THE ENVIRO-COMMERCE TUSSLE:

WTO & CLIMATE CHANGE

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ABSTRACT

Climate change has come to be seen as a major global environmental challenge. This essay examines the extent to which WTO rules constrain countries' ability to address climate change through domestic regulatory policies such as standards, labels, voluntary agreements and domestic emissions trading programs. In particular, it examines three broad types of constraints. First, it discusses the extent to which domestic regulatory measures may conflict with national treatment provisions of GATT and the Technical Barriers to Trade Agreement. Second, it discusses procedural constraints on domestic regulatory action, including from requirements related to scientific evidence. Finally, it discusses the 'necessity' or least restrictive means tests under GATT and the TBT Agreement. The essay argues that existing WTO rules provide members with some scope to take action on climate change. However, they do constrain domestic

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regulatory policy and the debate about future institutional changes will be central to how effectively global environmental issues such as climate change will be addressed.

Keywords: *Climate Change, WTO, GATT, Trade Barriers, National Treatment*

"The WTO tool-box of rules can prove valuable in the fight against climate change, but awaits a truly global consensus on how best to tackle the issue"

- DG PASCAL LAMY

A. INTRODUCTION

The history of discussions on trade and climate change is mostly a record of tensions. The objectives of trade and climate change are mostly seen as being in opposition.The research on the links between trade rules and climate change action has mostly been concerned with how far climate change action is constrained by current trade rules pertaining, for example, to border tax adjustments, subsidies and exports of natural gas.

Critics claim that these rules either intentionally or in effect reduce the ability of countries to set their own environmental, health and consumer protection policies. However, supporters of the international trading system argue that World Trade Organization (WTO) rules merely attempt to balance state autonomy in such areas with a desire to eliminate policies restricting trade and

protecting domestic industry.[2]Others argue that while there may have been concerns in the past, they have been partly or largely allayed by recent decisions by the Appellate Body of the WTO.[3]

Unfortunately, the issues surrounding climate change policy illustrate that the concern about WTO constraints on domestic environmental policy remain. Climate change has come to be seen as a major global environmental challenge. Although some dispute its existence or the severity of its potential impacts[4], concerns over climate change led to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (FCCC)[5]. The objective of the FCCC is 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'[6]Various industrialized countries have committed to particular emissions reductions. For example, Canada committed to reducing emissions by six percent below 1990 levels and the UK, France and Germany by eight percent. Developing countries have no set reduction commitments. The Kyoto Protocol contemplates countries using a range of policy instruments to meet their targets. The limits on energy use and greenhouse gas emissions necessary to meet these targets have the potential to impose significant costs on various industries and countries.

The authors intend to argue, that only radical technological progress can reconcile climate

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[2]For a discussion of these debates, see Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (3d Edition, London: Routledge, forthcoming), Robert Howse and Elizabeth Tuerk, 'The WTO Impact on Internal Regulations – A Case Study of the Canada-EC Asbestos Dispute' in Grainne de Burca and Joanne Scott, eds.,*The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing 2001) and Alan Sykes, 'Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View', 3(2) *Chi. J. International L.* 353 (2002).

[3]John Knox, 'The Judicial Resolution of Conflicts Between Trade and the Environment', 28(1) *Harvard Env.L.R.* 1 (2004).

[4]Bjorn Lomborg, *The Skeptical Environmentalist: Measuring the Real State of the World* (Cambridge: Cambridge University Press 1998).

[5]United Nations Framework Convention on Climate Change (FCCC), reprinted in 31 I.L.M. (1992) 849 and Kyoto Protocol to the FCCC (Kyoto Protocol), 37 I.L.M. (1998) 22.

[6]FCCC, Article 2.

change goals with the development and energy aspirations of humanity. Generating technological progress shall require the deploying of full range of policy instruments—to raise the price of carbon and to provide incentives for research and development of green technologies. Some of these policy instruments affect international trade and are therefore covered by the rules of the WTO. In this essay, we ask how trade policy and trade rules can facilitate action on climate change. WTO commitments constrain the ability of countries to adopt the latter form of instruments – domestic policies and measures – in the context of climate change. In particular, it examines the constraints on the use of a subset of domestic policies and measures - regulatory policies such as emission and energy efficiency standards, eco-labeling, voluntary measures (including voluntary contracts between governments and industry) and domestic emissions trading programs. Unlike the conflicts that can arise where multilateral environmental agreements explicitly incorporate trade measures to attempt to protect the environment,[7]the conflict between domestic regulatory measures and WTO rules arises from the limits under WTO agreements on unilateral measures taken by individual countries which are not aimed at trade per se (such as a prohibition on trade in certain products) but have an actual or potential impact on trade nonetheless. The regulatory measures under the Kyoto Protocol are unilateral measure since the Kyoto Protocol does not specify any required content for the domestic measures or even which measures to use.

