

# The Synergies and Tension between International Trade Law and Environmental Law in Ethiopia

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## Abstract

The relationship between international trade law and environmental law is susceptible to divergent views. Trade liberalization and global competition among producers may result in efficient use of natural resources, or it may on the contrary impede regulatory interventions by the government to protect the environment that may lead to wider circulation of polluting substances. This article examines the linkages (synergies) and tension between international trade law and environmental law in Ethiopia. Relevant international, regional as well as domestic legal instruments have been investigated. Relevant literature has also been analysed. The research identifies that both the linkages (synergies) and contradictions have been incorporated in the international and domestic laws of Ethiopia. Thus, Ethiopia needs to work more on the balance between the promotion of trade and environmental protection in the context of sustainable development.

## Key terms:

International trade law · Environment · Free trade · Environmental protection law · Ethiopia

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## Frequently used acronyms:

MEAs    Multilateral environmental agreements  
WTO    World Trade Organization

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## 1. Introduction

Trade is an economic activity that is, *inter alia*, based on natural resources, which are part of the environment.<sup>1</sup> The impact of trade liberalization on environmental protection is ambiguous<sup>2</sup> because it may lead to a pollution of the environment, or (in the context of sound social and environmental compliance standards) may result in efficient use of natural resources. Trade liberalisation may also lead to a wider circulation of environment-friendly goods and technologies.<sup>3</sup> Trade may contribute positively for the environmental protection by providing opportunity for the global spread of environmental services and technologies to address particular environmental problems. In addition, where trade is promoted, it may bring about economic efficiency and growth, which in turn may raise income and provide more

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<sup>1</sup> Mitsuo Matsushita *et al*, (2015), *The World Trade Organization Law, Practice, and Policy* (3<sup>rd</sup> Edition, The Oxford International Law Library: Oxford), at 719.

<sup>2</sup> Julia Grubler, Roman Stollinger and Gabriele Tondl, (2021), *Wanted! Free Trade Agreements in the Service of Environmental and Climate Protection* (Research Report 451, The Vienna Institute for International Economic Studies), at 9.

<sup>3</sup> Pierre-Marie Dupuy and Joerge E. Vinuales (2018), *International Environmental Law* (Second Edition, Cambridge University Press), at 472.

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money for environmental protection.<sup>4</sup> Trade may improve resource allocation, increase more environment-friendly products, and defuse higher environmental standards as well as green technologies especially to developing countries.<sup>5</sup>

Environmental protection and trade are two separate activities governed by separate laws. Various multilateral environmental agreements (MEAs), regional, national and sub-national regulations constitute environmental law that regulate the environment.<sup>6</sup> On the other hand, international trade law embraces multilateral agreements under the World Trade Organization (WTO), and the regional as well as bilateral trade agreements.<sup>7</sup>

The legal literature as well as data indicate tension and harmony between these two areas of laws. This article investigates the issue of the linkages and tensions between international trade law and environmental law in Ethiopia. The next section deals with the tension between environmental law and trade law. Section 3 discusses the linkage and synergy between trade law and environmental law of Ethiopia taking into account the international treaties. The practice of environmental protection in Ethiopia from trade point of view is examined in the fourth section, followed by concluding remarks.

## **2. The Tension between Trade Law and Environmental Laws**

Conflicts may be normative and/or they may be attributable to legitimacy. The tension between multilateral environmental treaties and trade regulations are discussed respectively under this section.

### **2.1 Arguments regarding the tension between trade law and environmental law**

Some argue that liberalization of trade, meaning, the removal of trade barriers on exchange of goods and services between nations, negatively affects the environment. According to this argument, developing countries may adopt less stringent environmental standards to attract trade to their

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<sup>4</sup> Matsushita *et al*, *supra* note 1, at 722. Trade law has both negative and positive impacts on environment. Diana Tussie, "The Environment and International Trade negotiations: Open Loops in the Developing World" in Diana Tussie (Editor), (2000), *The Environment and International Trade Negotiations Developing Country Stakes*, (National Political Economy Series, Great Britain), 225-236, at 225.

<sup>5</sup> Grubler, Stollinger and Tondl, *supra* note 2, at 9.

<sup>6</sup> In Ethiopia, the FDRE Constitution, international agreements to which Ethiopia is a party, relevant proclamations, regulations, directives regulate the environment.

<sup>7</sup> International Institute for Sustainable Development (2014), *Trade and Green Economy A Handbook* (3<sup>rd</sup> Edition, Geneva), at 3.

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jurisdictions from more stringent environmental standards.<sup>8</sup> Researches show that free trade negatively affects the environment.<sup>9</sup>

There is a theory which promotes the idea that environmental regulation would affect trade by shifting production from more regulated countries to less regulated ones. It is argued that countries, endowed with capital that is the main factor to produce pollution intensive industries, while the Global South has loose environmental regulations and low labour compliance standards. The pollution haven hypothesis explains that the stringency of environmental regulation in the industrialized countries results in the transfer of polluting industries to the South.<sup>10</sup>

On the contrary, it is argued that trade places constraints on legitimate environmental restrictions or contributes to the wider circulation of polluting substances.<sup>11</sup> Trade may have a negative impact where hazardous waste or harmful chemicals are involved or where sale relates to products from endangered species.<sup>12</sup> Trade in products derived from endangered species causes direct harm on the environment.

Production of any goods requires natural resources such as metals, minerals, soil, forests, and fisheries as inputs. The energy to process the production is also based on natural resources. The production activity may also have a by-product or involve waste disposal that would pollute the environment.<sup>13</sup> Trade activities including transportation produce carbon dioxide (CO<sub>2</sub>).<sup>14</sup> Thus, trade may have a negative impact on the environment.

On the other hand, the quality, safety and availability of natural resources affect trade.<sup>15</sup> Environmentalists assert that free trade is one of the main causes of the global environmental crisis, and environmental law should limit free trade where it harms environmental quality.<sup>16</sup> It is argued (and

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<sup>8</sup> Richard K. Lattanzio and Christopher A. Casey, (2022), *Environmental Provisions in Free Trade Agreements (FTAs)*, Congressional Research Service, at 1.

<sup>9</sup> Mounir Belloumi and Atef Alshehry (2020), "The Impact of International Trade on Sustainable Development in Saudi Arabia", *Sustainability*, at 5.

<sup>10</sup> Zhe Dai, Yunzhi Zhang and Rui Zhang, "The Impact of Environmental Regulations on Trade Flows: A Focus on Environmental goods Listed in APEC and OECD" *Front.Psychol.* 12, doi:10.3389/fpsyg.2021.773749; at 2.

<sup>11</sup> Dupuy and Vinuales, *supra* note 3, at 472.

<sup>12</sup> Matsushita, and Et al, *supra* note 1, at 722.

<sup>13</sup> *Id.*, at 719.

<sup>14</sup> Grubler, Stollinger and Tondl, *supra* note 2, at 451.

<sup>15</sup> International Institute for Sustainable Development, *supra* note 7, at 3.

<sup>16</sup> Robert Falkner and Nico Jaspers, (2012), "Environmental Protection, International Trade and the WTO: in Ken Heydon and Steven Woolcock (Eds.), *The Ashgate*

revealed based on data) that free trade has deleterious effects on the environment through the release of emissions that pollute the environment and causes depletion of natural resources.<sup>17</sup>

Critics argue that trade may cause environmental harm by promoting economic growth that results in the unsustainable consumption of natural resources and waste production where there is no (or weak) environmental safeguard. Unless appropriate environmental protection mechanisms are built into the structure of the trade system, trade rules and trade liberalization often override environmental regulations. Thus critics suggest trade restrictions.

It is contended that countries having lax environmental standards have a comparative advantage in global market over countries having rigorous environmental standards.<sup>18</sup> This indicates that trade may have a negative impact on the environment by attracting non-environmental friendly investment. On the other hand, Matsushita *et al* argued that the empirical evidence proves that it is only few companies which actually moved to countries with lower environmental standards to take advantage of lower costs of production.<sup>19</sup>

Recent researches also confirm that strict environmental law limits trade. However, it is found that strict environmental regulation impede environmental goods. On the other hand, researches revealed that strict environmental regulation reduces trade volume, but promote environmental friendly goods.<sup>20</sup> There is a friction between international environmental law and international trade law<sup>21</sup> because as economic globalization proceeds,

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*Research Companion on International Trade Policy* (Ashgate, Chapter 13), at 2. Some environmentalists oppose trade for it harms the environment. Matsushita *et al*, *supra* note 1 at 719. For the debate see Domminic Gentile, "International Trade and the Environment: What is the Role of the WTO?" *Fordham Environmental Law Review*, Vol. 19 No. 1, 2009, at 196-99.

<sup>17</sup> J. Bernard and S. K. Mandal (2016), "The Impact of trade openness on environmental quality: an empirical analysis of emerging and developing economies" *WIT Transactions on Ecology and The Environment*, Vo. 203, , at 197. For detailed treatment of the issue, see Jeffrey Frankel *et al*, (2009), *Environmental Effects of International Trade*, Expert Report No. 31. To Sweden's Globalization Council, Stockholm.

<sup>18</sup> Matsushita and *et al*, *supra* note 1, at 719.

<sup>19</sup> *Ibid*.

<sup>20</sup> Dai, Zhang and Zhang, *supra* note 10, at 9.

