

The Legal Inter-Linkages: Trade: Environment: Development

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Abstract: Problem statement: Multilateral trade agreements or the world trade organization rules-can trade and environmental laws be in harmony? **Approach:** The main aim of the research is to find out whether there is any pathway or solution to the disputes that arises when a country trades certain specific goods which poses a threat to the world at large. Our main focus lies in the fact that does the dispute resolution mechanism serves its duty well. **Results:** Trade in everything implies an environmental impact of some sort or the other. One of the central issues of the debate is the difficult relationship between Trade Related Environmental Measures (hereinafter 'TREMs') in Multilateral Environmental Agreements (hereinafter 'MEAs') and World Trade Organization (WTO) norms. **Conclusion:** The international community must find a way to balance environmental and trade interests. Development and the environment are invariably related to each other. Hence an essential and grave problem is to maintain harmony between development and the environment. Hence the central aim of this paper is to find out whether international law has any answers regarding the overlapping boundaries of trade and environment. In future "Best efforts" can be taken to equate to the diplomatic negotiation of a settlement by the parties to the dispute.

Key words: Multilateral Environmental Agreements (MEAs), development, environment, trade, dispute, threat

INTRODUCTION

The trade and environment debate is not new. The link between trade and environmental protection, consisting of both the impact of environmental policies on trade, as well as the impact of trade on the environment, was recognized as early as 1970^[1]. In the early 1970s, there was growing international concern regarding the impact of economic growth on social development and the environment^[1]. This debate and the rising concern among the countries led to the 1972 Stockholm Conference on the Human Environment. The 1990s marked the origin of the debate between the trade and environment.

The link between trade and the environment is very complex. Trade liberalization is of itself neither necessarily good nor bad for the environment. The two main objectives namely protection of the environment and the liberalization of the trade revolve around the inter-relationship between the Multilateral Environmental Agreements (MEAs) and the multilateral trading system^[2]. At a broader level trade and environment represent two distinct bodies of the international law.

Origin of the MEAS and WTO: MEAs are agreements between states, which may take the form of

"soft-law", setting out non-legally binding principles, which parties will respect when considering actions which affect a particular environmental issue, or "hard-law" which specify legally-binding actions to be taken to work toward an environmental objective^[3]. Over the past 20 years, an extraordinary number of international environmental agreements have been concluded^[4].

The foundations of the international trade regime date back to 1947 when the General Agreement on Tariffs and Trade was sealed. This Agreement, salvaged from an un-ratified bigger agreement called the International Trade Organization, was one piece of the so-called Bretton-Woods system, designed in the post-World War II environment to endorse and manage global economic development. GATT established the two requirements which were the need to lower and eliminate tariffs and creating obligations to prevent or eliminate other types of impediments or barriers to trade.

The last of these negotiations, the "Uruguay Round," concluded in 1994. The Marrakech Agreement Establishing the World Trade Organization marked the end of the Round. It also created the World Trade Organization. The main functions of the WTO can be described in very simple terms. These were to oversee implementation and administering WTO agreements; to

provide a forum for negotiations and to provide a dispute settlement mechanism.

History and the context of the MEAS: Environmental treaties dates back to the 19th century, a large number of MEAs have been adopted since 1972 United Nations Conference on Human Environment often referred to as the Stockholm Conference. The present discussion is with reference to two types of multilateral agreements:

- A set of agreements that relates to preservation of the environment, such as preventing global warming, rise in sea level, ozone depletion they have either a direct or indirect impact on the economic performance of a country
- Agreements that link trade and the environment; these include measures to discourage the export of certain products or materials which are produced using unsound environmental practices, or discourage the imports of hazardous materials^[5]

Origin of the environment-trade debate: The Stockholm conference on the environment in 1970 is regarded as the first major international conference on environment issues in the UN system. During the preliminary stage the Stockholm Conference, the Secretariat of the GATT was called on to make a contribution. On the Secretariat's own responsibility, a study entitled "Industrial pollution control and international trade" was prepared. At the November 1971 conference of the GATT Council of Representatives, it was settled that a Group on Environmental Measures and International Trade (also known as the "EMIT Group") be established. Until 1991 no request was put forward for the activation of the organization. During the Tokyo Round of trade negotiations (1973-1979) Agreement on Technical Barriers to Trade, identified as the "Standards Code", was negotiated. There was superficial reference to it in the GATT, but it was not until late in the processes of the Uruguay Round (the Uruguay Round began in 1986 and ended in 1994) that Western NGOs made an issue of the need to include the impact on trade of the WTO^[6].

