

GLOBAL TRADE LAW SERIES

THE WTO DISPUTE SETTLEMENT SYSTEM

CHALLENGES OF THE ENVIRONMENT,
LEGITIMACY AND FRAGMENTATION

Kati Kulovesi



Wolters Kluwer
Law & Business

The WTO Dispute Settlement System

**Challenges of the Environment, Legitimacy
and Fragmentation**

Kati Kulovesi



Wolters Kluwer
Law & Business

Published by:

Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3406-6

© 2011 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA.
Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

About the Author

Kati Kulovesi is Post-Doctoral Researcher at the Law Department of the University of Eastern Finland, teaching and researching climate change law. She holds an LL.M from the University of Helsinki, and LL.M and Ph.D. degrees from the London School of Economics and Political Science (LSE). She is also Team Leader and Writer for the Earth Negotiations Bulletin/International Institute for Sustainable Development, and Affiliated Research Fellow at the Erik Castrén Institute of International Law and Human Rights, University of Helsinki. She has taught international and European environmental law at the LSE, and consulted for a number of organizations, including the Finnish Ministry for the Environment, the World Bank, the UN Food and Agricultural Organization, the International Conservation Union, the Nordic Environment Finance Corporation and others.

List of Abbreviations

AAU	Assigned Amount Unit
AB	Appellate Body
ABS	Access and Benefit Sharing
ACP	African, Caribbean and Pacific Countries
AIA procedure	Advance Informed Agreement Procedure
ALBA	Bolivarian Alliance for the Americas
AR4	Fourth Assessment Report by the Intergovernmental Panel on Climate Change
AWG-KP	Ad Hoc Working Group on Further Commitments by Annex I Parties under the Kyoto Protocol
AWG-LCA	Ad Hoc Working Group on Long-term Cooperative Action under the Convention
BSE	Bovine Spongiform Encephalopathy
CBD	Convention on Biological Diversity
CDM	Clean Development Mechanism
CER	Certified Emission Reduction
CIEL	Center for International Environmental Law
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMS	Convention on the Conservation of Migratory Species of Wild Animals
COP	Conference of the Parties
COP/MOP	Conference of the Parties serving as the meeting of the Parties
CTE	Committee on Trade and Environment
DNA	Deoxyribonucleic Acid
DSB	Dispute Settlement Body

List of Abbreviations

DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
ERU	Emission Reduction Unit
ETS	Emissions Trading Scheme
EU	European Union
EUR	Euro
FAO	UN Food and Agriculture Organization
G-77/China	Group of 77 and China
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GM	Genetically Modified
GMO	Genetically Modified Organism
GSP	Generalized System of Preferences
ICC	International Criminal Court
ICJ	International Court of Justice
IEA	International Energy Agency
IISD	International Institute for Sustainable Development
ILC	International Law Commission
IMF	International Monetary Fund
INSEREM	Institut National de la Santé et de la Recherche Scientifique
IPCC	Intergovernmental Panel on Climate Change
ITLOS	International Tribunal for the Law of the Sea
ITO	International Trade Organization
IUCN	World Conservation Union
JECFA	Joint FAO/WHO Expert Committee on Food Additives
JI	Joint Implementation
LDCs	Least-Developed Countries
MEA	Multilateral Environmental Agreement
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFN	Most-Favoured Nation Treatment
MGA	Melengestrol Acetate
MMPA	The US Marine Mammal Protection Act
MoU	Memorandum of Understanding
NAFTA	North American Free Trade Agreement
NAMA	Non-agricultural Market Access (WTO)
NAMA	Nationally Appropriate Mitigation Action (UNFCCC)
NGO	Non-governmental Organization
NIEO	New International Economic Order
OECD	Organisation for Economic Co-operation and Development
OPEC	Organization of Petroleum-Exporting Countries
PCG	Polyvinyl alcohol, cellulose and glass fibres