<sup>21</sup> Edith Brown Weiss and John H. Jackson, (2008), "The Framework for Environment and Trade Disputes" in Edith Brown Weiss, John H. Jackson, and Nathalie

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the global nature of many environmental problems becomes more evident.<sup>22</sup> In some cases, environmental regulations limit trade and this creates conflicts between the two regimes.<sup>23</sup> For instance, the regimes that protect the environment would result in lower consumption.<sup>24</sup>

Environmental law and trade law seem to work in opposite ways. Environmental regulation is a public/governmental intervention in various avenues including the private market place so as to correct perceived market failures to ensure environmental protection.<sup>25</sup> For instance, environmental law imposes standards on automobile emission, content and disposal of packaging, standards on chemical handling, processing and labelling food, and standards to protect natural resources and wildlife which affects trade.<sup>26</sup>

International trade law, on the other hand, “limits the government intervention and allow the unimpeded flow of goods and services”.<sup>27</sup> According to environmentalists, environmental law limits trade rules so as to protect the environment. Trade experts, on the contrary, start from the premise that States should not intervene in trade promotion.<sup>28</sup> Environmental law could increase cost in production by requiring using more environmental friendly technologies.<sup>29</sup> In Ethiopia, the trade regime contains crucial provisions that support economic development. International treaties to which Ethiopia is a party, regional trade instruments, bilateral trade agreements also regulate international trade in Ethiopia.<sup>30</sup>

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Bernasconi-Osterwalder, (editors,) *Reconciling Environment and Trade*, (2<sup>nd</sup> Edition), 1-38, at 2.

<sup>22</sup> Ibid; Daniel Bodansky and Jessica C. Lawrence, “Trade and Environment”, in Daniel Bethlehem Etal (editors) *The Oxford Handbook of International Trade Law*, available at: [www.oxfordhandbooks.com](http://www.oxfordhandbooks.com); accessed on: 23 June 2020, at 512.

<sup>23</sup> Bodansky and Lawrence, id, at 508.

<sup>24</sup> Richard Baron and Justine Garret, *Trade and Environment Interactions: Governance issues*, (Background paper for the 35<sup>th</sup> Round Table on Sustainable Development 28-29 June 2017), at 8.

<sup>25</sup> Bodansky and Lawrence, *supra* note 22, at 512.

<sup>26</sup> David Voget, (2000), “The Environment and International trade” *Journal of Policy History*, at 1.

<sup>27</sup> Bodansky and Lawrence, *supra* note 22, at 512.

<sup>28</sup> Ibid.

<sup>29</sup> Baron and Garret, *supra* note 24, at 8.

<sup>30</sup> Much of the supporting legal institutions to promote trade remain underdeveloped. Nita K. Solanki and Jignesh N.Vidani, (2016), “The Study Legal Aspects of Trade in Ethiopia”, *ZENITH International Journal of Multidisciplinary Research*, Vol. 6(1), pp. 266-284, at 271. Despite the reforms made in the 1990s, and 2000s, more reforms

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Ethiopia is a beneficiary of UNCTAD's General Systems of Preferences (GSP) which is trade program. Ethiopian Exporters to Australia, Belarus, Bulgaria, Canada, Estonia, the European Union, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey and United States of America are given GSP.<sup>31</sup> Under GSP rules, *Everything but Arms* (EBA) guaranty duty free access to all products originated from Ethiopia, except arms and ammunitions.<sup>32</sup> However, unless due attention is given to environmental compliance standards in the process of production, mere focus on Ethiopia's trade promotion could use the natural resource unsustainably; and waste disposal can adversely affect the environment and local livelihoods. Thus, this could promote trade and 'economic growth' at the expense of sustainable development including the environment.

Ethiopia was also a beneficiary from the US African Growth and Opportunity Act (AGOA)<sup>33</sup> that is an extended duty free market access by United States of America (USA) to Sub Saharan African Countries.<sup>34</sup> The Act encourages increased trade and investment in both United States of America and sub-Saharan Africa.<sup>35</sup> The Act reduces tariff and non-tariff barriers as well as other trade obstacles.<sup>36</sup> In general, the Act promotes free trade economy.<sup>37</sup> Yet, according to environmentalists, free trade promotes trade that would adversely affect the quality of environment unless corresponding caution is made in relation to compliance standards.

Furthermore, India has provided the Duty Free Tariff Preference (DFTP) Scheme for least developed countries (LDCs) since 2008; and according to the 2012 Scheme, 85% of India's total tariff lines were made duty free. Ethiopia is one of the LDCs which are the beneficiaries of the Tariff Scheme.<sup>38</sup>

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are needed to ensure the trade laws are consistent to the international standards of "good governance". Solanki and Vidani, *ibid*.

<sup>31</sup> Addis Ababa Chamber of Commerce and Sectorial Associations, (2016), *How to Start Export in Ethiopia* at 22.

<sup>32</sup> *Ibid*.

<sup>33</sup> *African Growth and Opportunity Act* (AGOA), (One Hundred Sixth Congress of the United States of America, Washington, the twenty-fourth day of January, two thousand), Sec. 107.

<sup>34</sup> See Addis Ababa Chamber of Commerce and Sectorial Associations, *supra* note 31, at 23.

<sup>35</sup> *Id*, Sec. 103(1).

<sup>36</sup> *Id*, Sec. 103(2).

<sup>37</sup> *Id*, Sec. 104 (2)(1)(A).

<sup>38</sup> United Nations Conference on Trade and Development (UNCTAD), (2017), *Handbook on Duty-Free and Quota-Free market Access and Rules of Origin for*

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China has granted DFQF market access to LDCs on 97% of its tariff lines. Ethiopia is one of the beneficiaries of China's preferential rules of origin for Least Developed Countries.<sup>39</sup> Furthermore, the Republic of Korea Government has enacted a law that lifts tariffs on items that originate from the LDCs. The Republic of Korea granted preferential duty-free access to products for LDCs, including Ethiopia.<sup>40</sup>

African Countries have established an "African Economic Community" among themselves.<sup>41</sup> One of the principles of the African Economic Community is the "promotion of harmonious development of economic activities among member States".<sup>42</sup> This principle promotes economic development. However, it does not incorporate the principle of sustainable economic development. Therefore, the Treaty does not promote, as a principle, the principle of sustainable development.

One of the objectives of the Community is to promote development and economic integration of the Continent.<sup>43</sup> It is aimed at liberalizing trade through the abolition of custom duties, and non-Tariff barriers.<sup>44</sup> Ethiopia, as Member State to the Community, is obliged to abolish non-tariff barriers. Such restrictions should have allowed rooms regarding compliance standards that protect the environment and ensure that environmental polluting goods and services could not be allowed to enter into Ethiopia.

African Countries have established the African Continental Free Trade Area (ACFTA)<sup>45</sup> with the objective to, *inter alia*, deepen economic integration,<sup>46</sup> liberalize market,<sup>47</sup> and promote investments.<sup>48</sup> This again may contradict with the protection of environment if it solely pursues free trade.

A common market to East and South African countries (COMESA) is established to promote trade in the sub region. Ethiopia, as member to

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*Least Developed Countries Part II: Other Developed Countries and Developed Countries* (UNCTAD/ALDC/2017/4), at 57.

<sup>39</sup> Id, at 51.

<sup>40</sup> Id, at 62.

<sup>41</sup> Treaty Establishing the African Economic Community, (June 3<sup>rd</sup> 1991, Abuja, Nigeria), Art. 2.

<sup>42</sup> Id, Art. 3 (d).

<sup>43</sup> Id, Art. 4(1)(c).

<sup>44</sup> Id, Art. 4(2)(d).

<sup>45</sup> Agreement establishing the African Continental Free Trade Area (Kigali, 2018), Art. 2.

<sup>46</sup> Id, Art. (a).

<sup>47</sup> Id, Art. 2(b).

<sup>48</sup> Id, Art. 2(c).

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COMESA, must comply with the rules and principles stipulated under COMESA Treaty. The aims and objectives of the Common Market are meant to promoting trade and to foster economic development. For instance, it aims at cooperating in the "...creation of an environment for foreign cross border and domestic investment including the joint promotion of research and adaptation of science and technology for development".<sup>49</sup> This provision could have taken into account the protection of the environment in the course of trade promotion.

In general, Ethiopian trade law is intended to promoting economic development and to improve foreign exchange earnings.<sup>50</sup> Ethiopia is on the verge of accession to WTO. It is argued that Ethiopia will be obligated to perform the WTO Agreements and this would have a negative impact upon the environment<sup>51</sup> unless Ethiopia takes legal measures to protect the environment commensurate with the level of production and waste disposal that can unfold in the course of trade promotion which increases emissions that pollute the environment and cause depletion of resources.

## **2.2 Normative conflicts vs. legitimacy conflicts and the practice**

There are normative and legitimacy conflicts between the environment and trade law.<sup>52</sup> Normative conflicts are conflicts involving two or more norms of international law<sup>53</sup> or it may also occur in domestic laws. A normative conflict in international law (which is the thematic focus of this article) is a contradiction of obligation arising from international trade law and international environmental law.<sup>54</sup> Thus, a conflict between obligation

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<sup>49</sup> Id, Art. 3(c).

<sup>50</sup> Trade Duty Incentive Schemes Proclamation No. 768/2012, 1<sup>st</sup> paragraph of the preamble.

<sup>51</sup> Sirak Akalu, (2012), "The legal Framework on international Trade Institutions and their Impact on Environment in Ethiopia" (Proceeding, Faculty of Law SMUC), at 215.

<sup>52</sup> Dupuy and Vinuales, *supra* note 3, at 478-79. For the treatment of trade environment debate, see Simeneh Kiros Assefa, (2008), "The Trade and Environmental Debate: The Normative and Institutional Incongruity", *Mizan Law Review*, Vol. 2, No. 2, 311-338.

<sup>53</sup> Ibid. For detailed treatment of the definition of conflicts of norms, see Erich Vranes, (2009), *Trade and the Environment* Fundamental issues In International Law and WTO Law (Oxford University Press), at 10-38.

<sup>54</sup> See Tesfaye Abate Abebe, (2018), *Laws of Investment and environmental protection: The case of Ethiopian large-scale agriculture*, (A Thesis submitted in accordance with the requirements for the degree of Doctor of laws at the University of South Africa), at 57. For the detailed treatment of conflict of norms see Joost Pauwelyn,

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arising from international trade law and an obligation from international environmental law is a normative conflict. Such conflict of norms also constitutes a conflict within Ethiopia's legal system because international instruments ratified by Ethiopia constitute an integral part its law in accordance with Article 9(4) of the FDRE Constitution.

