

# Environmental Protection in Trade: The Challenges for the WTO

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**Abstract :** *Growing concerns over the environmental impact of global trade have led to increasing scholarly and policy attention to how international trade intersects environmental regimes. There emerges a substantial consensus among researchers and policymakers that multilateral trade agreements (MTAs) frequently intersect- and often conflict- with multilateral environmental agreements (MEAs), resulting in adverse consequences for the environment. In this context, this article explores the role and challenges of the World Trade Organization (WTO) in reconciling global trade and environmental governance. It critically examines how the WTO's institutional structures and procedural mechanisms have an impact on environmental outcomes across countries. The article concludes by outlining potential pathways for the WTO to enhance its relevance and effectiveness in addressing both trade and the environment.*

## 1. Introduction

There has been a growing interaction and integration of environment-related multilateral agreements (hereinafter MEAs) and multilateral trade agreements (hereinafter MTAs), as they increasingly impact each other. The World Trade Organization (hereinafter the WTO), the core body of the multilateral trading system, commits to addressing environmental concerns in both its policies and functions. The General Agreement on Trade and Tariffs 1994 (hereinafter the GATT 1994) had a provision<sup>1</sup> for environment and natural resources since its inception in 1947. However, environmental issues had not received as much attention earlier by the WTO as they do at present. The WTO has stressed the significance of free trade as a key driver for sustainable development since its founding in 1995.<sup>2</sup> In addition, the WTO Dispute Settlement Bodies (hereinafter the DSB) increasingly come across trade disputes that are intertwined with environmental concerns.<sup>3</sup> Even though the jurisprudence on adherence to MEAs in its decision-making has not developed in an entirely satisfactory and coherent manner,<sup>4</sup> the DSB is increasingly adopting multilateral environmental agreements

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<sup>1</sup> General Agreement on Tariffs and Trade (GATT) 1994, art XX(b), (g).

<sup>2</sup> Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, preamble.

<sup>3</sup> Lidia Rieder, *The Relationship between Trade-Related Environmental Measures in Multilateral Environmental Agreements and the WTO Law* (1st edn, Nomos 2020) 144–96.

<sup>4</sup> William J Davey, *Enforcing World Trade Rules: Essays on WTO Dispute Settlement and GATT Obligations* (CUP 2006) 322.

as an aid to the interpretation in reaching its conclusion.<sup>5</sup> It gets evident through the functions of the DSB that the interpretation of MEAs and MTAs will be crucial in the coming years to harmonise environmental and trade concerns. Traditionally, often in the proceedings before the DSB, free trade was prioritised, and the DSB upheld trade restrictions in several cases where legitimate environmental concerns exist.<sup>6</sup> At present, the WTO is more willing to demonstrate being a trade organisation that is genuinely concerned about the environment and to peacefully coexist with the international environmental law based on mutually supportive approaches.<sup>7</sup> Achieving this end has been one of the key agendas of WTO reform efforts since the Doha Development Round in 2001. It is important to note that for the first time in the 12<sup>th</sup> Ministerial Conference 2022, the WTO members gave their consent to conduct a comprehensive review of the WTO rules and to propose having a fully and well-functioning Dispute Settlement Body in place by 2024. In its 13<sup>th</sup> Ministerial Conference (hereinafter MC13), the WTO has reaffirmed the WTO and DSB reform as a key agenda.<sup>8</sup>

In this context, this article will explore the functions and challenges of the World Trade Organization (WTO) as a global trading institution in reconciling global trade and environmental governance. It critically examines how the WTO's organisational structure, its rules, procedural and dispute settlement mechanisms, as well as the power dynamics that shape its decision-making processes, tend to impact environmental issues. Finally, the article considers the future direction the WTO must pursue to remain relevant and effective in addressing the intertwined imperatives of global trade and environmental protection.

Part I provides a general introduction to the topic. Then Part II critically analyses the intersection between trade and environmental regimes, whereas Part III examines how far the DSB can balance environmental concerns in trade disputes. Afterwards, the article in Parts IV and V implicates the challenges that lie ahead for the WTO and DSB in reconciling environmental and trade issues within the existing legal framework. Finally, Part VI provides the ways forward, and Part VII provides the summary of the article as a conclusion.

## 2. Intersection of Environment and Trade in the WTO

The 2009 UNEP and WTO joint report on Trade and Climate Change first examines the connections between trade and the environment.<sup>9</sup> Then, several

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<sup>5</sup> Dominic A Gentile, 'International Trade and the Environment: What is the Role of the WTO?' (2017) 19(1) *Fordham Environmental Law Review* 223.

<sup>6</sup> Rieder (n 3) 97.

<sup>7</sup> *ibid.*

<sup>8</sup> WTO, '13th Ministerial Conference: WTO Reform' <[https://www.wto.org/english/thewto\\_e/minist\\_e/mc13\\_e/briefing\\_notes\\_e/reform\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc13_e/briefing_notes_e/reform_e.htm)> accessed 5 March 2024.

