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Steve Charnovitz

George Washington University Law School, scharnovitz@law.gwu.edu

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America's New Climate *Unilateralism*

BY STEVE CHARNOVITZ

*A better approach
to Copenhagen.*

Years of vital time were wasted during the 2000s when the United States refused to join the Kyoto Protocol on climate and the Bush Administration stood aloof from many ongoing international initiatives to better manage greenhouse gas emissions. So when Todd Stern, the current U.S. Special Envoy for Climate, made his maiden speech to the Ad Hoc Working Groups on climate, he received spirited applause. Speaking in late March 2009 in Bonn, Stern told the assembly, “We are very glad to be back. We want to make up for lost time, and we are seized with the urgency of the task before us.”

As this essay is penned ahead of the pivotal U.N. climate conference at Copenhagen in December 2009, no one doubts that the United States is back in the game. But being back is one thing and playing the game cooperatively according to the rules is another. In targeting other countries with new import charges for climate, the legislation passed by the U.S. House of Representatives in June 2009 strikes a confrontational posture that is, in some ways, just as unilateral as the much-criticized U.S. policies of the Bush era.

The trade measures included in the American Clean Energy and Security Act direct the Environmental Protection Agency, beginning in 2020, to require importers of certain products from certain countries to purchase an “international reserve allowance.” This required purchase would in effect be a financial charge upon the imported product. The official summary of the Act calls it a “border adjustment for energy-intensive trade-exposed sectors.” The Act itself explains that the purpose of

*Steve Charnovitz teaches international trade law at George Washington University Law School in Washington, D.C. He is a co-author (with Gary Hufbauer and Jisun Kim) of *Global Warming and the World Trading System* (Peterson Institute for International Economics, 2009).*



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OFFICIAL WHITE HOUSE PHOTO BY PETER SOUZA

the import charge is to minimize the likelihood of carbon leakage as a result of the differences in U.S. environmental compliance costs and the compliance costs in the other country arising from its climate policies. "Carbon leakage" is defined as a substantial increase in greenhouse gas emissions in other countries if that increase is caused by an incremental increase in the U.S. cost of production resulting from the Act.

In a recent article in this magazine ("Cap-and-Trade Protectionism?" Summer 2009), Martin Feldstein argues that a policy of imposing tariffs on imports to offset the advantage of countries with lower prices for carbon "is just the kind of protectionism that governments have been working to eliminate since the start of the GATT processes more than fifty years ago." Insofar as the House climate bill is motivated by offsetting the cost differences between the United States and a country such as China in order to preserve U.S. production and jobs, then I agree with Professor Feldstein that the climate tariffs embodied in the House bill are protectionist. On the other hand, if there were a valid environmental purpose in imposing a climate tariff, then Professor Feldstein would be wrong to say that such a policy is the same kind of protectionism that the General Agreement on Tariffs and Trade and now the World Trade Organization were given a mandate to regulate. The jurisprudence of the WTO since it was established in 1995 shows that WTO rules do not threaten legitimate environmental policies carried out in a fair way.

While there could be a valid environmental purpose in using tariffs against countries that are free riders on international efforts to address climate, the United States surely has no moral standing to do so now because the United States itself has been a longtime free rider within the climate regime. Countries that have not agreed to a greenhouse gas emissions cap, such as India, are entirely justified in condemning the trade measures in the House bill. The idea that threatening tariffs on other countries has to be a pre-

condition for the House to enact emission limits is objectionable given how little the Congress has done over the past decade to reduce U.S. emissions or to help developing countries reduce their emissions.

This new U.S. unilateralism of threatening other countries with carbon import charges constitutes both bad environmental policy and bad trade policy.

The House-passed carbon charge is bad environmental policy because it gives India and other countries the high ground to say that they will not negotiate new emission reduction commitments under a threat of U.S. trade sanctions. At this point, the House is the only legislative body in the world to include trade measures in climate law. The looming trade threat undermines the opportunity of the United States to exercise leadership in the multilateral climate negotiations. That point was made cogently by Rajendra Pachauri, the chair of the Intergovernmental Panel on Climate Change, who warned during a visit to Washington in July that "you [the United States] can't lead by bullying. You can only lead by setting an example."