There is a potential conflict between environmental law and international law. A number of MEAs provide for trade restrictions and this has the potential clash with WTO standards. For instance, the Basel Convention, the CITES Agreement (i.e., the Convention on International Trade in Endangered Species), the Biosafety Protocol, Rotterdam Convention and Stockholm Convention may potentially conflict with WTO law.<sup>55</sup> In such a case, conflict may arise where a country (Ethiopia) does not meet its commitments in the context of an MEA.<sup>56</sup>

Legitimacy conflicts involve an international obligation and a domestic measure.<sup>57</sup> Legitimacy conflict is one arising between international trade law and a domestic measure based on environmental consideration.<sup>58</sup> It can involve contradiction between domestic environmental measures and an international trade law norm.<sup>59</sup> For example, the competing interest between environmental and trade law can be seen from the General Agreement on Tariffs and Trade (GATT) Article XX exceptions and an implicit balancing test between the sovereign right of governments to avoid protectionist policies hindering trade.<sup>60</sup>

Over time, trade panels have paid increasing attention to environmental protection. There is a move from a "traditional" approach sometimes called "inward looking" which saw environmental measures as protectionist and

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(2003), *Conflict of Norms in Public International Law How WTO Law Relates to Other Rules of International Law* (Cambridge University Press).

<sup>55</sup> Tilman Santaruis *et al.*, (2004), *Balancing Trade and Environment An Ecological Reform of the WTO as a Challenge in Sustainable Global governance What kind of globalization is sustainable?* (Wuppertal Papers, No. 133e-), at 23.

<sup>56</sup> *Id.*, at 24.

<sup>57</sup> Dupuy and Vinuales, *supra* note 3, at 478-79.

<sup>58</sup> See George E. Vinuales and Manus Jesko Langer, Managing conflicts between environmental and investment norms in international Law, Electronic copy available at: <http://ssrn.com/abstract=1683465> visited on: 4 June 2020, See also Abebe, *supra* note 54, at 56-7.

<sup>59</sup> Abebe, *supra* note 54, at 57.

<sup>60</sup> Mark Wu and James Salzman, (2014), "The Next Generation of Trade and Environment Conflict: The Rise of Green Industry Policy" *North-western University Law Review*, Vol. 108, 401-474, at 405.

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subordinated to trade disciplines, to an “upgraded” one sometimes called “outward looking”, a sort of view by which environmental considerations and international environmental law are taken into account to interpret trade law.<sup>61</sup> Many States are pursuing “green industrial policies” namely policies that aspire to develop strong competitive industries in environment-related sectors, for instance, renewable energies. In such a case, they may be hindered by international trade and investment disciplines unless trade law evolves<sup>62</sup> towards the outward looking conception that is based on the *complementarity* of trade and the environment rather than the inward looking *trade-off* between the two pursuits.

In Ethiopia, the objective of trade law, *inter alia*, is “... to accelerate economic development”.<sup>63</sup> To this end, exporters are given duty free incentives<sup>64</sup> which would promote trade. The Export Duty Incentive Schemes Proclamation has the rationale “...to ensure economic development by accelerating industrial growth of the country and to improve the foreign exchange needed for development and investment.”<sup>65</sup> On the other hand, Ethiopia’s environmental law requires any person not to pollute the environment.<sup>66</sup> There is thus the need to balance the objectives of both categories on laws, i.e. trade laws and environmental laws. In the absence of such harmony mere focus on the ‘acceleration of economic development’ contradicts with the right to sustainable development enshrined under the FDRE Constitution, since accelerating economic development may be made at the expense of the environment.

Examining the new Commercial Code reveals similar gaps. Its preface expresses its aim to “... strike the balance between the interests of investors, traders and other stakeholders that are directly affected” and it states that “... it has been necessary in order to bolster commerce and improve the standard of living of citizens; ...”.<sup>67</sup> It also aspires to enhance Ethiopia’s global competitiveness in trade.<sup>68</sup> Although the new Commercial Code expresses the need for striking a balance between the interests of traders, investors and the like who do have similar interest of development, the interest of environmental protection is not clearly expressed. Nor does it express the

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<sup>61</sup> Dupuy and Vinuales, *supra* note 3, at 479

<sup>62</sup> *Id.*, at 479-80.

<sup>63</sup> Trade Competition and Consumers Protection Proclamation No. 813/2013, Art. 3(3).

<sup>64</sup> Export Trade Duty Incentive Schemes Proclamation No. 768/2012, Art. 3.

<sup>65</sup> *Id.*, Preamble, 1<sup>st</sup> paragraph.

<sup>66</sup> Environmental Pollution Control Proclamation No. 300/2002, Art. 3(1).

<sup>67</sup> Commercial Code of Ethiopia Proclamation No. 1243/2021, Preface, 3<sup>rd</sup> paragraph.

<sup>68</sup> *Ibid.*

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need for the promotion of social rights and cultural rights of citizens (which are among the pillars of sustainable development). Such gaps are, *inter alia*, inconsistent with the multinational environmental agreements (MEAs) highlighted below that are ratified by Ethiopia.

### **2.3 Multilateral Environmental Treaties and Trade Regulation**

The normative conflicts between trade and environmental treaties have been mostly analysed in connection with “trade-related environmental measures” (TREMAs). Several environmental treaties impose trade restrictions or even ban trade in certain substances.<sup>69</sup> These treaties may be categorized into two as discussed below.

#### **2.3.1 Imposition of trade control systems against environmental hazards**

This article uses the word ‘*trade control*’ rather ‘trade restriction’ in the context of the treaties that are discussed below because they do not restrict legitimate trade. Treaties that impose trade control systems embody the principle of prior informed consent (PIC) such as the Basel Convention, the PIC Convention or the Cartagena Protocol on Biosafety.<sup>70</sup> Control systems on trade are at the heart of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. The main objective of the Convention is to “ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with the protection of human health and the environment whatever the place of disposal.”<sup>71</sup>

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<sup>69</sup> Dupuy and Vinuales, *supra* note 3, at 480. Ethiopia is a party to the following international treaties: International Plant Protection Convention IPPC 1979; Convention on International Trade in Endangered Species of Wild Fauna and flora-CITES; The Vienna Convention, especially its Montreal Protocol on Substance that Deplete the Ozone Layer; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; Convention on Biological Diversity; Cartagena Protocol on Bio-safety; United Nations Framework Convention on Climate Change; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; Stockholm Convention on Persistent Organic Pollutants. See, Ministry of Trade and Industry, *Memorandum of the Foreign Trade Regime*, at 65.

<sup>70</sup> Dupuy and Vinuales, *Ibid*.

<sup>71</sup> Basel Convention, preamble. Ethiopia has ratified Basel Convention. See Basel Convention on the Control of the Transboundary Movements of hazardous Wastes and Their Disposal Ratification Proclamation No. 192/2000.

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Trade in hazardous waste is subjected to a comprehensive control system, which is based on the principle of prior informed consent.<sup>72</sup> Where a country has gained the prior written consent from the importing country and all transit countries, a country can export these materials to such other country.<sup>73</sup> In principle, trade in these materials with non-parties is prohibited.<sup>74</sup> However, it is possible to trade with non-party countries where there is an agreement with them. The agreement should “not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention”.<sup>75</sup> As provided under Article 4(1), a party has the right to ban the entry or disposal of foreign hazardous waste in its territory.

The Convention does not incorporate any substantive provisions for financial assistance to developing countries to assist them in implementing their obligations. This is accepted as one of the reasons for poor implementation of the Convention.<sup>76</sup>

The Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) was adopted in 1998.<sup>77</sup> It has the objective “to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use”.<sup>78</sup>

Chemicals which are subject to the prior informed Consent (PIC) procedure are specified under Annex III of the Convention. This makes clear that a country can only export these chemicals after having consent from the importing country.<sup>79</sup> The exporting country has also the responsibility to provide for “labelling requirements that ensure adequate availability of

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<sup>72</sup> Eric Neumayer, (2000), “Trade Measures in Multilateral Environmental Agreements and WTO Rules: Potential or Conflict, Scope for Reconciliation” Published in: *Aussenwirtschaft*, 55 (3), pp. 1-24, available at: <http://ssrn.com/abstract=248528>, visited on: 6 June, 2020, at 7.

<sup>73</sup> Basel Convention, *supra* note 71, Art. 6.

<sup>74</sup> *Id.*, Art. 4 (5).

<sup>75</sup> *Id.*, Art 11(1)

<sup>76</sup> Neumayer, *supra* note 72, at 8.

<sup>77</sup> *Id.*, at 9.

<sup>78</sup> The Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention), Art.1.

<sup>79</sup> Neumayer, *supra* note 72, at 9.

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information with regard to risks and/or hazards to human health or the environment, taking into account relevant international standards”.<sup>80</sup>

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, regarding the objective provides:

In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.<sup>81</sup>

The protocol has the objective to protect human health and conserve the environment. It, thus, prohibits the movement of living modified organisms. Article 7(1) of the protocol stipulates that:

Subject to Articles 5 and 6, the advance informed agreement procedure in Articles 8 to 10 and 12 shall apply prior to the first intentional transboundary movement of living modified organisms for intentional introduction into the environment of the Party of import.<sup>82</sup>

The basic purpose of the protocol, here again, is to restrict trade in living modified organisms. In addition, there are treaties which seek to protect endangered species (mostly located in developing countries) through the control of demand (from developed countries). The Convention on International Trade in Endangered Species (CITES) is an excellent example.<sup>83</sup>

CITES restricts international trade in endangered species.<sup>84</sup> Appendix I specifies around 600 animals and 300 plant species that are threatened with extinction and whose trade for commercial purpose is generally prohibited

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<sup>80</sup> Rotterdam Convention, *supra* note 78, Art 13(2).

