

## 7 Warming aid, chilling trade?

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Global warming is the mother of all environmental scares. In the scope of its consequences for life on planet earth and the immense size of its remedies, global warming dwarfs all the other environmental and safety scares of our time put together. Warming (and warming alone), through its primary antidote of withdrawing carbon from production and consumption, is capable of realizing the environmentalists' dream of an egalitarian society based on rejection of economic growth in favour of a smaller population eating lower on the food chain, consuming a lot less, and sharing a much lower level of resources much more equally ...

[The environmentalists'] favoured political mechanism [for achieving this outcome] would be an international treaty ... Think (if you are persuaded you hold the truth) of the glory of it: no need to cope with regulations in different countries ... Everything can be done uniformly and worldwide by central direction.

Aaron Wildavsky, 1992<sup>1</sup>

When Aaron Wildavsky wrote this passage, I was myself a naïve young environmentalist. I had just written a paper on how to establish a global system for restricting emissions of carbon dioxide and was about to embark on a Masters course in Environment and Resource Economics run by Professor David Pearce at University College London. At the time, there was much buzz about a conference due to take place in Rio de Janeiro that was being hailed as the 'Earth Summit' and global warming was a hot item on the agenda.

Eleven years later, much has changed. The international establishment, including environmentalists, has achieved many of its goals in

advancing regulations to deal with the threat of global warming. They have established a set of institutions, including an international treaty, the Kyoto Protocol, through which they would control world energy resources. They have bullied two of the world's three largest oil producers into accepting the basic proposition that global control of energy resources is desirable. They have scared many people into believing that absurdly high taxes on fuel are good for the environment. And they have likewise persuaded many opinion formers around the globe of the need for more public transport, renewable energy and other supposedly carbon-reducing fixes for global warming.

However, several obstacles have prevented the environmentalists' dream from becoming a reality. Specifically, the USA, Australia and Russia have not ratified the Kyoto Protocol.<sup>2</sup> Without ratification by at least one of these governments, the Protocol will not enter into force. Even if one of them (most likely Russia) does ratify, two of the world's largest producers of carbon dioxide are not members of the treaty and hence cannot have their energy use dictated by the environmentalist kings. In addition, numerous governments in poorer parts of the world seem ambivalent at best about implementing the Kyoto Protocol.

In order to overcome these obstacles the environmentalists have devised a cunning plan.<sup>3</sup> This involves a combination of aid to poor country governments and the use of trade sanctions against non-compliant rich country governments. In addition, a coalition of businesses has been pushing for implementation of the Kyoto Protocol, combined with trade sanctions as a means of protecting themselves from international competition.

The purpose of this chapter is to discuss the mechanisms available for the enforcement of the Kyoto Protocol and specifically the potential role of trade sanctions as a means of enforcement.

### **Enforcement of the Kyoto Protocol**

Multilateral Environmental Agreements (MEAs) such as the Kyoto Protocol are notoriously difficult to enforce. There are two main reasons for this: the first relates to distribution of benefits and costs; the second relates to the willingness of the parties to the convention to utilise effective mechanisms of compliance. I shall address each in turn.

Some MEAs generate relatively large benefits and relatively small costs for nearly every party. Some have argued that this is true for the Vienna Convention on Ozone Depleting Substances, which established a framework for reducing the production of CFCs that are blamed for causing stratospheric ozone depletion.<sup>4</sup> Under such circumstances, it has been observed, the agreement is essentially self-enforcing: most parties have an incentive to comply and do so without any external encouragement.<sup>5</sup> The main role of the agreement in this case is to specify an equitable distribution of costs.

Other MEAs create significant benefits and relatively few costs for their members, but the costs to non-members are far greater than the benefits. The North Pacific Fur Seal Treaty of 1911 sought to conserve seal stocks that traversed the high seas. The treaty had four members: the UK (on behalf of Canada), the USA, Japan and Russia. This small membership and the significant individual benefit of compliance made this treaty self-enforcing among members. However, it was not self-enforcing against non-members, who – in the absence of any enforcement mechanism – might have hunted seals, undermining the effectiveness of the treaty.

To deal with this potential threat, parties threatened non-parties with trade sanctions. What the treaty did, in effect, was create property rights in these fur seals, transferring them from open access to the exclusive domain of the signatory parties. The trade sanctions then operated as a mechanism to enforce exclusion on others, just as legal penalties operate as an exclusion mechanism for the owners of other forms of property, discouraging trespass, nuisance and theft.

For a convention such as Kyoto, whose costs fall on one group of parties whilst the benefits fall on another group, a self-enforcing agreement is almost out of the question, so various methods of inducing ratification and enforcing compliance have been devised.

### **The use of aid to induce ratification**

One way to overcome the problem of unequal distribution of benefits and costs resulting from the Kyoto Protocol is to offer financial transfers to those who would experience disproportionate net costs from the effects of global warming.

