

WTO Rules and Climate Change: The Need for Policy Coherence

Gary P. Sampson¹

Introduction

An important challenge facing the World Trade Organization (WTO) is dealing satisfactorily with the increasingly complex interface between trade policy and considerations relating to the environment. Current or future measures taken as part of national programs to address greenhouse gas emissions and the associated climate change concerns provide good examples of the complexity of this interface.

The goal of the UN Framework Convention on Climate Change is to establish institutional and economic mechanisms, backed by legal obligations, to enable the negotiated reductions in global emissions of greenhouse gases to be achieved. The Convention came into force on 21 March 1994; in its Article 3.5, the Convention addresses its relations with the trade regime. This Article states:

The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The Convention does not provide for any specific trade-related environmental measures. The nature and scope of any Protocol or another legal instrument, and the subsequent implementation of the measures enacted, will determine whether any potential trade-related developments or trade issues would arise.

The Kyoto Protocol to the United Nations Convention on Climate Change was adopted on a consensus basis by 160 developed and developing countries at the third session of the Conference of the Parties in December 1997.² The Protocol is to promote the "progressive phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors that run contrary to the objective of the Convention and application of market instruments" (Article 1:a:v). This is very much in line with the WTO objective of the progressive removal trade restrictions and distortions. Further, the Protocol states that the Parties shall strive to implement policies and measures "in such a way to minimize adverse effects ... on international trade." (Article 2:3).

The results of Kyoto were significant and a number of key principles were agreed to, including the use of market-based mechanisms to achieve the negotiated reductions in

¹ Gary Sampson is the former Director of the Trade and Environment Division of the WTO.

²For a comprehensive overview, see Brendan F.D. Barrett and W. Bradnee Chambers, Primer on Scientific Knowledge and Politics in the Evolving Global Climate Regime CPO 3 and the Kyoto Protocol, United Nations University, Institute of Advanced Studies, June 1998, Tokyo.

greenhouse gas emissions within specified time periods.³ The next step in the process is to define the detailed means to achieve the targets; a variety of measures are candidates, many of which are already in force in Parties to the Convention. Energy, carbon and other taxes, mandatory and voluntary standards, subsidies for environmentally friendly production processes, labelling and certification schemes and the sale and transfer of emission permits within or between groups of countries all provide examples.

In addition, novel mechanisms for the fulfilment of commitments are provided for in the Kyoto Protocol. Annex 1 Parties are allowed to act within bubbles to jointly achieve their emission reduction commitments. Countries adopting this procedure will have met their reduction commitments if their total aggregate emissions do not exceed the total of their combined amounts as set out in Annex B.⁴ In the event of failure to achieve the aggregate target, each of the countries concerned will be held responsible for its individual commitment as specified in the Annex.

The specific measures employed to reduce emissions will certainly have a bearing on world trade. They will affect the costs of production of traded goods and therefore the competitive position of producers in the world market. Offsetting measures will be called for by those whose competitive position is adversely affected by cheaper imports not subject to the same measures in the country of origin. Measures such as these may well raise complex questions with respect to WTO consistency and the conditions under which border taxes, for example, can be adjusted to accommodate a loss of international competitiveness. Similarly, enforcement mechanisms that could legitimize discrimination between products in international trade because of the manner in which they were produced in other countries touches on one of the fundamental principles of the WTO.⁵ Further, preferential trading of goods and services between countries - within "bubbles" or regional groupings - is only permitted within the WTO if certain strict conditions are met.

