



Promoting U.S. economic interests and global environmental goals through climate legislation

NFTC welcomes the priority attention of congressional leadership to addressing climate change as well as efforts by the Obama Administration to promote internationally-minded solutions to a global problem. As an organization which wishes 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 (ACES) as it passed the House of Representatives on June 26. NFTC is particularly concerned about the potential negative consequences of carbon tariffs or border adjustment measures on relations with major U.S. trading partners and the global trading system.

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 incentivize action by other major emitting countries. Key provisions under consideration by Congress, aimed at addressing carbon leakage and U.S. competitiveness, are likely to: do little to incentivize cleaner production abroad; cause friction with U.S. allies; conflict with U.S. obligations under international trade rules; and limit the ability of President Obama to implement a climate regime effectively. At the same time, U.S. legislation could do more to encourage U.S. green exports and support the protection of intellectual property rights that will help the United States create a vibrant 21st Century clean energy economy.



Summary of NFTC recommendations

1. Domestic legislation should encourage a global agreement on climate change, including an international framework for dealing with trade-related climate measures. The Senate should build on the positive language which was included in ACES to establish such a framework while advocating for a peace-clause among participants in a climate agreement.
2. Regardless of whether an international agreement can be achieved, U.S. trade-related climate measures such as free emission allowances and border taxes and adjustment programs must comply with U.S. trade obligations and should promote trade rather than discourage it. Congress must design a framework where implementation or continued reliance on trade measures is: subject to the full discretion of the President; applied only in a way that recognizes and encourages emissions efficiencies by foreign producers; and based upon clear evidence of a U.S. environmental interest. NFTC opposes the mandatory implementation of a unilateral border adjustment measure and efforts to limit the discretion of the President with respect to their application.
3. Efforts to promote innovation and lower barriers to U.S. green exports would benefit the environment and the economy, and should be a priority of Congress. Thus far, congressional efforts to provide a framework for exporting clean technology have failed to include any mention of global trade in green goods and services, and have only touched upon the importance of protecting intellectual property rights to creating new solutions to climate change and green jobs in the United States. Emphasizing the importance of lowering green trade barriers and promoting domestic innovation would enhance legislative efforts to deliver clean technologies to the developing world and help create the green jobs that will accelerate recovery of the U.S. economy.

Encouraging a trade framework through multilateral climate negotiations

The best way to integrate a global climate framework into the international trading system is to encourage an understanding among major emitting countries about the use of trade-related climate measures. For this reason, NFTC endorses congressional efforts to encourage President Obama to negotiate an international framework agreement on the use of trade-related climate change measures such as free emission allowances, carbon taxes and border adjustment programs contained in ACES at Section 766, "United States Negotiating Objectives with Respect to Multilateral Environmental Negotiations."

NFTC hopes the Senate will build on the language in Section 766 by advocating explicitly for a standstill pledge or peace clause among major emitters during which time border adjustment measures would not be applied to parties to an agreement. NFTC also supports the effect of the Rule of Construction contained in Section 767(b)(4), which presumes a climate agreement submitted or signed by the President is consistent with the negotiating objectives set forth in Section 766.

NFTC opposes congressional efforts to require the President to achieve specific concessions or trade remedies through international climate negotiations, which would tie the Obama Administration's hands and make an international agreement more difficult.

The problem with border measures



Regardless of whether an international agreement can be achieved, U.S. trade-related climate measures must comply with U.S. trade obligations and should not provoke a trade war.

NFTC is concerned that, if an international agreement cannot be reached, ACES would establish a framework which is likely to violate international trade rules, make it more difficult to achieve a global agreement on climate change, and interfere with President Obama's ability to balance U.S. environmental and economic interests through the proposed climate regime.

While global rules provide for the use of trade measures to address environmental issues, they also require that "a connection must be established between the stated goal of the climate change policy and the border measure at issue" and that "the measure must not constitute a means of arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade," as the World Trade Organization noted in a recent report.¹

It is difficult to design a border measure in a way that satisfies these criteria. As Jeffrey Frankel of Harvard University has written, "border measures to address leakage need not necessarily violate the WTO or sensible trade principles, but there is a very great danger that in practice they will."²

¹ Trade and Climate Change, WTO-UNEP Report, 2009,
http://www.wto.org/english/res_e/booksp_e/trade_climate_change_e.pdf

² Jeffrey Frankel, Addressing the Leakage/Competitiveness Issue in Climate Change Policy Proposals, 2009,
http://www.wcfia.harvard.edu/sites/default/files/Frankel_Addressig.pdf



NFTC believes that the framework established under ACES for implementing border measures is problematic for the following reasons:

1) The Act, as it passed the House, departs from the flexibility that had been provided to the President in earlier drafts to determine whether or not to implement a border adjustment program. By requiring congressional approval of the President's decision to elect against using a border measure (Section 767(b)), Congress has introduced a political element into the decision-making process, which U.S. trading partners will argue is as likely to be fueled by a desire to protect domestic industry as by an interest in protecting the environment. As Jacob Werksman of the World Resources Institute suggests, the legislation "automatically sets the switch for border measures to 'on' and makes it harder to turn it off."³

2) The use of a border adjustment measure is not tied to a finding of carbon leakage abroad. The Act currently requires the President to impose a border measure based on a Presidential Determination related only to the amount of industrial production that occurs outside of countries with comparable or sufficient policies to address climate change -- without sufficient regard as to whether carbon leakage has increased as the result of U.S. climate policies.