In the conventional analysis the main losers from climate change are assumed to be people in poor countries. So, logically, poor countries

should be made to pay rich countries in order to compensate them for the losses the rich incur by reducing emissions. However, such a dispassionate economic analysis ignores the realities of Kyotonomics, which is predicated on egalitarian assumptions. Thus, since climate change is deemed to be the fault of rich countries, it is the rich countries that must pay compensation to poor countries on the premise that they might suffer in the future.

Of course, there is both a pragmatic and an ethical logic to this. The pragmatic element is that poor countries have other priorities: nearly a billion people in poor countries continue to live at subsistence levels, malnourished and suffering from frequent debilitating diseases; approximately 1.7 million people, most of them children, die every year in poor countries from diseases that result from poor water quality and a lack of sanitation; millions more die from respiratory infections and other preventable or curable diseases.<sup>6</sup>

Under such circumstances, signing up to a Protocol that will have little or no benefit for at least 50 years is even a waste of bureaucratic energy. This is significant, since bureaucrats usually have endless amounts of energy to spend in pursuit of mindless outcomes.

The ethical element is that since rich countries currently emit most of the carbon dioxide, it seems reasonable that they should have the responsibility of dealing with problems created by those emissions. But this presents an ethical dilemma: does the sin of emitting carbon dioxide necessitate the evil of paying bribes to Third World politicians in order to induce them to ratify an agreement? The answer of the dream-seeking environmentalist seems to be yes.

In 1992, when the UN Framework Convention on Climate Change (FCCC) was negotiated at the Earth Summit, poor country governments sought a *quid pro quo* for signing up and they got one. In return for their acceptance of the Rio Declaration, the FCCC, a declaration on forests and the Convention on Biological Diversity, poor countries were promised more aid.<sup>7</sup> African governments in particular were offered the carrot of a Convention to Combat Desertification (CCD), which contained various provisions for government-to-government financial transfers.<sup>8</sup> The FCCC itself reminds us that our obligations towards the climate exist 'on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities'. Thus spake the environmentalist.

The promised aid was slow to materialise and much of it never did. Although some governments (or, more pertinently, some government officials in poor countries) benefited from monies from the Global Environment Facility, the sums involved were relatively small: approximately US\$2 billion per year.<sup>9</sup>

Whilst these dribbles from the GEF and other agencies kept poor countries happy as regards ratifying the FCCC, when it came to implementing the Convention through an agreement on targets and timetables, rich country governments were forced to increase the size of the carrot on offer. That carrot came in the form of a mechanism for transferring technologies from rich to poor countries. The Clean Development Mechanism (see Chapters 5, 'Sustainable energy for the poor', and 6, 'Energy for the poor? The Clean Development Mechanism'), will allow rich countries to generate emissions credits for reducing emissions in poor countries. Sceptics, including many environmentalists, have noted that the CDM will do little to reduce carbon emissions. It will also do little to benefit poor countries; indeed it may harm them by locking them into a low-energy, low-growth development path.

### **The use of trade sanctions as an enforcement mechanism**

Under some circumstances trade sanctions offer a means to enforce agreements. However, there have been relatively few instances where such sanctions have proved successful as enforcement mechanisms. Nevertheless, there are numerous MEAs containing explicit trade provisions, but most have been counterproductive.<sup>10</sup>

Consider the Convention on Trade in Endangered Species (CITES). Signed in 1973, CITES is predicated on the assumption that trade leads to the extinction of certain species. However, at least for the species that have been analysed in detail, this presumption is inaccurate. One reason is that CITES trade bans don't work. Since 1973, when a CITES ban was instituted, trade in rhino horn has not ceased and nor has the decline in rhino numbers slowed, except where those rhinos are well protected.<sup>11</sup>

This latter point demonstrates a more fundamental error in CITES, that it aims at the wrong target. The problem is not trade (if it was, then sheep and cows would also be extinct); it is the incentives to conserve. In the case of rhinos and most other land-dwelling species (such

as the buffalo), where there are no property rights, individuals will have no incentive to invest in conservation and will instead simply consume what they want when they want it – until the resource is depleted. Trade may hasten the process by increasing the relative value of dead animals to live animals, but it is not the *cause*.

Experience shows that if animals are subject to well-defined and enforceable private property rights, then the people who own those rights will have an incentive to conserve the animals in order to maximise their economic value. Trade in this case can increase the return on investments in conservation by increasing the price paid for the products, thereby giving people an even stronger incentive to conserve.

### **Trade, the environment and the WTO<sup>12</sup>**

Statutory limitations on imports and exports have been common throughout history, and generally have been used by the state to raise revenue and to bestow preferential treatment on favoured firms. They were often justified as a means of enhancing the wealth of a nation, based on the idea that exports are good and imports are bad. These arguments were demolished by Adam Smith (1776), who showed that trade produces mutual gains, and David Ricardo (1817), who showed that this applies to trade between nations even when there is no absolute cost advantage.<sup>13</sup> These insights still hold and have very clear implications for the environment.

