5. RESEARCH HYPOTHESIS

The current international climate change regime does not explicitly provide for the use of trade-related measures. Nevertheless, article 3.5 of the UNFCCC, using the language of $UWLFOH ;; RI WKH *$77 XUJHV WKDW ³PHDVXUHV WDNH unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a GLVJXLVHG UHVWULFWLRQ RQ LQWHUQDWLRQDO WUDGH´ suggests that the use of trade measures for climate change policy objectives is not excluded. It is possible that a post-Kyoto international climate change agreement will contain trade-related provisions. What would be the relationship between a trade obligation under the WTO and a trade obligation under an international climate change regime in this case?

Therefore, if trade measures are not authorized by a post-Kyoto climate change agreement, the safest way is to avoid using them. If used, unauthorised trade measures should either be consistent with WTO rules, or they should be designed in a manner which allows their justification under the general exceptions of GATT Article XX.[18]

If trade measures, which conflict [illegible]horized by a new climate change agreement, then, to avoid collisio[illegible]ading regime, WTO members will have to waive trade measures a[illegible]e change agreement from WTO obligations.

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Despite the fact that clarification of the relationship between the WTO and MEAs has been assigned by the Doha Ministerial Declaration,[19] the problem still remains unsettled, as the Doha Round is not concluded.[20] Consequently, at present, the relationship between the trade and climate change regimes is characterised by mutual avoidance. Climate change negotiators usually prefer to abstain from discussing of climate issues, finding the UNFCCC forum a more appropriate place for such discussions.[21]

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[18] Tarasofsky, Richard G. (2008), *Heating up international trade law: challenges and opportunities posed by efforts to combat climate change*, carbon and climate law Review, 1, pp. 7-17

[19] *The Doha Ministerial Declaration* is one of two Declarations adopted at the WTO Fourth Ministerial Conference in Doha, on November 2001, which folded the ongoing negotiations on trade liberalization in agriculture and services into the Doha Development Round.

[20] Two other environment related tasks, listed in the Doha Development Agenda, are the working-out of procedures for regular information exchange between MEA secretariats and relevant WTO committees, and the reduction or elimination of tariff and non-tariff barriers to environmental goods and services. See *para. 31 of the Doha Ministerial Declaration*

[21] Weischer, Lutz, Simmons, Benjamin, Van Asselt, Harro, and Zelli, Fariborz (2009), *Introduction-Climate and Trade Policies in a Post-2012 World* in climate and trade policies in a post-2012 world, UNEP, 2009

either as a provision included in a post-Kyoto climate agreement or as a separately signed agreement. India has already made an attempt to include such a provision. The paragraph which India proposed to include in the negotiating text of a post-Kyoto agreement for the Copenhagen conference in 2009 reads: G Q country Parties shall not resort to any form of unilateral measures including countervailing border measures, against goods and services imported from developing countries on grounds of protection and stabilization of climate. Such unilateral measures would violate the principles and provisions of the Convention, including, in particular, those related to the principle of common but differentiated responsibilities (article 3, Paragraph 1), trade and climate change (article 3 paragraph 5), and the relationship between mitigation actions of developing countries and provision of financial resources and technology by developed country Parties (article 4, Paragraph 3 and 7).[62]

2.5 Conclusion

At the outset, it would appear t to combat climate change on the one hand and expand international re motivated by divergent goals. The UNFCCC and the Kyoto Proto n the potentially negative effects of energy-intensive activity on the ATT are based on the premise that it is the expansion, not contraction, of economic activity through trade that will benefit all concerned. The climate change regime endaviours to correct market failure and negative externalities on the environment through economic instruments. By contrast, a key motivation of the trade regime is to correct government failure, or the inefficiencies arising from protectionist trade law and policy.[63] The climate change regime operates on the precautionary principle, deploying science to predict future climate fluctuations and law or policies to respond to these effects. With the exception of the SPS Measures Agreement for agriculture, science does not play a central role in the trade regime.[64]

[62] IIFT "Frequently asked questions: WTO compatibility of border trade measures for environmental *protection"*, Center for WTO studies, India Institute of Foreign Trade, available at http://wtocentre.iift.ac.in/FAQ/english/Environment_FAQ.pdf.

