China Law & Policy Interviews Jake Caldwell, Director of Policy for Agriculture, Trade and Energy at the Center for American Progress
Regarding the Tariff Provisions in the American Clean Energy and Security Act of 2009
August 27, 2009

Transcript of August 29 Interview with Jake Caldwell

Hi, this is Elizabeth Lynch of China Law and Policy Dot Com. Welcome to our Podcast. Today we will be discussing the American Clean Energy and Security Act of 2009. Or what is sometimes known as the Climate Change Bill or the Waxman-Markey Bill.

[00:16] Before Congress went to recess for the summer, the House of Representatives passed, by a very thin margin, the Climate Change Bill. Now it awaits discussion before the Senate when the Senate returns after Labor Day. There is high likelihood that the Senate will change some of the House Bill since heated debate and negotiation is anticipated.

[00:31] A key piece of the Bill that will be heavily discussed in the Senate is the Border Adjustment measures section, or what is more commonly referred to as tariffs. In order to pass the bill, the House threw in two provisions to help protect certain U.S. manufacturing industries that may face foreign competitors not subject to similar emissions regulation in order.

[00:51] Joining us today to discuss these tariff provisions is Jake Caldwell, Director of Policy for Agriculture, Trade and Energy at the Center for American Progress.

[1:00] **EL**: Thank you for joining us Jake.

[1:01] **JC**: My pleasure Elizabeth

[01:03] **EL**: First, can you give us some background on the tariff provisions in the Climate Change Bill?

[01:07] **JC**: Right, well, over in the House of the U.S. Congress, the House of Representatives, they've produced a fairly complex response to the issue of both competitiveness and something called carbon leakage, where the issue there is the movement or migration of carbon, carbon dioxide, a greenhouse gas, but also jobs to overseas competitor countries that perhaps are not taking the same amount of action as the United States. This is a little bit ironic in that the United States is probably not taking as much action as some other countries around the world. Needless to say, it is in the House bill.

A couple of details on what the House provided. Number one, they said for energy intensive, trade-sensitive industries, and here we are talking about steel, cement, chemicals, they will be given a two-year waiver from being obligated to fall under the cap and trade mechanism that would be established under the House bill. So a two-year moratorium for them - for energy intensive, trade sensitive.

The second provision allows for the same industries to receive emissions allowances that will compensate them for the cost of compliance once the two years are over and they have to comply with the cap and trade program. They will be given allowances to help them comply.

And the third piece that has garnered quite a bit of attention is this international boarder adjustment provision which essentially requires the President of the United States to require our trading partners that are importing these goods into the United States to submit emissions allowances along the same lines as the United States' industries. If by 2018 there is no international agreement, then President can do this by 2020. The interesting thing about this provision is that by 2020 the President has to make a decision on whether to impose this emissions allowance requirement which can be seen as a tariff basically on foreign imports on these products. The President has to make a decision. He or she can grant a waiver to those countries but the waiver has to also be backed up by a joint resolution of Congress. So the default is towards the tariffs.

[03:27] **EL:** So just to clarify, the border adjustment measures that will only occur if there isn't a multilateral agreement reached at Copenhagen in December?

[03:41] **JC:** The actual provision is that if there is no international agreement by 2018, then these border adjustment measures will kick in. So it is possible that we won't have an agreement in Copenhagen, but as long as there is agreement by 2018, we may avoid these boarder adjustment measures.

[04:01] **EL:** In terms of measuring other countries' emissions, does the bill say anything at all about how to measure it, especially with a country like China where a lot of people question the validity of their measurements?

[04:16] **JC:** I think that is a huge, outlying question even in the United States. What they said is that they are going to talk about sector-specific industries. So they have to be energy-intensive and they have to be sensitive to trade. They can't just be any industry that uses a lot of energy. They have to actually be active in international markets. But given that, and then they are going to measure both their energy-intensity and their greenhouse gases that they emit and their output, that alone in the United States and getting that proper data is going to be very difficult to do. So how that is going to occur on an international level remains a very big open question.

[04:51] **EL:** In terms of the House putting these provisions into the bill, were the reasons precisely to protect industries in the United States? How did these provisions get into the bill? Were they initially part of the House bill or were they thrown in at the end?

