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**The Trade Regime and the Climate Regime:  
Institutional Evolution and Adaptation<sup>1</sup>**

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<sup>1</sup> This is the first of two companion articles appearing in *Climate Policy*. This one provides an overview of the issues, presents the context in which they have emerged, and discusses concerns about key points of institutional intersection. The second (Brewer, 2004) focuses on a series of specific issues about the interactions of particular provisions in numerous WTO agreements and provisions in the Kyoto Protocol. The articles reflect the comments of participants in meetings of the Transatlantic Dialogue on Climate Change, funded by the German Marshall Fund of the United States, especially Workshop III, which was held at the Centre for European Policy Studies (CEPS) in Brussels on 3 December 2002, and Workshop IV, which was held at Georgetown University on 11 June 2003. Though it would be inappropriate to name any of the participants individually, I am indebted to them all for their careful attention to the factual details as well as the themes and logic of the analysis.

## **1. Introduction**

Questions about the interface between the multilateral climate regime embodied in the Kyoto Protocol and the multilateral trade regime embodied in the World Trade Organization (WTO) have become especially timely since late 2001. At that time, ministerial-level meetings in Marrakech and Doha agreed to advance the agendas, respectively, for the implementation of the Kyoto Protocol and for negotiations on further agreements at the WTO.

In early 2003 the US government's proposal in the Doha round negotiations at the WTO of a new 'schedule of specific commitments' for the General Agreement on Trade in Services included commitments concerning market access and national treatment for the 'air quality and climate' services sub-sector within its environment sector commitments (USTR, 2003a: 59-61). This action provided tangible evidence of one specific kind of interaction between the climate and trade regimes within the formal negotiating framework at the WTO. Further, in the context of the activities of the WTO Committee on Trade and Environment Special Session, the governments of Saudi Arabia (WTO, 2002e) and Qatar (WTO, 2002f and 2003) submitted documents that raise issues about the relationship of climate change mitigation to a wide variety of trade issues. Whatever the motivations of these submissions in the WTO and whatever their eventual fates in the negotiations and other deliberations, they have focused renewed attention on the climate regime-trade regime relationships.

There have been concerns that each of these multilateral arrangements could constrain the effectiveness of the other, and these concerns will become more salient with the entry into

force of the Kyoto Protocol.<sup>2</sup> There are questions about whether and how the rights and obligations of the members of the WTO and the parties to the Protocol may conflict. Of particular concern is whether provisions in the Protocol, as well as government policies and business activities undertaken in keeping with those provisions, may conflict with the WTO non-discrimination principles of national treatment and most-favored nation treatment.

The WTO agreements that are potentially relevant to climate change issues include many of the individual Uruguay Round agreements and subsequent agreements as well. The principal elements of the Kyoto Protocol that are particularly relevant are its provisions concerning: emissions trading, the Clean Development Mechanism, Joint Implementation, enforcement, and parties' policies and measures. In combination, therefore, there are numerous potential points of intersection between the elements of the Kyoto Protocol and the WTO agreements.

Previous studies have clarified many issues, as they have focused on particular aspects of the regimes' relationships. Yet, some analyses suggest that the two regimes are largely compatible and even mutually reinforcing, while others suggest that there are significant conflicts between them. In wide-ranging analyses of the relationship between the climate regime and the trade regime, Brack, Grubb and Windram (2000), Buck and Verheyen (2001), Assuncao and Zhang (2002), Peterson (1999) and Zhang (1998) have identified a variety of issues, and their contributions are indicated at several points below. In addition to these studies, there are many studies that focus on a particular issue or a set of issues, and these are also noted below in regard to individual issues; they include Müller (2002), Parker (1998),

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<sup>2</sup> Russian ratification of the Kyoto Protocol and thus its entry into force were still pending as of the time of writing.

