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### **The WTO Dispute Settlement System as a Forum for Climate Litigation?**

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# The WTO Dispute Settlement System as a Forum for Climate Litigation?

Henok Asmelash\*

## Abstract

*This article examines whether and to what extent the Dispute Settlement System (DSS) of the World Trade Organization (WTO) could and should serve as a venue for international climate litigation. The article tackles these questions in three parts. First, it maps the nature and features of a trade-related climate litigation. Second, it considers the prospect of such litigation under existing substantive and procedural rules of the WTO. Third, it investigates whether the WTO DSS should serve as a venue for climate litigation. The article finds that while the prospect of pro- climate litigation remains limited, anti- climate litigation is likely to increase, and that the DSS is an appropriate venue for adjudicating such disputes.*

## 1. Introduction

The emergence of litigation as one of the key strategies in the fight against climate change and the continued inadequacy of international climate action has prompted considerable interest in the role of international courts and tribunals over the last few years.<sup>1</sup> One of the international courts and tribunals at the forefront of this rising interest is the dispute settlement system (DSS) of the World Trade Organization (WTO).<sup>2</sup> The DSS has been at the heart of the highly emotive trade and environment debate that dominated the multilateral trading system over the last three decades. Its decisions in high profile trade and environment disputes such as *US – Gasoline*, *US – Shrimp* and *Brazil – Retreaded Tyres* have shaped the nature and direction of the debate on the interaction between trade and environment.<sup>3</sup> The now defunct Appellate Body particularly made crucial jurisprudential moves in these disputes that helped create or maintain the policy space of governments to pursue environmental protection goals.<sup>4</sup> However, its role (and that of the DSS more generally) has been limited mostly to the interpretation of environmental exceptions contained in WTO Agreements. Most of the trade and environment disputes were also neither specific to climate change nor filed out of concern to protect the environment. They were disputes brought against trade restrictive/distortive environmental measures driven by trade concerns. This means that the DSS remains mostly untested as a

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<sup>1</sup> See Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021); Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections' (2017) 49 *Arizona State Law Journal* 689; Keely Boom, 'The Rising Tide of International Climate Litigation: An Illustrative Hypothetical of Tuvalu v Australia' in Randall S Abate and Elizabeth Ann Kronk (eds), *Climate Change and Indigenous Peoples* (Elgar 2013), at 409–438; Andrew Strauss, 'Climate Change Litigation: Opening the Door to the International Court of Justice' in Hari M Osofsky and William CG Burns (eds), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press 2009).

<sup>2</sup> See Harro Van Asselt, 'Trade and Climate Disputes before the WTO: Blocking or Driving Climate Action?' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021); Nilmini Silva-Send, 'Climate Change Disputes at the World Trade Organization: National Energy Policies and International Trade Liability' (2012) 4 *San Diego Journal of Climate & Energy Law* 195.

<sup>3</sup> See Kati Kulovesi, 'Real or Imagined Controversies? A Climate Law Perspective on the Growing Links between the International Trade and Climate Change Regimes' (2014) 6 *Trade Law & Development* 55.

<sup>4</sup> On the role of the now defunct Appellate Body, see Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 *European Journal of International Law* 9.

venue for climate change litigation. Against this background, this article examines whether and to what extent the DSS could and should serve as a forum for climate change litigation.

Contrary to recent literature that casts doubt on the ability and mandate of the WTO and its DSS to address climate change and other environmental concerns, this article argues that both the organization and its dispute resolution mechanism remain appropriate venues for tackling trade-related climate change issues.<sup>5</sup> Here the term ‘appropriate’ is taken in a broader sense to refer to the relevance and suitability of a judicial forum for climate change litigation. The climate litigation literature has not yet identified clear criteria or framework to assess the appropriateness of a court or tribunal to serve as a forum for climate litigation. However, a review of the literature on climate litigation and dispute settlement reveals that a wide range of factors are significant in determining the appropriateness of a judicial forum for the adjudication of a particular dispute. Such factors include, mandate or jurisdiction, subject-matter expertise, enforcement mechanism and compliance record, remedies, time and costs of proceedings, etc. Some of these factors are particularly relevant for international climate litigation. First, jurisdiction (both subject matter and personal) is crucial given that most international courts and tribunals have relatively limited jurisdiction (often confined to the interpretation of specific legal instruments).<sup>6</sup> International courts and tribunals with broad and compulsory jurisdiction are more suitable for climate litigation as the underlying claims may not necessarily fall squarely within a particular legal instrument.<sup>7</sup> Second, an equally important factor is the strength of the enforcement mechanism.<sup>8</sup> This is because climate litigations are mostly aimed at inducing policy change or enforcement of existing commitments. Third, the expertise of the court on the subject matter of the dispute is also essential to its appropriateness. Van Asselt, for example, considered the climate-related expertise of the adjudicators in assessing the merits of adjudicating trade-related climate change issues at the WTO.<sup>9</sup> Finally, the literature also considers effectiveness and performance to assess the prospects of climate litigation before a particular court. Milaninia and Aparac, for example, considered, *inter alia*, the overall performance, length of proceedings and resources of the court in assessing the prospect of climate litigation before the International Criminal Court (ICC).<sup>10</sup> Consideration of all these factors in light of the close interaction between international trade law and climate change, the decades-long experience of the WTO DSS in balancing between trade and non-trade concerns, its relative effectiveness and environmental jurisprudence makes the WTO DSS an appropriate forum for trade-related international climate change litigation.

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<sup>5</sup> See Steve Charnovitz, ‘A Better Transatlantic Agenda on Trade and Environment’ (Carleton University 2021) Jean Monnet Network on Transatlantic Trade Politics Policy Brief 2; Van Asselt (n 2).

<sup>6</sup> See Benedict Kingsbury, ‘International Courts: Uneven Judicialisation in Global Order’ in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012), at 203-227. See also Aura Weinbaum, ‘Unjust Enrichment: An Alternative to Tort Law and Human Rights in the Climate Change Context?’ (2011) 20 *Washington International Law Journal* 429, (associating appropriateness of a court to its jurisdiction), at 443.

<sup>7</sup> See Deepak Raju and others, ‘Multi-Forum Strategies to Tackle Climate Change and Other Complex Problems: A Note from Practitioners’ (*EJIL: Talk!*, 1 November 2022) <<https://www.ejiltalk.org/multi-forum-strategies-to-tackle-climate-change-and-other-complex-problems-a-note-from-practitioners/>>.

<sup>8</sup> See Darin R Bartram, ‘International Litigation Over Global Climate Change: A Skeptic’s View’ (2007) 10 *Proceedings of the Annual Meeting (American Society of International Law)* 65.

<sup>9</sup> See Van Asselt (n 2), at 458. See also Nema Milaninia and Jelena Aparac, ‘Climate Change Litigation before the International Criminal Court: Prospects in Theory and Practice’ in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021) (considering expertise in ‘environmental crimes’ in their assessment of the prospects of climate litigation before the International Criminal Court), at 483.

<sup>10</sup> See Milaninia and Aparac (n 11).

