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Reviewing Carbon Changes and Free Allowances Under Environmental Law

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REVIEWING CARBON CHARGES AND FREE ALLOWANCES UNDER ENVIRONMENTAL LAW AND PRINCIPLES

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In late June 2009, a slim majority of the U.S. House of Representatives enacted the American Clean Energy and Security Act, a 1427 page bill finalized on the morning of the House vote.[1] This legislation was rushed to a rapid vote in the House in order to give momentum to the U.S. Senate's effort to finalize a climate law before the December 2009 United Nations Climate Change Conference in Copenhagen. At the moment that this article is being written in late November 2009, the accelerated parliamentary practices used in the House seems to have gone for naught as the Senate has yet to take up the behemoth legislation.

One by-product of the backroom procedures used in the House was that the final measure included a hastily-written requirement that importers purchase allowances beginning in 2020. The import charge was quickly criticized by President Barack Obama as unnecessary,[2] and by many trade

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1. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

2. Steven Mufson, *Obama Praises Climate Bill's Progress But Opposes Its Tariffs*, WASH. POST, June 29, 2009, at A5 [hereinafter Mufson].

law experts on the grounds that such measures would violate World Trade Organization (WTO) law.[3] The main target country governments, India and China, have vociferously complained that the threatened U.S. action, sometimes called a "carbon tariff," is protectionist and violates rules in the WTO's General Agreement on Tariffs and Trade (GATT).[4] In this article, I will use the term "carbon charge" rather than "carbon tariff," because the measure in the House bill is technically a charge, rather than a tariff.

The House-approved bill imposes a cap-and-trade form of regulation on covered entities with the goal of reducing greenhouse gas (GHG) emissions in 2012 to seventeen percent below the 2005 levels.[5] Agricultural emissions are not regulated. The bill provides for large, temporary, free grants of emission allowances to polluting businesses.[6] Eligibility for these subsidies is determined by a formula including factors such as energy, GHG intensity, and trade intensity of each covered sector. According to the House bill, this program is designed to help "trade vulnerable industries."7 Although the U.S. House of Representatives is the only legislative body to approve carbon charges, many parliamentary bodies, for example in Europe and Australia, have agreed to free emission allowances.

The import provisions in the House bill are complex, and can only be briefly summarized here. The purpose of requiring importers to purchase an international reserve allowance from the U.S. government is to minimize the likelihood of "carbon leakage" as a result of differences between the cost of compliance in the United States and the costs in other countries.

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3. *See, e.g.*, Zack Hale, *Democrats Try to Walk Fine Line on Tariffs*, NAT'L J., July 8, 2009, *available at* http://www.nationaljournal.com/njonline/no_20090708_2274.php (last visited Mar. 3, 2010); Dina Cappiello, *UN Climate Expert Warns Against Carbon Tariffs*, ASSOCIATED PRESS FIN. WIRE, July 22, 2009; Michael A. Levi, *The Dangers of a Carbon Trade War*, BOSTON GLOBE, Aug. 12, 2009, at 13; Alan Oxley, *Bill Could Create a Trade War*, ROLL CALL, Nov. 9, 2009; *Cooling the planet without chilling trade*, WASH. POST, Nov. 13, 2009, at A19; Aaditya Mattoo, Arvind Subramanian, Dominique van der Mensbrugghe & Jianwu He, Reconciling Climate Change and Trade Policy at 16, (Center for Global Dev., 2009). A large literature written before June 2009 analyzes policy proposals for carbon charges and similar measures. *See, e.g.*, TREVOR HOUSER ET AL., LEVELING THE CARBON PLAYING FIELD (2008); ERICH VRANES, *Climate Protection and WTO Law*, *in* TRADE AND THE ENVIRONMENT 373-95 (2009); Paul-Erik Veel, *Carbon Tariffs and the WTO: An Evaluation of Feasible Policies*, 12 J. INT'L ECON. L. 749 (2009) [hereinafter Veel].

4. *See* Veel, *supra* note 3. *Trade Issues Come to the Fore in Climate Talks*, 13 BRIDGES WEEKLY TRADE NEWS DIGEST 30, Sept. 9, 2009, at 2-3, *available at* http://ictsd.org/i/news/bridgesweekly/54721/ (last visited Mar. 10, 2010); David Stanway & Wang Lan, *Carbon Tariff Proposals Unworkable: China WTO Rep*, REUTERS, Oct. 29, 2009.