Sampson (1999, 2000, 2001a), Werksman (1999), Werksman and Santoro (1999), Werksman, Baumert and Dubash (2001), and Wiser (1999). Charnovitz (in progress) focuses on a series of trade measures that are related to climate policy.<sup>3</sup>

The paper addresses questions about a large and diverse number of specific issues. However, they tend to be focused on four concerns about the evolution of the climate regime and its relationship to the trade regime:<sup>4</sup>

- *International transactions associated with the three flexibility mechanisms of the Protocol* - that is, international emissions trading, CDM projects and JI projects. These concerns emerge from the intersections of key provisions of the Protocol and the principles and rules of the WTO. These are therefore issues that require clarification - and perhaps institutional adjustment - through consultations and coordination at the multilateral level, particularly among secretariats and other technical experts on a continuing basis, and occasionally through negotiations among representatives of parties to the agreements.

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<sup>3</sup> A study by Frederiksson and Gaston (1999), 'The Importance of Trade for the Ratification of the 1992 Climate Change Convention', examines a different issue from the ones being investigated in the present paper. Their concern is the relationship between the relative importance of countries' trade (as a proxy for their involvement and stakes in international issues) to the relative speed of their ratification of the FCCC; they find on the basis of extensive empirical data that although levels of total imports and exports are related to FCCC ratification, other indicators of trade are not.

<sup>4</sup> The first three correspond to the categories in Buck and Verheyen (2001: 6).

- *Domestic policies and measures* that countries adopt to achieve their Protocol emission targets. These concerns arise from the process of implementing a wide range of national and regional programmes to reduce emissions or increase carbon sequestration. The central concern is whether these programmes will be consistent with the principles and rules of the WTO and therefore whether they might be subject to challenge through the WTO's dispute settlement process or other WTO procedures such as the periodic reviews that it undertakes of its members' policies. Since each domestic programme undertaken to implement the Protocol will reflect each party's distinctive domestic political and institutional constraints, each will pose a different set of factual circumstances in relation to WTO principles and rules. Conflicts that emerge will be the subject of bilateral discussions between the interested parties, plus the involvement of multilateral processes.
- *Free riding and international competitive issues* associated with the Protocol – that is, the problem that products produced in countries that are not parties to the Protocol may have a production-cost advantage in international competition. This concern involves a combination of issues of economics, equity and politics. Individual firms and national economies can be disadvantaged by the uneven and thus unfair 'playing field' created by free riders in multilateral agreements. Political pressures to fix the problem arise from the disadvantaged firms, interest groups and publics. Internationally coordinated responses that target the free rider are likely to result.
- *The long-term viability and effectiveness of the two regimes* as they individually and jointly adapt to changing economic and political circumstances. These concerns are prompted by the possibility that any or all of the first three sets of problems could be become so severe that the functioning of either or both of the two regimes would be

undermined. Thus, there are ultimately ‘meta’ issues of the governance of international institutions at stake.

Although these are not entirely mutually exclusive categories, as the discussion below of individual specific issues will reveal, they are nevertheless a useful way to keep in mind the nature, extent and significance of the issues at stake. The details of institutional minutiae, legal technicalities and features of business transactions and government policies, which are at the core of the nexus of the climate and trade regimes, are ultimately about one or more of these four basic concerns.

This article and its sequel (Brewer, 2004) conclude that although there are some specific areas of interaction that are problematic, the two regimes may nevertheless co-exist in relative harmony in other respects – perhaps more like ‘neighbors’ than either ‘friends’ or ‘foes’ in the metaphor of Krist (2001, 2002). Further, as Werksman (1999: 262) has observed, ‘As with any exercise that is speculative, and that is aimed at comprehensive “issue spotting”, this analysis risks overplaying the potential for theoretical conflicts, and the potential that theoretical conflict might lead to actual disputes between states’. Of course, such an exercise is intended to clarify where there may be serious conflicts and to facilitate the search for constructive solutions and conflict resolution processes.

