**Could Proposed Laws in the U.S. and EU Help Save the Planet?**
Sam Gandhi, Nicolas Lockhart, Andrew Shoyer, and Brittany Bolen
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**Sam Gandhi:**
Momentum on climate action is unstoppable. Investors, businesses, and the public are demanding policy makers get serious about reducing emissions. Legislation from the U.S. and the EU offers challenges and incentives for businesses worldwide. How will these proposed laws impact companies, and could they really help save the planet? We'll find out in today's podcast.

**Nicolas Lockhart:**
It's going to affect all parts of economic life across all sectors. The most affected sectors are going to be the ones that are the most carbon intensive.

**Andrew Shoyer:**
They're trying to make intelligent decisions about how these measures are going to affect them, and how they can influence the system so that they don't get left behind.

**Brittany Bolen:**
The market shifts are there such that there is going to be meaningful, significant emissions reductions that help put our planet on the right path.

**Sam Gandhi:**
From the international law firm, Sidley Austin, this is the Sidley Podcast where we tackle cutting edge issues in the law and put them in perspective for businesspeople today. I'm Sam Gandhi.

Hello, and welcome to this addition of the Sidley Podcast, episode number 24. Today we speak with three thought leaders on climate action initiatives taking shape in the United States and the European Union. Nicolas Lockhart, Andrew Shoyer, and Brittany Bolen.

Nic is a partner is Sidley's Geneva office and a member of the firm's Global Arbitration, Trade and Advocacy practice. International trade and sustainability is a particular focus for Nic, and he's advised governments and commercial stakeholders on international environmental law, and on the interface between international environmental and trade law. Nic has contributed to papers published by the world economic forum on trade policy and circular economy.

Andy Shoyer leads our firm's Global Arbitration, Trade and Advocacy practice and is a partner in the firm's Washington, D.C. office. He focuses on the implementation and enforcement of international trade and investment agreements. He also served in the office of the U.S. Trade Representative, most recently as legal advisory in the U.S. mission to WTO in Geneva.

And Brittany is a senior policy advisor in the firm's Environmental and Government Strategy practice in the firm's Washington, D.C. office. Her practice involves counseling and advocacy on complex environmental regulatory and policy matters across the executive branch and Capitol Hill. She is the former head of the EPA's office of policy, and previous served as counsel for the U.S. Senate Committee on environment and public works.

Nic, Andy, and Brittany, great to have you on the Podcast today.

**Nicolas Lockhart:**
Sam, it's a pleasure to be here.

**Andy Shoyer:**
Thank you, Sam.

**Brittany Bolen:**
Thank you, Sam.

**Sam Gandhi:**
Last month, world leaders signed off on a new climate change agreement after negotiations at COP26, the UN climate summit in Glasgow, Scotland., And some countries committed to ambitious emission cutting, among them the EU, and the EU's so-called Fit for 55 package proposes legislation to

meet the continents climate ambitions. Nic, just on the face of it, Fit for 55 sounds monumental. What does it actually cover?

**Nicolas Lockhart:**
Thanks, Sam. Well, I think monumental really is a good word to describe this project. It’s a wide-ranging set of legislative proposals by which the EU aims to reduce greenhouse gas emissions by 55 percent, that’s where we get the name from, by 2030 as compared with 1990 levels, and then to move on to achieve climate neutrality by 2050. The legal context of this thing is that it implements the EU’s Paris Agreement commitments, as well as the EU’s new climate law, which was adopted this year, and is part of the EU’s broader green deal, which aims to achieve climate and biodiversity objective. It’s a group of 13 different legislative proposals, which are interlocking and interdependent, and they’re designed to decarbonize the EU economy as a whole. It’s going to affect all parts of economic life across all sectors.

The most affected sectors are going to be the ones that are the most carbon intensive. So, that would be things like energy and power generation, heavy industries like metal, cement, fertilizer, glass production. But there’s also a new focus in these proposals on transport and buildings with transport covering road transport as well as air and sea transport, and it extends to agriculture and forests.

Across the 13 proposals, there’s also a mix of policy tools that the EU is using to try to achieve these objectives. So, there’s a mix of regulatory incentives and mandates, as well as a lot of compliance reporting. So, price is a key element of the policy tools that are being used. So, they are putting a price on carbon emissions for many industries, and they’re also revising the energy taxation directive to tax fossil fuels higher than renewables.

