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Trade restrictions as an international police power

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Summary

It is commonly contended that, if countries do not subscribe to collective endeavors by other states to improve management of the environment, the non-participating states will be discriminated against in some way in international trade. This has certainly been said of Australia in the event it does not join an international consensus to adopt mandatory controls on emissions of carbon dioxide.

The suggestion reflects a supposition which has wide currency among environmental movements that trade restrictions should be used to support international efforts to protect the environment.

This supposition reflects thinking among environmental movements in industrialised countries. This is at odds with the international consensus over trade and environment issues which was settled at UNCED in 1994. That consensus was that trade restrictions should not be used to support protection of the environment. This view is strongly held by developing countries. If this attitude is any guide, there will be no international endorsement of trade sanctions to support measures to restrict greenhouse gas emissions.

Efforts by industrialised countries to press for use of trade restrictions will widen the gulf in attitudes between industrialised countries and developing countries which currently is preventing agreement on global approaches to international management of environmental issues, in particular global warming.

Why the Framework Convention raises the issue of trade restrictions

The Framework Convention places the responsibility for reducing emissions on the OECD countries. Developing countries are only obliged to put general policies in place to deal with climate change issues.

The obligations of the convention will be onerous for some parties. As a result, perceptions about the effectiveness of the treaty will influence the types of instrument chosen. Most environmental control measures entail cost. Usually the cost is considered worthwhile if the environmental benefit secured is considered to be commensurate. Governments do not accept international commitments bound in law which affect national interest unless they can demonstrate that it is in their self-interest to do so.

The imbalance of obligations and consequential lack of effectiveness of the global warming strategy in the UN Convention will put OECD Governments under pressure to alter the strategy or to defray the cost. A clear illustration of this effect is the nearly

unanimous vote of the US Senate to oppose any mandatory controls on greenhouse gas emissions until developing countries accept comparable obligations.

While OECD countries are yet to decide what measures they will use, some assumptions can be safely made about the overall economic impact of reductions of emissions. There is likely to be a reduction in economic activity when the cost of fossil fuel rises and there is a reduction of activity to produce items which depend on energy, such as iron and steel and aluminum. The economic welfare of the countries which make the reductions will be improved or worsened according the effect of the changes on their terms to trade.¹

Since it is only the OECD countries which are required to implement concrete measures to restrain greenhouse emissions, the cost of the strategy which is created by the Convention will be borne first by those economies.

The issue of how to make the strategy work without putting those who carry the burden at an economic disadvantage has concerned policy makers for several years. This question permeates the considerations of the numerous working groups set up within the European Community and in the OECD/IEA framework and is giving rise to thought about use of trade restrictions as part of the mechanisms to implement the strategy.

The issue of how to mitigate the negative effect on countries which adopt the more onerous restrictions arises in two cases. The first is among those countries that apply measures to control greenhouse emissions. For the sake of discussion we will call them the ‘control states’.² The second case is how control states might mitigate economic disadvantage when trading with non-control states.

Since it is all OECD countries which have to carry the burden of the cuts in emissions, policy thinkers in OECD countries have concluded that measures adopted by the control states would be more effective if they were common. This has given rise to the concept of ‘common action’. Since many OECD countries are each other’s major traders, concerns about loss of competitiveness with other OECD economics as a result of the imposition of restrictions on greenhouse emissions would also be significantly obviated if common measures to reduce greenhouse gases were adopted.

Three types of common action have been studied in some depth — carbon taxes, common emission standards for automobiles and common energy efficiency standards for consumer products which are high energy users, such as domestic appliances.

1 See ABARE/DFAT, *Global Climate Change: Economic Dimensions of a Co-operative International Policy Response beyond 2000*, Canberra, 1995.

2 These are effectively the OECD countries. Annex One of the Convention also includes the Eastern European economies in the category of those who will cut back on greenhouse emissions. While economic restructuring in Eastern Europe will result in considerable reductions in carbon emissions, practical expectations that the Eastern European economies will adopt positive measures must be low.

There is no agreement on any of these issues. Applying any common or harmonised standard or tax in a number of countries is always difficult. It will take a long time before OECD countries agree on common measures. Imposition of such common standards would impose a higher cost on carbon dependent economies, like Australia, than on others. In order to spread the burden of cost, OECD economies which favour such approaches, like those in the EU, are likely to consider measures to pressure other OECD economies to go along.