<sup>9</sup> WTO and UNEP, *Trade and Climate Change* (WTO and UNEP 2009) [https://www.wto.org/english/res\\_e/booksp\\_e/Trade\\_climate\\_change\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/Trade_climate_change_e.pdf) accessed 5 March 2024.

follow-up reports of the WTO and other international organizations, i.e., World Bank, UNCTAD, UNEP, UNDP, etc., in their reports reiterated the close links between trade and the environment.<sup>10</sup> The objectives of promoting sustainable development and safeguarding the environment are of utmost importance to the World Trade Organization (WTO), as explicitly stated in the preamble of its founding treaty, the Marrakesh Agreement.<sup>11</sup> The Ministerial Declaration adopted on March 2, 2024, at the MC13 recognises sustainable trade as a key driver of sustainable development in its environmental, social and economic context.<sup>12</sup> Therefore, the protection of environment and the promotion of sustainable development have already been part of the policy commitment for the WTO. Thereby, the growing integration of trade and environment requires a balancing between the two seemingly independent yet intertwined legal regimes.

First and foremost, the WTO rules and its operational framework do not fit in with its policy commitment to sustainable trade.<sup>13</sup> The WTO agreements do not *per se* provide for the issue of the environment, except Article XX of GATT 1994, which in fact indirectly addresses environmental concerns.<sup>14</sup> There exists no WTO Agreement addressing the environmental protection. Mostly, the WTO addresses environmental issues by way of product standards, restrictions on environmentally harmful goods, and tariffs and subsidies for environmentally friendly or green products and production methods under different trade agreements.<sup>15</sup> The WTO hardly provides any rules for the conservation of the environment; rather only prescribes conditions or limitations that environmental measures shall be met when they have an impact on trade.<sup>16</sup> Though the WTO rules are not meant to discourage the environmental objective of members, the WTO rules have practically reduced the ability of member states to set their

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<sup>10</sup> WTO, *World Trade Report 2022: Climate Change and International Trade* (WTO 2022) <[https://www.wto.org/english/res\\_e/booksp\\_e/wtr22\\_e/wtr22\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/wtr22_e/wtr22_e.pdf)> accessed 5 March 2024; WTO, *WTO Report on Re-Globalization for a Secure, Inclusive and Sustainable Future* (WTO 2023) <[https://www.wto.org/english/res\\_e/booksp\\_e/wtr23\\_e/wtr23\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/wtr23_e/wtr23_e.pdf)> accessed 5 March 2024; WTO ‘WTO issues information briefs on trade, climate, related issues with COP26 talks underway’ (*WTO*, 3 November 2021) <[https://www.wto.org/english/news\\_e/news21\\_e/clim\\_03nov21\\_e.htm](https://www.wto.org/english/news_e/news21_e/clim_03nov21_e.htm)> accessed 5 March 2024.

<sup>11</sup> Marrakesh Agreement (n 2).

<sup>12</sup> 13th Ministerial Declaration (2 March 2024) WT/MIN (24)/DEC [15] <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/DEC.pdf&Open=True>> accessed 5 March 2024.

<sup>13</sup> Susanne Droege and others, ‘The Trade System and Climate Action: Ways Forward under the Paris Agreement’ (2016) 13(2) *South Carolina Journal of International Law and Business* 218.

<sup>14</sup> WTO, ‘Trade and Climate Change’ (*WTO*) <[https://www.wto.org/english/tratop\\_e/envir\\_e/climate\\_intro\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/climate_intro_e.htm)> accessed 5 March 2024 (the Article XX does not expressly mention the word, “climate change” or “environment”).

<sup>15</sup> GATT 1994 (n 1); Agreement on Technical Barriers to Trade 1994; Agreement on Subsidies and Countervailing Measures 1994; Agreement on Sanitary and Phytosanitary Measures 1994.

<sup>16</sup> Gentile (n 5) 204–205.

environmental standards and restrictions.<sup>17</sup> This contradiction in the WTO system has been demonstrated in several decisions of the DSB, explained later in this paper.<sup>18</sup>

The most used broad provision relating to environmental aspects in trade is the GATT 1994, Article XX, which provides general exceptions to the GATT rules, allowing the WTO member states to adopt measures that would otherwise be inconsistent with the GATT provisions. Article XX(b) and (g) allows member states to take trade-related measures subject to certain conditions to protect human, animal or plant or health life and to preserve exhaustible natural resources. These provisions have been issues of contention in several cases before the DSB, and its decisions and interpretation have shaped the jurisprudence around the interlinks and trade-off between environment and free trade.<sup>19</sup> The well-established jurisprudence is that Article XX contains a two-tiered tests to justify a trade measure to fall within the exceptions. Firstly, an environmental measure taken by a member country shall be justified under one of the subparagraphs, either (b) or (g) of Article XX. Secondly, such measure shall be examined in relation to the chapeau of Article XX.<sup>20</sup> Therefore, at first, the environmental measure must be “necessary” to protect human, animal or plant or health life or the measure must be “relating to” the conservation of exhaustible natural resources, made effective in conjunction with restrictions on domestic production or consumption.<sup>21</sup> Here, the “necessity” test for sub-paragraphs (b) and the “relating to” test for subparagraphs (g) are important. It means that a sufficient nexus shall be established between the measure and the interest protected.<sup>22</sup> An assessment of “necessity” involves “weighing and balancing” several distinct criteria relating both to the measure sought to be justified as “necessary” and to possible alternative measures that may be reasonably available to the responding Member to achieve its desired objective.<sup>23</sup> As to the treatment of scientific data and risk assessment, the Panel enjoyed “a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence”.<sup>24</sup> Secondly, the Chapeau of Article XX refers to the introductory part of the article, which necessitates that the application of the measure concerned shall not constitute “a

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<sup>17</sup> *ibid.*, 205.