Amongst the mandates, there are a series of product standards, which I think some of which are quite interesting. So, for cars and vans, there are going to be stricter emission standards, moving to zero emission cars and vans by 2035. And there are also going to be fuel standards for aviation and shipping, the goal being to boost the use of sustainable less carbon intensive fuels. That’s going to start with limited requirements and gradually ratchet it up from 2025 all the way to 2050.

I think given the scale of this, given the number of different proposals and the way in which it touches all parts of economic life, it's really hard to overstate its impact. It's going to fundamentally change the rule book, and it's going to fundamentally change the way business is done in the EU. And that's going to have an impact for businesses, not only in the EU, but elsewhere, too. For example, many imported goods are going to have to meet new standards or pay charges under Fit for 55 proposals.

**Sam Gandhi:**
Nic, I want to follow up on that. Where is the EU on the progress of legislation, is this likely to go into law? Do you think it's a long transition? Where is the EU on it?

**Nicolas Lockhart:**
Yeah. So, the proposals themselves came out in July. The first step in the EU legislative processes is for the commission to make proposals, which it did in July. So, we're now five months in, and so, we now have a little bit of an insight as to how this is going to unfold.

The second step in the process is that the proposals go to the council, which consists of the EU member states, the 27 member states, and the European Parliament. And both in the council and in the Parliament, they have started meeting to discuss the Fit for 55 proposals. I think it's fair to say that because of the number, size, and complexity of the proposals, this is not going to be a rapid process.

One of the questions that we've had though was whether there would be an attempt to keep all of the proposals together and move them through as a single package, or to split them up and identify priorities just because that might be easier. What we're seeing so far is a real desire to try to keep the package together because, as I said, the different elements of the package are interconnected and interdependent, and there's a recognition of that fact by the member states and in Parliament.

I think it's fair to say that there is strong political will to push through the package, and there are shared high-level climate ambitions as a matter of principle, but the devil will be in the detail and questions are already being raised about a number of the proposals, and differences are emerging.

Some of those questions relate to how quickly to progress. So, to give you one example, on the cars and vans proposal, there are some questions as to whether 2035 is too early to move to emissions free vehicles, and others relate to ways in which to expand the climate legislation.

So, to give you another example, on carbon pricing there are proposals to expand that, and there are some questions coming from some of the member states as to whether to make those expansions.

So, I think it’s going to take some time. I think we will start to see legislation emerging in the course of 2022, certainly that is what the commission would want to see, but it probably will depend on whether everything gets held together or split up. So, it may not be until 2023, but we’ll just have to wait and see, Sam.

**Sam Gandhi:**
And Andy, let me go to you in terms of the implications for businesses, and particularly with regard to World Trade Organization rules.

**Andrew Shoyer:**
Sam, clearly the most important impact for business will be higher costs. That is, in fact, the main thrust of the EU’s legislative efforts. The EU is trying to introduce a price of carbon and solve, essentially, a market failure. So, businesses that are more carbon intensive are going to feel those costs, both with respect to the measures that are linked to the emissions trading scheme, but also, the command-and-control regulations in terms of emission standards.

Conversely, businesses that are looking to take advantage of the greener future, that are betting everything on green industry, will see opportunities because the Fit for 55 measures create very friendly conditions for them to thrive. And so, there’s no question that one of the most profound shifts will be the incentives that the measures cause, and the impact on those businesses that take advantage of them and shift away from carbon intensive activity.

One of the biggest concerns, of course, within the European Union, is the impact on European companies. Will they feel, disproportionately, the impact of these costs, and that's where the World Trade Organization rules come in.

One of the things that, I think a lot of businesses are not aware of, is that the World Trade Organization rules apply to all of these measures, even though they don't sound in trade, and indeed, the European Union has already anticipated that. They focused, however, pretty narrowly on anti-discrimination. That is, they have conceded, the commission, that these measures will be judged ultimately under WTO rules and that they need to be nondiscriminatory. That is, that they can't favor European producers and European goods over foreign producers and there the like products. However, WTO rules are much broader than that, and so, there will be rules that will be important, that companies, particularly U.S. exporters, from other trading partners into Europe, will want to take into account in their advocacy to ensure that the WTO rules are used to encourage a level playing field. And that in an effort to avoid a disproportionate cost on European producers, that the European governments don't go too far in the other direction, and I think that's going to be the key consideration in looking at these international trade rules.

