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**Trade and the Environment: With Particular Reference to  
Climate Change Issues\***

Shinya Murase\*\*

## 1. Introduction

The Doha Declaration addresses the issue of “Trade and the Environment” in paragraph 31, which states as follows:

- (i) relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements, negotiations limited in scope to the applicability of such existing WTO rules as among parties in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question.
- (ii) Procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for granting of observer status.
- (iii) The reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

To the disappointment of many of us, the Declaration has defined the scope of negotiation so narrowly by limiting to the relationship between WTO and MEAs (multilateral environmental agreements) only in such cases where the countries concerned are parties to *both* WTO and MEA. In other words, the paragraph does not cover the cases where one of the countries is not a party to a MEA, such as the United States or Australia in relation to the Kyoto Protocol on climate change.

Nonetheless, I think it would be great if the Doha Round successfully reaches an agreement in formulating a viable scheme for the coordination between trade rules and the rules for the environment even for the limited scope, since it will certainly give a favourable effect on resolving the issues, perhaps by way of analogy, among the WTO members involving non-parties to a MEA.

This paper first addresses the question of coordination between WTO and MEAs in a broad, general perspective, and then take up the problems of Kyoto Protocol as a concrete example of MEA. In this presentation, I deal with both topics mainly from the *lex ferenda* perspectives.

## 2. GATT Article XX and MEAs

### (a) Relationship between WTO/GATT and MEAs

First, it may be appropriate to review the relationship between WTO/GATT and MEAs. Recall that the GATT (General Agreement on Tariffs and Trade), as it stood from 1947 until 1994, was not really an international organization, but was merely a

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\* Pre-Publication from Harald Hohmann (ed.), *Agreeing and Implementing the Doha Round of the WTO Round* (Cambridge University Press, 2006).

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loose combination of treaty-based relations among States. It would not have been regarded even as an international regime at least at its initial stage. The GATT lacked an institutional mechanism which otherwise would have assured a substantial degree of normativity. It goes without saying that the environment was not yet a forefront issue in 1947 when the GATT was drafted.

The World Trade Organization, or WTO, was created in 1995 by the Uruguay Round negotiations as a full-fledged international organization, with an international legal personality and effective, transparent institutional apparatus. The GATT is now an annex, together with other annexed agreements, to the Agreement Establishing the WTO, which makes it clear in the first paragraph of its preamble that its aim is to reconcile trade goals and environmental needs “in accordance with the objective of sustainable development”, indicating a stronger and integral link with general international law, with international environmental law in particular.

As recalled, it was the *Tuna/Dolphin* dispute before the GATT panel that sparked a heated debate on “trade and the environment” worldwide in 1991<sup>1</sup>. This was the case in which the United States, in order to protect dolphins, took measures to prohibit imports of tuna that had been caught by Mexican fishermen on the high seas – a dramatic replay of a century-old story of the Bering Sea fur seals arbitration<sup>2</sup>. The GATT panel found that such “extra-jurisdictional” application of domestic environmental law should be rejected under GATT as undermining the multilateral framework of world trade, and concluded that trade measures taken by the United States were not consistent with GATT provisions. After the establishment of the WTO in 1995, its Committee on Trade and Environment (CTE) began discussing the issue, and a consensus grew that any unilateral, extra-jurisdictional measures must be denied. As far as *non-treaty-based* measures are concerned, it seems clear that they are not generally regarded as GATT-consistent<sup>3</sup>.

What about *treaty-based* measures? The GATT panel noted in the above *Tuna/Dolphin* case that the US had not exhausted all other efforts available under international law to protect dolphins: “The United States had not demonstrated to the panel that it had exhausted all options reasonably available ... in particular through negotiations of international cooperative agreements”. This suggests that the US actions may have been considered differently if it had been taken pursuant to a recognized international environmental agreement. The claim for an Article XX exception would have, effectively, been considered to have a greater legitimacy if it had been made within the specific context provided by a recognized MAE<sup>4</sup>. If certain trade measures, such as the restriction of imports or levy of high tariffs, are taken in accordance with a multilateral environmental agreement (MEA), would they be considered permissible under the GATT? Between the GATT and an MEA, which is supposed to prevail over the other in case of a conflict? This is the crux of the

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<sup>1</sup> *U.S. Restriction on Imports of Tuna* (Mexico v. United States), 30 *ILM* (1991), 1594.

<sup>2</sup> Shinya Murase, “Conflict of International Regimes: Trade and the Environment”, Kalliopi Koufa, ed., *Protection of the Environment for the New Millennium*, Institute of International Public Law of Thessaloniki, *Thesaurus Acroasium*, vol. XXXI, 2002, 297-340.

<sup>3</sup> Shinya Murase, “Unilateral Measures and the WTO Dispute Settlement”, in Simon S.C. Tay & Daniel C. Esty, eds., *Asian Dragons and Green Trade: Environment, Economics and International Law*, Times Academic Press, 1996, pp.137-144.

<sup>4</sup> UNU/IAS, *Global Climate Governance: Inter-linkages between the Kyoto Protocol and Other Multilateral Regime*, 1999, p.24.

problem that I would like to pose in this paper. Before discussing the issue of compatibility, however, we should confirm our basic understanding of the legal framework of WTO/GATT relevant to the problem of trade and the environment.

(b) The Legal Framework of the WTO/GATT Regime

Let us first consider the procedural aspect of WTO/GATT dispute settlement. The central question here is whether the WTO dispute procedure can be regarded as “a self-contained regime”. Recall that the notion was first referred to in the judgment on the *United States Diplomatic and Consular Staff in Tehran*, in which the International Court of Justice held that the resort to unilateral countermeasures by the injured State was excluded from the diplomatic law except for those measures specifically prescribed<sup>5</sup>. Recall also the debate at the International Law Commission in elaborating draft articles on State Responsibility, particularly in the context of the most controversial point whether the aggrieved State should exhaust all the available dispute settlement procedure before taking countermeasures<sup>6</sup>. One of the primary concerns of the international community during the Uruguay Round of negotiations was to block and contain unilateral measures by the United States and other powerful States, and from that perspective, the new WTO dispute settlement mechanism has attained a significant improvement toward a self-contained regime.

The former GATT dispute system had a number of defects, such as delays in the establishment of panels and in the appointment of panel members, delays in the completion of the panel reports, blocking of the adoption of panel reports and non-implementation. It was essentially based on the principle of consensus, and had strong elements of conciliation procedure rather than judicial settlement. In the WTO, by contrast, the dispute procedure is centrally administered by the Dispute Settlement Body (DSB) in accordance with the Understanding on Rules and Procedures Governing Dispute Settlement, or Dispute Settlement Understanding (DSU). The DSU has incorporated the “negative (reverse) consensus rule” in the establishment of a panel and in the adoption of reports of panels and the Appellate Body. This enables WTO dispute settlement to proceed automatically, unless there is a consensus to the contrary (which is, of course, most unlikely). The DSU has also set out a strict timetable for each key stage of the proceedings in order to ensure speedy completion, adoption and implementation of the rulings, which are closely monitored by DSB<sup>7</sup>.

