Trade Remedies and Climate Change: How the United States Can Use its Buying Power and Trade Laws to Encourage Clean Energy

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The United States currently aims to be among the world's leaders in limiting global heating caused by greenhouse gas emissions from fossil fuels. To reduce future damage caused by unhindered extraction and burning of fossil fuels, the United States is attempting to evolve from its reliance on fossil fuels by investing in clean energy. Some of this evolution stems from market forces, making renewable energy less expensive than fossil fuels in some circumstances. But other aspects of the transformation require regulation and could be costly for stakeholders in energy-intensive domestic industries. The question thus becomes, how does the United States encourage clean manufacturing by overseas industries that continue to pollute and externalize those costs on the planet's remaining inhabitants while, at the same time, protecting and (discouraging offshoring by) domestic industries that are incurring climate mitigation costs that their foreign competition avoid?

In this article, I will explore the Executive Branch's ability to use the national security import law[2] to help level the playing field between clean domestic

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[2] Section 232 of the Tariff Act of 1962, 19 U.S.C. § 1862 (Section 232).

industries and polluting competitors from nations that fail to live up to their climate commitments. Similarly, I will discuss how the antidumping duty law[3] in its current form might be used in some circumstances, albeit with significant litigation risk, to mitigate injury sustained by clean domestic industries from polluting imports by pricing costs and adjustments based on the cost of renewable energy as opposed to fossil fuels.

BACKGROUND

I. Global Heating

The Earth's climate continues to suffer the effects of a buildup of greenhouse gases, with global heating already causing the collapse of certain biological systems and degrading the ability of billions of people to survive in the most affected regions. These trends appear to be accelerating. Most nations agree that the planet's climate is changing for the worse, and the overwhelming scientific consensus, based on years of observation and analysis, confirms that the root cause of the planet's heating is the emission of greenhouse gases.[4] The two primary greenhouse gases, carbon dioxide (CO_2) and methane (CH_4), are by-products of the

[3] 19 U.S.C. § 1671, *et seq*.

[4] *See generally* UN Climate Change Conference 2021, Climate Pact, available at https://ukcop26.org/wp-content/uploads/2021/11/COP26-Presidency-Outcomes-The-Climate-Pact.pdf

extraction, transport and combustion of fossil fuels, primarily coal, oil, and natural gas.

The burning of coal, petroleum products, and natural gas, generates CO_2 as a by-product. For over a century and a half, science has known that CO_2 in the atmosphere traps heat.[5] Specifically, the earth, and its atmosphere and oceans, absorb incoming sunlight and re-emit some of that energy as longwave infrared radiation. CO_2 molecules in the atmosphere reflect that longwave radiation back to the earth, thus reducing the amount of heat energy that is emitted into space. This phenomenon is called the "greenhouse effect," after the way in which sunlight enters through the glass of a greenhouse but resultant heat remains inside.[6] According to the National Oceanic and Atmospheric Administration, since 1750, the concentration of atmospheric CO_2 has increased nearly 50 percent, from below 280 parts per million to nearly 420 parts per million.[7]

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[5] Eunice Foote's Pioneering Research On CO_2 And Climate Warming, Raymond P. Sorenson, Search and Discovery Article #70092 (2011), Posted January 31, 2011.

[6] USGCRP, 2017: Climate Science Special Report: Fourth National Climate Assessment, Volume I [Wuebbles, D.J., D.W. Fahey, K.A. Hibbard, D.J. Dokken, B.C. Stewart, and T.K. Maycock (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 470 pp, Ch. 2, available at https://science2017.globalchange.gov/. Congress directed various agencies to confer and issue climate assessment reports periodically in the Global Climate Change Research Act of 1990, 15 U.S.C. § 2921 *et seq*.; *id*. § 2936.

[7] https://www.climate.gov/news-features/understanding-climate/climate-change-atmospheric-carbon-dioxide

Methane, the second greenhouse gas generated through fossil fuel extraction transport and combustion, is the smallest hydrocarbon molecule, with one carbon atom and four hydrogen atoms. It is the main component of natural gas and can be found in oil wells and gas-only deposits. Given the methane molecule's small size, there can be significant leakage from natural gas wells and transport systems. Abandoned oil and gas wells also leak methane.[8] Although not emitted in volumes as high as CO_2, methane's heat trapping ability is 100 times that of CO_2. But methane degrades in the atmosphere at a faster rate than CO_2, somewhat moderating its long-term climate effect.[9]

In the United States as of 2019, the transportation sector emitted 37.5 percent of the country's CO_2 emissions, electricity generators caused 31 percent of CO_2 emissions, and the industrial sector emitted 27 percent of the country's CO_2 emissions through direct combustion and electrical generation for industry.[10] Total United States CO_2 emissions peaked in 2005 and had dropped by over 15 percent by 2019.[11]

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[8] *See* Inventory of U.S. Greenhouse Gas Emissions and Sinks, U.S. Environmental Protection Agency, USEPA Pub. 430-R-21-005 at ES-15-17 (2021), available at https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks, follow link to full report.

[9] https://climate.mit.edu/ask-mit/why-do-we-compare-methane-carbon-dioxide-over-100-year-timeframe-are-we-underrating

[10] Inventory of U.S. Greenhouse Gas Emissions and Sinks, U.S. Environmental Protection Agency, USEPA Pub. 430-R-21-005 at ES-13-15.

[11] *Id*. at ES-13.

