International Law

Settlement of Environmental Disputes Two Different Systems: MEAs' DSPs and WTO's DSP

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Abstract: This paper aims at analyzing two different dispute settlement procedures (DSPs), - multilateral environmental agreements (MEAs)'s DSPs and World Trade Organization (WTO)'s Dispute Settlement Procedure (DSP)- in the context of their role in managing environmental questions. For this purpose, it starts with drawing a general framework on DSPs created under different MEAs. Afterwards, it examines the WTO's DSP with a careful and detailed analysis of WTO cases on environmental issues. Thirdly, it focuses on the relationship between the MEAs' DSPs and the WTO's DSP. After this clarification on two systems with their main features, it makes a comparative analysis between them, discussing weaknesses and gaps of both systems in the settlement of environmental disputes. As a conclusion, based on its findings, its provides a general evolution on its analysis.

Keywords: environmental disputes; WTO cases; weaknesses

1. Introduction

Principle 26 of the 1992 Rio Declaration clearly sets out that states have to "resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations."

Art. 33(1) of the UN Charter, on the other hand, states that the settlement of disputes can be provided "by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Thus, it put forwards two kinds of means (procedures) for dispute settlement: 1. diplomatic means, such as negotiation, inquiry, mediation, conciliation, and 2. "judicial" (Ehrmann, 2002) (or "legal" (Sands, 1996) or "adjudicative") (Romano, 2000) means, such as arbitration and judicial settlement.

The aim of this work is to analyze two different dispute settlement procedures (DSPs), multilateral environmental agreements (MEAs)'s DSPs and World Trade Organization (WTO)'s Dispute Settlement Procedure (DSP), in the context of their role in managing environmental questions, to make a comparative analysis between them and to discuss the weaknesses involved in both systems in the settlement of environmental disputes.

On this basis, it starts with drawing a general framework on DSPs created under different MEAs. Afterwards, it examines the WTO's DSP with a careful and detailed analysis on WTO cases on environmental issues. Thirdly, it focuses on the relationship between the MEAs' DSPs and the WTO's DSP. After this clarification on two systems with their main features, it makes a comparative analysis between them, discussing weaknesses and gaps of both systems in the settlement of environmental disputes. As a conclusion, based on its findings, its provides a general evolution on its analysis.

2 Dispute Settlement Procedures (DSPs) under Multilateral Environmental Agreements (MEAs)

Before proceeding further and focusing on the significant aspects of DSPs under MEAs, first of all, it should be underlined that, all MEAs do not contain "the complete model" (Treves, 2009, pp. 499-501) of dispute settlement including both judicial and diplomatic procedures.

There can be three distinct group agreements according to their inclusion these procedures: First group consists of all procedures completely, e.g. the Vienna Convention for the Protection of Ozone Layer, art. 11 (applicable also to the Montreal Protocol etc.) the United Nations Framework Convention on Climate Change (UNFCCC), art.14 (applicable also to the Kyoto Protocol) etc. Second group adopts the negotiation and submission of the dispute to the arbitration and judicial settlement, e.g. the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, usually known as the Aarhus Convention, art. 16, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, usually known as the Basel Convention, art. 20, etc.). Third group involves merely negotiation, e.g. the **Convention** on Long-Range Transboundary Air Pollution, often abbreviated as Air Pollution or CLRTAP, art. 13 and its four protocols, the

European Pollutant Emission Register (EPER) Protocol, art.7, the first Sulphur Protocol, art.8, the Protocol concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes (NOx Protocol), art. 13, the **Protocol** concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes (VOC Protocol), art. 12) (Treves, 2009, pp. 499-501).

Also, the provisions included to the MEAs for settling disputes can differ according to the features of different MEAs, so, it becomes necessary to examine every MEA with its own conditions. However, as the aim of this paper is to draw a general framework on the MEAs' DSPs, but not exhaustively deal with the various aspects of each of these procedures inserted into different MEAs, each procedure under "the complete model" (Treves, 2009, pp. 499-501) of dispute settlement will be briefly explained with its significant aspects in this part.

