceptable reason for a different U.S. standard is “fundamental climatic or geographical factors or fundamental technological problems,” even if the domestic standard does not discriminate against foreign-produced goods.

### **Coal-fired Electric Plant Regulation**

Obama calls for a possible ban on new “traditional” coal facilities, while Clinton calls for an economic needs tests by state utility commissions for new coal plants. But under Article VII of the WTO’s General Agreement on Trade in Services (GATS) – discussed at length in the health care section – needs tests or bans (“zero quotas”) in service sectors under WTO jurisdiction are prohibited. While energy generation *per se* is not covered under *current* U.S. GATS commitments, many closely related energy sectors were committed to WTO jurisdiction. Currently U.S. services related to mining (including oil and gas field service activities), incidental to energy distribution, wholesale and retail trade (including of solid, liquid and gaseous fuels and biofuels), construction, and maintenance and repair are under WTO jurisdiction.<sup>72</sup> The U.S. commitment in energy distribution includes “transmission and distribution services on a fee or contract basis of electricity, gaseous fuels and steam and hot water to households, industrial, commercial and other users.”<sup>73</sup> It would be difficult to ban traditional coal-fired electric plants without implicitly imposing constraints on services incidental to energy distribution.

### **Renewable Portfolio Standards (RPS)**

Obama advocates a national renewable portfolio standard (RPS) similar to that already in effect in Illinois and other U.S. states. RPS programs require that a certain percentage of energy sold or consumed must come from renewable sources. Changes to existing U.S. GATS commitments would ensure RPS programs are not subject to WTO attack or threats, given that now U.S. “services incidental to energy distribution” are under WTO jurisdiction.<sup>74</sup> GATS Article XVII national treatment rules ban policies that “modif[y] the conditions of competition” in a way that favors domestic producers,<sup>75</sup> whether or not the “discrimination” is intentional and whether or not obvious. To the extent that an RPS program could make it more difficult in any way for a foreign energy provider or a foreign firm operating an energy distribution system here to sell their product in the U.S. market, a GATS national treatment violation could be claimed.

### **Subsidies to Green Industry**

Both Clinton and Obama propose loan guarantees and tax benefits aimed at bringing ethanol onto the market in greater quantities. Clinton also calls for government funding for R & D and deployment of alternative energy, coal, battery products, “ethanol and other homegrown biofuels.”<sup>76</sup> Obama also calls for funding for commercialization and deployment of low carbon coal and vehicles, and for projects “that make use of our biomass, solar and wind resources”<sup>77</sup> and other technologies. McCain promotes a less specific proposal in this regard, which singles out nuclear power.<sup>78</sup> Clinton proposes government retooling funds for America’s “oldest auto plants,”<sup>79</sup> while Obama proposes “retooling tax credits and loan guarantees for domestic auto plants and parts manufacturers so that the new fuel-efficient cars can be built in the U.S. rather than overseas. This measure will strengthen the U.S. manufacturing sector and help ensure that American workers will build the high-demand cars of the future.”<sup>80</sup> Obama also proposes modernization funds for manufacturing centers “to nurture America’s success in clean technology manufacturing.”<sup>81</sup> Finally, Obama proposes to “provide an additional subsidy per gallon of ethanol produced from new facilities that have a minimum of 25 percent local capital, and [...] provide additional loan guarantees for advanced ethanol facilities with local investment.”<sup>82</sup>

Many subsidies to green industry advocated by the presidential candidates could run afoul of the WTO’s Agreement on Subsidies and Countervailing Measures (SCM), especially since an exception

initially included in this agreement for one-time environmental upgrades sunset in 2000. A subsidy as defined by the SCM's Article 1 includes *any* financial contribution by a government that amounts to a conferred benefit to a ("specific") goods-producing industry or enterprise. This includes grants, loans, equity infusions, loan guarantees, tax credits and other fiscal incentives, government purchases, provision of government services, or any of the foregoing instruments funneled through a private body acting on the government's behalf.<sup>83</sup>

The SCM's Article 3 outright *prohibits* "subsidies contingent, in law or **in fact**, whether solely or as one of several conditions, upon export performance [or] upon the use of domestic over imported goods"<sup>84</sup> [emphasis added]. In other words, this clause does not just apply to export performance subsidies, but also to any domestic subsidy conditioned on giving preference – even unstated – for domestic inputs. Thus, subsidies to firms that have nothing to do with the international market but which are dependent in law *or in fact* on the use of domestic renewable energy sources are prohibited.<sup>85</sup> Thus, any of the candidates' proposed subsidies to encourage the use of "homegrown biofuels" could violate SCM Article 3 by being "in fact" contingent "upon the use of domestic over imported" biofuels.

Moreover, the SCM's Article 5 allows a WTO challenge to *any* subsidy (tax credit, funding for R & D, and other, as defined above) deemed to be "specific" and carry a benefit that has the effect of causing serious prejudice, nullification of WTO goods market access benefits, or injury to a domestic industry of another WTO signatory country.<sup>86</sup> Serious prejudice may occur when the effect of the subsidy is to displace or impede like imports from another WTO member, to displace or impede like products of another WTO member in a third country market, to significantly undercut the price of like products in the market of another WTO member, or to reduce the world market share of other WTO members in the given product.<sup>87</sup> The candidates justify many of their proposed subsidies as helping bolster U.S. exports or competitiveness against imported products. As noted, Obama promises to provide "retooling tax credits and loan guarantees for domestic auto plants and parts manufacturers, so that the new fuel-efficient cars can be built in the U.S. rather than overseas. This measure will strengthen the U.S. manufacturing sector and help ensure that American workers will build the high-demand cars of the future."<sup>88</sup> If the effect of these retooling subsidies were to actually reduce car imports, or to promote exports in way that allows U.S. automakers to gain foreign market share at the expense of other WTO members, the subsidies could be challenged as causing serious prejudice, injury or nullification of WTO benefits to another WTO country.<sup>89</sup>

Beginning in 1995, temporary provisions were in effect under the SCM's Article 8 that allowed very limited types of R & D assistance, aid to depressed regions, and government assistance for enterprises or industries to comply with new environmental requirements.<sup>90</sup> But these were phased out in 2000 as required by SCM Article 31,<sup>91</sup> meaning that retooling and retrofitting subsidies aimed at meeting environmental requirements proposed by the candidates could be challenged at the WTO if they displace imports or promote exports in the ways described above. As one scholar noted, the Article 8 "provisions did provide a very limited safe harbor for environmental subsidies. However they expired in 2000 and have not been renewed ... there is no general exception provision under the SCM agreement for subsidies that further a legitimate public purpose (such as protection of the environment)."<sup>92</sup>

The pro-WTO National Foreign Trade Council recently wrote a detailed analysis of the WTO compatibility of climate change bills before Congress. In their report, they remind legislators that the WTO has “limited capacity to accommodate climate-friendly subsidies, although they are often a preferred and domestically-acceptable policy tool for achieving legitimate environmental policy goals [...] while this financial aid is clearly intended to speed the transition to an environmentally-friendly U.S. economy, WTO rules do not distinguish between ‘good’ and ‘bad’ subsidies.”<sup>93</sup> In fact, European industry is already calling for challenges to U.S. biofuels subsidies.<sup>94</sup> And currently, Europe and Brazil are challenging U.S. government R&D funds and provision of government services that they claim have benefited Boeing – just the most recent reminder of how possible and indeed probable such challenges are absent changes to this WTO agreement.<sup>95</sup>

### **Green Procurement**

Both Clinton and Obama have proposed a variety of policies aimed at promoting green building in federal and subfederal contracts. Such policies, while not elaborated on campaign websites, will almost certainly contain specifications about what kinds of materials to use in federal buildings, how green and energy-efficient these materials should be, and specifications tied to the construction process itself.

