

POLICY BRIEF - JULY 2015

The Customs Bill: an unacceptable barrier to climate action

Summary and Key Messages

A proposed amendment to the Trade Priorities and Accountability Act (TPA) incorporated into the House version of the Customs Bill¹ poses significant risks to future progress on climate mitigation if accepted. The language of the provision raises new and significant barriers in the fight against global climate change. Specifically, it would:

- Make it more difficult to ensure climate mitigation efforts by the United States and our global partners are not undermined by new or existing trade agreements;
- Complicate global climate negotiations by increasing uncertainty about what measures U.S. negotiators can and cannot negotiate on; and
- Foreclose an array of necessary and potentially powerful tools to accelerate the adoption of renewable energy and energy efficiency technologies and deliver on global political commitments to phase out fossil fuel subsidies.

By leaving domestic climate measures open to continued trade attacks, injecting new uncertainty into vital climate talks and shutting off an important avenue for climate action, the provision will pose a new and unnecessary obstacle to climate response measures. Accordingly, it should be rejected.

Background

Section 912(b)(15) of the Customs Bill would amend the TPA "to ensure that trade agreements do not require changes to U.S. law or obligate the United States with respect to global warming or climate change". Rep. Paul Ryan (R-Wis.), who introduced the amendment in the House, claims it will ensure the Administration cannot seek "legislative changes in climate...through trade agreements".² While USTR has asserted that the TPA itself "does not provide the Administration with any *new authority* to enter into climate change agreements,"³ this begs the question of what existing authorities the proposed provision may compromise, and what new uncertainties it creates in the efforts to confront global climate change.

As the President declared before Congress in January, no challenge poses a greater threat to humanity than the threat of global climate change.⁴ Recognizing the gravity and urgency of that threat, President Obama pledged that he would "not let this Congress endanger the health of our children by turning back the clock on our efforts", and he pledged his determination "to make sure that American leadership drives international action".⁵ Any measure that would negate that pledge, impair that leadership, or limit the United States' capacity to respond to global warming should and must be rejected.

Complicates climate mitigation efforts

In recent years, climate mitigation efforts have been recurring targets of trade measures and trade arguments. Countries are commonly invoking trade rules against climate mitigation measures both within and outside the World Trade Organization (WTO).⁶ For example:

- In February 2013, the United States filed a formal WTO challenge against India for its national solar programme claiming the programme discriminates against foreign manufacturers.⁷
- In 2010, the United States, Japan and the EU filed a WTO complaint against China's domestic incentive program for wind power equipment.⁸
- In 2010, Japan, the United States and the EU all requested consultations with Canada with respect to a feed-in tariff program under the Province of Ontario's renewable energy law,⁹ and ultimately filed a claim in the WTO.¹⁰

Even in the absence of a formal WTO complaint or request for consultations, moreover, trade disciplines are increasingly being invoked against national policy measures that benefit the global climate. For example, USTR "voiced strong concerns"¹¹ over China's investments in building strategic emerging industries, essential to climate mitigation measures, such as new energy and new energy vehicles.¹²

Nor is the United States itself immune to trade attacks against its own climate mitigation measures. Both the EU and Indonesia have targeted U.S. efforts to align its renewable fuel standards more consistently with its greenhouse gas (GHG) reduction priorities.

- In 2012, EPA made a preliminary finding that lifecycle GHG emissions from deforestation would disqualify imported palm oil as a renewable fuel feedstock.¹³ In comments to EPA, the Indonesian Trade Minister raised the

prospect of WTO action if EPA failed to modify its finding.¹⁴

- Similarly, the EU (through the European Commission) raised concerns regarding the United States' GHG thresholds for renewable fuels and the consequential impact that these thresholds will have on EU/U.S. trade.¹⁵

USTR, in turn, has targeted an array of climate change mitigation measures in the EU as technical barriers to U.S. trade.¹⁶ Examples include, the phasing-down and phasing-out of the use of particular high global warming potential gases¹⁷, the EU Renewable Energy Directive aimed at, among other things, reducing GHG emissions¹⁸, and the 2009 Fuel Quality Directive adopted as part of the EU's Climate and Energy package¹⁹.

And both the United States and the EU used trade negotiations to win concessions from South Korea to weaken its vehicle fuel efficiency standards for imported vehicles.²⁰

The foregoing examples demonstrate the close interaction between trade agreements and climate action. These trade arguments can have a profound chilling effect on domestic and international climate measures even if a formal complaint is never filed, providing additional leverage for industry groups opposed to regulation and creating strong pressure on regulators in both the United States and abroad to weaken proposed measures or broaden loopholes to ameliorate trade partners.