The FCCC itself addresses the potential conflict between climate change policy and the

[7]There are relatively few multilateral environmental agreements that explicitly incorporate trade measures. These include the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),12 I.L.M. 1085 (regulating trade in endangered species), the Basil Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 28 I.L.M. 649 (regulating trade in hazardous wastes) and the Montreal Protocol on Substances that Deplete the Ozone Layer, 26 I.L.M. 1541 (regulating trade in ozone depleting substances). See Tania Voon, 'Sizing up the WTO: Trade-Environment Conflict and the Kyoto Protocol', 10(1) *J. Transnational Law & Policy* 71 (2000) (arguing the Kyoto Protocol has the potential to have this type of impact on trade through the creation and trading of emission credits).

international trading regime. It states that parties 'should cooperate to promote a supportive and open international economic system' 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'.[8]

The tension between trade and climate change has arisen in part because of the assumption that climate change action (e.g., carbon price increases) can be taken as a given. The question that many essays adopt is, given this assumption, what is best from a trade perspective. But our approach and proposals are predicated on the current reality that action on climate change is proving fiendishly difficult. The relevant question then is: can trade rules be designed or changed to facilitate—in any way, direct and indirect, economic and political—climate change action without unduly damaging trade?

B. National Treatment And Kyoto Implementation

I. The relationship between GATT and TBT Agreement

The first potential source of conflict between these domestic policies and WTO rules arises from the national treatment provisions of GATT and the TBT Agreement. These agreements appear to overlap considerably. The GATT national treatment provisions under Article III.4 pertain to 'laws, regulations and requirements' affecting the internal sale, offering for sale, purchase, transportation, distribution or use of domestic or imported products. The Contracting Parties to the original GATT believed these provisions were insufficient to address the growing importance of non-tariff barriers to trade. As a result, they negotiated a more detailed and stringent 'Standards Code' in the Toyko Round in the 1970s. This Code was strengthened when Members

[8]FCCC, Article 3.5.

adopted the TBT Agreement along with the Sanitary and Phytosanitary Agreement (SPS Agreement) during the Uruguay Round.[9] The TBT Agreement governs "technical regulations", standards and conformity assessment procedures. The exact relationship between GATT Article III.4 and the TBT Agreement is unclear. There is an interpretative note to the Agreement establishing the World Trade Organization, which provides that in the event of a conflict, the provisions of agreements such as the TBT Agreement are to prevail over the GATT provisions.[10] However, unlike the SPS Agreement, the TBT Agreement contains no 'safe harbour' from non-compliance with the GATT.[11]

WTO decisions have done little to clarify this relationship. In *EC-Asbestos*, the Appellate Body found that both GATT and the TBT Agreement were applicable to a French ban related to asbestos.[12] It analyzed the issue under GATT. The Appellate Body declined to assess the measure's compliance with the TBT Agreement as it found that it did not have a proper basis for analyzing the TBT Agreement issues. However, it stated:

> *"We observe that, although the TBT Agreement is intended to 'further the objectives of GATT 1994', it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the TBT Agreement imposes obligations on Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994."*[13]

In the more recent decision of *EC-Sardines*, the Appellate Body found that EC rules relating to

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[9]Alan Sykes, 'Regulatory Protectionism and the Law of International Trade', 66(1) *U. Chic.L.R.* 1 (1999).
[10]Agreement establishing the World Trade Organization, General Interpretative Note to Annex 1A.
[11]Fiona Macmillan, *WTO and the Environment* (London: Sweet & Maxwell 2001). SPS Agreement, Article 2.4 states 'Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).'
[12]WTO Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos- Containing Products* (*EC-Asbestos*), WT/DS135/AB/R, adopted 5 April 2001, at p. 31.
[13]*Ibid*

sardines were inconsistent with the TBT Agreement.[14]As a result, they declined to make a finding under other provisions of the TBT Agreement or under Article III of GATT. As a result, the exact relationship between the agreements remains unclear. Any regulatory measure may have to comply with both agreements.[15]However, if a measure is challenged under both agreements, WTO panels and the Appellate Body will likely consider the TBT Agreement claim before the GATT claim.[16]

