

Trade Related Environmental Measures in Multilateral Environmental Agreements and the WTO: Irreconcilable Differences?

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Abstract: Problem statement: WTO adopted a multilateral trading system without ignoring the importance of protecting environment. Exceptions in Article XX, Clause (b) and (g) checks trade at the cost of environment. It is difficult to establish a relationship between Trade Related Environmental Measures (TREM) in Multilateral Environmental Agreements (MEAs) and World Trade Organization (WTO) rules. For the past ten years there have been simultaneous efforts to reconcile the differences between the two. **Approach:** Therefore, the author was intrigued by this topic and followed an analytical method of study with the help of various WTO documents available online as well as in books. Against this background, this article pursues three main goals to achieve. Firstly, it examines whether Public International law can be used in the WTO. In answering this question the author analyses the relationship between Trade Measures in MEA and WTO and how a meaningful balance can be struck between the two. The author has tried to find a solution to such conflicts in the Vienna Convention on the Law of Treaties. The Public International Law by applying the principle of *lex specialis* settles the conflict in favor of environment. **Results:** But somehow for years, WTO and its Dispute Settlement Body have been settling disputes between trade and environment in favor of trade. The second goal of this study is to determine whether sustainable development and its principles are intending to achieve a normative status in International law. In examining this issue it is pertinent to note that the International Case laws like the *Gabcikovo Nagymaros* Dispute becomes of utmost importance. The treaty laws also add to the presence of Sustainable Development. The author has also discussed the response of the WTO to sustainable development in the light of leading case laws. **Conclusion:** Towards the end the author has offered humble suggestions to reconcile the differences between TREMs in MEAs and WTO norms using sustainable development as an effective tool. The application of only the WTO law is not sufficient; it should also apply International law to the disputes. Such an approach would help in handling climatic changes and trade in genetically modified organisms.

Key words: World trade organization, TREMs, MEAs, public international law, sustainable development, environment

INTRODUCTION

Trade and environment has been one of the most important issues in past one decade. Ever since the establishment of World Trade Organization (WTO), the member states have indulged in strong debates to change the rules of the multilateral trading system. The question arises whether a measure taken to protect the environment is a genuine one or is it a system of imposing duties on imports into a country in order to protect its domestic industries. Scholars and Ministerial Conferences have always involved themselves in an endless debate of coming to a precise relationship between Trade Related Environmental Measures (hereinafter 'TREM') in Multilateral Environmental Agreements (hereinafter 'MEAs') and World Trade

Organization (WTO) norms. Whereas the need of the hour is to strike a balance between the environmental and trade interests.

The WTO as a part of public international law: In determining whether Public international law can be used in the WTO, it is important to look at the relationship between TREMs in MEAs and the rules of the multilateral trading system.

The WTO-MEA relationship: It is indisputable that development cannot take place without the environment being affected. International trade does affect environment. The recent jurisprudence on environment can be traced back to the debate and negotiations that has happened at the global picture. The Committee on

Trade and Environment (CTE) was established in 1995 by a Ministerial Decision at the end of the Uruguay Round. The objective of this committee was to identify the relationship between trade measures and environmental measures to promote sustainable development and to make recommendations on whether any modifications to WTO provisions are required with respect to goods, services and intellectual property^[1]. The CTE has been trying to look into the provisions of the WTO so that trade relations could contribute to the objectives of sustainable development. Even the Seattle Third Ministerial Conference concluded without any consensus among the member states on how to deal with the trade and environment debate. But, the conference gave a signal that the multilateral trading system will have to address trade and environment issues. This issue seems to be so complex that certainly it invites conflict of interests between North-North and North-South. Therefore expecting CTE to make exact concrete recommendations would be too immature. Interests of both the developing and the developed nations have to be balanced. In order to do this balancing act the relationship between the WTO and MEA needs to be looked into so as to draw better solution which is in interest of North as well as South. This issue saw a renewed attention in February 2000, when the Cartagena Protocol on Biosafety was adopted. This is also called the first trade and environment treaty which goes on to the controversial decisions in the Shrimp-Turtle case^[2].

Several member-states have urged for the need to clarify the relationship between WTO rules and MEA trade-related provisions. European Communities demand for a legal clarification of the WTO-MEA relationship. In fact the CTE members have proposed this idea to a legal framework needs to be developed to clarify this relationship between WTO and MEA, especially with reference to the exceptions given in Article XX of the GATT Agreement. The question that bothers is that to what extent can WTO accommodate environmental concerns or the environmental issues can be addressed within the existing WTO Agreements. To this some of the member states prefer to have environment related results in all or some agreements and other feel that this issue has been adequately dealt in these agreements.

The session at the June, 2001 meeting of the CTE came up with a background paper to the issue of WTO-MEA relationship. Some of the highlights of this study were:

- First, both the WTO and MEAs contain dispute settlement procedures with resort to higher bodies

of international law, either the Appellate Body or the International Court of Justice

- Second, while dispute settlement is central to the WTO, MEAs encourage compliance through supportive measures, such as financial and technological assistance
- Third, the WTO and MEA systems both represent multilaterally co-operative efforts to pursue mutually beneficial goals. Still, no clear solution has been reached^[3]

Approaches to the WTO-MEA relationship: There have been three main approaches to the issue namely: WTO approach, an extra WTO approach and a cooperative approach.