## **2. Stated Objectives of the WTO and Kyoto Protocol**

The two regimes have formally stated objectives that reflect a mixture of compatible and conflictive objectives as well as recognition of their interactions. These themes are evident in key documents for both regimes, as follows:

Article 2:3 of the *Kyoto Protocol* notes that parties should ‘strive to implement policies and measures...in such a way as to minimize adverse effects, including the adverse effects...on international trade...’<sup>5</sup>

Article 3.5 of the *Framework Convention on Climate Change* (FCCC) notes that ‘The parties should cooperate to promote [an]...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’.

Article 4.2 of the *FCCC* notes that ‘measures taken to combat climate change, including international ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade’.

As for the WTO, in the *Doha Communiqué*, the members observe that ‘the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive’ (WTO, 2001a).

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<sup>5</sup> Michaelowa (2001) is a concise introduction to the Kyoto Protocol and includes much data on key points. Grubb, Brack and Vrolijk (1999) provides a comprehensive analysis of the negotiations, provisions and implementation issues of the Protocol. Also see Kopp and Tatcher (2000).

The beginning of the *Preamble to the Marakesh Agreement* establishing the World Trade Organization (WTO) notes... ‘The parties to this agreement, [r]ecognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living...while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, ....’ (WTO, 1995a).

Of course, preambles of international accords and communiqués from ministerial meetings do not necessarily entail precise commitments to specific tangible actions; however, they do reflect - and shape - a diplomatic-political context that influences subsequent negotiations and decisions. Indeed, the opinion of the WTO Appellate Body in the shrimp-turtles case is often noted to have cited the preamble as follows: ‘While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy’ (cited in Brack, Grubb and Windram, 2000: 13, fn 13).

### **3. Diplomatic Context: MEAs and the WTO**

Although it is widely agreed that the relationships between the Kyoto Protocol and the WTO are important - and require further consideration - discussions concerning them in the WTO are constrained in the Doha round. The language of the Doha ministerial declaration is quite restrictive on this issue. Negotiations are limited to ‘the relationship between *existing* WTO

rules and *specific trade obligations* set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules *as among parties to the MEA in question*. The negotiations shall not prejudice the *WTO rights of any Member that is not a party to the MEA in question*' (WTO, 2001a, paragraph 31, italics added by author).

Issues concerning the precise nature and scope of these terms of the negotiating agenda have emerged in the work of the WTO Committee on Trade and the Environment (CTE) Special Session (see for instance USTR, 2003b). Much discussion centered on an EU proposal to define the negotiating mandate broadly and thus raised questions about the applicability of WTO rules to non-parties of MEAs and, by implication, matters that could be related to the multilateral climate change regime. Although this initiative was negated by other members in the CTE, it was interpreted as a preliminary effort to raising the issue at the September 2003 WTO ministerial meeting in Cancun (Inside US Trade, 2002a, 2002b, 2002c, 2002d). Also see WTO (2002a), which provides a systematic review of the proposals made by members of the CTE concerning the relationship of MEAs and the WTO during the period 1995 through late May 2002, and WTO (2002e and 2003), which are submissions respectively by Saudi Arabia and Qatar concerning carbon energy taxes.

Of course, constraints on the WTO Doha round agenda do not, in any case, preclude a discussion in other forums – such as follow-up meetings to the World Summit on Sustainable Development, or in meetings in conjunction with other diplomatic processes. In one forum or another – and probably in many – representatives of governments, firms and NGOs will be confronting the issues. In any case, issues about Kyoto Protocol-WTO relationships are already being raised by individuals and by organizations, as evidenced by the growing body

of studies as well as conference agendas. In that sense, the issues are already unofficially on the international trade-environment agenda. Even in the absence of their formal consideration in the WTO Doha round, they will be receiving increasing attention.