Thus the GATT dispute settlement system has been substantially strengthened and “judicialized” under the WTO, which has attained a rule-oriented, binding system of adjudication with compulsory jurisdiction over virtually the entire body of WTO law. Article 23 of the Dispute Settlement Understanding makes it clear that States are obliged to refrain from taking any unilateral action against alleged impediments to trade and to seek recourse to WTO’s dispute settlement procedure. The intention of the drafters was clearly to move toward a self-contained regime, with the notion that

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<sup>5</sup> *ICJ Reports 1980*, p.43.

<sup>6</sup> Oscar Schachter, “Dispute Settlement and Countermeasures”, *American Journal of International Law*, vol.88, 1994, pp.471-477; Yoshiro Matsui, “Countermeasures in the International Legal Order”, *The Japanese Annual of International Law*, no.37, 1994, pp.1-37.

<sup>7</sup> John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations*, Cambridge University Press, 2000.

unilateral measures can be effectively “contained” and that resort to such measures is prohibited<sup>8</sup>.

The WTO dispute settlement system has so far demonstrated great success, and the number of cases filed and settled during the past eight years since its establishment has already far exceeded the number of cases referred to the GATT dispute settlement during its forty-odd years of existence. However, it is still open to question whether the WTO system of dispute settlement can be regarded as being completely sealed and self-contained regime. We can fairly say that the system works as a self-contained regime as far as a given dispute concerns trade matters arising *within* the GATT system, such as tariff rates, anti-dumping and subsidies, namely, those disputes arising under the “covered agreements” of WTO as provided for in Article 23 of the DSU. When it comes to the kind of disputes in which the GATT trade system is challenged from *outside*, such as trade *and environment*, the WTO dispute settlement will face certain difficulty, since the subject matter has not yet been covered by the WTO’s annexed agreements, with the result that WTO members may not be presumed to be bound by the DSU at least for disputes that are predominantly environment-related rather than trade-related.

This leads us to consider the substantive law aspect of the problem on trade and the environment in the WTO. The most pertinent provision is GATT Article XX, which is an exception to the most-favored-nation (MFN) clause of Article I, the supposed cornerstone of GATT. Article XX provides for “general exceptions” and its paragraphs (b) and (g) are the most relevant to our discussion. Article XX provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- ...
- (b) necessary to protect human, animal or plant life and health;
- ...
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Obviously, this provision is far from satisfactory for the protection of the environment. One may question, first of all, if these paragraphs are really applicable to the measures taken for the protection of the environment. The legislative history of the GATT Article XX does not reveal any significant signs of concern for the environment, except in the very limited area of sanitary and phytosanitary measures for the protection of human health, animals and plants, which are related to customs regulations applied at the border. How is it possible to make these paragraphs applicable to the broad objective of protecting the environment of a particular country, or extend it to cover the protection of the global commons? This is the very question underlying the issue of compatibility of MEAs with GATT.

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<sup>8</sup> P.J. Kuyper, “The Law of GATT as a Special Field of International Law”, *Netherlands Yearbook of International Law*, vol.25, 1994. pp.227f.

Naturally, we should interpret the GATT articles not only from their text and legislative history but also in light of the “subsequent practice” of States (Vienna Convention on the Law of Treaties, Article 31, paragraph 3), and from that perspective, the findings of dispute settlement panels and the Appellate Body are very important. Nonetheless, the defects of GATT provisions in respect of environment-related trade measures are too obvious.

It was for this reason that the WTO has set up the Committee on Trade and Environment (CTE) to consider and elaborate applicable rules. Despite the high expectations of international community, the CTE and the Ministerial Conference have failed to reach any substantive consensus and no new rules have yet to emerge.

As I noted earlier, the procedures under the WTO certainly have improved. But such procedural improvement goes only halfway toward a self-contained regime. Substantive law reform is crucial for the WTO to become fully self-contained. The lack of substantive rules pertaining to environmental protection may well be considered a reason for not submitting certain disputes to WTO, because there is no point on relying on the WTO when no remedies can be expected therefrom based on the existing WTO law. The mandate of a WTO panel or the Appellate Body is to interpret and apply the existing law, namely, covered agreements, and such a panel or the Appellate Body would and should certainly exercise judicial restraint when facing new areas of law. It therefore seems inevitable that, at least at the present stage, there are important gaps discernible in the multilateral trading system dealing with the legal problems of trade and environment.

Before I offer my own proposal regarding a method of filling this existing gap, I would like to point out the modalities of the conflict between MEAs and the GATT, which is our central question.

### (c) Modalities of Conflict between WTO/GATT and MEAs

A conflict between the GATT and an MEA could take various forms: (a) a conflict of *basic constitutional principles*; (b) a conflict in the *methods of regulation*; (c) a conflict arising from the *means taken for domestic implementation of MEAs*; and (d) finally, a conflict arising out of the *means taken to ensure effectiveness of MEAs*.

First, there are explicit or inherent differences between the GATT and an MEA on the level of basic constitutional principles. The basic norm of the GATT, as expressed in its Articles I and III, is “equal treatment and non-discrimination”, and if there are exceptions to this principle, they are recognized only on the specifically prescribed basis, whereas MEAs for the protection and use of the global environment are based on the principle of “common but differentiated responsibility”, according to which developed States bear special responsibility (Principle 7 of the Rio Declaration), while the special situation and needs of developing countries are given special priority (Principle 6).

Thus, for example, the UN Framework Convention on Climate Change and the Kyoto Protocol impose on Annex I parties (industrialized, developed countries) targets for the emission reduction/restriction of greenhouse gases (GHGs), with no such obligation prescribed for developing countries. As a result, goods produced in developing countries enjoy comparative advantages in the developed countries’

markets. Since the WTO/GATT law requires that all members be placed, in principle, under the same privileges and obligations, the Annex I countries may assert to impose, in accordance with the WTO rules, countervailing measures or labelling requirements on these goods in order to reduce such advantages enjoyed by the developing countries under the Convention and the Protocol.