Changes to the WTO’s Agreement on Government Procurement (AGP) – which covers government purchases above a certain dollar threshold of goods and services by the federal government, 37 states and other entities such as port authorities<sup>96</sup> – are needed to ensure the space for such policies. First, any requirement that building materials be locally produced would run afoul of the AGP’s prohibition on “Buy America” or “Buy Local” policies.<sup>97</sup> Additionally, the WTO procurement agreement requires that technical specifications for contracts must generally “be in terms of performance rather than design or descriptive characteristics.”<sup>98</sup> Slightly more latitude is given in the AGP relative to other agreements to require certain processes and production methods be used, subject to the considerable constraint that these and other specifications “shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.”<sup>99</sup> Finally, the conditions that may be imposed on a prospective supplier for getting or bidding for a government contract must be “limited to those which are essential to ensure the firm’s capability to fulfill the contract”<sup>100</sup> and not on environmental, labor or human rights performance.

To the extent that Clinton and Obama’s green building procurement policies give preference to local or American construction materials, they may violate the AGP. Moreover, virtually any requirement that distinguishes products or services on the basis of how energy-efficient they are (i.e. how much carbon they produce) rather than what they do (light a room, drive down the road) could be considered a prohibited technical specification. Similarly, any requirement that the suppliers to the government themselves be green could be a prohibited supplier qualification.

## **NAFTA and Other FTAs' Foreign Investor Privileges and Private Enforcement Systems Must Be Eliminated To Restore Policy Space for Health Care and Climate Policies**

In addition to the policy constraints found in WTO, NAFTA and seven U.S. "free trade agreements"<sup>101</sup> based on the NAFTA model provide foreign investors operating within the 13 countries<sup>102</sup> additional rights regarding how they may be regulated when operating within the United States. These investor rights apply top-down – they cover all sectors unless an exception is taken. They cover all foreign investors operating within these countries (including those from Europe and China, for instance), not only "domestic" firms from these nations.

Among the privileges the FTAs provide such a large category of foreign investors is a right to demand compensation from the U.S. government for policies and actions that undermine their *expected future profits* relating to an unimaginably broad set of possible investments within the United States.<sup>103</sup> NAFTA allows the companies to equate domestic regulatory policies to an "expropriation" of their assets, or "takings." This broad provision for corporations to be compensated for "regulatory takings" does not exist under U.S. domestic law, and empowers foreign investors – including foreign subsidiaries of U.S. firms – to attack a broad array of policies that would not pass muster under U.S. law in U.S. courts. Such rights apply "pre-establishment" – that is to say if a domestic policy could keep a foreign investor from establishing or acquiring an operation within the United States, then the investor can demand compensation even before having established an investment here.

In NAFTA and six NAFTA-style FTAs,<sup>104</sup> foreign corporations and investors are empowered to privately enforce these new rights in a closed-door arbitration system that operates outside the domestic court system and excludes public participation, even though U.S. taxpayers must foot the bill for any cash compensation that may be awarded.<sup>105</sup> Moreover, if a state law is implicated in such a case, the state has no standing and must rely upon the federal government to defend its policy.

Since NAFTA's enactment in 1994, corporations in all three NAFTA countries have challenged a variety of national, state and local environmental policies and even civil judicial decisions under this system. Over \$35 million has been paid out in damages.<sup>106</sup> While many NAFTA investor cases are still pending, some companies have succeeded with these challenges already. The mere threat of such a challenge has chilled governments from making policy innovations, including a threat under NAFTA against a Canadian province's single payer mandatory auto insurance program.

A variety of measures taken by state, provincial and municipal governments to protect the environment have been challenged by corporations as regulatory takings using NAFTA's Chapter 11. These include:

- *Metalclad v. Municipality of Guadalcázar, Mexico*: A Mexican municipality demanded that a U.S. company obtain the same construction permit that had been required of the Mexican company that previously owned the toxic waste facility. When the municipality insisted that the company obtain the permit before it could begin expanding the facility, Metalclad filed a NAFTA Chapter 11 complaint. The NAFTA panel ruled that limiting the company's use of its property was a NAFTA-illegal action tantamount to an "indirect" taking. The Mexican government was ordered to pay \$15.6 million in damages.
- *S.D. Myers v. Canada*: In this case, a U.S. company sought compensation because its "right" to treat Canadian PCB waste in its Ohio facility was halted by Canada, which was acting in compliance with the Basel Convention, a multilateral environmental agreement that encourages nations to treat toxic waste domestically. Canada stopped the toxic trade before the United States did although both signed the treaty. S.D. Myers filed a NAFTA suit claiming discrimination. S.D. Myers was awarded \$5 million in damages by a NAFTA tribunal.

- *Glamis Gold v. U.S.*: In 2003, a Canadian mining company, Glamis Gold, filed a notice that it intended to pursue a \$50 million dollar NAFTA claim against mining regulations promulgated by the State of California meant to safeguard the environment and indigenous communities from the impacts of open-pit mining.<sup>107</sup>

The array of health care reform and climate policies that could be attacked under these provisions is virtually limitless. And, because private commercial interests – not governments – initiate these cases, there is no incentive for a firm in another country that may well have a policy similar to the one being attacked here to avoid setting such a precedent. In contrast, a government might decide not to pursue a challenge so as to avoid a counter challenge on its own similar measure.

## **IMPLEMENTATION OF CANDIDATES' DOMESTIC AGENDAS REQUIRES WTO REFORMS**

Significant changes not yet being discussed by the candidates must be made to existing U.S. trade pacts in order to implement the candidates' priority health care and climate crises proposals. Changes to these agreements are also necessary for candidates' domestic policy goals of creating jobs, countering wage inequality, rebuilding America's manufacturing sector and infrastructure, and improving food and product safety and to succeed. Simply to create the policy space needed to implement their health care and climate change proposals, presidential candidates should supplement their proposals on these issues in the following ways:

1. **Avoid additional limits on policy space needed to implement proposals: revise U.S. WTO Doha Round offers made by the Bush administration.** In the ongoing Doha negotiations, the Bush administration has offered up many new health and environment-related sectors to be committed to WTO jurisdiction. The first order of business in a new presidency must be a withdrawal of these offers from the on-going WTO expansion negotiations.
2. **Restore policy space needed to implement proposals: withdraw U.S. health- and environment-related sectors from WTO GATS coverage.** Once a U.S. service sector is submitted to GATS jurisdiction, it can only be removed or altered after the United States gives notice to other WTO signatory countries, and negotiates to compensate them for lost business opportunities and even future market access to the sector. GATS Article XXI sets out the process to remove or alter a commitment. There is precedent for the United States to withdraw a previously committed service sector from WTO jurisdiction. The Bush administration is currently using GATS Article XXI to withdraw the "gambling services" from its WTO GATS commitments. Last year the Bush administration started the process of removing gambling services from the GATS after the Caribbean nation of Antigua successfully challenged the U.S. Internet gambling as being a violation of U.S. WTO obligations and USTR recognized the serious ramifications for other criminal statutes and regulatory bans in the gambling sector at the federal and state level.<sup>108</sup> To implement key health and climate proposals, the following modifications to existing WTO commitments are needed:
  - a. For health: removal of health insurance from financial services commitment; removal of health services provided by hospitals, HMOs and other health care facilities; removal of distribution

services in wholesale and retail distribution of prescription drugs; removal of telemedicine for certain nursing services listed under the category of “placement and supply of services personnel”; removal of construction services related to health care facilities;<sup>109</sup> and addition of an exception for privacy protections that limit market access in data processing services of medical records and insurance claim processing.<sup>110</sup>

b. For environment: removal of services related to energy distribution; removal of wholesale and retail trade of solid, liquid and gaseous fuels and biofuels; and addition of a national treatment exception for construction relating to energy facilities.<sup>111</sup>

3. **Restore needed policy space by renegotiating or replacing health- and environment-constraining aspects of other WTO agreements.** Many aspects of the current WTO rules need major revision – if not replacement or elimination – in order to create the policy space needed to address an array of non-trade policy challenges. In order to implement key health care and climate proposals, at a minimum general and self-judging health and environmental exceptions need to be added to the WTO’s product, standard and procurement agreements (i.e. GATT, TBT, and AGP respectively). This means that when a nation determines that urgent action must be taken to address major health and environmental problems, it would be free to do so without risking trade challenges and sanctions. As described above, the current exceptions to these agreements have proved to be useless, both because they are too narrow, and because they provide enormous discretion for the trade experts staffing WTO tribunals to substitute their judgment for that of domestic environmental and health experts regarding whether domestic policies are “necessary” to meet various legitimate environmental and health policy goals. Additionally, the exception to SCM product subsidy disciplines for environmental measures that was eliminated in 2000 must be restored and significantly expanded to cover a wider range and degree of measures.
4. **Remove extraordinary investor rights and private enforcement systems from NAFTA and NAFTA-style FTAs.** . A long list of changes beyond the scope of this report need to be made to U.S. NAFTA-style trade deals. However, of urgent necessity to implementing key health care and climate proposals is removing the investor-state system that would allow foreign health and energy companies to challenge domestic reforms in these areas.

Altering WTO, NAFTA and various NAFTA-style FTAs – to scale back their invasion of domestic policy space – is necessary to implement many key non-trade policy proposals being promoted by the U.S. presidential candidates. Such a change of course in WTO talks is becoming more urgent by the minute, as corporations are pressuring their governments right now to expand WTO coverage of health- and environment-related sectors in the Doha Round talks.<sup>112</sup> This would only make the necessary changes more difficult in the future.

Presidential elections offer a historic opportunity to shift fundamentally the terms of policy debates. Implementation of their most central policy proposals requires candidates to change existing trade agreement rules to provide domestic policy space, rather than searching for an elusive compatibility with WTO rules that often are a cause of the problem in the first place.

## **APPENDIX I: CHANGES TO WTO RULES NEEDED TO IMPLEMENT CAP-AND-TRADE POLICIES**

Cap-and-trade carbon reduction proposals could run into existing WTO rules in numerous ways. The obvious trade issue relates to how imports of goods and services would be treated under this system and the changes needed to existing WTO rules to allow an effective policy, which is discussed below.

However, there are many less obvious ways in which WTO rules implicate cap-and-trade systems. Although, the Clinton administration actually attempted to put “services to reduce exhaust gases and other emissions to improve air quality” under WTO service sector rules,<sup>113</sup> most scholars agree that carbon credits themselves are not currently considered goods, services, technical standards or subsidies subject to WTO rules, but few doubt that this could quickly change in ongoing WTO negotiations.<sup>114</sup> The McCain-Lieberman bill cosponsored with Clinton and Obama, like many of the other pieces of legislation, specifically states that “a tradable allowance is not a property right, and nothing in this [law] limits the authority of the United States to terminate or limit a tradable allowance.”<sup>115</sup> However, in the WTO context, the WTO’s determination, not a statement in U.S. law, would decide this question. If WTO rules were to treat carbon allowances themselves as a good or service, then fundamental aspects of climate bills before Congress – many of which allow trades in allowances from countries determined by the United States to have an adequate carbon emissions program, but prohibit trade in emissions from other countries – would conflict with the core WTO principle of Most Favored Nation (MFN) treatment. Under the MFN rule, which is contained in numerous WTO agreements, goods and services from any WTO signatory country must be provided treatment no less favorable than that given goods and services of any other WTO signatory country.<sup>116</sup>

Moreover, while the credits themselves now seem to be outside obvious WTO definition, the tradable allowance system is a classic securities market – and as such may well fall under the broad U.S. WTO commitments regarding financial services.<sup>117</sup> Because establishment of such a system could not be foreseen when the United States made its various WTO financial service commitments, no exceptions for such a program were listed to U.S. commitments. Yet, WTO market access rules for financial services a country commits to WTO jurisdiction forbid establishment of new monopolies – which a government-run futures market in emissions rights would appear to be.

The issue that has obvious WTO implications – and increasingly is being discussed – is how imports of goods and services into the United States would be treated once a cap-and-trade system is operating. Especially given the United States is the world’s largest recipient of imports, a U.S. program that does not address carbon limits on imports would miss a significant share of the U.S. consumers’ carbon footprint and put U.S. firms playing by the rules at a global disadvantage. While carbon credits may be outside the WTO’s definition of goods, numerous items *already* clearly defined as goods under WTO rules – for instance autos, appliances, steel and more – are imported into the U.S. market in large quantities, with electricity generated in Mexico and Canada being sold in U.S. border states.<sup>118</sup>

Detailed analysis of the WTO issues raised by various border adjustment proposals would require an even longer report, in part because so many issues are unclear and the expanse of WTO rules that would have to be overcome. At issue is trying to game out how a WTO enforcement tribunal might decide literally scores of legal issues. What becomes clear is that trying to work around various

possible WTO pitfalls will result in policies that do not fully address either the climate or competitiveness issues. Some of the issues:

Most Favored Nation treatment requirements vs. differentiating between different countries' products:

Most cap-and-trade proposals would treat the same goods coming from different countries differently based on whether those countries had carbon control policies. This makes sense practically, but as noted above, a core rule of WTO – and literally the first rule of GATT which covers trade in goods – is the Most Favored Nation rule which forbids differential treatment regarding border charges or regulatory measures as between different nations.<sup>119</sup>

Is a border adjustment an import charge, a domestic tax adjustment or a domestic regulation, with WTO problems under any definition: GATT Article II sharply restricts any new import charges.<sup>120</sup>

However, if a border adjustment mechanism could be justified as being an internal tax applying to both U.S.- and foreign-made products, rather than a new import charge, then under GATT rules it can be collected at the border. “The cost of having to present an emission credit can qualify as a tax,” according to a leading analyst.<sup>121</sup> Indeed, many economists advocate the use of a border carbon tax altogether, but cap-and-trade systems have gained more political traction, perhaps due to the difficulty domestically of raising taxes. It’s also possible that under WTO rules a cap-and-trade system would not be considered a tax, but rather a domestic regulation. How the WTO decided to categorize a U.S. border carbon adjustment measure would determine if and when it would be permitted.