Not surprisingly, the possibility of an eventual conflict between the rights and obligations of the WTO and what emerges from the future negotiations to address climate change concerns has been flagged by a number of authors.⁶ While the potential for conflict may exist, it should be kept in perspective. First, while the outcome of future negotiations on mechanisms to reduce emissions is a moving target, the WTO Agreements are established and well known. Decisions will be taken by governments with a full awareness of the implications with respect to their WTO commitments. As with any Multilateral Environment Agreement (MEA), acceptance of a legal instrument relating to the reduction of emissions

³The developed countries commit themselves to reducing their collective emissions of six key greenhouse gases by at least 5 per cent. This group target will be achieved through cuts of 8 per cent by Switzerland, most Central and East European states, and the European Union (the EU will meet its target by distributing different rates to its members states); 7 per cent by the U.S.; and 6 per cent by Canada, Hungary, Japan, and Poland. Russia, New Zealand, and Ukraine are to stabilize their emissions, while Norway may increase emissions by up to 1 per cent, Australia by up to 8 per cent, and Iceland 10 per cent. The six gases are to be combined in a "basket", with reductions in individual gases translated into "CO₂ equivalents" that are then added up to produce a single figure.

⁴The European Union will, for example, be bound by a specific commitment to a reduction of 8 per cent.

⁵See WTO (1997), Taxes and Charges for Environmental Purposes: border tax adjustment, WT7CTE7W/47, Geneva, 2, May, 1997.

⁶See Donald M. Goldberg, "The Framework Convention on Climate Change", in The Use of Trade Measures in Select Multilateral Environmental Agreements, R. Housman *et. al.* (eds.), UNEP and CIEL, 1995. See also, UNCTAD (1996), Legal Issues Presented by a Pilot International Greenhouse Gas Trading System, written by Richard B. Stewart, Jonathan B. Wiener and Philippe Sands, UNCTAD, Geneva, Switzerland.

would mean that an individual government has agreed to be subjected to the obligations of that instrument. If trade measures not authorized by the WTO are provided for, then the WTO Member would have agreed to forgo its WTO rights. The fact that the legal rights and obligations are not consistent with the WTO is a problem only if WTO inconsistent measures are applied to WTO Members not Parties to the Agreement. In this respect, Sir Leon Brittan,⁷ Vice President of the European Commission, recently expressed a balanced degree of concern:

Most of the governments that signed up to the Uruguay Round also accepted the outcome of Kyoto. There is a clear need for policy coherence here, and we owe it to our selves to ensure that we do not make our task more difficult by taking on obligations that are incompatible.

The purpose of this paper is to review the WTO provisions that could be relevant with respect to measures taken to address climate change concerns. The outline is as follows. There is first an overview of how the WTO Members view MEAs in general. This is based largely on the discussion in the Committee on Trade and Environment (CTE) in the WTO. Where relevant, the Climate Change Convention and the Kyoto Protocol are referred to. Second, some relevant WTO principles are singled out and discussed in the light of the objectives to reduce greenhouse gas emissions; in particular, the constraints they could place on measures to reduce emissions. Third, a number of specific measures that could be employed to achieve the desired reductions are discussed with a view to establishing their "coherence" with WTO rules. The objective is not to be comprehensive, but rather to concentrate on some of the more important principles and measures that are relevant for the rules of the two regimes. The paper closes with a conclusion.

WTO, MEAs and Climate Change

In the Committee on Trade and Environment (CTE), there has been considerable discussion on the current and potential relationship between MEAs and the WTO.⁸ As the WTO and MEAs represent two different bodies of international law, it is clear the relationship between them should be fully understood and coherent. In this context, much of the discussion is relevant for a full appreciation of the relationship between the WTO Agreements, the Climate Change Convention, the Kyoto Protocol and any subsequent legally binding instruments to address climate change.

What has clearly emerged is the acceptance by Members that the WTO has no special expertise as to how to deal with environmental problems such as the heating of the upper

⁷See Leon Brittan (1998), in *Policing the Global Economy: Why, How and for Whom*, Saddrudin Aga Khan (ed.), Cameron and May, London, 1998.