**Nicolas Lockhart:**
Sam, if I can just pick up on a couple of points that Andy just made. The first is, I think it's worth underscoring, that the EU sets for itself as part of its high level of ambition, the ambition of ensuring that what comes out of the legislative process is consistent with its WTO obligations, and that is, as Andy says, really positive for the EU's trading partners and for business because it will ensure that the rules strike the right balance between allowing trade to continue and securing the environmental objectives that the EU wants to achieve.

I think another point on that is the EU has recently recognized itself in a series of joint statements by the commission, the Council, and the Parliament, the need for more international engagement and more international cooperation on these trade related environmental measures. And I think that's also a good thing that the international community should try to come together and approach how to tackle some of the regulatory challenges in a cooperative way.

In those same statements, the EU has recognized that there are some questions about the WTO consistency of regulation where an importing country tries to regulate how goods are produced in third countries, and they see that, that does raise issues for some of the proposals that are coming in Fit for 55.

So, again, I think it's valuable that the EU recognizes the need for cooperation, the need for WTO consistency, and that there are some questions around WTO consistency.

Second point that I want to make is that when we think about WTO consistency, we should not lose sight of international environmental law. The measures that we're talking about, these trade related environmental measures, are kind of legal hybrids. They have a foot in two different legal worlds. One of those legal worlds is the international trade law world, and the other is the international environmental law world.

So, the international legal and governance framework for these measures comprises both international trade law and international environmental law. I think it would be hard for a WTO member to justify action that violates WTO law on the basis that the measure pursues environmental objectives, if the measure is not pursuing those environmental objectives in a way that is consistent with the internationally agreed rules and principles in environmental law. And I think, again, it would be healthy to have a discussion at international level to try to bring the trade and the environmental law worlds together, and to make sure that measures can only be justified under WTO law when they are compliant with rules and principles in international environmental law.

**Sam Gandhi:**
Brittany, there was one key announcement that was made during COP26 and that was the formal launch of the global methane pledge by President Biden and European Commission President, Ursula von der Leyden. What is the global methane pledge?

**Brittany Bolen:**
Sure. So, there were a number of announcements coming out of COP26, and the global methane pledge is noteworthy, Sam, because it really marked the first international commitment on methane. You know, methane

is known to be considered a potent greenhouse gas with a higher global warming potential than carbon dioxide, though shorter lived in the atmosphere, and there is this effort to address methane emissions to try to get some short term reductions in a meaningful way. The global methane pledge was announced by the EU and U.S. in September, and at COP26 they announced the formal launch of the pledge, and at that time they had over 100 countries that signed the pledge.

The signatories have pledged to limit methane emissions 30 percent compared to 2020 levels by 2030. While there were more than 100 countries that signed on to the pledge, some of the major methane emitting countries, such as Russia, China, India did not join the pledge. There is this question about implementation of the plan and how effective it may be, and what I’ve noticed, this is significant, certainly, but it is voluntary. It’s not binding on the nations that sign it, and so, there’s no obligation that they necessarily cut methane emissions by a set amount.

I know that the EU and the U.S. have stated that they expect this pledge to get more teeth over the years as countries will take stock of their methane reductions annually at the forth coming COPS.

**Sam Gandhi:**
You know, I understand that there’s a major focus on aggressive reduction of methane in the energy sector and in other sectors, but from just a pure nuts and bolts standpoint, how does the U.S. aim to reduce its emissions and what does that actually look like?

**Brittany Bolen:**
So, since we’re talking about methane, I’ll just focus on methane for a minute. In conjunction with the global methane pledge that was announced, formally launched at COP26, the U.S. did release a methane emissions reduction action plan. Sam, what you saw with that plan, it called for substantial reductions in methane emissions across various sectors including, as you noted, the energy sector, and we’ve seen already, the U.S. Environmental Protection Agency issued two proposals to regulate and further reduce methane emissions from the national gas sector. You also see, in the methane plan, a call for EPA to further regulate landfills. You also see action at the administrative level with the agricultural sector,

which is a main contributor to methane emissions, including incentives to farmers to adopt methane mitigation practices.

