

COMMENTS ON THE PROPOSED USE OF TRADE SANCTIONS AGAINST NON-KYOTO STATES

The scope of these comments is to look international trade law implications of possible unilateral trade sanctions against US goods in order to bring the US back to the Kyoto Protocol negotiating table.

Legal Status of the Kyoto Protocol

The Kyoto Protocol is not yet in effect, and therefore has not yet created any legally binding obligation on any State nor the EU to abide by its provisions. For it to become effective, the Kyoto Protocol needs to be ratified by 55 States that are also, at the same time, Parties to the UN Climate Change Convention. This minimum of 55 States must include States listed in Annex I of the Climate Change Convention (mainly developed countries and CEE countries) which accounts for at least 55% of the total carbon dioxide emissions in 1990. So far, only 33 countries have ratified the Protocol. Of these 33, only 1, Romania, is an Annex I country. Romania's 1990 carbon dioxide emissions was 1.2% of the 1990 total global carbon dioxide emissions.

Both the US and the EC (with its member states) are signatories to the Protocol, but have not ratified it. But all of them have ratified the Climate Change Convention, which took effect on 21 March 1994.

State Obligations under the Protocol

As Parties to the Convention, but not to the Protocol, the EC and its member states and the US have legally binding obligations to the former but not to the latter.

NOTE HOWEVER, that the Climate Change Convention does not contain any clear-cut GHG emissions reductions commitments for Annex I countries (including US and EC). Rather, Party obligations under the Convention are focused mostly on cooperation in technology transfers, scientific research, and information exchange. It is the Kyoto Protocol that sets out the GHG emissions reductions commitments and obligations of Annex I countries.

Neither the Convention nor the Protocol provides for Parties to ban trade in GHG emitting products with non-parties. In fact, Art. 2(3) of the Protocol requires Annex I countries to “strive to implement policies and measures [to reduce GHG emissions] in such a way as to minimize adverse effects, including ... effects on international trade ...”

As Signatories to the Protocol, the obligations of the EC and the US with respect to the Protocol should be determined by the provisions of the 1969 Vienna Convention on the Law of Treaties. Under Art. 18 of the Vienna Convention, both the EC and the US, as Signatories to the Protocol, are “obliged to refrain from acts which would defeat the object and purpose of a treaty” (i.e. the Protocol). However, Art. 18(a) gives a way out for the US and the EC from this obligation. As applied to the US, this subparagraph effectively states that notwithstanding its being a signatory to the Protocol, the US will no

longer be obliged to abide by the provisions of Art. 18 of the Vienna Convention once the US “shall have made its intention clear not to become a party to the treaty.” (Bush and Whitman pretty much made it clear that they want out from the Protocol). Furthermore, the US has not even ratified the Vienna Convention on the Law of Treaties, although its State Department has stated in the past that it considers the Vienna Convention to be a codification of customary international law and hence also binding on the US. Since the EC has not yet expressed its intention not to become a party to the Protocol, the EC is still bound to comply with Art. 18 of the Vienna Convention, and hence should refrain from any action which would defeat the object and purpose of the Protocol. What this simply means is that the EC, while not required to comply with the GHG emissions reductions commitments in the Protocol, should not violate the spirit and intent of the Protocol by increasing GHG emissions unilaterally for so long as it has not made its intention clear that it will not ratify the Protocol.

Assuming that the Protocol is in effect and is binding on the Parties, the Protocol itself does not contain any provision that per se authorizes the imposition of trade or other sanctions against non-compliant Parties or non-Parties. Article 18 of the Protocol only authorizes the Conference of the Parties serving as the Meeting of the Parties to the Protocol to approve during its first session procedures and mechanisms to determine and address cases of non-compliance, including the development of an indicative list of consequences of non-compliance. Any binding procedures or consequences as a result of non-compliance requires adoption by the Parties through the process of amending the Protocol. Dispute settlement under Article 19 of the Protocol is by reference to Article 14 of the UNFCCC.