2.1. Diplomatic Means

2.1.1. Negotiation

Negotiation is an informal and flexible procedure which provides direct contact of the parties of the dispute and exchange of their views. On the basis of the principle of good faith, the parties negotiate and endeavor to find a jointly agreed solution. So, parties have direct control over the dispute regarding the interpretation or application of an agreement, the resolution process and its non-binding outcome. Its "flexibility" and "informality" can render some benefits for leading to the resolution in an easy way (Kolari, 2002). On the other hand, in this procedure, there is no third party which helps the parties to solve the dispute. In addition, when one side of the acts against the negotiated outcome, there is no way of enforcing this side to act to the agreed outcome.

2.1.2. Mediation

Some environmental agreements can also involve mediation mechanism (or good offices of a third party) when the negotiation fails to settle the dispute (e.g. art. 11(2), the Vienna Convention for the Protection of the Ozone Layer, Biodiversity Convention). In some MEAs, mediation can also be used as one of the first remedies (e.g. art. XXV of the Antarctic Convention on Marine Living Resources) or an alternative mechanism (e.g. the Rotterdam and Stockholm Conventions).

In this mechanism, a third person (another party to the agreement, the Secretariat or a specific Committee of the agreement) also participates to "the interchange of proposals" between the parties to the dispute, and he can submit his informal proposals to the parties to resolve the dispute (Sands & MacKenzie, 2000).

2.1.3. Conciliation

Conciliation can be defined *in-between* among the other formal and informal procedures, as it is more formal than mediation, but not as formal as judicial procedures. In this mechanism, as in mediation, there is a third-party who is entitled to resolve the dispute between two parties. Yet, here, he has the right to investigate and consider the factual and legal aspects of the dispute and to make formal proposals for the amicable settlement of the dispute (Aust, 2000, p. 289; Kolari, 2002; Sands & MacKenzie, 2000).

The outcome does not again bind the parties of the dispute, it is recommendatory in nature. However, it is argued that, even if it is recommendatory, in practice, it can pressure the parties through the impact of the public, if the decision is declared publicly (Chayes; Chayes & Mitchell, 1998, p. 55; Kolari, 2002).

In some agreements, it can also be referred to a Conciliation Commission, e.g. Vienna Convention for the Protection of Ozone Layer, art. 11(5), which can be created by the request of one of the parties to the dispute. This Commission is generally composed of an equal number of members appointed by each party and aims to resolve the dispute with a recommendatory decision-unless otherwise agreed-. Because the Commission has power "to elucidate the facts, may hear the parties, and must make proposals for a settlement" (Brownlie, 2003, pp. 672-673), it can be argued that it has "a semi-judicial aspect." In addition, "[t]he prospect of being brought" before this kind of Commission can be found as facilitative to settle the dispute creating pressure on parties (Treves, 2009, p. 503).

Conciliation can be either optional or compulsory:

Optional Conciliation: The parties can agree to submit the dispute to conciliation which is counted as one of the DSPs among others in the agreement.

Compulsory Conciliation: If a dispute has not been settled by negotiation or other means and if the parties have not accepted the same or any compulsory procedure available under the agreement in a reasonable time, then either party can take the dispute to conciliation in accordance with the procedure accepted under specific

annexes adopted by the agreement or Conference of the Parties (COP) (e.g. art. 11(5), Vienna Convention for the Protection of the Ozone Layer, art. 27(4), Convention on Biological Diversity). Thus, as different from other DSPs mentioned above which require "parallel declarations" of the parties, conciliation can be resorted one of the parties' request and the others' acceptance this request (Treves, 2009, p. 516). Through submission of one party, all parties become involved into the procedure, yet, the decision at the end of the procedure continues to be non-binding for all parties.

2.2. Judicial Means

Where a dispute has not been settled by other procedures, it then should be submitted to arbitration "*the submission of a dispute to a judge or judges in principle chosen by the parties who agree to accept and respect the judgment"* (Aust, 2000, p. 291) or judicial settlement at the request of any one party.