Within the WTO, a dispute case could prompt a formal consideration of some aspects of the relationship. Furthermore, climate change mitigation measures are already in effect at the national, sub-national and international levels. This is a reality that prompts questions about the international trade and investment implications of such extant measures as carbon taxes, emissions standards, subsidies for production technologies, labeling and certification standards for product efficiency, and markets for emission permits. It is prudent, therefore, to continue to advance understanding of the issues, as the Kyoto Protocol enters into force and as the WTO elaborates new rules during the Doha round (Brewer, 2003).

The issues and institutional aspects of the climate regime and trade-investment regime will evolve diplomatically as part of a wider set of issues concerning MEAs and the WTO. Taking a cue from the lexicon of acronyms about the relationship of trade measures to investment measures – i.e. Trade Related Investment Measures (TRIMs) and Investment Related Trade Measures (IRTM) – which have been identified in the WTO context, one can identify ‘Environment Related Trade Measures (ERTMs)’ and ‘Environment Related Investment Measures (ERIMs)’. At the same time, international environmental agreements contain numerous provisions that affect governments’ trade and investment policies and corporations’ international business practices. Thus, one can identify Trade Related Environmental Measures (TREM) and Investment Related Environmental Measures (IREM). This paper

specifically focuses on WTO-Kyoto Protocol interfaces and thus on WTO ERTMs and ERIMs concerning climate change, and on Kyoto Protocol TREMs and IREMs.<sup>6</sup>

Overlaps between MEAs and the WTO have been identified in previous studies. Krist (2001, 2002) identifies 22 MEAs with trade implications that are in force and specifies the particular products affected. A Note by the Secretariat of the WTO (2001b) examines 238 international environmental agreements. Of those, it identifies 32, including the FCCC and Kyoto Protocol, which contain trade-related measures or whose parties adopted trade measures in implementing them or which could have ‘consequences for trade during their implementation’. Of these, 14 multilateral agreements – including the FCCC and Kyoto Protocol - are analyzed in detail in terms of their trade-related provisions.

As for the FCCC, it observes (in item IX) the following concerning trade-related measures: ‘The UNFCCC does not directly restrict trade, but actions of countries implementing the UNFCCC could have significant trade implications. The requirement to adopt [n]ational policies and corresponding measure to mitigate climate change by developed country [parties] is set up in Article 4.2(a)’. (See section 2 above for the text of this article.) The FCCC also provides in Article 11 for the facilitation of international technology transfer, i.e.

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<sup>6</sup> There is a vast literature on environmental issues at the WTO, including Brack (1998), Byron (2001), Charnovitz (1998, 2000, 2002), Cottier (2001), Esty (1994, 2000, 2001), Graham (2001), Robertson (2001), Sampson (2001b) and Shaw and Schwartz (2002); also, see other items cited *passim* below. There are numerous WTO documents; in addition to items cited on particular points below, see WTO (1999a, 1999b, 2000, 2001c, 2001d, 2002d).

an international ‘trade’ issue in the broad sense now reflected in the TRIPs agreement at the WTO. On climate change technology transfer issues generally, see especially Forsyth (1999).

As for the Kyoto Protocol, the WTO Secretariat Note (in item X) observes that in addition to the three flexibility mechanisms there are also provisions concerning implementation related to trade. In particular, Article 2.1(a) indicates that ‘Annex I Parties *shall* ... implement and/or further elaborate policies and measures ... such as enhancement of energy efficiency in relevant sectors of the national economy and progressive reduction or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas-emitting sectors that run contrary to the objective of the Convention and application of market instruments’ (italics added by author). The Note also cites Article 2.3 (which is quoted above in section 2).

A submission to the WTO CTE by the European Communities (WTO, 2002b: 5-6) identifies four types of trade measures that arise from MEAs: (1) mandatory measures that are explicit in an MEA, (2) specifically-mentioned measures that are identified as ways that could be used to meet required results in an MEA, (3) optional measures that are not listed in an MEA but that could be used to comply with MEA obligations, and (4) measures that might be adopted to meet environmental standards as stringent or more stringent than those in the MEA.

