

## Multilateral Environmental Agreements versus World Trade Organization System: A Comprehensive Study

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**Abstract: Problem statement:** Most environmental problems have a transboundary nature and often global in scope, and can only be addressed effectively through international co-operation. Multilateral Environmental Agreement (MEA) is the main method available under the international law for countries to work together on different global environmental issues. This research was needed to observe how MEAs as agreements between states take the form of “soft law” which the parties will respect when considering actions which affect a particular environmental issue, or “hard law” which specify legally binding actions to be taken towards global environmental objectives. **Approach:** The main context with which the study contracted is the status, development, effectiveness, necessity and the impact of the MEA trade measures. The study discussed the inter-relationship between the MEA trade measures and the WTO rules and the possible grounds of conflict. The WTO agreements themselves contain measures allowing for environmental considerations. The agreements establish that the trade should be conducted while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so. **Results:** The study would further discuss the problems related to the increased likelihood of actual conflict between the two systems and the Dispute Settlement Body (DSB) of the WTO. The study would discuss the scope of the core Environmental Conventions and related International Agreements taken like the Kyoto Protocol, Montreal Protocol, Basel Convention, CITES, ICCAT and the trade resolutions taken by different states under them, domestically and internationally to regulate and monitor trade practices accordingly. **Conclusion:** The study in the later part would give some suggestions as to why ICJ appears to be the appropriate legal system for the purpose of settling disputes resulting from clash between MEAs and WTO rules followed by a conclusion based on a deep study of the relationship between the MEA trade system and the WTO rules.

**Key words:** Transboundary environmental problems, global environmental issues, optimal use of resources, sustainable development, regulation of trade practices, core environmental conventions

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### INTRODUCTION

The goal of establishing a positive relationship between World Trade Organization (WTO) rules and Multilateral Environmental Agreements (MEAs) has been on the international agenda for around two decades. The earliest multilateral treaty related to the environment dates back to 1868. The MEAs are concerned with multilateral cooperation for protecting environment and human health. Generally the actions taken pursuant to MEAs do not have trade implications, and most of the actions taken in the WTO do not have environmental implications. However, there are a few MEAs which require having some specific trade obligations as means to achieve the environmental

objective. This leads to overlap between these two bodies of international law. These two systems of law are equally valid and have equally critical objectives; what is needed is for each to better respect the other’s jurisdiction.

**MEAs:** Multilateral environmental agreements (MEAs) are a cooperative means of protecting and conserving environmental resources or controlling pollution that is transboundary in nature. There are about two hundred fifty international environmental agreements existing today and about twenty among these contain trade measures<sup>[1]</sup>. Some of the MEAs are under the auspices of UNEP, some under the Food and Agricultural Organization of the United Nations, and some are

stand-alone agreements. There is no umbrella organization for MEAs.

Some of the major MEAs are: The Montreal Protocol requires parties to exercise control over trade by providing for a variety of trade restrictions including voluntary industry agreements, product labeling requirements, requirements for import licenses, excise taxes, quantitative restrictions on imports and total or partial import bans; the Basel Convention requires that no category of waste to be exported to States not party to the convention unless, the State is a party to any other agreement bilateral, regional or multilateral; and the Kyoto Protocol potentially might lead to similar policy measures affecting trade. It lists a wide range of potential areas for action, including energy efficiency, renewable energy resources, removal of market distortions such as subsidies and transport.

Three broad reasons for incorporating such trade restrictions are<sup>[2]</sup>:

- To provide a means of monitoring and controlling trade in products where the uncontrolled trade would lead to or contribute to environmental damage. This may extend to a complete exclusion of particular products from international trade
- To provide a means of complying with the MEA requirements
- To provide a means of enforcing the MEA, by forbidding trade with non-parties or non complying parties

**Effectiveness and impact of trade measures in MEAs:** It is virtually not possible to measure the impact of trade measures and their contribution to the effectiveness of the MEAs as none of the MEAs mentioned above has primarily and solely depended on trade measures to achieve their aims. These trade measures thus represent an effective re-regulation of international trade and also provide the easiest way to distinguish between legal and illegal products. MEA notification procedures (basel convention, montreal protocol) have also been submitted to committees of WTO for providing greater co-ordination between the WTO rules and MEAs. These trade restrictions also help countries which lack the regulatory or institutional capacity to control the products in question, to ban or restrict trade in products which are not granted permission for export or import<sup>[3]</sup>. Finally, the impact of MEAs both in terms of implementation of the plan and the trade forgone as its result differs from states against whom they have been applied and the states complying with them (Supra en no. 2).