So, there's a major focus on aggressive, I think, short term abatement of methane in the energy sectors specifically, as well as some of these incentives for other sectors, such as the agricultural sector, to reduce their emissions.

So, that's just with respect to methane, Sam. But taking a step back, generally, when you're looking in the U.S., and you ask about the nuts and bolts, emissions reductions, you're looking at what's known as the U.S. nationally determined contribution under the Paris Climate Agreement. The NDC as it's called. That NDC put forward 50 to 52 percent economy-wide net greenhouse gas emissions reduction by 2030 goal. Okay, and so the question is, how does the U.S. meet that goal? And the U.S. administration has identified various regulatory actions that are key to getting those emission reductions. It's noted legislative proposals that are needed to meet those reductions, and then it's also noted just general trends among the private sector. And then lastly, some state and local efforts here in the U.S. that we're seeing play out that are also contributing to those reductions.

On the federal level, the big components, I think of the emissions reductions in meeting the NDC, it's focused on the power sector. So, you will see my former agency, the EPA, is working on a rule to further regulate greenhouse gases out of the power sector. We're seeing the transportation sector, EPA finalized new standards for light duty cars and trucks. And you see there will be rules for buildings, and energy efficiency, the industrial sector, and so on.

**Sam Gandhi:**
Brittany, let me follow up on one thing with you. How much of this is irreversible, meaning, when we talk about the U.S. making these commitments, we're really talking about the Biden administration moving forward to implement rules to do this. How much of this is really irreversible? Or could we be in a situation in which we have a new administration, a new Congress, as early as 2024, cutting back on this, and

how productive will these rules really be in the long term in terms of saving the planet?

**Brittany Bolen:**
The way in which our system is in the U.S., it does open up that uncertainty for the regulated community because of a change in administration. And I think though there is increasing acceptance by consumers and by the regulated community for these sort of regulatory actions, there still will be judicial challenges, and of course that takes time to play out. You know, in fact, as I was discussing the power plant regulations, right now, pending before the Supreme Court, is a challenge that involves standards that were initially set by the Obama administration that then were revised under the Trump administration, and now the Biden administration has announced a reconsideration. And so, that's just one example where an initial rule that was put in place in 2015, it's now going to have it's day in court essentially, in 2022, seven years later, and in effect, in the meantime, there still hasn't been a standard in place. And so, I think there is uncertainty, and while I think the regulatory proposals may not necessarily stick, just due to potential challenges, the private sector and just the market shifts are there, such that there is going to be meaningful significant emissions reductions that help put our planet on the right path.

**Nicolas Lockhart:**
Sam, if I could just offer an international perspective on that I'd make three points. The first is that for emissions reductions to really work, we're talking long term. This needs to be sustained over time. So, as Brittany said, the U.S.'s NDC is a 50 to 52 percent reduction by 2030, and then you know, moving from there to 2050. So, these are really long-term changes in the way that we consume carbon in our economies, and you need those changes, really, to be sustained to have that long-lasting impact.

The second point that I would make is that we really need the U.S. to be engaged actively in these efforts because the U.S. is one of the biggest emitters of carbon just because of the size of the U.S. economy. So, it's really important to the effort to have the U.S. engaged.

The third point that I would make is that the U.S. plays, and will continue to play, I think, a really important role in persuading other countries to make more ambitious climate reduction commitments. And I think it's really important, again, for the U.S. to be actively engaged domestically so that it can continue to play that role of persuading others to make more commitments themselves.

**Sam Gandhi:**
You're listening to the Sidley Podcast and we've been speaking with Sidley partners Nic Lockhart, Andy Shoyer, and Brittany Bolen about the EU's Fit for 55 climate action package and parallel plans by the U.S. to reduce carbon emissions.

So, let me move to one other topic, which is carbon pricing, and that's grabbed a lot of attention as an important way to reduce emissions. The World Bank reports that there are 65 carbon pricing initiatives worldwide covering about a fifth of global emissions with 45 national schemes and 34 regional schemes. Nic, what role does carbon pricing play in the EU's Fit for 55 proposals?