Can a WTO country distinguish at the border between “like” products made using processes that emit different amounts of carbon? Even if a border carbon adjustment requirement can be justified as a domestic tax adjustment or a regulation, it must conform to GATT’s national treatment rules. “Border adjustment” mechanisms related to domestic taxation are currently in place in Europe and other locales in the form of value-added taxes.<sup>122</sup> GATT national treatment rules forbid differential treatment of “like” domestic products over foreign products in the application of “**internal taxes and other internal charges, and laws, regulations and requirements** affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products”<sup>123</sup> [emphasis added].

What is a “like product” is the subject of reams of WTO jurisprudence. However, one initial determining factor is whether products compete with one another, as undoubtedly for instance high- and low-carbon cement and cement produced with and without carbon allowances would. Currently, the United States imports cement from countries as diverse as Canada and France, to China and Colombia.<sup>124</sup> Under current GATT rules, trade tribunals have only allowed consideration of the physical characteristics of an end product when interpreting what is a “like” product, although there is nothing specific in the GATT rules that require such an interpretation. Yet, the whole premise of the cap-and-trade system is controlling how much carbon is emitted *during production processes* and whether it is offset, not on how much carbon is contained in the end product. Thus, cap-and-trade systems treat physically identical products differently based on their “process and production methods.”

The WTO prejudice against domestic policies focused on how a product is produced or harvested is the basis for many environmentalists’ opposition to the WTO. In the infamous 1991 and 1994 GATT rulings against the U.S. Marine Mammal Protection Act, which banned U.S. sale of tuna caught using dolphin-deadly purse seine nets, tribunals ruled that tuna caught using dolphin-killing methods could

not be treated differently from tuna caught in dolphin-safe methods – labeling the U.S. law as discriminatory and ordering its removal or alteration.<sup>125</sup>

Similar logic was applied in WTO rulings against U.S. Endangered Species Act regulations, which forbid U.S. sale of shrimp caught without using turtle excluder devices.<sup>126</sup> In a later enforcement ruling on that case, a WTO tribunal did find that after the United States had altered its laws – to focus only on shrimp shipments and not on the practices of the country involved –, and had conducted negotiations with countries on how the United States could help their shrimp meet the weakened U.S. standard, such GATT-illegal discrimination could be excused under the GATT Article XX exception for exhaustible natural resources.<sup>127</sup> Meanwhile, various WTO countries also have threatened WTO action against proposals aimed at keeping products made with child labor out of the U.S. market, noting that policies which treat physically identical goods differently based on how they are made is GATT-forbidden discrimination.

Finally, if the mechanism were considered to fall within the jurisdiction of the WTO's Technical Barriers to Trade Agreement (TBT), additional problems arise. The TBT agreement's coverage is broad: "All products, including industrial and agricultural products, shall be subject to the provisions of this Agreement."<sup>128</sup> Perhaps the most problematic TBT rule would be the requirement that: "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.... In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products."<sup>129</sup> While the TBT Agreement recognizes environmental protection as a legitimate goal of a technical standard, it does not permit technical standards aimed with the goal of protecting domestic competitiveness. Thus, a WTO panel made up of a tribunal of three trade experts – not environmental experts – would decide whether a border adjustment is the least trade restrictive way to promote an environmental goal.<sup>130</sup>

With so many WTO problems, is there an exception to the rules that might protect such programs? GATT Article XX contains various exceptions to GATT rules that can be raised in defense when a domestic law relating to trade in goods has been challenged before a WTO tribunal. The climate-relevant GATT Article XX defenses for measures that otherwise violate WTO rules are those "necessary to protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."<sup>131</sup> These two Article XX exceptions have only been accepted in 2 of 11 WTO cases,<sup>132</sup> and never were permitted in the 48 years of GATT before WTO was established.<sup>133</sup> The defense regarding exhaustible natural resources is easier to meet, because it does not include a "necessary" test. (The GATS agreement does not include an exception relating to exhaustible natural resources.) Moreover, for any of these exceptions to be applicable, a WTO tribunal would have to first determine that the policy in question 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."<sup>134</sup> The difficulty of qualifying for these exceptions and the record of their rarely being allowed is why we advocate for changing the underlying WTO rules rather than relying on a WTO tribunal allowing any exception to excuse violation of the underlying rules. Finally, because these exceptions are only usable in the context of an

actual WTO challenge, relying on them does not counter the problem of WTO threats being used to chill initiatives from even being implemented.

## ENDNOTES

<sup>1</sup> WTO, Agreement Establishing the WTO, Article XIV:4.

<sup>2</sup> WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article XXII.

<sup>3</sup> See Public Citizen's Global Trade Watch, Fact Sheet Tallying WTO Rulings 1995-Present, at <http://www.citizen.org/documents/WTODisputesSummaryOnePagerwtables.pdf>.

<sup>4</sup> The European Union pays nearly \$130 million per year since 1999 in trade sanctions after refusing to alter its ban on the sale of meat containing artificial growth hormones despite a successful U.S. WTO challenge of this policy. See "European Communities – Measures Concerning Meat and Meat Products (Hormones)," DS26, DS48, World Trade Organization's Dispute Settlement Summary, accessed Feb. 25, 2008.

<sup>5</sup> "The WTO tool-box of rules can certainly be ... 'adapted' if governments perceive this to be necessary to better achieve their goals" [quotes in original]. See "Lamy: Bali UN Climate Conference speech, WTO Secretariat Press Release, Dec. 9, 2007, at [http://www.wto.org/english/news\\_e/sppl\\_e/sppl83\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl83_e.htm).

<sup>6</sup> One observer commented that "In effect, this result can amount to a higher degree of irreversibility that even for [domestic] constitutional amendments." See Robert Howse, "From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime," *American Journal of International Law*, Volume 96: 94, 2002, at 107.

<sup>7</sup> Dave Skidmore, "Sen. Brown Takes Nader's GATT Quiz, Earns Perfect Score," *Associated Press*, Nov. 28, 1994.

<sup>8</sup> WTO, General Agreement on Trade in Services (GATS), Annex 1B.

<sup>9</sup> William J. Drake and Kalypso Nicolaidis, "Ideas, Interests, and Institutionalization: 'Trade in Services' and the Uruguay Round," *International Organization*, Vol. 46, No. 1, Knowledge, Power, and International Policy Coordination, Winter 1992, at 52.

<sup>10</sup> Joyce Barrett, "Clinton, business leaders ready lame-duck session GATT push," *News Record* (Calif.), Nov. 16, 1994; Joan Lowy, "GATT Lobby Turns Effort to Pivotal Senate," *Pittsburgh Post Gazette*, Nov. 28, 1994.