5. Mufson, *supra* note 2.

6. Although some auctions of emission allowances would begin in the early years of implementation of the House bill, at least eighty percent of the allowances would be granted freely to polluters in the initial years of the program.

7. H.R. 2454 § 782 (e).

The bill defines "carbon leakage" as "any substantial increase in greenhouse gas emissions . . . in other countries if such increase is caused by an incremental cost of production increase in the United States resulting from . . ." the American Clean Energy and Security Act of 2009.[8] The imposition of this import charge would be triggered by specified findings that are both country and sector specific.

The bill does not have an integrated section on exports; instead, exports are addressed in several provisions. For example, in the rules for ozone-depleting substances, there is a provision for a refund of an allowance upon export. In the rules on obtaining emission allowances, the bill exempts the export of certain fuel, coke natural gas, and other chemicals. Otherwise, the House bill does not provide a rebate for an export of a good for which the producer purchases an emission allowance.

As I am already on record regarding whether climate-related import charges and subsidies are consistent with WTO law,[9] this article will cover a different issue. That is, whether the proposed carbon charges and emission allowance subsidies are consistent with international environmental law and principles. My analysis will include:

1) hard-law in the form of customary or conventional international environmental law,
2) soft-law,
3) non-binding principles propounded by governments to guide governmental measures.

I recognize that I may be engendering confusion by conflating different sources of law and lumping together law and non-law, but I do so for two reasons. First, with respect to the environment, the dividing line between legal norms and non-legal principles remains contested.[10] Second, the "hard" environmental law is often too general to say anything about the environmental appropriateness of the contested U.S. trade provisions. By contrast, some of the "soft" principles are directly on point and ought to be

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8. *Id.* § 762.

9. *See* Steve Charnovitz, *America's New Climate Unilateralism*, 23 INT'L ECON. MAG. 4, Fall 2009, at 50–52, *available at* http://www.international-economy.com/TIE_F09_Charnovitz.pdf (last visited Mar. 10, 2010).

10. *See generally* Ulrich Beyerlin, *Different Types of Norms in International Environmental Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 425–48 (Daniel Bodansky et al. eds., 2009) [hereinafter Beyerlin]; Pierre-Marie Dupuy, *Formation of Customary International Law and General Principles*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 449–66 (Daniel Bodansky et al. eds., 2009).

emphasized more in the ongoing international debate about carbon charges and free allowances.

The aim of this article is to fill a gap in the literature on trade and climate. Although some of the international environmental law to be analyzed here, for example the U.N. Framework Convention on Climate Change (UNFCCC), is discussed frequently, other environmental principles covered here have largely been left out of the ongoing debate. Relatedly, although I am aware of a cornucopia of legal literature on how trade rules and principles apply to climate-related trade measures, I am unaware of any article examining how environmental rules and principles apply to such measures.

This article proceeds in four parts. Part I articulates the conceptual bases for trade-related climate measures. Part II summarizes the key international environmental principles most relevant to an evaluation of the carbon charges and free allowances in the House bill. This part will also briefly discuss the normativity of these provisions. Part III applies these environmental norms and principles to the House bill and, in particular, examines the free allowances and carbon import charges. Part IV concludes the analysis.

I. CONCEPTUAL BASES FOR TRADE-RELATED CLIMATE MEASURES

If there was only one government on the planet, no rationale would exist for trade-related climate measures. Thus, it is the asymmetry between the global commons and national regulatory authority that may make it difficult to obtain coherent and effective environmental regulation to control climate change.[11] The experience in the climate regime over the past twenty years has shown that many countries, most notably the United States, can drag the regime down through free-riding behavior. Moreover, experience has shown that even if countries formally agree to regulate in the same way, there can still be substantial problems of non-compliance, as there is in the WTO and in many environmental regimes. Looking ahead to 2050, the challenge of obtaining coherence will be even greater because eighty percent in the baseline growth in GHG emissions will occur in developing countries.

One of the greatest challenges in obtaining cooperation is equity. The developing countries, like India and China, quite rightly point out that burden-sharing formulas in the climate regime need to take into account the historical responsibility for GHG emissions by the industrial countries. There is also a significant issue of intergenerational equity, namely, how

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11. *See* Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U.L. REV. 1495, 1535–36 (1999).

much mitigation should occur now even though technological improvements may make mitigation less expensive in the future.