While the language of the provision may ensure negotiators cannot use trade agreements to affirmatively obligate the United States with respect to climate change, it will also limit the country's ability to clarify existing agreements to ensure space for climate action, and to protect legitimate climate mitigation efforts in trade agreements under negotiation.

At the very least, the climate provision is injecting tremendous uncertainty into the United States' latitude to safeguard climate policies from trade attacks under existing or future agreements.

Injects new uncertainty into global climate talks and other MEAs

The impact of trade agreements extends far beyond the mere regulation of trade. There is a proven record of countries using trade agreements to oppose action in key global areas. Parties frequently characterize market measures, proposed in multilateral environmental negotiations, as impermissible trade measures and invoke trade disciplines within and beyond the WTO as a constraint on what can be negotiated.

For example, Brazil, among other developing countries, invoked WTO obligations in an effort to head off action to address the underlying drivers of deforestation in UN climate talks. Brazil asserted that, because it implicated the role of international markets in driving forest loss--thus contributing to climate change--adopting specific measures to address drivers of deforestation would be in conflict with WTO trade disciplines.²¹ While the effort was successfully rebutted,²² it demonstrates the existing ambiguities--real and perceived--in the use and characterization of trade measures in multilateral negotiations to protect the environment.

Viewed in light of these ambiguities, the Customs Bill stands to inject still greater uncertainty into ongoing negotiations in the UNFCCC and other arenas by raising new questions about the scope of U.S. negotiating authority. As a result, it will both weaken U.S. bargaining power and increase the reticence of other Parties to address how their own markets contribute to climate change.

While the UNFCCC is the forum most likely to be affected, it is not the only one. The United States and its international partners must--and do--confront the implications of climate change under a host of international environmental agreements. Potential conflict with trade rules is already a recurrent spectre in many of these arenas, including notably the Convention on International Trade in Endangered Species (CITES) despite CITES' well-established role in the regulation of wildlife trade.²³ As the CITES Parties grapple with the complex relationship between wildlife trade and climate change,²⁴ the Customs Bill may inject new and needless uncertainty into their efforts to do so.

Forecloses a powerful tool for international climate cooperation

Finally, and most fundamentally, the climate provision explicitly forecloses the opportunity to leverage the power of trade agreements to benefit the global climate. In so doing, it undermines the President's commitment not to let Congress turn back the clock on climate action.

Ongoing trade negotiations face intense and well justified opposition to among both the public and many in Congress--not least for their heretofore negative impact on climate efforts. Experience with environmental provisions in past trade agreements gives little reason for optimism in this regard. Yet, there is real and untapped potential for trade agreements to be negotiated and used to benefit climate action.²⁵

The United States has recognized this potential in its professed negotiating objectives with important trade and climate partners.

Consider the ongoing negotiations of the Transatlantic Trade and Investment Partnership (TTIP) between the United States and Europe. Environmental groups have heavily criticized TTIP for its anti-regulatory orientation and its potential negative impacts on an array of environmental and health measures on both sides of the Atlantic.

Perhaps in anticipation of the criticism, USTR asserts that one U.S. objective of the negotiations is to "seek opportunities to address environmental issues of mutual interest" and identifies both clean energy and environmentally harmful subsidies as areas it has addressed with other agreements.²⁶ In fact, the EU explicitly identifies climate change as an important area for such cooperation in its own position papers on the talks.²⁷ Specifically, the EU seeks through TTIP to address "the engagement of the Parties to strengthen their cooperation on trade-related aspects of the current and future international climate change regime, as well as means to promote low-carbon technologies and energy efficiency".²⁸

On its face, the Customs Bill climate provision would appear to expressly foreclose the United States from negotiating on or achieving these objectives. In so doing, and by prohibiting the parties from addressing climate mitigation directly, it may actually exacerbate the negative climate impact of TTIP's efforts to reduce regulatory barriers to trade.

The Customs Bill climate provision also calls into question U.S. ambition under last December's U.S.-China joint announcement on climate change. In that announcement, the two countries committed to "Promoting Trade in Green Goods" and, specifically, to encouraging bilateral trade in sustainable environmental goods and clean energy technologies.²⁹ While the announcement envisioned a trade mission by Secretaries Moniz and Pritzker, focused on low-carbon cities and low-carbon growth technologies, the Customs Bill may raise serious challenges to any formal agreements to facilitate trade in these technologies.