Such a voice will be stronger in view of the fact that the total amount of GHG emissions from developing countries will be higher than that from developed countries beginning around the year 2010-20. You will recall that the United States Senate passed a resolution in 1997 to the effect that unless there is “meaningful participation” by major developing countries, most notably, China, India, Indonesia, Brazil and Nigeria, the United States would not be a party to the Protocol. Eventually, the Bush administration “unsigned” the Protocol in April 2001 for the same reason. Secondly, there may be a difference in the methods of regulation between the GATT and MEAs from which a conflict may arise. One of such questions is *processes and production methods* (PPMs) used in MEAs. This kind of regulation was not known to the GATT, which applies its rules primarily on *products*. In the long history of GATT practice, it was not until 1987 that the GATT was faced squarely with the question of PPMs for the first time. In the course of negotiating the Montreal Protocol on Substances that Deplete the Ozone Layer, the committee that drafted the Protocol’s Article 4 relating to the trade restriction with non-parties to the Protocol discussed the question of compatibility of the PPM requirements with the GATT. It was understood then that such requirements were permissible under the GATT law. As a result, Article 4 of the Montreal Protocol provides not only for the restriction of CFCs themselves and goods containing CFCs, but also of goods which are produced with CFCs even where the goods do not contain them, if the restriction is deemed feasible after a certain period of time. It is this last category of regulations that concern PPMs. In the context of global warming, it is possible to imagine a wide range of measures that may be contestable under the WTO rules. A party might impose equivalent energy efficiency standards on domestic and imported refrigerators and automobiles. Or a party might ban the national production or import of rice grown under methane intensive cultivation methods or wood harvested under non-sustainable forestry practices. All these measures are related to the question of permissibility of PPMs under the WTO/GATT.

The *Tuna/Dolphin* and the *Shrimp/Turtle* disputes were cases involving PPM regulation. There was nothing wrong with either the tuna or the shrimp *as products*. Presumably, they were clean, healthy tuna and shrimp. The concern of the United States was that the methods and processes of harvesting tuna and shrimp allegedly caused the incidental killing of dolphins and turtles. It should be noted however that dolphins and turtles are not the species protected by treaties<sup>9</sup>, and the fishing nets and equipment used were not of the type prohibited by international law. In other words, the PPM regulations in question were not treaty-based unlike the above-mentioned Montreal Protocol, which led to the decision in these two cases that they were not GATT-consistent.

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<sup>9</sup> The sea turtles are covered by the 1973 Convention on International Trade in Endangered Species (CITES), but the CITES is an instrument which restricts *international trade* and, strictly speaking, is not an instrument for the *protection* of such species.

Nonetheless, the *Shrimp/Turtle* ruling by the WTO's Appellate Body<sup>10</sup> seems to have broken new ground for PPM requirements under the GATT law, for better or worse. The complaint brought by India, Malaysia, Thailand and Pakistan concerned in this case the prohibition by the United States of the importation of certain shrimp and shrimp products because fishing vessels of these countries did not use turtle excluder devices (TEDs) or equally effective means of protecting turtles from shrimp-trawling activities. The Appellate Body implicitly indicated in its finding that such a PPM requirement might not be inconsistent by its very nature with GATT Article XX(g), although it held that the measures in question be considered unjustifiable under the chapeau of Article XX because of insufficient efforts made by the United States to secure a multilateral acceptance of its exclusionary program.

Although there is not yet a universally accepted interpretation of the *Shrimp/Turtle* decision, an argument has been advanced that PPMs may no longer be considered incompatible with the GATT. If that is the case, however, I think that the Appellate Body has exceeded its competence as a judicial organ that is supposed to interpret and apply the existing law and not create a new law. I believe that the Appellate Body's judicial legislation is not acceptable while the CTE, as the WTO's legislative body, has been considering the topic on PPMs for several years now without reaching a consensus.

With regard to a difference between the GATT and MEAs on the basis of the methods of regulation, there may be another possibility of conflict. The method of regulation presupposed in the WTO/GATT has been the direct administrative regulation generally called "command and control", such as imposition of tariffs and restriction of imports. However, in the field of international environmental law, there has been increasing support for the use of economic instruments that are considered more cost-effective. As a method of indirect regulation, these instruments include deposit-refund systems, charges and taxes, emission trading and financial assistance, and they are premised to use market mechanisms in order to realize the environmental objectives. They have been incorporated in some of the MEAs, most notably in the Kyoto Protocol, the issue which will be discussed in some detail later.

The third type of conflict between the GATT and MEAs is one that may arise out of the means of domestic implementation. Within the bounds of an MEA, a State party may take different means and measures for its domestic implementation in order to fulfil the objectives of the MEA in question. This may create a situation where the domestic measure is challenged by another State under the relevant rules of WTO/GATT. As I will explain later, this is exactly the situation that countries may face in respect of national implementing legislation taken in accordance with the relevant MEAs. For example, a national system on the allocation of permits for tradable emissions that is set up in implementation of the Kyoto Protocol but that actually works in favour of domestic firms may well be contested as being GATT-incompatible by exporting countries.

Fourth and finally, a conflict can occur when an MEA incorporates certain measures to ensure its effectiveness by way of sanctions either on non-parties or on non-

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<sup>10</sup> *United States – Imports Prohibition of Certain Shrimp and Shrimp Products*. See Jutta Brunnee & Eellen Hey, eds., "Symposium", *Yearbook of International Environmental Law*, vol.9, 1998, pp.3-47.



compliant parties. I have already referred to Article 4 of the Montreal Protocol which provides for restriction of trade with non-parties. The discussion currently going on in respect of compliance mechanism under Article 18 of the Kyoto Protocol is posing the problem of sanctions on the parties that have not complied with the commitments set out in the Protocol, which I will describe later.

(d) Coordination of Conflicting Regimes

I have described above diverse implications involved in the problem of “trade and the environment”. Together we have come to a conclusion that clear criteria need to be established for coordination between an MEA and the WTO. However, an MEA and the WTO are independent treaties on equal footing, and between the two there is no supremacy over the other. If there is an overlap and a resulting conflict regarding the same subject matter, theoretically coordination in the form of dispute settlement should take place at a forum other than the MEA or the WTO in order to maintain impartiality. There should be at least an equal chance of selection between the two for dispute settlement. However, on the environmental side, there is no counterpart to the WTO’s compulsory dispute settlement procedure, and therefore a dispute on “trade and the environment” is more likely to be submitted to the WTO rather than that under an MEA, which is possible only on the consensual basis. It is more than desirable that a World Environment Organization (WEO) be established as a counterpart of WTO with a view to attaining an equal footing between the two regimes.

With regard to methods to accommodate MEAs into the GATT, there has been a division between *ex post* and *ex ante* approaches. The former is based on the idea that the existing GATT provisions are adequate to deal with the question and that any clarification can be provided, as necessary, *ex post*, either through the WTO dispute settlement or through the use of a waiver procedure. The latter *ex ante* approach includes an amendment of the existing GATT provisions, such as the insertion of the term “environment” into Article XX(b). None of these suggestions have attained full support among the WTO members.

My own suggestion on this point is that we should consider an amendment to the effect of incorporating into the GATT an “approval procedure” similar to the exception for international commodity agreements of Article XX(h), as I will explain in a moment. This proposal has become the core of the position taken by Japan’s Environmental Protection Agency (EPA) on the basis of the recommendation made by an EPA advisory group in March 1999. However, due to certain differences among Japan’s Ministries (which is not surprising to those of steeped in Japanese policy making), at the present this remains as only the EPA’s provisional proposal. Those of us watching and involved in the process hope that this proposal will be formalized as Japan’s official proposal for consideration at the CTE, or at the WTO’s millennium round of negotiations.