The problems of coherence and equity exist with or without transborder investment and trade. But when one takes into account transborder investment, additional challenges arise. The challenge of "leakage" is the one most discussed. The concern is that if the price of carbon differs among countries, investment and production will move from a high-regulation country in the international regime to a low-regulation country outside of the regime, and thereby undermine the benefits of the emission reductions agreed to within the regime. Leakage is distinguishable from the traditional concern about "polluter havens," where only low-regulation countries would suffer more pollution and high-regulation countries would not necessarily suffer more pollution.

Although the concept of climate leakage is conceptually sound, the significance of leakage has been questioned. For example, Angel Gurria, the Secretary General of the Organization for Economic Co-operation and Development (OECD) recently pointed to estimates of a leakage rate of just two percent by 2050 if all industrialized countries take action to reduce emissions.[12] Note that this low number does not mean that the growth of developing countries' emissions does not threaten to undermine the coherence of the climate regime. The low number only reflects the emissions associated with the movement of production from high-regulation to low-regulation countries. The climate regime would still be incoherent and ineffective if large emitting countries do not agree to absolute reductions in their emissions. So far, India and China have not agreed to do so.[13]

Although leakage is typically characterized as being bad, one should recall that leakage can be efficient if GHG-intensive production moves to another country where the same goods can be produced in a more carbon friendly way, for example, with hydropower.[14]

Taking into account cross-border trade adds another layer of complexity to the design of a climate regime. The central problem is how to allocate responsibility for goods that move in international trade. Should the producing economy be responsible for the emissions entailed in the production and transportation of exported goods, or should that be the

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12. Angel Gurria, *Carbon Has No Place in Global Trade Rules*, FIN. TIMES U.K., Nov. 4, 2009, at A9.

13. Kimberley Strassel, *Cap and Trade Is Dead*, WALL ST. J., Nov. 27, 2009, at A19 (stating that "China and India are clear they won't join the West in an economic suicide pact").

14. This point was made by Laura Campbell at the International Law Weekend panel session on trade and climate change.

responsibility of the importing, consuming country? A surprisingly small amount of attention has been devoted to that conundrum. Instead, the trade focus on climate change is about the economic effects on domestic producers of importing goods produced in another country under lower environmental regulations and with lower costs of carbon. The economic effect feared is lost jobs, at least in the short run. This is termed the "competitiveness" problem and the need for a level playing field.

II. RELEVANT INTERNATIONAL ENVIRONMENTAL LAW AND PRINCIPLES

The sources of environmental law and principles are custom, treaties, soft-law, and non-binding declarations. Many of these emanate from the environmental regime, but as I will note below, some of them emanate from the trade regime.

A. Custom[15]

As Ulrich Beyerlin has noted, the principle that states should not cause transboundary environmental damage is recognized as a rule of universal customary law.[16] This rule is restated in Principle 2 of the Rio Declaration on Environment and Development in the following way:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[17]

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15. Although I have noted this above, it bears repeating here that the only environmental norms and principles covered in this article are those that I consider to be relevant to an assessment of whether carbon charges and subsidies can be justified on environmental grounds. Space constraints prevent me from justifying why I have omitted specific norms such as the precautionary principle, environmental impact assessment, and sustainable development.

16. Beyerlin, *supra* note 10, at 439.

17. U.N. Conf. on Env. & Dev., *Rio Declaration on Environment and Development*, princ. 2, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) [hereinafter Rio Declaration on Environment and Development]. *See also* Ved P. Nanda, *International Environmental Norms Applicable to Nuclear Activities, with Particular Focus on Decisions of International Tribunals and International Settlements*, 35 DENV. J. INT'L L. & POL'Y 47, 53–54 (2006) (discussing the history of this provision going back to the Stockholm Convention).

Although a transboundary impact can also be a global impact, the law of transboundary impact was traditionally focused on the exclusive impact on particular, often nearby, countries, rather than global effects.[18] The normativity of customary international law notionally is that it expresses an obligation on all states.