[05:09] **JC**: Well, the provisions in the House bill - and this is a caution for your listeners and viewers of your blog – is to be wary of policy that professes to have many purposes and I think this in particular, these boarder adjustment measures fit into that category. They were (a) designed to go after that carbon leakage issue which I talked about, which was sort of the migration of carbon to other countries if the U.S. were taking action but also the migration of jobs to those countries if they felt that they could gain an advantage from not being under similar environmental regulations or climate change regulations. And that goes to the second argument which is competitiveness. Is the U.S. potentially at a competitive disadvantage if it's actually taking action toward climate change - a big if there - and other countries are not? The third argument that is put forth for the boarder adjustment measures is leverage over developing countries; to get them to accede to an international agreement; to bring them to the table and participate in an international agreement. Unspoken was certainly a focus on China, and to some extent India, but primarily China.

[06:23] **EL:** And will these provisions, it seems like just on the face of it, not knowing more behind it, the provisions will in fact protect U.S. industries, assuming that a country like China or a country like India doesn't have similar emissions cap. But is that actually true?

[06:42] **JC:** I think the potential is there for this to knock out incentives, perhaps, for an energy-intensive, trade-sensitive industry to move to a country with laxer environmental regulation or climate change regulation. This potentially cuts off that route for them. But I think in the history of and in the economics of looking at why industries locate where they do, I'm not sure environmental regulation stands up to be the main reason for the migration of industries. I think it is much more around technology, much more around education of the workforce, much more around labor cost. So potentially it will cut off a certain route of some companies that may have been thinking about laxer carbon regulation in a carbon-constrained world that we have, but we're not going to solve the competitiveness problem by just simply going after this component of it. It has to be a much broader strategy.

[07:39] **EL:** What will happen if the climate change bill, because it is before the Senate, is passed with these provisions? How will the rest of the world react you think and how will this impact the U.S. in going into Copenhagen?

[07:54] **JC:** I think you're initially going to see some fairly negative reaction from the rest o f the world. We've seen a bit of this already. China has reacted fairly vociferously; India in particularly, with Secretary Clinton's trip to India just last month, spoke and addressed this issue of carbon tariffs directly and said they were really unacceptable. I think the word use was pernicious. So you are going to have, at least on the surface, a visceral negative reaction. In terms of how it plays in Copenhagen, it's really going to be unclear. I think there will initially be a negative reaction to "oh here comes the United States again acting holier than thou with a provision that is actually going to be more addressed to the competitiveness than really at the climate change problem," or that will at least be the accusation. But whether that may actually provide a bit of an incentive – certainly these boarder tariff measures gain the attention of countries and governments, as we have seen from China and India. Certainly, we've seen actually recently with the South Korean announcement that they are going to take international action; they too cited the boarder tariffs as a reason to jump on board with an international agreement. So we may see sort of on the surface a negative reaction, but maybe below the surface actual momentum toward an international agreement.

[09:12] **EL:** So do you think then that these provisions could in fact have the leverage that might have been intended? China and India seem pretty adamant, at least as of late, that they are not interested in capping greenhouse emissions.

[09:26] **JC:** I think there is an opportunity that if we can actually even work with China and India and the developed nations like the European Union, well actually all the nations, in terms of an international agreement, if we can work it in a way to craft these boarder adjustment measures in a way so that they don't discriminate between domestic products and foreign products and perhaps agree on a framework to put them into place and enforce, then I think there is actually a possibility that they could provide some momentum toward an international agreement. So yes, they could work.

[10:00] **EL:** Are there other ways, outside of having tariff provisions in this climate change bill - in some ways you don't want other countries to be able to benefit if for some reason a country like China or India, don't agree to have cap-and-trade, but are there other ways, either through the treaty at Copenhagen or other bodies such as the WTO, where we can guarantee that U.S. business won't be adversely affected?

[10:31] **JC:** That's a really good point. I should say that in the sense that they can be properly constructed, they do provide some leverage. I do want to emphasize that it is my personal feeling that we need to use them with a real abundance of caution. They are potentially very dangerous from a trade war situation, from a tit-for-tat trade penalty and even that word protectionism standpoint in terms of countries taking action. Are there other things we can do? Yes, certainly a multi-lateral agreement, an international agreement starting in Copenhagen but moving on from there is the best way to go, whether it is agreeing on ways to attack carbon issues at the boarder or even on carbon dioxide and greenhouse gas targets. The other forum for this is basically the WTO. You could do that, that is possible. The WTO has shown a much more greater sensitivity to environmental issues in the recent past. The only concern I have there is that the WTO is a very, very slow process as we have seen with the Doha round, negotiations launched in 2001 and still sort of lurching along. So I wouldn't want to leave it up to the WTO which might be a very long process. My preference would be for the Copenhagen-U.N. framework convention process. The third way is for in the United States and other countries is sort of the first part of the provision in the House bill which is to use domestic allowances or domestic incentives to actually help these industries that if they do have a legitimate case to be made that they are energy-intense and they do have sensitivity on trade, on exports and imports, then we should be stepping up to the plate and helping them with assistance from our own U.S. government and not taking it out on foreign competitors.