<sup>18</sup> See the discussion herein below under ch III.

<sup>19</sup> Gentile (n 5) 204–205.

<sup>20</sup> WTO, ‘General Exceptions: Article XX of the GATT 1994’ (*WTO*) <[https://www.wto.org/english/tratop\\_e/dispu\\_e/repertory\\_e/g3\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/repertory_e/g3_e.htm)> accessed 14 March 2024; WTO, *Analytical Index: GATT 1994 – Article XX (DS Reports)* <[https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gatt1994\\_art20\\_jur.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_jur.pdf)> accessed 14 March 2024.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.*

<sup>24</sup> Appellate Body Report, *EC – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R [161].

means of arbitrary or unjustifiable discrimination between parties where the same conditions prevail” and is not “a disguised restriction on international trade”.<sup>25</sup> While weighing the necessity of a concerned environmental measure to protect the environment against the non-discrimination and free competition objective of the WTO, the DSB often traded off the environment for free trade.<sup>26</sup> Apart from Article XX, which prescribes general exceptions for environmental concerns, the WTO multilateral agreements hardly feature environmental concerns.<sup>27</sup>

Multilateral Environmental Agreements (MEAs), on the other hand, are also increasingly having provisions of trade-related environmental measures, i.e., trade restriction, trade ban, product and process standard, labelling and packaging requirement, etc.<sup>28</sup> Trade measures have become part of the MEAs on issues as diverse as wildlife protection, ozone depletion, Genetically Modified Organism (GMO), and hazardous wastes and chemicals.<sup>29</sup> Over 250 MEAs dealing with various environmental issues are currently in force. About 15 of these MEAs contains provisions relating to the regulation of trade to prevent environmental harm.<sup>30</sup> The objectives of trade-related environmental measures in the MEAs are three-fold: (a) controlling harmful trade practices; (b) protection of local environment from harmful foreign species and products; (c) protecting the global commons, i.e., oceans or forests.<sup>31</sup> According to the Environmental Database of the WTO, environment-related notifications submitted in the Trade Policy Reviews of member states, and environment-related measures taken by member states concerning trade have shown a steadily increasing trend since 1997. In 2023, member states communicated to the WTO 840 environment-related notifications, which stood at 168 in 1997.<sup>32</sup> Similarly, in 2023, member states took 2,229 environment-related measures, as shown in their 840 environment-related notifications.<sup>33</sup>

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<sup>25</sup> *ibid.*; see also GATT 1994 (n 1) art XX.

<sup>26</sup> Harro van Asselt, ‘Trade and Climate Disputes before the WTO: Blocking or Driving Climate Action?’ in Ivano Alagna and others (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021) 436.

<sup>27</sup> *ibid.*

<sup>28</sup> Rieder (n 3) 33–36.

<sup>29</sup> WTO, ‘Matrix Trade-Related Measures Pursuant to Selected Multilateral Environmental Agreements’ (*WTO*, 2017) <[https://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_matrix\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/envir_matrix_e.htm)> accessed 5 March 2024.

<sup>30</sup> *ibid.*

<sup>31</sup> Rieder (n 3) 37.

<sup>32</sup> Committee on Trade and Environment, ‘Environmental Database for 2022’ (*WTO*, 14 March 2024) 3–4 <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/CTE/EDB23.pdf&Open=True>> accessed 17 March 2025.

<sup>33</sup> *ibid.*

### 3. The Efficacy of the DSB to Resolve Conflicts between Environmental and Trade Measures

The DSB, consisting of the Panel and the Appellate Body, is “one of the strongest and most sophisticated intergovernmental dispute settlement systems” relating to trade among the WTO member states.<sup>34</sup> The member countries between 1995 and the end of 2024 have submitted 631 complaints for consultation that resulted in panel reports in 297 cases, followed by appeals in 195 cases.<sup>35</sup> The DSB aims to uphold the WTO’s objective of creating an open, fair, and non-discriminatory global trading system and addresses environmental matters only when these policies directly impact trade in a discriminatory manner.<sup>36</sup> Therefore, its focus has not been to protect the environment, but to examine whether any environmental measures result in discrimination for a member country or a measure of protectionism against free trade.<sup>37</sup>

In the *US-Tuna I case* between Mexico and the United States, the Panel examined the US import restrictions on Mexican yellowfin tuna fish caught by using the “purse-seine” fishing method, which sometimes led to the accidental capture of dolphins in the Eastern Tropical Pacific Ocean (ETP).<sup>38</sup> The USA took the trade measure under the U.S. Marine Mammal Protection Act (MMPA) of 1972, which was enacted to reduce dolphin mortality during tuna fishing. The Panel decided that the US trade restrictions on Mexican tuna were not consistent with the GATT 1994, Articles III and XI, and not justified under Article XX. The Panel took a narrow interpretation of Article XX(b) and (g) that it only covers measures necessary to protect human, animal or plant life or health within the jurisdiction of the importing country and does not permit extraterritorial application of the trade measure of such importing country. The Panel also held that the USA did not exhaust all reasonably available alternatives to safeguard dolphins, in particular through the negotiations of international cooperative arrangements.<sup>39</sup> In the *US-Tuna II (Mexico) case*, again between Mexico and the USA, the US trade restrictions requiring “a dolphin-safe label” on Mexican Tuna fish and fish products became the contention between the parties.<sup>40</sup> The AB found that, the measure at issue, the US “dolphin-safe” labelling provisions are not consistent with Article 2.1 of the Technical Barriers on Trade Agreement 1994 (hereinafter the TBT) as the measure of the USA provides a single and legally binding set of requirements for making any statement concerning the broad subject of ‘dolphin-

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<sup>34</sup> Asselt (n 26) 433.