Thus, MEAs can also include the possibility of resorting to judicial settlement and/or to arbitration relying on *ad hoc* arrangements like the Permanent Court of Arbitration (PCA)**,** set up under the Hague Convention for the Pacific Settlement of International Disputes of 1989, or standing bodies like the International Tribunal for the Law of the Sea (ITLOS), International Court of Justice (ICJ) for dispute settlement. While some MEAs require the submission of parties a declaration accepting compulsory dispute settlement of the ICJ and/or arbitration, others can require the agreement of the parties on arbitration or submission to the ICJ. In fact, in relation to a particular dispute, the ICJ's jurisdiction can arise in contentious cases between two or more states by a special agreement ("*compromis"* (Sands, 1996) whereby two or more states agree to refer a particular dispute to the ICJ (art. 36(1) of the ICJ Statute), or by a "compromissory clause" (Sands, 1996) in an international agreement. Or under "the optional clause" (Dagne, 2007; Sands, 1996), whereby parties to the statute may make a unilateral declaration recognizing its compulsory jurisdiction without special agreement (art. 36 (2) of the Statute). To illustrate, the agreement over the conservation and management of southern Bluefin tuna stocks adopted between Japan, Australia and New Zealand (Convention for the Conservation of the Southern Bluefin Tuna, art. 16), involves a dispute settlement clause stating that in case of dispute, "…with the consent in each of all parties to the dispute, [it will] be referred for settlement to the International

Court of Justice or to arbitration." Using this clause, the Southern Bluefin Tuna case[1] was resorted to the ICJ by Japan against Australia and New Zealand.

The United Nations Convention on the Law of the Sea (UNCLOS) should be noteworthy here, as it has compulsory, binding arbitration, art. 287(5), UNCLOS. In Part XV, the Convention establishes its dispute settlement system. In its first section (arts. 279-285, UNCLOS), it encourages parties to settle their disputes choosing the peaceful means they wish to resolve disputes including conciliation (specifically referred, art.284) and negotiation (not specifically referred). When they fail to resolve disputes by the means that they chose freely, the dispute can be submitted to the compulsory procedures entailing final and binding decisions [art.296,(1)]under second section of Part XV (arts. 286-296).[2] The Convention allows the parties to choose one or more of these different dispute settlement methods [art.287, (1)]:

a) the ITLOS
b) the International Court of Justice

This is a compromissory clause in respect of art. 36 (1) of the ICJ Statute. Yet, it is also possbile to apply to the ICJ by special agreement and under the optional clause declaration (art. 36(2) of the ICJ Statute) (Schiffman, 1998).

c) an arbitral tribunal, Annex VII.
d) a special arbitral tribunal, Annex VIII.

If the parties choose the same method, then it has become operative over the dispute upon the unilateral application of either party. If they do not choose the same one, or none, then arbitration *ipso facto* becomes the dispute settlement mechanism of the dispute at issue [compulsory arbitration, art. 287(5)].

Third section of Part XV (arts. 297-299) states the limitations and exceptions to the binding procedures of second section. This "categorization and separation" in between different disputes providing some of them binding compulsory settlement, but others not, is criticized due to the fact that it can seriously undermine the Part XV regime (Rayfuse, 2005). In addition, particularly in the field of environmental

[1] See the case details from http://www.itlos.org/index.php?id=62.
[2] See third section of Part XV for the limitations and exceptions to the binding procedures of second section.

protection, it is observed that not much action thus far has occurred under Part XV (Schiffman, 1998).

3 Dispute Settlement Procedure (DSP) under World Trade Organization (WTO): What makes it more effective, if really effective?

A WTO dispute proceeding mainly consists of four phases: consultations, the dispute panel (involving the panel proceedings (interim and final reports), adoption of panel reports, measures (compensation and suspension of concessions), the appellate process, and implementation and compliance of panel and appellate body reports.

3.1. Consultations

In the WTO system, dispute settlement procedure can only be initiated by a WTO member state when it considers that "any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member" (art. 3.3, **Dispute Settlement Understanding (**DSU), and request by the complainant party for consultations emerges as a precondition for further dispute settlement proceedings.

As different from other dispute settlement procedures, here, there are tight deadlines and detailed provisions on the application process of the counseling process. To illustrate, there are precise time periods for replying to the consultation request (within 10 days after the date of its receipt), for entering into consultations (within a period of no more than 30 days after the date of receipt of the request) (art. 4.3, DSU). If these periods are expired without replying and entering into consultations, it is possible for the member that requested the holding of consultations to proceed directly to request for the establishment of a panel process (art. 4.3, DSU). In addition, there are provisions on what should be done in cases of urgency (art. 4.8.9, DSU), when a member other than the consulting members considers that it has a substantial trade interest in consultations (art. 4.11, DSU), on confidentiality of the process (art. 4.6, DSU) etc.

In addition to consultations, the parties to a dispute also have the right to revoke to good offices, conciliation and mediation at any time (art. 5.3, DSU). There are again precise time periods, similar to provisions on consultations, for entering into

these procedures and for leading to consultations before requesting the establishment of a panel (art.5.4, DSU).