⁸WTO members recognised some time ago the complexity of the relationship between trade policy and environment policy. As a result of discussions, which coincided with the latter stages of the Uruguay Round, the WTO General Council established a Committee on Trade and Environment (CTE) in January 1995. The CTE mandate and terms of reference are contained in the Marrakesh Ministerial Decision on Trade and Environment of 15 April 1994. They are far-reaching and indicate an early concern on the part of the WTO Members with the compatibility of WTO rules with MEAs. This Decision also mandated the CTE to report to the first biennial meeting of the Ministerial Conference when the work and terms of reference of the CTE were reviewed in the light of recommendations of the CTE. This report was heavily negotiated, forwarded to Ministers, and adopted in Singapore. The CTE has now structured its work around the ten items listed in the Decision on Trade and Environment. Indeed, the Secretariat of the Climate Change Convention has been invited to the CTE and has described the principles features of the Convention, particularly the trade-related features, to WTO Members. The CTE is kept fully informed of developments in the Climate Change Convention.

atmosphere. Nor is it well placed to make judgements on the most appropriate means to achieve objectives or targets such as greenhouse gas emission reduction. A consensus has emerged that MEAs are the best way of coordinating policy action to tackle global and trans-boundary environmental problems cooperatively. Members of the WTO are, however, concerned with trade measures applied pursuant to MEAs which can affect WTO Members' rights and obligations. Of the many MEAs currently in effect, while only about 20 contain trade provisions, some - like the Climate Change Convention and the Kyoto Protocol - are potentially important in commercial and political terms.

There are considerable differences between the trade provisions of the various MEAs; in particular, the kinds of trade measures that MEA Parties are authorized or required to apply and the conditions pursuant to which the measures are taken. Some, such as CITES, the Montreal Protocol and the Basle Convention provide for discrimination in world trade if specific conditions are not met.⁹ A case for the existence and even strengthening of MEAs can be made on the grounds that no GATT or WTO trade dispute has arisen so far over the use of trade measures applied pursuant to an MEA.¹⁰ Nevertheless, doubts have been expressed by some WTO Members about the WTO consistency of certain trade measures applied pursuant to some MEAs; in particular, discriminatory trade restrictions and sanctions applied by MEA Parties against non-parties that involve extra-jurisdictional action.

It has been suggested that the WTO should formally recognize the possibility for inconsistent WTO measures to be applied under certain specified Agreements. The discussion in the CTE reveals that different views exist on this matter. One School of thought is that when account is taken of the limited number of MEAs that contain trade provisions, and the fact that no trade dispute has arisen over the use of those provisions, no real problem exists.¹¹ The reasoning continues that with some limited resort to the WTO disputes settlement procedures, existing WTO rules could be considered to provide sufficient scope to allow trade measures to be applied pursuant to MEAs, and it is neither necessary nor desirable to exceed that scope. According to this view, the proper course of action to resolve any underlying conflict is for WTO Members to avoid using trade measures in MEAs which are inconsistent with their WTO obligations.

Another view is that because of the increasing commercial and political importance of some MEAs that clearly deal with trans border problems (eg., the effects of greenhouse gas emission), it is perhaps important to adopt a preventive attitude and provide greater certainty as concern grows about the collective impact of individual countries on the global commons. As a result, various proposals have been advanced in the CTE with a view to establishing a framework for the relationship between MEAs and the WTO. Although these proposals differ in nature, scope, and level of ambition, they are all based on the view that the WTO should be supportive of action at the multilateral level for the protection of the environment.

The proponents of this approach develop the view that, subject to specific conditions being met, certain trade measures taken pursuant to MEAs should benefit from special treatment under the WTO provisions; this approach has been described as creating an

⁹ For a discussion of a variety of MEAs and WTO rules see Robert Housman *et. al.*, eds., The Use of Trade Measures in Select Environmental Agreements, No. 10 in Environment and Trade Series, UNEP, Geneva, 1995.

¹⁰ See WTO (1996), Report on the Committee on Trade and Environment, November, WT/CTE7W740, Section II, Item I.