Recognizing and utilizing the WTO DSS as a forum for international climate litigation has significant implications for efforts to tackle climate change through litigation. In the absence of a comprehensive and integrated set of rules addressing all aspects of climate change and a single international forum dedicated to climate litigation, a multi-forum approach remains the most practical way forward for international climate litigation.<sup>11</sup> Climate change is also a complex and multidimensional phenomenon that transcends existing legal boundaries. It is therefore imperative that judicial bodies across different regimes of international law are put to the service of tackling climate change. Climate litigation before one of the most prominent international courts and tribunals with relatively high rate of compliance and influence is critical to ensuring the mutual supportiveness of trade and climate change. This is regardless of the outcome of the litigation. In considering the advantages of climate litigation before the International Court of Justice (ICJ), Strauss noted that ‘a favourable ruling by the ICJ could provide an authoritatively sanctioned reference point around which public opinion can crystallize by imbuing that claim with the official imprimatur of law.’<sup>12</sup> The WTO DSS has similar influence on issues related to international trade. The backlash against the rulings of the Panels of the General Agreement on Tariffs and Trade (GATT) in the tuna/dolphin disputes suggests that even unfavourable decisions by the WTO DSS may have significant influence on public opinion and international trade negotiations.<sup>13</sup> Clarity around the nature and prospects of climate litigation at the WTO would also help relevant stakeholders to consider ways of optimizing the opportunities and overcoming the associated challenges.

The analysis in this article shows that the WTO DSS is likely to serve as a forum for anti-climate than pro-climate action litigations. Turning the prospect of trade-related pro-climate litigations primarily requires legal reform (e.g., the introduction of rules that require the adoption of climate-friendly and the prohibition of climate-unfriendly trade measures). The likelihood of trade-related anti-climate litigations, on the other hand, underlines the importance of expanding existing and/or creating new exceptions for trade-restrictive/distortive climate-friendly measures. Lack of legal reform will place undue burden on the WTO adjudicators to interpret and apply international trade rules negotiated almost three decades ago with inadequate climate and environmental considerations in a climate friendly manner.

The article is structured in five sections. *Section 2* maps the nature and features of a trade-related climate litigation. *Section 3* examines the prospect of climate litigation at the WTO. To be sure, the WTO DSS is not the only forum for trade-related climate litigation. The deadlock in multilateral trade negotiations over the last two decades has led to the proliferation of preferential trade agreements (PTAs) with in-built dispute settlement systems. Most of these PTAs contain provisions specific to climate change - some even have environmental or sustainable development chapters. These provisions provide solid grounds for climate litigation. However, with a few recent exceptions, the dispute settlement systems of PTAs are

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<sup>11</sup> See Raju and others (n 7).

<sup>12</sup> Strauss (n 1), at 337. See also Bodansky (n 1) (noting that ‘An I.C.J. decision on the issue of compensation could help influence national litigation in the nearer term and change expectations regarding the potential for future international litigation in the longer term’), at 711.

<sup>13</sup> See Kati Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Kluwer 2011) (noting that the rulings ‘provoked a furious reaction and led many environmentalists to believe that the GATT/WTO regime was dedicatedly and irrevocably biased in favour of free trade’), at 87. See also Henry L Thaggert, ‘A Closer Look at the Tuna-Dolphin Case: “Like Products” and “Extrajurisdictionality” in the Trade and Environment Context’ in James Cameron, Damien Geradin and Paul Demaret (eds), *Trade & the Environment: The Search for Balance* (Cameron May 1994), at 83; Robert Howse and Donald Regan, ‘The Product/Process Distinction: An Illusory Basis for Disciplining “Unilateralism” in Trade Policy’ (2000) 11 *European Journal of International Law* 249, at 250.

mostly dormant. Despite its ongoing crisis, the WTO DSS remains one of the most active international courts and tribunals. *Section 4* responds to the question whether the WTO DSS should serve as a venue for international climate litigation. *Section 5* concludes the discussion by considering ways of making the DSS fit for international climate change litigation.

## 2. Trade-Related Climate Litigation

Understanding the type of claims and legal issues that may arise in a climate litigation in the international trade regime is important to understanding whether the DSS could and should serve as a venue for international climate litigation. Climate litigation is a relatively new phenomenon that has no commonly agreed definition.<sup>14</sup> What counts as a ‘climate litigation’ remains the subject of much debate and different scholars use different definitions mostly depending on whether climate change is a central or peripheral issue in the case. Alogna *et al.* categorized the definitions used in international legal scholarship into narrow and broad definitions.<sup>15</sup> The narrow definitions confine climate litigation to ‘litigation which directly and expressly raises an issue that is related to climate change or climate change policy’.<sup>16</sup> A climate litigation exists under these definitions only insofar as the parties directly and expressly raise an issue of fact or law related to climate change. The broad definitions of climate litigation encompass not only cases where climate change is a central issue, but also cases in which it is a peripheral concern.<sup>17</sup> Such definitions capture cases that have implications for climate change even if there is no explicit reference to climate change in the proceeding or decision. Such definitions are more suitable to international climate litigation outside the climate change regime where climate change is less likely to form the core component of the dispute. However, adopting an implication-based definition requires some caution.<sup>18</sup> This is because the nature of climate change is such that almost all litigations have some climate change implication.<sup>19</sup> An unqualified use of implication-based definition will turn virtually all trade disputes into climate litigation as they are likely to have at least indirect implications for climate change. It is therefore important to identify the key features of trade-related climate litigation.

At the most basic level, trade-related climate litigations comprise a trade component. This means that such litigations involve a trade measure that either deter or contribute to climate change. The interaction between trade and climate change and the role of international trade in climate change is a subject of a longstanding debate that lies beyond the scope of this article. However, there is little disagreement over the presence of close ties between trade and climate change.<sup>20</sup> The IPCC recently noted that ‘policies to open up trade can have a range of effects on GHG emissions, just as mitigation policies can influence trade flows among countries’.<sup>21</sup> The prevailing view in the trade and climate change literature is that trade presents both

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<sup>14</sup> See Ivano Alogna, Christine Bakker and Jean-Pierre Gauci, ‘Climate Change Litigation: Global Perspectives: An Introduction’ in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021), at 15.

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.*

<sup>17</sup> *ibid.*, at 16.

<sup>18</sup> See Christopher James Hilson, ‘Climate Change Litigation: An Explanatory Approach (or Bringing Grievance Back In)’ in F Fracchia and M Occhiena (eds), *Climate Change: La Riposta del Diritto* (Editoriale Scientifica 2010).

<sup>19</sup> See *ibid.*

<sup>20</sup> See Michael Jakob and others, ‘How Trade Policy Can Support the Climate Agenda’ (2022) 376 *Science* 1401; Susanne Droege and others, ‘The Trade System and Climate Action: Ways Forward Under the Paris Agreement’ (2017) 13 *South Carolina Journal of International Law and Business* 195.

<sup>21</sup> IPCC, *Climate Change 2022: Mitigation of Climate Change: Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022), at 14-71.

opportunities and obstacles to addressing climate change.<sup>22</sup> On the one hand, there are a broad range of trade measures that can help countries to mitigate and adapt to climate change. Several Parties to the Paris Agreement also included some of these trade measures in their Nationally Determined Contributions (NDCs).<sup>23</sup> These measures include renewable energy subsidies, border carbon adjustments (BCAs), import bans, standard and labelling schemes, etc.