The issue, which triggered interest, was the Tuna/Dolphin dispute. GATT panel acting on the complaint of Mexico had declared that some of the bans that are imposed by United Nations on imports of tuna were illegal in nature.

US environmental groups demonized the GATT in the United States and promoted the adverse impact of free trade on the environment as a populist platform to generate opposition to the North American Free Trade

Agreement (NAFTA) that was being negotiated in 1990/91^[6]. In 1987, the World Commission on Environment and Development fashioned a report entitled *Our Common Future* (also known as the Brundtland Report), in which the term "sustainable development" was produced. Public Citizen, Ralph Nader's consumer advocacy and Friends of the Earth, who led the anti-free trade campaign in the United States, raised calls to introduce environment issues in the WTO as the Uruguay Round moved to conclusion in the early nineties^[6]. The activation of the EMIT group was followed by further developments in environmental fora. In 1992, the UNCED, also known as the "Earth Summit", drew attention to the function of international trade in poverty mitigation and in combating environmental dilapidation.

These protests mark the greater participation of the NGOs and the discriminating norms established by the Multilateral Environmental Agreements (MEAS) in relation to WTO. Environmental NGOs in Europe and North America presupposed that the "rainbow coalition" (The rainbow coalition united Greens, Reds (socialists), Blues (unions) and Social Development Groups in common cause for change. It rested on the fallacy that the interests of Western NGO Social Development Groups were the same as the Governments of Developing Countries) concept of collaboration among NGOs would work in the trade and environment issue^[6]. The developing countries rejected suggestions that they should accept restrictions on emissions of greenhouse gases and they strongly supported the Agenda 21 Declaration that trade measures should not be used to protect the environment.

This apparent difference in approach can be accounted for by difference in perspectives adopted by trade and environment officials in developing countries^[6]. There are significant differences towards trade and environment issues among industrialized economies^[6]. Since every country had their own way of handling the trade and the environmental issues and on top of that the developing countries were not ready to follow the trade restrictions to protect the environment. The trade and environment controversy emerged which in turn lead to the debate between the MEAs and the WTO.

Challenges faced in implementation of MEAS: We can cite some other examples where due to these agreements there is loss of competitiveness of the country in the international market. We can cite the example of Pakistan where the country's cotton textile exports manufacturers are losing competitiveness as its

trading partners are becoming increasingly aware of their environmentally unsound process of production, this in turn is hampering the trade relations of this country with the other nations. Some Pacific island products, such as timber (Fiji, Papua New Guinea, Solomon Islands and Vanuatu) and squash (Tonga) are facing a decline in exports owing to environment-related restrictions^[5].

Although these above cases are seen as threats but then these environmental measures can be also seen as a platform for sustainable development. We can also take the example of Fiji where we found that it is losing its competitiveness but it can do away with it if it can shift to organic sugar production to regain an advantageous position in the market, as organic sugar receives considerable price premiums over conventional sugar. In spite of the above-cited doubts, in general multilateral agreements have played a useful role in promoting the usage of environmentally sound technologies and increasing consciousness about sustainable development^[5].

Enforcement of trade-measures in MEAs and its conflicting nature: The application of some trade measures in MEAs could create discord with certain principles and rules of the World Trade Organization (WTO). The germane principles in the General Agreement on Tariffs and Trade (GATT) 1994 are in Articles I, III and XI. The Most-Favored Nation (MFN) principle of Article I prohibit discrimination among products on the basis of their national origin. Most MEAs have diverse provisions for parties and non-parties. The National Treatment (NT) principle of Article III requires parties to minister foreign products the same as “like” domestic products. In some WTO contretemps, the dispute settlement panels and the Appellate Body had to make ruling on whether or not environmental regulations make products differ even though they are physically similar. Article XI on general elimination of quantitative restrictions requires no limits or restrictions other than duties, taxes or other charges, whether made effective through quotas, import licenses or other measures on imports and exports. Trade restrictions may be crucial to achieve objectives of an MEA, but they would violate GATT Article XI.