3.2. The Panel Process

Before requesting the establishment of a panel, the complainant party should allow 60 days after the date of receipt of the request for consultations If all the parties to the dispute consider that the good offices, conciliation or mediation process has failed to settle the dispute, the complainant party can request the establishment of a panel during the 60-day period (art. 5.4, DSU). While the panel process proceeds, good offices, conciliation or mediation procedures can proceed in tandem, if all parties to the dispute agree on it (art. 5.5, DSU).

Unless the DSB which is composed of all WTO members decides by consensus not to establish a panel (for the DSB's competences see art.2.1, DSU), a panel should be established at the latest at the Dispute Settlement Body (DSB) meeting following the first appearance of the request as an item on the DSB's agenda (art. 6.1, DSU),

Regarding the composition of panels (art.8, DSU), panels are generally constituted by three governmental and/or non-governmental individuals (art. 8.5, DSU), who are suggested by the WTO Secretariat and agreed to by the Parties to the dispute. Panelists serve not as government representatives, nor as representatives of any organization. So, members should not give them instructions and not to seek to influence them (art. 8.9, DSU). Their selection is made from a list of names suggested by members and approved by DSB (art. 8.4, DSU). If the parties cannot agree on the panelists within 20 days after the date of the establishment of a panel, any party to the dispute can request the Director-General to determine the composition of the panel (art. 8.7, DSU). When a dispute arises between a developing country member and a developed country member, the developing country member can request the inclusion of at least one panelist to the panel from a developing country member (art. 8.10, DSU).

Like consultations, panel procedures also aim not to delay "unduly" the process (art. 12.2, DSU), so the panelists determine the timetable for the panel process (art. 12.3.4.5, DSU). In addition, the period in which the panel conducts its examination, as a general rule, should not exceed six months. In only cases of urgency, the panel can issue its report to the parties to the dispute within three

months (art.12.8, DSU). Under circumstances in which the panel cannot issue its report within six months or within three months in cases of urgency, it informs the DSB on the reasons for the delay together with an estimate of the period within which it will issue its report. However, in no case, the period cannot exceed nine months (art.12.9, DSU).

If the parties to the dispute cannot develop a "mutually satisfactory solution," the panel submit its findings of the facts and recommendations, and the reasons behind them in the form of a written report to the DSB. However, if a solution is found, the report only includes a brief description of the case and states that a solution has been found (art. 12.7, DSU). There are here again specific provisions regarding developing country members as being in consultations (art. 12.10.11, DSU).

Following written submissions and oral arguments from the parties, the panel also issues the descriptive part of its draft report to the parties (art. 15.1, DSU). With the expiration of the period for receiving the comments from the parties to the dispute, the panel can issue an interim report to the parties, including not only the descriptive part but also findings and conclusions. Within a period of time set by the panel, a party can request from the panel to review precise aspects of the interim report or to hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the determined period, the interim report is considered the final panel report (art. 15.2, DSU).

After the date the report is issued to the members, it is not adopted for 20 days by the DSB to enable the parties adequate period to consider on them (art. 16.1, DSU).If there are members who want to explain their objections on the report, they have to give their reasons in written at least 10 days prior to the DSB meeting which will consider the adoption of the panel report (art. 16.2, DSU).There is again a precise deadline on the adoption of the report, it should be adopted in 60 days after its issue to the members. Yet, if a party to the dispute declares its decision to appeal, then, until the end of the appeal process, the DSP does not consider for adoption of the report (art. 16.4, DSU).

3.3. The Appellate Process

The standing Appellate Body consists of seven individuals who are unaffiliated with any government and have recognized authority in the field of law and international trade (art. 7.3, DSU).

The Appellate Body can address the issues as "limited to issues of law covered in the panel report and legal interpretations developed by the panel," (art. 12.6.7, DSU) and can "uphold, modify or reverse the legal findings and conclusions of the panel" based on its examination (art. 12.13, DSU).

There is here again time limitation for the proceedings. They cannot exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body issues its report. If the Appellate Body cannot provide its report within 60 days, it should inform the DSB the reasons for the delay together with an estimate of the additional period required for submitting its report. Yet, under no circumstances, they can exceed 90 days (art. 12.5, DSU). Another time limitation is about the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption. It cannot exceed nine months where the panel report is not appealed or 12 months where the report is appealed (art. 20, DSU).