On the other hand, trade measures such as the liberalization of trade in carbon-intensive products (e.g., fuels, metals, fertilizers, cement, etc.) and the imposition of tariffs and non-tariff barriers on renewable energy technologies tend to either contribute to climate change or undermine efforts to overcome its impacts.<sup>24</sup> Trade rules governing the use of these two sets of trade measures are therefore critical to addressing climate change. They may impede climate action by restricting the discretion of countries to adopt climate-friendly trade measures and/or by encouraging the adoption of trade promoting climate-unfriendly measures.<sup>25</sup> Trade rules may also help catalyse climate action by allowing the adoption of climate-friendly trade measures and/or prohibiting the adoption of climate-unfriendly trade measures.<sup>26</sup> The existence of these possibilities enables us to envisage at least three scenarios of trade-related climate change disputes. First, dispute brought against climate-friendly trade measures driven by trade concerns. The complainants in such disputes typically challenge the adoption of a climate-friendly but trade restrictive measure alleging its inconsistency with international trade law. As we will see shortly, the climate litigation literature refers to such disputes as ‘anti-climate litigation’. Second, disputes brought against the lack (or inadequacy) of climate-friendly trade measures. Such disputes would qualify as pro-climate litigation insofar as they are driven by climate change concerns (e.g., disputes over barriers to trade in renewable energy technologies). Third, disputes brought against climate-unfriendly trade measures. Such disputes typically involve complaints filed against a WTO Member that adopts climate-unfriendly trade measures (e.g., fossil fuel subsidies, etc.). Such disputes would qualify as pro-climate litigation. We can also imagine a fourth scenario involving disputes against the lack of trade promoting but climate-unfriendly measures (e.g., low tariffs on fossil fuels). However, such disputes overlap and fall under the first scenario as the underlying trade measure would be a trade-restrictive climate-friendly measure (e.g., high tariffs on fossil fuel products).

The question as to whether the WTO DSS could and should serve as a forum for climate litigation is therefore a question of whether it could and should resolve disputes that may arise under any of the three scenarios outlined above. I will attempt to answer these questions in *sections 3 and 4* below by adopting the categorization of climate change litigation into pro-climate and anti-climate litigation.<sup>27</sup> The former refers to climate litigation initiated to engender policy change.<sup>28</sup> The main motivation behind such litigations is to induce the

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<sup>22</sup> See Jakob and others (n 23).

<sup>23</sup> See Clara Brandi, ‘Trade Elements in Countries’ Climate Contributions under the Paris Agreement’ (International Centre for Trade and Sustainable Development (ICTSD) 2017) Issue Paper.

<sup>24</sup> See Joseph S Shapiro, ‘The Environmental Bias of Trade Policy’ (2021) 136 *The Quarterly Journal of Economics* 831.

<sup>25</sup> IPCC (n 24), at 14-71.

<sup>26</sup> *ibid.*

<sup>27</sup> See Annalisa Savaresi, ‘Inter-State Climate Change Litigation: “Neither a Chimera nor a Panacea”’ in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021), at 366 ff; Alogna, Bakker and Gauci (n 17), at 19. See also Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015) (categorizing climate litigation along the same lines as ‘proactive’ (litigations that seek to promote climate regulation) and ‘antiregulatory’ (litigations that seek to oppose existing or proposed regulatory measures)), at 5.

<sup>28</sup> See Savaresi (n 30), at 366.

adoption of more ambitious climate legislation or the implementation of existing ones. Such cases are typically initiated by individuals or civil society organizations against governments. In the context of international trade law, a ‘pro-’ climate litigation may take the form of a claim against a WTO Member for failing to take (adequate) climate-friendly trade measures (*scenario 2*) or for adopting a climate-unfriendly trade measure (*scenario 3*). Such claims have never been brought before the DSS. As we will see in *section 3*, this is primarily because the WTO lacks norms that impose a direct obligation to address climate change. The absence of such an obligation makes it difficult (if not impossible) for potential complainants to find legal grounds to challenge the lack or insufficiency of trade-related climate action.

Anti-climate litigation refers to climate litigation initiated to resist the adoption of new climate policies or laws.<sup>29</sup> The complainants in such litigations (e.g., individuals, private companies, investors, etc.) typically allege the inconsistency of new (more stringent) climate laws and policies with constitutional or other norms. These type of climate litigations are common at the international level.<sup>30</sup> Investors have brought several of such cases relying on investment treaties.<sup>31</sup> Much of the trade and environment disputes in the multilateral trading system also concern cases brought against the adoption of new environmental laws and policies claiming their inconsistency with multilateral trade rules. The classic trade and environment disputes from *US – Tuna* to *US – Gasoline* and *US – Shrimp* involve claims against environment/climate-friendly trade measures. In all these disputes, the complainants challenged the inconsistency of the trade-related environmental measures with international trade rules. The parties to or the adjudicators of these disputes rarely made explicit reference to climate change. Environment and climate change concerns came into the picture in these disputes in the form of justifications the respondents invoked to justify their GATT/WTO-inconsistent measures. The lack of an express reference to climate change and the fact that climate change was only a peripheral concern leaves all these disputes outside the narrow definitions of climate litigation. However, it is apparent that these disputes have considerable implications for efforts to tackle climate change and as such meet the broad definition of climate litigation. Some of the recent trade and environment disputes also make more explicit references to climate change. In *India – Solar Cells*, for example, India unsuccessfully tried to justify its renewable energy local content requirements (LCRs) as measures necessary to secure compliance with its obligations (under national and international laws), *inter alia*, relating to climate change.<sup>32</sup> This and other ‘trade and environment’ cases demonstrate that the WTO DSS has already served as a forum for ‘climate litigation’ at least in the broad sense of the term. However, climate change remained a peripheral concern in all these disputes. The subsequent section considers the prospect of disputes before the WTO DSS that feature climate change more prominently.

### 3. Prospects of Trade-Related Climate Litigation at the WTO

Trade disputes have always been influential in the debate over the role of the international trade regime in tackling climate change and other environmental concerns. Although this debate predates the emergence of formal disputes, the legal aspect of the debate began in earnest with

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<sup>29</sup> Anti-climate litigation is also referred to as ‘anti-regulatory’ and ‘defensive’ litigation. See David L Markell and JB Ruhl, ‘An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?’ (2011) 64 Florida Law Review; Navraj Singh Ghaleigh, ‘“Six Honest Serving-Men”: Climate Change Litigation as Legal Mobilization and the Utility of Typologies’ (2010) 1 Climate Law 31.

<sup>30</sup> See Savaresi (n 30), at 367.

<sup>31</sup> See Kyla Tienhaara and others, ‘Investor-State Disputes Threaten the Global Green Energy Transition’ (2022) 376 Science 701; Savaresi (n 30), at 366.

<sup>32</sup> See *Appellate Body Report, India – Certain Measures Relating to Solar Cells and Solar Modules (India – Solar Cells)*, WT/DS456/AB/R, adopted 14 October 2016.

the emergence of trade and environment disputes. In one of the early and highly controversial disputes, the dispute settlement system of the General Agreement on Tariffs and Trade (GATT) stirred huge controversy by ruling against the United States' bans on the importation of tuna to protect dolphins from certain harmful fishing practices in the high seas.<sup>33</sup> These decisions drew much criticism from environmental groups against the international trade regime and put pressure on trade negotiators to better align international trade rules with climate change and other environmental concerns. Such pressure and other parallel developments within the international climate change regime brought about significant substantive and procedural developments in the multilateral trading system at the Uruguay Round (1986-1994) that *inter alia* established the WTO. The introduction of environmental exceptions into newly introduced trade agreements and the recognition of sustainable development that protects and promotes environment were the major substantive developments.<sup>34</sup> The Uruguay Round also led to the adoption of the Marrakesh Decision on Trade and Environment that established the Committee on Trade and Environment (CTE) with a mandate to identify areas of mutual supportiveness between trade and environment for future negotiations.<sup>35</sup> Some trade and environment issues eventually made it onto the trade and environment package of the Doha Development Agenda (DDA).<sup>36</sup> However, like in most other areas, the political paralysis in multilateral trade negotiations meant that the international trade regime made limited if any progress in the legislative front in addressing climate change and other environmental issues over the last two decades. Much of the progress within the multilateral trading system took place either in the form of informal mechanisms such as policy discussions and experience sharing within the CTE or trade and environment litigation through the DSS. The classic trade and environment disputes such as *US-Shrimp* in which the Appellate Body eventually accepted the justification that the US' trade restrictive environmental measures were necessary for the protection of exhaustible natural resources within the meaning of GATT Article XX(g) created or maintain policy space within the multilateral trade rules to pursue environmental protection.<sup>37</sup> However almost all the trade and environment disputes had little or no reference to climate change. As Van Asselt pointed out, the interaction between trade and climate change historically received marginal attention and it is only over the last few years that it started to receive more attention within the multilateral trading system.<sup>38</sup> Efforts to tackle climate change through the multilateral trading system are being pursued in multiple fronts. The most prominent of these are efforts to reduce barriers to trade in environmental goods and services. The IPCC identified the liberalization of trade in environmental goods and services as measures that 'may both lower trade barriers and potentially bring about GHG emission reductions'.<sup>39</sup> WO Member launched the negotiation on environmental goods and services in 2001 but failed to agree on the definition of environmental goods and services. The definition disagreement undermined any progress and eventually led to the collapse of the negotiations. Efforts to reinvigorate these negotiations by shifting switching from multilateral to plurilateral and narrowing the scope of