**WTO system:** The World Trade Organization came into existence on January 1, 1995 as a result of the

Uruguay Round trade negotiations (1987-1994). It now has 153 members. The WTO system encapsulates the GATT also. The WTO incorporated all the elements of GATT including those that were added to it in the Tokyo Round in 1970s and the Uruguay Round in the early 1990s. It is the sole multilateral international body, overlooking international trade based on certain universally accepted principles that have evolved in multilateral trade with time.

WTO rules aim at lowering the trade barriers and promoting fair competition in order to encourage trade and thereby encouraging development and economic reform. They also contain measures allowing for environmental considerations. The agreement establishing the WTO rules recognizes that trade should be conducted in a manner which allows the optimal use of the resources in accordance with the objective of sustainable development seeking both to protect and preserve the environment.

**Inter-relationship between MEAs and WTO trade rules:** Trade measures have been incorporated in MEAs where uncontrolled trade can potentially lead to environmental damage, or even as a means of enforcing the agreement and prevent free-riding by banning trade with non-parties. Inclusion of such trade measures is not forbidden under the WTO rules until they are directed towards protecting the environment and human health and life and such measures comply with General Agreement on Trade and Tariffs (GATT) rules, or fall under the exceptions to these rules. This right has been affirmed by panels and the Appellate Body time and again (In the first case decided by the new WTO dispute settlement body, US-Gasoline, the Appellate Body asserted WTO members' autonomy to determine their own environmental policies. The Appellate Body cautioned, however, that a balance needed to be maintained between market access obligations, on the one hand, and the right of members to invoke the environmental justifications foreseen in the GATT, on the other, so that one objective is not eroded or compromised by the pursuit of another).

Article XX of the GATT specifies certain "general exceptions", two of which are of relevance to trade measures taken with respect to environmental and human health protection.

**Article XX states that:** Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be

construed to prevent the adoption or enforcement by any contracting party of measures:...

(b) Necessary to protect human, animal or plant life or health; ... (g) Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;...

In addition, the preamble to the WTO agreement aids in preventing the misuse of trade-related measures. The preamble, states: “[R]elations in the field of trade and economic endeavor should be conducted with a view to raising standards of living...seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development<sup>[4]</sup>...”

Also, pursuant to the chapeau to Article XX of GATT an environmental measure may not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”. These additional safeguards seek mainly to ensure that, by allowing a measure to be inconsistent with GATT rules through the use of exceptions, protectionism is not introduced through the back door<sup>[5]</sup>.

However to put fetters on the scope of these exceptions there are a number of relevant WTO provisions. Firstly, any measure that is taken must be deemed as “the least trade-restrictive measure reasonably available to achieve the environmental objective in question”. Secondly, the measure “must be applied in a manner that does not amount to arbitrary or unjustifiable discrimination or a disguised restriction on international trade”. Also, there are some fundamental GATT/WTO principles or disciplines that apply to environmental and public health regulation, as in other areas, include principles of the most-favoured nation (This principle is that there should be no discrimination between the trading partners. If a country grants the other country some special favors, then it will have to do the same for all other WTO members also. This principle is so important that it is the first article of the GATT, which governs the trade in goods and is also a priority in the GATS and the TRIPS), the principle of national treatment (This principle ensures that imported and locally produced products are treated equally. The principle only applies once a product, service or item of intellectual property has entered the market) and principle of prohibition on quantitative restrictions for imports or exports. Taken together, one can think of the basic strategy as a sort of “equal protection clause” for foreign and domestic goods, specifying treatment of

foreign goods on the same footing as domestic and prohibiting discrimination among various foreign sources<sup>[6]</sup>.

**Inconsistent principles:** If we observe the history of the multilateral trade regime, it can be inferred that the whole regime is based on the fundamental that less governmental intervention promotes liberalized trade. The WTO imposes negative obligation on the members in which the members are to refrain from unjustified regulatory requirements. In contrast to this view taken by international trade agreements, the MEAs require implementation of affirmative action by members. It is this contradiction in fundamentals of trade and environmental agreements that encapsulate recent clash between trade and environment: the conflict between the “negative” obligations in trade agreements and the prophylactic governmental action required to assure environmental quality. One regime-environment-is designed to facilitate the implementation of affirmative governmental measures, and the other- trade-is intended to assure their absence (ibid). Thus the relationship shared between MEAs and WTO Rules is of opponent boxers standing in the same ring.

