



UNITED STATES COUNCIL FOR
INTERNATIONAL BUSINESS

June 24, 2009

The Honorable Nancy Pelosi
Speaker of the House
United States House of Representatives
Capitol Building H-232
Washington, DC 20515-6501
Fax: (202) 225-4188

The Honorable Charles B. Rangel
Chairman, Committee on Ways and Means
United States House of Representatives
1102 Longworth House Office Building
Washington, DC 20515-6348
Fax: (202) 225-2610

The Honorable Henry A. Waxman
Chairman, Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515-6115
Fax: (202) 225-2525

Dear Speaker Pelosi and Chairmen Rangel and Waxman:

We applaud your priority attention to addressing climate change and your leadership in Congress on advancing responsible and internationally-minded domestic solutions to a global problem. We also commend the efforts of both the Committee on Energy and Commerce and the Committee on Ways and Means to offer thoughtful solutions to the various trade and competitiveness-related challenges associated with climate legislation.

As organizations that wish to support responsible and effective domestic and international responses to climate change, we are concerned with the potential repercussions of certain aspects of the trade and competitiveness provisions of the American Clean Energy and Security Act of 2009 as well as changes which have been proposed to the Act.

In order to achieve a successful and lasting domestic solution for addressing climate change, U.S. legislation must abide by U.S. international trade obligations and should encourage action by other major emitting countries. We are concerned that some provisions contained in the Energy and Commerce Committee's text ("Energy Committee Text" or "Text") – and potential changes to the Act that we understand have been proposed by the Committee on Ways and Means ("Ways and Means Committee Proposal" or "Proposal") – are likely to cause friction with U.S. allies and conflict with U.S. obligations under international trade rules.

The importance of placing domestic legislation in the international context

We believe that the measures under the Title "Ensuring Real Reductions in Industrial Emissions" (Title IV, Subtitle A, Part F in the Energy Committee Text), which address carbon leakage and U.S. competitiveness, should encourage the development of an international framework for addressing the issues.

We applaud the Ways and Means Committee for attempting to place domestic climate legislation more firmly in the context of ongoing international discussions in their Proposal. The amendments contained in the Ways and Means Committee Proposal (at Section 903) acknowledge the concerns that have been raised by our organizations that the United States should seek international consensus with respect to relying upon trade-related climate measures.

As the Ways and Means Committee rightly suggests, the United States should seek to achieve consensus not only on an international framework agreement on climate change at the UN Framework Convention on Climate Change (“UNFCCC”), but also on the use of trade- or competitiveness-related aspects of domestic climate change efforts which could violate international trade rules or encourage retaliation. Importantly, the Proposal would prohibit the use of a unilateral border measure if the Administration can achieve a multilateral framework agreement on trade-related aspects of climate change.

We encourage you to build upon the draft language proposed by the Committee on Ways and Means, and incorporate language which more explicitly advocates for negotiating an international “peace clause” to avoid implementing border adjustment mechanisms among major emitters of greenhouse gases in an appropriate international forum. One potential venue for the kind of negotiation is the Major Economies Forum, which gathers climate and economic experts from the G-8 and other major economies including Brazil, China, India, and South Africa.

Carbon leakage versus U.S. competitiveness

At the same time, certain aspects of the Energy Committee Text and Ways and Means Proposal could encourage friction with U.S. allies and subsequent WTO challenges. In order to qualify for an environmental exemption under global trade rules, it is important to frame domestic efforts to make clear that emission rebates and any potential international reserve allowance program are intended and designed to further an environmental good rather than to improve the competitiveness of U.S. businesses.

Provisions in the current Energy Committee Text – as well as the hearings and discussions surrounding the effort – seem to suggest that these measures are being taken to improve the competitiveness of U.S. industries rather than to deter carbon leakage. This is particularly true with respect to the purpose of the international reserve program (Title IV, Subpart 2, Section 766(a)(2) in the Text), which links the program to “the competitive imbalance in the costs of producing or manufacturing primary products in industrial sectors resulting from the difference between – ‘(A) the direct and indirect costs of complying with this title; and ‘(B) the direct and indirect costs, if any, of complying in other countries with greenhouse gas regulatory programs, requirements, export tariffs, or other measures adopted or imposed to reduce greenhouse gas emissions.”

The Ways and Means Committee Proposal is even more likely to be challenged by U.S. trading partners at the World Trade Organization, as it strongly suggests that these measures are being taken to improve the competitiveness of U.S. industries rather than to deter carbon leakage. The Proposal directly ties the early implementation of border measures to unit cost of production increases in the United States (see Sections 904 and 905), rather than to a finding of significant carbon leakage.