II. National Treatment under GATT and the TBT Agreement

Both GATT and the TBT Agreement contain national treatment provisions. GATT, Article III.4 states that imported products 'shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.'[17]Article 2.1 of the TBT Agreement contains very similar language.[18]

The national treatment provisions under GATT have been addressed in a number of GATT and WTO decisions. These decisions help set the general framework for how dispute resolution would proceed for various domestic regulatory instruments implementing climate change. In the recent *EC-Asbestos* decision, the Appellate Body stated that the purpose of the national treatment provisions under GATT is to avoid protectionist domestic measures.

i. Are the regulatory mechanisms covered under the GATT and TBT Agreement?

Governments may use various policy instruments, not all of which may be governed by the

[14]WTO Appellate Body Report, *European Communities – Trade Description of Sardines* (*EC-Sardines*), WT/DS231/AB/R, adopted 23 October 2002.
[15]Mattias Buck and RodaVerheyen, 'International Trade Law and Climate Change – A Positive Way Forward' (FES-AnalyseOkologischeMarktwirtschaft, July 2001), http://orae.fes.de:8081/fes/docs/INFOONLINE/AN-ITLCC-1.PDF (visited 16th, March 2014)
[16]*Supra N. 13*
[17]GATT, Article III.4
[18]TBT Agreement, Article 2.1

provisions of GATT or the TBT Agreement. The national treatment provisions under Article III of GATT apply to 'laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use' of products. WTO dispute settlement bodies have tended to interpret both the terms 'laws, regulations and requirements' and 'affecting' quite broadly.

Panels and the Appellate Body have interpreted 'laws, regulations and requirements' to cover more than traditional legislation and regulations. For example, in *Canada – Certain Measures Affecting the Automotive Industry* the Panel held that the term included non-mandatory conditions that a private actor accepts in order to receive an advantage.[19]In that case, Canada exempted imported motor vehicles from a customs duty where the manufacturer's local production of motor vehicles reached a minimum amount of Canadian value added and a certain production to sales ratio in Canada. These conditions were expressed in government Orders and commitments by manufacturers in Letters of Undertaking to the government but were not, according to Canada, legally enforceable. The acceptance of the conditions to obtain the benefits related to importation potentially brought the measure within Article III. However, the Panel interpreted the term even more broadly.

ii. Can 'domestic' and 'imported' products be accorded the reckoning of being 'like'?

Both Article III of GATT and Article 2.1 of the TBT Agreement relate the national treatment obligation to discrimination between 'like' products. In discussing the different uses of 'like', the Appellate Body in *Japan – Alcoholic Beverages* noted that 'the concept of "likeness" is a relative

[19]WTO Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R and WT/DS142/AB/R, adopted 19 June 2000. *See also*, Michael Trebilcock and S. Giri, 'The National Treatment Principle in International Trade Law' (Law and Economics Workshop Series, Faculty of Law, University of Toronto, WS 2002-2003 (9), February 2003).

one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied.'[20] As there have been no decisions under Article 2.1 of the TBT Agreement, it is not clear if the term 'like' means the same in both contexts. The existence of a competitive relationship between the imported and domestic products is central to the determination of whether the products are 'like'.[21]One of the most recent decisions in this area is the Appellate Body Report in *EC-Asbestos* addressing a general ban by France on asbestos fibres, with limited exceptions.[22] The Appellate Body held that 'like' products should not be read as narrowly in Article III.4 as in Article III.2. It found that 'like' in Article III.4 related to 'the nature and extent of a competitive relationship between and among products'.[23]To aid in this determination of 'likeness', the Appellate Body referred to a non-closed list of four criteria found in earlier GATT and WTO decisions:

(i) the properties, nature and quality of the products;

(ii) the end-uses of the products;

(iii) consumers' tastes and habits; and

(iv) the tariff classification of the products.

(The test is largely market based.)

A further important qualification on 'like' products relates to the relevance of non-product-related process and production methods ('PPMs') – that is, how products are made (such as the level of energy used or emissions). A key question is whether products with different PPMs are

[20]WTO Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996 at p. 23.
[21]Donald Regan, 'Further Thoughts on the Role of Regulatory Purpose under Article III of the General Agreement on Tariffs and Trade', 37(4) *J. World Trade* 737 (2003).
[22]*Supra N.* 11 at ¶ 98.
[23]*Id* at ¶ 99.