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<sup>33</sup> See *GATT Panel Report, United States – Restrictions on Imports of Tuna (US-Tuna I)*, DS21/R - 39S/155, circulated 3 September 1991 (not adopted); *GATT Panel Report, United States – Restrictions on Imports of Tuna, (US-Tuna II)*, DS29/R, circulated 16 June 1994 (not adopted).

<sup>34</sup> See, e.g., Agreement on Subsidies and Countervailing Measures (signed 15 April 1994, entered into force 1 January 1995) 1869 UNTS 14 (SCM Agreement), Art 8; Agreement on Technical Barriers to Trade, Annex 1A to Agreement Establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995) 1868 UNTS 120 (TBT Agreement), Art 2.2.

<sup>35</sup> See Decision on Trade and Environment, MTN/TNC/45(MIN), adopted 15 April 1994.

<sup>36</sup> See Ministerial Declaration, WT/MIN(01)/DEC/1, adopted 14 November 2001 ('Doha Declaration').

<sup>37</sup> See *Appellate Body Report, United States-Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimp)*, WT/DS58/AB/R, adopted 6 November 1998; Howse (n 4).

<sup>38</sup> Van Asselt (n 2).

<sup>39</sup> IPCC (n 24), at 14-73.



the negotiations from environmental goods and services to just environmental goods also met the same fate. A group of like-minded WTO Members launched the plurilateral trade negotiations on environmental goods in 2016 but made little to no progress. Recent years are seeing interest and efforts to reinvigorate these negotiations, but there is no tangible development on this front yet.<sup>40</sup> Another issue of particular importance to tackling climate change is fossil fuel subsidy reform (FFSR). Studies have long established the adverse effects of fossil fuel subsidies to climate change.<sup>41</sup> There have also been several intergovernmental initiatives to tackle fossil fuel subsidies not least since the 2009 G20 Leaders' statement to phase out inefficient fossil fuel subsidies.<sup>42</sup> Much of these early efforts bypassed the WTO, but recent years have seen significant progress towards tackling fossil fuel subsidies within WTO.<sup>43</sup> However, much of these efforts remain informal and have not yet produced concrete legal commitments to phase out environmentally harmful fossil fuel subsidies.

The lack of progress in the legislative front to address climate change issues within the multilateral trading system is once again drawing attention towards the judiciary. Would WTO Members resort to the DSS to tackle climate change in the multilateral trading system? If so, what kind of trade-related climate litigation may arise? Are there adequate legal basis? Would the extant substantive and procedural rules allow for such litigation to happen? This section addresses these questions in two parts. We will first consider the likelihood of pro-climate litigation in the multilateral trading system (*section 3.1*) and then proceed to examine the prospect of anti-climate litigation in the multilateral trading system (*section 3.2*).

### **3.1 Pro- Climate International Trade Litigation**

I noted in *section 2* that a pro-climate international trade litigation may take the form of a complaint against failure to take (adequate) climate-friendly trade measures or against climate-unfriendly trade measures. No such complaint has ever been filled in the multilateral trading system. Understanding the reasons behind would help us gauge the prospect of such disputes. No WTO Member brought a formal complaint against another WTO Members for failure to take adequate climate-friendly trade measures primarily because there is no obligation under WTO law that requires WTO Members to take such measures. The WTO has no agreement that requires WTO Members to eliminate barriers to trade in environmental goods and services (despite efforts to do so over the last two decades). Nor there are rules that require WTO Members to impose BCAs or the other climate-friendly trade measures outlined in *section 2*. In fact, a recent study found that international trade rules are biased towards carbon-intensive goods.<sup>44</sup> According to this quantitative study, 'import tariffs and nontariff barriers are substantially lower on dirty than on clean industries'.<sup>45</sup> In the absence of rules that require the adoption of climate-friendly trade measures, WTO Members will find it difficult if not

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<sup>40</sup> See, e.g., WTO, 'WTO Trade and Environmental Sustainability Structured Discussions: Meeting Held on 5 March 2021' (2021) Informal summary by the Coordinators, INF/TE/SSD/R/1; WTO, 'WTO Trade and Environmental Sustainability Structured Discussions: Meeting Held on 26-28 May 2021' (2021) Informal Summary by the Coordinators, INF/TE/SSD/R/2.

<sup>41</sup> See Bjorn Larsen and Anwar Shah, 'World Fossil Fuel Subsidies and Global Carbon Emissions' (World Bank 1992) WPS 1002.

<sup>42</sup> See G20 Leaders' Statement: Pittsburgh Summit, 24-25 September 2009 (Pittsburgh Declaration).

<sup>43</sup> For a comprehensive overview of recent initiatives to tackle fossil fuel subsidies at the WTO, see Henok Asmelash, 'The Regulation of Environmentally Harmful Fossil Fuel Subsidies: From Obscurity to Prominence in the Multilateral Trading System' (2022) 33 *European Journal of International Law* 1.

<sup>44</sup> See Shapiro (n 27).

<sup>45</sup> See *ibid*.

impossible to find legal basis to initiate a pro-climate international trade litigation against another WTO Members for its failure to take (adequate) climate-friendly trade measures.

The same is true for litigation against climate-unfriendly trade measures. Extent WTO rules do not prohibit or restrict the use of climate-unfriendly trade measures such as fossil fuel subsidies. This lack of legal basis is one of the factors that contributed to the absence of legal dispute on fossil fuel subsidies in the multilateral trading system where subsidies to renewable energy technologies have been the subject of several trade dispute.<sup>46</sup> One may argue that a direct obligation to adopt climate-friendly trade measures or to remove climate-unfriendly trade measure is not necessary to initiate pro-climate international trade litigation. For example, the complainants may rely on general obligations. However, the only such general obligation under WTO law is the preambular statement on sustainable development.<sup>47</sup> The Appellate Body in *US – Shrimp* underlined that this preambular statement serves an interpretive guide.<sup>48</sup> However, this preambular statement is unlikely to form an adequate legal basis for a pro-climate trade dispute. India invoked this preambular statement to justify its renewable energy LCRs in *India – Solar Cells*, but both the Panel and the Appellate Body rejected its argument that the preamble to the Marrakesh Agreement constitutes ‘laws and regulations’ within the meaning of the GATT Article XX(d).<sup>49</sup> To be sure, neither the Panel nor the Appellate Body directly assessed the normativity of the preamble to the Marrakesh Agreement. Their analysis was limited to determining whether the preamble to the Marrakesh Agreement and the other three international instruments that India invoked to justify its otherwise GATT-inconsistent measures had direct effect India. Having found that none of the four instruments had direct effect they concluded that they are not laws and regulations within the meaning of GATT Article XX(d). However, the Panel’s remark that ‘laws and regulations’ do not include ‘general objectives’ directly speaks to the preambular language on sustainable development.<sup>50</sup> While preambular language helps inform the interpretation of WTO agreement and provisions, it offers an inadequate legal basis for a formal legal complaint against the lack of climate-friendly trade measure or the adoption of climate-unfriendly trad measures on its own.

