

# Trade Agreement Threats to State Climate-Change Policy

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## How to Avoid the Planetary Heat *and* Stop the WTO Chill

Creating effective policies to address the global climate emergency is one of our country's most urgent tasks. State governments are leading the way by committing to a wide variety of "green" policies, and to the notion that the adjustment to a low-carbon economy must be equitable to working families at home and abroad. Such state initiatives continue to play a crucial role in developing both national and international climate strategies.

But some backwards-looking corporations and politicians have turned to invocations of WTO rules as a reason to halt decisive action on climate change. These obstructionists are the modern-day "climate-change deniers," who, having lost the scientific argument, have turned to trade-pact attacks. Because the WTO contains such extreme regulatory limits, some of the claims are, sadly, legally accurate. However, the threats are relatively easy to deflate with information about how the WTO actually operates.

**WTO Rules Have Been Modified Before to Address Global Crisis:** It would be a mistake to fail to enact necessary climate legislation now. In the past, when WTO rules conflicted with global priority policies, nations negotiated changes to the pact. For instance, the 2001 "Doha Declaration on TRIPS and Public Health" was created to clarify WTO rules so as to allow for a global response to the HIV/AIDS crisis. Like that pandemic, global warming is a planetary emergency. Scores of WTO countries are seeking to implement the very same climate policies that are being attacked as WTO violations. Given the WTO's already shaky legitimacy, it is foreseeable that – rather than allow the institution to become a practical barrier to forward-looking climate solutions – a new Declaration establishing needed policy space on climate will be created.

**It Takes Years for a WTO Challenge to Get an Initial Ruling:** Even if a climate proposal violates WTO rules, a member country must formally challenge the policy for WTO action to be initiated. After a challenge is brought, it typically takes more than five years before issuance of a final WTO ruling, which could result in trade sanctions. Thus, the "way to go" is to ignore the threats, enact legislation, and see if it draws an actual challenge.

**The Bush Administration Has Demonstrated that Sensitive Economic Sectors Can be Withdrawn from the WTO to Avoid Challenges:** Another way to ensure that green-building, biofuel and other measures are protected from WTO challenge is for the U.S. government to withdraw key climate-related sectors like energy and construction from WTO coverage. The Bush administration already did this once. In 2007, it withdrew the U.S. gambling-services sector from WTO coverage to avoid further challenges or sanctions, after the WTO ruled against the U.S. Internet gambling ban.

# Climate Change Policies at Risk

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**Cap-and-Trade Policy Proposals:** Cap-and-trade programs typically establish a limit on carbon emissions, and then auction off permits or allowances that entitle corporations and other entities to emit set amounts. Many countries are using cap-and-trade programs, yet the Bush administration has already used the threat of WTO-incompatibility to chill the European Union's. Corporate interests pulled similar stunts during the Senate debate on climate legislation. In the absence of a federal program, three U.S. regional initiatives, which together encompass nearly half of all states, currently lead the way in developing cap-and-trade programs. While uncertainty about the WTO-legality of cap-and-trade continues to be leveraged at the federal and international levels to chill innovation, these exciting regional programs remain vulnerable to challenges themselves.

**CAFE (Corporate Average Fuel Efficiency) Standards:** Following California's lead to regulate tailpipe emissions, at least 13 states have pledged to adopt more stringent vehicle-emissions standards. Sounds reasonable, but under WTO "non-discrimination" rules, any method for calculating fleetwide carbon emissions must not only treat foreign and domestic manufacturers the same, but must have the same *effect* on them in practice! This means that a foreign auto company could argue to the WTO that more stringent CAFE standards in the United States impose an unfair burden to their cost of production. The WTO already ruled against U.S. CAFE standards once in 1994.

**Ban of Incandescent Light Bulbs:** At least seven states have initiated action to limit or ban incandescent light bulbs to promote use of more energy-efficient light bulbs – something also supported by many federal policymakers. But a ban is definitionally the *most* "trade-restrictive" policy device, and WTO rules require use of the *least* trade-restrictive means to meet an environmental goal.

**Renewable Portfolio Standards (RPS):** Renewable portfolio standard (RPS) programs, like those already in effect in 26 U.S. states and D.C., require that a certain percentage of energy sold or consumed must come from renewable sources. Currently, U.S. "services incidental to energy distribution" are under WTO jurisdiction. Even if it applied equally to foreign and domestic plants, an RPS program could make it more difficult for a foreign energy provider (or a foreign firm operating an energy distribution system here) to sell their product in the U.S. market. If this happened, a "national treatment" violation could be claimed.

**Subsidies for green building and production:** From benefits for biofuel production, to money for retrofitting auto plants, to deploying energy-efficient technologies, concerned Americans are thinking long and hard about how to ensure that climate legislation creates new "Green Collar" jobs. Various green measures could run afoul of the WTO's subsidies rules. But, this can be fixed. For instance, a temporary WTO provision that expired in 2000 that allowed governments to fund environmental transitional assistance should be renewed and strengthened.

**Excessive Foreign Investor Privileges Must Be Eliminated To Restore Policy Space for Addressing Climate Change:** The North American Free Trade Agreement (NAFTA) and seven U.S. "free trade agreements" (FTAs) provide foreign investors the right to demand compensation in foreign tribunals from the U.S. government for policies and actions that undermine their *expected future profits*. A variety of measures taken by state, provincial and municipal governments to protect the environment have been challenged by corporations as regulatory takings using NAFTA's Chapter 11. One example took place in 2003, when a Canadian mining company, *Glamis Gold*, filed a notice that it intended to pursue a \$50 million dollar NAFTA claim against mining regulations promulgated by the State of California. Although the *Glamis* was recently dismissed, this was the second major NAFTA claim brought against California's environmental regulations which required considerable California Attorney General's office time and resources. Four other NAFTA claims remain pending with alleged damages totaling over \$6 billion.



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