First, the costs of producing goods vary due to the environmental conditions that pertain. By enabling trade to take place, production will tend to occur in places where the environmental conditions are more suitable.

Production of aluminium, which requires large amounts of electricity, occurs in areas where cheap electricity is available from hydroelectric power stations. This often entails transporting raw material – bauxite – thousands of miles, from one continent to another. Transporting bauxite clearly necessitates the consumption of more raw materials than transporting the finished product. However the important factor here is that producing aluminium closer to the bauxite mines would probably be less environmentally efficient, necessitating the use of more resources and the emission of more pollution to generate electricity than results from transporting the bauxite and producing aluminium using hydroelectric power.

In addition, open trade enables competition between suppliers, which drives technological innovation as suppliers seek to satisfy consumer demands by producing better products at a lower cost. New technologies themselves typically consume fewer resources for each unit of service they provide to consumers: fibreoptic cables carry thousands of times more information than their copper predecessors, and are produced with fewer resources. A small computer today can process vastly more information than computers the size of a house could process fifty years ago. At a more prosaic level, soft drink cans are now far lighter and as a result require fewer resources in production and distribution than they did twenty and thirty years ago.

New technologies also increase economic efficiency, raising productivity, which leads to economic growth. As a result, people become wealthier. And wealthier people are more willing to spend money on goods such as environmental protection, which tends to improve indefinitely as countries become wealthier. Wealthy countries have largely eliminated egregious environmental problems, and with economic development poor countries will too.

Thus, we may conclude that agreements limiting the use of tariff and non-tariff barriers to trade result in direct improvements to human welfare and the environment. We are enormously fortunate to live in an era when these barriers continue to fall. During the past fifty years a series of international agreements have reduced such barriers, first under the framework of the General Agreement on Tariffs and Trade (GATT) and then under the WTO (of which the GATT is now a part).

The GATT knocked down barriers to trade by establishing various principles. Perhaps the most important of these is the principle of non-discrimination, which requires *inter alia* that any restrictions must be applied equally to national producers and importers, and that they cannot be a disguised restraint on trade. In particular, there is a general prohibition on the use of trade sanctions to discriminate against the methods by which goods are produced when these do not affect the qualities of the good itself (this is called non-product-related process and production methods, or PPMs).

### Evaluating policies towards trade and the environment

Given the potential benefits of trade liberalisation for human welfare

and for the environment, Professor David Pearce has suggested that policies which restrict international trade for environmental reasons must pass three tests:

- 1 They must show that the environmental degradation brought about by free trade is a) truly brought about by trade rather than some other factor, and b) of greater consequence than the losses of human well-being that would ensue from restricted trade.
- 2 They must show that production-related damage is a legitimate feature of the importing nations' loss of well-being.
- 3 They must show that a trade restriction is the most cost-effective way of bringing about the change in the product or process which gives rise to the externality.<sup>14</sup>

On the first point, it has been observed above that trade is generally beneficial to the environment, so the burden of proof is well and truly on those who claim the opposite to be the case. When one assesses the claims made in specific cases by environmentalists regarding the impact of trade on the environment, the claims are often if not always found to be incorrect. For example, it has been widely claimed that species losses, from elephants to tropical hardwood, are being driven by trade. However the reality is that trade is not a major cause of such losses. The real culprit is inefficient and ineffectual systems of ownership and enforcement of ownership.

Similarly, the Basel Convention, which restricts trade in so-called hazardous waste between OECD and non-OECD countries, is predicated on the assumption that trade in such waste is harmful. But is this assumption valid? There are no doubt many instances of illegal dumping of waste in poor countries and these no doubt cause harm to people and the environment. However, the evidence suggests that the cause is lack of enforcement of laws locally, not the international trade in waste, and this is far less related to trade between rich and poor countries. Indeed, poor countries produce a considerable amount of waste locally, much of it potentially hazardous. It seems unlikely that the Basel Convention would improve local management of such waste. Indeed, it may make things worse. A voluntary restriction on the import of waste lead into India undermined the formal lead recycling industry in that country, which was dependent on high

volumes of material. The result was an increase in informal recycling, which is more hazardous both to people and to the environment.

The environmental priorities of people in developing countries are significantly different from those of people in the developed world. For environmentalists in the developed world, global environmental standards mean less landfilling of waste and increased government protection of endangered species. It's not that people in poor countries care less about the environment. To them, though, such 'standards' seem absurd in light of their immediate needs and priorities – access to clean water, a reasonably reliable supply of electricity, and the ability to generate income (amongst other things), which would enable them to access new technologies.

From these two examples, it is clear that measures to restrict trade are rarely, if ever, necessary to achieve environmental goals. This is because environmental degradation is rarely, if ever, brought about by trade. It is usually the consequence of poor enforcement of laws at the local level and can best be addressed by improving those laws, not by imposing restrictions on trade.