It is worth noting that WTO Members may challenge climate-unfriendly trade measures out of trade/economic rather than climate change concerns to the extent that the climate-unfriendly measure is also trade-distortive. For example, the literature on fossil fuel subsidies has long established that general fossil fuel consumption subsidies do not only encourage wasteful energy consumption but also distort trade in energy-intensive products. Energy-intensive industries such as steel and aluminium in fossil fuel consumption subsidizing countries benefit from the subsidized prices of one of their major inputs. However, WTO Members remained reluctant to challenge such subsidies through the DSS for various reasons. The only exceptions are the two tit-for-tat disputes between China and the United States. In *China – GOES*, the US challenged the imposition of antidumping and countervailing duties by China against grain oriented flat-rolled electrical steel (GOES) from the US.<sup>51</sup> China imposed the countervailing duties having identified 11 support programs that allegedly constitute direct and indirect

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<sup>46</sup> See Henok Asmelash, ‘Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies Are Challenged’ (2015) 18 *Journal of International Economic Law* 261.

<sup>47</sup> See Marrakesh Agreement Establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154.

<sup>48</sup> See *US-Shrimp* (n 41), paras 129-154.

<sup>49</sup> See *India - Solar Cells* (n 36), para 5.149; *Panel Report, India – Certain Measures Relating to Solar Cells and Solar Modules (India – Solar Cells)*, WT/DS456/R, adopted 14 October 2016, para 7.311.

<sup>50</sup> See *India – Solar Cells* (n 53), para 7.311.

<sup>51</sup> See *Appellate Body Report, China - Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States (China – GOES)*, WT/DS414/AB/R, adopted 16 November 2012.

specific subsidies to the steel industry. Three of the support programs at issue were related to fossil fuels. China argued that the US subsidized its steel industry directly through the provision of natural gas and electricity at below-market prices (through price regulation) and indirectly through the subsidization of the natural gas, electricity and coal production. The Appellate Body upheld the Panel's finding that China imposed the countervailing duties without sufficient evidence of the existence of either 'financial contribution', 'benefit' or 'specificity' within the meaning the Agreement on Subsidies or Countervailing Duties (SCM Agreement). In *China – Primary Aluminum*, the US challenged several subsidy programs benefiting Chinese primary aluminum producers.<sup>52</sup> One of the subsidies at issue was the provision of coal for less than adequate remuneration. The US alleged that these subsidies are causing adverse effects to its interests within the meaning of Article 5(c) of the SCM Agreement.<sup>53</sup> However, this case remained at the consultations stage since it was filed in January 2017. These two disputes indicate both the potential and limitations of challenging climate-unfriendly and trade distortive trade measures in the multilateral trading system. On the one hand, their mere existence suggests that there is a potential for such disputes in the future. On the other hand, China's defeat in *China – GOES* and the abandonment of the claim in *China – Primary Aluminum* suggests the difficulty of challenging such measures under the extant trade rules.

A reasonable inference from the foregoing discussion is that the chance of pro-climate international trade litigation largely depends on legal reform within the multilateral trading system. The introduction of new rules that require the adoption of climate-friendly trade measure or prohibit/restrict the use of climate-unfriendly trade measure will provide the necessary legal basis to initiative pro-climate international trade litigation in the future. Ongoing efforts to introduce new rules on environmental goods and services and fossil fuel subsidies are therefore crucial to the prospect of pro-climate international trade litigation.

Besides these substantive obstacles, pro-climate international trade litigation also faces significant procedural and other political economy hurdles. The first hurdle from a procedural point of view is the issue of standing. Who can bring a pro-climate case before a WTO DSS? Under the Dispute Settlement Understanding (DSU) only WTO Members have a standing to file a complaint before the DSS. This means that a pro-climate international trade litigation must be initiated by a WTO Member. That other actors such as individuals, NGOs, etc. have no standing undermines the likelihood of such litigation within the multilateral trading system. Inter-state disputes are historically limited and the global public good nature of climate change further undermines the likelihood of a WTO Member filing a formal complaint against another WTO Member for failing to adopt a climate-friendly trade measure or for taking a climate-unfriendly trade measures. The last few years have seen the establishment of informal country groupings such as the Friends of Fossil Fuel Subsidy Reform (FFSR), Friends of Advancing Sustainable Trade (FAST) and the Trade and Environmental Sustainability Structured Discussions (TESSD). These friends have been proactive in addressing climate change and other environmental issues within the multilateral trading system. However, most of their activities remain on tackling such issues through informal mechanisms such as adopting non-binding statements, policy dialogue and information sharing within the CTE and other WTO forums such as the Trade Policy Review Mechanism (TPRM).<sup>54</sup> Their proactive actions within the CTE, TPRM and to a lesser extent within the Committee on Subsidies and Countervailing Measures (SCM Committee) indicates a strong interest to tackle climate change through the multilateral trading system. However, it remains unclear whether this leads to the filing of a

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<sup>52</sup> See WTO, 'DS519: China – Subsidies to Producers of Primary Aluminium' (2017) WT/DS519/1.

<sup>53</sup> See *ibid.*

<sup>54</sup> See Asmelash, 'The Regulation of Environmentally Harmful Fossil Fuel Subsidies' (n 47).

formal pro-climate trade dispute even if we were to assume that there are adequate legal bases to challenge the lack of (adequate) climate-friendly trade measure or the adoption of climate-unfriendly trade measures. The good thing about the WTO DSS is that WTO Members do not have to show direct interest to file a WTO dispute. Even if establishing such interest was necessary, this will not be an obstacle given that climate change is a universal problem that affects all countries and communities. However, there are several other factors that affect the decision to initiate a formal WTO dispute. Such factors include cost of litigation, risk of injuring diplomatic relations, and risk of counter complaints and precedent setting, etc.<sup>55</sup> These considerations limit the prospect of a pro-climate international trade litigation.

Granting access to the DSS for non-state actors would alleviate some of these problems but this is unlikely under the current political climate in international trade regime. The issue of standing has been the subject of a longstanding debate in international trade scholarship and that it took long time for the trading system to accept intervention by non-governmental actors and open its hearing to the public suggest that this is not a viable solution. Therefore, from a procedural point of view, the prospect of pro-climate international trade litigation largely depends on the likes of the FFSR to voluntarily take the lead by initiating such disputes.

To sum up, the substantive and procedural considerations outlined above undermine the prospect of pro-climate international trade litigation. The chance for such litigation largely depends on future legislative reform and the determination of WTO Members such as those that formed the FFSR, FAST and TSSD to embrace climate litigation as a valuable instrument in their effort to tackle climate change within the multilateral trading system.

### **3.2 Anti- Climate International Trade Litigation**

In contrast to pro-climate international trade litigation, the prospect of anti-climate international trade litigation is high. Extant international trade law (and international economic law more broadly) is more suited for anti-climate than pro-climate litigation. I already noted that international investment arbitration has been used by foreign investors to challenge climate-friendly government measures. The international trade regime has also seen its own fair share of legal disputes brought against trade restrictive environmental measures (see *sections 2*). Van Asselt identified the recent spate of legal disputes over renewable energy LCRs as ‘climate change-related litigation’.<sup>56</sup> Such disputes undoubtedly have considerable implications for climate change. Climate change also featured more explicitly in one of these cases (i.e., *India – Solar Cells*). However, whether they count as anti-climate or pro-climate international trade litigation is debatable. First, in all the disputes the challenged measures were LCRs.<sup>57</sup> Such requirements are put in place to retain the economic benefits (e.g., job creation) from the subsidization of renewables at the local level. The respondents in these disputes (Canada, India, China and the United States) typically conditioned eligibility to their generous feed-in tariff (FIT) programs on the use of locally produced renewable energy generation equipment (e.g., wind turbines, solar panels, etc.). Renewable electricity producers may avail themselves of the FITs (i.e., above market electricity prices) only insofar as they establish that a certain percentage of their inputs were locally sourced. However, there is no conclusive

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<sup>55</sup> See more generally, Christina L Davis, *Why Adjudicate? Enforcing Trade Rules in the WTO* (Princeton University Press 2012).