<sup>11</sup> Economic needs tests are an important policy tool for controlling costs in the health care arena. Thirty-eight states have "Certificate of Need" or "CON" laws for health care facilities such as hospitals, outpatient clinics and nursing homes. CON laws are intended to bring oversight to health care construction and major capital expenditures which fuel skyrocketing health care costs. Unfortunately, GATS Article XVI prohibits economic needs tests in a covered service sector. U.S. negotiators safeguarded needs testing under hospital services, but not under construction of health buildings. This contradiction will need to be clarified to safeguard these important cost-saving laws from challenge.

<sup>12</sup> Taken in part from Pat Arnold and Terrie Reeves, "International Trade and Health Policy: Implications of the GATS for U.S. Healthcare Reform," *Journal of Business Ethics*, Vol. 63, 2006, at 313-332. The service sectors the United States committed to the WTO GATS are contained in a document called the "U.S. schedule of commitments"; WTO, United States of America, Schedule of Specific Commitments, GATS/SC/90 April 15, 1994 and related supplements. The text of the U.S. schedule, along with a glossary of terms and other materials to help decipher often inaccessible trade jargon, can be found in Public Citizen's GATS directory, available at: [www.citizen.org/GATSdirectory](http://www.citizen.org/GATSdirectory)

<sup>13</sup> Quote of WTO official David Hartridge. Quoted in Erik Wesseliuss, "Behind GATS 2000: Corporate Power at Work," *Transnational Institute Briefing Paper*, 2002/6, at 15.

<sup>14</sup> WTO, General Agreement on Trade in Services, Article I:1.

<sup>15</sup> WTO, General Agreement on Trade in Services, Article I:3(a).

<sup>16</sup> WTO, General Agreement on Trade in Services, Article XVI:2 on "market access" reads: "In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as: (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test; (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test; (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test; (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a

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service; and (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.”

<sup>17</sup> WTO, General Agreement on Trade in Services, Article XVI:2(e).

<sup>18</sup> “Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member,” WTO, General Agreement on Trade in Services, Article XVII.

<sup>19</sup> WTO, General Agreement on Trade in Services, Article VI:4. This article empowers the WTO to develop disciplines (rules) on domestic regulation. In addition, GATS Article XIII mandates further multinational negotiations on government procurement and GATS Article XV mandates multilateral negotiations to develop disciplines (rules) to avoid the “trade-distortive” effects of subsidies. These negotiations may also impact health services.

<sup>20</sup> Sheila Tefft, “Trade strength seen in services,” *Chicago Tribune*, Nov. 26, 1980. See also Jane Seaberry, “Brock to push for pacts on trade in services,” *Washington Post*, June 9, 1981.

<sup>21</sup> (For instance, American Express financed early GATS educational efforts through the American Enterprise Institute, and then one of their executives Harry Freeman went on to staff the Alliance for GATT Now Coalition that lobbied Congress to pass the Uruguay Round Agreements Implementation Act.) See Allen R. Myerson, “In trade pact war, clashes outside capital are heavy,” *New York Times*, Nov. 24, 1994, and William J. Drake and Kalypso Nicolaidis, “Ideas, Interests, and Institutionalization: ‘Trade in Services’ and the Uruguay Round,” *International Organization*, Vol. 46, No. 1, Knowledge, Power, and International Policy Coordination, Winter 1992, at 75. See also, Joyce Barrett, “Clinton, business leaders ready lame-duck session GATT push,” *News Record* (Calif.), Nov. 16, 1994; Joan Lowy, “GATT Lobby Turns Effort to Pivotal Senate,” *Pittsburgh Post Gazette*, Nov. 28, 1994.

<sup>22</sup> See William J. Drake and Kalypso Nicolaidis, “Ideas, Interests, and Institutionalization: ‘Trade in Services’ and the Uruguay Round,” *International Organization*, Vol. 46, No. 1, Knowledge, Power, and International Policy Coordination, Winter 1992, at 40-41, and 60.

<sup>23</sup> While the candidates themselves do not use the term “pooling,” many analyses of their plans – such as that by Kaiser Permanente – do. See [http://www.health08.org/sidebyside\\_results.cfm?c=11&c=16](http://www.health08.org/sidebyside_results.cfm?c=11&c=16), accessed Feb. 25, 2008.

<sup>24</sup> <http://www.barackobama.com/issues/pdf/HealthCareFullPlan.pdf>.

<sup>25</sup> <http://www.hillaryclinton.com/feature/healthcareplan/americanhealthchoicesplan.pdf>.

<sup>26</sup> These are subcategories under the broader service category of “financial services, direct insurance” to which the United States made GATS commitments. To examine the U.S. health care commitments, please go the Public Citizen database available at [http://www.citizen.org/trade/forms/gats\\_search.cfm](http://www.citizen.org/trade/forms/gats_search.cfm). You can “Search by Sector” and choose “Health” to see all the committed sectors that impact health care delivery in the United States including insurance, hospitals and distribution services.

<sup>27</sup> WTO, General Agreement on Trade in Services, Article XVI:2(a). Under GATS rules, a country must list previously existing government policies that establish monopolies or exclusive service supplier arrangements it sought to preserve, otherwise a country is forbidden from enacting policies that establish such limits unless it alters its WTO commitments to allow for such new policies.

<sup>28</sup> WTO, General Agreement on Trade in Services, Article VIII:5.

<sup>29</sup> WTO, General Agreement on Trade in Services, Article XVII:3.

<sup>30</sup> For instance, in the financial services subcategory regarding securities trading the U.S. GATS schedule of commitments reads “Unbound with respect to the use of simplified registration and periodic reporting forms for securities issued by small business corporations. [MA and NT for trading of securities].” Also federal small business loans are explicated exempted from the GATS in the horizontal section of the U.S. schedule.

<sup>31</sup> WTO, General Agreement on Trade in Services, Article XVI:2(b).

<sup>32</sup> Lori Wallach, Fiona Wright and Chris Slevin, “Addressing the Regulatory Vacuum: Policy Considerations Regarding Public and Private Sector Service Job Off-shoring,” Public Citizen, June 2004.

<sup>33</sup> In 2005, WTO Appellate Body ruled in the U.S.-Gambling case that a regulatory ban in a GATS-covered service sector constitutes a “quota of zero” – in violation of GATS market access rules that prohibit numerical limits on service operations. Thus, policies criminalizing certain acts or banning certain activities, even if they treat domestic and foreign companies alike, are now presumptively WTO-illegal if a government has made unconditional GATS commitments in a particular service sector. This implicates not only the complete and partial gambling bans held by some states and localities, but also the regulatory bans in other service sectors that the United States has signed up to the GATS including health care. The United States so far has made no effort to review its past commitments to protect regulatory bans in covered areas, implicating innumerable policies.

<sup>34</sup> WTO, General Agreement on Trade in Services, Article XIV(c)(2).