Second, it is clear that such trade restrictions often have a human cost that outweighs any putative environmental cost. In the cases cited above, the loss of revenue to local people from the restriction on trade in wildlife, and the loss of jobs of people working in waste-related activities in poor countries would be examples. So, on this analysis trade restrictions in MEAs fail on both parts of the first hurdle set by Professor Pearce.

As for the second part, it is perhaps difficult to evaluate the extent to which the well-being of the importing country is improved by restricting goods on production-related grounds. This has been tested several times by the Dispute Settlement body of the World Trade Organization, with varied consequences. I now briefly describe the most important cases.

### *Tuna–Dolphin I*

The first case involved a dispute over the import into the USA of tuna caught in ways that are allegedly harmful to dolphins. The USA had imposed restrictions on tuna caught using purse seine nets (which can trap dolphins), on the basis that its own tuna fishermen were governed by the same restrictions under a US law, the Marine Mammal Protection Act (MMPA).

The Dispute Panel of GATT, which at the time was the main system which governed world trade, reported that application of the MMPA to Mexican tuna constituted a breach of Article XI(1) of the GATT, which says that tariffs are the only legitimate means to limit imports and that other restrictions are unjustified restraints on trade. The ban on tuna imports was said to be a ‘quantitative restriction’ and therefore illegal.

The panel noted that internal domestic regulations should apply only to the good itself; regulations relating *only* to the process or production method (PPM) by which the good is produced should not be applied to imported goods *with substantially similar characteristics to the domestically produced good*.<sup>15</sup> The purpose is, ‘to ensure that internal measures not be applied to imported or domestic products so as to afford protection to domestic production’.<sup>16</sup>

Whilst Article XI is the rule, there are exceptions, most of which are specified in Article XX. The USA argued, *inter alia*, that it might use Articles XX(b) or (g) of the GATT in its defence. Article XX(b) permits measures ‘necessary to protect human, animal or plant life or health’, and Article XX(g) permits measures ‘relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption’. But the header, or *chapeau*, of Article XX prohibits such measures if they are merely a disguised restriction on trade, which appears to be the case with the USA using the MMPA to prevent tuna imports.

The panel reported that neither Article XX(b) nor Article XX(g) was intended to be applied extrajurisdictionally.<sup>17</sup> Furthermore, it was pointed out that perfectly legitimate means exist to enable consumers to distinguish ‘dolphin-friendly’ tuna from dolphinicidal tuna, namely labels (in the USA the Flipper ‘seal-of-approval’ is one of these labels), which the panel ruled acceptable under the GATT.<sup>18</sup>

In 1992, then, it could be said that the judges on the GATT Dispute Panel felt that, at least with regard to dolphin conservation, the welfare of US inhabitants was better protected by ensuring that free trade prevails rather than by protecting US tuna fishermen from Mexican imports. This is, of course, consistent with the guiding principles of the GATT, whose objective is to provide a forum for enabling countries to overcome vested interests.

There is a direct parallel with the Common Law in England, which

was developed from the twelfth century onwards through the King's Bench.<sup>19</sup> By establishing a common framework of rules, the law of the King's Bench enabled trade to take place more effectively because, whereas the local courts might favour powerful local parties, the king's court would be largely indifferent to local parties' interests (though of course the king would be subject to powerful national interests). In a similar way the GATT offers a forum in which to extend a system of impartial, open, clear rules to the whole world, at least where trade between nations is concerned.

### *Tuna–Dolphin II*

Two years later, a second case, between the European Union and the USA, was brought before the GATT Dispute Panel (DP) with almost identical facts. In this case, the panel again reported that the USA could not use Articles XX(b) or (g) of the GATT in its defence. The DP noted that 'the tuna is embargoed simply on the basis of a country's policies, regardless of whether an individual tuna may have been caught without harming dolphins.'<sup>20</sup>

However, in this second case the DP accepted the general proposition that Article XX(g), which relates to the protection of exhaustible natural resources, could be applied extraterritorially under certain circumstances.<sup>21</sup> The fact that dolphins are not a globally endangered resource was considered to be significant (objections to dolphin by-catch seem to result from a poorly justified view of the intelligence of these cetaceans).<sup>22</sup>

Despite the fact that these reports were not adopted, the US made changes to its domestic legislation in broad compliance. Some environmentalists, who had lobbied for the MMPA and for its application to Mexican tuna, were irked by this and have sought to establish an MEA for dolphin protection.<sup>23</sup> They also cite the case as a reason to amend Article XX to allow for more general extraterritorial application of environmental laws. The effect of such an expansion would be to undermine the whole premise upon which the trading system is based, since it would effectively permit arbitrary restrictions on what can be traded.