The problem of how to deal with imports from countries which do not require application of similar taxes or standards is regularly raised. In the case of the carbon tax, the Secretariat to the World Trade Organisation has prepared a discussion paper on what options countries have to apply taxes in imports to compensate for the higher cost to the domestic producer of having to pay a tax or meet a certain product standard.³

The second issue arises in the case of transactions between control states and other states. In order to contain ‘carbon leakage’ — the drift of intensive energy consuming industries towards countries which do not discourage consumption of carbon fuels — trade restrictions on non-control states are being considered. There are other conventions which serve as models. The Montreal Convention for the phase-out of fluorocarbons and mandates restrictions on trade with other countries which are not members of the Convention. The Basle Convention to control transboundary movement of hazardous waste has similar provisions.

The temptation to use trade restrictions to address the implementation problems in the greenhouse strategy will be large. Where one set of countries bear a disproportionate share of the burden, it is natural they would be attracted to mechanisms to protect their own industries which have to bear the cost. Imposing a trade restriction on non-parties would not necessarily be the most efficient economic response. Notwithstanding this, domestic concerns about competitiveness are likely to determine how policymakers act.

The global consensus against use of trade restrictions, and disregard of it

The idea of the use of trade restrictions to protect the environment raises major international public policy issues. There was a consensus at UNCED not to use trade restrictions to manage the environment. This consensus has basically been disregarded by the EU and the US Administration.

³ The basic issue for the WTO is whether or not its rules permit countries to tax imports if they come from countries which do not levy carbon taxes. Because of the diverse range of sources of carbon in puts, there is no simple answer. This is a very important issue, but oddly enough it is not a priority issue for consideration in the current review of trade and environment issues in the WTO.

The use of trade measures for environment purposes was comprehensively reviewed at UNCED. Policy makers were evidently concerned about the rising incidence of the use of environmental trade restrictions. There were two cases.

The most obvious example is unilateral imposition of trade penalties on countries which do not apply environmental policies favoured by the trade restricting country. The United States imposes such measures.

A second example is the imposition of trade restrictions by parties to environmental treaties on countries which are not parties to the treaty, to which reference has already been made. The most prominent examples are the convention to restrict trade in endangered species (CITES), the convention to protect the ozone layer (the Montreal Convention) and the convention to restrict transboundary movements of hazardous wastes (the Basle Convention).

This is a relatively recent innovation in treaty making. The purpose is to put pressure on the non-parties to behave in a manner which is consistent with the obligations assumed by the treaty parties. The effect is that it creates a form of international coercion. A number of countries opted not to join the Fluorocarbon Convention. Notwithstanding this, parties to that Convention have agreed to impose trade restrictions on non-parties. In so doing they effectively put pressure on non-parties considering joining the treaty to obviate the trade restrictions.

It is the precedent set by the three international environmental agreements which is most germane to what solutions control parties to the Climate Change Convention might consider to address the problems they perceive in implementing their obligations to cut emissions. In the case of the Climate Change Convention, the parallel is that a number of countries joined the Convention, but effectively on the condition that they did not have to make cuts in carbon emissions. When parties to the Convention which have such obligations consider applying trade restrictions to protect their regime of emissions cuts, they too act to obviate the choice of non-control parties not to adopt the emission cuts regime.

It is recognised that these approaches conflict with established approaches to international law. They generally put members of these treaties in conflict with their obligations under the World Trade Organisation (WTO).⁴ Imposition by the US of unilateral restrictions on

⁴ The General Agreement on Tariffs and Trade (GATT) is one of the WTO Agreements. It lays out a set of international rules for use of trade restrictions which respect the principle of international sovereignty. When countries accede to the GATT, they agree to trade with each other on terms set out in the treaty and commonly accepted by parties to the treaty. GATT does not permit countries to restrict trade if parties do not apply measures specified by one part. Trade may only be restricted in accordance with principles commonly agreed upon in the treaty.

trade on environmental grounds are regularly questioned in the GATT and its successor, the World Trade Organisation.⁵

The consensus at UNCED was that trade measures should be eschewed.⁶ The UNCED countries were emphatic that international action to improve the environment should be taken in accordance with commitments set out in multilateral treaties to which member states had voluntarily subscribed. It recognised unilateral action as a reality, but did not endorse it.

