

**Multilateral Trade Measures in a Post-2012 Climate  
Change Regime?: What Can Be Taken from the  
Montreal Protocol and International Negotiations  
on Climate and Trade?**

**ZhongXiang Zhang 张中祥**

Senior Fellow, Ph.D in Economics

East-West Center, Honolulu, HI 96848, USA

Tel: +1 808 944 7265; Fax: +1 808 944 7298

Email: [ZhangZ@EastWestCenter.org](mailto:ZhangZ@EastWestCenter.org)

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# Outlines

- Trade measures in the MP and the lesson learned
- Financial mechanisms under the UNFCCC and its KP: their funding level versus DC need, and implication for the scope of multilateral trade measures
- The WTO Appellate Body decisions on the Shrimp-Turtle dispute and their relevance to post-Kyoto regime
- What can be taken from the lesson from the MP and the findings of the Appellate Body in the Shrimp-Turtle dispute?
- Developing country commitments most unlikely to go beyond policies and measures in a post-2012 climate regime
- Focus on Carrots, Rather Than Sticks, as the Main Means of Encouraging Developing Countries to Do More
- Current international trade negotiations can make an important contribution to that end: an agreement on EGS should represent one immediate contribution the WTO can make to fight against climate change

# Trade measures in the Montreal Protocol [1]

- Trade measures were included as an enforcement mechanism.
- Bans parties from trading with non-parties
  - in ozone-depleting substances (ODS), such as CFCs
  - in products containing them, such as refrigerators
  - and potentially, in products made with but not containing CFCs, such as electronic components - this provision has not yet been implemented primarily because of problems of detection, and also because of the small volumes of CFCs involved.

# Trade measures in the Montreal Protocol [2]

- Accompanied with finance and technology transfer mechanisms
  - Multilateral Fund - the first of this kind from an international treaty - to meet the incremental costs of developing countries in complying with the requirements.
  - Since its operation in 1991, the Multilateral Fund has received contributions totaling over US\$ 2.3 billion from 49 industrialized countries and supported about 5,700 projects and activities in 146 developing countries.
  - Developing countries are no worse off as parties than they are as non-parties.
- The MP is now 20-year old
  - with 191 Parties
  - has achieved 95% of its objective of phasing out the ODS and put the ozone layer on the path to recovery.
- Accompanied with this effective financial mechanism, the MP trade measures have in fact hardly ever been used, because almost every country is now a party to the treaty.

# **Lesson learned from the MP**

- Trade measures can be incorporated in multilateral environmental agreements and works effectively in practice only if they are accompanied with effective finance and technology transfer mechanisms.

# Financial Mechanisms of Relevance to DCs under the UNFCCC and its KP[1]

- Clean development mechanism (CDM)
  - The CDM market increased from 563 million tons of certified emission reductions (CERs) and €3.9 billion in 2006 to 947 million tons of CERs and €12 billion in 2007 (Point Carbon, 2008).
  - Still does not work to full potential scale. Change needs to take place both at national and international levels.
  - Market instruments like CDM, as useful as it may be, must therefore be complemented with traditional fund solutions.

# Financial Mechanisms of Relevance to DCs under the UNFCCC and its KP[2]

- The Special Climate Change Fund, and the Least Developed Countries Fund are established under the UNFCCC
  - The contributions from these two funds are expected to be **US\$227 million a year** (UNFCCC, 2007).
- The only fund under the KP is the Adaptation Fund.
  - The level of its funding depends on the quantity of CERs issued and their prices. Assuming annual sales of 300-450 million tons of CERs and a market price of US\$24 per ton of CERs, the Adaptation Fund would receive **US\$80-300 million per year for the period 2008-2012** (UNFCCC, 2007).