<sup>35</sup> WTO, ‘Dispute Settlement’ (*WTO*) <[https://www.wto.org/english/tratop\\_e/dispu\\_e/disputstats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disputstats_e.htm)> accessed 9 February 2025.

<sup>36</sup> Gentile (n 5) 201.

<sup>37</sup> *ibid.*

<sup>38</sup> Panel Report, *US – Restrictions on Imports of Tuna* DS21/R-39S/155.

<sup>39</sup> *ibid* [5.28].

<sup>40</sup> Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* WT/DS381/AB/R (3 December 2015).

safety’ of tuna products in the United States”. The AB also held that “the measure at issue modified the competitive conditions in the US market to the detriment of Mexican tuna products and the United States did not demonstrate that this stemmed solely from legitimate regulatory distinctions”. The Appellate Body therefore found that the US dolphin-safe labelling measure was not consistent with Art. 2.1 of the TBT.<sup>41</sup> The AB reasoned that the measure at issue created a discriminatory market competition for Mexican products because the US retailers and consumers tend to prefer tuna labelled as “dolphin-safe”. In addition, it created discrimination or less favourable treatment for Mexican Tuna as the dolphin-safe requirement was not required for the US tuna products, as they constitute like products.<sup>42</sup>

In the *US-Shrimp Case*, the AB invalidated the US ban on the importation of shrimp and shrimp products from India, Malaysia, Pakistan and Thailand in an attempt to save sea turtles on the ground that the ban was implemented in a manner constituting unjustifiable and arbitrary discrimination and thus was contrary to the Chapeau of Article XX.<sup>43</sup> However, the significance of the case in the trade and environment debate is that it considered the application of MEAs in guiding trade negotiations and resolving trade disputes and held that the USA should have engaged in multilateral negotiations before imposing the import ban. It also held that the interpretation of Article XX is “not static but is rather revolutionary” and included living natural resources within the meaning of “exhaustible natural resources”.<sup>44</sup> Similarly, in the *Brazil-Tyres case*, the AB held that the trade measures prohibiting the import of retreaded and used tyres from the EU were necessary to protect human health under Article XX(b) but declared unjustified as the measures resulted in arbitrary discrimination and a disguised restriction on international trade.<sup>45</sup>

In the *EC-Asbestos Case*, the import ban imposed by France on asbestos and asbestos-containing products was the measure at issue. The AB held that the measure was necessary to protect human health within the meaning of Article XX(b).<sup>46</sup> It is the only case in the history of the DSB where a trade-related environmental measure has passed the complex and multistage test of Article XX.<sup>47</sup>

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<sup>41</sup> *ibid* [240].

<sup>42</sup> *ibid* [233–240].

<sup>43</sup> Appellate Body Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R [130, 160].

<sup>44</sup> *ibid* [170–176].

<sup>45</sup> Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R [25].

<sup>46</sup> Appellate Body Report, *EC – Measures Affecting Asbestos and Asbestos-Containing Products* (n 24).

<sup>47</sup> Reider (n 3) 195.

#### 4. Challenges for the WTO to Integrate Environmental Protection in Trade Rules

The WTO may play a crucial role in ensuring that the trade measures for the environment are coherent, fit-for-purpose and non-discriminatory.<sup>48</sup> To achieve this purpose, the Doha Development Agenda was adopted in 2001. During the Doha Round of trade negotiations, fresh discussions began on how trade commitments under multilateral environmental agreements interact with WTO rules, on mechanisms for information sharing between environmental treaty secretariats and the WTO, and on lowering trade barriers for environmental goods and services.<sup>49</sup> But the negotiations ultimately failed by 2008. It has been a major blow for the WTO in its attempt to make the global trading system more inclusive, transparent and sustainable.<sup>50</sup> It is argued that the member-driven, consensus-based decision-making process of the WTO is both its strength as well as its weakness. The unanimity requirement makes the decision-making process extremely rigid and difficult.<sup>51</sup> It is argued that the WTO's powerful member states, unable to reach consensus on environmental matters, are driven mostly by the rising geopolitical tensions resulting from the US-China trade war, the Russia-Ukraine war and the increasing drift between developing and developed countries on numerous fronts, including agriculture, fossil fuel subsidies, fisheries subsidies, etc.<sup>52</sup> The United States has recently been more resentful of the limitations imposed on its actions by the WTO dispute settlement mechanism. A number of Western countries started to push for changes to the laws that would limit the Chinese model of capitalism as China emerged as a significant trading power. The growing geostrategic rivalry between the US and China is currently putting additional strain on the WTO.<sup>53</sup>

Trade-related environmental measures can conflict with the multilateral trading systems of the WTO. The main purpose of the WTO is to promote free trade, and liberalisation of trade and free trade mechanisms is often anti-environment, because the expansion of international trade has been accompanied by a corresponding increase in the exploitation of natural resources and the

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<sup>48</sup> WTO, 'Trade Topics: Trade and Climate Change' (*WTO*) <[https://www.wto.org/english/tratop\\_e/envir\\_e/climate\\_intro\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/climate_intro_e.htm)> accessed 9 February 2025.