In subscribing to this principle, participants at UNCED were reflecting the fundamental principle of respect for national sovereignty which underpins the approach of the United Nations to law-making.

Notwithstanding the consensus at UNCED, use of trade measures for environmental purposes has continued. The US has continued to impose trade restraints on trading partners who do not comply with US environmental policies. Restrictions by the US on imports of shrimp which are not caught with methods that protect turtles are currently under challenge in the WTO. The European Union proposed amendment of the WTO to legitimise use of trade restrictions for environmental purposes and members of the EU promoted development of a Protocol to the Basle Treaty that requires members of the OECD not to trade in waste products covered by the Treaty with developing countries.

Developing country constitutionalism versus industrialised green imperialism

The concept of the use of trade measures in environmental agreements against non-parties is highly contested. Although it contravenes the principles of treaty-making for environmental purposes which were endorsed at Rio, advocates of this approach nevertheless argue that the character of the environmental problem warrants this type of international measure.

5 US restrictions on tuna imports where the exporting country does not mandate measures specified in US law to protect dolphins have twice been challenged in the WTO. On both occasions, expert dispute panels assessed that the US measures contravened GATT rules. For technical reasons, these findings were never adopted. US restrictions on imported gasoline which did not meet environmental standards have been found to contravene GATT rules. US restrictions on shrimp imports from countries which do not apply measures set in US law to protect turtles are currently under review in the WTO disputes system.

6 It is straightforward and provides a workable set of guidelines. UNCED proposed a concept for cohabitation between systems for management of the environment and management of an open trading system which can be described as 'parallelism'. Each system operates independently, but with regard to economic principles which ensured that instruments used did not impede the interests of the other. In the environment systems, instruments should address the root of the environmental problems. The trade system was to support growth to enable sustainable development. Discriminatory restraints on trade were contrary to this philosophy and formally discouraged. The summary conclusion was that measures to open up international trade and measure to protect the environment should be 'mutually supportive'. The fact that measures had been used which were inconsistent with the foregoing was recognised. UNCED treated these measures as exceptions or instruments of last resort. Where trade measures were used in environmental agreements, they had to satisfy rigorous criteria, in particular the principle of non-discrimination. Some political loophole like this was necessary to secure consensus at UNCED. But the basic philosophical approach was clear.

This led to calls by the European Union to amend the general exceptions provision in Article XX of the GATT to allow trade restrictions on environmental grounds and statements by the US Administration that provisions in environmental agreements should not be negated by commitments in other international agreements. This general question was tabled for discussion at the Singapore Ministerial Conference of the World Trade Organisation in December 1997.⁷

But it was not discussed. Developing countries have been insistent that the question of amending the GATT to justify trade restrictions on environmental grounds should not be entertained. They have a point. The existence of discriminatory trade provisions in three multilateral environment agreements should first raise the question ‘are these provisions necessary?’

There is a very strong case to say they are not. Trade restrictions are very poor economic instruments for regulation of production. Where the agreements regulate production and consumption, as does the Fluorocarbon Treaty, what is the point of restrictions on trade? They merely constrain the movement across national borders of products, the production or consumption of which has already been banned.

Zimbabwe recently secured a partial exemption from the ban on trade in ivory which is imposed by the Convention which restricts trade in endangered species (CITES). In this case, the restriction hampered successful programs at conservation of elephant herds in Zimbabwe because tusks from culls could not be exported and proceeds from those exports could not be returned to the conservation program. Saving the elephant depended on the intelligent use of an economic instrument — managing the elephants provided a livelihood for the local people so they protected the elephants from poachers. Banning trade in ivory is an unintelligent use of an economic instrument.

The full impact of the use of trade restrictions in the Basle Treaty to restrict transboundary movement of hazardous waste is only just becoming clear. The effect has been to give industrialised countries the right to impose environmental conditions on trade with developing countries. There is also a Protocol to the treaty which is open to accession which would prevent companies in industrialised countries from recycling in developing countries. These provisions are not sustainable.

These three agreements misuse economic instruments. None of these agreements need the discriminatory trade provisions which are contained in them to meet the declared public policy purpose of them.