PPMs	processes and production methods
REDD-plus	Reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stock in developing countries
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SIDS	Small Island Developing States
SPS measure	Sanitary or Phytosanitary Measure
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TED	Turtle Excluder Device
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCCD	United Nations Convention to Combat Desertification
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
US	United States
USD	United States Dollar
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization
WWF	World Wildlife Fund for Nature

Preface and Acknowledgement

This book is an edited and updated version of my doctoral dissertation, accepted by the London School of Economics and Political Science (LSE) in October 2008. The original manuscript was written at the LSE Law Department in 2003–2007 when I benefited from financial support from the Finnish Cultural Foundation and the Helsingin Sanomat Centennial Foundation. An Erasmus grant from the LSE also enabled me to visit the European University Institute in Florence for four months in 2005 and participate in the stimulating seminars by Professor Ernst-Ulrich Petersmann. My current employment at the Law Department of the University of Eastern Finland enabled me to finalize this book manuscript.

I would like to thank a number of people who have supported me during this research project. I wish to especially thank my Ph.D. supervisors at the LSE, Dr Veerle Heyvaert and also Dr Deborah Z. Cass who played a critical role during the early stages of my research project. I also wish to thank Professors Joanne Scott and Ilona Cheyne as members of my Ph.D. viva panel in 2008.

Dr Veijo Heiskanen, Professor Jan Klabbers, Professor Martti Koskenniemi and Dr Outi Korhonen, as well as other colleagues and friends at the Erik Castrén Institute for International Law and Human Rights, and the Institute for International Economic Law (Katti) at the University of Helsinki were instrumental in encouraging me to write a Ph.D. and providing an inspiring intellectual foundation. Co-authoring a commentary of the GATT in a WTO law textbook with Seppo Puustinen in 2004–2006 also helped me to deepen my understanding of the international trade regime.

My understanding of international environmental law in general and climate change issues in particular has greatly benefited from my work since 2004 at the International Institute for Sustainable Development as a team leader/writer for the Earth Negotiations Bulletin. Through this work, I have also come to appreciate the importance of transparency in international negotiations. I therefore wish to warmly thank my numerous friends and colleagues at the IISD Reporting Services.

Preface and Acknowledgement

As always, all mistakes and omissions in this book remain my sole responsibility.

Finally, I thank my family and friends for their invaluable support. The numerous adventures and debates with my husband Ismo about development, environment, poverty and climate change while living in Africa and finalizing this research have certainly broadened my horizons. This book is for my grandmother Vieno, and my grandparents Taneli and Sylvia.

*Kati Kulovesi
Helsinki, 15 April 2011*

Table of Contents

About the Author	v
List of Abbreviations	xi
Preface and Acknowledgement	xv
Part I Introduction	1
Challenges of the Environment, Legitimacy and Fragmentation in the WTO Dispute Settlement System	3
Part II Overview: The WTO, Legitimacy and the Environment	9
Chapter 1	
The WTO, Legitimacy and New Trends in International Law	11
1.1. Debating the Legitimacy of the WTO	12
1.1.1. Criticism of the GATT/WTO System	15
1.1.1.1. Critiques of Free Trade	17
1.1.1.2. Criticism of Institutional Aspects of the WTO	22
1.1.2. A Striking Image of the Legitimacy of the WTO	27
1.2. Legitimacy, International Law and International Institutions	28
1.2.1. Constitutionalization of the WTO? The Debate concerning Petersmann's Arguments	37
1.3. The Concept of Legitimacy	41
1.3.1. Legitimacy in International Legal Theory	44
1.3.2. Legitimacy in This Book	51

Table of Contents

Chapter 2

The WTO and the Challenge of Environmental Linkages	55
2.1. Evolution of the International Trade Regime	60
2.1.1. Trade and Non-trade Objectives: The Question of Linkages	63
2.1.2. The WTO Dispute Settlement System and Linkage Disputes	66
2.2. Parallel but Fragmented: Evolution of International Environmental Law	70
2.3. The WTO and the Environment	77
2.3.1. Trade and the Environment in the Uruguay Round	77
2.3.2. Trade and the Environment in the Doha Development Round	78