3.4. Implementation and Compliance (art. 21, art. 22, DSU)

If a panel or the Appellate Body finds out that a measure subject to dispute settlement is inconsistent with a covered agreement, it is expected from the member in question to bring the measure into conformity with that agreement immediately following the recommendations of the adopted report by the DSB.

Within 30 days after the adoption of the panel or Appellate Body report, the member concerned should inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. Yet, if to comply immediately with the recommendations and rulings is impracticable for it, it can be given a reasonable period of time for doing so (art. 21.3, DSU). As a general rule, this period should not exceed 15 months from the date of the adoption of a panel or the Appellate Body report [see also determination and other features of reasonable period, art. 21.3(a),(b)].

The issue of implementation of the recommendations or rulings can be raised at the DSB by any member at any time following their adoption, and it can be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time. It remains on the DSB's agenda until it is resolved completely (art. 21.6, DSU).

It is also noteworthy that the member concerned should report its progress in the implementation of the recommendations or rulings (art. 21.6, DSU).

There is here again special treatment towards developing country members, as if the matter is raised by a developing country member, the DSB considers "*what further action it might take which would be appropriate to the circumstances*" (art.21.7, DSU). "[I]f the case is one brought by a developing country [m]ember, in considering what appropriate action might be taken, the DSB takes into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country [m]embers concerned (art. 21.8, DSU).

When a Party fails to implement the recommendations and rulings of the report within a reasonable period of time, compensation and the suspension of concessions or other obligations can be applied against that party (art. 22, DSU). So, that party should enter into negotiations with any party having invoked the dispute settlement procedures to determine mutually acceptable compensation which should be agreed within 20 days after the date of expiry of the reasonable period of time. With the expiry of 20 days, any party having invoked the dispute settlement can ask the DSB for the suspension of concessions (art. 22.2, DSU, see also art. 22.3 (a-g), for the principles and procedures in considering what concessions or other obligations to suspend). The DSB should grant the authorization for the suspension of concessions within 30 days of the expiry of a reasonable period of time, unless there is a consensus against it (art. 22.6, DSU). However, if the member concerned submits an objection regarding the suspension, the matter should be referred to arbitration (art. 25, DSU) which should be completed within 60 days after the date of expiry of the reasonable period of time (art. 22.6, DSU).

In accordance with art. 21.6, DSU, the DSB should keep monitoring the implementation of adopted recommendations or rulings in those situations as well (art. 22.8, DSU). The Parties to a dispute can also resort to arbitration, and the arbitration decision given pursuant to art. 25, DSU is also subject to monitoring of

implementation and compensation, and suspension of concessions as foreseen in arts. 21 and 22, DSU (art. 25.4, DSU).

With respect to specifically compliance issue, it should be noted that the WTO agreements also involve provisions aiming to facilitate compliance, such as notification requirements, counter-notifications, transparency, committees for the review of the operation of the related agreement.[1]

Regarding notifications and counter-notifications, the Report of the Working Group on Notification Obligations and Procedures, while underlining the importance of increasing the rates of compliance in all WTO agreements, also focused technical assistance with respect to some developing country members. It was also agreed that the listing of notification obligations and the compliance should be maintained on an "*on-going basis" and issued "semi-annually" to all members, and also notifications should be issued "as unrestricted and made available on the WTO website*."

Regarding transparency, in the Ministerial Decision on Notification Procedures (15 April 1994),[2] members have agreed on improving transparency, effectiveness of monitoring arrangements, and the operation of publication and notification procedures under the WTO agreements. In addition, the establishment of a central registry of notifications (CRN) which would inform members annually of the regular notification obligations was raised by that Decision.

On committees for the review of the operation of the related agreement, some examples can be given here. To illustrate, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) has a Committee (SPS Committee) in which WTO members can exchange information on all aspects related to the implementation of the SPS Agreement. This Committee also has entitled to review compliance with the SPS Agreement and to discuss matters related to notification and transparency. In addition, Agreement on Agriculture has also a Committee (Committee on Agriculture) which has entitled to review implementation of the agreement. The Committee established under the Agreement on Technical Barriers to Trade (TBT) has also the same right, it reviews the implementation every three years. Agreement on Subsidies and Countervailing Measures (SCM Agreement) has a Committee on Subsidies and Countervailing

[1] For examples of compliance-related provisions in the WTO agreements, see (WTO, 2001, pp. 20-23).
[2] Ministerial Decision on Notification Procedures. Retrieved from http://www.wto.org/english/docs_e/legal_e/33-dnotf.pdf.