Significantly, the provision eliminates an important potential avenue for delivering on global political commitments to phase out wasteful and environmentally damaging fossil fuel subsidies.

In 2009, the U.S. and other G20 countries made a joint commitment "to phase out and rationalize over the medium term inefficient fossil fuel subsidies" as such subsidies "undermine efforts to deal with the threat of climate change".³⁰ Leaders reaffirmed this commitment to phase out inefficient fossil fuel subsidies at last month's G7 summit, while further agreeing to the "decarbonisation of the global economy over the course of this century".³¹ To date, the U.S. and its G20 partners have failed to deliver on these commitments.³² Their ability to do so is critical to achieving a 2 degree climate goal.³³

Trade agreements provide a potentially promising tool for overcoming this inertia and creating the mutual accountability needed for countries to make good on subsidy reduction commitments.³⁴ Indeed, members of the European Parliament have actively evaluated the potential benefits of addressing fossil fuel subsidies within the U.S.-EU TTIP negotiations.

The Customs Bill climate provision forecloses that possibility, along with the option of using other trade fora to make progress in this vital area of climate policy.

Conclusion

Global climate change poses the greatest environmental challenge humankind has ever faced. The window for responding to that challenge is closing rapidly; and doing so demands immediate and dramatic action both domestically and internationally.

The Customs Bill climate provision would raise new and very real barriers to effective climate action at a time when barriers should be coming down.

The language of the provision will reduce our ability to safeguard domestic climate actions from trade attacks. It will result in increased uncertainty regarding the United States' negotiating authority in international climate negotiations and other key policy arenas. And it expressly forecloses an avenue of trade cooperation that could create genuine and important benefits for the global climate, and for the countless species who depend on a safe climate--including our own.

Accordingly, it should be rejected.

About this Briefing

This policy briefing was prepared by Carroll Muffett and Viv Fernandes on behalf of the Center for International Environmental Law (CIEL). Since 1989, CIEL has used the power of law to protect the environment, promote human rights and ensure a just and sustainable society.

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Endnotes

¹ §912(b)(15) *Amendments to Bipartisan Congressional Trade Priorities and Accountability Act of 2015*.

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³ Letter from Ambassador Michael B.G Froman (United States Trade Representative) to Congressman F. James Sensenbrenner, Jr, dated June 12, 2015. Italicized emphasis added, available at http://sensenbrenner.house.gov/uploadedfiles/amb._froman_letter_to_fjs.pdf.

⁴ Remarks by the President in the State of the Union Address, January 20, 2015. <https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015>

⁵ *Id.*

⁶ Chris Wold et al, *Climate Change and the Law*, Newark, NJ, LexisNexis Matthew Bender, 2009, p.442.

⁷ *U.S. Challenges India's Renewable Energy Incentives at WTO*, International Centre for Trade and Sustainable Development, February 13, 2013, available at <http://www.ictsd.org/bridges-news/biores/news/us-challenges-indias-renewable-energy-incentives-at-wto>.

⁸ See <https://www.wto.org/english/tratop e/dispu e/cases e/ds419 e.htm>.

⁹ See <https://www.wto.org/english/tratop e/dispu e/cases e/ds412 e.htm>.

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¹² *Id.* at 62.

¹³ *EPA Issues Notice of Data Availability Concerning Renewable Fuels Produced from Palm Oil Under the RFS Program*, EPA Office of Transportation and Air Quality, December 2011, available at <http://www.epa.gov/otaq/fuels/renewablefuels/documents/420f11046.pdf>.

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¹⁶ *Foreign Trade Barriers – European Union, United States Trade Representative (2014)*, available at <https://ustr.gov/sites/default/files/files/reports/2015/NTE/2015%20NTE%20EU.pdf>.

¹⁷ *Foreign Trade Barriers*, pp.121-122.

¹⁸ *Foreign Trade Barriers*, p.124.

¹⁹ *Foreign Trade Barriers*, p.124.

²⁰ *The U.S.-South Korea Free Trade Agreement (KOR.U.S. FTA): Provisions and Implementation*, p26.

²¹ *Drivers of deforestation and WTO rules – Conflicts and Solutions*, Policy Brief, Global Canopy Programme, 2013, available at

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²⁷ EU Position Paper, Trade and Sustainable Development Chapter/Labour and Environment: EU Paper outlining key issues and elements for provisions in the TTIP, publicly released January 7, 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153024.pdf.

²⁸ EU Position Paper, Article III 2(3), p.6.

²⁹ U.S.-China Joint Announcement on Climate Change, November 12, 2014, available at <https://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>.

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