B. Treaties

Treaties (or conventions) express obligations that states voluntarily incur by ratifying a treaty. A state that does not ratify a treaty has no obligations under that treaty. The most important treaty law respecting climate for which the United States is bound is the U.N. Framework Convention on Climate Change.[19] Article 4 (Commitments) states that:

> All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall: . . . [t]ake climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.[20]

This provision enshrines the principle of "common but differentiated responsibilities"[21] for climate policymaking and puts forward a goal of minimizing the adverse effects on an economy of measures to mitigate or adapt to climate change.

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18. *See* Günther Handl, *Transboundary Impacts, in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 531–32 (Daniel Bodansky et al. eds., 2009). Handl notes that "the basic rules regarding transboundary state-to-state impacts may also apply to transboundary impacts of the global effects/global commons category." *Id.* at 532. *See also* PHOEBE N. OKOWA, STATE RESPONSIBILITY FOR TRANSBOUNDARY AIR POLLUTION IN INTERNATIONAL LAW 9–10 (2000).

19. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 (1992) [hereinafter UNFCCC].

20. *Id.* art. 4 sec. (1)(f).

21. *Id.* art. 3 sec. (1).

Another treaty with relevant environmental norms is the Agreement Establishing the World Trade Organization (WTO Agreement).[22] Although the WTO Agreement is often not considered part of international environmental law, the jurisprudence of the WTO makes clear that besides its trade objectives, the WTO also propounds non-trade objectives, including environmental protection. This was explained in the compliance panel decision in *U.S.-Shrimp* case, when the WTO panel declared that sustainable development is one of the objectives of the WTO Agreement.[23]

The WTO judiciary has not had occasion to issue detailed holdings on the obligations of WTO member governments with respect to the environment and public health, but some norms have fructified. For example in the *U.S.-Shrimp* case, the highest court of the WTO, the Appellate Body, suggested that sovereign states "should and do" act "together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment."[24] In the earlier *EC-Hormones* case, the Appellate Body noted that there was not only a right, but also a "duty of [WTO] Members to protect the life and health of their people."[25]

C. Soft-law

I stand with Dinah Shelton in using the term "soft-law" to refer to "hortatory or promotional language of certain treaty provisions than for instruments concluded in non-binding form."[26] Soft-law of this type is

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22. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Legal Instruments–Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

23. Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 7.42, 9.1, WT/DS58/R (*adopted* May 15, 1998). Pascal Lamy, Director-General, WTO, Keynote Address at the Carleton University: Climate First, Trade Second—GATTzilla is Long Gone (Nov. 2, 2009) (stating that "the creators of the WTO [had] enshrined the concept of Sustainable Development, right in the Preamble of the WTO accord").

24. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 185, WT/DS58/AB/R (*adopted* Nov. 6, 1998) [hereinafter Appellate Body Report, *U.S.-Shrimp*]. Pascal Lamy, Director-General, WTO, Keynote Address at the Yale University: The WTO and its Agenda for Sustainable Development (Oct. 24, 2007) (stating that "the WTO showed itself capable of delivering not only trade justice, but some measure of environmental justice too . . . the WTO pushed its members towards a strengthening of their environmental collaboration. It insisted that a cooperative environmental solution be found for the protection of sea turtles between the parties to the conflict.")

25. Appellate Body Report, *European Communities--Measures Concerning Meat and Meat Products*, ¶ 177, WT/DS26/AB/R (Jan. 16, 1998) (*adopted* Feb. 13, 1998) [hereinafter Appellate Body Report, *EC-Hormones*].

26. Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 319 (2006) [hereinafter Shelton].

regularly used in environmental treaties. For example, Article 3 of the UNFCCC commits parties to be guided by listed principles, including that "[m]easures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."[27] The Kyoto Protocol contains detailed mitigation obligations for Annex I countries. One of the Kyoto Protocol obligations for Annex I countries is that they "shall strive to implement policies and measures . . . in such a way as to minimize adverse effects, including the adverse effects of climate change, effects on international trade, and social, environmental and economic impacts on other Parties, especially developing country Parties. . . ."[28] Given the use of the word "strive," I would characterize this provision as soft-law, and note that the Protocol is widely ratified by 184 parties.

D. Non-binding Declarations

A non-binding declaration adopted by states is not law, but as Professor Shelton has noted, such declarations "can be effective and offer a flexible and efficient way to order responses to common problems;" such declarations may also lead to law.[29] The three most relevant non-binding declarations are the Environmental Principles adopted in the early 1970s by the OECD Council.[30] The first of these Principles was enacted in May 1972, when the Council passed the "Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies."[31] These Principles do not apply to transfrontier pollution.[32] Among these Principles are:

> The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter-Pays Principle." This principle means that the polluter should bear the

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27. UNFCCC, *supra* note 19, art. 3 (5).

28. Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 2(3), Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/7/Add. 1.

29. Shelton, *supra* note 26, at 320, 322.

30. *See also* Candice Stevens, *Interpreting the Polluter Pays Principle in the Trade and Environment Context*, 27 CORNELL INT'L L.J. 577 (1994).

31. Organization for Economic Cooperation and Development [OECD], *Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies*, OECD Doc. C(72)128, 11 I.L.M. 1172 (May 26, 1972) [hereinafter Guiding Principles].

32. *Id.* ¶ 1.

> expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.[33]
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> Measures taken to protect the environment should be framed as far as possible in such a manner as to avoid the creation of non-tariff barriers to trade.[34]
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> Where products are traded internationally and where there could be significant obstacles to trade, Governments should seek common standards for polluting products and agree on the timing and general scope of regulations for particular products.[35]
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> In conformity with the provisions of the GATT, measures taken within an environmental policy, regarding polluting products, should be applied in accordance with the principle of national treatment (i.e. identical treatment for imported products and similar domestic products) and with the principle of non-discrimination (identical treatment for imported products regardless of their national origin).[36] In accordance with the provisions of the GATT, differences in environmental policies should not lead to the introduction of compensating import levies or export rebates, or measures having an equivalent effect, designed to offset the consequences of these differences on prices. Effective implementation of the guiding principles set forth herewith will make it unnecessary and undesirable to resort to such measures.[37]

The second OECD Recommendation, enacted in 1974, is the "Implementation of the Polluter-Pays Principle."[38] In addition to restating points from the earlier recommendation, this Recommendation addresses the issue of transitional government assistance for pollution control. Such grants are to "be strictly limited" and have to comply with three conditions, including that:

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33. *Id.* ¶ 4.

34. *Id.* ¶ 9.

35. *Id.* ¶ 10.

36. Guiding Principles, *supra* note 31, ¶ 11.

37. *Id.* ¶ 13.

38. Organization for Economic Cooperation and Development [OECD], *Recommendation of the Council on the Implementation of the Polluter-Pays Principle*, OECD Doc. C74(223) (Nov. 14, 1974) [hereinafter Recommendation on Implementation of the Polluter-Pays Principle].

a) it should be selective and restricted to those parts of the economy, such as industries areas or plants, where severe difficulties would otherwise occur;
b) it should be limited to well-defined transitional periods, laid down in advance and adapted to the specific socio-economic problems associated with the implementation of a country's environmental programme;
c) it should not create significant distortions in international trade and investment.[39]

The third set of OECD Principles, adopted in 1974, are the OECD Principles Concerning Transfrontier Pollution.[40] Among them, the Principle of Non-Discrimination states:

> Countries should initially base their action on the principle of non-discrimination, whereby: a) polluters causing transfrontier pollution should be subject to legal or statutory provisions no less severe than those which would apply for any equivalent pollution occurring within their country, under comparable conditions and in comparable zones, taking into account, when appropriate, the special nature and environmental needs of the zone affected; . . . c) any country whenever it applies the Polluter-Pays Principle should apply it to all polluters within this country without making any difference according to whether pollution affects this country or another country. . . .[41]

Because GHG emissions have both domestic and transborder effects, all three of these OECD Principles apply to the issue of climate change.

The pioneering work of the OECD has influenced normative developments in environmental policy. For example, Principle 16 of the Rio Declaration states: "[n]ational authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest

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39. *Id.* ¶ III (2).

40. Organization for Economic Cooperation and Development [OECD], *Recommendation of the Council on Principles concerning Transfrontier Pollution*, OECD Doc. C74(224) (Nov. 14, 1974). Pollution is defined as "the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health harm living resources and ecosystems, and impair or interfere with amenities and other legitimate uses of the environment." *Id.* at title A.

