

# The Application of Multilateral Environmental Agreements in the WTO Dispute Settlements

Azene Endalamaw Basazinew\*

**Abstract:** - The WTO dispute settlement system has dealt with environmental disputes more frequently than any other international court or tribunals. None of these cases involved MEAs trade measures. The author argued that the main problem is the institutional discrepancies of the trade and environmental spheres. Also the applicability of GATT article XX (b and g) to the MEAs is uncertain given the inconsistent interpretation of terms. The author recommends there must be some harmonization between them to coexist. Also the exceptions listed in GATT article XX have to make reference to MEAs.

**Keywords:** Dispute settlement, GATT, MEAs, WTO

## I. INTRODUCTION

The most fundamental and divisive issue confronting the World Trade Organization (hereinafter the WTO) in the trade and environment debate has been whether trade restrictions to protect the environment are permissible under the law of the GATT/WTO system.<sup>[1]</sup> The inter face of trade and environment in the global arena in a multilateral setting is characterized by both trade regimes and environmental regimes. There is no better way for sustainable development to be implemented than by linking its economic, human development, and environmental cornerstones. It is at this intersection where benefits such as improved living conditions can be maximized.<sup>[2]</sup>

The WTO dispute settlement system has dealt with environmental disputes more frequently than any other international court or tribunal.<sup>[3]</sup> One of the explanations is that the close connection between trade and environmental protection makes it impossible to prevent linkage disputes such as Shrimp-Turtle, Asbestos, Hormones or Biotech from being brought up in the WTO dispute settlement system.

This paper seek to analyze the application of Multilateral environmental agreements (hereinafter MEAs) in the WTO dispute settlements. This is followed by critically analysis of their relationship and environmental consideration in the WTO dispute settlements. Finally, this paper will wind up by giving some conclusions.

## II. THE RELATIONSHIP BETWEEN MULTILATERAL ENVIRONMENTAL AGREEMENTS AND THE WTO REGIME

---

\* LL.B (Haramaya University); the author served as a Judge in Oromiya Court and Legal researcher at Oromiya Justice Sector Professional's Training and Legal Research Institute and is currently on study leave.

The objective of WTO is to deals with the rules of trade between nations at a global or nearglobal level.<sup>[4]</sup> It is a place where member governments go to negotiate and try to sort out the trade problems they face with each other <sup>[5]</sup> to ensure that trade flows as smoothly, predictably and freely as possible, with a level playing field for all its members.<sup>[6]</sup>

However WTO is not only liberalizing trade, but also in some circumstances its rules support maintaining trade barriers to protect consumers, prevent the spread of disease or protect the environment<sup>[7]</sup> and optimal use of the world's resources and Sustainable development is an objective of the WTO, as reflected in the Preamble of the Marrakesh Agreement Establishing the WTO<sup>[8]</sup>. It also states that ministers have furthermore adopted a Decision on Trade and Environment.<sup>[9]</sup> This was clearly reaffirmed in the Doha Declaration in 2001.<sup>[10]</sup>

The objective of MEAs may be of local, regional or global significance<sup>[11]</sup> which are specially governed by United Nations Framework Convention on Climate Change (UNFCCC) focused on to act or not act in a certain way to protect, conserve or enhance the environment.<sup>[12]</sup> These commitments focus on results and employ various mechanisms like control measures, standards or limitations, including specific bans and/or quantifiable targets or it could be focus on process by prior informed consent<sup>[13]</sup>... etc.

The balance between environmental protection and free trade has started to become an international agenda in the early 1970's i.e. since the first conference on Human Environment (UNCHE) in Stockholm, 1972.<sup>[14]</sup> However, various research findings put into words there has been debate as to whether trade practices conflict with environmental protection.<sup>[15]</sup>

The preamble underscores for the members to WTO to reiterate the issue of environment whenever they endeavor to negotiate so as to develop and foster trade liberalization. Furthermore, the responsibility of the WTO is much widened in which trade policies now encroach into other ministries' responsibilities in sectors such as the environment, public health, international development cooperation, culture, and so on<sup>[16]</sup>. As a result, environmental and trade policies become intertwined.<sup>[17]</sup>