Between 1901 and 2016, the earth's average temperature has increased by 1.8ºF (1ºC).[12] According to the most recent National Climate Assessment Report, "[w]ith significant reductions in emissions, global temperature increase could be limited to 3.6°F (2°C) or less compared to preindustrial temperatures. Without significant reductions, annual average global temperatures could increase by 9° F (5°C) or more by the end of this century compared to preindustrial temperatures."[13] The current scientific consensus is that preventing global temperature from increasing by more than 2.7ºF (1.5ºC) could mitigate some of the future anticipated harms caused by global heating.[14]

The consequences of global heating include loss of agricultural land; habitat degradation and alteration resulting in extinctions of plant and animal species that cannot adapt to the loss of the conditions in which they evolved; increases in extreme weather events such as hurricanes, flooding and drought; and sea level rise stemming from melting ice caps as well as seawater's natural expansion as the oceans absorb excess heat from the atmosphere.[15]

For the purpose of determining the cost of greenhouse gas emissions in assessing the costs and benefits of new regulations, the United States has estimated

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[12] Fourth National Climate Assessment at 73 (2018).

[13] *Id*.

[14] Emission budgets and pathways consistent with limiting warming to 1.5°C, Millar *et al*., Nature Geoscience volume 10, pages741–747 (2017).

[15] Fourth National Climate Assessment at 25-32 (2018).

that the cost per ton of CO_2 emissions in 2020 to be $51, and for methane emissions to be $1,500.[16] The United States estimates that these figures will increase over time.[17]

II. Legal Framework For Regulation Of Carbon Pollution: *Massachusetts v. EPA*, *West Virginia v. EPA*, and the Inflation Reduction Act of 2022

The United States possesses statutory authority to regulate carbon pollution through the Clean Air Act and, and the recent enactment of the Inflation Reduction Act of 2022 provides significant resources to encourage the transition from polluting to clean sources of energy.

First, the Supreme Court held in *Massachusetts v. EPA* that the Clean Air Act authorizes EPA to regulate CO_2 emissions in the transportation sector in

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[16] Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990, Interagency Working Group on Social Cost of Greenhouse Gases, United States Government at 5 (Feb. 19, 2021) (three percent discount rate), available at https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf. A district court in Louisiana preliminarily enjoined the Government from taking regulatory action in line with Interagency Working Group recommendations. *Louisiana v. Biden*, No. 2:21-CV-01074, 2022 WL 438313, --- F. Supp. 3d. ---- (W.D. La. Feb. 11, 2022). The Fifth Circuit stayed the preliminary injunction, concluding that the plaintiff states lacked standing and that the balance of hardships merited against injunctive relief. *Louisiana by & through Landry v. Biden*, No. 22-30087, 2022 WL 866282 (5th Cir. Mar. 16, 2022). The Supreme Court refused to overturn the stay without comment. --- S.Ct. ----, 2022 WL 1671759 (Mem).

[17] *Id*.

response to global heating.[18] There, the Court addressed EPA's authority under section 202(a)(1) of the Clean Air Act, under which EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare . . ."[19] The Court acknowledged expert statements that global heating presents "the most pressing environmental challenge of our time,"[20] and assessed whether CO_2 could qualify as a pollutant covered by section 202(a)(1). Relying primarily on *Brown & Williamson*,[21] in which the Supreme Court had held that FDA lacked authority to regulate tobacco products due to Congress's decision not to include tobacco products within the ambit of the Food Drug and Cosmetics Act,[22] the Bush Administration had contended that earlier legislative history in which Congress had not adopted an amendment to compel regulation of greenhouse gases stripped it of authority to regulate that pollution.[23]

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18 *Massachusetts v. EPA*, 549 U.S. 497 (2007).
19 42 U.S.C. § 7521(a)(1).
20 *Massachusetts v. EPA*, 549 U.S. at 505.
21 *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (2000).
22 21 U.S.C. § 321, *et seq*.
23 *Id*. at 511-12.

The Supreme Court analyzed the plain language of the Clean Air Act to dispose of that position, explaining that "[t]he statutory text forecloses EPA's reading."[24] The Court explained that "[t]he Clean Air Act's sweeping definition of 'air pollutant' includes '*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air . . . ."[25] Indeed, "[o]n its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.'"[26]

A decade and a half later, in *West Virginia v. EPA*,[27] the Court adopted a very different analytical framework, applying the "major questions" doctrine to conclude that EPA lacked authority to regulate greenhouse gas emissions from power plants through a cap-and-trade system designed to transition electric generation from coal to gas and, ultimately, clean energy sources. There, the Court set aside the Obama Administration's Clean Power Plan system. Under section 111 of the Clean Air Act, Congress "direct[ed] EPA to (1) 'determine,' taking into

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[24] *Id*. at 528.

[25] *Id*. at 528-29 (quoting 42 U.S.C. § 7602(g)) (emphasis by Court).

[26] *Id*. at 529 (quoting 42 U.S.C. § 7602(g)); *but see Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 319 (2014) (explaining that *Massachusetts v. EPA* "does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme.").

[27] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

account various factors, the 'best *system* of emission reduction which has been adequately demonstrated,' (2) ascertain the 'degree of emission limitation achievable through the application' of that *system*, and (3) impose an emissions limit on new [or existing] stationary sources that 'reflects' that amount.[28] The Clean Power Plan imposed emissions limits on existing coal-fired plants and allowed operators to exceed those limits based on credits obtained through investment in natural gas or renewable energy sources, or purchase of credits from other entities.[29]

The majority first acknowledged that the Clean Power Plan's invocation of authority "had a colorable textual basis."[30] Nevertheless, the Court concluded that "common sense as to the manner in which Congress would have been likely to delegate such power to the agency at issue made it very unlikely that Congress had actually done so."[31] Despite its apparent departure from *Massachusetts v. EPA* framework, the majority (and concurrences) never acknowledged that precedent. In contrast, the dissent noted that "[c]limate change's causes and dangers are no

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[28] *Id*. at 2601 (quoting 42 U.S.C. § 7411).

