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DEBATE

# Trade and Climate, Law and Politics: A Response

Timothy Meyer[1] and Todd N. Tucker[2]

[1]Vanderbilt Law School, Nashville, TN and [2]Roosevelt Institute, New York, NY
*Corresponding author: Email: tim.meyer@Law.Vanderbilt.edu

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We are grateful to Simon Lester for responding to our piece, 'A Pragmatic Approach to Carbon Border Measures' and its companion policy proposal, 'A Green Steel Deal: Towards a Pro-Jobs, Pro-Climate Transatlantic Cooperation on Carbon Border Measures.' We are heartened to find ourselves broadly in agreement with Lester on the need for WTO rules to offer states greater flexibility to pursue legitimate policy objectives. This agreement is part of a broadening consensus that the WTO Appellate Body interpreted the combination of nondiscrimination rules and exceptions in a narrow and technical fashion that ultimately has made it difficult for governments to comply with their WTO commitments while simultaneously addressing existential threats like climate change. People who hold this general view may differ on how to solve this problem. Our view is that the Appellate Body interpreted the element of 'likeness' in the WTO's nondiscrimination rules in an expansive way, disregarding the aim of a government's measure in drawing distinctions among products.[1] At the same time, the Appellate Body suggested in *EC–Asbestos* that it would interpret nondiscrimination treatment standards to permit governments to draw distinctions among products without violating WTO rules.[2] The Appellate Body's reasoning in subsequent disputes left that promise unfulfilled, emphasizing how a government's measure alters the conditions of competition, rather than why it does so.[3] Nondiscrimination principles applicable to the GATT Article XX exceptions through that article's chapeau have extended the difficulty to exceptions. Thus, even if one agrees that the Appellate Body's direction of travel in interpreting the GATT's exceptions – towards broader acceptance of governments' legitimate policy objectives – was correct, one might still feel that the Appellate Body ultimately failed to show sufficient deference to national regulators pursuing legitimate objectives.

Our disagreements with Lester are less about WTO law and more about the politics of integrating climate into trade policy. We understand Lester's two principal arguments. First, the climate problem could be solved more directly if politicians (especially in the United States) told the truth about the climate problem. Second, the United States cannot rely on Section 232 of the Trade Expansion Act to impose trade-related climate measures without

[1]Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, para. 99

[2]Ibid para. 100.

[3]Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, para. 5.108. The Appellate Body's decisions regarding nondiscrimination under the TBT Agreement adopt a similar commercial viewpoint. However, the Appellate Body has said that if a measure detrimentally impacts the conditions of competition for reasons 'that stem … exclusively from legitimate regulatory distinctions', the measure does not unlawfully discriminate. Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, para. 175. Given that the TBT Agreement does not have general exceptions as the GATT does, the requirement that any detriment to the competitive relationship among like products stem *exclusively* from a legitimate regulatory distinction is no better, and arguably even more limiting, than the GATT framework in its totality.

aggravating US allies. Section 232, in Lester's view, has been irrevocably tainted by the Trump administration's unilateralism. Both of these contentions seem to us misguided.

With respect to the former, we certainly share Lester's view that politicians should take climate change on directly, educating the public about the risks. We disagree, however, that hope is a solution. A strong majority of the US population already supports action on climate change. In a survey taken after the 2020 presidential election, 66% said that developing clean energy should be a high or very high priority and 83% supported shutting down old coal mines and abandoned oil and gas wells, with job support for workers in those sectors.[4] When asked about the Green New Deal by name, 66% of respondents were supportive, with even higher support for the specific policies contained therein.[5]

This overwhelming support for climate policies suggests that most voters in the US already understand the need for action on climate change. It is easy to see why, as the Pacific Northwest region of the US and Canada endures 115 degree F temperatures (46 degrees C), and hurricane and wildfire seasons have become catastrophically long and intense for the south and west of the US, respectively. Yet, these political views have not translated into action from the US Congress. The US Senate, in which representation is based on federal geography rather than population, is the primary culprit. Republican Leader Mitch McConnell has described Republicans in the Senate as in 'total unity … in opposition to what the new Biden administration is trying to do to this country.'[6] This kind of opposition to policies with majoritarian support is sadly familiar to anyone who follows US politics. As a result of the epidemic of mass shootings, support for stricter gun control laws in the US has hovered between 55% and 67% for years, yet Congress has taken no action.[7] The United States Senate has also become very hostile to consenting to new treaties, refusing to approve the Convention on the Rights of Person with Disabilities (based in large part on a US law, the Americans with Disabilities Act) and, famously, the UN Convention on the Law of the Sea, to say nothing of climate change treaties like the Kyoto Protocol.[8]

The countermajoritarian nature of the US Senate has caused presidential administrations of both parties to turn increasingly towards general grants of statutory authority to fulfill policy objectives across a wide range of issues. Where trade is concerned, the Trump administration dusted off Section 232 and made aggressive use of Sections 201 (which is the US law authorizing safeguards) and 301 (which authorizes the administration to respond to discriminatory or unfair trade practices) of the Trade Act of 1974[9] in service of that administration's goal of raising US tariffs and protecting certain industries. So is Lester right that these actions have tainted reliance on these laws going forward?