Measures (SCM Committee) and subsidiary bodies (e.g. Permanent Group of Experts) which enables the members to consult and lead to information on any matter relating to the operation and implementation of the agreement.

The WTO Agreement also provides a mechanism, Trade Policy Review Mechanism (TPRM),[1] for improving compliance with the commitments undertaken under the agreement. Based on the reports of members and the Secretariat, this mechanism reviews trade policies of members working as "*an effective and transparent fact-finding mechanism*," thus, even in an indirect way, improves compliance and avoids disputes.

4. The Relationship between the MEAs' DSPs and the WTO's DSP

An important matter relating to the WTO DSP in environment-related cases is the relationship between the WTO DSP and the MEAs DSPs. This is because if a dispute involves issues related to the dispute settlement provisions of a MEA, while at the same related to the WTO matters, the question which one should be applied arises.

If there is no choice of treaty clause, the rules *lex posterior* v. *lex specialis* under the 1969 Vienna Convention can also not be applied here, since trade and environment regimes have different subject matters, nature and objectives. So, the law applied to them and the remedies offered by them are also generally different.

Article 23 of the DSU stipulates that disputes related to the interpretation and application of WTO provisions can be brought only before the WTO bodies (panel, the Appellate Body, or arbitration under art. 25, DSU) in accordance with the rules and procedures of this Understanding.

However, to the WTO Committee on Trade and Environment (CTE) (1996), if a dispute arises between WTO members over the use of trade measures taken under a MEA, if both sides are parties to that MEA, then, they should consider trying to settle it through the mechanisms available under the MEA. Then, in the case that one side in the dispute has not signed that MEA, then the WTO should be the only forum that should be revoked for resolving that dispute (UNEP-IISD, 2000, p. 62; Sampson, 2005).

[1] Trade Policy Review Mechanism. Retrieved from http://www.wto.org/english/res_e/booksp_e/analytic_index_e/tprm_01_e.htm#6.

With regard to this recommendation of the WTO CTE, it should be underlined that, although it has been taken into account as a recommendation in WTO procedures, it does not amend the article 23, DSU. In addition to this, if there is no provision in the MEA concerned obliging its parties to use its DSP in the case of a dispute before initiating a WTO dispute, it cannot be argued that, there is an obligation to exhaust MEA dispute-settlement mechanisms before initiating a procedure under the WTO (González-Calatayud & Marceau, 2002). If both processes have been initiated, given "the quasiautomatic nature of the WTO dispute process and Article 23 of the DSU" (González-Calatayud & Marceau, 2002), it is not expected that the WTO procedure has been ceased due to the existence of a parallel dispute under MEAs' system, and the experience displays that the WTO procedure has been concluded in a shorter period than the procedure conducted under MEAs (González-Calatayud & Marceau, 2002).

5. A Comparative Analysis: Weaknesses of Both Systems in the Settlement of Environmental Disputes

DSPs established under MEAs, explained above briefly, involve a series of diplomatic and judicial means of dispute settlement. Even though these methods available for resolving disputes have considerably improved over time, it is still controversial whether they are well-equipped to deal with the environmental issues (Sands, 1996:50). This is particularly because, they are confrontational and adversarial and are designed for bilateral disputes (diplomatic means either), yet, environmental problems are often multilateral in nature. So, in case of violation of an obligation, it is hard to define two sides of the dispute. In addition, as they are usually "confined to the facts of a specific dispute," so, they "cannot deal with the whole or part of a broader environmental problem" (Guruswamy & Hendricks, 1997).

Of these different means, in practice, it is generally observed that diplomatic means are further revoked than judicial means and further supported by MEAs. This is particularly because they are more flexible and cooperative, as mostly based on the consensus of the parties. Yet, they cannot be preferred to be applied by the parties, as they can be "ineffective" because of having no compulsory nature (Charney, 1996).

Judicial means can be admitted as compulsory and binding for the parties to the dispute (most of them do not refer to compulsory-binding mechanisms (exception: ITLOS and the Fish Stocks Agreement). However, they are rarely used in practice either and are seen as improper in the field of environmental law in general, and in MEAs specifically (Charney, 1996).