The gist of this proposal is to insert, as a new subparagraph (k) of Article XX of the GATT, the following provision:

- (k) undertaken in pursuance of obligations under any multilateral environmental agreement which is submitted to the Ministerial Meeting and not disapproved by it.

This is a combination of *ex post* and *ex ante* approaches, and in my view, this proposed method is most appropriate for harmonizing the conflicting obligations of free trade under the WTO/GATT on the one hand and the protection of the environment under MEAs on the other. In my view, it will satisfy the requirement of assuring legal stability and predictability, while at the same time maintaining flexibility. If it is difficult to add this language as an amendment to existing GATT provisions, the above provision could be incorporated in a binding “Understanding” to be annexed to the WTO Agreement.

There are some thirty MEAs with trade measures awaiting the formulation of objective criteria. New environmental agreements like the Kyoto and Cartagena Protocols are being elaborated with similar trade measures. Furthermore, increasing number of cases is expected to be brought before the WTO panels and the Appellate Body. It is therefore strongly hoped that the international community will reach a consensus on this important agenda as soon as possible.

What I have attempted to do here has been to find out a method of coordination between two multilateral treaties, a MEA and the GATT. Questions regarding the overlap of two multilateral treaties is basically a matter that can be settled in accordance with the principles laid down in Article 30 of the Vienna Convention on the Law of Treaties regarding “application of successive treaties relating to the same subject-matter”. However, the issue on “trade and the environment” is not merely a conflict of treaties. It is a conflict of “regimes”. Since a regime is comprised of multiple treaties and non-binding instruments, a conflict between one regime and another, -- the trade regime and environmental regime – cannot be solved simply as a matter of coordination of individual treaties.

From my perspective, the conflict of international regimes should be considered first as a question of their *external accommodation* on the basis of opposability. Confrontation of regimes can be seen as a clash of opposability of respective regimes. As you recall, the component element of opposability is effectiveness and legitimacy. The issue on trade and the environment is in fact the *on-going competitive process* between the two regimes in terms of effectiveness and legitimacy. In case of conflict between the two, one regime, either trade or the environment, will have to prevail over the other, and that will depend on which regime is regarded more effective and more legitimate.

Needless to say, such a confrontation of international regimes is not desirable. It is therefore necessary to achieve *internal accommodation* within each regime. The environmental regime should try not only to passively obstruct but also actively incorporate the legitimate interests of free trade, while the trade regime should try to accommodate the legitimate concerns for environmental protection, both within their respective regimes. In this way, it is hoped that both regimes can be transformed to be “mutually supportive”.

While we have already touched on some aspects of the Kyoto Protocol, I would like next to concentrate on the Kyoto Protocol, or more specifically, the so-called Flexibility (Kyoto) Mechanisms, and their relationship with the WTO/GATT regime.

### 3. Kyoto Protocol and WTO/GATT

#### (a) The Climate Change Regime and International Trade

It may be recalled that it was especially a hot summer in 1988 when heat and drought hit large parts of the United States as well as some areas of Europe. That heat and drought supplied the driving force for action on the global warming issue. However, there was striking differences of positions among States surrounding the issue. Not only was the usual decisive division between developed and developing countries exhibited, but also conflicting positions in each group were more than evident in the negotiating process of the 1992 Framework Convention on Climate Change. In particular were conflicts related to energy production and consumption patterns, levels of technological development in the use and conservation of energy and resources and the specific vulnerability to climate change. Developed countries were far from being united, with the United States alone in publicly opposing the specific targets and timetables. Germany and Japan were at the forefront viewing the Convention as an instrument for gaining longer-term competitive advantages by requiring the further development, production and dissemination of innovative new technologies. Developing countries were also divided. The oil producing countries, led by Saudi Arabia, strongly opposed any substantive obligations in the Convention. The large industrializing developing countries, such as China and India, were concerned that their economic development, including use of large coal reserves, should not in any way be limited. Countries with extensive forests, such as Brazil and Malaysia, were concerned that the primary emphasis of the Convention should be on limiting developed countries' emissions and not on protecting or enhancing developing countries' sinks (forests). And developing countries particularly vulnerable to the effects of climate change, such as the thirty-seven member Alliance of Small Island States (AOSIS), sought a Convention with strong and enforceable commitments and an emphasis on the adverse effects of climate change. It was in these complex economic and environmental interests that the emergence of a climate change regime had to be worked out in the form of the Framework Convention in 1992. These same situations remained when Kyoto Protocol was drafted in 1997.

Before getting into the problems of the Kyoto Protocol, I would like to point out certain intrinsic similarity between the GATT and the Climate Change regimes. It was suggested that both regimes are based on the common recognition that the problems that they are dealing with, whether trade barriers or the GHG emissions, need to be treated *as a continuing process* and under the framework within which the relevant issue links could be adequately coordinated in each round of negotiations. Thus the idea was proposed by David Victor in 1991 for the creation of a General Agreement on Climate Change, or GACC, modelled after the GATT, intended to provide for allowable contributions to global warming set for individual nations or groups of nations<sup>11</sup>. Under the system, it was envisaged that the level of emissions would be lowered through interactive and highly flexible rounds of negotiations in the same way as, say, tariffs and non-tariff barriers have been lowered under the GATT.

Although a GACC was not realized, elements of the GATT model are nonetheless discernible in the Framework Convention on Climate Change. In fact, among the

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<sup>11</sup> David Victor, "How to Slow Global Warming", *Nature*, No.349, 1991, pp.451-456.

principles guiding the Parties, the Convention provides that “policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost” (Article 3, para. 3). While the developed countries assumed specific commitments, recognizing that “return by the year 2000 to earlier emission levels [unspecified] would contribute to modification of longer-term emission trends” (Article 4, para. 2), it was the intention of the Parties that a protocol or protocols would stipulate future targets and timetables for GHG emissions in developed countries for the post-2000 period. Thus, the Kyoto Protocol was elaborated to cover the first phase of this period, and it is expected that similar protocols will be worked out in future for succeeding periods. These arrangements may not be as institutionalized as the WTO/GATT round of negotiations, but the considerations underlying the climate change regime for the continuous efforts to stabilize and lower emission levels can be seen as quite similar to the WTO/GATT principles.

While I am dealing with “conflict” between an environmental regime and the WTO/GATT regime, as far as the climate change regime is concerned, coordination between the two may not seem to be much of a problem because of the similarity that I just mentioned and because the Kyoto Protocol has incorporated a new type of flexible economic instruments based on market mechanisms. It should be noted that a number of specific policies and measures promoted by the Kyoto Protocol, as a means of achieving its environmental goals, are not only consistent with measures promoted by the WTO Agreements, but result in mutual support. Some of the ways in which the Kyoto Protocol aims to achieve its goal of reducing GHG emissions include the promotion of the “progressive phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all GHG emitting sectors that run contrary to the objective of the Convention and application of market instruments” (Article 1, subparagraph (a) (v)). This is very much in line with the objective of the progressive removal of trade restrictions and distortions<sup>12</sup>.

