

- Disguised protection through the use of domestic standards tailored to discriminate against imports.
- Government procurement contracts given to firms favouring 'clean energy' in order to meet targets.
- Eco-labelling acting as a barrier to trade.
- Conflicting obligations between MEA's and WTO regulations.⁷³²

Given the tightly prescribed nature of multi-lateral negotiations⁷³³ and given what appears to be an emerging WTO jurisprudence in support of measures taken in regards to MEAs⁷³⁴ there are risks as well as opportunities in looking at the Kyoto-WTO relationship.⁷³⁵

Some analyst's feel that recent cases in which environmental issues were used to remedy trade infractions portends a more active use of the WTO to mediate environmentally based trade disputes. An example is the "Shrimp-Turtle" WTO ruling from the late 1990s. This case was extremely contentious and there is no agreement on what it means for WTO activity in trade disputes involving environmental matters. It does harbingers however, a more conscious role of WTO mediation in such disputes which has implications for the Kyoto accord.

In many parts of the world, sea turtles and shrimp inhabit the same waters. In pursuit of shrimp, trawlers drag their nets along the bottom of the oceans for hours at a time and sweep up virtually all marine life in their path. When the air-breathing sea turtles become entangled in shrimp nets, they cannot reach the surface and often drown. To address this problem, the U.S. in 1989 required its shrimpers to use turtle protection devices in their shrimping nets. Turtle excluder devices—known as TEDs—are trap doors that allow sea turtles to escape the nets while retaining nearly all the shrimp. They can be fitted to shrimp nets for between \$50 and \$400 each, and have been proven extremely effective in protecting sea turtles.

In addition to requiring its shrimpers to use the TEDs, the U.S. also banned shrimp imports from non-TED using sources, both to keep its shrimpers competitive and to encourage other countries to adapt the TED requirement. The U.S. eventually wound up banning shrimp from India, Malaysia, Pakistan and Thailand. The four

countries filed a challenge against the U.S. at the WTO claiming that the import restrictions on shrimp were illegal under international trade rules intended to reduce barriers to trade. Since in essence the rules of the World Trade Organization are intended to remove restrictions on trade the challenging countries argued that the U.S. sea turtle law discriminated against countries that did not require the use of TEDs and therefore violated the rule that restrictions on trade must not discriminate between products from different countries.

The WTO ruled in 1998 against the United States. The WTO determined that the United States was discriminating by giving Asian countries only four months to comply with the Turtle Shrimp Law, but giving Caribbean Basin nations three years. The result was that the United States revised its guidelines on the importation of shrimp, changing both the method and the schedule by which it evaluated how well foreign shrimpers are doing at protecting sea turtles from drowning in order to comply with the WTO. This ruling has had a major impact on the WTO regime.

According to a study by the Economic Strategy Institute, the Shrimp-Turtle case represents a fundamental shift in WTO jurisprudence. The ESI claims that in Shrimp-Turtle, the WTO's Appellate Body completed a transition in dispute settlement reasoning that, if sustained, would permit members to invoke the Article XX exemptions to regulate imports on the basis of non-product related process and production methods [PPMs]. This allows nations to accomplish environmental objectives both outside their jurisdiction and in the global commons—and perhaps to achieve other social objectives.⁷³⁶ In other words, environmental protectionism might be sanctioned.⁷³⁷

Such a shift in WTO positioning would engender trade tensions as Kyoto goes forward, due to the vagueness of the protocol's wording and its intention on protecting a global commons.⁷³⁸ In particular, disputes based on competition concerns are certainly likely because those nations who have chosen to stay outside of Kyoto and future climate instruments may benefit from lower production costs.⁷³⁹ WTO panels and the Appellate Body might be willing to countenance the