### *Shrimp–Turtle*

A similar dispute arose four years later in 1998 when India, Pakistan, Thailand and Malaysia found themselves on the wrong side of a US

ban on imports of shrimp caught without the use of Turtle Excluder Devices (TEDs). The ban was made in reference to Section 609 of the Endangered Species Act (ESA), which lists turtles as an endangered species and empowers US regulators with the authority to impose measures to protect them. The initial ruling of the dispute panel was clear: the import ban was an unjustified restraint on trade (in breach of Article XI) and could not be justified under Article XX.<sup>24</sup>

However, the USA appealed the ruling. The appellate body (AB) of the WTO overruled the panel's decision, arguing that the panel's interpretation of Article XX was incorrect. The AB introduced a new two-stage test, which involves deciding whether the regulation meets the criteria of the appropriate clause in Article XX (b, d, g, etc.), and then deciding whether the criteria outlined in the *chapeau* of Article XX are met.<sup>25</sup>

The AB said that the US ban on shrimp imports passed the first part of the test. It deemed the measure consistent with GATT Article XX(g) on the grounds that turtles are listed as endangered under CITES and that the use of TEDs is reasonably related to the desired end of conserving sea turtles.

However, the AB deemed the ban to have failed the second part of the test because of the way it had been implemented, which meant that it was both arbitrary and an unjustifiable discrimination on trade between countries.<sup>26</sup>

All things considered, the AB's ruling amounts to a significant concession to the environmentalists, who had for years sought to impose Western environmental laws on poor countries by threatening those countries with trade sanctions. Moreover, the AB clearly spelled this out, towards the end of its opinion, stating:

We have not decided that the protection and preservation of the environment is of no significance to the members of the WTO. Clearly it is. We have not decided that the sovereign nations that are members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should.<sup>27</sup>

Thus, if *Shrimp-Turtle* is followed, any country can impose restrictions on products on the basis of how they are produced or processed so long as the country imposing the restrictions is able to show that

the measure is necessary to protect the environment and is carried out in a non-discriminatory manner.

After the AB ruling and after the USA complied with the requirement to impose the restrictions in a non-discriminatory manner, Malaysia launched a new challenge against the extraterritorial application of Section 609, but was again defeated.

What did this ruling mean to Asian shrimp fishermen, who might earn as little as US\$500 a year? For such a fisherman, a Turtle Excluder Device costing US\$150 is a significant cost. If he receives no economic return from using one, why should he do so? The fishermen continue to export shrimp to other countries who have not imposed such a ban, but receive less money for their product because purchasers do not face competition from the USA. Thus, surely it would be better to give the shrimp fishermen an economic incentive (for example in the form of a cuddly turtle-friendly symbol) to both procure new technologies and likewise generate more income.

Sea turtles are of some importance as an economic resource to some people in poor countries. But because environmentalists successfully lobbied for trade in sea turtles and products derived from them to be banned under CITES, their value has been significantly reduced.<sup>28</sup>

To answer Professor Pearce's second test (that production-related damage is a legitimate feature of the importing nations' loss of well-being), we can say that opinion at the Dispute Settlement Body of the GATT/WTO has shifted.

If this shift reflects a genuine change in public opinion, then it would be evidence that the importing nations' well-being is best served by permitting such restrictions on trade. However, I believe that the shift more accurately reflects a desire on the part of the members of the Appellate Body to avoid criticism from a small minority of anti-trade environmentalists. If that is true, it has not worked.

Immediately after the ruling, several environmentalists condemned the AB's decision, even though it represented a significant concession to their demands that trade sanctions be used to restrict imports on environmental grounds, and actually led to restrictions being imposed on imports of shrimp. Clearly the public posturing of environmentalist groups regarding the WTO has been more important than the actual decisions that have been taken. Ironically, even the people in turtle costumes on the streets of Seattle during the

WTO's 1999 ministerial meeting didn't have a clue about the implications of the decision. Nor did they know much about how the WTO works, or why there was a case. Mostly, they seem to believe that the WTO is part of a great global capitalist conspiracy.

For a court to have undermined the rules-based trading framework merely to appease a small minority of vocal activists is very troubling. The public still want high-quality produce at a low price, and mostly are not too concerned about how it is produced. Those who are troubled express their concern by purchasing produce labelled in ways that satisfy their preferences. Thus, consumers are harmed by bans on imports that are based on the way that goods are produced or processed, if the outlawed production or processing technique makes no substantial difference to the good itself. One would hope that *Shrimp-Turtle* was a minor aberration that will be corrected in the next case.

### Implications of *Shrimp-Turtle* for Kyoto

*Shrimp-Turtle* appears to create a dangerous precedent. It says that trade restrictions may be imposed on any good if that good is produced in a way that is deemed to contravene the objective of an MEA.

In principle this means that parties who ratify an MEA could impose trade restrictions on other ratifying parties to the MEA, regardless of whether or not there are explicit trade sanctions in the MEA itself.

It is less clear as to whether *Shrimp-Turtle* would enable countries who are parties to an MEA to legitimately impose restrictions on non-ratifying countries. This depends largely on the extent to which an MEA is evidence of a commitment on the part of the international community to take action with regard to an ostensible environmental problem.