[63] Charnovitz S. (2003). The trade regime and the climate regime: institutional evolution and adaptation. Climate Change, Washington DC.

[64] Ibid.

CHAPTER IV

NATIONAL LAW AND POLICY OPTIONS AVAILABLE TO STATE

4.1 Introduction

This chapter considers which various domestic climate change law and policy options are possibly compatible with WTO rules. Four law and policy options are discussed: energy/GHG taxes, product regulations and standards, subsidies, and domestic emissions trading. Note that any of these might be perceived by someone as a "trade barrier". But they are categorised as "domestic" law and policy *options in this study because they are not premised on treating imports differently from domestic products.*

For many laws and policies options, the most relevant GATT law constraints will be Article III, which bars a government from discriminating against "like" *products from other countries, and Article X which allows General Exceptions for several purposes, including measures necessary to protect human, animal or plant life and health, and measures relating to the conservation of exhaustibl icle III imposes the obligation of* "national treatment", requiring im ted no less favorably than "like" *domestic goods. In a dispute, the t (1) whether the domestic product* and the competing import are "l e treatment of the import is less *favorable.*[124] *A government law me le III can be excused under Article X when the law and policy fits within one of the General Exceptions, provided that the measure is not applied in an arbitrary or unjustifiable manner and is not a disguised restriction on international trade. In the first eight years of the WTO, Article X has been interpreted more flexible than in previous GATT jurisprudence.*[125]

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4.2 Energy/GHG Taxes

A tax may be an appropriate instrument to address climate change law measures because it can reduce demand for energy, promote more efficient technologies, and with GHG taxes,

[124] Z P vU }v o ,X ~îìîî•U Z Pµo š}ŒÇ ‰µŒ‰}• v ^o]l ‰Œ} µ š•_]v Œ remarks on Article III:2), *Journal of the World Trade* 36: 443

[125] Wiers, Jochem (2002), Trade and Environment in the EC and the WTO. A legal analysis, Europe Law Publishing. pp. 361-64

giving rebate (of allowances/emission costs) to exporters, which would run contrary to climate change law and policy goals. Therefore, a country intending to defend a measure as an exception to its GATT obligations should from the very beginning adjust the design an the implementation of a measure to pass the justification test under Article XX.

Although justification of a carbon-related BAM under GATT Article XX is not entirely excluded, it will be quite difficult to design and implement a measure in a way which would satisfy the conditions of Article XX, especially its chapeau. Furthermore, justification of violations by a measure of GATT rules under GATT Article XX can be made each time only through litigation in the WTO. This implies that the problem of incompliance will have to be resolved each time anew. Therefore, there seems to be a need for long-lasting institutional solutions to the problem of WTO incompliance of carbon-related BAMs.

As this paper shows, there are a number of institutional solutions to the problem of WTO inconsistency of carbon-related BAMs that could be discussed. These solutions may be achieved through multilateral, plurilateral and bilateral negotiations and even through adjudication by the WTO dispu t, each of them lacks either feasibility or effectiveness. Most of them w necessary for their adoption: to reach consensus or the necessary vote s, which negatively affect economic interests of the majority of (d ould be hardly possible. Solutions adopted plurilaterally (i.e. onl which agree to them) would lack effectiveness, as they could be easily surmounted by non-agreeing parties.

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Of all approaches to address the problem of WTO inconsistency of carbon-related BAMs, which were discussed in this paper, the bilateral approach seems most feasible. It be possible to include provisions on carbon-related BAMs, including mutual recognition of climate change law and policy actions and refraining from using BAMs, in bilateral and regional FTAs and economic cooperation agreements. The experience of the WTO shows that many sensitive trade-related issues were first negotiated bilaterally or at the regional level and only then were brought to the multilateral negotiations. Provisions on climate change law and policy trade-related measures would be just part of a much broader economic cooperation agreement, which included trade, investment, government procurement and other issues. Therefore, even if such provisions were contrary to the interests of one of the parties to the agreement, there would always be something which would be given by the other parties in compensation for this. Nothing would preclude negotiating on carbon-related BAMs,

WTO Appellate Body Report, European communities - measures affecting Asbestos and Asbestos-containing products ("*EC-Asbestos*"), WT/DS 135/AB/R, adopted 5 April 2001, DSR 2001: VII, 3243

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