GATT Article XX offers two general exceptions related to environment: (i) de rigueur to guard human, animal or plant life or health (sub-paragraph (b)) and (ii) conservation or preservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (sub-paragraph (g)). These exceptions are subject to the requirement that such measures are not

applied in a manner which would constitute a means of prejudiced or unwarrantable differentiation between countries where the same circumstances prevail, or a disguised restriction on international trade. According to WTO jurisprudence, a state wanting to use a trade-restrictive measure must give justification for using GATT Article XX sub-paragraph (b) or (g) and must justify that the measure does not infringe GATT Articles I, III and IX. The state must show that the measure is “necessary” to preserve the environment. The necessity test necessitates that there is no reasonably alternative measure.

There are several cases in which countries face challenges which can be looked upon either as an opportunity or a threat. We can take the case of Myanmar, its admittance as a member of ASEAN means it will have to adapt to a programme adopted by ASEAN Senior Officials on the Environment. In such cases the development of the membership of Myanmar can be viewed as an opportunity for the country or it can also be seen as a threat, as the country will have to undertake fundamental changes in its institutional structures and operations

WTO institutions advance dialogue and understanding of trade and environment linkages:

In April 1994, a Ministerial Decision on Trade and Environment was adopted, calling for the establishment of a Committee on Trade and Environment (CTE)^[1]. The CTE is composed of all WTO Members and a number of observers from inter-governmental organizations. One unique institutional venue is the Committee on Trade and Environment (CTE). Its functions constitute in identifying the relationship between trade measures and environmental measures, in order to promote sustainable development; to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system. Other WTO bodies are also important. For example, the committee administering the Technical Barriers to Trade Agreement (which deals with regulations, standards, testing and certification procedures) is where governments share information on actions they are taking and discuss how some environmental regulations may affect trade.

Interaction of MEA trade measures with the WTO:

Cites convention: The treaty contains language that could ensure mutual supportiveness with WTO requirements. Article XIV (2) stipulates that: the provisions of the present Convention shall in no way

affect the provisions of any domestic measures or the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking, possession or transport of specimens which is in force or subsequently may enter into force for any Party including any measure pertaining to the customs, public health, veterinary or plant quarantine fields^[2].

Montreal protocol: In 1999 the Ozone Secretariat issued a communication to the WTO Committee on Trade and Environment noting that the measures could be 'saved' under Article XX since the ozone layer is an exhaustible natural resource and its depletion adversely affects human, animal and plant life and health; there would not be any arbitrary or unjustifiable discrimination since the Montreal Protocol is a multilateral instrument based on an international consensus relating to the scientific assessment of what is necessary to protect the ozone layer^[2].

Basel convention: In this convention, 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^[2].

Convention on biological diversity and the Cartagena protocol on bio-safety: Cartagena is a Protocol to the CBD, covering trade in most forms of Living genetically Modified Organisms (LMOs) and the risks it may present to biodiversity. It sets out a procedure for countries to decide whether to restrict imports of LMOs.

United nations framework convention on climate change and the Kyoto protocol: It aims to stabilize the emission of various greenhouse gases (such as carbon-dioxide or methane) that contribute to global climate change. Since such emissions can rarely be limited with technical, "end-of pipe" technologies, the principal strategy of the UNFCCC must be to change the patterns of future production, consumption and investment in favor of activities that emit fewer greenhouse gases.

Rotterdam convention on the Prior Informed Consent (PIC) procedure for certain hazardous chemicals and pesticides in international trade: The Rotterdam Convention is designed to help countries

monitor and control trade in certain hazardous chemicals. For years there was controversy over the procedures to ensure that the appropriate authorities in the importing country were informed promptly. The PIC regime offers assurance that information will be provided quickly and that it will reach the appropriate authorities when needed.

Stockholm convention on Persistent Organic Pollutants (POPS): It establishes an international regime for the control of certain substances that persist in the environment and can accumulate in the food chain, all of which are suspected of disrupting hormonal functions in animals and humans. The controlled substances are listed in three annexes: one that envisages elimination of nine chemicals or classes of chemicals (subject to time limited exceptions), one that imposes restrictions on DDT and one that deals with the unintentional production of certain chemicals.