⁷ The European Commission circulated a proposal to this effect in the Committee on Trade and the Environment in the WTO. The EU paper was described as a ‘non-paper’. This is a device which the EU employs to circulate proposals which are draft concepts. They may not be fully endorsed by the members of the EU, but they represent fully developed proposals which the European Commission wants discussed. The aim of the EU was to seek agreement at the meeting of Ministers of the WTO in Singapore in December 1996 to the change. The idea was strongly opposed, particularly by developing countries. The EU did not to press the proposed change, but has not also not formally eschewed it.

The rational course of action would be to remove the discriminatory trade provisions from the environmental agreements, or negate them. The irrational course of action would be to protect them. Yet this is precisely the policy direction in which the EU and the US Administration moved in the lead up to the Singapore Ministerial meeting of the WTO. Neither has yet resiled from those policy positions.

There is an interesting point here. It is the developing countries which are taking positions to defend the constitutional order of the world system and even advocacy of the rational use of economic instruments to manage international problems. They blocked proposals to amend the GATT to legitimise the discriminatory trade provisions in the three international environmental agreements. It was Zimbabwe which made the economic rationalist case against bans on exports of ivory.

The irony deepens. The community of environmental officials in industrialised countries is using the North/South framework to develop global solutions to environmental problems. The North/South dichotomy is based on the idea that the world is divisible according to economic status of industrialised and developing countries and that the latter have an obligation to meet a large share of the costs of the economic development of the latter. Hence the idea in the Framework Convention on Global Warming that only industrialised countries have an obligation to reduce global emissions.

An economic issue is an economic issue. The setting may change, the issue does not. If the North/South dichotomy ever had any validity, it does not today given that many so-called developing countries enjoying standards of living comparable with those in industrialised economies. It is therefore perhaps no coincidence that the economic and moral presumptions which underpin the North/South dichotomy have been discarded in international economic forums where international solutions to global economic problems are developed.

Why then are the leading western powers proposing international solutions to management of environmental problems which rest of presumptions which they themselves have discarded in forums in which they were developed? The use of trade restrictions as a police power, whether they are imposed unilaterally, as in the tuna/dolphin trade restrictions, or collectively, as in the three environmental treaties, disregards the sovereign independence of states and reflects a presumption that some states have a superior right to determine what is good for other states.

There is no doubt that among committed environmental groups, there is a belief that environmental problems are so serious that extraordinary action to address them is warranted. Such passion has no place in the more ordered processes of government.

The manifold flaws which underpin the UN Framework Convention, in particular the absence of consensus among the world's leading emitters of greenhouse gases, will drive the sponsors of the Convention to consider ideas such as trade restrictions to protect those who cut emissions from the economic consequences of those actions.

They will not succeed, because there is no international consensus that such action is warranted.

If they go down this path, they will widen the gulf which has opened in positions between developing countries and leading industrialised countries. This will only serve to put off development of effective international solutions to the issue of global warming because it will enlarge, not reduce, the biggest, single obstacle to making progress on this issue. That is the absence of international consensus on how to proceed. Environmental officials in the leading industrialised economies are yet to learn what their colleagues in the economic ministries know. The leading industrialised economies cannot by themselves set the terms of global solutions to global problems.

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A note about terminology.

Since the terms developing countries and industrialised countries are so liberally used, the reader might be forgiven for wondering where Australians see themselves fitting since the Australian Government has established itself as the most vocal critic of the industrialised country position in the Global Warming negotiations. Had developing countries not been so readily excused from obligations to reduce greenhouse emissions in the UN Framework Convention, Australia's natural allies in this process would have been other commodity energy exporters, most of which are other developing countries. Australia has developed alliances with developing countries in international economic negotiations, particularly international trade, over the last two decades. On greenhouse, Australia's interest is in fact shared by New Zealand and to a degree Canada and Japan. If the artificiality of the North/South categorisation of states were removed, what does emerge is a general division of interest between APEC states and the Europeans, with the US Administration aligning itself more closely with the Europeans. On energy resource issues, the US more usually would ally itself with other energy producers.

Hence, in this paper, the term developing countries is used to describe general positions supported by them as group in bodies like the UN or the WTO and industrialised countries is meant to refer to the positions espoused by the EU and the US Administration.