3) It is unclear if or how the border adjustment mechanism proposed in the legislation would encourage innovation and energy efficiency improvements by producers in developing countries. If the United States seeks to qualify these provisions under the exemption provided under international trade rules (GATT Article XX) relating to the conservation of exhaustible natural resources, then demonstrating a commitment to further an environmental good via an international allowance program which incentivizes individual foreign firms to go green is likely to be important. Just as the current emission rebates envisioned in ACES is designed to promote energy efficiency and innovation domestically, any framework which provides for the imposition of border measures should be designed in such a way to encourage foreign firms to become more efficient and less carbon intensive. Carbon tariffs should not be blunt or indiscriminant.

Redesigning trade measures

While we recognize some political utility of providing a framework for the unilateral use of trade-and competitiveness-related climate measures if an international agreement cannot be reached among major emitters, congressional guidance must ensure that any initiation of border adjustment measures and long-term reliance on free allowances are last resorts, subject to the discretion of the President, and utilized only to further an environmental good -- to combat carbon leakage. If there is no environmental benefit to using trade measures (that is, if carbon leakage is not occurring), the President ought to have the ability to discontinue free emission allowances and refrain from employing a border adjustment mechanism.

The Senate should ensure that the criteria for Presidential Determinations with respect to emission allowances and an international reserve allowance program make clear that trade measures are taken to further an environmental good. In particular, Congress should tie the continued reliance on emission rebates and use of border measures to a finding of carbon leakage.

³ Alan Beattie and Fiona Harvey, "Border taxes linked to cap-and-trade laws," Financial Times, 2009 June 29.



The Senate could include qualifying language in Section 767(d)(1)(C)(ii) 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*. NFTC also strongly supports broadening the discretion provided to the President by deleting Section 767(b)(1)(B), which would require congressional approval of any decision by the President to elect against implementing a border measure.

Implementing these changes would bolster the credibility of the claim that these measures are aimed at reducing carbon leakage rather than protecting U.S. firms.

Promoting green jobs through green trade

In order to promote green jobs in the United States, it is essential to lower trade barriers to U.S. environmental goods and services abroad and make certain that other countries protect the innovation and intellectual capital behind U.S. technologies. Yet while the Act contains an entire section on “Exporting Clean Technology” [Title IV, Subtitle D, Sections 441-446], it says little about promoting U.S. exports of green goods and services. The Senate has an opportunity to make clear in the Act the importance of encouraging new export markets for U.S. green technologies and for delivering them to the developing world.

Lowering barriers on green goods and services would benefit U.S. workers and businesses as well as the environment. In the United States, the environmental technologies sector supports nearly \$40 billion in exports and almost 1.5 million jobs. U.S. businesses and workers would benefit from the removal of disproportionately high tariffs and non-tariff barriers that U.S. exporters face on green goods and services in a large and rapidly growing export market. Lower trade barriers would help create the green jobs that will accelerate recovery of the U.S. economy.

The World Bank notes that, “it is widely accepted that trade liberalization of [environmental goods and services] would benefit the environment by contributing to lowering the costs of goods and services necessary for environmental protection, including those beneficial for climate change.”⁴ The Stern Review highlights “a clear case for lowering tariffs” on environmentally friendly goods, and that “increased trade allows effective and efficient mitigation or adaptation to climate change.”⁵

The United States, along with the EU, have proposed an “Environmental Goods and Services Agreement” as part of the Doha Development Round of trade negotiations under the World Trade Organization. The Forum on Asia Pacific Economic Cooperation (APEC) and the Organization for Economic Cooperation and Development (OECD) have also initiated important work on reducing barriers to green goods and services.

Given the economic and environmental importance of a green trade agreement, Congress should instruct the President through ACES – for example in Sections 441-446, “Exporting Clean Technology” – to use all possible channels to pursue an agreement to reduce or eliminate trade barriers on environmental goods and services.

We hope that Congress would encourage the Administration to investigate the feasibility of either a plurilateral agreement at the WTO or the initiation of negotiations via another forum such as the OECD

⁴ International trade and climate change, The World Bank, 2008.

⁵ Sir Nicholas Stern, Stern Review on the Economics of Climate Change, 2006.



or APEC. Because of the clear environmental benefits of lowering barriers to green trade, Congress should also instruct the President to introduce discussion of the benefits of eliminating barriers to green trade into international climate change discussions, including the UN Framework Convention on Climate Change.

Encouraging green innovation and technology production in the United States

Similarly, intellectual property rights create American jobs and spur economic growth across all sectors, and promote a green economy through the development of new energy solutions and environmental technologies.

Congress should be commended for acknowledging the importance of intellectual property protection for promoting innovation and delivering clean technologies to developing countries. NFTC strongly supports inclusion of the language in ACES Section 441 and agrees that, “Intellectual property rights are a key driver of investment and research and development in, and the global deployment of, clean technologies.”

Given that some countries have staked out positions in the UNFCCC negotiations that would distort trade and weaken global rules on intellectual property, we believe it is important for Congress to make clearer the priority it attaches to resisting these calls. Considering the time and care involved in negotiating an Agreement on Trade-Related Aspects of Intellectual Property Rights, NFTC believes it is inappropriate to negotiate exceptions to current rules through a climate agreement.

Congress should urge the Administration to resist the range of trade-distorting or IP-weakening mechanisms that governments, including some in the developed world, have proposed. In particular, NFTC is concerned about proposals that would compel technology providers from developed countries to enter into ventures to share know-how with developing country partners or to make new technologies available to the developing world at below-market prices. Congress should make clear that global climate negotiations must exist within the established intellectual property regime.