Various scholars attempt to finger out the interlocution and the intertwined relationship between WTO and MEAs are suggested as irreconcilable conflict. According to their view, free trade is responsible for many aspects of environmental degradation and for the failure of policy makers to adequately protect the environment.<sup>[18]</sup> For instance, the case of

tuna/dolphin and shrimps/sea turtle decision could affect many other international environmental issues, such as forest protection, ozone depletion, hazardous wastes, and global climate change.<sup>[19]</sup> Moreover, trade rules may restrain the use of trade measures in multilateral environmental agreements.<sup>[20]</sup>

The current WTO jurisdiction on linkages of trade and environment is not free of contradictions and has provided for heated debate due to some inconsistencies in past WTO rulings.<sup>[21]</sup> Therefore, the trade environment interface has historically been characterized in conflictual terms. Because International trade rules can potentially inhibit States' efforts to meet MEA objectives.<sup>[22]</sup> And most MEAs are always stands in favor of protecting the environment irrespective of free trade movements.<sup>[23]</sup>

### III. ENVIRONMENTAL CONSIDERATION IN THE WTO AGREEMENTS

Some indications of environmental protection were included in WTO agreements. The preamble of the WTO Agreement states the relationship between trade and environment listing the economic aims of prosperity and growth for all members through trade liberalization and also by protecting and preserving the environment.<sup>[24]</sup> SPS also promotes international standards but allows countries to set their own higher standards of safety if there is scientifically evidenced reason for this. Hence trade measures employed under this agreement to protect human, animal or plant life or health and the environment typically target dirty goods.<sup>[25]</sup> But, the GATT articles explicitly didn't include the word environment under article XX (b and g).

GATT article XX (g) refers exhaustible resources rather than environment.<sup>[26]</sup> Because of this we could see in disputed cases when this issue is raised as an argument. For example, in US prohibition of imports of Tuna and Tuna Products from Canada the panel justified under Article XX (g) of the GATT and to be consistent with the chapeau of Article XX. However, as the panel found no equivalent restrictions on domestic production and consumption of tuna, it ultimately found the measure failed the requirement of article XX (g).<sup>[27]</sup> The United States argued the measures were justified under Article XX (g) as it was an exhaustible natural resource. In this case US, Canada and the panel were considered article XX (g) as it stands only for the protection of exhaustible natural resources rather for environmental protection.

Most of the environmental exceptions have been attempted over the years seeking cover under GATT exceptions via Article XX. However, most of the disputed cases that supposedly involved environmental protection lost their standing because of the chapeau. For example, in Shrimp/Turtle, the AB held that the U.S measure which prohibited imports of shrimp from any country that did not have a turtle-conservation program comparable to that of the US fit the Article XX (g) exception for conservation of

exhaustible natural resources. However, the AB also found that the U.S. measures had been applied in a way that violated the chapeau: by treating certain Asian countries differently than its trading partners, the U.S. had engaged in unjustified and arbitrary discrimination.<sup>[28]</sup>

In the US reformulated Gasoline the AB determined that the measures qualified as sufficiently relating to the conservation under Article XX (g). Then, AB turned to chapeau and concluded that the baseline establishment rules constituted both 'unjustifiable discrimination' and a 'disguised restriction on international trade. The measures thereby failed to meet the requirements of the Article XX chapeau.<sup>[29]</sup>

This would be to ignore the fact that Article XX of the General Agreement contains provisions designed to permit important state interests including the protection of human health, as well as the conservation of exhaustible natural resources to find expression. In the preamble to the WTO Agreement and in the Decision on Trade and Environment,<sup>[30]</sup> there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment, their environmental objectives and the environmental legislation they enact and implement.

Generally we could understand from this even if there is some indication for environmental protection in practice there is a problem of giving due consideration to it.