**Nicolas Lockhart:**
Sam, carbon pricing, I think, a key role in the Fit for 55 proposals, and in general, in the EU's climate ambitions. If you ask an economist, an economist will say that carbon pricing is one of the most effective ways to reduce greenhouse gas emissions and that's because it works by increasing costs that create an incentive for producers to reduce carbon consumption in production, and hence, to reduce those costs.

The carbon price covers the hidden costs of emissions to the planet. So, for example, the costs that we incur as a result of extreme weather events, Ursula von der Leyden at COP26 put this quite nicely. She said we need to put a price on carbon because nature cannot pay that price any longer.

The EU has had a successful carbon pricing system since 2005. It's the largest of its type in the world, and the data suggests that it has led to a 42 percent reduction in emissions for the covered sectors. It's called the emissions trading system. It's a cap-and-trade scheme, which means that there is an overall cap on the quantity of carbon emissions. That cap is reduced annually by the regulator, and is divided up into allowances, and the allowances are then allocated amongst producers, some of them for free and some of them paid for through an auction. Producers then have to surrender those allowances for each ton of carbon that they emit, and so, what that creates is a regulated market for these carbon allowances where the regulator controls the supply and creates the demand by requiring that producers surrender allowances for their production.

The EU has this cap-and-trade scheme, and it applies that to high carbon intensity industries like, as I said earlier, like power generation, energy, heavy industry, and metals, and under Fit for 55 the proposal is to strengthen this emissions trading system.

So, the idea is on the one hand that they will extend it to cover road transport and buildings, which have so far been left out, that some of the free allowances to producers for some sectors, including aviation, will go, that there will be a faster annual drop in the cap so that we ratchet down the aggregate emissions that are allowed for the covered sectors, and what this is going to mean is that within the EU, the price of carbon for the covered sectors is going to go up. And actually, we've recently seen the price of EU allowances trading at record highs, and that price has been approaching 100 euros per ton, and some market analysts are suggesting that it could go as high as 200 euros per ton.

So, these are quite significant costs, and so, in Fit for 55, another proposed feature of the carbon pricing system is to charge a carbon price to imports, so, for some imported goods, to account for the carbon that's consumed in the production of those goods in a third country. The EU has so far chosen the five sets of goods that would be covered. They are aluminium, cement, electricity, fertilizer, and iron and steel, and it says it's chosen these because they involve high carbon intensity production. And so, what will happen is when these goods are imported into the EU, the importer will have to pay an import charge for the carbon that was emitted in the production of the good in question in the third country. And the price that will be paid will be equal to the EU internal market price within the EU's ETS at the relevant time, and the idea behind this equality of price gets to the real purpose of this proposal. This proposal is known as the carbon border adjustment mechanism or CBAM.

So, the idea is really to level the playing field between carbon costs for domestic EU producers and imported producers, to try to avoid a situation where EU consumers shift their consumption away from EU produced goods, which bare a carbon price, towards imported goods that don't bare a carbon price. So, the EU will impose a carbon charge for these categories of goods to offset the internal carbon charge. There will be exemptions for countries that have their own emissions trading system that is linked to the EUs, and there will also be a downward adjustment for any carbon price that is paid at home, and there are very recent press reports of high-level negotiations between the EU and the U.S. on what types of U.S. regulation would warrant a downward adjustment for U.S. imports to ensure that they would pay a lower carbon price.

**Sam Gandhi:**
Nic, I imagine that CBAM is a bit controversial, and maybe you can explain why.

**Nicolas Lockhart:**
It is, Sam. It is controversial. In fact, I think it's probably the most controversial feature of the Fit for 55 package, and quite a few of the EU's trading partners, including the U.S., but also Brazil, China, Russia, Indonesia, ASEAN have all raised concerns about the proposal. So, the question is why. The reason is, what the EU is effectively doing is imposing a carbon price for carbon emitted in the production process in a third country, which I've said a couple of times, and they do that even though it has no bearing on the product that emerges from the production process. If we just think about steel for a moment, what the EU would be doing is imposing a charge for carbon emitted in the production of steel, but that charge and that form of regulation has no bearing on the steel itself, steel is steel is steel, irrespective of the quantity of emissions. And under international rules, the general principle is the countries get to determine how goods are produced in their own country in according to what environmental regulations, and so, what the EU is doing here is effectively regulating an aspect of production in a third country with respect to goods that are then imported into the EU, and the Paris Agreement itself is structured in a way that respects this regulatory autonomy of a country over its own production.