In the *Shrimp-Turtle* dispute, all the parties had ratified CITES (and, globally, 163 nations have ratified CITES). But the same may not be true for other potential disputes. Some environmentalists have argued that the EU should impose restrictions on imports from the USA on the basis that the USA has failed to implement Kyoto and that US industry therefore benefits from a subsidy by virtue of its lower-cost energy.<sup>29</sup> The EU has given tentative support to this proposal.<sup>30</sup> However, it seems likely that such restrictions would be WTO illegal

(in addition to being harmful to both the citizens of the EU and the USA). At least until Kyoto comes into force, it would be very difficult to argue that the agreement represents the will of the international community.

The Kyoto Protocol, like other international treaties (including the WTO), was signed by the leaders of each country in their executive powers as the delegates of the people. However, in most states, such treaties are not directly binding on the people. This is for good reason: it forces the leaders of the signatory state to obtain the consent of the people they govern before binding them to commitments that might, on balance, be harmful. So, before Kyoto can come into force, it must be ratified by a sufficient number of member states, which in most cases must obtain consent from a broader representative body, such as Congress or Parliament.

Even if Kyoto comes into force, it remains unclear as to whether it can be used as a justification for imposing restrictions on trade with parties who have not ratified the Protocol. There are several reasons for this. First, it is not clear that even entry into force of the Kyoto Protocol represents the will of the international community. Certainly it represents the will of the ratifying parties, but are these parties representative of the international community? Although many are representative democracies, some are not, so the question remains: have these countries entered into the agreement freely and voluntarily and with the best interests of their people at heart, or were they cajoled or encouraged in some way? Some might even question the extent to which EU ratification is legitimate, given the dubious nature of the EU's democracy.

Second, if Kyoto is deemed to be the will of the international community, a question remains as to whether it is in fact the best solution to the problem of climate change, a question this book seeks to answer. If it is not, then trade restrictions imposed in the name of the Protocol would be illegitimate.

Third, if Kyoto is deemed to be the will of the international community and is deemed to be the best solution to the problem of climate change, a question arises as to whether trade sanctions are the best mechanism for enforcing the agreement. Given the analysis above, for most MEAs the answer would be no, so it is incumbent on those who demand the use of trade sanctions to explain why the case of Kyoto is peculiar. This point is addressed below.

### EU protectionists

As if the *Shrimp–Turtle* decision is not bad enough, protectionist industries in Europe have been attempting to make formal changes to the GATT that would bias the system in favour of allowing WTO members to impose trade restrictions on environmental grounds.

Leading the charge has been the European Employers' Federation, the Union of Industrial and Employers' Confederations of Europe (UNICE), which represents big business in the EU. UNICE has suggested that Article XX should be amended to allow a rebuttable presumption that trade measures contained in MEAs are permissible and that 'MEAs reflect a broad consensus in the international community on how to solve global environmental issues.'<sup>31</sup> Such a change would not only reaffirm the *Shrimp–Turtle* decision, it would clarify its provisions regarding MEAs by affirming their status as justifying the restrictions, even against non-members.

That an industry body might take such a position seems at first quite astonishing. However, a moment's reflection enables one to see that for UNICE, this is a means of enabling the EU to impose restrictions on lower-cost imports from countries that are not compliant with various MEAs. It is blatant eco-protectionism.

If UNICE's suggestions were adopted, the presumption would be that trade restrictions based on non-product-related PPMs should be permissible generally, where they satisfy the objectives of an MEA, regardless of whether the state against which the sanctions are imposed has implemented the MEA or not. This would be an egregious abrogation of the rights of members of the WTO who have either not signed or not ratified MEAs.

In the context of Kyoto, a ratifying party such as the EU might legitimately impose trade restrictions on goods from a non-ratifying party (the USA or Australia, for example) on the basis that those goods benefited from lower-cost energy available in the USA or Australia because those countries have not ratified Kyoto. In fact, environmentalists have been calling upon the EU to impose such restrictions.

### EU as protectionist

In 2001, the EU pressed for negotiations on the relationship between MEAs and the WTO. After resisting, WTO members finally caved in

to negotiations on this matter after lengthy talks at Doha, Qatar, at the fourth ministerial meeting of the WTO. However, they circumscribed the negotiations to the relationship between MEAs and the WTO for parties to the MEA.

The EU has subsequently sought to interpret the meaning of MEA very broadly, so that an agreement of only three members might be deemed an MEA, and it has pushed for negotiations to be opened up so that the relationship between parties and non-parties could be codified.

The clear intention on the part of the EU is to enable the wide use of MEAs as a means of imposing restrictions on trade. It is almost without doubt that the intention of the EU is to impose restrictions on energy-intensive goods imported from the USA and thereby sate the desires of local protectionists and their environmentalist friends. (See Chapter 9, 'Bootleggers, Baptists and the global warming battle', for further discussion of the vested interests who have lobbied in favour of the Kyoto Protocol.)