# How Much DCs Need?

- Stern Review - a very conservative estimate.
  - The incremental costs of low carbon investments in developing countries are likely to be at least **US\$20-30 billion a year**.
  - The UNFCCC (2007) Secretariat puts the investment estimates for climate change adaptation in developing countries in the range of **28-67 billion a year**.
- **So, the contributions from all these three funds only amount to less than one percent of the anticipated needs from developing countries.** If the funding available under the financial mechanism of the UNFCCC remains at its current level and continues to rely mainly on voluntary contributions, it will not be sufficient to address the future financial flows estimated to be needed for climate change adaptation in developing countries, not to mention investment need for climate change mitigation.
- **If a success of the MP could be considered as some kind of predictor for a post-2012 climate regime, the combined pledged funding from the funds under the UNFCCC and estimated funding from the fund under its KP are nowhere near to make trade measures work effectively, not to mention whether they can be incorporated in a post-2012 climate regime in the first place.**

# **Significance of the WTO Appellate Body decisions on the Shrimp-Turtle dispute and their relevance to post-Kyoto regime [1]**

- Requiring other WTO members to adopt a comparable regulatory program may not be inconsistent *per se* with the WTO obligation
- The WTO Appellate Body pointed to a 1996 regional agreement reached at the U.S. initiation, namely the Inter-American Convention on Protection and Conservation of Sea Turtles, as evidence of the feasibility of such an approach (WTO, 1998; Berger, 1999). Here, the Appellate Body again advanced the standing of multilateral environmental treaties (Zhang, 2004; Zhang and Assunção, 2004).

# **Significance of the WTO Appellate Body decisions on the Shrimp-Turtle dispute and their relevance to post-Kyoto regime [2]**

- May have been interpreted as a clear preference for actions taken pursuant to multilateral agreement and negotiated through international cooperative arrangements, like the Kyoto Protocol and its follow-up regime in the case of dealing with the global climate change problem.
- However, this interpretation should be with great caution, because there is no doctrine of *stare decisis* (namely, “to stand by things decided”) in WTO. Put another way, the GATT/WTO panels are not bound by previous panel decisions (Zhang and Assunção, 2004).

# What Can We Take from the Lesson from the MP and the Findings of WTO Appellate Body in the Shrimp-Turtle Dispute? [1]

- The lesson from the MP
  - Trade measures can be incorporated in MEAs and works effectively in practice only if they are accompanied with effective finance and technology transfer mechanisms.
  - However, given that the combined pledged funding from the funds under the UNFCCC and the estimated funding from the fund under its KP are far from the anticipated needs from developing countries, it is conceivable that developing country parties would not agree on incorporating trade measures against them in any post-2012 climate regime in the first place. Moreover, even if they were incorporated, they will not work.

# **What Can We Take from the Lesson from the MP and the Findings of WTO Appellate Body in the Shrimp-Turtle Dispute? [2]**

- Trade measures should, at the very least, be contemplated for a set of countries, say, Annex II countries under the UNFCCC as part of the evolving climate regime.
- The real issue is whether trade measures, if were incorporated, can be upheld if challenged by the U.S. under WTO, provided that the U.S. takes a formal step to withdraw from the UNFCCC.

## **Six Plausible Options in Ascending Order of Stringency for China (Zhang for UNDP, 1998; Zhang, *Energy Economics*, 2000)**