[12:22] **EL:** And that would be the carbon leakage provisions?

[12:24] **JC:** That would be the carbon leakage provisions but also just allowing them to have allowances to a certain level that would be free and that would allow them to meet the cost of compliance of some of the domestic regulation.

[12:39] **EL:** In going back to where we stand now with the bill, once the Senate is back in session after Labor Day, how do you see things shaping up? I know that initially some Senators were against the tariff provisions but more recently other Senators have come out, especially Senators from states where there is industry that would impacted, how do you see things shaping up in the Senate going forward in the next few months?

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[13:05] **JC:** Well it's going to be really interesting Elizabeth because essentially the Senate in the United States is considered the more trade-friendly, liberalize trade-friendly body, and I think that is still largely true. Initially when these provisions came out of the House, there was concern from Senator Boxer, Senator Kerry, Senator Baucus, real leaders on the climate change issue and on trade issues, about these provisions. What we see now though is that pressure mounts on the swing votes, the senators from the mid-west like Senator Bayh, Senator Sherrod Brown from Ohio, they are suggesting that these provisions are a necessity in the Senate bill. And I think that is where we've started to head. I think you'll see essentially these provisions be either very close to the House provisions on the Senate side and perhaps even a bit stronger. But what I am hopeful of is that the Senate will take a good look at the House provisions and make them better if you will. Make them more WTO compliant, or better I would define as improved in terms of making more WTO complaint. So no discrimination between domestic and international products. But also perhaps taking a look at the enforcement of these issues on a sector-by-sector basis. So that if there is a violation of one industry in a particular country, in China let's say, the steel industry believes to be falling behind on its carbon emissions, we don't take it out on all Chinese imports, for instance. So I think the Senate will narrow the focus basically, narrow the scope of this provision down to the specific sectors. The other thing I am hoping the Senate will do is actually provide a great deal more deference toward the President. Because the United States, even though the Constitution provides for the Congress to have a role in treaties and foreign affairs, we like to speak with one voice from the White House, so the President should be the ultimate person making the decision on whether to impose these boarder adjustment measures or not. So hopefully that is something the Senate will do.

[15:11]**EL:** So, right now, as the tariff provisions stand, as the boarder adjustment provisions stand, it isn't on a sector-by-sector basis. So if China's steel industry, all of China's imports would then be subject?

[15:26] **JC:** It's a little unclear but I guess theoretically if we got all the way to 2020 and there was still no international agreement, then we are probably all in trouble. But if there is no international agreement by 2020 and these provisions started to be put in force by the United States that would be, you could see that it may potentially have the effect on all imports from China. It's just not clear on how it would be enforced. So one way of potentially narrowing the scope is to say "well look maybe the aluminum industry in China is in compliance but the cement industry is not, maybe we can just talk about getting it to work on the cement industry." And maybe we can work in partnership to get the cement industry in compliance instead of sort of using a stick all the time in terms of boarder adjustment measures.

[16:16] **EL:** In terms of deference toward the President, would that mean that in the provision, as it stands now, there is that portion where Congress has to ratify, is this what you would want to come out of the bill?

[16:28] **JC:** This is an interesting piece of U.S. law. It's not clear to me how constitutional it is, but essentially, the President has the right to grant a waiver, to a China let's say, if he feels like or she feels like they are not in compliance, but that has to be "seconded" if you will by Congress through a joint resolution. I think it might be preferable to just have the President make that decision all on their own and not need the sanction of Congress.

[16:57] **EL:** In questioning the constitutionality of the provision as it stands now, is that because Congress would be overstepping its bounds and stepping into the executive power?

[17:07] **JC:** I need to go back to school on it, but it rang an alarm bell for me in actually granting the President a power to grant a waiver on this and then taking it away from him or her by requiring a joint resolution.

[17:30] **EL:** How do you think things are looking in passing the climate change bill before the Senate, just in general right now?

[17:37] **JC:** I think things are going to be very, very close. I think it will come down to a few of these swing senators, mostly from the mid-west, and that's why the boarder adjustment provision is getting a lot of attention. My advice to the U.S. Senate is actually to ratchet it up the chances of us achieving an international agreement. So they should be putting more money into international technology transfer, international cooperation, adaptation and less emphasis on some of the boarder adjustment measures.

[18:05] **EL:** Ok, well thank you very much Jake. I think this gives us a good background on what's going to be happening in September and October before the Senate.

[18:13] **JC:** My thanks Elizabeth

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