It is clear that such protectionism, whilst beneficial in the short-term for a few industries, would be harmful in the long run to the majority of EU businesses and employees, as well as to EU citizens as a whole.

This brings us to Pearce's third test, which is to assess whether trade measures are the most cost-effective manner to bring about change in the product or process which causes the environmental problem. With Kyoto, would trade measures enable countries to deal with climate change?

The likely effect of such restrictions would be to slow economic growth in Europe and elsewhere. As a result, companies would have fewer resources available to invest in research and development into new production methods, which on average will be more environmentally benign, and many of which will be less carbon intensive. Moreover, by slowing economic growth globally, Kyoto prevents people from adapting to change, which is almost certainly the most cost-effective means of coping with climate change, at least in the short and medium term. In other words, trade restrictions based on Kyoto would make products and processes less, not more, sustainable.

### It doesn't have to be like this

One might hope that *Shrimp-Turtle* was an aberration and that a future AB ruling would return us to the position we were in at the time of *Tuna-Dolphin I*, when non-product related PPMs could not be used as a justification for imposing trade restrictions.

However, another approach is to utilise the current negotiations in the WTO to clarify the position of MEAs vis-à-vis the WTO, reasserting the rule that non-product-related PPMs are not a legitimate justification for imposing restrictions on trade.

At Doha, Qatar, in November 2001, trade ministers from WTO members agreed, as part of a broader mandate, to negotiations on the relationship between the WTO and MEAs. Article 31 of that declaration says:

With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question.<sup>32</sup>

Whilst this negotiating mandate is appropriately very narrow, it nevertheless offers an opportunity to clarify the relationship between MEAs and the WTO. Given the above discussion, it seems that the appropriate way to achieve this would be to declare 'a rebuttable presumption that trade measures in MEAs agreed prior to the entry into force of this amendment are not consistent with WTO rules.' On this basis, a country seeking to utilise such a trade measure would have to prove that the trade measure is consistent with GATT Article XX.<sup>33</sup>

In addition, it would be appropriate to declare, 'MEAs not ratified by all members of the WTO are not per se evidence of a commitment on the part of the international community to take action in respect of a particular environmental problem.' This will send a clear signal that the notion, introduced in *Shrimp-Turtle*, that MEAs provide evidence of such a commitment, was a mistake (perhaps based on the fact that

CITES, in spite of its faults, has been ratified by most countries in the world).

### **Conclusion**

This chapter has demonstrated that trade measures are rarely, if ever a desirable, efficient or effective means of achieving environmental goals. Arguably the Kyoto Protocol is itself not an efficient or effective means of dealing with the problem of climate change. In light of these facts, it would be unwise to permit the use of measures to restrict trade in goods on the basis that they are produced in countries that have not ratified the Kyoto Protocol.

## Notes

- 1 Aaron Wildavsky was Professor of Political Science at the University of California, Berkeley, and served as the President of the American Political Science Association. Professor Wildavsky died in 1996. Wildavsky (1992).
- 2 At the time of writing, but this may change subsequently.
- 3 The phrase cunning plan is now closely associated in (British) English with the character Baldrick from the television series *Black Adder*. The association is not an unhappy one.
- 4 Even with the Vienna Convention, however, it turned out to be very difficult to establish a system that was equitable and the political process was gamed by vested interests in the form of DuPont, which lobbied for a more rapid phase-out than might have been optimal because it had developed patented alternatives to the CFCs. Also, India, China and Russia soon started producing large quantities of CFCs, not only for their home markets but also for illegal sale to overseas markets.
- 5 Barrett (1994).
- 6 WHO (2002).
- 7 'So it's worth remembering (however many revisionist interpretations of it there may now be!) that there was undoubtedly a "deal" on the table at the Earth Summit. G77 and emerging countries implicitly agreed to sign up to a variety of action plans for addressing some of the big environmental issues (global warming, deforestation, loss of biodiversity etc.), whilst OECD countries implicitly signed up to the idea of increased aid flows and other forms of development assistance as the quid pro quo for their buy-in on the environment agenda.' ECO (1997).
- 8 Indeed the agreement might more accurately be titled the convention on cash for despots but for the fact that very little money has flowed as a result. (See e.g. Morris 1995).
- 9 This amounts to barely one gold-plated Rolls-Royce car per corrupt government official. (The calculation is a simple one: assume that a gold-plated Rolls-Royce costs about \$200,000; so \$2 billion will buy 20,000. Assume further that the money is disbursed to 100 countries; that means 200 officials in each country get a gold-plated Rolls-Royce.)
- 10 See Morris (2000).
- 11 't Sas-Rolfes (1995).
- 12 The following discussion is adapted from Morris (2000), pp. 267–301.
- 13 That is to say, when the cost of producing all goods in country A is greater than in B, there will still be trade if the *relative* cost of producing some goods is greater in B than in A. Thus, in Ricardo's famous example, although both wine and cloth may be more expensive to manufacture in Britain than in Portugal, the relative cost of producing wine compared to cloth is greater in Britain than in Portugal, so people in Britain will sell cloth to Portugal in exchange for wine.
- 14 Pearce (1994), pp. 20–38.
- 15 The report was never adopted by the GATT contracting parties, so the decision is only of value as guidance. Appleton (1999), p.206.