Use of Trade Restrictions against Non-Kyoto States

Since neither the Climate Change Convention nor the Kyoto Protocol authorizes the imposition of trade restrictions as a means towards achieving GHG reductions, imposing trade restrictions on imports from the US and other non-Kyoto protocol parties or signatories (but not on imports from Kyoto protocol parties or signatories) would fall not under the provisions of the Climate Change Convention nor the Kyoto Protocol but rather under the WTO trade treaty provisions and obligations of the countries involved. The “lex specialis” principle of international law cannot be invoked in this case because neither the Climate Change Convention nor the Protocol contains any provisions allowing for the imposition of trade measures with respect to GHG-emitting commodities or services. The closest that the Protocol comes to allowing trade measures is with respect to the trading of GHG emissions reductions units under Arts. 6 and 12 of the Protocol. Emissions reductions units trading would constitute the only case in which the Protocol’s provisions would take precedence over WTO provisions.

Given the considerations above, what are the possible options that States may take to ensure that the Protocol is ratified and will become effective? The actions that States (such as the EC, Japan, and developing countries) can use against States that have signed but refuse to ratify the Protocol (such as the US) can range from international moral suasion (through diplomacy, statements in international organizations, and media and

public pressure), cooperative multilateral action to push for ratification of the Protocol and compliance with its terms, and multilateral imposition of economic sanctions.

A mix of all of the actions above would be most likely to meet with success. However, likely to be most controversial will be the attempts to impose trade sanctions targeted against US goods and services.

Trade Law Implications of Trade Measures Against US Goods Alone

Any import ban, restriction, or border tax measures imposed against US goods alone – and not on like (i.e. the same or similar) goods that are domestically produced or sourced from other WTO Members – will most likely be challenged by the United States before the WTO, regardless of whether the trade measures were imposed unilaterally or collectively in pursuit of the objectives of the Kyoto Protocol.

The provisions of the GATT 1994 that the United States will most likely invoke as having been violated by such trade measures will be:

- Article I (MFN) – with respect to import bans, quantitative restrictions, or border tax adjustments
- Article III (national treatment) – also with respect to import bans, quantitative restrictions, or border tax adjustments
- Article XI (elimination of quantitative restrictions) – with respect to import bans or other quantitative restrictions
- Article XIII (non-discrimination with respect to application of quantitative restrictions)
- Article XXIII (nullification or impairment of benefits)

A discriminatory trade measure – i.e. targeted solely at US goods – would most likely not stand up to legal challenge at the WTO. The pattern of WTO dispute settlement panel and Appellate Body decisions suggests that panels and the Appellate Body will stick closely to the reasoning and conclusions of past GATT and WTO dispute settlement decisions.

Thus, any outright discriminatory trade measure – both in terms of MFN and national treatment – will most likely be deemed to be violative of the provisions identified above, and will further be deemed to fall outside the scope of the Article XX exceptions.

Such trade measures would not be justifiable under Art. XX(b) because, following the GATT panel ruling in the adopted 1990 *Thai Cigarettes* case, the measures would not be “necessary.” The definition of “necessary” in this case requires that the measure must be the least trade-restrictive measure possible under the circumstances. Hence, in general, an outright import ban or imposition of quantitative restrictions would not be the least trade-restrictive if the policy objective sought to be achieved by such measures can be achieved by other means that would not restrict trade or provide a lesser amount of trade restriction. Such other means (pointed out by the GATT panel) can be the imposition of non-discriminatory product labeling requirements, consumer education, etc.

Neither, it seems, would the trade measures described above be justified under Art. XX (g). Although they might well fit within some of the legal parameters of Art. XX's subparagraph (g) – i.e. they might be construed as measures “relating to” (i.e. primarily aimed at) the conservation of exhaustible natural resources (i.e. the global climate), Art. XX(g) requires further that such trade measures “are made effective in conjunction with restrictions on domestic production or consumption” (i.e. goods, regardless of source country – domestic or not – that are “like” the US goods sought to be banned from importation must likewise be banned from being domestically produced or consumed). If this additional requirement is not met, Art. XX(g) cannot be used to justify the trade measure.