Nevertheless, it is possible that at the practical operational level the Kyoto Protocol may pose certain intricate problems of conflict with WTO/GATT rules, though this will largely depend on how its mechanisms are defined, designed and actually implemented. A potential point of conflict hinges upon the issue of discrimination. While the fundamental objective of the WTO regime is to remove any form of discrimination that may act as a barrier to free trade, the market mechanisms within the Protocol are dependent upon discrimination by distinguishing between developed and developing countries, between signatories and non-signatories, and between different manufacturing technologies and processes<sup>13</sup>. Let us look into each of the Flexibility (Kyoto) Mechanisms from this angle.

#### (b) The Kyoto Mechanisms

The key Annex I countries agreed to take on substantial targets for emission reduction/limitation in Kyoto, which was indeed the most ambitious environmental commitments ever set by an international agreement. However, it was recognized during the Kyoto negotiations that many developed countries would find it difficult to achieve their target reductions solely on the basis of domestically implemented

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<sup>12</sup> UNU/IAS, *Global Climate Governance: Inter-Linkages between the Kyoto Protocol and Other Multilateral Regimes*, 1999, p.13.

<sup>13</sup> *Ibid*, p.12.

policies and measures. The reason for their acceptance despite such practical difficulties can be attributed in part to the availability under the Protocol of a number of unique market-based flexibility mechanisms. Essentially, these mechanisms constitute ways in which developed countries can supplement their domestic efforts to achieve their emission reductions by implementing specific projects and policies outside their countries.

These most innovative Kyoto Mechanisms can be grouped into two types: One is the project-type mechanisms, namely, the Joint Implementation (JI, Article 6) and the Clean Development Mechanism (CDM, Article 12). The other is a mechanism called Emissions Trading (Article 17). All three mechanisms rely on existing economic forces to make them viable. It is considered that the Protocol will work most efficiently if parties or related private entities are allowed to acquire or invest in emission reduction opportunities in whichever countries they are cheapest to achieve. In effect, this approach will allow Annex I emitters to acquire parts of each other's assigned amounts or to invest in projects that generate "emission reduction units" within each other's territory. These parts of assigned amounts or emission reduction units can then be used *as credits* to offset domestic obligations or international commitments under the Protocol. If these mechanisms are designed properly, it is considered that they may provide both the incentives and the means for countries to comply<sup>14</sup>.

Because the practical and operational details relating to the implementation of the Protocol's flexibility mechanisms have yet to be elaborated, the elements of possible conflict with WTO/GATT that I am referring may simply be hypothetical and speculative. Nonetheless, some potential points of conflict have become already apparent.

First on JI and CDM: While there is a difference between the two in that the Joint Implementation mechanism covers transactions between Annex I parties, and the Clean Development Mechanism runs between Annex I and non-Annex I parties, the nature of the operation of these project-based mechanisms is quite similar in the sense that the amount of emission reductions achieved through these activities may be offset against the party's assigned emissions. Articles 6 and 12 provide the opportunity for Annex I parties to transfer or acquire emission reduction units (ERUs) resulting from joint implementation projects under Article 6, or to use certified emission reductions (CERs) resulting from CDM projects undertaken in accordance with Article 12.

If I am allowed to present a bit about Japan, I believe that an industrialized country such as Japan can make a significant contribution in JI and CDM activities. From the bitter experience in the 1950s and 60s of disastrous pollution, the public and private sectors in Japan have made tremendous efforts to achieve the most energy-efficient style of industry, and as a result, Japan now enforces the world's strictest standards for exhaust emission controls for both factories and automobiles. For instance, through progress made in fossil-fuel and facilities improvement programs, the volume of sulphur oxide and nitrogen oxide emissions per unit of electricity generated in fossil-fuel plants has been reduced drastically, with the result that SO<sub>x</sub> emissions during the 1980s was one-eighteenth that of the average of five leading OECD countries, and NO<sub>x</sub> emissions was one-seventh. Thus, Japan's efforts for energy

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<sup>14</sup> Jacob Werksman, *op. cit. supra* note x, p.50.

conservation have been carried through to the near maximum, and to reduce emissions by one-tenth of a percent would require a tremendous amount of investment. It can be expected that the same amount of money, if used under the proposed JI or CDM programs for replacement or improvement of non-efficient plants and facilities in a technologically less-developed country, would contribute to dramatically reduce the volume of GHGs emitted in that country.

Despite such utility, JI and CDM may not be without a problem in respect with WTO/GATT law. Depending on how the specific rules on the operation of these mechanisms are elaborated, they may, at least in part, be deemed incompatible with relevant WTO rules. Although the WTO/GATT is not directly applicable to investment *per se*, it may nonetheless be applicable to trade-related aspects of investment activities. Therefore, a potential for conflict with the GATT may arise if, for example, a party hosting a CDM project is encouraged or required by the Protocol to expressly discriminate between investors or investment-related goods on the basis of the status of their home country in several ways: Annex I versus Non-Annex I parties, Complying versus Non-Complying parties, Party versus Non-Party, etc<sup>15</sup>. Thus, for example, it may be questioned whether the industrial plants to be exported to the host country under the CDM scheme could be duly exempt from the importing State's obligation to extend MFN tariff rates and other benefits to other countries imposed under the GATT. From the GATT's point of view, such transactions should be treated as exceptions to the MFN principle and should be authorized in the same way as, say, the preferential treatment under the Generalized System of Preferences granted for developing countries.

Second, I would like to refer to Emissions Trading under Article 17 of the Kyoto Protocol, which has introduced a completely new "product" to be traded called "certified emission credits", or CECs. Under the system, one Annex B party will be allowed to purchase the rights to emit GHGs from other Annex B parties that have been able to cut GHG emissions below their assigned amounts. Structured effectively, this market-based emissions trading approach, pioneered in the U.S. Sulfur Allowance Trading Program, can provide an economic incentive to cut GHG emissions while allowing the flexibility needed to promote cost-effective actions.

When the GATT was created in 1947, "trade and the environment" was not an issue, let alone the "trading of air pollution" among its parties. First we must ask whether emissions are identifiable as something that can be traded on international markets, and that can be under the jurisdiction of the WTO/GATT. Is a CEC really a good to be covered by the GATT? If we can recognize a certain physical element in a CEC, it is argued that it may be characterized as a good, similar to hazardous waste or used oil, which would then entail application of the GATT. However, waste is not normally considered as a good because of its lack of commercial value (unless it is intended for recycling). Some argue that a CEC is a service rather than a good by characterizing it as the right to emit and as a permit or credit that is a negotiable instrument. For this reason, they consider a CEC to be a sort of financial service covered by the General Agreement on Trade in Services (GATS). The apparent artificiality of these arguments notwithstanding, either the GATT or the GATS, which work on similar principles, will be applicable to emissions trading to the extent it has an effect on

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<sup>15</sup> UNU/IAS, *op. cit.*, pp. 31-32.

trade. Depending on the size and effectiveness of the system, emissions trading will certainly have significant impacts on international trade as has been the case for other trade-related environmental measures.