<sup>49</sup> WTO, *Decision on Trade and Environment* LT/UR/D-6/2 (15 April 1994) [31].

<sup>50</sup> WTO, 'The Doha Declaration Explained' (*WTO*) <[http://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm)> accessed 17 March 2024.

<sup>51</sup> Patrick Low, 'The WTO in Crisis: Closing the Gap between Conversation and Action or Shutting Down the Conversation?' (2022) 21 *World Trade Review* 274.

<sup>52</sup> Shushanik Hakobyan, Sergii Meleshchuk and Robert Zymek, 'Divided We Fall: Differential Exposure to Geopolitical Fragmentation in Trade' (IMF Working Paper No 2023/270, IMF 2023).

<sup>53</sup> Sandra Polaski, 'WTO in a Changing Geopolitical Environment' in Karhu and Haaja (eds), *Global Trade and Trade Governance During De-Globalization: Transforming Trade Policy for a Not-So-United World* (Springer 2022) 33–50.



environment.<sup>54</sup> Secondly, the core principle of the WTO system is non-discrimination among foreign “like products” as well as between foreign and domestic like products for a free and competitive market in international trade.<sup>55</sup> The MEAs, on the other hand, are discriminatory as they often require differential treatment for different countries.<sup>56</sup> Such conflict would mean that a country which is signatory to both the MEA and the WTO Agreements cannot comply simultaneously with the obligations under both of these treaties.<sup>57</sup> There are no specific rules or guidelines on what would happen in case of an actual conflict between the provisions of the GATT and trade-related environmental measures required by MEAs or taken under MEAs.<sup>58</sup> Moreover, the integrative mechanism between the WTO multilateral trading system and the environmental protection mechanism is quite fragile.<sup>59</sup> The formation and working procedure of the WTO is rules-based, and not adequately flexible to accommodate the innovative approach, which is a prerequisite for such integration of environmental commitments in the WTO functions.<sup>60</sup>

It is further argued that the power dynamics, along with the strength and capacity of the WTO mechanism and mechanisms under the MEAs, are crucial and should be underscored in any initiative in balancing trade and environmental issues.<sup>61</sup> Some argue that the organisation is “ill-equipped” as the domestic policies of the powerful countries, for instance, the USA, affect the international negotiation process.<sup>62</sup> The WTO is often helpless amid the power conflicts between the powerful nations, at present, between the USA and China. The developed nations are even less aligned with the core objectives of the WTO, which is the lowering of tariffs to facilitate international trade. A WTO study on tariffs from the period of 2006 to 2021 shows that developed countries have the “highest maximum tariffs” above 300 per cent over the 16 years, and the Least Developed Countries the lowest below 100 per cent, whereas the developing economies fall somewhere between these two groups.<sup>63</sup> With this power dynamics, where the developed countries are the highest polluters, it is less likely that the WTO could possibly be in agreement to trade off environmental protection for their national policy goal

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<sup>54</sup> Rieder (n 3) 47; see also, Gentile (n 5); Andy J Rich, ‘International Trade and the Environment: A Seething Antagonism?’ (2003) 12 *South Texas International Trade Law Journal* 17.

<sup>55</sup> GATT 1994 (n 1) arts I, III.

<sup>56</sup> Rieder (n 3) 49, 50.

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid* 193.

<sup>59</sup> Emma Lees and Jorge E Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (OUP 2019) 765.

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid* 766.

<sup>62</sup> Gregory Shaffer, ‘The Under-Examined Trade–Environment Linkage: Domestic Politics and WTO Disputes’ (Columbia University, 5–6 August 2005) 13.

<sup>63</sup> WTO, ‘The Evolution of Market Access over the 16-Year Period of World Tariff Policies’ (*WTO*, 2023) <[https://www.wto.org/english/res\\_e/statis\\_e/wtp2023\\_special\\_topic1\\_e.pdf](https://www.wto.org/english/res_e/statis_e/wtp2023_special_topic1_e.pdf)> accessed 16 March 2024.

of increasing economic growth through global trade. Moreover, traditionally, the core function of the WTO is to promote free trade, not address environmental concerns.<sup>64</sup> Accordingly, there is an opinion that instead of stipulating on their relationship with the WTO norms and advocating their incorporation, more positive measures should be used in MEAs to reach sufficient results in environmental protection, which can be done by such institutions as UNEP and UNDP, instead of bringing the discussion to the WTO.<sup>65</sup>

“The Committee on Trade and Environment (CTE)”<sup>66</sup> focuses on understanding the intersection between trade and environment to promote sustainable development. It also recommends necessary modifications to the multilateral trading system to align trade policies with environmental goals. In summary, the CTE plays a crucial role in harmonising trade and environmental considerations within the WTO. At the Doha Ministerial Conference in November 2001, ministers agreed to initiate negotiations regarding the connection between existing WTO rules and the specific trade obligations outlined in multilateral environmental agreements (MEAs). These negotiations aim to clarify how trade measures taken under MEAs align with WTO rules. The negotiations occur during “special sessions” of the Committee on Trade and Environment (CTE), where environmental and developmental aspects of international trade are discussed.<sup>67</sup> However, the role of the dedicated committee of the WTO has been limited as the 2001 Doha Round negotiations of the WTO members were halted by 2008.<sup>68</sup> It results in having the CTE with no clear mandate in harmonising trading rules and MEAs. The outcome of the failure of the Doha Round is also an undecided WTO trading system on environmental goods and services, and the issue of imposing tariffs on such goods and services, as well as subsidies.<sup>69</sup>

## 5. Challenges of Balancing Free Trade and Environmental Concerns in DSB

Since Article XX of the GATT, the only provision in the WTO rules is too broad and ambiguous, much of its application depends on the way the provision is interpreted. The words like “necessary”, “relating to”, “measures”, “exhaustible natural resources”, “arbitrary or unjustifiable discrimination”, “disguised restriction on international trade”, “like products”, etc. have come under the scrutiny of the DSB and have posed uncertainty and obstacles for countries

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<sup>64</sup> Rieder (n 3) 97.

