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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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ENVIRONMENTAL PROTECTION BY THE WORLD TRADE ORGANISATION

AUTHORED BY - GOPIKA ANIL

INTRODUCTION

The aftermath of the first and second world war along with the prolonging effect of the Great Economic Depression in the 1930s led to the world nations pondering about the need to harmonise international trade in order to strengthen the nation's economy. Although the thought of harmonising international trade had begun post the second world war, it failed to emerge in the Bretton Woods Conference in 1944 further, after a long period of discussions and debates the World Trade Organisation had come into effect in the year 1995. The major objective of the World Trade Organisation was to promote free trade that is to reduce trade barriers and also to resolved the conflicts among its member nations.

The strenuous Uruguay Round negotiations concluded at the conference in Marrakesh with the emergence of the World Trade Organisation replacing the General Agreement on Tariffs and Trade. The World Trade Organisation now comes as the third pillar of world- wide dimensions along with the World Bank and the International Monetary Fund. The members of the Uruguay Round Talks concluded the establishment of World Trade Organisation by recognising the need to raise standards of living, ensuring employment and expanding production and trade of goods and services. The concept of sustainable development, seeking to protect and preserve environment and to enhance the means for doing so in a manner consistent with the needs of economic development was also recognised.¹

WORLD TRADE ORGANISATION AND ENVIRONMENT

In this 21st Century, after the emergence of economic globalisation and rapid industrial and technological development environmental issues have become a pressing issue. This eventually has made environmental issues the focal point for international trade disputes. Several of the decisions made by the World Trade Organisation in many of its disputes in its initial years had convinced that the World Trade Organisation works against the interest of the environment and

¹ Dr. S. R. Myneni, International Trade Law, Pg. 52, 3rd Edn, Allahabad Law Agency, 2014

it was over time that the World Trade Organisation Agreements particularly the GATT recognised the need to harmonise trade with environmental protection.²

The World Trade Organisation still faces contentions that the organisation is not adequate for the protecting the environment. However, proving this contrary is the fact that World Trade Organisation has imposed trade restrictions on its members to protect the environment. Reflecting the objectives of the World Trade Organisation the reference of sustainable development is visible from the time of its establishment in the Marrakesh Agreement. However, the existence of uncertainties, ambiguities and conflicts situation between World Trade Organisation and environment still persists.³

Hence, the relationship between the World Trade Organisation and its policies has always been complex and contentious in protecting the environment. However, in many of the decisions of the World Trade Organisation the need to reconcile trade liberalisation and environmental protection has emerged as a significant focus point.

HISTORY OF THE TRADE AND ENVIRONMENT DEBATE

The GATT's Brussel's Conference in 1990 commenced the beginning of the trade and environmental debate. The European Free Trade Organisation (EFTA) proposed a statement on trade and environment which led to the convening of the GATT Group on environmental measures and international trade leading to major objections from developing countries.⁴

A major outcry by environmental groups world- wide occurred after the first **GATT Tuna-Dolphin decision**⁵ in 1991. In this case Mexico challenged the US law which imposed a ban on Tuna from countries that did not meet specific criteria for dolphin safety. The very decision of the panel in favour of Mexico declaring the US law GATT illegal was frowned upon by the environmental groups world-wide.⁶

² Ken Belcher, Anna L. Hobbs, et al., The WTO and Environmental sustainability: is there a conflict? ,2, International Journal of Environment and Sustainable Development, Pg. 3, 2023

³ Bhargav Mansatta and Anupam Parack, WTO and Environmental Issues, Indian Society for Ecological Economics, ecoinsee.org

⁴ Steve Charnovitz, The World Trade Organisation and the Environment, 8, Yearbook of International Environmental Law, 104-105, 1997

⁵ DS 21/R, BSID /39S/155

⁶ Steve Charnovitz, The Environment v Trade Rule: Defogging the Debate, 23 ENVTL. L. 475(1993); Benedict Kinhsburg, The Tuna Dolphin Controversy, the world trade organisation and liberal project to reconceptualise international law, 5 YBIEL 1 (1994).