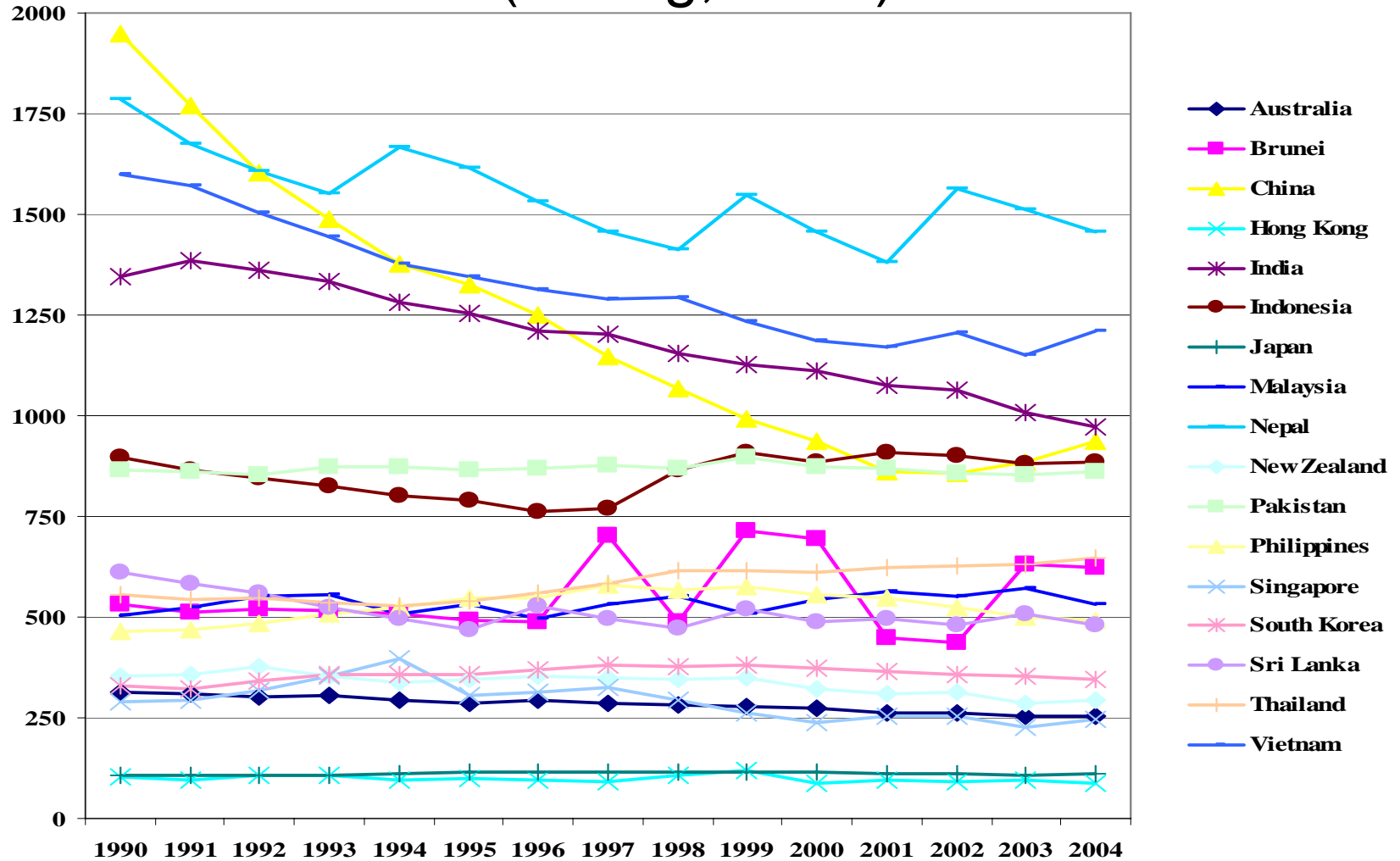
- Active participation in CDM as meaningful participation
- (Undefined) Demonstrable progress between the first commitment period and 2020
- Specific policies and measures (explicitly demonstrate) between the first commitment period and 2020
- Energy intensity or carbon intensity around or beyond 2020
- Sectoral emissions cap around or beyond 2020
- Bottom line: A combination of a targeted carbon intensity level with an emissions cap on a particular sector around or beyond 2020

# Developing Country Commitments Are Most Unlikely to Go Beyond Policies and Measures in a Post-2012 Climate Regime [1]

- Given the very short timeframe to conclude the negotiations, it would in all likelihood not be possible to reach the necessary agreement on the rules, countries and sectors covered and the levels of ambitions for developing countries, especially due to the amount of the data that would be required (Sterk, 2008).
- The Sydney APEC Leaders' Declaration on Climate Change Energy Security and Clean Development, September 8, 2007
  - Australia proposed that **all 21 APEC economies**, regardless of whether they are developed and developing economies, agree to reduce energy intensity by at least 25% by 2030.
  - But the leaders only agreed to work towards achieving an **APEC-wide** aspirational goal in energy intensity by at least 25% by 2030, relative to 2005 levels.
  - Since 1990, the rate of energy efficiency improvement in IEA countries has been **less than 1% per year** (IEA, 2007); many Asian countries consumed more energy per unit of GDP in 2004 than they did in 1990 (Zhang, 2008).