Most trade agreements will allow for unilateral trade-restricting measures for environmental protection purposes. None explicitly articulate an exception for measures pursuant to a MEA or even the environment. Article XX of the GATT stipulates that parties can adopt or enforce measures necessary to protect animal or plant life or health or measures relating to the conservation of exhaustive natural resources.<sup>[31]</sup> Other trade agreements import the Article XX exceptions into its text although they can be modified.<sup>[32]</sup>

Some MEAs is inconsistent with WTO. For example, as with the Montreal Protocol and CITES, there is no explicit GATT compatibility language in the Basel Convention. As a result, there is no specific requirement that WTO obligations are to be taken into consideration when adopting or implementing any trade measures relating to hazardous wastes, suggesting that the parties intended to keep hazardous waste a distinct and separate class of products, not subject to international trade obligations.<sup>[33]</sup> One can refer to the case of *S.D. Myers Inc. v. Canada*,<sup>[34]</sup> which held that where a NAFTA party had a choice among equally effective and reasonably available alternatives for complying with the Basel Convention, they should choose the alternative least inconsistent with NAFTA.

### IV. APPLICATION OF MEAS IN ENVIRONMENTAL DISPUTE SETTLEMENT IN WTO SYSTEM

The WTO dispute settlement system has dealt with environmental disputes more frequently than any other international court or tribunal.<sup>[35]</sup> One of the explanations is that the close connection between trade and environmental protection makes it impossible to prevent linkage disputes such as Shrimp-Turtle, Hormones or Biotech from being brought up in the WTO dispute settlement system. The second reason relates to institutional discrepancies between the trade and environmental spheres. In contrast to the compulsory jurisdiction by the WTO dispute settlement system, the most prominent MEAs do not contain any provisions for legally binding dispute resolution.<sup>[36]</sup>

The use of trade measures in MEAs is widely recognized to be in potential conflict with the GATT/WTO regime. In particular, trade measures that are specifically directed at non-parties of MEAs may be in violation of GATT/WTO Most Favoured Nation<sup>[37]</sup>, national treatment<sup>[38]</sup>, and the prohibition on quantitative restriction obligations.<sup>[39]</sup> The applicability of Article XX (b) and XX (g) to the MEA trade measures is uncertain given the inconsistent interpretations of such article XX terms as arbitrary and unjustified, disguised restriction on international trade, necessary, relating to the conservation of exhaustible natural resources and the extra jurisdictional relevance of).<sup>[40]</sup>

The jurisprudence under the WTO has shown an expansive interpretation of Article XX revealing an approach that can accommodate MEA measures. The Shrimp-Turtle,<sup>[41]</sup> Asbestos<sup>[42]</sup> and US Gasoline<sup>[43]</sup> rulings have renewed optimism that future cases can address the MEA-WTO relationship in a positive way. None of these cases have directly involved MEA trade measure but the evolutionary rules of treaty interpretation, requiring the WTO Agreements to be interpreted in light of the contemporary concerns of the community of nations about the protection and conservation of the environment has opened the door for a broader interpretation of Article XX. The exceptions permit States to take measures that restrict trade for the purpose of environmental protection, irrespective of any relationship between the MEA and the measure.

The problems that arise in the consideration of MEAs in the WTO dispute settlement are the applicability of the agreement in case of conflict. The Vienna Convention state that when the provisions of two treaties relating to the same subject matter are in conflict, the later in time prevails unless one of the treaties expressly specifies otherwise.<sup>[44]</sup> The existence of trade measure in the environmental agreements and the existence of exceptions in GATT suggest that certain provisions of the agreements may relate to the same subject matter.<sup>[45]</sup> The GATT 1994 is more recent than multilateral environmental agreements.<sup>[46]</sup> It seems as these prevails over MEAs. Although not stated in the Vienna convention, specific treaties or provisions prevails over general treaties or provisions even if the general provisions are later in time. GATT is a more general international agreement than MEAs,

the later may control if there is a conflict. Yet these contending arguments got any consensus among scholars.

Conflict between MEAs and trade rules seem to require some harmonization of the two regimes so that they can coexist.<sup>[47]</sup> The effectiveness of the WTO dispute settlement process, and the authority it enjoys among all members, is a clear demonstration of WTO power. Some environmentalists argue that this immense power has lead to an erosion of national sovereignty and has made it possible to weaken national environmental policies.<sup>[48]</sup>

The basic WTO rules require members not to discriminate between members like products,<sup>[49]</sup> or between domestic and international production.<sup>[50]</sup> MEA based measures could potentially run afoul of these requirements where imports are treated less favourably than domestic goods in the market particularly where enforcement measures are being taken against non complying parties or non parties. The exception requirements listed in GATT article XX make no reference to MEAs. However, the exceptions for the protection of animals, human and public health, and the conservation of exhaustible natural resources may be applicable. Some of these exceptions have been used in various environment related cases at the WTO, though to date none of these have involved measures taken under MEAs.<sup>[51]</sup>

Generally, from the above analysis one could understand as there are fewer places for the application of MEAs in WTO dispute settlement.