The WTO approach: This approach recognizes the importance of the multilateral trading system and hence tries to find a solution in the WTO rules itself. There are many WTO members who believe that there is already a scope under the WTO provisions to use trade related measures for environmental purposes, including in MEAs. It means that WTO has sufficient scope to accommodate trade related measures pursuant to MEAs. There can be an amendment in General Agreements on tariffs and trade (hereinafter 'GATT') in exceptions to Article XX so that the measures taken in accordance with MEA provisions do not violate WTO rules^[4]. A second option could be 'clarification of WTO rules'^[5]. If an official interpretation is given to Article XX, it would avoid conflict of issues (In accordance with the procedure provided for in Art. IX. 2 of the Marrakech Agreement Establishing the World Trade Organization.). This would help in promoting the ideas that trade related environmental measures are a necessary facet of the multilateral trading regime. A third way out could be to provide a 'waiver' (In accordance with the procedure provided for in Art. IX. 3 of the Marrakech Agreement Establishing the World Trade Organization) which means that WTO members with a consensus decision may allow certain member to derogate from their obligations for a limited period of time. Certain members go on to the extent of saying that WTO rules do not require an amendment as such. They argue that there are already a range of provisions in the WTO which can accommodate the use of trade-related environmental measures, including the measures taken pursuant to MEAs (This was the position of Egypt, India and of the United States of America within the WTO Committee on Trade and Environment) and in case there is a conflict it can be dealt with on a case-by-case basis.

All the above approaches emphasize for a need of legal framework related to environment in the WTO to give way to trade related environmental measures in multilateral trading agreements. The last option makes it explicit that the provision available under the current multilateral trading system and the WTO is adequate enough to address the environmental concerns. Only the last approach favors for no modification of the WTO framework.

The extra-WTO approach: This approach insists on finding a solution to the conflict between TREMs in MEA and WTO outside the regime of multilateral trading agreements. The European Communities and Switzerland continue to highlight the need for stronger dispute settlement systems within MEAs themselves^[6]. This approach would address the environmental issues under environmental forums. If the WTO mechanism fails in accommodating or giving adequate redressal to such issues then the reason might be that WTO was not established for the purpose of monitoring environmental concerns. Therefore the need of the hour is for a set of efforts to better coordinate international environmental policy so that the WTO is protected and insulated from responsibilities for which it is both disinclined and unprepared. To achieve this end a Global Environment Organization (GEO) can play an important part in global restructuring and reducing the criticisms of global institutions^[7].

Cooperative approach: Several members in the past have suggested adopting a cooperative approach in dealing the WTO-MEA relationship. Whenever an environment related dispute comes in front of the WTO, then the panels giving the decision should be more of the environmental experts. Apart from this, if there is a mutual cooperation between MEA Secretariats, the WTO Committee on Trade and Environment and the United Nations Environment Programme, it would prove beneficial at the global level (Cooperative approaches have been suggested for example by Japan and New Zealand).

Public international law in the trade and environment debate: Nobody can dispute that WTO law is very much a part of International law. Like international environmental law and human rights law, WTO law is "just" a branch of public international law^[8]. There is certainly a conflict of norms and jurisdictions while trying to resolve the conflict between TREMs in MEAs and the WTO. If there is a conflict between the two, then can public international

law be used in finding a solution to these issues? In answering the question of jurisdiction it is pertinent to note Article 30 (Article 30 Application of successive treaties relating to the same subject-matter:

- Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs
- When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail
- When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty
- When the parties to the later treaty do not include all the parties to the earlier one:
 - As between States parties to both treaties the same rule applies as in paragraph 3
 - As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations
- Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty of the Vienna Convention of treaties, 1969. The instant article establishes the *lex posterior* rule. According to this rule if there are several treaties on the same subject-matter, the most recent one will prevail. Applying this rule to MEAs before 1994 which were also on international trade would get defeated under the Marrakech Agreement^[9]. Therefore it is not desirable to always use this rule, so it is important to look for other international law rules which can help in proper interpretation of treaties to settle the dispute between trade and environment. The dispute must be settled in such a manner that the most apt and specific law is applied. The rule of *lex specialis* can go a long way in giving more importance to the multilateral trade regime that specifically deals in international trade

than the WTO norms. Thus, it can be easily deduced from the above observations that the rule of *lex specialis* would certainly decide the jurisdiction issue between WTO and MEA in favor of the environmental forums

Practically speaking as of now if we have disputes relating to trade and environment, it would fall under the WTO jurisdiction due to its strength. That does not mean that decisions given by the Dispute Settlement bodies should be only consistent with the WTO law. They should apply the principles of public International law as well. They are also under an obligation for international protection of the environment (the obligation to protect the environment is a norm of international law. This has been clarified by the International Court of Justice (ICJ) in its Advisory Opinion Legality of the Threat or Use of Nuclear Weapons in 1996). Thus, the experts on the panel are expected to give a decision not in clinical isolation from the norms of the public international law^[10].