41. *Id.* ¶ 4. *See generally* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, LEGAL ASPECTS OF TRANSFRONTIER POLLUTION (1977).

and without distorting international trade and investment."[42] Although I have characterized the Polluter-Pays Principle as non-binding, Beyerlin argues that it is a legal rule in the OECD.[43] It should also be noted that European law contains the environmental principle "that the polluter should pay"[44] and that a GATT panel once ruled that the Polluter-Pays Principle was not an obligation of GATT law.[45]

Besides the OECD, another rich fount of relevant non-binding environmental principles is the Rio Declaration. Principle 7 states in part: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities."46

Although in this article I characterize "common but differentiated responsibilities" as a non-binding principle, this principle, as Christopher Stone has noted, has received considerable recognition in international law.[47] Principle 12 of the Rio Declaration is another important normative guideline and provides that:

> States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.[48]

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42. Rio Declaration on Environment and Development, *supra* note 17, at princ. 16.

43. Beyerlin, *supra* note 10, at 441. Although the OECD has the competence to legislate binding rules, I do not view the Polluter-Pays Principle as having bindedness.

44. Treaty Establishing the European Community, art. 174 (2), Nov. 10, 1997, 1997 O.J. (C340) 3.

45. Panel Report, *United States—Taxes on Petroleum and Certain Imported Substances*, ¶ 3.2.9, L/6175, GATT B.I.S.D. 34S/136 (June 17, 1987).

46. Rio Declaration on Environment and Development, *supra* note 17, at princ. 7.

47. Christopher D. Stone, *Common But Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 276 (2004).

48. Rio Declaration on Environment and Development, *supra* note 17, at princ. 12.

In the *U.S.-Shrimp* case, the Appellate Body opined that Principle 12 had "particular relevance" interpretation of applicable WTO law.[49]

III. APPLICATION OF INTERNATIONAL ENVIRONMENTAL LAW AND PRINCIPLES TO HOUSE CLIMATE BILL

This part will be organized as follows: it will start with an analysis of free emission allowances; next, carbon import charges will be examined, and the analysis will show both arguments for and against the use of such measures; finally, some more general issues will be considered.

A. Free Emission Allowances

Starting with hard law, one should note that the use of free allowances is consistent with the UNFCCC obligation to employ appropriate methods with a purpose of minimizing the adverse effects on the economy of measures to mitigate climate change. Indeed, there could be an argument that there is an obligation to undertake economic adjustment measures.

Moving down the hierarchy to non-binding declarations, we see that free emission allowances are clearly in tension with the Polluter-Pays Principle[50] because the cost of the pollution would not be internalized and because such subsidies could create significant distortions in international trade and investment.[51] But the Principle is qualified by the Recommendation on the Implementation of the Polluter-Pays Principle which provides for specified transition measures. In the House bill, there are well-defined transition periods laid down in advance and adapted to the specific socioeconomic problems associated with the implementation of the cap-and-trade program. On the other hand, the generous House bill provisions do not provide for a showing of "severe difficulties" and do not contain a limiting principle to prevent significant distortion in international trade. In addition, free allowances may violate Principle 16 of the Rio Declaration because the polluter would not be bearing the cost of pollution and because the large subsidies are intended to distort trade and investment by safeguarding trade-vulnerable industries. In summary, while the more general hard-law could justify free allowances, the more specific non-binding principles would offer caution at least with respect to the way free allowances are designed in the House bill.

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49. Appellate Body Report, *U.S.-Shrimp*, *supra* note 24, ¶ 168.

50. Guiding Principles, *supra* note 31, ¶ 4.

51. *See* Jonathan R. Nash, *Too Much Market? Conflict Between Tradable Pollution Allowances and the "Polluter Pays" Principle*, 24 HARV. ENVTL. L. REV. 465, 505 (2000).

B. Carbon Charges at the Border

Applying the environmental law and principles to the carbon charges in the House bill also leads to an ambiguous result, and this analysis should start with environmental justifications for a carbon charge. The strongest justification comes from the non-binding OECD Principles Concerning Transfrontier Pollution which state that "polluters causing transfrontier pollution should be subject to legal or statutory provisions no less severe than those which would apply for any equivalent pollution occurring within their country, under comparable conditions and in comparable zones."[52] As I read it, this principle would direct the United States to apply measures against polluters in, for example, India no less severe than against polluters within the United States. That is the broad purpose of the House bill, but some of the detailed provisions may be inconsistent with the "non-discrimination" aspect of this OECD Principle. For example, the carbon charges in the House bill are too blunt to take into account the carbon footprints of a particular Indian product or producer.