Even Stephens (2009:346) arguing that the international environmental litigation has been flourished, accepts that he makes this evaluation "taking an expansive definition, so that all those disputes involving at least one issue of environmental protection or management are captured." This is because:

1. states usually do not want to damage their relationships challenging another state taking it before a court (Brownlie, 2003:693; Faure and Lefevere, 1999);

2. their proceedings are regarded as costly, slow and troublesome (Charney, 1996); (Kolari, 2002);

3. the absence of an enforcement and monitoring mechanism which can provide the implementation and compliance of their decisions also restricts their influence;

4. judicial decisions do not prevent the damage before it occurs, but, use measures such as restoration of the previous situation or compensation after it occurs. Given the irreversible character of environmental damages (Enderlin, 2003), they do not meet the needs of environmental protection.

Because of the reasons mentioned above, in recent years, most MEAs have started to focus on more flexible mechanisms-compliance mechanisms- based on facilitative-preventive-cooperative approaches to address the issue of settling disputes and promoting compliance, and for the avoidance of both disputes and non-compliance (Savaşan, 2013).

Table 1. Weaknesses of Both Systems

DSPs established under MEAs (diplomatic and judicial means)	**DSP established under WTO**
• confrontational • adversarial • designed for bilateral disputes (yet, environmental problems are often multilateral in nature) • less compulsory-less binding	• the lack of transperancy • NGOs participation(despite the use of *amicus briefs*)in procedures • the problems of implementation and compliance,

• diplomatic means are further revoked than judicial means and further supported by MEAs, but, have no compulsory nature, • Judicial means can be compulsory and binding for the parties to the dispute. However, they are rarely used in practice either. This is because: 1. states usually do not want to damage their relationships with other states taking them before a court 2. their proceedings are regarded as costly, slow and laborious 3. there is no enforcement and monitoring mechanism 4. judicial decisions do not prevent the damage before it occurs, so not meets the needs of environmental protection	• its inadequancy on cases involving environmental issues.

The WTO's DSP, on the other hand, through its Understanding on the Settlement of Disputes (DSU), is backed up by compulsory and binding system of settlement of disputes arising under WTO agreements. So, the overall system with its DSP and TPRM, is defined as a system including a mixture of police patrol ("efforts by centralized authorities to actively and systematically look for violations") (Raustiala, 2001) and fire alarm ("rely[ing] instead on individuals or individual parties who are empowered to trigger investigations through a formalized institution approaches to implementation and compliance review") (Raustiala, 2001). In fact, through particularly its strict time limitations on the duration of proceedings (e.g.12.8, DSU), specific deadlines for intermediate steps in dispute settlement process (e.g.art.5.4, DSU, art.8.7, DSU, art.16.1, DSU, art.16.2, DSU..etc.), "quasi-automatic" (González-Calatayud & Marceau, 2002;WTO, 2001) adoption of panel reports, the Appelate Body, its well-qualified and experienced panelists (art.8.1, DSU)and members (art.17.3, DSU), compulsory and binding decisions, and the possibility of imposition of bilateral trade sanctions, the suspension of trade concessions or the provision of compensation as measures, provisions aiming to facilitate compliance, such as notification requirements, counter-notifications, transparency, committees for the review of the operation of the related agreement, it is seen as the strongest DSP when compared with others.

However, this system has also some shortcomings like the lack of transperancy and NGOs participation(despite the use of *amicus briefs*)in procedures (despite the emergence of a " trend toward greater transperancy"),[1] the problems of implementation and compliance, and -the most significant one for this study-, its inadequancy on cases involving environmental issues.

Indeed, Article XX of GATT [art. XX, GATT, (b), (g), (chapeau)] involves exceptions regarding environmental concerns to trade obligations of the agreement. So, even before the WTO Agreement, there have been cases related to environmental issues, such as Tuna case (US vs.Canadia), Salmon and Herring case (US vs. Canadia), Cigarettes case (US vs.Thailand), Tuna case (US vs. Mexico), Tuna Case (US vs. EEC), Automobiles Case (US vs.EEC). After the WTO agreement, Gasoline case (US vs. Brazil, Venezuele), Shrimp Turtle Case (US vs. Malaysia, Indian, Pakistan, Thailand (joint case) and Asbestos case (EC vs. Canada) can be counted as examples.[2]

Of these, particularly Schrimp-turtle case[3] should be emphasized as the WTO DSP begins to take into account environmental concerns further with this case, while there was less tolerance to environmental issues from 1990 to 1998 (e.g.Tuna Dolphin Case) (Charnovitz, 2005). However, the decisons of the WTO DSP on the issues related to the environmental concerns is generally criticized as it does not sufficiently pay attention to them.