If one applies this typology to the Kyoto Protocol, there are examples at least of types 2 and 4 as follows:

*Specifically-mentioned measures for required result.* Protocol Article 2.1 says ‘Each Party included in Annex I, in achieving its quantified emission limitation and reduction commitments ... shall ... (a) Implement and/or further elaborate policies and measures ... such as ... (v) ... Progressive reduction or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors that run counter to the objective of the Convention and application of market instruments....’

*Other measures adopted to meet environmental standards.* Protocol Article 2.3: ‘The Conference of the Parties serving as the meeting of the Parties to this Protocol may take further action, as appropriate, to promote the implementation of the provisions of this paragraph’.

#### **4. Potential Tangible Outcomes of Interactions**

Regardless of the language of agreements and the typologies that can be used to describe their contents, the specific activities of the two regimes and the particular measures that parties to them adopt offer a wide range of potential tangible outcomes for climate change mitigation and trade liberalization. While some interactions of the two regimes offer the prospect of win-win outcomes, others pose the possibility of less benign outcomes. The matrix in Figure 1 depicts the full range of possible outcomes in terms of their consequences for climate change mitigation and for trade liberalization.

*[Insert Figure 1 about here]*

Examples of win-win possibilities, represented by cell 1, include reductions of barriers to international trade and investment in goods and services related to climate change mitigation – barriers such as tariffs on windmill turbines or restrictions on foreign direct investment in (alternative) energy firms. Reduction of barriers to international business transactions in environmental goods and services is an item on the agenda of the current round of negotiations at the WTO, but it remains to be seen whether any such agreements will concern transactions that are specifically related to climate change mitigation (see Brewer, 2003; OECD, 1999b, 2000; Vaughan, forthcoming; WTO, 1998a).

An example of another win-win possibility would be the reduction of fossil fuel subsidies, as envisioned by Protocol Article 2.1(a) quoted above. The phase out of such subsidies is envisioned in the Protocol; but they are not currently on the WTO agenda, though they have long been recognized in trade circles as antithetical to WTO principles. Thus, although the elimination of such subsidies would represent a win-win outcome for the core objectives of both the climate regime and the trade regime, political-economy realities may inhibit such action for several more years, despite increasing attention. In a detailed analysis of government energy subsidies, including those for GHG-producing fossil fuels and those for alternative energy sources, Brack, Grubb and Windram (2000: 90-97) conclude that ‘the evolution of the climate regime is likely to move the topic up the political agenda, from the point of view both of environmentally damaging subsidies ... and environmentally beneficial subsidies’ (p. 96).

Potential conflict areas where win-lose (cell 3) outcomes can occur include disputes where there is tension between trade-discriminatory elements of climate policies that focus on differences in production methods, as contrasted with the application of the WTO non-

discrimination principles to products. Further, whereas the Framework Convention on Climate Change (FCCC) explicitly endorses the ‘precautionary principle’ when there is uncertainty about the scientific evidence concerning the damages from trade, the WTO has only recently and tentatively begun to subscribe to such a notion, as for instance in the Technical Barriers to Trade agreement and in some dispute case decisions. More generally, lose-lose outcomes (cell 9) could occur, for instance, if conflicts such as disputes at the WTO or issues concerning US or other countries’ non-participation in the Protocol undermine confidence in both regimes.

Unlike many other multilateral environmental agreements, there are no provisions for trade sanctions in the Protocol (cell 8). In this respect, therefore, the two regimes are at least superficially compatible in legalistic terms. However, in more fundamental political terms, restrictive trade measures could nevertheless be adopted outside the terms of the Protocol to exert pressure on governments to become a party to the Kyoto Protocol or to comply more fully with its rules (cell 7), in order to offset the competitive effects of non-participation in the Kyoto Protocol and thus address the ‘free-rider’ problem.