'like' each other.[24] This provision could be interpreted as covering non-product related PPMs, making technical regulations on non-product related PPMs permissible provided they meet the other requirements of the TBT Agreement.[25]

iii. Is the treatment 'no less favourable'?

If the domestic and imported products are found to be 'like', the panel or Appellate Body must then consider whether the imported product was accorded treatment 'no less favourable' than the domestic product.[26]A formal regulatory distinction or difference in treatment between the imported and domestic products is not sufficient to find non- compliance with Article III.4. Whether or not environmental purposes (including PPMs) will be considered legitimate to ground regulatory categories under Article III.4 therefore remains unclear. The TBT Agreement also includes the term 'no less favourable'. However, as yet, no WTO decisions have interpreted this term.[27]

III. Reduction of Greenhouse Gases: An uphill challenge.

How will national treatment obligations under WTO agreements impact governments' ability to use domestic regulatory measures to implement climate change policy?

i. Whether they are encapsulated within the ambit of GATT or the TBT Agreement?

The majority of the domestic regulatory measures relating to product characteristics (such as the energy efficiency or GHG emissions of the product itself) will fall under both GATT and the TBT Agreement. The mandatory emissions or energy efficiency requirements are 'law,

[24]*United States – Restrictions on Imports of Tuna*, 30 ILM (1991) 1594; *United States – Restrictions on Imports of Tuna*, 33 ILM (1994) 936.
[25]Gabrielle Marceau and Joel Trachtman, 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods', 36(5) *J. World Trade* 811 (2002).
[26]*Supra N.* 11 at ¶ 100.
[27]*Supra N.* 24.

regulations and requirements' for the purposes of Article III of GATT as would be any mandatory labeling program or mandatory DET provisions. Voluntary agreements may also fall within Article III, given the broad interpretation of 'requirements' found in *Canada-Automotive Industry*. Further, most such agreements would 'affect' the internal sale, offering for sale, purchase, transportation, distribution or use of a product given the broad scope given to the term 'affecting'.

Most of these measures related to product characteristics would also fall under the TBT Agreement. The most common mandatory requirements such as those relating to fuel efficiency or emissions of GHG (including bans on products with certain types of characteristics[28]) would be 'technical regulations' as they would relate to product characteristics given its broad interpretation in WTO decisions.[29] The definitions are sufficiently vague, however, that there is the strong possibility that a panel will find that non-product related PPMs are not included in the agreement As a result, measures based on non-product related PPMs seem likely to be found to violate Article III and not be included under the TBT Agreement, with the result that they are not permissible.

C. SECONDARY IMPEDIMENTS: PROCEDURE, SCIENCE AND UNCERTAINTY.

I. The TBT Agreement and the associated procedural requirements.

The TBT Agreement has a range of obligations designed to foster transparency in regulatory decisions. These obligations include notification to other Members of proposed technical regulations not in accordance with international standards, a duty to provide other Members with an explanation of the justification for technical regulations (both as part of the notification and

[28] *Supra N.* 11.
[29] *Supra N.* 13.

more generally on request), reasonable time for comments by other Members, consideration of these comments, listing of the final technical regulations (whether or not based on international standards) and publication of regulations.[30]Further the TBT Agreement requires that members establish an enquiry point where other members can obtain information on technical regulations.[31] These procedural requirements can act as a constraint on states' actions. Members may be able to use them to challenge how other members made their decisions – such as the lack of speed with which decisions are made.[32]However, in general such procedural requirements are relatively weak, do not mandate decisions and help improve democratic decision-making, a point we will return to in the next section.

II. Science & Uncertainty

Evidentiary requirements are particularly important in the case of environmental regulations where there is often considerable uncertainty about the level, or even the existence, of a risk. As Sykes argues, an accommodation between scientific evidence requirements and the ability of states to set their own level of protection against risk 'is exceedingly difficult if not impossible. Meaningful scientific evidence requirements fundamentally conflict with regulatory sovereignty in all cases of scientific uncertainty'.[33]

The Appellate Body in *EC-Asbestos* quoted its decision in *Beef- Hormones*, stating:

> *"In addition, in the context of the SPS Agreement, we have said previously, in European Communities – Hormones, that 'responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources.'In justifying a measure under Article XX(b) of the GATT*

[30]TBT Agreement, Article 2.
[31]*Id*, Article 10.
[32]M. Busch and R. Howse, 'A (Genetically Modified) Food Fight: Canada's WTO Challenge to Europe's Ban on GM Products' (CD Howe Commentary No. 186, September 2003).
[33]*Supra N.* 1, Sykes at p. 355.