<sup>56</sup> See Van Asselt (n 2), at 441-448.

<sup>57</sup> For an overview of these disputes, see Henok Asmelash, ‘The First Ten Years of WTO Jurisprudence on Renewable Energy Support Measures: Has the Dust Settled Yet?’ (2022) 21 *World Trade Review* 455.

evidence on the effectiveness of such requirements in promoting the development and deployment of renewables to consider them as climate-friendly trade measures.

On the one hand, they help governments justify the subsidization of renewables to their constituencies not only on climate change but also on economic grounds. The claim here is that LCRs promote local renewable energy equipment manufacturing, attract renewable energy investment, and create green employment opportunities that help alleviate potential opposition to the subsidization of renewables.<sup>58</sup> It has also been argued that LCRs could help reduce dependence on foreign renewable energy equipment and ensure enough domestic supply. India unsuccessfully tried to justify its LCRs on this ground in *India – Solar Cells*.<sup>59</sup> The Appellate Body was not convinced that renewable energy equipment were products of local or general short supply. It concluded that India could simply source such equipment from the international market. I argued elsewhere that this argument has lost its force since the covid pandemic.<sup>60</sup> The global health pandemic has shown that even ordinary products such as masks could become products of local or global short supply in times of emergence. Given climate change is an even bigger emergence, renewable energy LCRs may pass as climate-friendly trade measures insofar as they help countries build their renewable energy equipment manufacturing capacity.

On the other hand, renewable energy LCRs are adopted as green industrial policies. Studies have shown that trade restrictions and distortions such as LCRs often end up increasing the price of renewable energy generation equipment and thereby reduce their deployment.<sup>61</sup> The reduced rate of deployment then cuts downstream renewable energy job opportunities. These considerations cast doubt on the characterisation of renewable energy LCRs as climate-friendly trade measures and the dispute over such measures as anti-climate international trade litigation. Indeed, it was these considerations that led Japan and the EU, the complainants in the first ever WTO disputes that reached the Panel stage (i.e., *Canada – Renewable Energy/FIT*) to go out of their way to underline that the dispute should not be characterised as a ‘trade and environment dispute’.<sup>62</sup> Both Japan and the EU insisted that their complaint was against the discriminatory aspect of the FIT program not the program itself and hence the dispute should rather be characterised as ‘trade and investment’ instead.<sup>63</sup> It is also important to note that neither Canada nor the US (the respondents in *Canada – Renewable Energy/FIT* and *US – Renewable Energy*, respectively) attempted to justify their LCRs on environmental or climate change grounds.<sup>64</sup> India also curiously left out the popular environmental/climate change

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<sup>58</sup> See Jan-Christoph Kuntze and Tom Moerenhout, ‘Local Content Requirements and the Renewable Energy Industry: A Good Match?’ (International Centre for Trade and Sustainable Development 2013).

<sup>59</sup> *India - Solar Cells* (n 36).

<sup>60</sup> Asmelash, ‘The First Ten Years of WTO Jurisprudence on Renewable Energy Support Measures’ (n 61).

<sup>61</sup> See, e.g., Christopher Ettmayr and Hendrik Lloyd, ‘Local Content Requirements and the Impact on the South African Renewable Energy Sector: A Survey-Based Analysis’ (2017) 20 *South African Journal of Economic and Management Sciences* 11.

<sup>62</sup> See *Panel Reports, Canada – Certain Measures Affecting the Renewable Energy Generation Sector (Canada – Renewable Energy)/Canada – Measures Relating to the Feed-in Tariff Program (Canada – Feed-In Tariff Program)*, WT/DS412/R, WT/DS426/R, adopted 24 May 2013, para 7.7; WTO, ‘Canada - Measures Relating to the Feed-in Tariff Program (DS426): The First Submission by the European Union’ (2012), para 2.

<sup>63</sup> See *Canada – Renewable Energy/FIT* (n 66); WTO, ‘EU First Submission’ (n 66).

<sup>64</sup> See *Appellate Body Reports, Canada – Certain Measures Affecting the Renewable Energy Generation Sector (Canada-Renewable Energy)/ Canada - Measures Relating to the Feed-in Tariff Program (Canada- Feed-In Tariff Program)*, WT/DS412/AB/R, WT/DS426/AB/R, adopted 24 May 2013; *Panel Report, United States – Certain Measures Relating to the Renewable Energy Sector (US – Renewable Energy) WT/DS510/R*, circulated 27 June 2019.

justifications under WTO law (i.e., GATT Article XX(b) and XX(g)) from the list of justifications it invoked in *India – Solar Cells* to justify its renewable energy LCRs.<sup>65</sup>

Notwithstanding whether the existing renewable energy subsidy disputes count as anti-climate litigation they indicate the trajectory of climate litigation in the international trade regime. Like trade and environment disputes, most trade-related climate litigation are likely to take the form of challenges against climate-friendly trade measure on the grounds of inconsistency with international trade rules. Van Asselt and other commentators forestall that one such trade-restrictive climate-friendly measures would be BCAs.<sup>66</sup> BCAs received much attention in the trade and environment scholarship particularly in the aftermath of the refusal of the US to join the Kyoto Protocol. Commentators suggested that that EU and other developed country parties to the Kyoto Protocol should impose tariffs and countervailing duties on products from non-Kyoto parties such as the US.<sup>67</sup> Initial discussion towards the imposition of such measures in the EU and subsequently in the US prompted trade and environment scholars to consider the compatibility of such measures with WTO law in anticipation of a potential trade over BCAs.<sup>68</sup> However, as Kulovesi pointed out, these remained imagined than real disputes as no country introduced BCAs.<sup>69</sup> This is now set to change with the EU's proposed Carbon Border Adjustment Mechanism (CBAM) and growing initiatives towards the adoption of CBAs in the United States, Canada and the UK. These recent developments have reinvigorated academic debate on the compatibility of such measures with the WTO law and raised expectation of an anti-climate international trade litigation. BCAs typically take the form of import tariffs to level the competitive playing field and thereby overcome the problem of carbon leakage. As additional and/or potentially discriminatory tariffs they are likely to raise compatibility issue with WTO rules and principle such as the non-discrimination principle contained in GATT Article I and II. The complainants in such disputes would likely challenge such measures as violation of the principle of market access (GATT Article II) and/or non-discrimination (GATT Articles I and III). It is equally anticipated that the respondents will invoke one of the classic environmental/climate change justifications contained in GATT Article XX (b) and (g). The outcome of this and other potential anti-climate litigations will largely rest on the design and implementation of the trade-restrictive climate-friendly measure and the interpretation of the climate change related exceptions contained in the WTO Agreements. It is therefore interesting to see how the EU not only designs and implements its CBAM but also tries to justify it under the existing international trade rules. It is also equally interest to see how the crisis-hit dispute settlement system handles such a sensitive issue.