So, countries get to decide by how much they're going to reduce greenhouse gases, and they get to decide in respect of which products they're going to do so, and what legal instruments they're going to use, and so, what we have here with CBAM is the EU effectively making a series of choices that in principle should be left to the exporting countries. So, whether to have a carbon price at all, if so, for what products.

So, for example, why steel and cement? Why not vegetables and meat, would be an example. What level of carbon price should there be? Why should it be the EU price with the price in the country of production for carbon — in light of supply and demand in that country — be the same, be lower, be higher? And so, countries should get to decide for themselves according to what procedures carbon prices should be charged.

So, this is controversial and sensitive, Sam, because the EU is perceived to be making these choices for the third countries.

**Sam Gandhi:**
Andy, let me shift to you in terms of the U.S. reaction. A number of years ago, the U.S. tried to do similar legislation and tried to put in place changes and certain border measures that affect climate change.

**Andrew Shoyer:**
You're right, Sam. The irony is that between 2005, 2006, and 2007 the United States basically told its trading partners, look, you people need to be much more sophisticated about how to address this market failure with respect to carbon. All you know is how to do command and control regulation, product standards, emission standards, or you know how to tax. That's not the way we should go. We should really pursue a cap-and-trade program so that we can create market incentives for people to sort of change their behavior and shift. And so, the United States was, again ironically, really proselytizing the use of exactly the kind of system that the EU now has in place.

Starting in 2007, a number of congressional leaders started to draft legislation around cap-and-trade, exactly along the lines that Nic has described with respect to the European system. At about that time, of course, there were a number of U.S. industries that found that prospect deeply disturbing, but one U.S. electric power utility, that was highly reliant on fossil fuels, partnered with its principle labor union and came out with an op-ed, and basically said, you know what, we support a cap-and-trade program. We understand that it's going to create cost of carbon, and that is definitely going to create competitive pressures for us. But we only support

Congress moving if it can also introduce something like a CBAM, a WTO compliant border measure that would effectively prevent carbon leakage; and even more so, we want that border measure to create incentives for other countries to take the kind of action that the United States is willing to lead on. And again, you have to take yourself back to 2007 when the United States was really at the forefront politically, and so, the legislation was drafted, and the way this took effect was an international emissions allowance scheme. Just as Nic described with respect to the European ETS, the United States planned on having some quantum of emission allowances, kind of pieces of paper that you had to get or buy, in order to emit a certain quantum of carbon.

Alongside of that, the idea was to create something similar for exporters and for U.S. importers of steel, cement, and other carbon intensive goods. The idea was that in order to import a ton of steel you had to have a number of these allowances, these sort of pieces of paper, that were counted based on the carbon intensity of that ton of steel. And interestingly, the idea was to discriminate, that is, to treat Chinese steel differently from German steel based on the level of activity that China or Germany had taken to address carbon emission nationally. That is, this was supposed to not only deal with the carbon leakage from the United States, but also to induce greater participation in carbon reduction efforts. In order to deal with the WTO concerns around that, there were modifications so that an importer could try to demonstrate that, that particular ton of steel coming from China was no more carbon intensive than a similar one in the United States.

These ideas got fleshed out in legislation and in the House of Representatives, that legislation moved pretty far. For good or ill, by 2009, it was clue that there simply wasn't sufficient political support in the United States to move ahead with cap-and-trade. So, it wasn't, Sam, really about this sort of CBAM. The CBAM was seen as a necessary part of getting political consensus around the domestic restrictions that people would have to live with. It simply was, at that point, you couldn't get enough support for the domestic restrictions and the legislation simply just stalled. And so, we are now at the point where the United States has much more of a regulatory focus, as Brittany has described, and it's really been others, like the European Union, that has taken the lead.