<sup>81</sup> The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, (2000) Montreal, Article 1.

<sup>82</sup> *Id.*, Art. 7(1). Ethiopia has ratified the Cartagena Protocol. *See* Cartagena Protocol on Biodiversity Ratification Proclamation No. 362/2003.

<sup>83</sup> Dupuy and Vinuales, *supra* note 3, at 480.

<sup>84</sup> Neumayer, *supra* note 72, at 5

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with few exceptions.<sup>85</sup> Furthermore, Appendix II provides 4000 animals and 25,000 plants species that might become threatened with extinction where their trade is not regulated. It is possible to import them if the exporter gets permit from the exporting state, testifying that the export will not be detrimental to the survival of that species. The export should be made in a manner where risk of injury, damage to health or cruel treatment is minimized.<sup>86</sup> As one can discern from the discussion, the Convention controls trade with a view to harmonizing it with health and environment compliance standards.

### **2.3.2 Trade bans as implementation tool for environmental protection**

The second category on environmental treaties includes treaties such as the Montreal Protocol<sup>87</sup> or the Persistent Organic Pollutants (POP) Convention.<sup>88</sup> The Vienna Convention for the Protection of the Ozone Layer<sup>89</sup> and its Montreal Protocol aim to phase out ozone depleting substances (ODS). These substances are responsible for the thinning of the ozone layer in the stratosphere, which filters out ultraviolet radiation. Chlorofluorocarbons (CFC) and Halons are the major ODS regulated by the Protocol.<sup>90</sup>

The Protocol bans imports<sup>91</sup> and exports<sup>92</sup> of controlled substances between parties as well as non-parties of the Protocol. It is possible to trade with those substances with non-parties where the latter comply with its obligations.<sup>93</sup> It also bans the import of products containing controlled substances from non-parties.<sup>94</sup>

Coming to the Persistent Organic Pollutants (POP) Convention, its objective is to eliminate ten POPs- aldrin, cholordane, DDT, dieldrin, endrin, heptachlor, hexacholorobenzene, mirex, polychlorinated biphenyls (PCBs), and toxaphene. In an exception, DDT could be used against malaria and for

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<sup>85</sup> The Convention on International Trade in Endangered Species of World Fauna and Flora (CITES), Art. III.

<sup>86</sup> *Id.*, Art. IV.

<sup>87</sup> The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, *supra* note 81, Art. 4 and 4A.

<sup>88</sup> Stockholm Convention on Persistent Organic Pollutants (POPs), as amended in 2009, Arts. 3(1)(a)(ii) and 3(2).

<sup>89</sup> The Vienna Convention for the Protection of the ozone layer, Vienna, 22 March 1985, entered into force: September 1988, preamble, 6<sup>th</sup> Paragraph.

<sup>90</sup> Neumayer, *supra* note 72, at 4

<sup>91</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, Art. 4(1).

<sup>92</sup> *Id.*, Art. 4(2).

<sup>93</sup> *Id.*, Art. 4(8).

<sup>94</sup> *Id.*, Art. 4(3).

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existing uses of (polychlorinated biphenyls) PCBs is possible. POPs are considered as special danger to human health and the environment as they persist and can accumulate in the environment and therefore passed on from one generation to the next.<sup>95</sup> According to these treaties, trade measures (typically a ban of transfers to non-parties) are useful to avoid shifting the production and/or the consumption of regulated substances to States that are not parties to the treaty.<sup>96</sup> It is to be noted that such trade bans are also found in treaties of the first category, for instance, the Basel Convention which bans trade with non-parties unless they have a similarly protective system regulating hazardous waste.<sup>97</sup>

TREMs (“trade-related environmental measures”) are not the only measures required or authorized by environmental treaties that may conflict with trade pursuits. A treaty that does not explicitly require the adoption of TREM, for instance, the UNFCCC, may be interpreted as authorizing the adoption of TREMs or other (non-TREM) trade relevant measures. Ethiopia is a party to the above international instruments which control trade in such a manner that the environmental objectives enshrined under Article 92 of the FDRE Constitution are respected in the pursuance of trade enhancement and economic growth.

### **3. Arguments in Support of Free Trade as a Positive Factor for the Environment**

Free trade supporters argue that liberalizing trade has mostly a positive effect on the environment. They contend that, some environmental measures pose a protectionist threat to the free trade order.<sup>98</sup> They consider trade law and environmental protection law as mutually supportive. According to this perspective, trade will affect the environment at its initial development, and can provide resources to mitigate environmental pollution as trade develops. They believe that trade liberalization can support environmental goals through the elimination of tariffs on environmental goods, and can, *inter alia*, reduce trade distorting subsidies.<sup>99</sup>

It is argued that free trade attracts more advanced technology and this in turn helps to promote sustainable development.<sup>100</sup> According to the

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<sup>95</sup> Neumayer, *supra* note 72, at 10-11.

<sup>96</sup> Dupuy and Vinuales, *supra* note 3, at 481.

<sup>97</sup> Basel Convention, *supra* note 71, Arts 4(5) and 11(1).

<sup>98</sup> Falkner and Jaspers, *supra* note 16, at 1-2.

<sup>99</sup> Lattanzio and Casey, *supra* note 8, at 1.

<sup>100</sup> Dai, Zhang and Zhang, *supra* note 10, at 3.

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arguments in favour of free trade, there are three features in the link or the synergy between environment and trade. *First*, promoting the efficiency in trade would promote the protection of environment. If international trade promotes efficiency it allows enhanced production from lesser inputs and minimizes our impact on the natural environment.<sup>101</sup> Using renewable energy, for example, could promote trade without polluting the environment.<sup>102</sup> It is argued that international trade promotes efficiency and this promotes sustainable development as a result of efficiency and reduces our use of resources.<sup>103</sup> Trade can help to end poverty, which is one of the core Sustainable Development Goals (SDDs), to promote sustainable economic growth<sup>104</sup> and promote sustainable industry.<sup>105</sup>

*Second*, empirical evidence shows that the increase of wealth by trade promotes environmental protection. This is explained by the Kuznet curve which shows that where members of the society intensify their economic demands, they demand for more healthy and sustainable environment.<sup>106</sup> Thus, they demand their government to regulate the environmental protection by using law.<sup>107</sup> *Third*, there is a positive relationship between trade and sustainable development. As trade liberalizes, economic development increases which is one of the pillars of sustainable development.<sup>108</sup>

### 3.1 Mutual supportiveness

There is mutual supportiveness between environmental and trade regimes. The Rio Declaration states:

States should cooperate to promote a supportive and open international economic system that would lead to economic

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<sup>101</sup> Chandaengerwa Yeukai, (May 2005), *Trade Promotion vs The Environment: Inevitable Conflict?* (A mini thesis submitted in partial fulfilment of the requirements for the degree of Masters in Law, International Trade and Investment Law in Africa, Faculty of Law, University of the Western Cape), at 8.

<sup>102</sup> See OECD, (June 2021), *OECD Work on Trade and the Environment: A retrospective, 20008-2020*, at 56.

<sup>103</sup> Yeukai, *supra* note 101.

<sup>104</sup> United Nations, *Transforming our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, 8<sup>th</sup> goal;

<sup>105</sup> Sustainable industry is the ninth Sustainable Development Goal. *Ibid.*

<sup>106</sup> Yeukai, *supra* note 101, at 9. Kuznet curve is challenged in practice.

<sup>107</sup> *See Id.*, at 10.

<sup>108</sup> *Ibid.* Economic pillar, social pillar, cultural pillar and environmental pillar are the four pillars of sustainable development. For the discussion of the four pillars of sustainable development, see Abebe, *supra* note 54, at 72-75.

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system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade ...<sup>109</sup>

The Declaration promotes *mutual supportiveness* between trade and environmental protection. In addition, Agenda 21 stresses that “the international economy should provide a supportive international climate for achieving environment and development goals by ... making trade and environment mutually supportive”.<sup>110</sup> States are called upon to “promote and support policies, domestic and international, that make economic growth and environmental protection mutually supportive”.<sup>111</sup>

Then, the WTO Committee on Trade and Environment (CTE) was instructed to pursue its activities “with the aim of making international trade and environment policies mutually supportive”.<sup>112</sup> The Committee reported that the environmental protection and the WTO system are both “two areas of policy-making that are both important and ... should be mutually supportive in order to promote sustainable development”<sup>113</sup> It is emphasised that in both environmental treaties and international trade treaties, the parties are representatives of the international community, and they should pursue both the protection of the environment as well as the promotion of trade.<sup>114</sup> This requires making both laws mutually supportive.

In 1996, the WTO Committee on Trade and Environment (CTE) Report turned this principle to a legal standard internal to the WTO. The Doha Ministerial Conference gives emphasis to the Mutual Supportiveness principle. The Doha Ministerial Declaration indicated the WTO members’ conviction “that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of

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<sup>109</sup> Rio Declaration on Environment and Development, 12 August 1992, Principle 12.

<sup>110</sup> Agenda 21, (Rio de Janeiro, 1992), para. 2.3(b), emphasis added.

<sup>111</sup> Id, para. 2.9(d). See also paras. 2.19-2.22. The emphasis is mine.

<sup>112</sup> Acceptance of and Accession to the Agreement Establishing the World Trade Organization, Decision of 14 April 1994, MTN/TNC/45(MIN). Emphasis supplied.

<sup>113</sup> Riccardo Pavoni, (2010), “Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the ‘WTO- and-Competing-Regimes’ Debate?” *The European Journal of International Law* Vol. 21 N0. 3, 649-679 (EJIL), at 652.

<sup>114</sup> Id.