Table 2. Strengths of the DSP established under WTO

Through its Understanding on the Settlement of Disputes (DSU), it provides stronger characteristics:
• strict time limitations on the duration of proceedings;
• specific deadlines for intermediate steps in dispute settlement process;
• quasi-automatic adoption of panel reports;
• the Appelate Body, its well-qualified and experienced panelists and members;
• compulsory and binding decisions;
• the possibility of imposition of the suspension of trade concessions or the provision of compensation as measures;
• provisions aiming to facilitate compliance, such as notification requirements,

[1] See (Downes and Penhoet, 1999; Hunter, Salzman, Zaelke, 2002) for the details on transperancy, NGOs' participation, and the use of *amicus briefs.*
[2] For details on cases, see (WTO, 2004).
[3] For details see (Cameron, 2005; UNEP, 2005, pp. 27-30; WTO, 2008, pp. 62-69).

counter-notifications, transparency, committees for the review of the operation of the related agreement.

To improve the WTO DSP in environment-related cases, there are several recommendations like the involvement of MEA secretariats, use of environmental experts, to be able to refer to the ICJ where rights and obligations outside of the WTO sphere are applicable (yet, requires the amendment on art. 23, DSU), to increase the use of art. 5, DSU methods (mediation, conciliation and good offices)-as they require the agreement of all parties to the dispute, they are rarely used-, and the establishment of an environment advisory board consisting of experts to which the parties to the dispute have to resort before formal DSPs.[1] However, all these recommendations remain to be controversial.

Table 3. Proposals for the Improvement of the WTO DSP in Environment-related Cases

• the involvement of MEA secretariats, • the use of environmental experts, • to be able to refer to the ICJ where rights and obligations outside of the WTO sphere are, • to increase the use of art. 5, DSU methods (mediation, conciliation and good offices), • the establishment of an environment advisory board consisting of experts to which the parties to the dispute have to resort before formal DSPs

6. Conclusions

Consequently, based on these findings, it can be argued that DSPs do not play a crucial role in ensuring compliance with MEAs which primarily aim to induce the parties to compliance or to enhance their compliance through various forms of international cooperation, such as reporting, assistance, non-compliance procedures, non-compliance response measures. Specifically, if the violation does not stem from deliberate non-compliance, but rather lack of inability or incapacity, to address non-compliance through DSPs become more problematic, and this situation better explains why MEAs prefer compliance mechanism rather than DSPs. In the WTO system, on the other hand, there is a compulsory dispute settlement mechanism referring to exclusive jurisdiction (art.23, DSU) and

[1] For details see (González-Calatayud & Marceau, 2002).

producing binding decisions strict timetables, specific procedures and more powerful measures supported by binding decisions. When comparing the dispute settlement provisions of the MEAs discussed above with those of the WTO then it becomes clear that the WTO system operates in a more effective way than the MEAS' system in the settlement of environmental disputes and in ensuring compliance.

However, it should not be forgotten that "… *the WTO is not an environmental protection agency and that it does not aspire to become one. Its competence in the field of trade and environment is limited to trade policies and to the trade-related aspects of environmental policies which have a significant effect on trade*". (WTO, 2004, p. 6)

That is, MEAs should develop more influential and operative mechanisms, such as CMs-even they have also some weaknesses to ensure compliance-(Savaşan, 2013), or should develop the existing ones on the basis of the problems of the present system and the new needs. While doing that, it can benefit from the information, expertise and practice taken pursuant to WTO DSP, so as to improve the compliance with their provisions - the WTO system can also benefit from those of the MEAs-. Nevertheless, this requires a well operating coordination mechanism - or coordination units- between two systems. Unfortunately 'coordination' rises as one of the most important problems in the new century, particularly in environmental system which has been built under regimes addressing the specific issue areas individually, so operating relatively isolated from each other (Savaşan, 2013).

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WTO's DSP" which was held on 12-13 April 2012, in Warsaw, Poland. This paper is its updated version.

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