**Potential grounds of conflicts:** As we study the relationship between MEAs and WTO Rules, the whole discussion revolves around the question that whether measures under a multilateral agreement are compatible with WTO rules. Well, no formal dispute involving under a MEA has been so far brought before the WTO. However, the complexity arose out of a fear in the environmental policy community that the reasoning of a GATT panel in the infamous Tuna Dolphin (Mexico v. United States) (Mexico put forth a request for dispute settlement under the GATT 1947, claiming that measures taken by the US to enforce US Marine Mammal Protection Act was in violation of the GATT because of a ban it placed on tuna originating from countries whose policies were in conflict with MMPA and was inconsistent with three GATT Articles. The outcome of the dispute had the ruling that the US was in violation because of the embargo it imposed and that GATT rules do not allow for countries to use trade measures as a means of enforcing a domestic law in another country) case, in 1991, threatened the rapidly developing international architecture of environmental protection. This problem is not barely theoretical, several trends like this indicate that there is now an increased likelihood of actual conflict between the WTO and MEA rules (This is evident from some recent “near misses”: The Swordfish and GMO cases).

A major factor in all this is the expansive WTO mandate, which has evolved from focusing exclusively on trade in goods, and now encompasses trade in services, intellectual property rights, and even government procurement policies. This widening heightens the risk of collision with MEAs. By the same token, there is a raise in the amount, and type, of trade measures being developed in MEAs which include trade restrictions on specific items, labeling requirements for e.g., Biosafety Protocol, and in the possibility of development of rules relating to intellectual property rights in the Convention on Biological Diversity.

Also, there is the evident reluctance of US to join MEAs, including those with trade measures (The US decision to abandon the Kyoto Protocol in 2001 to the United Nations Framework Convention on Climate Change encapsulates an alarming trend in American attitude toward the environmental agreements). This unilateralist tendency of one of the largest economic powers in the world heightens the risk that it may complain that its WTO rights are being infringed by an MEA with trade measures.

**The Doha Mandate and the alternative forum:** The Doha negotiating agenda deals explicitly with the topic of MEAs in paragraph 31, which provides a mandate for current negotiation on the relationship between existing WTO rules and specific trade rules set out in multilateral environmental agreements.

There are several problems and shortcomings of this mandate; the first being its limitation in scope. In cases of WTO rules, all the virtual instruments like GATT Article XX, Article 27.2 of TRIPS, TBT and SPS agreements provide flexibility allowing MEA norms. However, the more serious issues have not been addressed in this mandate for instance, MEA trade measures that effect the non-parties to that MEA but are members of WTO. The trade measures recommended by a Conference of MEA parties, but not specifically required in the MEA are not covered under the WTO Negotiations.

Secondly, the forum is itself inappropriate. The reason for choosing WTO as a forum for negotiations seems to be its ability to actually determine trade relations and develop international trade law as a result of its quasi-mandatory dispute settlement mechanism. However, it may be noted that WTO was set up as an organization not under the aegis of UN and is therefore not accountable to the UN General Assembly. Consequently, it also does not follow the democratic system of decision making as is mandated as per UN Rules. This is very evident from the mini-ministerials

and green room sessions<sup>[7]</sup>. The decision taken in these meetings is thus thrust upon other members. There is also a very high risk of political influence by economically powerful to sway the negotiations in a direction favoring them. Also, there is a lack of transparency and no input is sought through public symposia and from NGOs.

Moreover, the negotiations are only taking place in the framework of the WTO and are thus institutionally unbalanced. The lack of representation for the MEAs is a cause of serious concern. It may view non-trade issues from perspective of trade and thereby only thinking about the effect of environmental agreements on trade and not the other way round.

The solution then is to find an alternate forum. Steve Charnovitz (Steve Charnovitz is the former Director of Global Environment and Trade Study (GETS) at Yale University. He has also been the Legislative Assistant to the Speaker of the US House of Representatives. He is also author to many books on trade and environment and is currently a full-time Faculty of the George Washington University Law School) proposes International Law Commission (ILC) as the alternate forum. According to him, in recent years the ILC has taken on two very difficult tasks, the International Criminal Court and state responsibility, and succeeded to some extent with both of them. He argues that compared to those issues, the WTO/MEA issue should be much easier. He says "It is not completely clear from the Statute of the ILC whether it could take on the task of developing a set of rules and principles for trade-related environmental measures linked to MEAs. Generally, the ILC's role is to pursue either (a) the progressive development of international law through a draft convention or (b) codification through the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice precedent and doctrine. I would argue that the WTO/MEA question could be fit within those parameters<sup>[8]</sup>".