The House-passed carbon charge is bad trade policy because it would transgress the law of the World Trade Organization. The Congressional proponents of the carbon charge have suggested that the import charge could qualify under a GATT exception available for conservation measures. But that seems unlikely in view of the fact that the trade measures in the House bill are so obviously designed with a competitiveness, rather than environmental, purpose. Furthermore, the House-passed bill is so lopsided in favor of U.S. producers and gives so little due process rights to other countries that a WTO dispute panel would easily rule against

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the United States. The Obama Administration would then face the awkward choice of either backing down or publicly flouting a WTO judgment against it.

But my legal prediction could be wrong. Suppose the WTO panel finds that the GATT environmental exception is broad enough to immunize the carbon charge in the House bill. Would that save the U.S. measure from being bad trade policy?

In my view, no. If U.S. carbon charges are ruled WTO-legal, then the door will be opened for other countries to fashion their own measures imposing new climate-based trade restrictions. For example, India could base its tariff on per capita carbon emissions where its performance of 1.2 million tons is much better than the 19.8 million tons spewed

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out by U.S. producers. Thus, if the United States leads by imposing new trade restrictions, other countries could retaliate with parallel actions against U.S. exporters.

Enactment of new climate tariffs would add to the already long string of protectionist trade actions by the United States during the Obama Administration. The world took note when new tariffs were imposed on tires from China, when the Congress attached domestic-content requirements to the subsidies to state agencies in the American Recovery and Reinvestment Act (popularly known as the "Stimulus"), when the Congress barred trucking services from Mexico, and when the Obama Administration postponed any efforts to seek Congressional approval of long-pending U.S. free trade agreements with Korea, Colombia, and Panama. These early trade missteps will make it much harder for the United States to exercise pro-trade leadership in the WTO Doha negotiations, assuming that the Obama Administration becomes inclined to do so.

Is there a chance that the Senate will remove the trade measures from the climate bill? At this point, that scenario is unlikely. After the import charges were added to the House bill in a late-minute, untransparent parliamentary maneuver, President Obama declared in late June that "At a time when the economy worldwide is still deep in recession and we've seen a significant drop in global trade, I think we have to be very careful about sending any protectionist signals

out." But the President stopped far short of asking for the trade measures to be stripped out. Several weeks later, ten Democratic senators wrote a letter to Obama warning that it was "essential that climate change legislation include a border mechanism." And then on October 11, Senators John Kerry (D-MA) and Lindsey Graham (R-SC) co-authored an op-ed for the *New York Times* putting forth ideas for how to fashion a climate bill that could draw sixty votes in the Senate. In the op-ed they state: "There is no reason we should surrender our marketplace to countries that do not accept environmental standards. For this reason, we should consider a border tax on items produced in countries that avoid these standards. This is consistent with our obligations under the World Trade Organization and creates strong incentives for other countries to adopt tough environmental protections."

As with House supporters of climate-related border measures, the Senate supporters also claim that such measures are "consistent" with WTO law. But if the policy goal is to prevent the "surrender" of the U.S. marketplace, the imposition of import charges will not qualify for the environmental exceptions in the WTO.

Although unilateral trade measures by the United States are not reasonable, there is a need for ongoing multilateral climate negotiations to develop policies to address so-called carbon leakage and to allocate responsibilities for carbon emissions between exporting and importing nations. Climate negotiators should also consider what collective action would be warranted if large emitting countries refuse to consider any legally binding emission reduction commitments. The House bill does go in the right direction in calling for a new policy of the United States "to work proactively" in the climate regime "to establish binding agreements, including sectoral agreements, committing all major greenhouse gas-emitting nations to contribute equitably to the reduction of global greenhouse gas emissions." Where the House bill goes in the wrong direction is in assuming that the United States is still powerful enough to get its way in the world economy by threatening trade measures against countries that have the temerity to craft their own clean energy and climate policy without giving much weight to how it impacts jobs in the United States.

The era of isolationist climate unilateralism is now in danger of being replaced by an equally ugly impulse of eco-imperialist unilateralism. Rather than igniting trade wars and undermining respect for WTO law, the Obama Administration should be launching positive initiatives such as accelerating WTO Doha Round negotiations on the reduction of barriers to environmental goods and services. And at Copenhagen, the United States should support a multi-year moratorium on any unilateral imposition of climate tariffs. ♦