Many of the specific manifestations of these broad issues are explored in the second of the two companion articles. The present article focuses on a key threshold issue that can determine the evolution and disposition of other issues. Thus, the next section considers issues about the coverage of climate mitigation activities within the context of the WTO.

## **5. The Nature of Climate Mitigation Activities in Relationship to WTO Agreements**

Questions concerning the types of international transactions in goods, services and other business activities in the flexibility mechanisms of the Kyoto Protocol that are covered by WTO agreements can be answered only if the emission credits and other elements of the Kyoto mechanisms can be defined in the context of WTO agreements.<sup>7</sup> Thus a key question is: What kinds of ‘things’ do the flexibility mechanisms of the Kyoto Protocol entail that might raise issues in the WTO? In particular, are AAUs, ERUs and CERs goods and/or services, or neither?

These items in the Protocol’s flexibility mechanisms have been variously described as involving the following: carbon and thus commodities, services such as ‘decarbonization’, permits that convey property rights, financial instruments, and investment goods. At the same time, CDM and JI projects represent foreign direct investment projects, which also involve trade in goods as well as provide services. Because of ambiguities about some distinctions (e.g. the difference between goods and services) in WTO agreements, there is not a conclusive formalized position on these basic issues of coverage.

Discussions in the WTO’s Committee on Trade and the Environment (CTE) have suggested that emissions credits are neither services because they are not activities, nor goods because they are not tangible materials. Werksman (1999) notes that ‘It can be concluded with some confidence that internationally traded emissions allowances are themselves neither goods nor services under the WTO’. Thus, they would presumably not be subject to WTO rules.

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<sup>7</sup> Butzengieger, Betz and Bode (2001) provide a succinct introduction to the features of emissions trading systems. For more extensive treatments, see International Energy Agency (2001) and Kerr (2000). For the EU emissions trading system, see Centre for European Policy Studies (2002). For a review of the US experience with domestic emissions trading with emissions other than greenhouse gases, see Stavins (2000).

Yet, one might suppose that brokerage, consulting and insurance services associated with emissions trading could be considered commercial services within the normal meaning of the term and thus potentially covered by the GATS. In that case, governments' policies concerning such services would be subject to the limits of the individual WTO members' schedules of specific commitments under the GATS. Peterson (1999: 203) suggests: 'Some of the activities that Parties and their entities undertake in the course of emissions trading may likely involve services, such as those of brokers, verification entities, and the like. At the national level, a Party's regulation of those services may raise issues under the GATS; however, it is not likely that the Kyoto Protocol itself raises such issues'.

Briefly, countries' GATS commitments pertain to granting market access and/or national treatment for each of four different types of 'modes of supply' of services; the four modes are cross-border trade by export of the supplier of the service, consumption by a foreigner in the country of the provider, commercial presence through foreign direct investment, and movement of natural persons such as employees of multinational firms. There are, therefore, two different, though closely related issues, about the coverage such emissions trading services by GATS: (a) whether and how particular types of services are included by definition in the categories of types of services covered by GATS, and consequently whether they are covered by MFN and other general obligations under the GATS, and (b) what kinds of specific liberalization commitments and/or exceptions to such commitments individual countries have made for each of the types of services. In any case, the GATS seems more likely than the GATT to be applicable to at least some aspects of international emissions trading.

Such a view is consistent with Brack, Grubb and Windram (2000), who have concluded that it is ‘unlikely that emissions reduction units would automatically be considered to be recognizable items under the WTO, though even if they were, ... this seems unlikely to cause any particular problem. It is more likely that the [emissions] trading systems themselves – the infrastructure of brokers and exchanges – would be considered to be services under the [GATS]’ (p. xxii).