16 *United States – Measures Affecting Alcoholic and Malt Beverages* (1992).  
Report of the panel, GATT document DS23/R, adopted 19 June 1992.  
17 Even if extra jurisdictional application were permitted, the DP said that the  
measures in question were not necessary within the meaning of Article XX  
(b) because the US had not demonstrated that it had exhausted all  
reasonable GATT-consistent options, such as the negotiation of an MEA to  
protect dolphins.

With regard to XX(g), the DP noted that since a country can only control  
the production or consumption of a natural resource if that production or  
consumption is under its jurisdiction, Article XX(g) should not be applied  
extrajurisdictionally.

Even if they could be applied extrajurisdictionally, the panel decided that  
the US measures did not meet the requirement of Article XX(g) that they  
'relat[e] to the conservation of exhaustible natural resources'. To *relate to*  
conservation, the panel said, the measures must be 'primarily aimed at' such  
conservation. Because of the unpredictability caused by the linkage between  
the permitted Mexican incidental taking rate and the actual US taking rate,  
the US measures could not be considered 'primarily aimed at' the  
conservation of dolphins.

Applying the same reasoning, the panel decided the *intermediary* nation  
embargo could not be justified under Article XX(b) or (g). See Goldberg  
(1994).

18 Appleton, *supra* note 4, p. 206.

19 Hogue (1996) [1985].

20 DP report, cited at [http://www.american.edu/projects/mandala/TED/  
TUNA2.HTM](http://www.american.edu/projects/mandala/TED/TUNA2.HTM)

21 For a commentary see e.g. [http://www.american.edu/projects/mandala/TED/  
TUNA2.HTM](http://www.american.edu/projects/mandala/TED/TUNA2.HTM)

22 The myth of smart dolphins is ancient and probably rests on a mistaken  
view that dolphins care for humans: it is found in Greek mythology, in  
which a dolphin saves a man from drowning; there are numerous reports of  
such incidents, which are most probably the result of a dolphin mistaking  
the man for a drowning dolphin.

23 See <http://www.defenders.org/wildlife/dolphin/tundolph.html>;

<http://www.nwf.org/trade/dolphins.html>

24 This case particularly irritated the environmentalists, in part because the US  
had attached three *amicus curiae* (friend of the court) briefs submitted by  
environmentalist NGOs, which the panel chose not to consider. The panel's  
grounds for so doing were that it had not requested the briefs and that they  
did not form an integral part of the requested submission of the US  
government.

25 The AB also overruled the panel on the point regarding *amicus* briefs,  
arguing that under certain circumstances dispute panels would be obliged to  
accept such briefs.

26 Section 609 was applied without prior negotiation with the four Asian  
countries, whereas with other countries it had been applied with prior  
negotiation; also, the timeframe for implementation was shorter for the

- Asian countries. Finally, the AB noted that the mode of certification was lacking in transparency and predictability, thereby denying all nations subject to the regulation basic fairness and due process.
- 27 *United States – Import Prohibition of Certain Shrimp Products (1998)*, para. 185, p. 75.
- 28 Cuba currently catches approximately 5,000 sea turtles per year, a perfectly sustainable level; yet it is facing serious opposition from environmentalists to a proposal to trade in 500 of these – a trade that would, by increasing the value of turtles, make it more worthwhile investing in such things as turtle hatcheries.
- 29 Robert Nappier of the WWF was quoted as supporting such a proposal at a meeting at Chatham House in London ([http://www.re-focus.net/jun2001\\_3main.html](http://www.re-focus.net/jun2001_3main.html) accessed 17 July 2003).
- 30 See <http://www.uscib.org/%5Cindex.asp?documentID=2496>
- 31 Specifically, UNICE has proposed that as a rebuttable presumption, the WTO accept in principle the validity of trade measures contained in MEAs (presumably trade measures that are discriminatory in nature and those that are consistent with WTO rules). This rebuttable presumption essentially reverses the burden of proof and raises the standard of proof in respect of compatibility between a trade measure pursuant to an MEA. In other words, any party to the GATT who believes that a trade measure is being pursued in a manner that is in violation of the *chapeau* of Article XX should have to show positively that the measure is in fact in violation of its rights and should be required to provide substantial evidence of this fact. And that ‘MEAs reflect a broad consensus in the international community on how to solve global environmental issues.’
- 32 Doha Declaration, available at: [http://www.wto.org/english/thewto\\_e/minist\\_e/minol\\_e/minded\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/minol_e/minded_e.htm)
- 33 This chapter perhaps also offers a framework for assessing the validity of such claims.

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