> *1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion."*[34]

Therefore, the extent to which the Appellate Body will defer under GATT and the TBT Agreement in the face of such scientific uncertainty remains unclear. It may not require as stringent evidence under these agreements as it appears to under the SPS Agreement.[35]

D. FLIPSIDE: EXCEPTIONS AND LIMITS (THE LEAST RESTRICTIVE MEANS TEST)

Both GATT and the TBT Agreement attempt to both foster free trade and permit domestic autonomy. The national treatment provisions use the notion of protectionism to address these two goals. However, both agreements also deal with these goals more explicitly – GATT through Article XX and the TBT Agreement though its provisions relating to least trade restrictive means and international standards. This Part begins by discussing the concepts of 'least restrictive means' and 'necessary'. It discusses both Article XX and the TBT Agreement together despite the significant difference in their implications for the role of the WTO, as these concepts are central to both. This difference, however, must be borne in mind in predicting how these concepts may be applied in particular cases. After setting out these concepts, this Part discusses their effect on domestic regulatory measures to implement Kyoto.

I. Least restrictive means and necessity.

i. Exceptions to Article XX of GATT.

Article XX of GATT provides limited exceptions for countries whose measures have been found to violate other provisions of GATT. The panel or the Appellate Body analyzes Article XX in

[34] *Supra N.* 11 at ¶ 178.
[35] *Supra N.* 24 at p. 836.

two steps.[36]First, it must determine if the measure falls within one of the specified exceptions under Article XX. Second, it must then determine whether the conditions of the prefatory words or 'Chapeau' of Article XX are satisfied. In terms of measures implementing climate change policy, states are most likely to invoke the exceptions under Article XX(g) ('relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption') or Article XX(b) ('necessary to protect human, animal or plant life or health').

ii. The Chapeau

Even if a measure falls within one of the exceptions under Article XX, it must also comply with the conditions of the chapeau of Article XX. The chapeau prohibits measures from being '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'. The TBT Agreement and the FCCC also refer to arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.[37] In a decision on whether the U.S. was complying with this initial decision, the Appellate Body held that the regulating state did not have to complete negotiations with the exporting states, but only need engage in 'serious, good faith efforts' to reach an agreement.[38]The Appellate Body thus has appeared in *US-Shrimp* to sanction multilateral environmental

[36]WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Reformulated Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996.
[37]TBT Agreement, preamble and FCCC, Article 3.5.
[38]WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp II)*, WT/DS58/AB/RW, adopted 21 November 2001, para. 134.

agreements between parties as satisfying the chapeau as well as good faith negotiations towards such an agreement.[39]

i. The ambit of TBT Agreement

Article 2.2 of the TBT Agreement has not yet been interpreted. It essentially requires that states use the least trade restrictive means for achieving a legitimate objective. Further, Article 2.2 takes into account the risks of not attaining the objective. As a result, on its face, the language of Article 2.2 accords with the test laid down for 'necessary' under Article XX of GATT.[40] There is an additional emphasis under the TBT Agreement on the use of international standards as 'a basis for' technical regulations, where such standards exist or are imminent and they are not 'ineffective or inappropriate'.[41] The TBT Agreement therefore places similar but more explicit emphasis than GATT (as currently interpreted) on finding cooperative solutions to environmental concerns as a means of avoiding trade disputes.

II. Balancing trade and regulatory decisions.

What then do the tests entail and how do they impact on the autonomy of states to choose their own means of implementing climate change policy? In both decisions on GATT and in the TBT Agreement, the state has been found to have discretion to set its own level of protection or its own objective.[42]As neither agreement incorporates the language from the SPS Agreement referring to the need for a scientific basis, the state may have considerable discretion as to the

[39]*Supra N.* 2, (Knox).
[40]*Supra N.* 24
[41]TBT Agreement, Article 2.4.
[42]*Supra N.* 11 (in terms of GATT); 6th preamble statement of TBT (In terms of TBT Agreement).

choice of end to pursue. However, the importance of the end comes into the test of 'necessity' in both GATT and in the TBT Agreement (through the risks of non-fulfillment).[43]