Issues about the application of WTO principles and provisions of individual agreements could also arise in connection with Kyoto Protocol Joint Implementation (JI) and Clean Development Mechanism (CDM) projects. Because of the diversity of the types of international business transactions that could be involved in JI and CDM projects under the Protocol, there could be international trade in goods, international trade and/or investment in services, and international technology transfers related to WTO agreements. (On technology transfer issues in climate change, see especially Forsyth, 1999.) As a result, both the GATS and the GATT - and the agreements concerning agriculture, trade-related investment measures, and subsidies - are all potentially applicable to JI and CDM projects.

In sum, there are unresolved issues about whether and how each of the three so-called flexibility mechanisms of the Protocol might be covered in one way or another by one or more WTO agreements. A particularly benign view of the potential for a supportive relationship is expressed in Brack, Grubb and Windram (2000: xxii), who suggest that a key ‘question that needs to be asked is ... whether the involvement of the WTO system in the new global emissions market to be created under the Kyoto Protocol could be actively helpful to the operation of the flexibility mechanisms of the Protocol; the answer is almost certainly

affirmative'. Their analysis, nevertheless, identifies several specific points of problematic intersection, as discussed in Brewer (2004).

Yet, despite much analysis suggesting that there are important constraints on the applicability of WTO rules to the activities envisioned by the Kyoto Protocol, there is much uncertainty as to whether and how such constraints would be operative in the WTO dispute settlement process.

## **6. WTO Dispute Settlement Process and Cases**

There are numerous questions about the Kyoto Protocol-WTO interface concern WTO disputes: What Protocol provisions, government policies or firm practices are the most likely to prompt WTO disputes? How are they likely to be decided? What would be the consequences for the climate and trade-investment regimes? What are the most relevant previous dispute cases, and how have they been decided?

The answers to such questions will depend at least as much on the political and economic circumstances pertaining to individual cases as on the legal technicalities.<sup>8</sup> In order for a dispute case to be considered and decided in the WTO dispute settlement process, the case must pass through several stages. These often include a firm (or firms) asking their

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<sup>8</sup> The literature on the WTO dispute settlement process and on individual cases is extensive, and of course it increases as the number of dispute cases increases. In addition to the items in footnote 6, see Brewer and Young (1998), Marceau and Gonzales-Calatayud (2001) and Petersmann (1997).

government to take the case to the WTO, after which a government decides to make a claim. The case must then go through several formal WTO stages. There must therefore be a combination of economic, political and legal factors that lead the complaining government to initiate a case.

Technical legal issues and the factual circumstances of the case are obviously central to the arguments and outcomes. But, in addition, economic interests of course play a central role in the decisions of complaining firms and governments about whether to make a claim and in the decisions of responding governments (and firms) about how to approach the case. Furthermore, domestic and international political considerations also come into play as governments (and firms) decide whether and how to pursue cases on the basis of calculations concerning political support and opposition. Once the case enters the WTO dispute process, the mixture of economic, political and legal factors changes, particularly if the case is not settled during preliminary negotiations and it becomes an item on the formal agenda of a dispute panel. Then legal issues tend to become more important.

## **7. Concluding Comments**

In any case, both the climate regime and the trade-investment regime will undergo recurrent changes to accommodate new economic and political circumstances. It is therefore important to continue to monitor and analyze the relationships between the two regimes as they evolve. Such an effort should be undertaken not only in legal terms but also in economic and political terms in order to understand their implications for the diplomatic agendas of governments, the strategic choices of firms and the policy concerns of NGOs.

As issues arise, they will inevitably entail quite specific and detailed questions about the provisions of both WTO agreements and the Kyoto Protocol. As the second companion article in the next issue of *Climate Policy* indicates, some of these questions are relatively problematic and require more attention, while others are unlikely to pose difficulties, at least for the next few years.

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**Figure 1**

**Outcome Matrix for Trade Regime - Climate Regime Interactions**

Trade- Investment Liberalization	Climate Change Mitigation		
	Beneficial	Neutral	Detrimental
Beneficial	1	2	3
Neutral	4	5	6
Detrimental	7	8	9