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- <sup>35</sup> Jeremy Marwell, "Trade and Morality: the WTO Public Morals Exception after Gambling," *New York University Law Review*, May 2006, at 828.
- <sup>36</sup> A recent study by Families USA shows that patients under Medicare are paying close to 50 percent more for the 20 most commonly used drugs by seniors than Veterans benefiting from the VA's drug formulary plan. Families USA, *No Bargain: Medicare Drug Plan Delivers Higher Prices*, Jan. 9, 2007 available at: <http://www.familiesusa.org/resources/publications/reports/no-bargain-medicare-drug.html>
- <sup>37</sup> Elias Mossialos, Monique Mrazek and Tom Walley, *Regulating pharmaceuticals in Europe: striving for efficiency, equity and quality*, (London: Open University Press, 2004.)
- <sup>38</sup> National Trade Estimate Report on Foreign Trade Barriers (NTE) submitted by the Pharmaceutical Research and Manufacturers of America (PhRMA), Dec. 12, 2003, at 5.
- <sup>39</sup> Professor Sean M. Flynn, Associate Director Program on Information Justice and Intellectual Property American University, Washington College of Law, Testimony Before House Committee on Ways and Means Subcommittee on Trade, March 20, 2007 available at <http://www.cptech.org/ip/health/c/korea/>. James Love, "Korea FTA Negotiations on Medicines Will Harm us Too," *Huffington Post*, posted July 12, 2006. Available at: [http://www.huffingtonpost.com/james-love/korea-fta-negotiations-on\\_b\\_24929.html](http://www.huffingtonpost.com/james-love/korea-fta-negotiations-on_b_24929.html)
- <sup>40</sup> WTO, General Agreement on Trade in Services, Article XVI:2(a).
- <sup>41</sup> WTO, General Agreement on Trade in Services, Article 14 *bis*: "1. Nothing in this Agreement shall be construed to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:... (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment..."
- <sup>42</sup> WTO, General Agreement on Trade in Services, Article I:3(c).
- <sup>43</sup> In 2003, the European Commission's "request" negotiating document to the United States was leaked. In this undated document, the EC asks the United States to adopt a policy that would allow foreign insurance firms to apply for one national license. "Gats 2000 Request From the EC and Its Member States (Hereinafter The EC) To The United States Of America" (no date), available at <http://www.citizen.org/documents/usa.pdf>. Similarly a USTR document listing GATS requests by many nations that impact states was leaked in 2003 and lists similar requests from Brazil "GATS Requests by States" (no date) available at <http://www.citizen.org/documents/GATSrequestsbystate.pdf>
- <sup>44</sup> For more information, see the European Union's data base on market access barriers to trade, "Insurance Market Fragmentation and Collateral Requirement for the United States," updated Jan. 2, 2008, available at: [http://madb.europa.eu/madb\\_barriers/barriers\\_details.htm?barrier\\_id=060127&version=2](http://madb.europa.eu/madb_barriers/barriers_details.htm?barrier_id=060127&version=2)
- <sup>45</sup> WTO GATS Article XXI requires compensation to other affected WTO signatories when a service sector is withdrawn from WTO jurisdiction.
- <sup>46</sup> "Climate experts have concluded with growing accord that human-generated greenhouse gases are the dominant driver of recent global warming and that centuries of rising temperatures and seas lie ahead if emissions are not curbed." See Felicity Barringer and Andrew C. Revkin, "Gore warns Congress of 'planetary emergency'," *New York Times*, March 22, 2007.
- <sup>47</sup> Andrew C. Revkin, "Issuing a bold challenge to the U.S. over climate," *New York Times*, Jan. 22, 2008.
- <sup>48</sup> For a comprehensive review of this literature, see Andrew Green, "Climate change, regulatory policy and the WTO," *Journal of International Economic Law*, Volume 8:1, 2005, at 143-189.
- <sup>49</sup> Victor Menotti, "G-8 Climate deal ducks looming clash with the WTO," *International Forum on Globalization Brief*, July 2007.
- <sup>50</sup> The campaigns' proposals on environment and energy can be found at: <http://www.hillaryclinton.com/files/pdf/poweringamericafuture.pdf>, <http://www.johnmccain.com/Informing/Issues/65bd0fbe-737b-4851-a7e7-d9a37cb278db.htm>, and <http://www.barackobama.com/issues/pdf/EnergyFactSheet.pdf>.
- <sup>51</sup> S. 280: The Climate Stewardship and Innovation Act.
- <sup>52</sup> "Under U.S. Pressure, EU Backs Off Carbon Import Taxes For Now," *Inside U.S. Trade*, Jan. 25, 2008.
- <sup>53</sup> According to *Inside U.S. Trade*, "The U.S. views the shelving of the proposal until after 2011 as a partial victory, a U.S. trade official said. But the official said the U.S. believes the proposal could still resurface and will continue to be 'very vigorous' in resisting it. 'Certainly postponement is better than moving forward now with such an approach. We do not expect, however, that our concerns will dissipate with time or on the basis of further study,' the official said." See "Under U.S. Pressure, EU Backs Off Carbon Import Taxes For Now," *Inside U.S. Trade*, Jan. 25, 2008.
- <sup>54</sup> This issue is touched upon in Christopher L. Weber and H. Scott Matthews, "Embodied Environmental Emissions in U.S. International Trade, 1997-2004," *Environmental Science and Technology*, Volume 41:14, 2007, at 4879.

<sup>55</sup> The National Association of Clean Air Agencies identifies 13 bills in Congress that address global warming via a cap-and-trade system or similar mechanisms. See <http://www.4cleanair.org/Documents/GWlegislationasidebyside.pdf>, accessed Feb. 26, 2008.

<sup>56</sup> Jennifer Haverkamp, Testimony of Environmental Defense before the Senate Finance Committee hearing on “International Aspects of a Carbon Cap-and-Trade Program,” Feb. 14, 2008, at 12-15.

<sup>57</sup> Abraham Breehey, Testimony of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers before the Senate Finance Committee hearing on “International Aspects of a Carbon Cap-and-Trade Program,” Feb. 14, 2008.

<sup>58</sup> Bureau of Labor Statistics, Current Employment Statistics survey, series ID CES300000001, manufacturing industry, accessed Feb. 22, 2008.

<sup>59</sup> <http://www.hillaryclinton.com/files/pdf/poweringamericasfuture.pdf>, at 7.

<sup>60</sup> <http://www.barackobama.com/issues/pdf/EnergyFactSheet.pdf>, at 8.

<sup>61</sup> “United States – Taxes on Automobiles,” General Agreement on Tariffs and Trade panel, DS31/R, Oct. 11, 1994, at 108-119.

<sup>62</sup> At that time, European producers were importing large, high-profit luxury cars into the U.S. market. The foreign producers’ marketing strategies of focusing on the sale of highly profitable large luxury cars resulted in U.S. producers being able to meet lower efficiency standards on their large heavy cars, because U.S. makers who produced both small and large cars could average the two types together, thereby obtaining a lower combined standard that also applied to their large cars.

<sup>63</sup> “United States – Taxes on Automobiles,” General Agreement on Tariffs and Trade panel, DS31/R, Oct. 11, 1994, at 37, 82.

<sup>64</sup> “United States – Taxes on Automobiles,” General Agreement on Tariffs and Trade panel, DS31/R, Oct. 11, 1994, at 13.