¹¹ The following views have emerged from discussions in the CTE, see WTO (1996), *op. cit.*

“environmental window” in the WTO. In terms of the test of the “necessity” of discriminatory measures to fulfil an environment objective (see below), the interpretation of necessity could be influenced by the existence of a broad-based MEA. In the case of the Kyoto Protocol, it will enter into force following the ratifications from 55 countries accounting for at least 55 per cent of carbon emissions in 1990. The issue then emerges as to whether it is appropriate to provide for differentiated treatment for trade measures applied pursuant to the environment agreement, depending on whether they apply between Parties or against non-parties and whether or not the measures are specifically mandated in the environment agreement itself.¹²

In this respect, there is not a great deal of specificity in the Kyoto Protocol as to the measures that can be applied to meet the objectives. Articles 2 and 3 describe the measures for the implementation of the reduction commitments. The Protocol specifies that Parties are bound to adopt policies or measures in a manner to promote sustainable development. Examples are policies or measures to enhance energy efficiency, protect and enhance sinks and reservoirs, promote research and development, increase the use of new and renewable forms of energy and environmentally sound technologies, phase out fiscal incentives and exemptions in greenhouse gas emitting sectors, promote the application of market instruments. Such actions are to be taken in accordance with national circumstances.

Based on the experience of the discussion of MEA dispute settlement procedures in the CTE, it seems reasonable that an eventual between WTO Members who are Parties to the Protocol in the application of these measures should in the first instance be pursued under the dispute settlement procedures of the Convention. It has also been suggested in the CTE that MEA Parties might stipulate *ex ante* that they intend trade disputes among them arising out of implementation of the obligations of the MEA to be settled under the MEA’s provisions. It could be argued that this approach can help ensure the convergence of the objectives of MEAs and the WTO while safeguarding their respective spheres of competence, thus overcoming problems arising from overlapping jurisdictions. It has been suggested that there may be value in strengthening MEA dispute settlement mechanisms, but this matter lies outside WTO competence.¹³

If, however, the Convention, Protocol or any follow up Agreement does not provide for the trade measures under dispute, then what is permissible under the WTO is relevant. It will be reasoned below that the relationship between the measures that are candidates for implementation to reduce carbon emissions and WTO obligations is a complex one. For example, any measure taken under the General Exceptions provision of the WTO must be either necessary to protect human, animal or plant life or health (Article XX(b)), or related to the conservation of exhaustible natural resources, and made effective in conjunction with restrictions on domestic production or consumption (Article XX(g)). Interpretations of what is necessary and the geographical location of the resources being protected, for example, raises difficult questions.

In creating an environmental window and giving a special importance to any specific MEA in the context of WTO rules, account would have to be taken of the fact that countries

¹²See WTO (1996), *op.cit.*

¹³The 1982 Convention on the Law of the Sea, and in particular the 1994 Agreement Relating to the Implementation of Part XI of the Convention (Section: 6 Production Policy), attributes competence to the WTO in settling disputes involving trade-related measures, notably production subsidies and trade restricting measures

may not wish to join the Agreement for a variety of reasons. If a country had chosen not to join an agreement relating to emission reduction, who would judge the merit of that decision and the reasons why a country would take that decision? The country in question may find the scientific evidence unpersuasive, it may not be able to afford to join, or have access to the necessary technology on favourable terms. It may not agree with a given environmental objective or with the means to achieve the objective, or it may consider there are more pressing national policy problems which deserve higher priority.^{14 15}

It has been proposed in the CTE that with respect to measures applied among Parties but not specifically mandated in any legal instrument to deal with emission reduction, and those applied against non-parties which are specifically mandated in the legal instrument, these could be tested through WTO dispute settlement against procedural and substantive criteria which would be set out in an "Understanding" to be established by WTO members. The Understanding would not apply to trade measures taken against non-parties to the instrument that were not specifically mandated by it; nor would it apply to unilateral measures. These would continue to be subject to existing WTO provisions.