## V. CONCLUSIONS

The issue of environmental protection has become increasingly important on the international agenda. At the same time liberalization of international trade receives much attention from those involved in it. This creates unconformity between the multilateral agreements established to govern them. WTO rules seek to remove barriers to trade and MEAs use trade barriers as a means of eliminating specific environmental problems. Reconciling these two is very important both to achieve their respective objectives.

Having conservation and protection of environment mean protection of the humans, animals and all biodiversities live. Therefore, whether it is a member or not to MEAs, it will be just for all states to give a first priority for the conservation and protection of the environment than the trade activities whenever the issue of trade and environment is in conflict. Moreover, as between parties to a MEA, both of which WTO members are, the MEA ought to operate as *lex specialis* of Vienna Convention on the Law of Treaty or an agreed derogation from WTO rules are relevant to be applied.

MEAs and the WTO agreements could be interpreted in a manner that avoids a reading that one agreement requires what another prohibits. The states also should not attempt to take the advantage of the exception provisions of the GATT by interpreting broadly.



GATT article XX refers to exhaustible resources rather than environmental protections and it is useful to revise the terminology so as to pay adequate attention to non-renewable resources in the interests of the environmental, ecological and ecosystem services and its application of must refer the MEAs.

## REFERENCES

- [1]. Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, COLUMBIA JOURNAL OF ENVIRONMENTAL LAW, Vol. 27:2, p.489.
- [2]. World Trade Organization, *Trade and Environment at the WTO 1* (2004).
- [3]. Kati Kulovesi, *THE WTO DISPUTE SETTLEMENT SYSTEM AND THE CHALLENGE OF ENVIRONMENT AND LEGITIMACY* (A thesis submitted to the Law Department of the London School of Economics for the degree of Doctor of Philosophy) 106 (2008).
- [4]. World Trade Organization, *Understanding the WTO* (2015), available at: WWW.wto.org. (Accessed on 24/02/2017)
- [5]. Id.
- [6]. World Trade Organization and Convention on International Trade in Endangered Species of Wild Fauna and Flora *Enhancing Cooperation for Sustainable Development* (2015), available at: WWW.CITES\_WTO\_Brochure\_72.Pdf . (Accessed on 24/02/2017)
- [7]. WTO, *Supra note 4*
- [8]. WTO, *Supra note 6*
- [9]. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994
- [10]. They stated that 'We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. See, WTO Doha Ministerial Declaration, 14 November 2001, para 6.
- [11]. P. K. Rao, *International Trade Policies and Climate Change Governance* (2012)
- [12]. UNEP, *Multilateral Environmental Agreement Negotiator's Handbook 2-2*(2007)
- [13]. Id. at 1- 9
- [14]. Yanti Ahmad Shafiee, *Regulatory Trade Restrictions to Protect the Domestic Environment: The case of Malaysia*, The Macrotheme Review 3(1)A, Spring 2014 at 54
- [15]. Tiffany Mathiason and Angela Cabral, *Symposium: Managing the Global Environment through trade: WTO, TTP, and TTIP Negotiations, and Bilateral Investment Treaties Versus Regional Trade Agreements* 377-381 (2013-2014)
- [16]. Urs P. Thoma, *Trade and the Environment: Stuck in a Political Impasse at the WTO after the Doha and Cancun Ministerial Conferences* 10 (2004)
- [17]. Annick Emmenegger Brunner, *Conflicts Between International Trade and Multilateral Environmental Agreement*, Annual Survey of Inter'l and Comp. Law, Vol, 4:1 at 75.
- [18]. Eric Neumayer, *Trade and the environment: A Critical Assessment and some Suggestions for Reconciliation*, Journal of Environment and Development, 9 (2), 2000, pp. 138-159.
- [19]. Neumayer, *Supra note 18*
- [20]. Paul Ekins, *Trade and Environment 6 -7* (2003)
- [21]. Setareh Khalilian, *The WTO and Environmental Provisions: Three Categories of Trade and Environment Linkage*. February (2009), available at <http://www.ifw-kiel.de>. (Accessed on 20/02/2017).