Furthermore, even if such additional requirement is met, the chapeau of Art. XX(g) will still have to be considered (see the application of the chapeau of Art. XX in the *Reformulated Gasoline*, and *Shrimp-Turtle* cases). Under current WTO decisions, a trade measure may be deemed to be “arbitrary or unjustifiable discrimination” for purposes of the chapeau of Art. XX if it is done unilaterally or outside the context of “good faith” negotiations aimed at developing an international consensus regarding the need for such measures. Considering that neither the Kyoto Protocol nor the UNFCCC provide for the application of trade-restrictive or discriminatory trade measures against either Parties or non-Parties, any import ban, quantitative restriction, or border tax adjustment imposed solely against US goods for purposes of pursuing climate change policy objectives would be considered as “arbitrary or unjustifiable discrimination” within the meaning of the chapeau of Art. XX.

The Waiver Option

Trade measures that are not consistent with WTO obligations with respect to trade in goods, and which cannot be justified under either Art. XX (General Exceptions) or Art. XI (Security Exceptions), may still be applied if a waiver of such obligations has been previously granted by the WTO Ministerial Conference pursuant to Art. IX:3 and 4 of the WTO Agreement.

Waivers of WTO obligations – i.e. the MFN obligation in Art. I of the GATT 1994 – have been extended by the Ministerial Conference (or the General Council in between Ministerial Conferences) in the past. These include the following:

- waivers for Nicaragua and Sri Lanka in connect with the transposition of their schedules of commitments to the Harmonized System of Tariff Classifications
- waiver for Zambia in connection with the renegotiation of its schedule
- individual waivers for countries seeking an extension of time to harmonize their WTO schedules of tariff concessions with the Harmonized System
- waiver for Peru from some obligations in the Customs Valuations Agreement
- waiver for the EC for providing preferential treatment to countries in the Western Balkans

- waiver for the EC/France for providing preferential treatment to Morocco
- waiver for Turkey to provide preferential treatment for Bosnia-Herzegovina

The request by the EC for a waiver in order to continue to provide preferential treatment to ACP (Africa, Caribbean, Pacific) countries under the Lome IV Convention is still under consideration.

Waivers must be approved by at least three-fourths (3/4) of the WTO Members – i.e. 105 out of the current 140 WTO Members. The procedure laid out in Art. IX:3(a) and (b) of the WTO Agreement must be observed in the consideration and granting of the waiver request. The decision to grant the waiver must state the “exceptional circumstances” that justify the waiver, its terms and conditions, and its termination date. Waivers must be reviewed every year by the Ministerial Conference (or the General Council).

A look at the nature of the waivers that have been granted so far indicates that the “exceptional circumstances” that are cited to justify waivers are likely to be granted if the objective of those waivers would be consistent with the object and purpose of the WTO Agreement and its annexed agreements – i.e. the promotion of further trade liberalization and the integration of countries into the multilateral trading system covered by the WTO. See, for example, the EC’s request for a WTO waiver for the granting of preferential treatment to Lome IV Convention ACP countries. There seems to be little scope for waivers that would allow Members to derogate from their WTO obligations in ways that would not further the WTO system’s object and purpose. On the other hand, there is, as yet, no WTO dispute settlement proceeding that defines what constitutes “exceptional circumstances” for purposes of the application of Art. IX:3 and 4 of the WTO Agreement. It might well be that the objective of promoting the object and purpose of the Kyoto Protocol and the UNFCCC in view of their current state of non-effectivity and the threatened withdrawal of the United States would be considered by the General Council as an “exceptional circumstance” justifying the grant of a waiver. However, this turn of events would seem to be fairly remote.

Amendments to the Protocol?

Article 18 of the Kyoto Protocol can be used as the basis for the insertion of treaty language providing for both trade incentives and sanctions vis-à-vis energy-efficient and GHG emitting technologies, goods or services as an amendment to the Protocol. It states:

Article 18

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.

The use of trade sanctions, including their scope and extent, against technologies, goods or services coming from non-compliant States or States that are not Parties to the Protocol can be indicated as one of the consequences for such non-compliance or non-participation in the Protocol. However, with respect to non-Parties, the extent to which such trade sanctions can be utilized against them is limited by the international law rule in Article 34 of the Vienna Convention on the Law of Treaties stating that treaties (such as the Protocol) creates neither rights nor obligations for a third party State (i.e. a non-Kyoto Protocol Party State) unless such State has expressly consented thereto.