The arguments against the proposed U.S. carbon charge are also strong. Under the legal obligation of UNFCCC Article 4(f), U.S. policy should take into account the "common but differentiated responsibilities" of the other UNFCCC parties.[53] For that reason, a U.S. law that holds India to the same standard as the United States might be misapplying the vague concept of differentiated responsibilities. Clearly, there is tension between the OECD Principle of 1974 and the UNFCCC Principle of 1992, the latter appears to endorse lower obligations for developing countries. A second argument against unilateral carbon charges is the UNFCCC Article 3 which states that "[m]easures taken to combat climate change, including unilateral ones, should not constitute arbitrary or unjustifiable discrimination. . . ."[54] This soft-law environmental principle parallels the hard-law WTO principle in the chapeau of GATT Article XX which would deny an environmental exception for a measure that is applied in an arbitrary or discriminatory way.[55] A third argument against the House bill is that it is directly antithetical to the Kyoto Protocol injunction to strive to minimize adverse effects on international trade of other parties.[56] Similarly, Paragraph 9 of

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52. Recommendation on Principles concerning Transfrontier Pollution, *supra* note 40, at para. 4.

53. UNFCCC, *supra* note 19, art. 4 (1)(f).

54. *Id.* art. 3 (5).

55. *See* GARY CLYDE HUFBAUER, STEVE CHARNOVITZ & JISUN KIM GLOBAL WARMING AND THE WORLD TRADING SYSTEM 52–60 (2009).

56. This is not hard or soft-law for the United States, but is a relevant non-binding principle that should guide U.S. policy, particularly since the negotiating history shows that U.S. negotiators were

the OECD Guiding Principles states that measures should be framed as far as possible to avoid the creation of non-tariffs barriers to trade.[57] Yet clearly, the imposition of a new carbon charge creates a non-tariff barrier to trade. A fourth argument comes from Paragraph 13 of the OECD Guiding Principles which states that differences between national environmental policies should not lead to compensating import levies designed to offset the differences in prices.[58] Because the sole purpose of the trade provisions in the House bill is to use import levies to offset differences in prices, there is no way to reconcile the House bill with Paragraph 13. A fifth argument comes from the Rio Declaration agreed to by the United States in 1992 as a non-binding principle. Principle 12 states, in part, that "[u]nilateral action to deal with environmental challenges outside the jurisdiction of the importing country should be avoided."[59] Given that the House bill was passed without benefit of any multilateral negotiation, the House bill is a unilateral action. To the extent that the House bill attempts to deal with foreign or global environmental challenges, the House bill would seem to be a violation of Principle 12. On the other hand, climate change, including emissions emanating from China, is also an environmental challenge within the jurisdiction of the United States.

So far I have analyzed the proposed United States carbon charges under the lens of international environmental law and principles, but that is only half of a proper analysis. It is also necessary to apply environmental law and principles to the target countries. As Scripture says: "[j]udge not, that ye not judged. For with that judgment ye judge, ye shall be judged, and with that measure ye mete, it shall be measured to you again."[60] For the purpose of this analysis, I will use China as an example. Today, China's position on climate change is not making any internationally-binding commitments at Copenhagen and not making any commitments to reduce the absolute level of its GHG emissions. Rather, China will commit only to making legally non-enforceable pledges to reduce its carbon intensity by forty to forty-five percent between the years 2005 and 2020.[61]

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active in negotiating this provision, and the Kyoto Protocol was signed by the United States on Dec. 11, 1998.

57. Guiding Principles, *supra* note 31, ¶ 9.

58. *Id.* ¶ 13.

59. Rio Declaration on Environment and Development, *supra* note 17, at princ. 12.

60. *Matthew* 7:1–2 (King James).

61. Fu Jing, Li Jing & Sun Xiaohua, *China Targets Massive 40–45% Carbon Cut*, CHINA DAILY, Nov. 27, 2009, http://www.chinadaily.com.cn/china/2009-11/27/content_9060284.htm (last visited Mar. 10, 2010).