Beyond BCAs, the likelihood of anti-climate trade litigation is set to increase as more countries start to adopt policy measures in their effort to combat the ever-deepening climate change crisis. The shift from the top-down to the bottom-up approach in international climate governance has left parties to the Paris Agreement to determine their emission reduction targets and policy instruments to meet their targets. This opens an opportunity for countries to

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<sup>65</sup> *India - Solar Cells* (n 36).

<sup>66</sup> Van Asselt (n 2), at 448-453.

<sup>67</sup> See, e.g., Joseph E Stiglitz, *Making Globalization Work* (1st ed, WW Norton & Co 2006), at 177; Jagdish Bhagwati and Petros C Mavroidis, 'Is Action against US Exports for Failure to Sign Kyoto Protocol WTO-Legal?' (2007) 6 *World Trade Review* 299.

<sup>68</sup> See, e.g., Henrik Horn and Petros C Mavroidis, 'Border Carbon Adjustments and the WTO' (2010) 53 *Japanese Yearbook of International Law* 19; Kateryna Holzer, 'Trade and Climate Policy Interaction: Dealing with WTO Inconsistencies of Carbon-Related Border Adjustment Measures' (National Centres of Competence in Research (NCCR) 2010) Working Paper WP4 Paper 2010/06; Ludivine Tamiotti, 'The Legal Interface between Carbon Border Measures and Trade Rules' (2011) 11 *Climate Policy* 1202.

<sup>69</sup> See Kulovesi (n 3).

experiment and adopt different climate-friendly trade measures. Countries are also more likely to try to pursue both economic and climate change objectives through such measures (as we have seen in the case of renewable energy LCRs). This will further intensify the tension between trade and climate change and pose the trading system with the challenge of resolving such tension. The continued paralysis in multilateral trade negotiations (despite the glimpse of hope at the 12<sup>th</sup> Ministerial conference in 2022) will keep the pressure on the WTO DSS to strike the right balance between trade and climate change concerns. The following section will consider whether we should entrust the DSS with the responsibility to do so or find alternative venues for adjudicating trade-related climate change disputes (if and when) they arise.

#### **4. The Case for Climate Litigation at the WTO**

The question whether the international trade regime should address climate change and other environmental concerns has been the subject of a long-standing debate. The recognition of sustainable development as overarching objective of the WTO partly resolved the debate and shifted its focus towards how best to ensure the mutual supportiveness of trade and climate change/environmental concerns. The CTE was accordingly established with a mandate to resolve potential conflicts between international trade rules and multilateral environment agreements (MEAs) and identify areas of mutual supportiveness between the two. This subsequently led to the inclusion of trade and environment issues such as environmental goods and services and fisheries subsidies in the Doha Round negotiations. The recent conclusion of the Agreement on Fisheries Subsidies (AFS) reaffirms the continuance of the political consensus to tackle environmental issues within the multilateral trading system.

However, commentators have continued to question the merits of entrusting the WTO with the responsibility to tackle climate change and mandating its DSS to decide on climate change-related disputes.<sup>70</sup> In a recent policy brief, Professor Steve Charnovitz, argued against efforts to address environmental issues at the WTO.<sup>71</sup> Two points lie at the heart of his argument. The first one is the many dysfunctions and poor track record of the WTO over the last two decades. Noting the failed Doha Round trade and environment negotiations, he argued that ‘all the evidence points to the sad conclusion that the WTO should not be perceived as an institution capable of solving important non-trade problems’.<sup>72</sup> The breakdown in the legislative function of the WTO is undisputable but the fact that the WTO recently managed to conclude the negotiations on fisheries subsidies undermines the premise of this argument. More importantly, the WTO is not the only international forum struggling to achieve multilateral agreements.

Charnovitz’s second point is that the WTO is better left to deal with international trade issues. He is of the view that ‘the WTO should stick to its constitutional mission to effectuate the goals of an open and rule-based trading system’ and ‘letting the WTO do its own job is not only a good idea for the world economy but is also a good idea for the global environment’.<sup>73</sup> This argument finds little support in WTO law and practice. The very first paragraph of the preamble to the Marrakesh Agreement establishing the WTO set out sustainable development that protects and promotes the environment as an overarching objective of the WTO. The WTO also embraced tackling environmental issues from its inception by establishing of the CTE. The conclusion of the Agreement on Fishes Subsidies (AFS) reaffirms the will and ability of the WTO membership to tackle environmental issues at the WTO. The AFS represents the first

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<sup>70</sup> See Charnovitz (n 5); Van Asselt (n 2).

<sup>71</sup> See Charnovitz (n 5).

<sup>72</sup> See *ibid*, at 3.

<sup>73</sup> See *ibid*, at 3.

ever agreement in the history of the multilateral trading system that favours environmental protection over trade promotion as its primary objective. Its conclusion effectively debunks the outdated argument that the WTO is an international trade organization and hence could and should not deal with climate change and other environmental concerns. Moreover, given the close interaction between trade and non-trade issues such as climate change, it is also extremely difficult to address international trade issues in clinical isolation. It is this type of silo thinking that led to the fragmentation of international law in the first place and is unlikely to help the world resolve its current multifaceted health, economic and climate change crisis.

On whether the WTO DSS should decide on climate change-related disputes, Professor Van Asselt cautioned against a stronger role for the DSS stating that some of the trade and climate change issues ‘probably should not be answered by WTO panels or the Appellate Body’.<sup>74</sup> His argument rests on two fundamental assumptions. The first one concerns the (un) willingness of the DSS to integrate non-trade concerns. He pointed to the failure of the Panel in *EC – Approval and Marketing of Biotech Products* to seek recourse to relevant MEAs such as the Convention on Biological Diversity and the Cartagena Protocol as evidence of the DSS’s limitation in integrating non-trade concerns. However, he submits that ‘the practice of the Appellate Body suggests an increasing accommodation of environmental concerns’.<sup>75</sup> First in *US – Gasoline* where it underlined that WTO law should not be interpreted in clinical isolation and then in *US – Shrimp* where it relied on MEAs to interpret the meaning of ‘exhaustible natural resources’, the Appellate Body has shown enough will to incorporate environmental considerations in the resolution of trade disputes. The Appellate Body even went out of its way to save the Canadian FIT program from inconsistency with the SCM Agreement in *Canada – Renewable Energy/FIT* by performing what trade scholars criticized as ‘legal acrobatics’ and ‘legal fiction’.<sup>76</sup> The Appellate Body may not have saved the FIT program from WTO-inconsistency in the end and its benefit analysis may have been methodologically erroneous<sup>77</sup> but its willingness to integrate environmental considerations was axiomatic. It was indeed such willingness and judicial activism that eventually brought about its demise. As Howse demonstrated in his *EJIL Forward Article*, the Appellate Body has made important jurisprudential moves that helped secure or expand the policy space governments have under extent WTO law to pursue non-trade objectives such as the protection of the environment.<sup>78</sup> It managed to do so during a ‘period of intense diplomatic and political divisiveness and prevailing perception of impasse and malaise’ in the multilateral trading system.<sup>79</sup> The failure of the *EC – Approval and Marketing of Biotech Products* Panel to consult relevant MEAs is inadequate to show the DSS’s limitation in integrating climate change-related considerations. The environmental credential of the Appellate Body is strong enough to even suggest that it would have rectified this failure had the parties appealed the findings of the Panel. It is equally important to acknowledge that the DSS can only do as much. Its mandate is limited ‘to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public

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<sup>74</sup> See Van Asselt (n 2), at 457.

<sup>75</sup> *ibid.*

<sup>76</sup> See Aaron Cosbey and Petros Mavroidis, ‘A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO’ (2014) 17 *Journal of International Economic Law* 11, at 12; Luca Rubini, “‘The Good, the Bad, and the Ugly.’” *Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies* (2014) 48 *Journal of World Trade* 895, at 916.