**Nicolas Lockhart:**
I think, Sam, in the way Andy's just described this, you can see why, you can hear some of those sensitivities that I was describing. You can see why other countries are sensitive about a measure like this. So, Andy started out by saying that the position that the U.S. took at the time was we should peruse a cap-and-trade and a cap-and-trade is better than a regulatory approach. It's better than taxes, and also that there would be, kind of, discrimination based on the level of the carbon reduction efforts that had been taken at home, and against an international framework where countries under the Paris Agreement get to choose for themselves what legal instruments they will use to reduce carbon, for what products, and to what extent. You can see why having one country impose a charge on imports, because the exporting country is not doing things in a certain way when the exporting country has recognized discretion under the international agreement, is going to cause a degree of sensitivity. But you can also hear, in what Andy just described, why there is a domestic push for measures like this because domestic industries are keen to ensure that if they're going to be paying a higher price for carbon regulation then they don't want to suffer in the marketplace.

So, there's a real push and pull here, and it is, I think, it's a naughty political issue both domestically and internationally, and it raises some very difficult legal questions.

**Sam Gandhi:**
Brittany, I'm going to, in this kind of legislative ping-pong ball that we're seeing, the U.S. tried to be a leader legislatively, and then we had a few years in which we didn't want to do that, and now we're seeing more legislation in the form of the Build Back Better Act that is at this point, as we speak today, stalled a bit. But what are the issues for carbon pricing in the US, and what other legislative efforts that are parallel to the Fit for 55 are trying to take place in the United States?

**Brittany Bolen:**
Sure, and one point, is following the conversation that Andy and Nic were having related to CBAM. I'll just say, I think some of those complexities with the CBAM and trying to have parity in the U.S. with a domestic price and those challenges is precisely why a CBAM was not included in the draft Build Back Better Act. And at one point it was on a list of a number of

concepts that may have been included in a Senate package, but it was ultimately, never made it into the draft.

To answer your question, Sam, on issues for carbon pricing at a high level, the views on climate have significantly evolved since the time of the cap-and-trade debate, that Andy was describing, in the mid-2000s. And you know, I just say that generally you do have this evolution of views, and I do think there is a spotlight on Congress to take action because of the limitations in the regulatory authority, and what we were discussing earlier on the regulatory ping-pong, and uncertainty with judicial reviews, and change in administrations. And so, I think all of that has dramatically shifted and that carbon pricing has emerged as one of the tools in the toolbox, so to speak, that members on both sides of the aisle have embraced, and the business community has accepted, but there continues to be this lack of consensus on the specific mechanism.

On the mechanism, is it carbon tax that sets a fixed price but the emissions fluctuate, or it is a sort of cap-and-trade scheme? Or another proposal that was floated around Congress was a clean electricity standard that focuses in on just the power sector; that proposal was ultimately pulled from the Build Back Better Act, in large part because of the complexities with the U.S. grid, and how certain producers may have been treated, and how it would have been, as a practical matter, implemented and how that would have been crafted mindful of existing laws and regulations, and so, that was ultimately dropped.

So, really what you have here is an acknowledgement that this is a space where there should be some legislative action. You know, as it stands right now, Sam, it's unclear if we will see that here in the near term. While the federal government, Sam, has not yet fully put forward this sort of carbon pricing mechanism yet, whether you know, in a regulatory sense or a legislation, I'll note that states have been taking the lead.

In the U.S. we've got a couple of different schemes, one of which is a Regional Greenhouse Gas Initiative, RGGI. That's where 11 northeastern states have developed a cap-and-trade system. California, it's had its cap-and-trade system since 2013. I know Washington state, earlier this year, enacted its own carbon pricing system, and there's several other U.S. states that are in the process.

So, while you're seeing this you know, somewhat of a vacuum here at the federal level, states are advancing it.

**Nicolas Lockhart:**
Sam, I just wanted to make an observation on Brittany's remarks about regional carbon pricing initiatives in the U.S. in relation to CBAM, because what that could mean is that I mentioned the CBAM proposal, the EU would grant a reduction in the CBAM charge for a carbon price that has been paid in the home country.

So, if you have goods that are produced, say steel produced, in a U.S. state where there is a regional carbon pricing initiative, then that price would be discounted from the CBAM charge upon importation into the EU. So, the result of that could be that some goods produced in the U.S. would enjoy a reduction in CBAM depending upon whether they were produced in states where there is a carbon price, whereas goods coming from states where there's no carbon price might not enjoy a reduction or might not enjoy such a large reduction. So, U.S. goods may face different competitive conditions in the EU depending upon carbon pricing policies adopted at the state level.