Questions on the compatibility with the WTO are raised by the very fact that the Kyoto Protocol restricts the trading of emissions only to Annex B parties, which could be seen as barrier to trade particularly from the perspective of non-Annex B parties, namely, developing countries. Some of these countries have large inventories of emission credits which they might wish to trade on an emissions “credits” market, but could only do so by becoming Annex B members. There is also a possibility of discrimination if the eligibility for participation in the market is linked with compliance: for instance, if the selling party were in compliance with its emission requirements, the trade would be unrestricted, while if, by means of a monitoring and verification process, a potential for non-compliance were recognized, then the trade would be banned or the seller would be sanctioned for trading while out of compliance<sup>16</sup>. Such a system would certainly pose delicate compatibility problems with the WTO principle of non-discrimination.

The crucial aspect of the emissions trading system is also the allocation of permits within the domestic market, which could raise the issue of compatibility with the WTO rules. Various forms of allocation have been debated including “upstream”, “downstream” and “hybrid” models<sup>17</sup>. No matter how national trading systems are designed, importers and domestic producers of fossil fuels should be treated equally in obtaining emission allowances under the like-product provisions in the WTO. It is feared, for example, that governments might allocate permits in such a manner as to favour domestic firms against foreign rivals, violating the GATT principle of non-discrimination<sup>18</sup>.

All of these flexibility mechanisms adopted by the Kyoto Protocol must be elaborated in detail and with care and a view to avoiding potential conflict with the WTO as much as possible. I feel it imperative to remind the readers that the Kyoto Mechanisms are available only as supplementary means to domestic efforts to

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<sup>16</sup> UNU/IAS, *op. cit.*, p.16.

<sup>17</sup> An “upstream” trading system would target fossil fuel producers and importers as regulated entities, and therefore would reduce the number of allowance holders to oil refineries and importers, natural gas pipelines, natural gas processing plants, coal mines and processing plants, making administration of the system easier. However, since such firms would simply raise prices, an upstream system would provide no incentive for energy end-users to develop disposal technologies, an aspect deemed critical in searching for long-term solutions to climate change problems. In contrast, a “downstream” trading system would apply at the point of emissions. As such, a large number of diverse energy users are included. However, such a system would be more difficult to administer, especially concerning emissions from the transportation sector and other small sources. Alternatively, a national trading system could be modeled as a “hybrid” system, which is similar on the one hand to a downstream trading system, in the sense that regulated sources at the levels of energy users are also limited to utilities and large industrial sources, but which, on the other hand, like an upstream trading system, would require fuel distributors to hold allowances for small fuel users and pass on their permit costs in a mark-up on the fuel price. As such, small fuel users are exempted from the necessity of holding allowances, and yet the rise in fuel price will motivate them to reduce fuel consumption or switch from fuels with high carbon content such as coal to fuels with a low carbon content such as natural gas. Zhong Xiang Zhang, “Greenhouse Gas Emissions Trading and the World Trading System”, *Journal of World Trade*, vo.32, no.5, 1998, pp.219f. 225-226.

<sup>18</sup> *Ibid*, pp.226-227.

reduce/limit GHG emissions by Annex I countries. They should never be the mainstream of the measures contemplated by the Protocol. I would like to focus on some of the pertinent points concerning domestic measures to curb global warming, which again might pose intricate compatibility problems with the WTO.

(c) Certain Domestic Measures

The Kyoto Protocol provides in general terms that Parties be bound to adopt policies and measures in a manner to promote sustainable development. The Protocol, however, stops short of specifying the *methods* by which to attain the objectives through domestic policies and measures. Such actions are to be taken in accordance with national circumstances, and the selection of appropriate methods is left largely to the discretion of individual States. It is conceivable that the validity of certain measures by a State come to be challenged by other States for not being mandated under the Framework Convention and the Protocol. Measures that are not clearly treaty-based thus pose delicate problems, as they might be categorized, at worst, as tantamount to unilateral measures by individual States.

Nonetheless, active debates have been going on in various countries with regard to such domestic policies and measures. 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 GHG-emitting sectors, and promote the application of market instruments, just to name a few. Energy, carbon and other taxes, mandatory and voluntary standards, subsidies for environmentally friendly production processes, labelling and certification schemes are also mentioned. All of these domestic measures employed to reduce emissions will certainly have a bearing on world trade, and accordingly, potential conflict with the relevant WTO principles and rules.

There are some specific cases of domestic environmental policies worthy of mention. First, some Annex I countries have already established domestic legislation, either in mandatory or voluntary forms, regarding energy efficiency requirements and standards for the product and/or processes and production methods (PPMs). Japan, for example, revised its Law Concerning Rationalization of the Use of Energy (Energy Conservation Law) in 1998, which imposes strict emission controls on factories, construction, machinery, automobiles and electric appliances. The Law has introduced the so-called “top runner approach”, under which standards are set at the levels meeting or exceeding the highest energy efficiency achieved among currently commercialized products. To take a specific case of gasoline-fuelled passenger vehicles, it is expected that fuel consumption will be improved by about 23 per cent from 1995 levels by 2010. Importation of such automobiles that are not sufficiently energy efficient may be restricted under the Law. These requirements and standards may however be deemed inconsistent with the WTO agreement on technical barriers to trade (TBT), unless they are specifically accepted as legitimate exceptions to trade liberalization clauses. In fact, the United States and the European Union have reportedly noted their concern to the Committee on TBT; expressing certain reservations to Japan with respect to the specific provisions of the Energy Conservation Law for fear that they might be used for the protection of domestic automakers against European and American firms. I do not see however any



inconsistency under the Appellate Body's interpretation of the relevant provisions of TBT which was given in *Asbestos* and *Sardines* cases.

As we consider the potential trade-distorting effect of certain domestic legislation, I would like to describe another interesting Japanese law, the Law Relating to Recycling of Disposed Household Electric Appliances established in 1998. Its primary objective is waste management rather than emissions control, but it has an important aspect of conservation of resources through recycling and thus a certain bearing on emissions reduction. Interesting about this law is that it requires not consumers or municipalities but rather the *producers* of household electric appliances (such as TV sets, refrigerators, air-conditioners and washing machines) to *recycle* their products after consumer use upon disposal by the consumer. This means that the producers must design their products so as to facilitate recycling and also that they must set up effective networks for collecting disposed appliances. This is exactly the policy adopted by the OECD called "extended producer responsibility" (EPR). It is reported that the European Union has recently decided on even tougher recycling requirements<sup>19</sup>. These measures may be challenged, however, as being inconsistent with the TBT agreement in the same way as the energy efficiency requirements described earlier, particularly by prospective foreign producers and exporters of those products.