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the environment and the promotion of sustainable development can and must be mutually supportive".<sup>115</sup>

Likewise, in relation to trade and health, it is stated that the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) should be interpreted in a supportive context relating to WTO Members' right to protect public health and in particular to promote access to medicines for all.<sup>116</sup> In this regard, the (2004) trade agreement between Ethiopia and Libya provides that the parties to the Agreement can restrict trade to protect the public health.<sup>117</sup> This illustrates the potential for trade law, health and the environment to be *mutually supportive*.

### **3.2 Integration (synergy) of ecological principles with trade**

It is argued that ecological aspects must be firmly integrated into all international negotiations. It is necessary to integrate environmental aspects into WTO agreements to ameliorate the negative effects of international trade.<sup>118</sup> Law is an important tool to integrate environmental protection into trade law.<sup>119</sup> The protection of environment requires supportive trade laws that would promote using technologies to reduce or control pollution.<sup>120</sup>

In this regard, a number of international instruments articulate the connection between environmental treaties and trade disciplines from a synergetic point of view.<sup>121</sup> For instance, the preamble of the 1998 PIC Convention<sup>122</sup> reads:

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<sup>115</sup> World Trade Organization, Ministerial Declaration, WT/MIN(01)/DEC/W/1 (14 Nov. 2001), at Para. 6. Emphasis added.

<sup>116</sup> Pavoni, *supra* note 113, at 652.

<sup>117</sup> *Trade Agreement between The Government of The Federal Democratic Republic of Ethiopia and The Great Socialist People's Libyan Arab Jamahiriya*, (2004), Art. 9 (a).

<sup>118</sup> Engobo Emeneh, (2006), "*The Limits of Law in promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria*", *Journal of Energy and Natural Resources Law*, 24 574-606, at 578.

<sup>119</sup> *Id.*, at 576-77.

<sup>120</sup> OECD, *supra* note 102, at 12.

<sup>121</sup> Dupuy and Vinuales, *supra* note 3, at 475.

<sup>122</sup> The 1998 Rotterdam Convention on the Prior Informed Consent Procedures for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention), Revised in 2011, preamble, paras. 8-10. The 2000 Biodiversity Protocol embodies a relatively similar content. (The 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Preamble, Paras, 9-11.)

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*Recognizing* that trade and environmental policies should be mutually supportive with a view to achieving sustainable development,

*Emphasizing* that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection,

*Understanding* that the above recital is not intended to create a hierarchy between this Convention and other international agreements.

This Convention shows the mutual supportiveness between international trade and environmental laws. In short, the 1998 PIC Convention and the 2000 Biodiversity Protocol provide for the synergy between environmental and trade regimes through the principle of mutual supportiveness. In this respect, it is essential to consider the 2005 UNESCO Convention on Cultural Diversity<sup>123</sup> and the 2010 Nagoya Protocol. The protocol makes clear that the principle of mutual supportiveness be applied so as to implement the Protocol in relation to other international agreements and instruments.<sup>124</sup>

Mutual supportiveness between environmental protection and promotion of trade is also given attention in Africa. African countries negotiate regional trade agreements in the context of their other international commitments.<sup>125</sup> Africa's aspiration stated in Agenda 2063 includes "a prosperous Africa based on inclusive growth and sustainable development",<sup>126</sup> among others. Agenda 2063 was used as a basis for African countries to contribute to the 2030 sustainable development goals (SDGs). Both Agenda 2063 and the

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<sup>123</sup> Art. 20 titled "Relationship to other treaties: mutual supportiveness, complementarity and non-subordination" requires parties to "foster mutual supportiveness between [the] Convention and the other treaties to which they are parties" ... and to "take into account the relevant provisions of [the] Convention "when interpreting and applying the other treaties to which they are parties or when entering into other international obligations".

<sup>124</sup> Art. 4(3) of the 2010 Nagoya Protocol reads:

"This Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to this Protocol. Due regard should be paid to useful and relevant on-going work or practices under such international instruments and relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.",

<sup>125</sup> United Nations Economic Commission for Africa, (July 2017) *The Continental Free Trade Area (CFTA) in Africa - A human Rights Perspectives* (Report), at 27.

<sup>126</sup> Agenda 2063: *The Africa We Want*, Art. 8. There are seven aspirations in general.

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SDGs stipulate the key role that trade can play in alleviating poverty, achieving sustainable development, and fulfilling human rights. It is to be noted that trade policy and trade related measures are stated in Goals 2, 8, 9, 10, 14, and 17.<sup>127</sup>

Ministry of Trade and Regional Integration is responsible to formulate policies to ensure sustained development and competitiveness in trade, and implement same upon approval by the pertinent body.<sup>128</sup> Ethiopia has a vision to make the economic development green and sustainable.<sup>129</sup> This envisages that trade contributes to green economic development. For instance, the Industrial Parks Proclamation aspires “to enhance export promotion, protection of environment and human wellbeing...”<sup>130</sup> To this end, the Industrial Parks Council of Ministers Regulations requires environmental impact assessment to designate industrial park,<sup>131</sup> and an industrial park enterprise should submit environmental impact assessment to obtain permit.<sup>132</sup>

### 3.3 The implication of “mutual supportiveness”

The principle of mutual supportiveness has the following implications:

- a) It may be a mere policy statement;
- b) It can be used as interpretative guideline (and some commentators consider this as a ‘principle’);
- c) It may be used as a conflict clause allocating hierarchy; and
- d) It could even be a ‘law-making’ principle.

#### 3.3.1 Mutual supportiveness as principle of interpretation and balancing technique

In case law, there is some authority for the proposition that mutual supportiveness may at least play an interpretative role in trade disputes.<sup>133</sup> The 1998 report of the WTO Appellate Body (AB) in the *Shrimp-Turtle* Case is a good example. The case involved a domestic environmental measure adopted by the United States which affected the imports of shrimp harvested in a way that did not afford sufficient protection to sea turtles. As

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<sup>127</sup> United Nations Economic Commission for Africa, *supra* note 125, at 28.

<sup>128</sup> Definitions of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 1263/2021, Art. 22 (1) (a).

<sup>129</sup> Federal Democratic Republic of Ethiopia, (2011), *Ethiopia’s Climate –Resilient Green Economy Green economy strategy*, (Addis Ababa), at 5.

<sup>130</sup> Industrial Parks Proclamation No. 886/2015, Preamble Second paragraph.

<sup>131</sup> Industrial Parks Council of Ministers Regulations No. 417/2017, Art. 5(8)( C).

<sup>132</sup> *Id.*, Art. 9(2) (d).

<sup>133</sup> Dupuy and Vinuales, *supra* note 3, at 475.

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part of its defence, the United States invoked the general exception in Article XX(g) of the GATT regarding the protection of exhaustible natural resources.<sup>134</sup>

Although the Appellate Body eventually concluded that the measure was not justified under Article XX (as it violated its chapeau), it invoked both to the preamble of WTO Agreement and two environmental treaties, i.e.- the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to interpret Article XX (g).<sup>135</sup>

The Appellate Body stated that the terms “exhaustible natural resources” in Art. XX (g) had to be interpreted “in the light of contemporary concerns of the community of nations about the protection and conservation of the environment”.<sup>136</sup> This approach can be seen as a general application of the customary rule of systematic integration codified in Article 31(3)(C) of the Vienna Convention on the Law of Treaties. However, it has not been consistently followed by the WTO Dispute Settlement Body.<sup>137</sup>

The principle of mutual supportiveness (MS) is considered as essential means for achieving sustainable development. This envisages integration between competing regimes in the case of MS, and the integration of all the environmental, social, economic and cultural human rights factors involved in the case of sustainable development.<sup>138</sup>

The *SD Myers* case –submitted to an Arbitral Tribunal established under the North American Free Trade Agreement (NAFTA) investment chapter–involved a Canadian ban on the export of polychlorinated biphenyl (PCB) wastes allegedly issued pursuant to various international environmental standards and rules. The case evoked competing economic, environmental and health concerns. The Tribunal extensively reviewed the pertinent environmental regimes and found that mutual supportiveness was the main principle governing the interface of trade, investment and environmental

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<sup>134</sup> See *Unites States vs India and others, United States-Import Prohibition of Certain Shrimp and Shrimp Products*, World Trade Organization Appellate Body, AB-1998-4.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> Dupuy and Vinuales, *supra* note 3, at 476.

<sup>138</sup> Pavoni, *supra* note 113, at 661.

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obligations. It reasoned that “environmental protection and economic development can and should be mutually supportive”.<sup>139</sup>

It is to be noted that the conciliatory rationale in the principle of mutual supportiveness operates at both the interpretative and law-making levels. Thus, States are required to give due attention to thorough and careful negotiations in order to seek normative solutions to trade and environmental issues capable of accommodating competing interests.<sup>140</sup>

### **3.3.2 Mutual supportiveness as a law-making principle**

This element consists of a state’s responsibility to facilitate the law-making process, including amendment procedures so as to resolve the conflicts between environmental issues and trade issues. This law-making process should constitute a measure of last resort where the interpretative element cannot achieve the conciliation due to irreconcilable norms and principles.<sup>141</sup>

According to Riccardo Pavoni, the mutual supportiveness principle in law-making, is a “real added value that MS has to offer to the international law system”.<sup>142</sup> It is noted that mutual supportiveness would be used on the assumption “that conflicts may and should be resolved between the treaty partners as they arise and within a view to mutual accommodation”.<sup>143</sup>

### **3.4 Environmental goods and services**

Facilitating trade on Environmental Goods and Services (EGS) could serve a number of purposes, including incentivising green industries worldwide, creating “green jobs” and increasing the diffusion of green products. It is intended to achieve “triple win” outcomes –i.e. good for trade, the environmental protection and development.<sup>144</sup> Under this context, liberalizing international trade law can play a positive role in building

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<sup>139</sup> SD Myers, Inc v. Canada, Parital Award, 13 Nov. 2000, 40 ILM (2001) 1408, para 220 and 247.