Sustainable development as a norm of public international law: It is evident from the above discussions that public international law has a major role to play while giving decisions under trade and environment dispute by the WTO dispute settlement bodies. The solution to the conflict between TREMs in MEAs and WTO does not lie only within the WTO rules. Further, the second objective of this study is to examine whether sustainable development and its principles are norms of public international law.

Approach towards the concept of Sustainable development: There have been numerous definitions on the aforesaid topic. There is no standard definition of the term sustainable development. Though the definition according to the Brundtland Commission, it can be defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'^[11].

The theoretical foundations of the GATT system lie in the doctrine of comparative advantage and in the idea that there are economic (and consequently social) gains from international trade and the cultivation of comparative advantage that go beyond those that can be provided by autarky^[12]. Essentially the GATT system encourages a "trickle down" approach to both social justice and environmental protection, which means to protect the environment only once you earn wealth after liberalizing trade^[13]. Certainly, this is not the correct approach as trade cannot be treated as an end itself.

If sustainable development is to be rightly understood, then it is a global development model which aims to strike a balance between economic, social and environment policies that would allow even future generations to prosper. It is also concerned with equity. There should be a wide public participation in decision making process. Principle 27 of the Rio Declaration on Environment and Development maintains that:

States and people shall cooperate in good faith and in a spirit of partnership in the fulfillment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development^[14]. Therefore the states must cooperate and work together in order to achieve sustainable development. It is has gained official acceptance in the international community. Does that mean that sustainable development principles are on the verge of attaining a normative status in international law? In an attempt to examine this important issue, it is relevant to examine the same in the light of international case laws, state practice and the treaty laws.

State practice, treaty law and sustainable development: Various states all over the world have realized the importance and advantages of sustainable development. Therefore, we can see an increasing trend of sustainable development in treaty laws and its presence can be felt in state practice. Right away from regional agreements such as European Union to states domestic policies to incorporate sustainable development principles can be witnessed at the global scene.

The year of 1997 for the first time in the history of international law dealt with the sustainable development in the famous Gabcikovo Nagymaros case. The opinion of Judge Weeramantry is worth being cited here. He stated in a separate opinion that sustainable development is in fact a principle of customary international law, though the majority decided otherwise. Ultimately, the ICJ's decision did not end the dispute. The parties failed to reach an agreement and within a year Slovakia had filed for an additional judgment; the case remains pending. Thus, it is the principle with a normative concept and value which has been recognized by the ICJ jurists as an integral part of International law. Stating that sustainable development has already attained a normative status has in itself invited a lot of debate. There are few authors who believe that it has already reached the normative status, some who say that it does

have a legal nature and is a customary international law. According to Marong, sustainable development is becoming a public legitimate expectation that inevitably influences state's conduct. There is a lacking in the enforcement mechanism and also less seriousness is shown in non-compliance of the sustainable development policies. The expectations from these policies are increasing; therefore it would not come as a surprise to us if sustainable development becomes a norm of international law. As of now, there is no certainty about the legal nature of sustainable development but considering the state practice, treaty laws and international case laws it might be said that it is progressing towards becoming a norm of international law. It can be predicted so as certain principles like the precautionary principle and the common but differentiated responsibilities principle, are progressively developing into international law norms. Thus, it is not an international legal norm as it stands today.

Finding a balance between TREMs in MEAs and WTO norms: After having examined that public international law can be used in WTO law and that sustainable development law has not yet attained the norm of international law, the study moves on further to strike a balance between TREMs in MEAs and WTO norms. Brown Weiss has already maintained in 1992: 'Trade is not an end in itself; it is a mean to an end. The end is environmentally sustainable economic development^[15].' Marrakech agreement maintains sustainable development as one of the goals of the organization^[9]. The recent Doha round of negotiations, which have also been called the Development round, has highlighted the importance of sustainable development for the WTO^[16]. Therefore it is present both in the WTO law and the Doha Ministerial Declaration. But, certainly WTO does not recognize the legal nature of the sustainable development (However, the decision in the Asbestos case has been considered as a slight change in direction of the WTO jurisprudence on sustainable development principles).

CONCLUSION

The researcher does not dispute the fact that development cannot take place without affecting the environment. But, if we have a right to enjoy the nature, then certainly even the future generations have a right to prosper. The question need not necessarily be constrained to TREMs in MEA and WTO, the need of the hour is to address the trade and environment debate

as a whole. The public international law can be used in the WTO law and few sustainable principles have already attained a normative status in international law. Therefore the dispute settlement bodies must apply both the laws while deciding a case relevant to this. In fact the solution to the conflict between TREMs in MEAs and WTO can be largely accomplished within the current WTO/GATT framework. Yet there is a need for the WTO to give specific recognition to environmental values. Thus, environmental protection does not require the erection of new trade barriers.

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