These energy efficiency or recycling measures may also be coupled in some cases with certain subsidies or tax reductions, in which case the same benefits may, in principle, have to be extended to foreign imports in order to be compatible with the WTO/GATT. There have been debates about the use of subsidies in the form of financial support for investments with the objective of developing technologies and goods that reduce emissions. The WTO agreement on subsidies prescribes three kinds of subsidies: prohibited (red-light), actionable (yellow-light) and non-actionable (green-light) subsidies. Environmental subsidies are generally considered to be non-actionable, though they can be actionable if they are regarded as substantially trade-distorting, in which case certain countervailing measures become permissible under the WTO law.

Finally, some Annex I countries may decide to implement a carbon tax or environmental tax as a way to combat climate change. Taxes are considered very effective tools for achievement of environmental goals, particularly in the context of global warming, creating incentives for polluters to limit activities that cause GHG emissions. However, taxes raise inevitable questions concerning competitiveness, and therefore an effective system for border-tax-adjustment is indispensable in order to offset tax-related production costs. This is one of the major topics discussed at the WTO/CTE that needs to be resolved.

#### **4. An Alternative Regime on Climate Change and WTO/GATT**

The foregoing discussion has been based on the assumption that the Kyoto Protocol will take effect before long once Russia's ratification is reached. Let us hope that it will come into effect. With the desertion of the United States from the Kyoto Protocol, however, the landscape of the global warming issues has changed considerably. While

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<sup>19</sup> EU: Directive on Waste Electrical and Electronic Equipment, June 2000.

the United States may be condemned for its “selfish betrayal” of the *bona fide* efforts of the international community, there are many now who question the basic approaches adopted by the Protocol, most notably, its rigid imposition of national CAPs and its purported enforcement of sanction in case of non-compliance.

(a) Non-compliance of the Kyoto Protocol

The Kyoto Protocol requires industrialized parties to limit and reduce GHG emissions by quantified amounts and within a specific timeframe as set out in Annex B, according to which, for example, Japan is obligated to reduce 6% of its total emissions as compared to the 1990 level, the United States 7% and the European Union 8%. It should be noted that these numerical targets were set out in a top-down manner as a political compromise and were not in any way based on the objective criteria of bottom-up figures. The year 1990 selected as the base year for comparison is quite unfair for countries such as Japan which reached the level of substantive achievements in energy-saving technologies, while it is quite advantageous for the European countries that were still on the half-way toward that level, not to mention Germany’s unification which created extremely favourable “bubbles”. The problem of non-compliance for the Kyoto Protocol is centered around these commitments by developed countries, since most of these industrialized countries appear to be facing difficulty in meeting the assigned numerical targets. This was evidently another reason for the departure of the United States from the Protocol.

Article 18 of the Kyoto Protocol provides that “appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance” be established. It is, however, reminded that “[a]ny procedures and mechanisms ... entailing binding consequences shall be adopted by means of an amendment to this Protocol”. There are two schools of thoughts about the responses to non-compliance that are contemplated under this Article. One view advocates “soft” compliance-management, which favours primarily facilitative and promotional approaches by rendering assistance to non-compliant States, modelled after the Montreal Protocol’s non-compliance procedure. The other view takes a “hard” enforcement approach in order to coerce compliance by imposing penalties or sanctions on non-complying parties. Financial penalties and economic or trade sanctions have been proposed along these lines<sup>20</sup>. These measures, if incorporated, will certainly come in conflict with WTO/GATT rules on trade liberalization.

However, I do not believe that this latter approach can be a realistic option. The authority to impose coercive measures would certainly entail “binding consequences”, and so it will not be possible to establish such measures without an amendment of the Kyoto Protocol as is clearly stipulated in the second sentence of article 18. An amendment means a change of the carefully balanced compromises achieved in Kyoto, not to mention another cumbersome ratification procedure that many States may not be willing to take when the Kyoto Protocol itself is facing difficulty in collecting the necessary number of ratifications to enter into force. Even if such coercive measures are introduced into the system, it does not appear that it will work effectively for the

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<sup>20</sup> Jacob Werksman, “Compliance and the Kyoto Protocol: Building a Backbone into a “Flexible” Regime”, *Yearbook of International Environmental Law*, vol.9, 1998, pp. 48-101.

reasons based on the very nature of the global environmental regimes in which confrontational approaches do not seem to be appropriate.

Nonetheless, the COP-7 meeting at Marrakesh in November 2001 adopted an enforcement approach by a decision to the effect that the level of reduction/limitation of GHG emission be “deducted” from the second commitment period for those non-complying Annex-I countries. The rate of deduction has been set as 1.3 times of the amount of the emission that has been failed to comply. There are a number of problems that should be pointed out about this “decision”. First, since the amount of the reduction/limitation for the second commitment period has not been decided on yet, it is meaningless to talk about the reduction therefrom. Second, the “decision” reached at Marrakesh comprises of the “binding consequences” entailing “amendment” of the Protocol in accordance with Article 18 of the Protocol. Clearly, a decision of the Conference of the Parties cannot be equated with an amendment of a treaty provision. Third and most importantly, it should be pointed out that the temporal scope of application of the Kyoto Protocol is to extend only to 2012, the end of the first commitment period. Negotiations for the second commitment period are to be commenced only in 2005. Any consensus reached at the COP-7 meeting should therefore be deemed merely as a provisional political agreement which itself has no legal significance.

(b) A New Mechanism Modelled after the WTO/GATT

It has become increasingly evident that the Kyoto Protocol as it stands now will not adequately work as an instrument to combat global warming, even if it comes into effect. Almost certainly, it will not sustain after 2012 when the so-called first commitment period is to end. We would even be able to predict the worst conceivable scenario of 2012 that everybody is condemning everybody else: Developing countries will condemn the non-compliance of the developed countries; Developed countries condemn developing countries for non-cooperation. There will also be condemnations among developed countries. And naturally, all the parties will condemn the US for having deserted from Kyoto. In order to avoid such a situation to arise, we should seriously consider the possibility of establishing a new, alternative regime as early as possible, and definitely before 2005 when the negotiations for the second commitment period are to be commenced.

Let us summarize what the problems are: First of all, it was a mistake that the Protocol provided for the absolute numerical national CAPs as binding commitments for industrialized countries. Such a binding system is simply infeasible not only from the practical point of view but also from the logical standpoint. Governments can enter into agreements and will comply with the obligations incorporated therein that are within the government reach (levying carbon tax, for example), but they cannot be directly responsible for the activities, economic or otherwise, outside their mandate (such as limiting the amount of CO<sub>2</sub> emissions from various sources of a country), unless they are under the strict and all-encompassing State planning similar to the former socialist countries or those States under the wartime control. In this sense, we can fairly say that the Protocol has wrongly attempted to impose on the market-economy industrialized countries those binding commitments that have no guarantee to be complied with in the first place. In other words, the Kyoto Protocol should have set the CAPs as non-binding goals rather than binding commitments. As I stated

earlier, to adopt the enforcement approach for non-compliance is only to duplicate a mistake on top of the original mistake.