<sup>140</sup> Pavoni, *supra* note 113, at P.663.

<sup>141</sup> Id, at 666.

<sup>142</sup> Id, at 667. See generally Committee on Trade and Development Aid for Trade, Sustainable Trade, Circular Economy and Aid for Trade An Issue, Joint Paper for the 2020-2022 Monitoring and Evaluation Exercise, Joint Communication by the WTO and OECD Secretariats, World Trade Organization, 2 August 2021.

<sup>143</sup> Pavoni, *supra* note 113, at 667.

<sup>144</sup> Dupuy and Vinuales, *supra* note 3, at 477. Institute of International Sustainable Development, *supra* note 10, at 110.

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international markets for environmental goods and services.<sup>145</sup> Steenblink *et al* define *environmental goods and services* as:

... capable of measuring, preventing, limiting or correcting environmental damage such as the pollution of water, air, soil, as well as waste and noise-related problems. They include clean technologies where pollution and raw material use is being minimized.<sup>146</sup>

This definition comprises goods and services that can be used for prevention, monitoring, and remediation of environmental impacts. Environmental goods are also defined in two ways: through environmental services, or as an “environmental service”. The first category includes goods that are integral or incidental to the delivery of environmental services, such as waste water treatment or waste management. The second category comprises goods that are environmentally preferable products. However, these two categories are not mutually exclusive.<sup>147</sup>

There are trends towards product development and market creation in ecosystem goods and services, as in the case of bio-trade, or Kyoto Protocol markets. Services that have emerged from the Kyoto Protocol consist of emissions trading and emissions offset services.<sup>148</sup> The trend shows that trade in environmental goods has been increasing.

#### **4. Environmental Protection in Practice**

The practice of environmental protection may be explained by exploring the process and production methods, the use of general exceptions, and specific agreements including agreement on Sanitary and Phytosanitary (SPS) and agreement on Technical Barriers to Trade (TBT).

##### **4.1 Process and production methods (PPMs)**

Process and production methods (PPMs) deal with the way in which a product is made.<sup>149</sup> Trade law addresses how a product is made.<sup>150</sup>

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<sup>145</sup> Ronald Steenblink, Dominique Drouet, and George Subbs,(2005), *Synergies between Trade in Environmental Services and trade in Environmental Goods*, (OECD Trade and Environment Working Papers 2005/01, OECD 2005), at 5.

<sup>146</sup> Dupuy and Vinales, *supra* note 3, at 477.

<sup>147</sup>Alexey Vikhlyaev, (2003), “Environmental Goods and Services: Defining Negotiations or Negotiating Definitions?” 33-60, *United Nations Conference on Trade and Development, Trade and Environment Review*, (United Nations, New York), 35.

<sup>148</sup> *Id*, at 36.

<sup>149</sup> Institute of International Sustainable Development, *supra* note 7, at 67.

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Environmental trade measures on products, and import regulatory standards regulate how a product is produced, manufactured or obtained. This is known as process and production methods (PPMs).<sup>151</sup>

Many products go through a number of stages before they are made ready for market. Thus, we find a number of PPMs. For instance, the production of a traditional paper requires trees to be harvested. Then, wood should be processed, and the pulp is often bleached. In the production process, there are choices about how the product is made that have environmental impacts. For instance, in paper production, we may use post-consumer waste which is recycling, rather than trees, or may be bleached without chlorine. In general, the different processes may have various environmental impact. Accordingly, the impact of different products on the health, water, air etc. will depend on the type of chemicals used in the production or energy use.<sup>152</sup>

As Sifonios notes, legal regimes “may seek to adopt product standards or disposal requirements to reduce environmental effects” and they “also need to regulate the production methods of the goods” that will be produced domestically as well as imported ones.<sup>153</sup> This is because some methods may result in extensive environmental harm. For instance, exploitation of natural resources may cause environmental damage, such as “incidental catch of non-target species in fish trawling, destruction of primary forests to harvest tropical timber or the use of certain farming methods such as slash and burn”, and extensive use of chemicals.<sup>154</sup> Greenhouse gas emission is the other significant impact of production regardless of the location of emission sources. Thus, the production method of one country may have a negative impact upon the environment of another. Therefore, a process and production method of goods can be regulated to render the production and environmental protection mutually supportive.<sup>155</sup>

However, there are fears that environmental standards to regulate PPMs might produce environmental improvement only in certain industries. For instance, a country where water is scarce may regulate the product by discriminating the products which use more water than the products that use

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<sup>150</sup> Howard Mann and Stephen Porter, (2003), *The State of Trade and Environmental Law 2003 Implications for Doha and Beyond* (Institute for Sustainable Development and the Center for International Environmental Law), at 7.

<sup>151</sup> Matsushita et al, *supra* note 1, at 746.

<sup>152</sup> Institute of International Sustainable Development, *supra* note 7, at 67.

<sup>153</sup> David Sifonios, (2018), *Environmental Process and Production Methods (PPMs) in WTO Law*, (Springer International Publishing AG,) at 1.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

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of less water or recycle water. The same measure can be inappropriate in a country where water is not a problem.

Moreover, there are arguments that interrogate the application of a similar standard to all countries on the ground that this may violate the principle of common but differentiated responsibility.<sup>156</sup> Based on this conception, some developing countries argue that their priority primarily relates to social issues such as clean infrastructure, education, water, and health. Thus, the argument goes that the discrimination of the developed countries against the exporters of developing countries based on environmental issues that are high on these country's agendas is not appropriate.<sup>157</sup> They also argue that the now-rich countries have used various natural resources to develop and, on the contrary, forbid developing countries to use these natural resources.<sup>158</sup>

Sovereignty is among the arguments that can arise. If the environmental damage in issue is local, it is the jurisdiction of the government to manage it. However, the problem arises in case of some resources that are transboundary such as shared waters or airstreams. In such a case international cooperation is needed. Therefore, multilateral environmental agreements (MEAs) are used as a form of cooperation to prevent PPMs-based environmental and trade conflicts.<sup>159</sup>

Recently, several countries have introduced measures that do distinguish products based on their PPMs, such as "biofuel suitability standards" or fuel-quality standards. For instance, the European Union's Fuel-Quality Directive introduces "a mandatory reduction target of 6% by 2020 for the life cycle greenhouse gas emissions of fuels used in the EU by road vehicles and non-road mobile machinery".<sup>160</sup> As stipulated under the Trade Agreement Ethiopia made with the Republic of Korea, goods and services imported from Korea should be sold in Ethiopia after the approval by appropriate authority.<sup>161</sup> This gives the appropriate authority to check whether the goods

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<sup>156</sup> Institute of International Sustainable Development, *supra* note 7, at 70.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Id.*, at 71.

<sup>159</sup> *Ibid.*

<sup>160</sup> Baron and Garrett, *supra* note 24, at 20.

<sup>161</sup> Trade Agreement between the Government of the Federal Democratic of Ethiopia and the Government of the Republic of Korea, (Addis Ababa, 3<sup>rd</sup> of June 2002), Art. 5(2).

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and services meet the Standards<sup>162</sup> that are aimed at protecting the environment. Member States agree to implement common policy on standardization of goods and services among themselves.<sup>163</sup> In the case of trade between Ethiopia and Sudan, competent authorities must approve the goods and services prior to sale.<sup>164</sup> This means that appropriate authority has to check that goods and services conform to the national standards of Ethiopia.

With regard to Ethiopia's institutional framework, the Council for the Quality and Standards Authority must determine "standards of products, process and systems" that are subject to mandatory certification.<sup>165</sup> The Ministry of Trade and Regional Integration has the responsibility to control the export or import of goods so that they are in conformity with the required standards.<sup>166</sup> It also has the power to ensure that goods comply with the mandatory Ethiopian standards.<sup>167</sup>

For example, any infant formula and follow up formula must have the components free from genetically modified organisms (GMOs) and should not be exposed to any radiation during manufacturing. Its package should also be made from a non-plastic material, and contain a label bearing the source of its protein.<sup>168</sup> This shows the Process and Production Methods (PPMs) that are adopted in Ethiopian laws to protect health and the environment, while promoting trade.

#### **4.2 The use of general exceptions**

The use of exceptions is the main avenue through which environmental protection is being brought under trade law.<sup>169</sup> Thus, a member State may invoke justifications under the general exceptions provided under Article XX of the GATT.<sup>170</sup> Article XX, sub paragraphs (a), (b), (d), (g), and (j) of

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<sup>162</sup> Ministry of Trade and Regional Integration is responsible to control the compliance of goods with the mandatory standards of Ethiopia. Proc. No. 1263/2021, Art. 22 (1) (L).

<sup>163</sup> Treaty Establishing the African Economic Community, (June 3<sup>rd</sup> 1991, Abuja, Nigeria), Art. 67(1) (a).

<sup>164</sup> Trade Agreement between the Government of the Republic of Sudan and the Federal Democratic Republic of Ethiopia, Art. 10.

<sup>165</sup> Proclamation to Amend the Quality and Standards Authority of Ethiopia Establishment Proclamation No. 413/2004, Art. 9(3).

<sup>166</sup> Proc. No. 1263/2021, Art. 22 (1), (f).

<sup>167</sup> Id., Art. 22 (1) (l).

<sup>168</sup> Food and Medicine Administration Proclamation No. 1112/2019, Art. 12.

<sup>169</sup> Dupuy and Vinuales, *supra* note 3, at 485.

<sup>170</sup> Institute of International Sustainable Development, *supra* note 7, at 43.

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the GATT have been invoked to justify measures such as import bans of re-treaded tires, or seal products, or export restrictions of certain materials, or still, preferential treatment of domestic producers of solar panels for environmental reasons.<sup>171</sup>

Subject to the prohibition of “arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade” Article XX of GATT allows contracting parties to take measures that are:

- (a) “necessary to protect human, animal or plant life or health”...<sup>172</sup> [and]
- (b) “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption” ...