<sup>65</sup> WTO, General Agreement on Tariffs and Trade, Article XI. “General Elimination of Quantitative Restrictions. 1.No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”

<sup>66</sup> When a domestic technical standard – which the TBT Agreement defines as “product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory” (See Annex I) – could result in keeping a good out of the U.S. market, then it is considered a WTO-illegal trade barrier unless it meets certain criteria set forth in the TBT Agreement.

<sup>67</sup> WTO, Agreement on Technical Barriers to Trade, Article 2:2.

<sup>68</sup> WTO, Agreement on Technical Barriers to Trade, Article 2:3.

<sup>69</sup> WTO, Agreement on Technical Barriers to Trade, Article 2:4.

<sup>70</sup> See Claudia M. Deutsch, “Seeking a more flattering light on, and from, bulbs,” *New York Times*, Jan. 26, 2008.

<sup>71</sup> Elizabeth Economy, “China’s Environmental Challenge,” *Current History*, Volume 104: 683, September 2005.

<sup>72</sup> [http://www.citizen.org/trade/forms/gats\\_search.cfm](http://www.citizen.org/trade/forms/gats_search.cfm)

<sup>73</sup> WTO, Council for Trade in Services, “Energy Services: Background Note by the Secretariat,” S/C/W/52, Sept. 9, 1998.

<sup>74</sup> The 1997 U.S. International Trade Commission concordance links the U.S. commitment to **UNCPC 887 - Services incidental to energy distribution**, which is defined as: “Services incidental to energy distribution transmission and distribution services on a fee or contract basis of electricity, gaseous fuels and steam and hot water to household, industrial, commercial and other users.” The interpretation of “services incidental to” provided by the U.N. Statistics Division suggests that any service relating to distribution and sale of electricity – including to households - that is provided on a fee or contract basis is covered by the U.S. GATS commitment.

<sup>75</sup> WTO, General Agreement on Trade in Services, Article XVII:3.

<sup>76</sup> <http://www.hillaryclinton.com/files/pdf/poweringamericasfuture.pdf>, at 6.

<sup>77</sup> <http://www.barackobama.com/issues/pdf/EnergyFactSheet.pdf>, at 3.

<sup>78</sup> <http://www.johnmccain.com/Informing/Issues/65bd0f8e-737b-4851-a7e7-d9a37cb278db.htm>.

<sup>79</sup> <http://www.hillaryclinton.com/files/pdf/poweringamericasfuture.pdf>, at 7.

<sup>80</sup> <http://www.barackobama.com/issues/pdf/EnergyFactSheet.pdf>, at 8.

<sup>81</sup> <http://www.barackobama.com/issues/pdf/EnergyFactSheet.pdf>, at 5.

<sup>82</sup> <http://www.barackobama.com/issues/pdf/EnergyFactSheet.pdf>, at 4.

<sup>83</sup> WTO, Agreement on Subsidies and Countervailing Measures, Articles I:1.

<sup>84</sup> WTO, Agreement on Subsidies and Countervailing Measures, Articles III:1.

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<sup>85</sup> As Green notes, this provision is quite broad: “The task of the Panel or Appellate Body then is to examine the provisions of the subsidy as a whole to determine whether it is possible for the subsidized party to purchase imports and receive the subsidy. If not, the subsidy (either in fact or in law) will be viewed as contingent on the use of domestic over imported goods and be prohibited. Climate change subsidies aimed, for example, at reducing emissions from the energy industry could involve payments for the purchase of electricity from domestic renewable energy sources... Such subsidies would be prohibited.” See Andrew Green, “Trade rules and climate change subsidies,” *World Trade Review*, 5:3, 2006, at 397.

<sup>86</sup> WTO, Agreement on Subsidies and Countervailing Measures, Article 5.

<sup>87</sup> WTO, Agreement on Subsidies and Countervailing Measures, Article 5.

<sup>88</sup> <http://www.barackobama.com/issues/pdf/EnergyFactSheet.pdf>, at 8.

<sup>89</sup> In fact, because many of the panel rulings on serious prejudice under SCM are very fact specific, it has been especially unpredictable how they would rule.

<sup>90</sup> WTO, Agreement on Subsidies and Countervailing Measures, Article 8.

<sup>91</sup> WTO, Agreement on Subsidies and Countervailing Measures, Article 31.

<sup>92</sup> Andrew Green, “Trade rules and climate change subsidies,” *World Trade Review*, 5:3, 2006; Dukgeun Ahn, “Why Should Non-Actionable Subsidy be Non-Actionable?” KDI School of Pub Policy & Management Paper No. 05-05, June 2005.

<sup>93</sup> Alina Syunkova, “WTO Compatibility of Four Categories of U.S. Climate Change Policy,” National Foreign Trade Council Report, December 2007, at 12-13.

<sup>94</sup> “EU Biodiesel Board To Request AD, CVD Duties, WTO Case Against U.S.,” *Inside U.S. Trade*, January 11, 2008.

<sup>95</sup> “WTO Boeing Panel Probes U.S. on NASA Contracts, State Taxes,” *Inside U.S. Trade*, Feb. 1, 2008; “Brazil sides with EU in Arguments Before WTO Boeing Panel,” *Inside U.S. Trade*, Feb. 1, 2008.

<sup>96</sup> Only those countries that opted to be covered are in the AGP, as it is not a mandatory (but a plurilateral) agreement for all WTO countries.

<sup>97</sup> WTO, Agreement on Government Procurement, Article III:1.

<sup>98</sup> WTO, Agreement on Government Procurement, Article VI:2(a).

<sup>98</sup> WTO, Agreement on Government Procurement, Article VI:2(a).

<sup>99</sup> WTO, Agreement on Government Procurement, Articles 6.1, and 6.2.

<sup>100</sup> WTO, Agreement on Government Procurement, Article VIII(b).

<sup>101</sup> These include: NAFTA, CAFTA, and FTAs with Chile, Singapore, Australia, Morocco, Oman, and Peru.

<sup>102</sup> NAFTA extends these investor rights to firms operating in Mexico and Canada, and the CAFTA extends these rights to firms operating in El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic. Rounding out this list are Australia, Chile, Morocco, Oman, Peru and Singapore. Costa Rica, the sixth party to CAFTA, has not yet implemented the pact.

<sup>103</sup> See e.g. CAFTA Article 10.7 and Article 10.28 for definitions. “**investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; 9 (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; 10 11 and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;”

<sup>104</sup> The Australia FTA does not have the investor-state system, although it does have the same investor rights. They are simply not privately enforceable in FTA-established dispute settlement processes.

<sup>105</sup> See e.g. CAFTA Chapter 10, Section B.

<sup>106</sup> Mary Bottari and Lori Wallach, “NAFTA Chapter 11 Investor-State Cases: Lessons for the Central America Free Trade Agreement,” Public Citizen Report, February 2005.

<sup>107</sup> All examples are detailed in Mary Bottari and Lori Wallach, “NAFTA Chapter 11 Investor-State Cases: Lessons for the Central America Free Trade Agreement,” Public Citizen Report, February 2005. See also Canadian Centre for Policy Alternatives chart, at <http://www.policyalternatives.ca/Reports/2008/01/ReportsStudies1814/index.cfm?pa=BB736455>.