Post the **Tuna- Dolphin decision** in 1991, request to convene the EMIT group was made to the Director General of the GATT by the members of the European Free Trade Association (EFTA) in order to create a platform whereby the issues concerning trade and environment could be resolved and addressed. Further in the year 1992, the Earth Summit also known as UNED, focused on the need for tackling environmental degradation and poverty alleviation, with the aid of applying the concepts like sustainable development in international trade.⁷

In 1994, a ministerial decision on trade and environment was adopted that called for the establishment of Committee on Trade and Environment (CTE) which once again stressed the need to balance trade measures along with environmental measures promoting sustainable development. The committee also made recommendations focusing the need for modifications with regard to the provisions of the multilateral trading system. This committee proved to be more efficient than the previously existed EMIT Group as it addressed broader range of issues. Further in 2001, at the Doha Ministerial Conference a special session of the Committee on Trade and Environment was held to launch negotiations on trade and environment.⁸

PROVISIONS OF THE WORLD TRADE ORGANISATION DEALING WITH ENVIRONMENT

At present and throughout history, the World Trade Organisation has faced several backlashes for being anti-environmental. This however can be proved to the contrary once we pry into the provisions of the World Trade Organisation agreements dealing with environment protection. From the objectives of World Trade Organisation itself, the first instance for environmental protection can be detected in the form of sustainable development as it gives reference to the same as one of its general objectives.

Article XX plays an important role in confronting environmental issues and balancing trade. It specifies the activities that are exempted from GATT rules in order to control trade and to protect the environment. This can be made possible by aiding its members to waive their fundamental commitments like the non-discrimination principles in certain cases. A closer view into to the articles of the World Trade Organisation agreement opens up the protection it provides to human, plant and animal life. This is enshrined in Article XX (b) of the Agreement.

⁷ World Trade Organisation, Trade and environment at WTO, www.wto.org

⁸ Ibid

Complementary to this provision, Article XX (g) provides for the conservation of natural resources by permitting restriction if they complement national programs for the conservation of the same.

In **China- Rare Earth**⁹ case, it is visible that China argued under the shield provided in Article XX(g) that provides for the conservation of natural resources. The panel in this case ruled out that environmental protection and natural resource conservation was a noble and legitimate goal. However, the persisting fact that China's export restriction was not applied consistently to achieve the said aim undermined the entire conservation argument. As a result, China was compelled to lift its restrictions.¹⁰

Over the years exploring the use of Article XX of the GATT has unearthed several of its weaknesses with regard to certain provisions, particularly where the latitude to act was so wide that the government used the provision to secure economic protection. Hence the Agreement on Sanitary and Phytosanitary Measures was negotiated in the Uruguay Round.¹¹ The Agreement on Technical Barriers to trade was also negotiated in the Uruguay Round, replacing the standard code to facilitate harmony in trade and environmental related issues.¹² The Agreement played a crucial role for the said purpose as it was designed in a manner in order to prevent countries from using technical standards as disguised trade barriers. As far as environmental issues are concerned there are provisions in the Agreement on Agriculture and the General Agreement on Trade in Services (GATS).¹³

The World Trade Organisation Agreement on Subsidies and Countervailing Measures restricts the extent to which the government pay subsidies which eventually leads to the creation of a positive framework that enables to foster and cherish the concept of sustainable management of resources. However, this does not apply to subsidies to agriculture that is enshrined in and covered by the Agreement on Agriculture.

⁹ WT/ DS 432

¹⁰ Joel P. Trachtman, WTO trade and Environmental Jurisprudence: Avoiding environmental catastrophe, Vol. 58, Harvard International Law Journal, 296-297, 2017

¹¹ Preventing abuse – the role of Agreement on Sanitary and Phytosanitary Measures (SPS). The Uruguay Round Negotiation, 1986-1994

¹² The Standard Code of 1979 developed in the Tokyo Round of Trade Negotiations.

¹³ Supra Note 3

MULTILATERAL ENVIRONMENTAL AGREEMENT AND WORLD TRADE ORGANISATION REGIME

Due to the rapid environmental pollution leading to its degradation it has become necessary to address the said issue in order to prevent further deterioration of the environment. Multilateral Environmental Agreements (MEA) are voluntary commitments among sovereign nations that aims to address the effect and consequence of global and environmental degradation. To tackle the environmental crisis the Multilateral Environmental Agreement addresses the issue with transboundary effect. That is, they deal with and resolve domestic environmental issues that raise extra jurisdictional concerns, and environmental risks to global commons.¹⁴

The inconsistency between the Multilateral Environmental Agreement and the GATT/ WTO regime can be represented through the concept of Most Favoured Nation principle. Elaborating the same, suppose a party who is a non- party to the MEA but a member of the World Trade Organisation. If an import and export restriction has been issued against the non- party of the MEAs who is a member of World Trade Organisation, the said party can potentially challenge the same as the violation of Most favoured Nation principle under the GATT/ WTO Regime. The import restriction of MEA on the other hand can also be in conflict with the national treatment principle under the GATT/WTO regime.