As with the Climate Change Convention, most of the MEAs that are the focus of the CTE's work contain mechanisms for resolving disputes. As with the Dispute Settlement Understanding of the WTO, MEAs emphasize the avoidance of disputes. They include provisions to increase transparency through the collection and exchange of information, coordination of technical and scientific research and collective monitoring of implementing measures as well as consultation provisions. These range from non-binding, consensus-building mechanisms to binding, judicial procedures of arbitration, and in certain cases resort to the International Court of Justice.

In the event of a dispute between two WTO Members, one a non-party to a legal instrument to address the climate change over trade measures applied pursuant to the instrument, the WTO would provide the only available dispute settlement mechanism since the non-party would have no rights under, nor access to, the climate change dispute settlement mechanism. The point has been noted in the CTE that in such circumstances, it would be important for the WTO dispute Settlement Body to avoid becoming involved in pure environmental conflicts, but a WTO dispute settlement panel could seek relevant environmental expertise and technical advice.

WTO Rules and Climate Change

The WTO does not inhibit governments from protecting (as they wish) against damage to the environment resulting from the production and consumption of *products* produced within national boundaries. Final products, for example, can be taxed and other charges levied for any purpose thought to be appropriate by national governments. If carbon dioxide emissions and energy-use are considered to be excessive by a government, the products can, for example, be taxed in a form and to the extent necessary. Similarly, there

¹⁴Another approach is to examine whether recourse to arbitration, as provided for in the WTO Disputes Settlement Understanding Article 25, can be an appropriate means of resolving trade and environment disputes. See WTO, *op. cit.*

¹⁵This consideration is formally recognized in Principle 7 of the *Rio Declaration*, which states that there is a "common but differentiated responsibility" of States in resolving environmental problems of a global nature.

are no problems from a WTO perspective with governments levying taxes according to the manner in which a product is produced within their territory. There can, for example, be domestic taxes on production methods that are directed to reducing energy consumption or carbon emissions in the process of production.

It is important for measures taken for climate change purposes, however, that the WTO flexibility only extends to regulation of *products* produced domestically, imported *products* and domestic *production processes*. It does not extend to flexibility in the extraterritorial application of measures relating to production processes in exporting countries. The *manner* in which a foreign *product* is produced is not a basis on which WTO rights and obligations are established. An imported product can not be discriminated against only because the production process was energy intensive, for example. The underlying thesis is that should any country wish to influence the manner in which products are produced in other countries - however appropriate this may be thought by the importing country - this should not be translated into discriminatory trade measures. The relevance of this for a legal instrument that has as its objective the reduction of greenhouse gas emissions, is clear. If a product imported into a country has been produced by a process that emits more greenhouse gas than is thought acceptable according to norms established in the importing country, it cannot be treated differently to a “like product” (i.e. a product with the same physical characteristics) produced domestically, solely because of the process employed to produce the good.

Thus, for measures to be WTO consistent, products that have the same physical form are to be considered to be like products by the importing country, irrespective of whether they have been produced abroad in an environmentally friendly manner or not. There is, however, flexibility in the WTO rules to deal with these situations. The possibility of imposing WTO inconsistent measures, is provided for. If a product was to be treated differently at the border because of the way it was manufactured - emitting too much carbon dioxide - an “exception” could be sought from WTO obligations. Additional flexibility exists as there are specific circumstances under which WTO members can invoke measures that normally would constitute a breach of WTO obligations. The circumstances under which measures can be employed are spelled out in the General Exceptions Article XX provision. Exceptions to WTO obligations can be sought providing the measure is *necessary* to protect human, animal or plant life or health (Article XX(b)). Exceptions are also provided for measures related to the conservation of exhaustible natural resources (Article XX(g)). This general exception provision is clearly designed to permit governments to maintain or implement laws they feel are necessary to preserve the lives of people, flora, fauna and exhaustible natural resources.