<sup>108</sup> Statement of Deputy United States Trade Representative John K. Veroneau Regarding U.S. Actions under GATS Article XXI, Office of the U.S. Trade Representative, May 4, 2007. See also James Kanter and Gary Rivlin, “In Trade Ruling, Antigua wins right to piracy,” *New York Times*, Dec. 22, 2007.

<sup>109</sup> Economic needs tests are an important policy tool for controlling costs in the health care arena. Thirty-eight states have “Certificate of Need” or “CON” laws for health care facilities such as hospitals, outpatient clinics and nursing homes. CON laws are intended to bring oversight to health care construction and major capital expenditures which fuel skyrocketing

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health care costs. Unfortunately, GATS Article XVI prohibits economic needs tests in a covered service sector. U.S. negotiators safeguarded needs testing under hospital services, but not under construction of health buildings. This contradiction will need to be clarified to safeguard these important cost-saving laws from challenge.

<sup>110</sup> Pat Arnold and Terrie Reeves, "International Trade and Health Policy: Implications of the GATS for U.S. Healthcare Reform," *Journal of Business Ethics*, Vol. 63, 2006, at 313-332.

<sup>111</sup> See [http://www.citizen.org/trade/forms/gats\\_search.cfm](http://www.citizen.org/trade/forms/gats_search.cfm).

<sup>112</sup> GATS brief and <http://www.foei.org/en/publications/pdfs/NAMAenvironmentFINAL.pdf>

<sup>113</sup> U.S. Revised Offer on GATS, Environment, Carbon Trading, TN/S/O/USA/Rev. 1, on file with Public Citizen.

<sup>114</sup> See Alina Syunkova, "WTO Compatibility of Four Categories of U.S. Climate Change Policy," National Foreign Trade Council Report, December 2007, at 19; Jacob Werksman, "Greenhouse Gas Emissions Trading and the WTO," *Reciel*, Volume 8:3, 1999, at 255; Sikina Jinnah, "Emissions Trading Under the Kyoto Protocol: NAFTA and WTO Concerns," *Georgetown International Environmental Law Review*, 15, 2002-2003, at 709-762; Annie Petsonk, "The Kyoto Protocol and the WTO: Integrating Greenhouse Gas Emissions Allowance Trading into the Global Marketplace," *Duke Environmental Law and Policy Forum*, 10, 1999-2000, at 185-220.

<sup>115</sup> S. 280, Sec. 214.

<sup>116</sup> See e.g. WTO, General Agreement on Tariffs and Trade, Article I; WTO, General Agreement on Trade in Services, Article II.

<sup>117</sup> The United States signed up the category of "Trading of Securities and Derivative Products and Services Related Thereto; Participation in Securities Issues" as part of its GATS Financial Services commitments in 1998. See WTO, United States of America, Schedule of Specific Commitments, Supplement 3, GATS/SC/90/Suppl.3 Feb. 26, 1998. In other words, the United States committed to allow cross border trade in these products, to allow U.S. businesses to purchase these products abroad, and to allow foreign firms to establish businesses and sell these products in the United States. There are very few "limitations" or exemptions from these commitments listed in the U.S. GATS schedule. Oddly, onion futures were listed as exempted. The "Standstill" provision of the WTO's Understanding on Financial Commitments, does not allow for the listing of new nonconforming measures.

<sup>118</sup> Gary Clyde Hufbauer and Jeffrey J. Schott, *NAFTA Revisited: Achievements and Challenges*, (Washington, D.C.: Institute for International Economics, 2005), at 408-409, 424-425.

<sup>119</sup> WTO, General Agreement on Tariffs and Trade, Article I. "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III [regulatory measures], any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

<sup>120</sup> WTO, General Agreement on Tariffs and Trade, Article II:1: "The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

<sup>121</sup> Joost Pauwelyn, "U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law," Nicholas Institute for Environmental Policy Solutions at Duke University, Working Paper 07-02, April 2007, at 21. Gary Clyde Hufbauer and Jeffrey J. Schott, *NAFTA Revisited: Achievements and Challenges*, (Washington, D.C.: Institute for International Economics, 2005), at 408-409, 424-425.

<sup>121</sup> WTO, General Agreement on Tariffs and Trade, Article I. "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III [regulatory measures], any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

<sup>121</sup> WTO, General Agreement on Tariffs and Trade, Article II: "The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be

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<sup>121</sup> Joost Pauwelyn, “U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law,” Nicholas Institute for Environmental Policy Solutions at Duke University, Working Paper 07-02, April 2007, at 21.

<sup>122</sup> WTO, General Agreement on Tariffs and Trade, Article III:2. “The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.”

<sup>123</sup> WTO, General Agreement on Tariffs and Trade, Article III:1. Regarding national treatment for regulatory measures, the GATT specifically requires: “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.” (WTO, General Agreement on Tariffs and Trade, Article III:4.)

<sup>124</sup> U.S. imports of cement products (HTS 2523) totaled over \$1.3 billion in 2007. U.S. International Trade Commission Dataweb, accessed Feb. 28, 2008.

<sup>125</sup> GATT, United States—Restrictions on Imports of Tuna (DS21/R). Report of the Panel, Sept. 1991 and GATT, United States—Restrictions on Imports of Tuna (DS29/R). Report of the Panel, June 1994. See also: Joost Pauwelyn, “U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law,” Nicholas Institute for Environmental Policy Solutions at Duke University, Working Paper 07-02, April 2007, at 24-26.

<sup>126</sup> WTO, United States—Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58) Oct. 1998.

<sup>127</sup> <sup>127</sup> WTO, United States—Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58/AB/RW) Oct. 2001.

<sup>128</sup> WTO, Agreement on Technical Barriers to Trade, Article 1.3.

<sup>129</sup> WTO, Agreement on Technical Barriers to Trade, Article 2.2.

<sup>130</sup> In a recent case where the TBT necessary test and the proportionality issue were explored, the European Union prevailed in a WTO challenge of Brazil’s ban on retreaded tires. The WTO panel, consisting of trade experts not environmental experts, concluded that even though the policy did not single out imports, the ban on retreaded tires didn’t make a “material” contribution to resolving the problem. See “Brazil-EU Tire Ruling Sets New Standard for GATT Exemption Cases,” *Inside U.S. Trade*, Jan. 25, 2008.

<sup>131</sup> WTO, General Agreement on Tariffs and Trade, Article XX.

<sup>132</sup> Article XX exceptions were invoked in EC-Asbestos, US-Shrimp, Argentina-Bovine Hides, Brazil-Tyres, EC-Tariff Preferences, US-Gasoline, Mexico-Soft Drink, DR-Cigarettes, EC-Trademarks, Canada-Wheat, and Korea-Meat. Only in the first two instances was the exception accepted.

<sup>133</sup> Joost Pauwelyn, “U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law,” Nicholas Institute for Environmental Policy Solutions at Duke University, Working Paper 07-02, April 2007, at 34.

<sup>134</sup> WTO, General Agreement on Tariffs and Trade, Article XX.