Hence, all the above-mentioned inconsistencies act as a hindrance in order to achieve the objective of harmonising trade and environment therefore the need of a consistent and well-established set of rules becomes the need of the hour.

ENVIRONMENTAL ISSUES AT DISPUTE SETTLEMENT BODY

The dispute settlement body has always acted as an impartial referee in order to uphold the right balance between trade and environment.

The Gasoline Case¹⁵ the case challenged the US Clean Air Act, which was passed in order to control pollution caused by hazardous substances contained in gasoline to be violative of Art III (4) of the GATT, 1994. The reason for challenging the same was the stringent control the Act imposed on imported gasoline discriminating them from the domestic ones. Appellate body

¹⁴ Supra Note 3

¹⁵ United States – Standards for Reformulated and Conventional Gasoline, Panel and Appellate Body Report, WT/DS2/ R and WT/DS/ABR

stated that the concept of conservation of natural resources which is the essence of the US Clean Air Act is shielded under Article XX (g) of the GATT, 1994. However, Clean Air Act reveals its inconsistency under the chapeau of Article XX which requires that the measure in question be not arbitrary, discriminatory or a disguised restriction of international trade.

The Shrimp- Turtle Case¹⁶ the case challenged the imposition of restriction by the United States prohibiting the import of shrimps from certain countries including India, Pakistan, Malasia and Thailand on the ground that the government did not obligate fishing boats to install TED (Turtle Exclusion Device) to prevent the accidental catching and killing of turtles during the harvest of shrimps. The appellate held that the policy incorporated by the United States fell under Article XX g and was exempted from GATT disciplines. However, the action of US was condemned by the appellate body since United States did not do enough to negotiate with the East Asian Countries.

The Asbestos Case¹⁷ the case revolved around the hazardous nature of asbestos and the French decree which prohibited the use and importation of asbestos. In this case the appellate body upheld the French decree.

Brazil- Retreaded Tyres Case¹⁸, in this case Brazil banned the import of retreaded tyres, which was challenged by the European Union. The reason cited by Brazil for the said ban was the hazardous nature of retreaded tyres leading to health and environmental risk from waste tyres. The WTO upheld the ban affirming environmental and health considerations can prevail over trade rules on the condition that it has to be applied in non- discriminatory manner.

INDIA AND WOLD TRADE ORGANISATION

India and the World Trade Organisation appears to have resistance with each other. However, over the years India has never shown any aversion towards World Trade Organisation or its policies. India is of the view that the current World Trade Organisation policies and rules are sufficient to tackle the present needs and to resolve the disputes arising between the World Trade Organisation and Multilateral Environmental Agreements.

¹⁶ United States – Import Prohibition of certain shrimp products, Panel and Appellate Body Report, WT/DS 58/R and WT/DS58/ AB/R

¹⁷ European Communities – Measures affecting asbestos and products containing asbestos, Pane Report and Appellate Body Report, WT/DS/ 135/ R, WT/ DS135/ AB/ R

¹⁸ WT/ DS 332/AB/R

Moreover, active participation by India can be seen in the World Trade Organisation discussions and debates. India has always voiced its need for a balanced approach. That is the need to consider the developing nations when highlighting the environmental issues. Being a developing country in itself India emphasises that trade rules should not create burden on developing countries in the name of environmental protection. India advocates to transparent, science-based regulations that does not unfairly limit the market access for developing countries.¹⁹

CONCLUSION

The World Trade Organisation has an active role in balancing trade liberalisation and also to ensure that the environment is protected in the process. The major objective of the World Trade Organisation is to liberalise trade, to resolve the disputes in the process and also to promote sustainable development. Due to the rapid increase in globalisation facilitated by industrial and technological development, the world trade organisation struggles with achieving its objective. However, over the years the World Trade Organisation has mastered this craft that is to harmonise trade and environment, the very same can be reflected by the performance of its dispute resolution body.

Even today there exist certain inconsistencies between World Trade Organisation and the Multilateral Environmental Agreements causing a crack that can shake the entire foundation of the concept sustainable development. Hence, there is a dire need to surpass the said inconsistency to promote liberalised trade with environmental protection.

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