China's position is a violation of the customary law capsulized in Principle 2 of the Rio Declaration that pronounces a responsibility to ensure that activities within a state's jurisdiction do not cause damage to areas beyond its national jurisdiction. China cannot answer to that responsibility by saying that its "differentiated responsibility" under UNFCCC Article 4(f) allows it to merely curb its emission intensity as a percent of gross domestic product rather than its emission growth. Emission intensity is obviously a faulty metric for climate change because the atmosphere does not expand its absorptive capacity to accommodate whatever economic growth occurs on the Earth. Of course, the fact that China is in violation of its obligation to avoid transborder GHG pollution does not itself justify whatever remedy other countries might want to levy against China. After all, all countries are violating their own obligations to avoid transborder GHG pollution, especially the United States, which continues to be the largest current and historical GHG emitter.

China's position would also seem to violate the two WTO rules discussed in Part II. First, there is a soft-law obligation that China "should" act with other countries to protect the environment. Note that this obligation is in accord with the OECD Guiding Principles—that governments should seek common standards for polluting products. The second China violation occurs with the hard-law, WTO duty of China to protect the life and health of its people.[62] By refusing to cooperate with other countries on agreeing to binding emissions reduction commitments, China is violating the environmental law of the WTO.[63]

C. Broader Issues

Having discussed subsidies and carbon charges, let me briefly discuss some broader issues in the interstices of the House bill. First, giving an exporter a rebate of an emission allowance would violate the Polluter-Pays Principle as articulated in Paragraphs 4 and 11 of the Guiding Principles. Second, excluding agriculture or other major GHG-emitting sectors from national climate legislation would violate Principle 2 of the Rio Declaration and the WTO duty to protect life and health. Third, a multilaterally-agreed upon carbon charge against scofflaw countries would not be subject to the same normative criticism as a unilateral measure. Fourth, environmental principles do not dictate any answer to whether the producing or the consuming country should be liable for GHG emissions arising in the production of goods in transborder trade. It should be noted that in the

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62. *See* Appellate Body Report, *EC-Hormones*, *supra* note 25.

63. *Accord* Rio Declaration on Environment and Development, *supra* note 17, at princ. 7 (calling on States "to conserve, protect, and restore the health and integrity of the Earth's ecosystem").

House bill, the cost of an auctioned emission allowance (or an emission allowance to be purchased by an importer) is not calculated to approximate the cost "to ensure that the environment is in an acceptable state," as required by the Polluter-Pays Principle.[64] Rather, the cost is set in the market as a function of the supply of government issued allowances, the demand for them, and the generosity of domestic or international offset programs.

IV. CONCLUSION

The purpose of this project was to provide a counterweight to the extensive literature that analyzes climate measures from the perspective of international trade rules. By contrast, the approach taken in this article is to examine trade-related climate measures from the perspective of international environmental law and principles. As discussed in Part II, we cast the net wide to look at binding and non-binding norms. We also looked at environmental norms from the WTO recognizing that many organizations are part of the environment regime.

As explained in Part I, policymakers in all countries are sensitive to avoiding climate measures that adversely affect national competitiveness. Whether or not that concern is an economically valid one, this article reaches the conclusion that granting subsidies, such as free emission allowances, can be an appropriate instrument under international environmental law and principles. On the other hand, the article points out that utilizing border measures, such as carbon charges, is not an appropriate instrument under environmental law for the purpose of sustaining competitiveness.

Part I also explains that policymakers want to secure an effective and coherent climate regime that achieves sufficient emission reduction to avoid catastrophic climate change. Although the true coherence challenge is the unwillingness of major emitting countries (for example, the United States) to take binding obligations, governments are seen to have been reluctant to make that argument forcefully. Instead, the rhetoric of climate policymaking is that "leakage" is to be avoided, meaning with leakage being only the minor dilution of emission reductions in industrial countries that occur due to the movement of investment from industrial to developing countries as a result of the higher costs from climate legislation. This leakage fiction distracts attention from the real problems of international cooperation. Thus, as a measure to combat "leakage," carbon charges are too much to achieve too little.

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64. Recommendation on the Implementation of the Polluter-Pays Principle, *supra* note 38, art. 1 (2).

As designed in the House bill, carbon charges would violate many legal norms and principles of environmental law as discussed in Part III. Policymakers need also recognize that the core idea of subjecting foreign polluters to requirements equal to what domestic polluters are subjected to for equivalent pollution is justifiable under the non-binding OECD Principles Concerning Transfrontier Pollution. If a well-designed, non-discriminatory program of carbon charges were challenged in the WTO, a panel would have the opportunity to take into account not only the applicable WTO law, but also the relevant international environmental law and principles discussed here.