"Under WTO rules members can adopt trade-related measures aimed at protecting the environment". Moreover, WTO rules, including specialized agreements such as the Agreement on Technical Barriers to Trade (which deals with product regulations) and the Agreement on Sanitary and Phytosanitary Measures (which concerns food safety and animal and plant health), provide scope for environmental objectives to be followed and for necessary trade-related measures to be adopted.

A number of WTO cases have covered environmental measures: Since the entry into force of the WTO in 1995, the WTO Dispute Settlement Body has had to deal with a number of disputes concerning environment-related trade measures.

In the US-Shrimp dispute, the WTO pushed members towards a strengthening of their environmental collaboration; it required that a cooperative environmental solution be sought for the protection of sea turtles between the parties to the conflict.

The European Communities justified the prohibition of Chrysotile asbestos on the grounds of human health protection, arguing that asbestos was hazardous not only to the health of construction workers subject to prolonged exposure, but also to population subject to occasional exposure. Despite finding a violation of Article III, the Panel ruled in favor of the European Communities.

We can also put forward the US-Gasoline case which followed the 1990 amendment to the Clean Air Act, the US Environmental Protection Agency (EPA) promulgated the Gasoline Rule on the composition and

emissions effects of gasoline, in order to reduce air pollution in the United States. The Gasoline Rule allowed only gasoline of a specified cleanliness ("reformulated gasoline") to be sold to consumers in the most polluted areas of the country.

In another case known as the US-Tuna case the importation of yellowfin tuna harvested with purse-seine nets in the ETP (Eastern Tropical Pacific Ocean) was prohibited (primary nation embargo), unless the competent US authorities established that (i) the government of the harvesting country had a programme monitoring the taking of marine mammals, comparable to that of the United States and (ii) the average rate of incidental taking of marine mammals by vessels of the harvesting nation was comparable to the average rate of such taking by US vessels.

These are some of the cases where the WTO has altered the trade provisions in favor of the environment.

Legal and policy linkages: It has been reviewed previously that environmental law increasingly dictates how countries shall shape their economies and trade law increasingly defines how countries should structure their domestic laws and policies in areas such as environmental protection. These interactions occur at two levels—the national and the international. Nationally, the spheres of policy we will treat include subsidies, environmental labeling, intellectual property rights, agriculture, investment and government procurement. Internationally, we will look at the interaction of the multilateral system of trade with the multilateral regimes for environmental management.

WTO dispute settlement body is not the forum to solve trade-environment dispute: A dispute is said to arise when one country adopts a trade policy or follows some action that is not necessarily a trade action, but can be interpreted as a violation of free trade policies; which another country considers to be a breach of WTO agreements. Ex-GATTzilla Vs Flipper^[7].

Recent GATT jurisprudence, in particular the Shrimp Turtle Implementation case, appears to widen the scope in which WTO Members can apply trade-related measures for environmental purposes^[8]. According to Article 3.2 of the Dispute Settlement Understanding, the WTO agreements are to be interpreted in light of customary rules of interpretation^[8]. On the other hand, the WTO dispute settlement mechanism is not meant to be a court of general jurisdiction^[9]. In the WTO dispute settlement mechanism the panels and the Appellate Body do not have inherent expertise to evaluate and assess environmental measures. There may be solid grounds

for exploring non-traditional dispute resolution mechanisms that are alternative to seeking recourse from WTO dispute panels. International trade is based on reciprocity and comparative advantage; WTO rules and the DSB provide a framework for these notions^[8]. On the other hand environmental obligations tend to be of a non-reciprocal nature, which gives way to the question as to whether judicial approaches, as in the WTO, which are adversarial in nature, are always the most appropriate means to resolve trade and environment disputes. Non-compliance mechanisms established under some MEAs tend to be non-confrontational in nature^[10]. So far the WTO Dispute Settlement Body has proven to be a central actor in defining the trade and environment debate^[8].

The current Doha Round of negotiations gives members a chance to achieve an even more efficient allocation of resources on a global scale through the continued reduction of obstacles to trade. They are also discussing ways to maintain a harmonious co-existence between WTO rules and the specific trade obligations in various agreements that have been negotiated multilaterally to protect the environment.