[29] *Id*. at 2603-04; *see id*. at 2630 (dissent) (discussing Clean Power Plan's "cap-and-trade" "system").

[30] *Id*. at 2609; *see id*. at 1314 (conceding that, "as a matter of definitional possibilities, generation shifting can be described as a system.") (internal quotation marks and citation omitted).

[31] *Id*. (quoting *Brown & Williamson*, 529 U.S. at 133) (cleaned up).

longer subject to serious doubt"[32] and that Congress had "broadly authorized EPA in Section 111 to select the 'best system of emission reduction' for power plants."[33] "The 'best system' full stop—no ifs, ands, or buts of any kind relevant here."[34] Given this unequivocal statutory language, the dissent went on to explain that EPA's system should be sustained because "[t]he parties do not dispute that generation shifting is indeed the 'best system'—the most effective and efficient way to reduce power plants' carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system."[35]

Shortly after *West Virginia v. EPA*, Congress enacted its first significant law to address global heating: the Inflation Reduction Act of 2022.[36] Rather than imposing a system in line with the Clean Power Plan's cap-and-trade system, the Act funds significant investments in clean energy with the goal of reducing the cost of clean energy vis-à-vis polluting energy sources.[37] In addition to those carrots, Congress included one big stick, a $900 per metric ton charge for methane

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[32] *Id*. at 2626 (*dissent*)

[33] *Id*. at 2628 (quoting 42 U.S.C. § 7411(a)(1)).

[34] *Id*. at 2628 (quoting 42 U.S.C. § 7411(a)(1)).

[35] *Id*.

[36] Pub. L. 117-169 § 60113(d)-(e) (inserting new section 136 entitled "Methane Emissions and Waste Reduction Incentive Program for Petroleum and Natural Gas Systems" to Clean Air Act).

[37] https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/15/by-the-numbers-the-inflation-reduction-act/

emissions from production, transport, and storage of oil, gas, and other petroleum products for fiscal year 2024, with the charge increasing to $1,200 per metric ton in 2025 and $1,500 per metric ton in 2026.

Furthermore, given the Supreme Court's inconsistent conclusions regarding whether EPA may regulate greenhouse gases as pollutants under the Clean Air Act[38], and its limitation on the extent of EPA's programmatic authority[39], Congress made it abundantly clear in the Inflation Reduction Act that "greenhouse gases" are "air pollutants." Specifically, in nine separate places in the Act, Congress directed that the term "'greenhouse gas' means the *air pollutants* carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons, and sulfur hexafluoride."[40] (emphasis added). In fact, the very first repetition of this definition appears in the section entitled "Funding to Address Air Pollution."[41]

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[38] *Compare Massachusetts v. EPA*, 549 U.S. 497, with *Utility Air Regulatory Group v. EPA*, 573 U.S. 302.

[39] *West Virginia v. EPA*, 142 S. Ct. 2587.

[40] Pub. L. 117-169 §§ 60105(h) ("Funding to Address Air Pollution"); 60106(c) ("Funding to Address Air Pollution at Schools"); 60107(c) (amending Clean Air Act with regard to "Low Emissions Electricity Funding"); 60108(c) (funding for § 211(O) of the Clean Air Act); 60111(b) ("Greenhouse Gas Corporate Reporting"); 60113(i) (amending Clean Air Act to add "Methane Emissions and Waste Reduction Incentive Program for Petroleum and Natural Gas Systems"); 60116(b) ("Low Embodied Carbon Labeling for Construction Materials"); 60201(d) (amending Clean Air Act with regard to "Environmental and Climate Justice Block Grants"); and 60503(d) ("Use of Low Carbon Building Materials" in federal construction).

[41] *Id*. § 60105.

III. Section 232 National Security Import Adjustments

Section 232, entitled "Safeguarding national security," authorizes the President, upon receiving a report from the Secretary finding that an "article is being imported into the United States [a] in such quantities or [b] under such circumstances as to threaten to impair the national security," to take actions that "in the judgment of the President" will "adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."[42]

The statute requires the Secretary, upon request or upon the Secretary's own motion, to initiate an "investigation to determine the effects on the national security of imports of [an] article."[43] Section 232 then directs the Secretary to submit to the President "a report on the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security," along with "recommendations . . . for [Presidential] action or inaction" based on the investigation's findings.[44] Section 232 additionally requires the Secretary to consult with the Secretary of Defense and other United States officials, as well as (if appropriate) to hold public hearings

[42] 19 U.S.C. § 1862(c)(1)(A).
[43] *Id*. § 1862(b)(1)(A).
[44] *Id*. § 1862(b)(3)(A).

or otherwise afford interested parties an opportunity to present information and advice relevant to the investigation.[45]

Within 90 days after receiving a report finding that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall (1) "determine whether the President concurs with the finding of the Secretary," and (2) "if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."[46] The President shall implement that action within 15 days of the above determination.[47]

Section 232(d) sets forth a broad non-exclusive list of factors for the Secretary and President to consider, "in the light of the requirements of national security" as the President determines.[48] Importantly, these requirements are not limited to military production but cover other national security considerations. Accordingly, in addition to military readiness, the statute requires the Secretary and the President to recognize "the close relation of the economic welfare of the

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[45] *Id*. § 1862(b)(2)(A).
[46] *Id*. § 1862(c)(1)(A).
[47] *Id*. § 1862(c)(1)(B).
[48] *Id*. § 1862(d).