# Energy Use/GDP in the Selected Asian Countries, 1990-2004 (TOE/million 2000 US\$)

(Zhang, 2008)



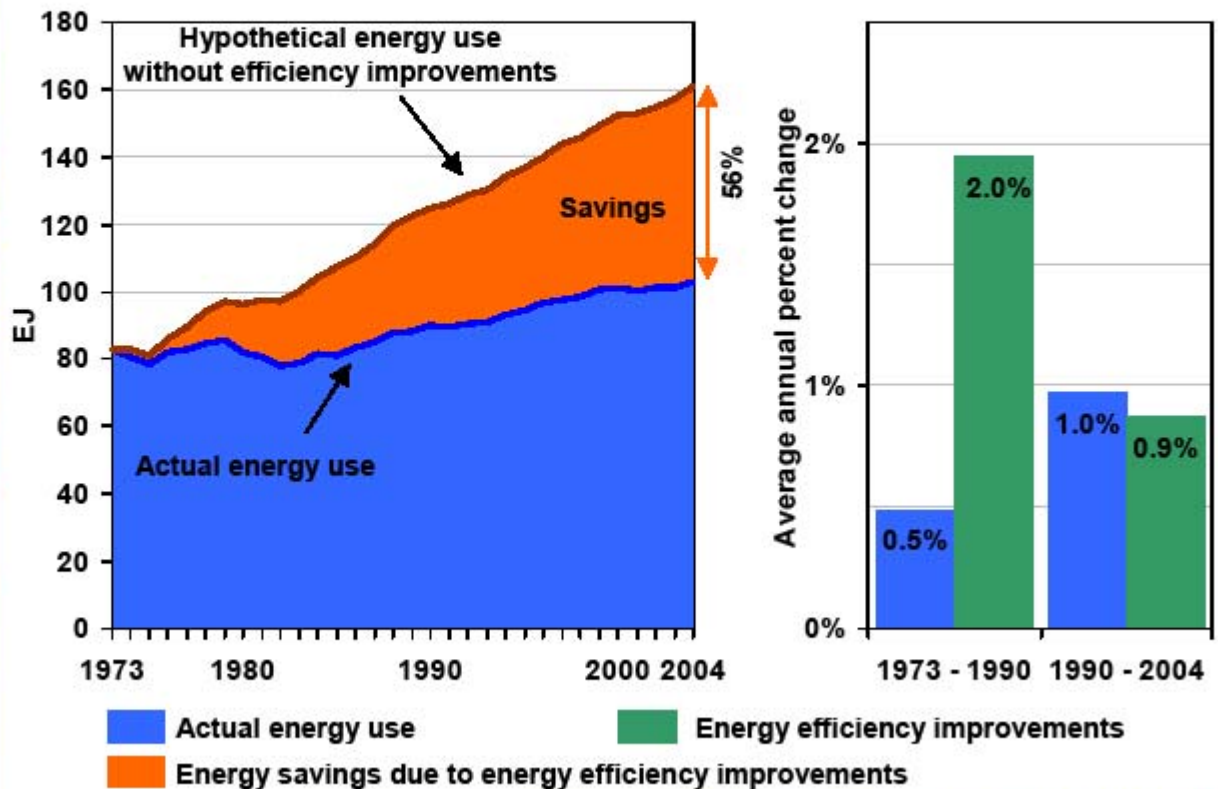
**Energy Use in the New Millennium**

Trends in IEA Countries

ENERGY INDICATORS

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# Overall Trends in Energy Efficiency



# Developing Country Commitments Are Most Unlikely to Go Beyond Policies and Measures in a Post-2012 Climate Regime [2]

- It is inconceivable that developing countries would ever go beyond the aforementioned third option between 2013 and 2020 without an effective financial mechanism.
- The U.S. factor will continue to play a role in affecting developing country's willingness to take on commitments and the stringency of that commitments. Let's look at the Lieberman-Warner Climate Security Act of 2008 (S.3036).
  - This Act is likely to serve as a template for any future bill. Under this Act, 87% of the U.S. GHG emissions are estimated to be subject to the emission caps that are set 19% below the 2005 level by 2020. However, the U.S. GHG emissions were 16.8% higher in 2005 than that in 1990 (EIA, 2007), and not all emission sources are capped under the Act. As a result, even if the Act becomes law, the U.S. GHG emissions in 2020 are probably still above its 1990 level.
  - In expectation that the U.S. would take on the more stringent commitments subsequent to the first compliance period (namely, far below its 1990 level), I envisioned a decade ago that developing countries may go beyond the aforementioned third option. However, the U.S. emissions in 2020 are at best kept at its 1990 level as estimated under the Lieberman-Warner Climate Security Act. This is far from the point where it is likely that developing country would do that.