At the same time, the Ways and Means Committee Proposal would largely eliminate the discretion of the President with respect to the use of border measures. The Text which emerged from the Energy and

Commerce Committee struck a better, though not perfect, balance by giving the President some discretion with respect to implementation and further use of trade-related measures. (The Energy Committee Text permitted the President to choose between implementing a border measure and continuing the free allocation of emissions to an affected industry in the face of manufacturing output in countries which are not taking comparable action to the United States.) In the absence of an international consensus over the use of trade-related climate measures, the Ways and Means Committee Proposal would largely remove the discretion of the President to decide against imposing a border measure by requiring the President to submit a national interest waiver that would need to be approved by a joint congressional resolution in order to preclude its imposition.

We believe that the President should have wide discretion to decide whether or not to impose or continue trade-related climate measures, and that Congress should tie the continued reliance on emission rebates and any imposition of border measures to a finding of significant carbon leakage. If the President determines that emission allowance rebates have sufficiently mitigated carbon leakage or an international reserve allowance program is unlikely to mitigate leakage or is unfeasible, the President should have the flexibility to ratchet down trade-related measures. Doing so would bolster the credibility of the claim that these measures are aimed at reducing carbon leakage rather than protecting U.S. firms and would be less likely to be seen as disguised protectionism internationally.

Neither the Text nor the Proposal provides sufficient flexibility for the President to ratchet down trade-related measures even if the President finds that significant carbon leakage has not occurred.

We would recommend adjusting the criteria for Presidential Determinations with respect to emission allowances and an international reserve allowance program to broaden the discretion of the President to decide if and how to respond following a determination under subsection (b) of Title IV, Subpart 3, Section 767 of the Energy Committee Text. If, following a presidential assessment under subsection (c), the president determines either that emission allowance rebates have sufficiently mitigated carbon leakage or an international reserve allowance program is unlikely to mitigate leakage or is unfeasible, the President should have the option of phasing out the emission allowance rebates.

For example, Congress could include qualifying language to Section 767(c)(3)(B) of the Text to implement an international reserve allowance program *only if the president determines that such a program is feasible and is likely to mitigate carbon leakage* as well as a new subsection 767(c)(3)(D) *take no action if the President has determined that significant carbon leakage has not occurred*. This change would help tie the continued reliance on emission rebates and border measures to a finding of significant carbon leakage.

Encouraging actions by major emitters and avoiding friction with U.S. allies

Current language in the Text and Proposal also construes comparable actions by other countries too narrowly and may hinder efforts to achieve a global climate agreement. Current language fails to exempt from border measures countries which are taking steps to comply with commitments made under an international agreement, for example under the UNFCCC. Only a small subset of countries – such as least developing countries and those countries which have committed to binding emissions reductions at least as stringent as those for the United States – are exempted from border measures.

Permitting the application of border measures to a country that has agreed to take steps – for example under the UNFCCC – which are deemed by the United States and the international community to be in

line with their common but differentiated responsibilities, will harm relations with U.S. allies in the developing world. Conversely, exempting countries which commit to an international framework agreement based on their common but differentiated responsibilities would provide a powerful incentive for those countries to be inside rather than outside of an agreement.

Congress should broaden the language used to assess global output in eligible industrial sectors to cover parties to an international agreement to which the United States is a party, such as an agreement under the UNFCCC, who are making good faith efforts to comply with their commitments under the agreement.

Linking trade, innovation, and the ability to export clean technology

Finally, we encourage you to link innovation and trade more closely with the ability of the United States to deliver clean technologies to the developing world in the Act. We believe the provisions related to technology transfer contained in Title IV, Subtitle D (Exporting Clean Technology) of the Energy Committee Text should be expanded to draw links between access to technology, intellectual property protection and liberalized trade in environmentally-friendly goods and services.

Congress should make clear the importance of protecting intellectual property for promoting innovation and delivering clean technologies to developing countries. The Act should note the importance of protecting all intellectual property rights of green technologies as well as the importance of eliminating other non-tariff barriers to trade that weaken or impede the use of intellectual property rights. Congress should also urge the Administration to resist the range of trade-distorting or IP-weakening mechanisms that governments have proposed. In particular, we are concerned about proposals that would compel technology providers from developed countries to enter into joint ventures to share commercial know-how with developing country partners or to make new technologies available to the developing world at below-market prices.

Another important method for facilitating the export of clean technologies abroad is to lower tariffs and other trade barriers on environmentally-friendly goods and services as the United States and European Union have suggested in major international forums including the WTO, G-8 and UNFCCC COP-13 in Bali. Emphasizing the need to conclude an environmental goods and services agreement compliments the messages contained in the legislation about the importance of delivering clean technologies to the developing world. Congress should instruct the U.S. Trade Representative and the Department of State to use all possible channels to pursue an agreement to reduce or eliminate trade barriers on environmental goods and services, including investigating the feasibility of an agreement at the OECD.

Thank you for your consideration of these comments. We look forward to working with you to address the urgent issue of climate change, and appreciate your continued leadership.

Sincerely,



William A. Reinsch
President
National Foreign Trade Council



Peter M. Robinson
President and CEO
U.S. Council for International Business