We don't think so. As we explained in our initial piece, reliance on Section 232 as a source of domestic legal authority does not mean the United States would need to rely on national security as a legal justification at the WTO. Invoking GATT article XXI at the WTO would be more contentious than invoking Section 232 domestically, but in our view pragmatic carbon border measures should be upheld under Article XX, obviating the need for a dispute panel to address arguments about article XXI.

Moreover, unlike the Trump administration's use of Section 232, our proposal is multilateral. The Biden administration would use Section 232 as the basis not only for a US carbon border measure, but also as the legal basis for an international agreement on how to treat carbon

[4]Anthony Leiserowitz et al, 'Politics and Global Warming, December 2020' Yale Program on Climate Change Communication (14 January 2021) 4–5, https://climatecommunication.yale.edu/wp-content/uploads/2021/01/politics-global-warming-december-2020b.pdf, accessed 29 June 2021.

[5]Ibid 23.

[6]Lindsay Wise, 'McConnell Says "100%" of His Focus Is on Blocking Biden Agenda', *Wall Street Journal* (5 May 2021).

[7]'Guns' *Gallup*, https://news.gallup.com/poll/1645/guns.aspx, accessed on 29 June 2021.

[8]David Kaye, 'Stealth Multilateralism: US Foreign Policy without Treaties – or the Senate', *Foreign Affairs* (2013), 113.

[9]19 USC § 2251 et seq; 19 USC § 2411 et seq.

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intensive imports. Although we would welcome congressional action on the matter, the possibility of the Biden administration acting without ex post congressional authorization should arouse few concerns among US allies. Indeed, the EU is currently pressing ahead with plans for a unilateral CBM, making complaints that Section 232 is inherently unilateral, regardless of the purpose for which it is used, ring hollow.

Indeed, our approach offers greater trade liberalization than the realistic alternative, which is developed countries each unilaterally adopting its own CBM. Our proposal amounts to a carbon customs union among like-minded countries.[10] The United States would lift existing Section 232 tariffs on other members.[11] At the same time, members would not impose their CBMs on each other. This is a significant form of liberalization. Imagine, for instance, if the US, EU, Canada, and Japan all have their own CBMs. Even if they give each other credit for the explicit or implicit price of carbon in the home market, an exporter will have to deal with three separate sets of CBM-related administrative hurdles. Under our proposal, these administrative trade barriers would vanish among members of the customs union.

Finally, governments' objections to domestic legal authorities are more closely tied to the use of those authorities than their existence. GATT members objected strenuously to the US's use of Section 301 as a tool of unilateral trade enforcement during the Uruguay Round, and the EC challenged the continued existence of the Section 301 procedures after the WTO's creation.[12] But a panel rejected that challenge based on assurances from the US that it would use Section 301 only for purpose permitted by the WTO Agreements, such as the withdrawal of concessions pursuant to a DSB decision, an action that requires domestic legal authority that Section 301 supplies. Concerns about Section 301 lay largely dormant thereafter until the Trump administration turned to the statute to impose tariffs on China.

In short, the question for other WTO members is whether Section 232 violates WTO rules as such, or whether any particular use of it does. The answer to the former question is no, and in the case of the kind of pragmatic and reasonable CBMs we propose, the answer to the latter question should be no as well.

[10]Lester suggests that our proposal would be a club of wealthy countries working against the economic interests of poor countries. We don't think this would necessarily be so. We agree with Lester that technological transfer and technical assistance to poorer countries should play a role in addressing climate change, including trade-related impacts. Moreover, existing trade policies, such as the Generalized System of Preferences and the Enabling Clause, have always allowed countries to extend preferential treatment to some developing countries.

[11]The US and EU recently agreed to address steel and aluminum global overcapacity, including a possible resolution to the dispute over the Section 232 tariffs, by 1 December 2021. Andrea Shalal, 'Resolving US–EU dispute over steel, aluminum no easy task' Reuters (15 June 2021).

[12]Panel Report, *United States – Sections 301–310 of the Trade Act 1974*, WT/DS152/R.

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