<sup>65</sup> *ibid* 79.

<sup>66</sup> It was established in 1994 by a ministerial decision of the WTO to examine the relationship between trade and the environment and make recommendations on whether any modifications of the provisions of the multilateral trading system were required: see WTO, ‘Decision on Trade and Environment’ LT/UR/D-6/2 (15 April 1994).

<sup>67</sup> WTO, ‘The Doha Declaration Explained’ (n 50).

<sup>68</sup> *ibid*.

<sup>69</sup> Low (n 51) 274.

adopting trade-related environmental measures.<sup>70</sup> It is argued that too much flexibility of the Chapeau has allowed the Panel and the AB to give precedence to free trade over legitimate environmental concerns, and the Chapeau is, in effect, an obstacle in disguise to environmental measures.<sup>71</sup> The multistage tests for adopting an environmental measure in conformity with the WTO rules is such that no such measures taken by a country would ever pass the test.<sup>72</sup> A survey of the DSB cases finds that out of forty cases, involving Article XX exceptions, in only one case, namely *EC-Asbestos*, environmental exceptions are held to meet all the requirements of the tests under Article XX. For eight cases, Article XX was considered by the panels or the AB irrelevant as the defence; five cases did not pass the subject matter threshold, eighteen cases did not pass the “necessity” or “relating to” test, and the last eight cases did not meet the test of the Chapeau.<sup>73</sup>

Undoubtedly, the interpretation of Article XX in due consideration of MEAs may play a crucial role in making WTO rules and MEAs coexist and avoiding possible conflicts.<sup>74</sup> The DSB in its decision making is increasingly adopts multilateral environmental agreements as an aid to the interpretation in reaching its conclusion.<sup>75</sup> However, the case laws suggest that the WTO jurisprudence on adherence to MEAs in their decision-making has not developed in an entirely satisfactory and coherent manner.<sup>76</sup> It is argued that the DSB is mostly textualist and lacks adequate environmental/climate expertise in its panels. Therefore, the DSB is not adequately organised to do the risky balancing act involved in disputes having trade and environmental dimensions. Moreover, the interpretative solution based on a mutually supportive or evolutionary approach may be proved “temporary” due to the uncertainty and unpredictability of the position of the DSB members in interpreting cases.<sup>77</sup> The interpretation issue is also crucial in balancing developing countries’ trade interests and environmental obligations, and in protecting them from environmental “protectionism”. For example, in the *US-Tuna I and II cases*, both between the USA and Mexico, the DSB Panel invalidated the US trade restrictions that aimed to create a dolphin-safe catching of tuna fish. The DSB in both cases invalidated US trade embargo and upheld the objectives of free trade. It, however, benefited the economic and trade interests of Mexico, which long claimed that the US measure regarding Tuna fishing was an environmental protectionism.<sup>78</sup> Therefore, there exists a delicate competing

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<sup>70</sup> Rieder (n 3) 100, 195.

<sup>71</sup> *ibid* 195.

<sup>72</sup> *ibid* 195.

<sup>73</sup> Sanford E Gaines, ‘The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures’ (2001) 22(4) *Journal of International Economic Law* 770–774.

<sup>74</sup> Rieder (n 3) 142–143.

<sup>75</sup> Gentile (n 5) 223.

<sup>76</sup> Davey (n 4) 322.

<sup>77</sup> Rieder (n 3) 142–143.

<sup>78</sup> *ibid*.

concern between the economic interests of a country and environmental conservation that needs to be carefully balanced.

The trade-related environmental measures under the MEAs are often extraterritorial, but the extra-territorial application of Article XX is debatable.<sup>79</sup> The DSB is constrained by the reciprocity of member states complying with its decisions. Its decision is not *per se* binding on the states, though they often comply with it. If the countries do not comply, the DSB has no power to enforce it. This is why DSB has emphasised the multilateral environment-related trade measures rather than unilateral ones.<sup>80</sup> Because multilateral environmental measures are less likely to be anti-free trade and trade restrictive, and discriminatory. Unilateral trade measures are discouraged due to their potential to be abused. Unilateral measures are more likely to be invalidated by the DSB as demonstrated in the *US-Tuna I and II cases*.<sup>81</sup>

One emerging obstacle in making trade and environment dispute settlement balanced and consistent is *jurisdictional conflict* (emphasis added), the solution to which is unknown or unexplored.<sup>82</sup> The jurisdictional conflict is to occur among WTO/DSB, RTAs, and MEAs as the countries tend to resort to forum shopping. The WTO faces growing fragmentation of the world trade regime as regional trade agreements (hereinafter RTAs) are increasingly made. By March 2023, a total of 355 regional trade agreements covering both goods and services were in effect, up from 136 in 2005.<sup>83</sup> The share of RTAs containing green norms increased from 2% in 2000 to 15% in 2021.<sup>84</sup> Nations representing roughly 78% of global GDP participate in mega-regional trade agreements.<sup>85</sup> MEAs have trade provisions to address trade concerns independent of the WTO. The jurisdiction of these independent bodies to settle trade-environment disputes is vague and uncircumscribed.

