

## The Climate Change Debate: Are Carbon Tariffs In Our Future?



Although climate change legislation held a central position in the Obama administration's 2010 agenda, recent developments in Copenhagen, Massachusetts, and Washington have moved "cap & trade" legislation well down the administration's priority list. The fate of the administration's climate change aspirations for 2010 is now uncertain, but if and when climate change action is revived border equivalence measures (aka "carbon tariffs") will occupy a prominent position.

Enacting an economy-wide cap and trade regime to limit greenhouse gas (GHG) emissions and encourage new technologies was near the top of the Obama administration's goals for 2010. However, failure of the Copenhagen climate conference to forge a global consensus around binding GHG reduction targets, the election of Republican Scott Brown to the US Senate in Massachusetts, continuing employment weakness in the United States, and mid-term elections in November, has led to a pragmatic reassessment of the legislative agenda. Instead of pushing ahead with cap and trade this year, look for Congress to move forward on energy legislation with a heavy emphasis on support for green technologies and green jobs, and a renewed aspiration for a global agreement at the December 2010 Mexico climate change summit.

The US House of Representatives moved aggressively in 2009 to advance the administration's climate change agenda by narrowly passing "The American Clean Energy and Security Act of 2009". That bill would establish a cap and trade system for the control of GHG, primarily carbon dioxide. Industries would be awarded, or would have to purchase, certificates allowing them to emit GHG under ever declining emissions ceilings. Reflecting a vigorous debate over the risk of saddling US industry with a carbon cost not shared by their foreign competitors, the bill includes a requirement that imported merchandise be accompanied by carbon allowance certificates as a condition of importation, unless the merchandise originates in a country that is either subject to binding and enforceable international GHG targets or has GHG restrictions equivalent to those in the United States. Although the administration opposed inclusion of so-called border measures, political (and legal) forces overwhelmed that opposition.

Critical voting blocs in the House insisted on the need for the legislation to guard against "carbon leakage," the preferred phrase to describe predicted drift of manufacturing and production from markets that restrict or tax carbon to those that do not. Labor unions and manufacturing industries joined with environmental groups and climate change advocates to argue that a purely domestic measure would not address the climate change problem because emission causing production would simply move overseas. The solution – incorporated in the House bill – is to require that foreign suppliers adopt the same burden either in the form of actual GHG reduction commitments or face an equivalent tariff.

Opponents immediately cried foul, arguing that carbon tariffs would not survive World Trade Organization (WTO) scrutiny. However, a joint WTO-United Nations Environmental Programme report concluded that certain border measures could be acceptable as measures designed to protect human, animal, or plant health, or conserve exhaustible natural resources. Soon thereafter, a bipartisan group of US senators wrote to President Obama arguing that the inclusion of border measures to prevent carbon leakage and the export of American jobs would be critical to the passage of a climate change bill in the Senate.



Leading up to the Copenhagen Climate Change Conference in December, US senators again wrote to the administration stressing the need for a common approach to GHG restrictions, including border measures to guard against export of American jobs. That conference ended without agreement on binding GHG reduction targets. Instead, the conference parties merely noted that countries could notify their voluntary GHG reduction goals by the end of January 2010 and pledged a renewed effort for global consensus at the December 2010 conference in Mexico.

Looking forward for 2010, it seems clear that any movement of climate change legislation through Congress will carry with it some form of carbon tariff to address concerns that other countries will not adhere to equivalent, binding reductions, thereby putting American industry at a competitive disadvantage. Whether characterized by catch phrases like downward spirals, carbon leakage, or level playing fields, the message is the same: when the United States decides to put a price on domestic carbon emissions, imported goods will be required to pay that price either at the time of production in the form of an equivalent carbon restriction or as a charge at the time of importation.

Should you have any questions, please contact the Arent Fox attorney with whom you work or a member of Arent Fox's International Trade Practice Group.