XVIII. TRADE RELATED ISSUES

1. Air Pollution and Climate Concerns

The air pollution protocols clearly stipulate that measures taken to reduce air pollutants, should not constitute an arbitrary or unjustifiable discrimination or a disguised restriction on international competition and trade.¹ As such, possible trade related restrictions related to air pollution, such as the exclusion of imported fuels or vehicles that fail to meet prescribed pollutant levels, need to be very carefully crafted so as not to breach international trade rules. Specifically, although such acts are permissible under international trade law, they must not be applied in a discriminatory way that effectively treats domestic industries that also produce cars or fuels, in a different, discriminatory, manner.²

Very similar issues are apparent with the climate regime, as multiple variations exist whereby the products or processes of one country could be restricted by another, in an attempt to control greenhouse gas emissions. Although there have been murmurings of disputes in this area, unlike with the air pollution regime, there have been no formal complaints. Also like the air pollution regime, the climate regime shares that same principle that an ‘open international economic system’³ should be supported and that, ‘measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade’.⁴ The Kyoto Protocol added that actions taken by developed Parties, should strive to avoid adverse effects on, inter alia, international trade.⁵

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³ FCCC. Article 3 (5).
⁴ FCCC. Article 3 (5).
⁵ Kyoto Protocol. Article 2 (3).
2. The Ozone Experience

The ozone experience on trade related issues has been very different to the regimes noted above. In the initial stages of negotiation for the Vienna Convention, the issue of trade related restrictions was particularly sensitive, as unlike the United States which primarily produced ODS for internal consumption, the European Union was actively exporting ODS. Accordingly, the European Union argued that any reductions in ODS should only be achieved whilst ensuring that, ‘the steps taken do not prevent any barriers to trade’ and in particular, that any country which elected not to sign the Convention (a ‘non-Party’) should not be retaliated against through trade mechanisms.6 The problem with this position was that a number of commercial entities which produced ODS appeared willing to move to countries without ODS restrictions, thereby bypassing the Convention, and making its objectives redundant.7 Although this problem was clearly set out, it was not resolved within the Vienna Convention, which did not need to consider trade related restrictions on ODS, as there were no restrictions on ODS at any level. The approach of the Vienna Convention on this question was very different to that of the Montreal Protocol, of which trade related questions were, and have remained, a central concern.8 The primary obligation relating to the detrimental9 trade in ODS is in Article 4 of the Protocol which prohibited the export of ODS to non-Parties, and the import of ODS from non-Parties.10

To further the Article 4 goals, an annex was created for the listing of products containing ODS, of which the importation would be prohibited.11 Second, an annex for, ‘products produced with, but not containing, controlled substances’ was constructed with a view to, ‘if feasible’ restricting

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9 This obligation, which was not related to products or processes that ‘improve the containment, recovery, recycling or destruction or controlled substances, promote the development of alternative substances, or otherwise contribute to the reduction of emissions of controlled substances.’ Montreal Protocol. Article 4 (7).
10 Montreal Protocol. Article 4 (1) and 4 (2).