Based on past experience in the GATT/WTO, it would appear, however, that the measures taken to protect the fauna and flora should be taken with respect to the fauna and flora the boundaries of the country taking the action. As noted above, in the case of greenhouse gas emissions, due to the trans-boundary nature of the problem, the production process is in the exporting country and the externality is experienced outside the borders of the country where that product is produced. Also, if the trade action is taken pursuant to that accepted within the context of a legal instrument addressing the reduction of greenhouse gas emissions, where Parties consider it necessary to take such action to implement the objective of the instrument, then added support would be given to the necessity test of Article XX(b) (i.e. for action taken *vis-à-vis* a non-party to the MEA). With respect to the notion of exhaustible natural resources, since precedents have arisen in GATT as to whether clean air is

a natural resource, presumably the question could be addressed as to whether cool air is also a natural resource that could be exhausted.

According to Article XX, however, any measure which breaches WTO obligations for this purpose should not be used as a means of arbitrary or unjustifiable discrimination between countries, or a disguised restriction on international trade. Further, that the measures must be *necessary* to protect the environment, means that other less trade restrictive options are not available. In the case of measures to restrict trade in products that have produced an excessive amount of carbon dioxide, it could mean, for example, that an attempt has already been made to deal with the problem through an Agreement to address climate change.

An additional and important consideration is that on the basis of decisions relating to disputes brought to the WTO (and GATT) in the past, any exception only applies to the lives and resources which in the territory of the country taking the action. While this limits the intrusion of some countries into the practices of others, it leaves open a number of questions relating to transboundary considerations such as the effects of global greenhouse gas emissions.

Another area of importance to the WTO is the role of voluntary standards, mandatory regulations and conformity assessment procedures when used for environmental purposes. Flexibility is also provided for here. The WTO Technical Barriers to Trade (TBT) Agreement establishes obligations to ensure that voluntary standards, mandatory regulations and conformity assessment procedures do not have as their objective the restriction of trade. However, the Agreement provides considerable flexibility to accommodate environmental concerns; while it encourages the adoption of international standards and technical regulations (which may well relate to reducing carbon emissions in the production of products) to encourage the harmonization of regulations and therefore to facilitate trade, it specifically recognizes that priorities with respect to the environment differ between countries. The Agreement formally acknowledges that this can be fully reflected in domestic regulations, and therefore permits the adoption of different standards and regulations by any WTO Member. This could relate the amount of energy used in the production of a good or the level of carbon dioxide emission within its borders. The principal obligation (apart from transparency etc.) is that standards and technical regulations should not be implemented in such a way that they restrict trade more than what is necessary to achieve the policy objective. This is the concept of proportionality.

A further point of relevance is that a WTO Member may wish to subsidize a production process to facilitate the adoption of less carbon producing technology, or could be competing in the world market with another country which is doing so. The WTO Subsidies Agreement has as its main purpose the prohibition of governments providing direct assistance to their own industries to improve their competitive position. The Agreement, however, identifies certain non-actionable subsidies. Included in the list of non-actionable subsidies is assistance to promote the adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burdens on firms. These subsidies are, however, carefully circumscribed to avoid them constituting trade barriers to improve competitiveness.

A final additional flexibility for WTO Members to derogate from their WTO obligations for environmental purposes is to invoke a waiver under Article IX of the GATT. In exceptional circumstances, a waiver to a WTO obligation can be granted, subject to

approval at a minimum by three-quarters of the WTO membership. A waived obligation is time-limited, it must be renewed periodically, and a trade measure applied pursuant to a waiver could still be challenged in WTO dispute settlement on the grounds of non-violation, nullification and impairment of WTO rights.

National Measures to Reduce Emissions

The undertaking of commitments to reduce carbon emissions means that measures will be adopted to implement these reductions at the national level, some of which may be specifically provided for. Article 2 of the Kyoto Protocol, for example, states that:

Each Party included in Annex 1, in achieving its quantified emission limitation and reduction commitments under Article 3, in order to promote sustainable development shall implement and /or further elaborate policies and measures in accordance with its national circumstances, such as: Enhancement of energy efficiency in relevant sectors ... protection and enhancement of sinks ... promotion of sustainable forms of agriculture ... etc.