The country that wants to use these exceptions must, first show the justification that the exception is applicable to the case at hand. Moreover, it must indicate that the application of the exception does not contravene the lead paragraph, called the chapeau of Article XX.<sup>173</sup>

Under sub (b) of Article XX, the party is required to show that the measure is “necessary” to protect the environment. Thus, the party should prove that the restriction of trade was the least restrictive measure necessary to protect the environment.<sup>174</sup> As coined by the panel in *Korea-Various Measures on Beef and Brazil-Retreated Tyres* case, the factors to balance include: “(1) the relative importance of the objective of the measure, (2) the contribution of the measure to the objective pursued, and (3) reasonably available less trade-restrictive alternatives.”<sup>175</sup> The reasonableness should be determined taking into account the cost and the administrative capacity to implement it. Moreover, the alternative measures should be equally effective in achieving the objectives of the members.<sup>176</sup>

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<sup>171</sup> Dupuy and Vinuales, *supra* note 3, at 485.

<sup>172</sup> The Ethiopian Criminal Code punishes a person who disseminates human diseases. Civ. C., Art. 514. It is also punishable to disseminate animal diseases. Civ. C., Art. 515.

<sup>173</sup> Institute of International Sustainable Development, *supra* note 10, at 44.

<sup>174</sup> *Ibid*; Thomas J. Schoenbaum, (1992), “Free International Trade and Protection of the Environment: Irreconcilable Conflict?” *The American Journal of International Law*, vol. 86, No. 4, pp. 700-727, at 711.

<sup>175</sup> *Korea-Various Measures on Beef and Brazil-Retreated Tires* case; Institute of International Sustainable Development, *supra* note 7, at 44.

<sup>176</sup> *Ibid*; Steve Charnovitz, (2007), *Trade and the Environment in the WTO* (GW Law Faculty Publications.), *10 J. of Int'l econ. L.1*, at 24.

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The exception under sub (a) of Article XX is seldom used to protect the environment, particularly the animals on the bases of public morality. This exception was invoked in an EU ban on seal products, implemented in response to concerns about animal cruelty in hunting. However, the scope of the exception is to be determined yet.<sup>177</sup>

Cases, like *Shrimp-Turtle case*, have greatly contributed to the understanding of Article XX and its potential for environmental protection. In the *US-Shrimp and China-Raw Materials* cases, the Appellate Body confirmed that the term “natural resources” is not static and may cover both mineral and living resources and that the term “conservation” means “the preservation of the environment, particularly natural resources”.<sup>178</sup> This would help the protection of the environment.

In *EC-Seal Products* case, a ban on the import of seal products was considered “necessary to protect public morals” under Article XX(a). However, the challenged measures failed to meet the requirements of the chapeau. This is the first case where an environmental concern such as animal welfare was brought under the protection of public morals in Article XX (a).<sup>179</sup> One can indeed appreciate these encouraging developments. However, it is argued that the protection of environment should not only rely on the exceptions: the interpretation of trade law should help more developments.<sup>180</sup>

### 4.3 Specific trade agreements: SPS and TBT

After the North American Free Trade Agreement (NAFTA) and Uruguay Round multilateral trade negotiations, a trend has been developed to include environmental provisions in trade agreements. However, this incorporation of environmental provisions in trade agreements is subject to debate. Those who criticize the incorporation argue that Environmental regulations inhibit trade; and without incorporating environmental provisions in trade agreements, trade promotes economic development which raises incomes and this is essential for the implementation of environmental protection. On the other hand, those who support the incorporation assert that trade and

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<sup>177</sup> Institute of International Sustainable Development, *supra* note 7, at 46-7.

<sup>178</sup> China- Measures Related to the Expropriation of Rare Earths, Tungsten, and Molybdenum, 7 August 2014, WT/DS431/AB/R WT/DS432/AB/R WT/DS433/AB/R, Reports of the Appellate Body, World Trade Organization, para. 5.89.

<sup>179</sup> Dupuy and Vinuales, *supra* note 3, at 487.

<sup>180</sup> *Ibid.*

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environment are interrelated; and in the absence of such incorporation many MEAs are weak and unenforceable to protect the environment.<sup>181</sup>

The Agreement on Sanitary and Phytosanitary (SPS) Measures and Agreement on Technical Barriers to Trade (TBT) are the two standards related to WTO Agreements on environmental measures.<sup>182</sup> An exception to Article XX incorporates the right of States to adopt measures necessary to protect human, animal and plant health. In addition, this is also regulated at the level of trade disciplines. The SPS Agreement allows the adoption of specific measures to ensure transparency –through a notification requirement, administrative due process (through expediency and reasonableness requirements in inspection procedures), for harmonization (through references to equivalent and to international standards). The relevant measures should be based on scientific evidence and risk assessment.<sup>183</sup>

*The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)*

This agreement refers to the process and production methods.<sup>184</sup> Sanitary and phytosanitary (SPS) measures are applied to both domestically produced and imported goods so as to protect human or animal life or health from food borne risks. It is intended to protect human from animal and plant carried diseases, and the territory of a country from the spread of pest or disease. To achieve these goals, SPS measures may address the characteristics of final products and how goods are produced, processed, stored and transported. Conformity assessment certificates, inspections, quarantine requirements, import bans, and so on would be used. Some of the SPS measures may result in trade restrictions. However, governments generally recognize that some restrictions are necessary and appropriate to protect human, animal and plant life and health.<sup>185</sup> The Agreement is an

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<sup>181</sup> Dale Colyer, *Environmental Provisions in Trade Agreements*, Paper presented at the short course “Trade and the Environment: Dealing with Pollution and natural Resource management in a Globalizing World”, World Bank, Washington, DC, December 8, 2004, at 2.

<sup>182</sup> Fahmida Khatun, (2009), *Environment Related Trade Barriers and the WTO*, (Centre for Policy Dialogue), at 7.

<sup>183</sup> Dupuy and Vinuales, *supra* note 3, at 488. Khatun, *id.*, at 7.

<sup>184</sup> Sifonios, *supra* note 153, at 5.

<sup>185</sup> Simonetta Zarrilli, (1999), *WTO Agreement on Sanitary and Phytosanitary Measures: Issues for Developing Countries*, (Working Paper, South Centre).

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attempt to promote efficient international trade and the sovereign duty to protect health.<sup>186</sup>

The legal base for SPS is risk assessment.<sup>187</sup> The SPS Agreement incorporates measures necessary to protect humans, animals and plants from certain hazards associated with the movement of animals, plants and foodstuffs in international trade.<sup>188</sup> The main goal of the SPS Agreement is to prevent domestic SPS measures having unnecessary negative effect on international trade and their being misused for protectionist purposes. The Agreement fully recognizes the legitimate interest of countries in setting up rules to protect food safety and animal and plant health.<sup>189</sup>

The Agreement provides national authorities with a framework within which countries can develop their domestic policies. It encourages countries to base their SPS measures on international standards, guidelines, or recommendations. It also requires states to play their role in the harmonization of SPS regulation worldwide.<sup>190</sup>

It may be argued that SPS gives a room for the adoption of environmental measures based on the *precautionary principle*. This was widely discussed in cases- *EC-Hormones* and *EC-Biotech*. In both cases, the EC sought to reason out trade restriction measures on the basis of the precautionary principle. However, the argument was not accepted by the tribunals. The Appellate Body declined to take the argument. In *EC-Biotech* case, “the panel reasoned that the legal status of the precautionary principle was still unsettled in general international law and therefore, the principle was not relevant for the interpretation of the SPS Agreement”.<sup>191</sup>

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<sup>186</sup> Christopher Bisgaard, (2008), “Assessing the Standard of Review for Trade-Restrictive Measures in the Sanitary and Phytosanitary Agreement” in Edith Brown Weiss, John H. Jackson, and Nathalie Bernasconi-Osterwalder (eds.), *Reconciling Environment and Trade*, (Second Edition), 357-376, at 357.

<sup>187</sup> Michael Burkard, (2018), *Conflicting Philosophies and International Trade Law*, World views and the WTO, (Malgrave Macmilalan), at 2.

<sup>188</sup> Institute for Sustainable Development, *supra* note 7, at 51.

<sup>189</sup> *Ibid.* Public morality is used as a rationale to protect the health of animals. See generally, Chad J MCyiure (2015), *Environmental Law and International Trade: Public Morality as a Tool for Advancing Animal Rights*” in Ronald Abate (Editor) *What Can Animal Law Learn from Environmental Law*, 287-304 (McGuire, Washington DC).

<sup>190</sup> Khatun, *supra* note 182, at 7; Institute for Sustainable Development, *supra* note 7, at 52.

<sup>191</sup> *EC-Biotech* case

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*Regulatory measures and bilateral trade agreements*

On the basis of bilateral trade agreements, Ethiopia has the right to impose restrictions or apply prohibitions to

- Protect public health;<sup>192</sup>
- Prevent disease and pests in animals or plants;<sup>193</sup> and
- To protect cultural values of the country.<sup>194</sup>

Importation of plant or animal originated food items to Ethiopia must be accompanied by a health certificate issued only by authorised government body from the exporting country.<sup>195</sup> Wildlife and wildlife products can be imported to Ethiopia upon presentation of health certificate.<sup>196</sup> Live animals should be exported only upon fulfilling the Ethiopian standards or in the absence of such standards, the standards of the buyer.<sup>197</sup> Live animals could be exported based on animal health certificate from the Ministry of Agriculture.<sup>198</sup> The Ministry of Agriculture and/or the regional concerned body is responsible to prohibit and control the importation of animals, animal products and by-products to Ethiopia so as to prevent and control the spread of animal disease.<sup>199</sup> Restricted plants could be imported to Ethiopia based on permit issued by the Ministry of Agriculture.<sup>200</sup> Moreover, there are plants that are prohibited to be imported.<sup>201</sup>

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<sup>192</sup> Trade Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Korea, Art. 9(b).