**Sam Gandhi:**
Brittany, I'm going to come back to you. We talked a lot about legislation, but we've also talked a lot about the uncertainty of legislation. And frankly, the back and forth of legislation, and I'll just kind of dare say, at some point, the unreliability of the long-term solution to the planet's problems.

How much is the investment community applying pressure here, and is that really the potential solution for a long-term salve here?

**Brittany Bolen:**
The investment community is applying significant pressure. Certainly you have publicly traded companies where we are seeing shareholders that have been vocal in advancing climate policies, and I think we've also seen investors looking where to make their investments and they see the instability in the U.S., they may opt not to make those investments. You're seeing a rise in individual companies developing their own climate pledges, and you are also seeing some of the largest and most prominent

institutional investors consider climate a major priority and that can help advance reductions in the long haul.

I also think consumer acceptance, we're seeing market rates of EV sales, rooftop solar, energy efficiency products that are being purchased, and so, I do think consumer acceptance and demand for those type of products has increased. And so, there are already investments, Sam. I know we've talked a lot about what Congress has not done, but I will just note, in November, that historic infrastructure legislation, a bipartisan infrastructure bill that was over a trillion dollars' worth of federal investments here in the U.S. was enacted. And it's significant, and part of that included major funding to support climate initiatives under the umbrella of infrastructure, namely EV infrastructure and advancements to the grid. There was also funding for carbon capture, clean hydrogen. So, there has already been significant amount of federal funding that's available, and I think you can't walk that back. There are those significant investments now that the government's made, but there's also this private sector shift and pressure that I think will keep the momentum regardless of Build Back Better Act.

**Sam Gandhi:**
So, just to wrap up the podcast. What are you all hearing from your clients regarding Fit for 55 and other climate initiatives, and what seems to be the key issues on their minds? Andy, I'm going to go to you first.

**Andrew Shoyer:**
Sure. Sam, we're certainly hearing from U.S. exporters who are concerned about losing market share in Europe and want to understand how the WTO and international trade obligations could work to help them, again, in their advocacy, and try to understand how they will impact the decisions as the European officials implement Fit for 55. We're also hearing from companies that produce globally, right, so for those companies that are producing outside the EU as well as inside the EU, they're also trying to make intelligent decisions about how these measures are going to affect them, and frankly, how they can influence the system so that they don't get left behind.

**Sam Gandhi:**
And Nic, what are you hearing on your end?

**Nicolas Lockhart:**
So, I think Andy just described it very well. I think in addition to the points that Andy just made, I would say that there is a lot of interest from clients at the moment, in understanding carbon regulation, carbon markets. That's partly been prompted by the recent decision from COP26 on standards for carbon offset projects. There is some concern about fragmentation across different markets, which can present challenges for business. And then, well, as Andy said, there is, I think, concern that some of these changes will not be consistent with international trade rules and will give rise to trade protection.

**Sam Gandhi:**
Brittany, to wrap up on the U.S. side, what are clients telling you?

**Brittany Bolen:**
Well, there are some energy or energy intensive industries that are and want to continue to be part of the climate solution, but they come to us with concerns by the vast shift in policy on the federal level and what some may view as too much too fast, or as exceeding an agency statutory authority. We also hear from those trying to access federal funds for decarbonization efforts, especially those funds now made available under the new infrastructure law, and we hear from those trying to obtain necessary permit approvals in a timely fashion for clean energy projects. I'd say, across the board, companies generally want regulatory certainty, and they want to participate in and engage with regulators and legislators on Capitol Hill in U.S. efforts to address climate.

**Sam Gandhi:**
We've been speaking with Sidley thought leaders, Nic Lockhart, Andy Shoyer, and Brittany Bolen about climate action initiatives in the EU and the U.S. and their potential impact on businesses. Nic, Andy, and Brittany, this has been a very informative look at potential new climate legislation. Thanks for being on the podcast.

**Nicolas Lockhart:**
Thanks, Sam.

**Andy Shoyer:**
Thank you.

**Brittany Bolen:**
Thanks, Sam.

**Sam Gandhi:**
You've been listening to the Sidley podcast. I'm Sam Gandhi. Our executive producer is John Metaxas, and our managing editor is Karen Tucker. Listen to more episodes at Sidley.com/Sidleypodcast and subscribe on Apple Podcast or wherever you get your podcasts.