While measures such as this certainly have the potential to influence international competitiveness, as noted above, the qualification is that these measures should be implemented in such a way as to "minimize adverse effects on trade". (Article 2:3).

Recent studies have specifically addressed the situation where national measures, such as energy efficiency standards or carbon and energy taxes which are not applied to imports provide foreign competitors with an economic advantage. It has been argued that it is likely that as countries develop their national response strategies, trade measures will play an increasingly important role.¹⁶ Carbon and energy taxes have been introduced to date in five European countries¹⁷ and all include some form of compensatory measures ranging from total exemptions for certain sectors, reduced rates for most energy-intensive processes, ceilings for total tax payments, subsidies for energy audits etc.¹⁸ According to Richard Barton (1997), exemptions and other such features were introduced to accommodate competitiveness of concerns of energy-intensive industries which argued that they would greatly suffer from similar operating in countries without such taxation.¹⁹

What is clear from WTO rules is that with respect to border tax adjustments, indirect taxes levied on products because of the energy consumed or the carbon dioxide emitted should not be used to provide a competitive advantage for domestic products. Thus, border taxes should not be in excess of taxes on like products manufactured and sold domestically. This is clear. However discriminatory taxes applied to products with the same physical characteristics (like products) according to the production processes employed (e.g. because of the energy consumed or carbon dioxide emitted) raises serious questions in the WTO. One of the major unresolved questions before the WTO Committee on Trade and Environment remains how to address the question of indirect taxes such as taxes on energy inputs applied on process and production methods.

¹⁶ See Donald M. Goldberg *op. cit.*

¹⁷Denmark, Finland, the Netherlands, Norway, Sweden

¹⁸See Richard Baron et. al. (1996), Economic/fiscal instruments: taxation, Working Paper 4, Policies and Measures for Common Action, Annex I Expert Group on UNIFCCC, OECD/IEA, Paris, Section 3.2.2.3.

¹⁹See Richard, Baron (1998), Policies and Measures for Possible Common Action, Working Paper 14, OECD/IEA, October pg. 47.

A further consideration is the use of labelling and certification to convey information to consumers on product energy efficiency levels. Already, this is used in a number of countries, including Australia, the US and Sweden. However, what remains unanswered in the WTO is the use of eco-labelling and certification schemes such as product and performance standards - which are traditional areas of GATT/WTO jurisprudence - but also labels which convey how much energy was used in making the product.

Novel measures and schemes will most likely be introduced to implement emissions reductions. In particular, an international "emissions trading" regime allowing industrialized countries to buy and sell emissions credits amongst themselves. They will also be able to acquire "emission reduction units" by financing certain kinds of projects in other countries. In addition, a "clean development mechanism" will enable industrialized countries to finance emissions-reduction projects in developing countries and to receive credit for doing so. The operational guidelines for these various schemes must still be further elaborated.²⁰ As far as tradeable emission permits are concerned, this is a new area of international policy. Questions to be addressed include whether tradeable emission schemes fall under the WTO General Agreement on trade in Services, and whether joint implementation schemes would be considered an environmental subsidy under the WTO Agreement on Subsidies and Countervailing Measures and therefore exempt from WTO disciplines on subsidies.

Conclusion

Should future commitments to achieve greenhouse gas emissions provide for measures that under WTO law would be considered illegal, this does not present a problem in itself as long as Parties to the Agreement voluntarily agree to forgo their WTO rights. From a WTO perspective, the relevance of any legal instrument to deal with climate change relates to the possibility of setting differentiated WTO disciplines for trade measures applied pursuant to the Agreement based on whether it specifically mandates the measures and whether they are applied among Parties or against non-parties. It is clear, however, that of the measures likely to be employed to meet either national or international emission targets, the potential exists for a number of important aspects of the key provisions of the WTO to be visited with a need to their clarification becoming increasingly important.

²⁰ See UNCTAD (1996), *op. cit.*