Nation to our national security"—and to take into consideration the "impact of foreign competition on the economic welfare of individual domestic industries," as well as any "serious effects resulting from the displacement of any domestic products by excessive imports"—in determining whether such factors result in a "weakening of our internal economy" that may impair national security.[49]

In essence, Section 232 delegates to the President authority to conclude that harm to domestic industries could equal harm national security.

IV. The Antidumping Duty Law

Congress enacted the antidumping duty law to protect domestic manufacturing industries from injury suffered due to imports of unfairly traded merchandise. As part of the Uruguay Round Agreements, which created the World Trade Organization (WTO) and implemented the international trading system in force today, the signers agreed to the Anti-dumping Agreement.[50] Unlike treaties that the Senate ratifies by a two-thirds vote,[51] Congress modified the then-existing antidumping duty law to bring it into compliance with the agreements. At least in Congress's view, if not the WTO's.[52]

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[49] *Id*.

[50] https://www.wto.org/english/docs_e/legal_e/legal_e.htm

[51] U.S. Const. Art. II § 2, Cl. 2.

[52] *See* WTO Dispute Settlement: One-Page Case Summaries 1995–2020 at 91 (holding antidumping duty provision known as the Continued Dumping and Subsidization Offset Act inconsistent with WTO agreements), available at https://www.wto.org/english/res_e/booksp_e/dispu_settl_1995_2020_e.pdf.

Given its name, the antidumping duty law protects domestic manufacturers from unfair trade that takes advantage of the United States' relatively open markets by "dumping" excess merchandise in the United States at prices below home market prices. In relevant part, the antidumping duty law mandates that, if the International Trade Commission (ITC) determines that a domestic industry suffers (or is threatened with) material injury, and the Department of Commerce determines that "a class or kind of foreign merchandise is being, or likely to be, sold in the United States at less than fair value," then "there shall be imposed upon such merchandise an antidumping duty . . . in an amount equal to the amount by which the normal value [home market price in the exporting country] exceeds the export price (or constructed export price) [United States price] . . . for the merchandise."[53] "Export price" is, in turn, defined as "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation . . . to an unaffiliated purchaser in the United States."[54]

In making this calculation, Commerce strives to make "a fair 'apples-to-apples comparison' between U.S. price and foreign market value 'at a similar point

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Congress further recognized that the statute as enacted or applied by Executive Branch might conflict with the underlying agreements. Congress thus preemptively directed that "United States law [would] prevail in conflict" with the WTO agreements and that no court challenge would lie premised on violation of a WTO agreement. 19 U.S.C. §§ 3512(a)(1), (c)(1).

[53] 19 U.S.C. § 1673.

[54] *Id*. § 1677a(a).

in the chain of commerce.'"[55] The statute and regulations set forth a multitude of adjustments that Commerce must make to achieve this comparison.[56] Then, "[i]f the adjusted price of the goods is less than the normal value of the goods in the foreign market, and there is a finding of material injury, Commerce will issue an affirmative finding of dumping."[57] The duty owed is the amount necessary to offset the amount of dumping.[58] For example, if a product is sold for $1.00 in the home market and for $0.50 in the United States, the rate of duty imposed on imports would be 100 percent (resulting in a $0.50 duty added to the $0.50 United States price), to recover the full difference between normal value and export price.

Although there will always be a United States (export or constructed export) price of imported merchandise for Commerce's comparison, there might not be usable prices in the exporting (or third-country comparison) market for use as normal value. For example, the exporter under examination might not sell comparable merchandise in its home or other markets. Or the foreign producer's home market (or third-country) sales of comparable merchandise might be made at below the cost of production. Furthermore, if the manufacturer is located in a

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[55] *Fla. Citrus Mut. v. United States*, 550 F.3d 1105, 1110 (Fed. Cir. 2008) (quoting *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995)).

[56] *See*, *e.g.*, 19 U.S.C. §§ 1677a(c); 1677b(a); 19 C.F.R. §§ 351.401-415.

[57] *Fla. Citrus*, 550 F.3d at 1110; *see also* 19 U.S.C. §§ 1673–1673(d).

[58] 19 U.S.C. § 1677(35).

nonmarket economy such as China, Congress has directed Commerce not to use prices in such countries as the basis for the agency's calculations.[59]

In all of the circumstances above, Commerce must build a normal value using other sources of information. In the nonmarket economy context,[60] which is very important with regard to China's greenhouse gas emissions, Commerce bases normal value on the "factors of production" of the subject merchandise, using values for those factors derived from data collected in market economy countries that are at a comparable level of development.[61] In investigating products from China, Commerce calculates normal value by adding the costs of raw materials, energy, labor, packaging, shipping, as well as selling general and administrative expenses.[62] Commerce also includes an amount for profit, based on market prices

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[59] *Id*. § 1677(18).

[60] For market economies, the statute requires Commerce to hue much closer to actual prices and costs than in the nonmarket economy context. For example, if a foreign respondent has home market (or third-country) sales with which to compare United States sales, then Commerce must use those sales prices unless they are below the actual cost of production. And in calculating cost of production, Commerce uses prices for inputs actually "employed in producing the foreign like product." *Id*. § 1677b(b)(3)(A). "Foreign like product," is in turn, defined to be the actual merchandise sold in the home or third country market. *Id*. § 1677(16). Because of this dichotomy and because the of the sheer volume of the United States' trade with China, I will focus on the nonmarket economy statute.