Chapter 3

Environmental Disputes in the WTO Dispute Settlement System	81
3.1. Origins of the Legitimacy Challenges	82
3.1.1. The <i>Tuna-Dolphin</i> Controversies	82
3.1.2. An Institutional Bias in Favour of Free Trade?	87
3.2. Environmental Disputes in the WTO Dispute Settlement System	90
3.2.1. The <i>Shrimp-Turtle</i> Dispute	92
3.2.1.1. The <i>Shrimp-Turtle</i> Appellate Body Report	95
3.2.1.2. Proceedings under Article 21.5 of the DSU	100
3.2.2. The <i>Asbestos</i> Dispute	102
3.2.2.1. The <i>Asbestos</i> Panel Report	102
3.2.2.2. The <i>Asbestos</i> Appellate Body Report	103
3.3.3. Other Disputes concerning Article XX of the GATT	105
3.3.4. Disputes under the TBT Agreement	108
3.3.5. Overview of the SPS Agreement	110
3.3.6. The <i>Hormones</i> Dispute	113
3.3.6.1. <i>Hormones I</i>	114
3.3.6.2. <i>Hormones II</i>	119
3.3.7. The <i>Biotech</i> Dispute	124

Chapter 4

International Law in the WTO Dispute Settlement System	129
4.1. Institutional Parameters of the WTO Dispute Settlement System	130
4.2. International Law in the WTO Dispute Settlement System	135
4.2.1. The Academic Debate	137
4.2.2. WTO Jurisprudence	143
4.2.3. Article 31.3(c) of the Vienna Convention on the Law of Treaties	146
4.2.4. International Law as Factual Evidence	147

Part III Analysis: The WTO Dispute Settlement System, Legitimacy and Fragmentation	151
Chapter 5	
Fragmented Landscapes: WTO Dispute Settlement System and International Environmental Law	153
5.1. International Environmental Law in the <i>Shrimp-Turtle</i> Dispute	156
5.2. The Precautionary Principle in <i>Hormones I</i>	160
5.3. Is the WTO Jurisprudence Relating to International Environmental Law Consistent?	167
5.4. Missed Opportunities for Constructive Interaction in the <i>Biotech</i> Dispute	170
5.4.1. International Environmental Law in the <i>Biotech</i> Dispute	171
5.4.2. Critical Assessment of the <i>Biotech</i> Panel Report	175
Chapter 6	
The Other Dimension of Legitimacy: Why ‘Importing’ Substantive Legitimacy Is Not the Answer	179
6.1. Limits of the Judicial Function	181
6.1.1. Political Balancing versus Legal Interpretation	185
6.2. On the Border between the National and International Spheres	192
6.2.1. The WTO Dispute Settlement System and National Political Processes	193
6.2.2. Standard of Review and Deference to National Authorities	196
6.2.3. Opening the Borders and ‘Importing’ Substantive Legitimacy?	201
6.3. The WTO Dispute Settlement Proceedings and Legitimacy	204
6.3.1. Transparency and Access to Information	205
6.3.2. Public Participation and Amicus Curiae Briefs	209
Chapter 7	
The WTO Dispute Settlement System and Fragmentation of International Law: The Case of Climate Change	217
7.1. Another Nobel Cause: Fighting Anthropogenic Climate Change	218
7.1.1. The Climate Change Challenge and the Fourth Assessment Report by the IPCC	223
7.2. The Specialized Legal Regime for Climate Change	227
7.3. The UNFCCC and WTO: Interaction between the Two Regimes	232
7.3.1. Possible Conflict Scenarios	234
7.4. The WTO and the Carbon Market	236
7.4.1. International Emissions Trading and Green Investment Schemes	237
7.4.2. The Project-Based Kyoto Mechanisms	240