III. Balancing Kyoto and Domestic Regulatory measures.

Before examining the necessity test in the context of climate change, it is important to consider briefly whether domestic regulatory measures are likely to fit within Article XX(g). A key issue is whether the climate or atmospheric greenhouse gas concentrations will be taken to be an 'exhaustible natural resource'. Climate or 'cool air' could be considered to fall directly within the scope of Article XX(g) as the Appellate Body has found that this exception should be interpreted in light of evolving global environmental concerns.[44] Climate change action may also indirectly fall under Article XX(g) given the other potentially damaging environmental conditions that may arise such as impacts on biodiversity and ecosystems.[45]A panel or the Appellate Body may therefore find that climate change and concentrations of GHG fall within the term 'exhaustible natural resource'.[46]This uncertainty relates to the nature of the goal of climate change action, the timing necessary for action as well as the relative effectiveness of various means for addressing climate change.

[43]*Supra N.* 24.
[44]*Supra N.* 37.
[45]*Supra N.* 14.
[46]Swedish National Board of Trade, *Climate and Trade Rules: Harmony or Conflict?* (January 2004) http://www.kommers.se (visited 18th March 2014), at p. 22.

E. CLIMATE CHANGE, INSTRUMENT CHOICE AND TRADE RULES

In establishing national treatment rules and the various forms of balancing, 'defenders of the [WTO] system regularly insist that the tension [between sovereignty and free trade] is illusory, and that WTO rules do not intrude on proper national prerogatives.'[47] In the case of the scientific evidence requirement under the SPS Agreement, a panel or the Appellate Body may interpret these constraints with significant deference to domestic decisions in which case they play little or no role in policing protectionist action. On the other hand, as has been more generally the case, they can use these rules to second-guess the decisions of governments, in which case they could significantly limit sovereignty.[48]

In terms of specific negotiations or actions around particular issues, most commentators on WTO rules and climate change point to the need for states to ensure they have transparent, well documented regulatory processes and to engage in international negotiations over the use of specific instruments to combat climate change.[49]Some commentators call for greater explicit balancing of trade and environment (and other issues) at the international level.[50]

Allowing the WTO system to police regulatory decisions for protectionism can promote deliberative democracy by governments.[51]This impact on domestic decision-making can go a long way to overcoming the issues surrounding economic protectionism and environmental protection.[52]However, while there have been positive changes to the dispute settlement

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[47]*Supra N.* 1, Sykes at p. 368.
[48]*Ibid*
[49]Steven Charnovitz, 'Trade and Climate: Potential Conflicts and Synergies' in Pew Centre, *Beyond Kyoto: Advancing the International Effort Against Climate Change* (2003).
[50]Andrew Guzman, 'Global Governance and the WTO', 45 *Harvard International L.J.* (2004).
[51]Robert Howse, 'Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization', *U. Michigan L.R.* 2329 (2000).
[52]James GustaveSpeth, *Red Sky at Morning: America and the Crisis of the Global Environment* (New Haven: Yale University Press 2004)

mechanism, continued progress is required such as through greater transparency and increased participation by third parties such NGOs.[53]

F. ANALYSIS AND CONCLUSION

The authors conclude by putting forth a resilient proposition whereby which an institutional framework will determine whose values prevail. This decision cannot be left to a supposedly neutral appeal to science because of the lack of information but also because even with perfect information there will still remain a wide range of issues science cannot decide related, for example, to environmental values, preferences for risk, and intergenerational equity.[54]

WTO rules and decisions refer to the right of states to make these value trade-offs for their own citizens. However, the current system tends to deal unsatisfactorily and unclearly with such trade-offs in the face of scientific uncertainty. Further, none of the above possibilities for reform is entirely satisfactory. A more promising approach seems to be the authors' argument for a revised approach by the WTO, which both fosters greater democratic experimentation domestically (while protecting against beggar thy neighbour policies) and promotes greater democratic legitimacy both domestically and within the WTO.

Unfortunately, the specific form of such an approach is not entirely clear.[55]However, what is clear is that the debate about the direction for institutional change will be central for improving how, or if, global environmental issues such as climate change will be addressed.

(4981 words)

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[53]Donald McRae, 'What is the Future of WTO Dispute Settlement?', 7(1) *J.I.E.L.* 3 (2004).
[54]Douglas Kysar, 'Climate Change, Cultural Transformation and Comprehensive Rationality', 31(3) *Boston College Envl Affairs L.R.*
[55]R. Howse, "From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime", 96 *Amer. J. International Law* 94 (2002) at p. 111