[61] *Id*. § 1677b(c); *see also Seah Steel Vina Corp. v. United States,* 269 F. Supp. 3d 1335 (Ct. Int'l Trade 2017) (using publicly available Indian import data for surrogate values for certain Vietnamese steel inputs and financial statements from publicly traded Indian companies to value factory overhead; selling, general and administrative expenses; and profit).

[62] 19 U.S.C. § 1677b(c)(1)(B).

and public financial statements for companies manufacturing comparable products in comparable market economies.[63]

As discussed below, these aspects of the antidumping duty law – especially with respect to nonmarket economy imports - provide the agency with some flexibility in adjusting prices to allow a "fair" comparison when determining whether dumping has occurred and the amount necessary to offset that dumping.

DISCUSSION

The President possesses significant discretion under the national security trade law to encourage our trading partners to reduce greenhouse gas emissions through adjustments to imports. Additionally, the Executive Branch can take some administrative steps to level the playing field so that domestic industries that convert to clean energy and reduce their pollution output are not harmed by dumped imports of polluting products, although agency action under the antidumping duty law would face significant litigation risk.

I. Imposition Of National Security Tariff Targeting Carbon Emissions

The President could most likely use Section 232 to impose import measures such as tariffs or other restrictions on imported merchandise whose manufacture or transport contribute significantly to climate change. This appears to be the best option short of enacting a new statute for targeting imports of merchandise whose

[63] *Id*.

manufacture results in excess greenhouse gas emissions. First, given the President's broad discretion and constitutional authority, the courts would most likely sustain the exercise of Section 232 for the purpose of encouraging our trading partners to reduce greenhouse emissions in the supply chain. Second, although tariffs can be a blunt instrument for fostering behavioral change, the President likely possesses authority to delegate to his subordinates the task of fine-tuning the initial determination through the grant of specific exclusions or reductions in the measures imposed.

A. Presidential Authority

Section 232 directs the President to take action in furtherance of "national security." It does not define "national security" but at subsection (d) provides a non-exhaustive list of considerations. In essence, Congress delegated to the President the authority to adjust imports of an article so long as those imports "threaten to impair the national security,"[64] and left it to the President to determine what constitutes a threat of impairment of the national security.

On its face, the statute is broad enough to allow the President to conclude that polluting nations pose a threat to national security. Indeed, one of the consequences of climate change is the loss of arable land and the dislocation of

[64] *Id*. § 1862(c)(1)(A)(ii).

populations as their former homes become uninhabitable.[65] Acceleration of this trend will likely lead to unrest in countries in which the United States has an interest. Moreover, as the climate changes and the United States experiences more severe weather events and sea level rise, both the military and civilian infrastructure will suffer.[66] In addition, if domestic manufacturers flee to countries that effectively provide subsidies through toleration of pollution,[67] such a flight of production capacity would "weaken[] our internal economy."[68]

These facts alone support action to prevent the worst of the projected consequences of global heating and, if one were to challenge a Section 232 determination in court,[69] the courts would likely find presidential action lawful.

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[65] Fourth National Climate Assessment at 606-18.

[66] *Id*.

[67] *See* Joseph E. Stiglitz, A New Agenda for Global Warming, Economists' Voice, July 2006, at 2, available at <https://www8.gsb.columbia.edu/faculty/jstiglitz/economistsvoice >; Abbey Stemler, *et al*., Paris, Panels, and Protectionism, Matching US Rhetoric with Reality to Save the Planet, 19 Vand. J. Ent. & Tech. L. 545 (Spring 2017) (discussing Stiglitz's observation that exporting nations that allow significant volumes of carbon pollution effectively subsidize exporting industries at the expense of clean industry in importing nations).

[68] 19 U.S.C. § 1862(d).

[69] The Court of International Trade, an Article III court that hears specialized subject matter including cases related to tariffs and certain embargoes, would address challenges to Section 232 proclamations. *See* 28 U.S.C. §§ 1581-1585. The Court of Appeals for the Federal Circuit hears appeals from judgments of the Court of International Trade. 28 U.S.C. § 1295(a)(5).

First, the Administrative Procedure Act's (APA) arbitrary and capricious or substantial evidence standards of review under 5 U.S.C. § 706(2) do not constrain the President.[70] Instead, courts review presidential Section 232 determinations under an *ultra vires* standard of review. Because "[t]he President's findings of fact and the motivations for his action are not subject to review," courts may not look beyond the nexus that the President identified.[71] Rather, to upset a presidential determination, there must be a "'clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.'"[72] Even then, "there are limited circumstances when a presidential action may be set aside if the President acts beyond his statutory authority, but such relief is only rarely available."[73] Rather than treating Section 232 determinations as ordinary tariff matters reviewable under the APA, Congress made an explicit call to entrust the President to administer Section 232. As a result, those who challenge Section 232 decisions would incur the burden of showing a "clear misconstruction" in the President's gap filling on national security.

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[70] *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992).

[71] *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984) (citing *United States v. George S. Bush & Co*., 310 U.S. 371, 379–80 (1940)).

[72] *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018) (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985)).

[73] *Id*. (citing *Corus Grp. PLC v. Int'l. Trade Comm'n*, 352 F.3d 1351, 1356 (Fed. Cir. 2003)).