<sup>77</sup> For a cogent criticism of the Appellate Body’s benefit analysis, see Rubini (n 80).

<sup>78</sup> See Howse (n 4).

<sup>79</sup> See *ibid.*



international law'.<sup>80</sup> The reference to customary rules of interpretation of public international law leaves the DSS with enough room to integrate climate change and other environmental considerations as was the case in *US -Shrimp*. However, the international climate change regime also needs to provide enough legal hooks for the DSS to rely on if it was to interpret existing international trade rules in line with environmental objectives. The fact that India could only find the preamble of the Marrakesh Agreement, the UNFCCC, the Rio Declaration on Environment and Development, and the UNGA Resolution adopting the Rio+20 Document to justify its subsidization of renewables in *India – Solar Cells* shows the limitations of the international climate change regime itself.<sup>81</sup> None of these international instruments even mention energy let alone call upon the subsidization of renewable energy sources.

Van Asselt's second point of caution against mandating the DSS to resolve trade-related climate disputes concerns the WTO adjudicator's lack of 'relevant background in environmental science, law and/or policy'.<sup>82</sup> Charnovitz raised a similar point in the context of the WTO more generally when he asked 'why relocate important environmental problems to a non-performing regime with no technical expertise to solve those problems?'.<sup>83</sup> The underlying concern here is that WTO Panel and Appellate Body Members are trade experts and hence carry a natural bias towards trade in resolving trade-related climate disputes. This is a valid concern - although finds little support in the WTO jurisprudence. However, the solution lies not in moving trade-related climate change litigation away from the WTO DSS, but in developing its climate change and environmental expertise. Applying this argument to other subject areas will exclude most international courts and tribunals from serving as venues for climate litigation. Nothing suggests that the adjudicators at other international courts and tribunals have better background in climate change science or policy than the WTO adjudicators. To be sure, a specialized international climate change or environment court would be better placed to address the environment/climate change component of a trade-related climate dispute. However, not only that we do not have such a court now but also that such a court would still need to have the necessary expertise in trade to strike the right balance between trade and climate change/environmental concerns. Van Asselt found that the criteria for the selection of Panel and Appellate Body Members is 'broad enough to include people with relevant climate expertise in panels or even the Appellate Body'.<sup>84</sup> The procedural rules contained in the DSU also allow the DSS to overcome its lack of expertise on climate change issues 'by calling upon relevant climate change-related experts or information'.<sup>85</sup> This is a better solution than moving trade-related climate disputes to a non-trade dispute settlement forum that suffers from the lack of expertise in international trade law/policy and the DSS's decades of institutional experience in resolving trade and environmental issues.

## 5. Conclusion

The close interaction between international trade rules and environmental protection measures has made the WTO DSS one of the most active venues for the resolution of environment-related international disputes over the last three decades. However, the fact that DSS remains

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<sup>80</sup> Art 3.2, Understanding on the Rules and Procedures Governing the Settlement of Disputes, Annex 2 to Agreement Establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401 (DSU).

<sup>81</sup> See *India - Solar Cells* (n 36), Annex B-3 *ibid*, paras 53-57.

<sup>82</sup> Van Asselt (n 2), at 458.

<sup>83</sup> Charnovitz (n 5), at 4.

<sup>84</sup> Van Asselt (n 2), at 458.

<sup>85</sup> See *ibid*. See also Art 13, DSU.

largely an untested venue for trade and climate change disputes has raised the question whether it could and should serve as a venue for international climate litigation. This article attempted to answer this question by categorizing trade-related international climate litigation into pro-climate and anti-climate international trade litigation. It has shown that there are significant substantive and procedural hurdles to initiating a pro-climate litigation before the WTO DSS. The most prominent of these is the lack of legal obligations under extant international trade law to adopt climate-friendly trade measures (e.g., BCAs, the removal of barriers to trade in renewable energy technologies) and/or to abolish climate-unfriendly trade measures (e.g., fossil fuel subsidies). In the absence of such obligations, the prospect of pro-climate international trade litigation is limited to instances where climate-unfriendly trade measures are also trade restrictive/distortive and subject to current international trade rules. For example, although extant international trade law does not have energy-specific disciplines that prohibit the subsidization of fossil fuels, such subsidies can still be challenged under the general subsidy rules contained in the SCM Agreement insofar as they are contingent upon export performance or the use of domestic over imported products or adversely affect the (trade) interest of other WTO Members. However, no such trade dispute has arisen so far particularly because of the form fossil fuel subsidies typically take and the difficulties associated with establishing their inconsistency with existing subsidy disciplines. The future of pro-climate international trade litigation is therefore highly dependent on developments on the legislative front.

Contrary to pro-climate litigation, the prospect of anti-climate international trade litigation remains high. Such disputes arise out of the adoption of trade restrictive or distortive climate-friendly measures such as renewable energy subsidies, BCAs, etc. NDCs to the Paris Agreement and environment-related notifications to the WTO show that many WTO Members have adopted or are planning to adopt climate-friendly trade measures.<sup>86</sup> For example, almost all countries currently subsidize renewables in one form or another.<sup>87</sup> Some of these renewable energy support programs have already been the subject of trade disputes and trade scholars expect CBAM to trigger trade dispute once put in place.<sup>88</sup> The number of climate-friendly but trade distortive/restrictive measures (and hence trade and climate change conflicts) are set to increase as countries strive to adopt multifunctional policy measures that promise to respond to both economic and climate change objectives. This will in turn pile the pressure on the crisis-hit trade regime and its dispute settlement mechanism to strike the right balance between trade and climate change concerns. While some scholars casted doubt on the ability and aptness of the WTO and its DSS to do so, this article argued that both the WTO and its DSS have the necessary mandate and institutional expertise to find the right balance. The WTO jurisprudence and practice offers ample evidence of the ability and willingness of the DSS to integrate non-trade considerations in the resolution of trade disputes. However, cases such as *India – Solar Cells* have shown that the judiciary can only do so much. No matter the ability and will of the judiciary, we should not take the interpretation of trade rules designed more than two decades ago with little climate change consideration as the first best approach to tackling climate change in the multilateral trading system. Indeed, as Bodansky opined, ‘adjudication should be viewed as a complement rather than as a substitute for negotiation.’<sup>89</sup> The introduction of new trade rules that provide concrete legal grounds for bringing pro-climate disputes and more robust

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<sup>86</sup> See WTO, ‘Environmental Database’ <<https://edb.wto.org/>> accessed 12 September 2022.

<sup>87</sup> See REN21, *Renewables 2020 Global Status Report* (REN21 2020).

<sup>88</sup> See Ingo Venzke and Geraldo Vidigal, ‘Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)’ in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2020: Global Solidarity and Common but Differentiated Responsibilities* (TMC Asser Press 2022).

<sup>89</sup> See Bodansky (n 1), at 693.

legal shelter for trade restrictive/distortive climate-friendly measures is of particular importance to both the prospect and effectiveness of trade-related climate litigation.

In this regard, recent years have witnessed renewed impetus to revitalize the trade and climate change agenda by resurrecting the stalled negotiations on environmental goods, introducing disciplines on environmentally harmful fossil fuel subsidies, etc. If they come to fruition, these developments will lessen the pressure on the WTO adjudicators to perform legal acrobatics to save climate-friendly trade measures from WTO-inconsistency and provide much needed room to strike the right balance between trade and climate change considerations. Of course, the WTO DSS itself need to first overcome its current existential crisis. While it is not clear at this stage whether and in what form the Appellate Body will resurrect from the dead, one only hopes that it will return without losing much of its mandate and willingness to integrate climate change and other environmental considerations in the resolution of trade disputes.