CONCLUSION

The public policy objective to protect human, animal or plant life or health is defined by the MEA. MEAs have long been held out as a concrete solution to potential trade and environment conflicts. Presumably international cooperation is required because national measures are insufficient. It is found that, in many countries, the Ministry of Foreign Affairs have attended the meeting and signed the agreements^[5]. The advantage of this arrangement is that foreign ministry officials usually have the most experience in undertaking negotiations at the international level and are trained to bargain in the international arena and to defend the national position^[5]. The common mechanisms used have either been enacting acts or laws in the country to execute what has been agreed at the international level, or incorporating these agreements in domestic policy in the form of creating national incentive or disincentive schemes. A country can enact a domestic law that incorporates what has been agreed upon at the multilateral level. Moreover, the problem is more political than legal. A political solution could take the form of a substantive and formal declaration by Ministers spelling out the legal framework contained in the relevant exceptions of the WTO. Thus, the international community would be reassured that MEA-related trade measures are allowed provided they are not disguised protection or discriminate arbitrarily or

unjustifiably. In both negotiating and implementing environment-related international agreements, the problems and issues are often perceived to be only environmental and their links to domestic economic policy and performance are not considered^[5]. Moreover there is often no coordination or consultation among the ministry responsible for attending the meeting. There is another problem once the agreements are signed, it is not clear who decides what mechanisms. Many of the countries suffer from a lack of such resources to implement these agreements effectively. The vigorous debate on the relationship between World Trade Organization (WTO) rules and Multilateral Environmental Agreements (MEAs) has mostly focused on clarifying legal complexities.

WTO dispute settlement body is not the appropriate forum to address environmental disputes. The WTO CTE has asserted that disputes involving MEAs should be settled in the framework of those MEAs and some Members have called for MEA dispute mechanisms to be strengthened^[8]. To date, formal disputes between parties tend not to be launched in an MEA dispute settlement mechanism (it is important to distinguish between disputes, which are between parties and compliance procedures that exist in some MEAs (e.g., CITES, Montreal Protocol), which neither involve conflicts between specific parties, nor are these procedures necessarily judicial).

Some suggestions: The body responsible for the domestic policy formulation should be either directly involved in the negotiation of an international agreement or should be consulted by the foreign ministry before attending the meeting. In this way, there is possibility for a country to arrive at a national position through the consideration of different aspects in an incorporated effort.

Considering the risks for international environmental governance engendered by WTO negotiations under paragraph 31(i) of the Doha ministerial Declaration, Friends of the Earth calls on governments to recognize these risks and take the initiative to halt the WTO negotiations on the relationship between WTO rules and MEAs and to transfer them to the United Nations immediately^[11]. Critically, WTO member states must not permit international environmental governance (through the MEAs) to be made subject to economic and trade considerations^[11].

The WTO panels and the Appellate Body can make use of the expertise of MEA secretariats condition of environmental expertise in relevant dispute cases and

also advice on the necessity of trade measures in the context of MEAs.

“Best efforts” can be taken to equate to the diplomatic negotiation of a settlement by the parties to the dispute. Some of the methods that can be used to settle the dispute or for the smooth execution of the different MEAs are to operate efficiently, minimizing duration and expense, to ensure collection and sharing of the best possible scientific evidence, to be fair, equitable, impartial and should achieve sound legally reasoned and fact based results and also be mindful of the equitable principle of shared but differentiated responsibility.

Competences could be divided so that, for example, the WTO could have the power to assess whether a trade measure is arbitrarily discriminatory or protectionist, while an MEA would have jurisdiction to determine the legitimacy of the environmental objective and the proportionality and necessity of any trade measure (The proposal by Switzerland at the WTO Committee on Trade and Environment, WT/CTE/W/139).

Another option is to obtain a waiver from WTO obligations for MEAs. Moving on to more radical solutions, GATT Article XX could be amended so that measures pursuant to a MEA could be deemed a justifiable restriction on trade.

Hence these are some of the measures which can be taken to resolve the dispute between MEAs and the WTO but the inter-linkages are such that such solutions are now only an idea left to be executed and implemented.

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