The formation, procedure, and expertise involved in the DSB are crucial to coping with the emerging challenges of evolutionary interpretation and being relevant to effective dispute settlement forums when environmental matters come into conflict with trade. DSB being “the core pillar of the WTO system”, there currently exists an impasse over the appointment of the Appellate Body members due to the disagreement among member countries on the functioning of the

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<sup>79</sup> *ibid* 103.

<sup>80</sup> Gentile (n 5) 222–223.

<sup>81</sup> *ibid*.

<sup>82</sup> Rieder (n 3) 320.

<sup>83</sup> WTO, ‘Regional Trade Agreements Database’ (*WTO*) <<https://rtais.wto.org/UI/charts.aspx>> accessed 22 March 2024.

<sup>84</sup> UNCTAD, ‘SDG Pulse: Tackling Global Inequality through Collaborative Trade’ (*UNCTAD*) <<https://sdgpulse.unctad.org/trade-barriers/>> accessed 22 March 2024.

<sup>85</sup> Uri Dadush and Enzo Dominguez Prost, ‘Preferential Trade Agreements, Geopolitics, and the Fragmentation of World Trade’ (2023) 22(2) *World Trade Review* 278.

Appellate Body.<sup>86</sup> At present, the Appellate Body cannot hear appeals due to unfilled vacancies, with the term of its last serving member having ended on 30 November 2020.<sup>87</sup> Since then, the DSB is “under stress”.<sup>88</sup>

The DSB is not evenly represented by the regions that are most vulnerable to environmental crises, i.e., climate change. This uneven participation of countries is most reflected in the proceedings before the DSB. The present study finds that between 1 January 1995 and 31 December 2022, a total of 615 requests for consultations were circulated to the WTO membership and the USA, EU, and Canada alone filed 45% of the total complaints dealt with by the DSB Panel. Brazil, Japan, China, India, and Argentina are among those, which have actively participated in the DSB. The rest of the countries during this period shared only 18% of the total complaints made before the DSB.<sup>89</sup> The data also demonstrate that the big carbon emitters have the most presence in the WTO.

## **6. How Should the WTO Address the Challenges to the Balance between Environmental Protection and Free Trade**

### **A. Clearer and detailed WTO rules for environmental concerns in trade**

The WTO is a member-driven and consensus-based organisation. The fundamental problem to address environmental issues in trade lies in the WTO rules and its operational framework. Therefore, there should be fundamental reforms for adopting or amending WTO rules with clearly expressed and detailed environmental provisions. Its operational framework, especially the DSB, should be reformed to balance between trade and environmental problems. The clearer and detailed WTO rules and reformed operational framework will create “legal certainty” and “normative coherence among countries, foster international trade, and provide a solution for the long term”.<sup>90</sup>

In the short term, as the principal organisation of the multilateral global trading system, the WTO can play major role in supporting environmental protection by providing a facilitative trade framework and forum for open and informed dialogue among member states on their concerns and to share their experiences and knowledge.<sup>91</sup> Because the WTO is a consensus-based organisation, and

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<sup>86</sup> WTO, ‘WTO Director-General Launches Consultations on Resolving Appellate Body Impasse’ (*WTO*, 09 December 2023) [https://www.wto.org/english/news\\_e/news23\\_e/gc\\_09dec23\\_e.htm](https://www.wto.org/english/news_e/news23_e/gc_09dec23_e.htm) accessed 22 March 2024.

<sup>87</sup> WTO, ‘Appellate Body’ (*WTO*) <[https://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm#SnippetTab](https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm#SnippetTab)> accessed 22 March 2024

<sup>88</sup> Asselt (n 26) 433.

<sup>89</sup> WTO, ‘Dispute Data (Member as Complainants)’ (*WTO*) <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm)> accessed 17 March 2024.

<sup>90</sup> Susanne Droege and others, ‘The Trade System and Climate Action’ (n 13) 245.

<sup>91</sup> WTO, ‘Trade and Climate Change’ (*WTO*) <[https://www.wto.org/english/tratop\\_e/envir\\_e/climate\\_intro\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/climate_intro_e.htm)> accessed 17 March 2024.

without members being committed to clear and agreed-upon rules, the WTO has little power to do any meaningful work toward environmental protection. For instance, eliminating or lowering tariffs on environmental goods is under negotiation. Forty-six countries are engaged in negotiations to enter a plurilateral Agreement on Environmental Goods (EGA).<sup>92</sup> The WTO can play an effective role when such an agreement reaches consensus and becomes rules of trade. The major challenge of this approach is that it is too slow to protect the environment and ecology.