Table of Contents

7.5. The WTO and Climate Change Mitigation Policies and Measures	245
7.5.1. Exploring the Territory Shared by the UNFCCC and the WTO	247
7.6. The WTO and Carbon-Related Border Tax Adjustments	251
7.7. The Conflict Scenarios and the WTO Dispute Settlement System	254
Part IV Conclusions	259
Striking the Right Balances?	261
Bibliography	269
Index	289

Part I

Introduction

Challenges of the Environment, Legitimacy and Fragmentation in the WTO Dispute Settlement System

The dispute settlement process is perhaps the single most controversial component of the WTO system... For some WTO critics, it is a question of legitimacy: the panels do not reflect any direct democratic representation, and they seem not to be accountable to any checks and balances. For others, it is an issue of transparency, openness and access: the panel reviews are not public, and only governments involved in the dispute are allowed to submit testimony. For yet others, the issue is ideological: the panel rulings have in some cases declared environmentally based trade provisions to be inconsistent with WTO obligations.¹

The dispute settlement system of the World Trade Organization (WTO) was not designed to resolve challenges related to trade and environment, legitimacy, globalization and fragmentation of international law that form the core of this study. While debates related to most of these issues were already at full swing at the time of its inception in 1995, the focus of those negotiating the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU) was on creating an improved forum for settling international trade disputes.² And judging from that narrow perspective, they succeeded. The WTO dispute settlement system has fruitfully solved a considerable

1. K. Jones, *Who's Afraid of the WTO?* (Oxford et al.: Oxford University Press, 2004), 81.

2. Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU), 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

number of 'traditional' trade disputes. That it would also become entangled in controversies related to legitimacy, democracy and environmental protection could perhaps be predicted at the time of its creation – but there were no realistic prospects for solving the ensuing problems at that point in time. Such challenges are, however, very much a part of the reality in which the WTO dispute settlement system currently operates: They might not form the core of its functions, but they are an important and demanding part of it.

Regardless of the more modest ambitions of its creators, the WTO Appellate Body (AB) has been characterized as 'the most powerful court in the world'.³ This reputation is based on certain unique features of the WTO dispute settlement system. Its jurisdiction is compulsory for all WTO Member States and it is the supreme authority on WTO law. Due to its competence to authorize trade sanctions against Member States violating WTO rules, the WTO dispute resolution mechanism can also have important economic and political implications. It therefore stands out from the growing number of other international courts and tribunals. The WTO was also born into an international reality undergoing several important changes. The end of the Cold War and globalization both enhanced the role of international law and organizations, prompting paradigm changes concerning their legitimacy. Around the same time, international environmental consciousness was expanding rapidly, bringing to the fore tensions between trade and environmental protection. All these factors have inspired some fundamental questions concerning the WTO dispute settlement system. What is its role in solving conflicts between international trade and non-trade policy objectives? Given that it is a trade body with limited jurisdiction, can it reach satisfactory decisions in such disputes? To what extent can it apply such rules of international law that are not contained in the WTO Agreements? What is the role of international environmental law in the WTO dispute settlement system? How can the system respond to tensions resulting from fragmentation of international law into various specialized legal regimes?

The focus of this study is on the legitimacy of the WTO dispute settlement system especially in the context of disputes involving environmental issues. Several such cases have already been considered under the auspices of the international trade regime. The contemporary debate on trade and environment began in the 1990s, when two panels under the General Agreement on Tariffs and Trade (GATT) ruled that an import prohibition by the United States (US) on tuna caught by fishing techniques that resulted in incidental killings of dolphins violated the GATT.⁴ These decisions caused an important backlash against the world trading system, especially in the North. The new WTO dispute settlement system thus inherited the challenge of responding to the fierce environmentalist critique and

3. P. Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London et al.: Allen Lane/Penguin Group, 2005), 99.

4. GATT Panel Report, *United States – Restrictions on Imports of Tuna*, BISD 39S/155, 3 Sep. 1991, unadopted; GATT Panel Report, *United States – Restrictions of Imports of Tuna*, GATT document DS29/R, 11 Oct. 1994, unadopted.