- [22]. Kevin R. Gray, *Accommodating MEAs in Trade Agreements (International Environmental Governance Conference) 1-2* (2004)
- [23]. *For instance, Basel Convention of 1989 states in its preamble that Convinced that States should take necessary measures to ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with the protection of human health and the environment whatever the place of disposal, otherwise any State has the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes in its territory. See, United Nations Environment Programme, Trade-related Measures and Multilateral Environmental Agreements, 2007. The Convention on International Trade in Endangered Species (CITES) prohibits trade in listed species unless the exporting country and the importing country each determine, inter alia, that the trade will not be detrimental to the survival of the species and the importing country determines that the specimen will not be used for primarily commercial purposes. See, UN Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973. The Montreal Protocol does not restrict trade between parties, but bans trade in listed ozone depleting substances with non-parties unless the non-parties have been determined by the parties to Montreal to be in full compliance with its restrictions on production and consumption. See, UN Montreal Protocol on Substances that Deplete the Ozone Layer, 1989.*
- [24]. Khalilian, *Supra note 21*, at 6
- [25]. Khalilian, *Supra note 21*, at 9
- [26]. *General Agreement on Tariffs and Trade, Oct. 30, 1947, (hereinafter GATT), Article XX (g)*
- [27]. Nathalie Bernasconi et.al, *Environment and Trade: A Guide to WTO Jurisprudence* 87(2006)
- [28]. Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, COLUMBIA JOURNAL OF ENVIRONMENTAL LAW, Vol. 27:2, 503(2002)
- [29]. World Trade Organization, *WTO Dispute Settlement: One-Page Case Summaries* 7 (2012).
- [30]. *Adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994.*
- [31]. GATT, *Supra note 16*, article XX (b and g)
- [32]. *For instance, Article 2101(1) of the NAFTA incorporates Article XX explicitly, while offering supplementary textual interpretation Article XX (b) is to include "environmental" measures necessary to protect human, animal or plant life or health, while Article XX (g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.*
- [33]. V. Yu, *Discussion Paper on the World Trade Organisation and Multilateral Environmental Agreements* 9 (2002).
- [34]. S.D. Myers v. Government of Canada, *International Legal Materials* 40 (2001).
- [35]. Kulovesi, *Supra note 3*
- [36]. *Instead, agreements such as the Montreal Protocol on Substances that Deplete the Ozone Layer, the CITES, the Kyoto Protocol and the Cartagena Protocol have created non-compliance systems, which typically focus on gathering information, monitoring and inspection, and the legally binding nature of their decisions is questionable. See, Kulovesi, Supra note 3, at 106 and 107*
- [37]. GATT, *Supra note 16*, Article I
- [38]. Id. Article III
- [39]. GATT, *Supra note 16*, Article XI
- [40]. GATT, *Supra note 31*
- [41]. World Trade Organization, *United States Import Prohibition Of Certain Shrimp And Shrimp Products, Report of the Panel WT/DS58/R* (15 May 1998)
- [42]. World Trade Organization, *EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS – CONTAINING PRODUCTS, Report of the panel WT/DS135/R* (18 September 2000)
- [43]. World Trade Organization, *United States Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body* (1998)
- [44]. Vienna Convention on the Law of Treaty, 1155 U.N.T.S.331, 8 I.L.M.679, 1980, Art. 30
- [45]. Brunner, *Supra note 17*, at 87

- [46]. *John H. Knox, THE JUDICIAL RESOLUTION OF CONFLICTS BETWEEN TRADE AND THE ENVIRONMENT, Harvard Environmental Law Review, Vol. 28 at 88*
- [47]. *Id.*
- [48]. *Khalilian, Supra note 21, at 10*

- [49]. *GATT, Supra note 37*
- [50]. *GATT, Supra note 38*
- [51]. *Duncan Brack and Kevin Gray, Multilateral Environmental Agreements And The WOT Report 19(2003)*

RSIS