Second, and in addition to the extremely deferential review afforded to presidential action, it is very unlikely that a court would upset a presidential determination on an issue that resides within the President's Article II grant of discretion "to affect a situation in a foreign territory."[74] In sum, "[t]he President's method of solving the problem [would be] open to scrutiny neither by the [lower court] nor by" the Supreme Court.[75]

Third, given Section 232's extremely broad delegation of congressional authority to the President to "lay and collect . . . duties" and "regulate Commerce with foreign Nations,"[76] the courts have addressed whether Section 232 is an unconstitutional delegation of congressional authority. The Supreme Court first addressed a delegation challenge to Section 232 in 1976, explaining that, "'[i]f Congress shall lay down by legislative act an intelligible principle to which the (President) is directed to conform, such legislative action is not a forbidden delegation of legislative power.' Section 232 . . . easily fulfills that test."[77]

To this end, when President Trump imposed a Section 232 tariff on steel articles in 2018, the courts sustained the statute against a delegation challenge, despite widespread criticism of the President's action as being merely protectionist

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[74] *United States v. Curtiss–Wright Export Corp*., 299 U.S. 304, 321 (1936).
[75] *George S. Bush & Co.*, 310 U.S. at 378-79.
[76] U.S. Const. Art. I § 8, cl. 1, 3.
[77] *Fed. Energy Admin. v. Algonquin SNG, Inc*., 426 U.S. 548, 559 (1976) (quoting *Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

and as lacking any true nexus to national security.[78] In declining to substitute its judgment for the President's, the Federal Circuit explained that, "'[f]or the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains.'"[79]

Lastly, Section 232 provides a more robust means for the President to address climate issues at the border than the other primary presidential import adjustment statute. The President possesses similar authority under the safeguard law, codified as Section 201 of the Trade Act of 1974 (Section 201)[80] to impose tariffs if an "article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof," to a domestic industry.[81] Although adjustments for the price of carbon under Section 201 might be lawful, Section 232 provides the Executive Branch much more flexibility than Section 201. First, before any presidential action under Section 201, a domestic industry or its representatives must file a petition with the ITC.[82]

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[78] *See*, *e.g.*, John C. Brinkley, Forbes.com, *Trump's National Security Tariffs Have Nothing To Do With National Security*, available at https://www.forbes.com/sites/johnbrinkley/2018/03/12/trumps-national-security-tariffs-have-nothing-to-do-with-national-security/?sh=38fc8bb5706c

[79] *Am. Inst. for Int'l Steel, Inc. v. United States*, 806 F. App'x 982, 991 (Fed. Cir.) (*AIIS*), *cert. denied*, 141 S. Ct. 133 (2020) (quoting *George S. Bush & Co.*, 310 U.S. at 380).

[80] 19 U.S.C. § 2251, *et seq*.

[81] 19 U.S.C. § 2251(a).

[82] *Id*. § 2252(a)(1).

This reliance on petitioners would necessarily constrict the United States' ability to address climate harm in a broad, programmatic, manner. Second, the ITC is an independent commission that does not directly report to the President,[83] whereas the Secretary of Commerce leads a cabinet department and thus reports to the President.[84] Third, unlike Section 232, Section 201 limits remedies to four years with the possibility of a single four-year renewal and allows modifications only at specific times.[85]

In sum, Section 232, although far from perfect, is a plausible tool for encouraging climate-friendly manufacturing through trade.

B. Logistical Challenges of Applying Section 232 to Climate

Although global heating poses a threat to national security, a Section 232 proceeding for the purpose of mitigating harm to the climate would present novel logistical and factual challenges. Unlike the traditional tariff proceeding in which the government investigates a particular product, often at the behest of competing domestic manufacturers, a climate-based Section 232 proceeding would first need to determine which product to investigate. Earlier Section 232 matters focused primarily on imports of petroleum and metals, and were designed to protect

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[83] *Id*. §§ 1330, 1331; 5 U.S.C. § 104.
[84] 5 U.S.C. § 101.
[85] 19 U.S.C. §§ 2253, 2254.

particular domestic industries,[86] but a climate-based Section 232 proceeding could focus on reducing harm to the global climate caused by production of particular products, regardless of the existence of a domestic industry.

Accordingly, the first step would be to ascertain which imported products result in the most climate harm. There could be multiple ways to measure this harm depending on the product. The first would be to look at greenhouse gas emissions of various industries. Steel produced using coal and coke to melt iron in decades-old plants would emit significantly more CO_2 than recycled steel manufactured in modern arc furnaces powered with renewable electricity. Similarly, petrochemicals manufactured using natural gas transported through leaky pipelines would emit more methane than the same products manufactured under stringent methane emissions rules. Likewise, deforestation in some countries for the production of beef or other agricultural products might emit more greenhouse gases than the raising of domestic counterparts. In fact, the European Union (EU) has proposed regulations that would price carbon generated in imported products in a manner consistent with the price imposed on comparable domestic products, focusing on: iron and steel; electricity, aluminum, fertilizer; and cement.[87]

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[86] *See*, *e.g.*, *Algonquin*, 426 U.S. 548; *AIIS*, 806 F. App'x 982.

[87] *See* https://ec.europa.eu/taxation_customs/green-taxation-0/carbon-border-adjustment-mechanism_pl (explaining that, "[o]n 14 July 2021, the

Determining the "[a]djustment of imports" [88] proportionate to the harm caused by polluting imports also is not a trivial problem.[89] But the first principle of reducing the greenhouse footprint of imports should control. The most logical adjustment would be a tariff based upon the regulatory cost of greenhouse gases to the environment as discussed above. Indeed, Congress, in the Inflation Reduction

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Commission adopted a proposal for a new Carbon Border Adjustment Mechanism which will put a carbon price on imports of a targeted selection of products so that ambitious climate action in Europe does not lead to 'carbon leakage.' This will ensure that European emission reductions contribute to a global emissions decline, instead of pushing carbon-intensive production outside Europe. It also aims to encourage industry outside the EU and our international partners to take steps in the same direction.").