## **B. Adopting a Mutually Supportive/ Evolutionary Approach**

In only two cases, the DSB recognised and upheld environmental concerns. In the *Asbestos case*, the Panel allowed the trade ban on the importation of asbestos to protect the health of the construction workers.<sup>93</sup> In the *US-Shrimp case*, the panel emphasised that countries adopt such measures as based on cooperation for the protection of sea turtles.<sup>94</sup> The DSB has demonstrated that it can take an ‘evolutionary interpretation’ or “mutually supportive/harmonious interpretation” approach for greater environmental protection and balancing trade and environmental concerns.<sup>95</sup> Therefore, mutually supportive or evolutionary approaches should be adopted for the interpretation by the DSB and to reconcile the trade and environment conflicts, the working of the WTO.<sup>96</sup>

## **C. Empowering Committee on Trade and Environment in WTO Workings**

The Core duty of the CTE was to find and recommend ways to balance environmental and trade measures under MEAs and MTAs, respectively. The negotiations for a functional and effective CTE should be revived, which had started in the Doha Round of 2001.

## **D. Strengthening the DSB**

A strong and capable DSB is crucial to addressing environmental concerns in the global trade regime. The WTO should use all its platforms and capacities as an international organisation to foster dialogue and to expedite consensus-building among its member states on the reforms of the DSB, including the appointment of AB members. The composition of the DSB must be reformed, including necessary technical expertise as per Article 13 and Appendix 4 of the DSU.

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<sup>92</sup> WTO, ‘Environmental Goods Agreement’ (*WTO*) <[https://www.wto.org/english/tratop\\_e/envir\\_e/ega\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/ega_e.htm)> accessed 17 March 2024.

<sup>93</sup> *Appellate Body Report, US – Import Prohibition of Certain Shrimp and Shrimp Products* (n 43).

<sup>94</sup> *Appellate Body Report, EC – Measures Affecting Asbestos and Asbestos-Containing Products* (n 24).

<sup>95</sup> Rieder (n 3) 142–143.

<sup>96</sup> Elena Cima, ‘The Evolution of the Nexus: The Quest for Balance’ in Elena Cima (ed) *From Exception to Promotion* (Brill Nijhoff 2021) 148–211.

It is often argued that without the norms-building consensus among member countries, particularly the strong ones, the DSB could not be effective and could not address environmental concerns around which the world stands divided. Due to the rising rivalry between China and the USA, it is almost unlikely that the member states would be able to reach a consensus on the reforms of the DSB soon.

### **E. Collaboration Building with the International Environmental Organisations, for example, UNFCCC COP, UNEP, IUCN, ITLOS, etc.**

Many emphasize the collaboration between the WTO and environmental organisations for reducing the adverse impact of trade on the environment.<sup>97</sup> It is argued that the dialogue and joint work among the international environmental organisations, UNEP, IUCN, ITLOS, etc. can foster awareness and knowledge building among diverse stakeholders within and among countries. It may also reduce the policy gaps of countries and help them build consensus on different issues affecting the environment and trade.<sup>98</sup>

## **7. Conclusion**

The interactive relationship between Multilateral Trade Agreements (MTAs) and Multilateral Environmental Agreements (MEAs) has gained increasing recognition among policymakers and experts. WTO member states generally acknowledge the interdependence of the global trade and environmental regimes. However, significant divergence remains regarding how the WTO should move forward to achieve sustainable trade, where both trade and environmental objectives can coexist.

One of the primary challenges in balancing trade and environmental concerns lies in the inadequate and outdated nature of the WTO's rules and operational framework. The structural and procedural rules of the WTO are often criticised for favouring free trade at the expense of environmental protection, limiting the ability of member states to adopt broad trade-related measures for environmental purposes. The Dispute Settlement Body (DSB) is perceived as rigid, with complex and time-consuming procedures that hinder timely responses to pressing environmental issues. The DSB has so far upheld environmental concerns in only one case coming before it. It is also argued that the DSB lacks environmental expertise and is not proportionately represented by the countries that are the most vulnerable in terms of environmental protection. Similarly, the Committee on

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<sup>97</sup> Robert B Koopman and Mary Lisa Madell, 'A Fairer and More Resilient Multilateral Trading System Will Require a Reinvigorated WTO' (2023) 14 *Global Policy* 37.

<sup>98</sup> Avidan Kent, 'Implementing the Principle of Policy Integration: Institutional Interplay and the Role of International Organizations' (2014) 14(3) *International Environmental Agreements: Politics, Law and Economics* 210–212; Oren Perez, 'Multiple Regimes, Issue Linkage, and International Cooperation: Exploring the Role of the WTO' (2005) 26 *University of Pennsylvania Journal of Law* 735.

Trade and Environment (CTE), which is mandated to promote the trade-environment network, has not been effectively operationalised. Moreover, ongoing geopolitical tensions— particularly between the United States and China— have contributed to the weakening of the DSB and continue to pose serious challenges for the WTO in addressing environmental concerns within international trade.

Despite these obstacles, the WTO has reiterated its commitment to bridging trade and environmental objectives and fostering coherence between MTAs and MEAs in pursuit of sustainable development and shared global prosperity. The WTO could adopt new rules or amend existing ones to explicitly address environmental issues related to trade. In the short term, fostering meaningful dialogue among member states, including through plurilateral agreements, could lead to the eventual establishment of global norms. The DSB and the CTE must be strengthened and function effectively. Within its current framework, the DSB may resort to mutually supportive or evolutionary approaches in interpreting the WTO rules to uphold environmental priorities in trade disputes. The WTO can also play a significant role by actively cooperating with other international environmental organisations such as UNEP, ITLOS, UNFCCC, and IUCN. As the world approaches a potential tipping point in environmental degradation, the WTO must employ every available option to support global environmental protection.