Article 18 of the Protocol requires that any proposal for amendments to the Protocol to provide for binding consequences to non-compliance must come from the Conference of the Parties. The procedure for amendments is governed by Article 20 of the Protocol.

Trade-related language that may be included as amendments to the Protocol can refer to: (a) the provision of trade incentives – such as technology transfers, preferential tariff and regulatory treatment – for the internal and cross-border production, sale, use, and consumption of energy-efficient and/or low GHG emission technologies, goods, or services; and (b) the provision of trade sanctions – i.e. import restrictions, higher regulatory requirements – for the internal and cross-border production, sale, use, and consumption of technologies, goods, or services that do not meet specified Kyoto Protocol-related energy-efficiency or GHG-emission standards.

However, proposing amendments to the Protocol text will create the risk of opening the entire Protocol to renegotiation – a step proposed by the US but opposed by the EC and the G77/China. Furthermore, since the Protocol is not yet in force, amendments to its text cannot yet even be proposed.

Proposed UNFCCC COP-6 Decision on Trade-Related Measures Relating to the Application of Energy Efficiency and GHG Emissions Standards

The focus of current negotiations with respect to the UNFCCC and the Kyoto Protocol is not with regards to the text of the Protocol itself, but rather with regards to the rules and operational details on how the emissions reductions targets and commitments indicated in the Protocol are to be achieved. These rules and operational details will be embodied in various “decisions” by the UNFCCC Conference of the Parties. There does not seem to be any room in the current negotiations process for any proposal for amendments to the Protocol to prosper.

Hence, instead of pushing for Protocol amendments, a proposal can be submitted to the UNFCCC Conference of the Parties calling for a decision on the use of trade measures (as both incentives and sanctions) relating specifically to energy-efficient and GHG-emitting technologies, goods, or services, in order to push forward the object and purpose of the Kyoto Protocol.

Such decision can recognize the right of States to impose more stringent energy efficiency and GHG emissions standards on domestic and imported technologies, goods, or services, and to use compliance with such standards as the basis for continued importation as well

as domestic production and consumption of such technologies, goods, or services. This recognition could involve recognition of the right to impose more stringent energy efficiency and/or GHG emissions standards of performance for domestic and imported products (regardless of source country), and for these countries to: (1) bar the importation and production; or (2) imposition of a general energy efficiency tax, on domestic and imported products that have been verified as not meeting such standards.

The decision should also provide for trade incentives and obligations among States (especially from developed to developing countries) with respect to transfers of skills, technology, financial resources, and capacity building in relation to energy efficiency and GHG emissions.

The decision can also expressly indicate that the trade measures that it provides for are not subject to the obligations of States under the WTO. Of course, this will be a controversial statement and will be opposed by many countries in both North and South. On the other hand, the Technical Barriers to Trade Agreement might be used in formulating these more stringent standards in order to ensure that they will stand up to any WTO challenge. In the Reformulated Gasoline case, the WTO Appellate did not strike down the US's clean air standards per se, but rather declared as WTO-incompatible the imposition of baseline standards only on foreign refiners but not on domestic refiners (hence, discriminatory). In both Reformulated Gasoline and Shrimp-Turtle, the AB highlighted the need for cooperative action first before undertaking any unilateral measure (in order to avoid the "arbitrary" connotation).

Hence, rather than campaigning for specific trade measures targeted specifically at non-Kyoto country imports (i.e. US imports specifically) solely because of their non-participation in the Kyoto protocol, a campaign to have the UNFCCC COP 6 come out with such a decision as described above.

A UNFCCC COP 6 decision providing for the use of trade measures in relation to the implementation of the Kyoto Protocol should, theoretically, be able to stand up to any WTO scrutiny or challenge since it can be considered as: (a) a special case involving the application of trade measures for a special and limited purpose (invocation of the *lex specialis* principle in international law); (b) the requirements of the Shrimp-Turtle and Reformulated Gasoline cases for cooperative multilateral action are met; and (c) any legal challenge arguing that the decision or its implementation by States would violate their WTO obligations can be effectively addressed and responded to utilizing current WTO texts and dispute settlement case law.