<sup>193</sup> *Ibid.*

<sup>194</sup> *Id.*, Art. 9(c).

<sup>195</sup> Public Health Proclamation No. 200/2000, Art. 8(1). Import permit is also essential. See Frank Joosten, (2007), *Phytosanitary services in the Ethiopian export-oriented horticulture; An assessment of needs and potentials for further development*, (Mission Report, Wageningen University & Research, the Netherlands), at 12.

<sup>196</sup> Council of Ministers Regulations to provide for Wild life Development, Conservation and Utilization, Regulations No. 163/2008, Art. 28(1).

<sup>197</sup> Live Animals Marketing Council of Ministers Regulations No. 34/2015, Art. 14(2).

<sup>198</sup> Live Animals Marketing Proclamation No. 819/2014, Art. 11(5).

<sup>199</sup> Animal Diseases Prevention and Control Proclamation No. 267/2002, Art. 7(1). See also the Draft Proclamation on Animal Health and Welfare, 2012, Art. 27.

<sup>200</sup> Plant Quarantine Regulation, Council of Ministers Regulations No. 4/1992, Art. 4(1). For the list of restricted plants, see Schedule I of the Regulation.

<sup>201</sup> *Id.*, Art. 5 and Schedule II. Ethiopia has signed a memorandum of understanding with Somalia so as to control animal disease, Art. 3(a) and to facilitate livestock trade through quality control and certification, among others (Art. 3(c)). Memorandum of Understanding between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Federal Republic of Somalia on Cross border Cooperation and Coordination on Animal Health and Sanitation measures, 2019.

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Consignments of plants or agricultural commodity by a trader require certificate issued by the Ministry of Agriculture. The certificate must indicate that the consignment is substantially free from diseases and pests, and conforms with the current phytosanitary regulations of the importing country.<sup>202</sup> In Ethiopia, goods must carry the labels affixed on them indicating particulars including country of manufacturing or export of the goods, quality of the goods, materials used to manufacture the goods and the indication that the goods have fulfilled the requirements set in Ethiopian standardization.<sup>203</sup> The rationale of the law is to prevent and control public health from hazards caused by unsafe food.<sup>204</sup>

The executive organ is empowered to initiate and implement food standards.<sup>205</sup> Therefore, food and packing materials must comply with the standards issued by the appropriate organ.<sup>206</sup> In the absence of such standards, standards adopted by international organizations may be used to regulate the safety of food.<sup>207</sup> It is stipulated that “every food prepared for the purpose of exporting shall be safe ...”.<sup>208</sup>

Food manufacturing for sale must install the required quality control system so as to ensure the safety of foods it produces.<sup>209</sup> Food must be produced from safe raw materials.<sup>210</sup> It is stipulated that : “Any food product may not have chemical residue including pesticide, fertilizer, animal medicine, food additive chemical, cleaning chemical, a radioactive substance, and other contaminants above the maximum level issued or adopted by the appropriate organ”.<sup>211</sup>

Food that complies with safety standards can be imported with permission granted by the executive organ.<sup>212</sup> Likewise, an exporter may be given health certificate to export food.<sup>213</sup> Ministry of Health must “ensure

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<sup>202</sup> Addis Ababa Chamber of Commerce and Sectorial Associations, *supra* note 31, at 18.

<sup>203</sup> Food and Medicine Administration Proclamation No. 1112/2019, Art. 24(2)

<sup>204</sup> *Id.*, 1<sup>st</sup> Paragraph of Preamble.

<sup>205</sup> *Id.*, Art. 4(1).

<sup>206</sup> *Id.*, Art. 5(3). The Quality and Standards Authority has the power to approve standards. Regulations No. 4/1992, Art. 9(2).

<sup>207</sup> *Id.*, Art. 5(4).

<sup>208</sup> *Id.*, Art. 5(6).

<sup>209</sup> *Id.*, Art. 9(1)

<sup>210</sup> *Id.*, Art. 9(2).

<sup>211</sup> *Id.*, Art. 7(5)

<sup>212</sup> *Id.*, Art. 10 (1)

<sup>213</sup> *Id.*, Art. 10 (5).

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the proper execution of food, medicine and health care administration and regulatory functions”.<sup>214</sup> Ministry of Agriculture is also responsible to create a system to prevent plant and animal diseases.<sup>215</sup> As one can discern from the above discussion, Ethiopia is employing SPS to protect public health and to ensure plants and animals are protected from pests and diseases. In addition, Ethiopia has adopted law so as to protect its cultural values, which are part of the environment.

*The Agreement on Technical Barriers to Trade (TBT)*

Technical Barriers to Trade refers to process and production methods (PPMs) “since it applies to technical regulations, which are defined as a document that lays down product characteristics ‘or their related process and production methods’.”<sup>216</sup> TBT Agreement does not apply to PPM measures that do not have any impact on the physical characteristics of the product—this is called non-product related (npr-PPMs, or unincorporated PPMs) which are only covered by the GATT.<sup>217</sup>

TBT covers non-tariff barriers to trade, which are technical regulations, standards and conformity assessment procedures. Specifications of product characteristics that goods (to be traded) must fulfil are called technical regulations. For instance, energy efficiency (in case of washing machine), and labelling requirements (for nutritional products) are technical regulations. On the other hand, there are label differentiation standards that can be non-binding product specifications which may include environmental, health, labour or other specifications that a product must meet to get a label. It is to be noted that forest products, for instance, must originate from sustainably managed forests.<sup>218</sup>

The TBT Agreement aims at promoting the objectives of the GATT by balancing between the benefits and risks of international trade and drawing a borderline between protectionism as legitimate protection that would include environmental protection.<sup>219</sup> As Khatun observes, the “Agreement on TBT relates to trade restrictive effect arising from the application of technical

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<sup>214</sup> Proclamation to the definition of a Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 1263/2021, Art. 35 (1)(L).

<sup>215</sup> Id, Art. 20 (1)(f).

<sup>216</sup> Sifonios, *supra* note 153, at 4.

<sup>217</sup> Id, at 4-5.

<sup>218</sup> Institute of International Sustainable Development, *supra* note 7, at 49-50.

<sup>219</sup> Erich Vranes, (2009), *Trade and the Environment* Fundamental Issues in International and WTO Law (Oxford University Press), at 286.

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regulations or standards such as testing requirements, labelling requirements, packing requirements, and safety and health regulations.”<sup>220</sup> According to TBT Agreement, each individual government has the right to set appropriate environmental standards.<sup>221</sup> However, the Agreement must meet the conditions such as notification, non-discrimination, proportionality, and transparency in developing the rules.<sup>222</sup>

Specific marking and labelling is essential among others, to ensure compliance with environmental and safety standards.<sup>223</sup> In this regard, Environmental protection may require voluntary or mandatory energy efficient standards and labelling.<sup>224</sup> This is important to make sure that trade does not contradict environmental protection. This would strengthen the mutual supportiveness of trade law and environmental law in Ethiopia.

## 5. Conclusion

As discussed in the preceding sections, trade law may have negative impact on the environment where it promotes free trade irrespective of its adverse effect on the environment such as trading in chemicals. On the other hand, trade law may provide the opportunity for supportive settings in the avenues of environmental sustainability.

Indeed, there is a potential for conflicts between environmental law and trade law (such as the potential conflict between trade and environmental treaties). Such conflict is normative where there is a contradiction between international environmental law and international trade law. There can also be a legitimacy conflict where the conflict arises between international trade law and domestic environmental law. Such conflicts can be solved through various methods of interpretation. Ethiopia should thus give due attention to environmental issues and the application of relevant laws so as to ensure environmental sustainability in the course of economic activities.

The pragmatic approach, as discussed above, is to pursue the path of synergy between trade and the environment. This approach can enable trade

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<sup>220</sup> Khatun, *supra* note 182, at 8.

<sup>221</sup> *Ibid.*

<sup>222</sup> Institute of International Sustainable Development, *supra* note 10, at 50.

<sup>223</sup> Addis Ababa Chamber of Commerce and Sectorial Associations, *supra* note 18, at 16.

<sup>224</sup> Shunata Yamaguchi and Rob Dillink, *Regional Trade Agreements (RTAs) on Non-Tariff Measures (NTMS) through Technical Barriers to trade (TBT), and Regulatory Co-operation*, 25 December 2020 Joint Working Party on Trade and Environment, at 9.

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law to enhance genuine and sustainable economic development which in turn would help the society to protect the environment. In short, there is the need to establish harmony and linkage between environmental law and trade law.

The effectiveness of this harmony and synergy is dependent upon the level of *mutual supportiveness* and *integration* between environmental law and trade law. The principle of *integration* is used as important tool to integrate environmental protection into trade law. And, the principle of *mutual supportiveness* can be used as principle of interpretation and balancing techniques among the elements of *sustainable development* which include economic, social, environmental and cultural objectives in the context of good governance.

Mutual supportiveness can also be used as a law-making principle thereby informing the laws on environment and trade. The synergies between environmental law and trade law can indeed be promoted by international trade law in building markets for environmental goods and services to solve environmental problems. Moreover, as discussed above, both trade and environmental protection can be promoted by using trade measures on products, import restrictions upon violation of standards, and regulation of process and production methods (PPMs), i.e., how a product is manufactured, produced or obtained. Efforts towards the balance (between trade and the environment) can further make use of the general exceptions enshrined under Article XX of the GATT.

The measures that have been highlighted relating to specific trade agreements, i.e, Agreement on Sanitary and Phytosanitary (SPS) Measures and Agreement on Technical Barriers to Trade (TBT) also reveal the trend of incorporation of environmental provisions in trade treaties. These agreements can indeed promote international trade in the context of the sovereign right to protect (human, animal and plant) health, and can meanwhile address trade objectives by balancing the risks and benefits of trade with environmental protection. \_\_\_\_\_■

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