The second mistake was the numerical quantification of such commitments. While the general target of 5% reduction might have been legitimate, the individual national targets (such as 6% for Japan and 7% for the US, and 8% for European countries, etc.) were set quite arbitrarily without any objective foundations. These targets were politically agreed on in a top-down, deductive manner rather than accumulating objective figures, sector by sector, in a bottom-up or inductive manner. The result was that those percentages were unfair for Japan, unfeasible for the US, and quite advantageous for Europe if considered together with the so-called “EU bubbles” and the base year of 1990. Such unfair and unfeasible elements would be detrimental to the incentives to comply by the industrialized nations outside Europe.

Thirdly, the Kyoto Protocol was concerned primarily with short-term achievements, while the global warming is something that should be tackled for the long term of fifty or one hundred years. The Protocol’s basic approach was to set a timeframe of some ten years, and to assess the result of achievement by individual nations at the end of each commitment period, which is to be reflected for the level of commitment to be allocated at the following period. This kind of mechanism may work well in some quarters domestically, but it is rather difficult to imagine that it will work as effective machinery in the international community. There is no legal link established between the first and second commitment periods in the Kyoto Protocol. Naturally, the nations cannot agree on the binding substantive commitments lasting for fifty or one hundred years, though they can probably agree on establishing certain procedures as we elaborate later in this paper.

The fourth point is well known and it has already been touched on earlier. It is now clear that “meaningful participation” by major developing countries such as China, India, Indonesia, Brazil and Nigeria should be inevitable at least after 2012. Korea and Mexico, now being OECD member countries, should be regarded as having “graduated” from the status of “developing countries”.

The present situation surrounding the Kyoto Protocol appears quite similar to the circumstances after the adoption of the UN Convention on the Law of the Sea (UNCLOS) in 1982. It may be recalled that the US and other industrialized countries strongly objected to Part XI of the Convention on the deep sea mining which was deeply influenced by the ideology of planned economy. The developed countries refused to ratify the Convention while the ratifications from the developing countries were piling up by which the Convention came close to entering into force by early 1990s. In the meantime, the developed countries led by the United States concluded the so-called mini-agreement for the development of the mineral resources of the deep sea. This was, in a word, a situation of parallel existence of two conflicting treaty regimes. It was apparent that the UNCLOS regime would face a serious paradox of collapse by the very entry into force of the Convention, because of the obvious fact that developing countries alone would not be able to support the regime financially. It was the UN Secretary-General’s efforts for conciliation between the developed and developing countries that eventually saved the Convention by “freezing” (that is, in effect, terminating) the Part XI.

In any event, it seems quite possible that the Kyoto Protocol will not be sustainable beyond 2013. If our assumption is valid, then, what kind of new mechanism can we envisage for an alternative regime to Kyoto Protocol? I believe that it should incorporate the following elements: First, the new regime should be a mechanism that is capable of assuring continuous efforts by all nations lasting for a long term of fifty or one hundred years. Second, instead of imposing rigid obligations on States by way of absolute CAPs, it should guarantee flexibility by which special requirements of individual nations can be accommodated. Third, however, the new regime after the Kyoto Protocol cannot go back to the level of soft-law or even to the level of the UNFCCC. It should contemplate the adoption of some sort of binding commitments while maintaining the flexibility requirement just mentioned. Fourth, rather than the top-down approach, we should consider the bottom-up approach based on the objective criteria accumulated in various sectors within the State. Fifth, the regime should have a steering organ in which major State parties have special power and responsibility, the one similar to the Antarctic Treaty Consultative Meetings.

As a concrete example based on the above considerations, I would venture to make the following proposal: A new regime could be worked out after the WTO/GATT model as we have already referred to earlier. As you know, people are talking about “Greening the GATT”: Conversely, I am here talking about “GATT-ization of a MEA”. I think that GATT-ization of the Kyoto Protocol is inevitable in view of the fact that the Protocol is, in essence, much more of an economic and energy treaty than an environmental treaty. The word, GATT-ization which I invented yesterday as I was preparing for this paper, has a very good association with the Japanese word, *Gattai*, which means “merger” or “accommodation”, and I am hoping to disseminate this word as a slogan for my proposition!

The WTO/GATT has been very successful for the past fifty odd years in realizing free trade, through lowering tariffs and non-tariff barriers. The GATT is a framework that combines bilateralism with multilateralism. Under its request-offer system, country A requests country B, for example, to lower tariffs for automobiles, offering the latter in return to lower its tariff for steel products. If the agreement is reached bilaterally between the two countries, the results are extended to all the other contracting parties on a MFN basis. Countries continue negotiations until the target is reached. Thus, the Kennedy Round negotiations in the 1960s, for example, started with the goal of reducing 50 % of the tariffs for all the industrial products, ended with the result of some 36 % average reduction, which was nonetheless a great success. In the course of such intergovernmental negotiations, the representatives from the related industrial sectors, such as the automobile and steel industries and those from the consumer side, are no doubt involved substantially. Introduction in this process should also considered is the “pledge and review” system similar to the one adopted by OECD code for the liberalization of capital movement.

This is in my view the model scheme that can be used for the reduction of GHG emissions. The result of the negotiations would be binding on States, but in a different form from the absolute national CAPs embodied in the Kyoto Protocol. The process is continuous and flexible, which lasts in principle until the set goal is achieved, like the 5 % overall reduction target. For developing countries, we can always consider the possibility of granting preferential treatment (another important GATT experience)

which should be subject to individual scrutiny rather than the unqualified, sweeping system of generalized scheme applicable to all developing countries.

As high tariff rates are preferable for the protection of domestic industry, States are inclined to be negative toward lowering the emission level for protecting the domestic industry. However, in the context of GATT, countries soon realized that lower tariffs would be desirable for the public interests of the international community which is also beneficial for the long-term national interests of each State. Although admittedly the distance between the individual national interest and the international public interest in the context of global warming is not as close as trade, I believe that countries have realized the linkage much more acutely than before.

Finally, I would like to refer to the recent “Climate Vision” program of the United States. So far, it appears to be merely a unilateral action program, remaining to be wholly non-significant commitments. It is no doubt more desirable that the program will pursue establishing international linkages with substantive goals for the emission of GHG gases. As in the case of the “mini agreement” for the deep sea mining activities, this may create a situation of coexistence of dual regimes. It may however create a more positive climate that encourages healthy competition between the regimes, which will certainly influence the process of building a better, more workable mechanism for the period after 2013.

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