[88] 19 U.S.C. § 1862(c).

[89] Although beyond the scope of this article, which focuses on the lawfulness of Executive Branch action under United States law, commentators have concluded that border adjustments that take carbon pricing into account could be consistent with the United States' international obligations under various multilateral international agreements. *See generally* Mark L. ("Buzz") Belleville, *The Key Stone in the Carbon Tariff Wall: The Alberta Oil Sands and the Legality of Taxing Imports Based on Their Carbon Footprint*, 43 Envtl. L. 365 (2013) arguing that nations that impose tariffs consistent with domestic carbon pricing do not run afoul of General Agreement on Tariffs and Trade and WTO rules). In fact, the European Union (EU) has proposed regulations that would price carbon generated in imported products in a manner consistent with the price imposed on domestic products; *but see* Abbey Stemler, *et. al*., *Paris, Panels, and Protectionism: Matching Us Rhetoric with Reality to Save the Planet*, 19 Vand. J. Ent. & Tech. L. 545, 575-77 (2017) (contending that the "United States also has a long history of noncompliance with global rules in the area of sustainable development. Generally, this takes the form of a failure to consult with trade partners and an insistence that all parties comply with the "US solution" to global problems" and collecting cases in which WTO panels and appellate body concluded that United States environmental protections inconsistent with WTO agreements).

Act imposed a charge on methane lost to the atmosphere during production, transport, and storage of oil, gas, and other petroleum products.[90] By its own name, Congress intended that the "Methane Emissions Reduction Program"[91] *reduce* methane emissions by encouraging industry to take steps to plug leaky infrastructure. These costs, either the statutory charge, or better yet, improved infrastructure, will necessarily appear downstream as a cost of doing business, potentially disadvantaging United States businesses facing more polluting competitors.

Another possibility would be to disallow imports of a country's article into the United States after reaching a certain level of carbon emissions, thereby rewarding clean manufacturing with additional access for clean products. This would have the same effect as a tariff by fostering a level playing field for domestic and imported merchandise.

Lastly, the President possesses authority to delegate to subordinate officials the duty to exclude particular products from any adjustment to imports under Section 232. For example, in the 2018 proclamation imposing a tariff on steel articles under Section 232, the President authorized the Secretary of Commerce to exclude from the tariff "any steel article determined not to be produced in the

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[90] Pub. L. 117-169 § 60113(d)-(e).
[91] *Id*. § 60113.

United States in a sufficient and reasonably available amount or of a satisfactory quality," and the President also "authorized [the Secretary] to provide such relief based upon specific national security considerations."[92] Likewise, the Federal Circuit has held that the President's authority to "take action" allows a "continuing course of action" through adjustments over time as the Government assesses the effect of the initial import adjustments.[93]

II. Antidumping Duties

Unlike Section 232, which can provide a broad remedy to benefit the climate as a whole (and thus national security), administrative recognition of the effects of climate in imposing antidumping duties could afford only modest protection to

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[92] *Adjusting Imports of Steel Into the United States*, *Proclamation 9705*, 83 Fed. Reg. 11,625, 11,626 (Mar. 8, 2018).

[93] *Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1318 (Fed. Cir. 2021) (citing 19 U.S.C. § 1862(c)(1)). Nevertheless, an exclusion process would likely impose significant burden on the agencies and spawn a significant amount of litigation. For example, with regard to the Section 232 tariffs on steel, Commerce estimated in 2018 that it would receive about 4,500 exclusion requests per year, and approximately 1,500 objections. *Requirements for Submissions Requesting Exclusions*, 83 Fed. Reg. 12,106, 12,109 (Dep't of Commerce Mar. 19, 2018). Less than three years later, the agency had received 260,450 exclusion requests. Congressional Research Service Section 232 Investigations: Overview and Issues for Congress, available at https://sgp.fas.org/crs/misc/R45249.pdf. Similarly, given the avalanche of steel exclusion requests, the agency has sustained criticism for the level of detail in its decisions, leading one court to conclude that "Commerce's denials are devoid of explanation and frustrate judicial review." *JSW Steel (USA) Inc. v. United States*, 466 F. Supp. 3d 1320, 1330 (Ct. Int'l Trade 2020).

domestic industries the United States rightly prohibits from externalizing the significant costs associated with polluting.

In the case of antidumping duties on merchandise from nonmarket economy countries, Commerce can take the simple step of basing the factors of production on the costs incurred in market economies using clean energy. For example, when calculating the electricity factor of production price for a nonmarket economy export, Commerce could use the price for renewable electricity in the comparison market. Not only would this level the playing field between the United States and exporting countries' industries,[94] it would provide a financial incentive to exporters who want to sell to the United States' market to convert to renewable energy.[95]

Unlike Section 232, however, in challenges to antidumping duty determinations, the courts do not afford the Commerce Department the same maximal deference afforded to the President.

As explained above, because "[t]he President's findings of fact and the motivations for his action are not subject to review," courts may not look beyond the nexus that the President himself identified.[96] In sum, the President stands as

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[94] Of course this assumes that the United States is taking large steps to mitigate its contribution to the heating climate.

[95] This also presumes that renewable energy is more expensive than polluting energy. As renewables become less expensive, users should gain incentive to switch without pressure from the trade laws.