Some authors have also suggested alternative forums like International Court of Justice, International Court of Environmental Arbitration and Conciliation, and Independent Group of Interested Governments (For detailed analysis of all these alternatives and their comparison based on various criteria, refer to *Is the WTO the only way?*, a briefing study published by Adelphi Consult, Friends of Earth Europe and Greenpeace International).

However, the most promising forum seems to be the International Court of Justice for the reason it is the best from political and strategic point of view. It is a part of

the UN family and has the requisite legal competence necessary to adequately consider environmental and trade interests in an unbiased fashion. It follows transparent and predictable rules and procedures and benefits from much international recognition.

**Dispute settlement system:** All MEAs contain provisions for dispute settlement among their parties or in case one party does not comply with the MEA rules. The existing dispute settlement procedures of MEAs are based on conciliation or arbitration procedures and/or dispute settlement by the International Court of Justice (Supra en no. 9). However, this system is of use only when the dispute is between parties to the MEA. But suppose one party out of the conflicting parties is not a signatory to the MEA, then this system cannot apply as the MEA rules would not apply to the non signatory. Recently, around 65 States have accepted compulsory jurisdiction of the ICJ (US had terminated the compulsory jurisdiction of ICJ in 1985. It is not among these 65 States). As a result, these countries will have to accept the jurisdiction of the ICJ whenever another party opts for the court as its preferred dispute settlement mechanism.

Since there has not been any conflict which has ever reached the stage of an official dispute settlement procedure beyond diplomatic negotiations, any discussion about the same may be speculative. But the increased chances of disputes make this speculation worthwhile. The WTO agreements and the MEAs are governed by international law (Under Article 3.2 of the WTO disputes settlement understanding, the WTO agreements are treaties to be interpreted in accordance with customary rules of interpretation of public international law). The interaction between them is also governed by the international law. MEAs too are governed by international law. Successive GATT and WTO cases give answers to the question of necessity of trade measures. Pursuant to Article 3 (2) of the WTO Dispute Settlement Understanding, the panels and the appellate body are under an obligation to presume that there is no conflict with other WTO provisions when interpreting Article XX of the GATT<sup>[9]</sup>. Therefore, there is always an attempt to find coherence between the WTO rules and MEAs and to interpret them in a manner that avoids any conflict in a manner that one agreement wants what the other prohibits. However, if the conflict is unavoidable, such multilateral solution should be reached at which is not arbitrary under the head note to Article XX of GATT.

### CONCLUSION

Global environmental problems are important challenges that are to be dealt with cooperation in the

international community of the 21st century. Unilateral trade measures not consistent with the WTO rules seriously undermine the multilateral trade mechanism. Also, the WTO rules should not be interpreted in isolation from other bodies of international law and without considering other complementary bodies of international law, including MEAs. MEAs and WTO, being equal bodies of international law should recognize each other with a view to being mutually supportive, in order to meet the common goal of sustainable development. From this viewpoint, to ensure harmony between trade and environmental policies there is a need to develop understanding between specific trade obligations set out in MEAs and the WTO rules. The current negotiations on the relationship taking within the WTO framework are highly flawed for several reasons discussed above. There is a need to replace the forum with some more appropriate alternative forum.

ICJ holding the necessary legal competence and political insight necessary for defining such principles seems to be an appropriate institution for this purpose. It being sufficiently independent from the government and trade interests, it will formulate unbiased legal principles on which the settlement of trade and environmental conflicts could be based.

The ICJ is the principal judicial organ of the United Nations. ICJ also is a perfect forum for settling disputes resulting from clash between MEAs and WTO rules. The judgments given by the ICJ are final and without appeal. In case if one of the states involved fails to comply with it, the other party may have recourse to the Security Council of the United Nations. The ICJ has also the advantage of having an environmental chamber with a procedure similar to the general submission procedures: The parties to the dispute need to indicate that they want the environmental chamber to handle the case. The element of consent by both the parties has to be eliminated however and thus it is recommended to make ICJ the official dispute settlement body for such disputes.

Therefore, there is a need to find a positive solution to the present negotiations by providing an alternative mechanism to enhance the stability between the WTO and MEA rules.

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