# Focus on Carrots, Rather Than Sticks, as the Main Means of Encouraging Developing Countries to Do More [1]

- Understandably, U.S. and other industrialized countries like to see developing countries, in particular large developing economies, to go beyond that. They are considering unilateral trade measures to “induce” developing countries to do so. A variety of measures have been put forward for the U.S. legislators to consider, falling into the three broad categories: border adjustments, performance standards and carbon market design (Subcommittee on Energy and Air Quality of the U.S. House of Representatives, 2008).
- WTO members are free to unilaterally decide what measures to take and under what conditions. But once they have made such a choice, then and only then the WTO rules apply. Such measures can only go ahead firmly if they withstand challenges before the WTO.
- To date, there is a considerable disagreement as to what measures would be most likely to pass muster under the WTO. Therefore, from the perspective of the WTO consistency, industrialized countries need to focus on carrots, assisted with sticks, as a means of encouraging developing countries to do more domestically than what are internationally agreed on.

# Focus on Carrots, Rather Than Sticks, as the Main Means of Encouraging Developing Countries to Do More [2]

- However, measures as proposed in the Lieberman-Warner Climate Security Act of 2008 hold out more sticks than carrots to developing countries.
  - Its original version had already threatened to punish energy-intensive imports from developing countries by requiring importers to obtain emission allowance, but only if they had not taken comparable actions by 2020. The current version has brought the deadline forward to a rather unrealistic 2014.
  - The bill has also dramatically expanded the scope of punishment : almost any manufactured product would now qualify.
  - Developing countries will have to take comparable actions as the U.S. does in order to avoid this punishment. If strictly implemented, this will pose an impossibly high hurdle for developing countries. Such measures, if undertaken, would be counterproductive.

# Focus on Carrots, Rather Than Sticks, as the Main Means of Encouraging Developing Countries to Do More [3]

- If the U.S. and other industrialized countries really want to persuade developing countries to do more, they should better look into other avenues. An old Chinese saying goes, “Let him who tired the bell on the tiger take it off – whoever started the trouble should end it”. This suggests that they need to first reflect why developing countries are unwilling to and cannot afford to go beyond in the first place. That will require industrialized countries to seriously take developing country’s legitimate demand that industrialized countries need to
  - demonstrate that they have taken the lead in reducing their own greenhouse gas emissions,
  - provide significant funding to support developing country’s climate mitigation and adaptation efforts and to
  - transfer low or zero carbon emission technologies at an affordable prices to developing countries.
- Industrialized countries need to provide positive incentives to encourage developing countries to do more. This should serve as the main means. Sticks can be incorporated, but they have to credible and realistic and only serve as a useful supplement to push developing countries to take actions or adopt policies and measures earlier than what otherwise have been the case.

# **Current international trade negotiations can also make an important contribution [1]**

- One area that holds the promise is the opening of environmental goods and services, in particular those directly linked to addressing climate change. Agreement on this should represent one immediate contribution that the WTO can make to fight against climate change (Lamy, 2008).
- However, negotiations on this EGS agenda have stalled.
  - The OECD has advocated a list-based approach, whereby goods and services on an agreed list will be subject to enhanced market access. The EU and US submitted a joint proposal at the WTO calling for trade liberalization in climate-friendly goods and services, with an aim to have a zero tariff for 43 climate-friendly goods in the near future but no later than 2013.
  - Developing countries like India and Argentina have advocated a project-based approach, where EGS required for a particular environmental project would have preferred market access. Brazil suggested that its “request-offer” approach took into account developing country interests more adequately than the common list.

# **Current international trade negotiations can also make an important contribution [2]**

- Having an agreement on EGS or a subset of EGS such as climate-friendly goods under WTO is the first best choice.
- However, should WTO members fail to reach such an agreement, then the second-best option needs to be explored. A plurilateral WTO agreement in this area is such an option. It needs not to be extended to non-signatory WTO members on an MFN basis. While such a plurilateral agreement is not ideal, it would still have value, in particular if the key trading parties were involved.