[96] *Florsheim Shoe*, 744 F.2d at 795 (Fed. Cir. 1984) (citing *George S. Bush*, 310 U.S. at 379–80).

the final arbiter of fact and courts may not inquire into a presidential determination's reasonableness.[97]

In contrast, courts review Commerce's determinations of fact under the "substantial evidence" standard,[98] and apply the familiar two-part *Chevron* framework to Commerce's resolution of questions of law.[99]

In addressing the first step of *Chevron*, Congress did not specifically direct Commerce to use particular prices for determining normal value. Instead, to value merchandise from nonmarket countries, Congress merely directed the agency to use the "best available information":

> [Commerce] shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. . . ., [T]he valuation of the factors of production shall be based on the *best available information regarding the values of such factors in a market economy* country or countries considered to be appropriate by the administering authority.[100]

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[97] *Franklin v. Mass.*, 505 U.S. at 800.

[98] 19 U.S.C. § 1516a(b)(1)(B)(i).

[99] *United States v. Eurodif S. A*., 555 U.S. 305, 316 (2009) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984)).

[100] 19 U.S.C. § 1677b (c)(1)(B) (emphasis added).

The courts thus might conclude that the agency's determination is reasonable under *Chevron* step two – that Commerce's interpretation of "best available information" is "reasonable."[101]

Interested parties might contend that an expansive interpretation of the statutory term "best available information" is unreasonable based on a contention that the statute as a whole arguably seeks to replicate an exporter's actual manufacturing experience.

But court precedent does not compel Commerce to deem evidence the "best available" based solely on congruence between the nonmarket respondent's and the comparison market's production experiences. For example, in a challenge to Commerce's use of labor wage data from the Bangladeshi shrimp industry as a surrogate for the price of labor in Vietnam, the Court of International Trade remanded to the agency to "address record evidence that the Bangladeshi data was the product of abusive labor practices and therefore could not be the best available information to value the merchandise."[102] On remand, Commerce, changed course, "acknowledge[ing] that additional considerations may affect a determination as to whether potential surrogate value data constitute the best

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[101] *Chevron*, 467 U.S. at 844.

[102] *Ad Hoc Shrimp Trade Action Comm. v. United States*, 219 F. Supp. 3d 1286, 1292 (Ct. Int'l Trade) (*Ad Hoc Shrimp I*).

available information."[103] Commerce explained that, "[g]iven the Court's concerns with respect to the evidence of labor abuses in Bangladesh [and the availability of other information, the agency] elected to conclude that the Bangladeshi wage rate is not the best available information on the record."[104] The court concluded that Commerce had complied with the Court's directive on remand in *Ad Hoc Shrimp I*.[105]

Important in *Ad Hoc Shrimp* is that the court did not consider labor conditions in the exporting country under investigation (Vietnam), which might not have substantively differed from Bangladesh. Similarly, Commerce found that the Bangladeshi labor rate was not quantitatively unreliable or aberrational when applying the agency's ordinary methodology for assessing whether a surrogate value involved the best available information.[106] Nevertheless, Commerce departed from that methodology in light of concerns regarding Bangladeshi labor practices.

In essence, the court construed the term "best available information" as conferring discretion to disregard statistics generated in activities that depart from certain norms. Accordingly, statistics alone did not bind the agency, and

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[103] *Ad Hoc Shrimp Trade Action Comm. v. United States*, 234 F. Supp. 3d 1315, 1320 (Ct. Int'l Trade 2017) (citation omitted) (*Ad Hoc Shrimp II*).

[104] *Id*. (citation omitted).

[105] *Ad Hoc Shrimp II*, 234 F. Supp. 3d at 1320.

[106] *Id*. at 1319.

Commerce remained free to take other considerations into account in selecting among data sources to use as the "best available information" in its calculations. In a similar vein, Commerce might permissibly exclude values for factors of production that are based on highly polluting activities if clean alternatives exist.

Any conclusion regarding how the courts would address greenhouse gas emissions in antidumping duty calculations would be speculative. The general rule is that courts "do not dictate the particular methodology that Commerce must use to determine [factors of production], but leave that decision to the discretion of Commerce."[107] But in *Sigma*, the court held that Commerce's calculation methodology unreasonable because it double-counted freight expenses associated with a particular factor of production. In addition to a patently inaccurate methodology that the court rejected in *Sigma*, Commerce may not create a novel type of proceeding that directly affects interested parties absent statutory text.[108] In contrast, when selecting among options, Commerce remained free in *Ad Hoc Shrimp* to select factor of production pricing information based on something other than the foreign producer's experience.

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[107] *Sigma Corp. v. United States*, 117 F.3d 1401, 1408 (Fed. Cir. 1997).

[108] *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States*, 483 F. Supp. 3d 1253, 1264 (Ct. Int'l Trade 2020) (citing *FAG Italia S.p.A. v. United States*, 291 F.3d 806, 815 (Fed. Cir. 2002)).

Accordingly, the question will ultimately be whether use of "clean" factors of production is reasonable given the purpose of the antidumping duty law. In these circumstances, Commerce would have a defensible litigation position but no guaranteed victory.

CONCLUSION

The President possesses almost total discretion to adjust imports in response to threats to or impairment of national security. Global heating is undeniably a national security issue, and Section 232 allows a broad swath of remedies to target all imports. In contrast, the antidumping duty law does not allow for a broad attack on global heating and its use in the climate context engenders significant litigation risk. Nevertheless, if sustained by the courts, domestic industries might be able to move towards a level playing field against injurious imports whose manufacture results in undue environmental harm.