

“Sustainable Development and the World Trade Organization- A Conflicting Arena”

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This article examines the complex inter-relationship between the World Trade Organization and the concept of sustainable development, the impact of WTO on this kind of development. It further delves into the issues ranging from benefits of sustainable development to the effects of WTO agreements on environmental agreements and various other such related issues

Introduction

The term ‘sustainable development’ has gradually become an unavoidable paradigm that supports most of the human actions. The idea has been used in various many different contexts and subsequently has come to represent many different ideas. The primary purpose of this article is to explore the fundamental connotation behind the term Sustainable Development and also examine and analyse its inter-relationship with the World Trade Organization.

This concept of sustainable development permeates into a variety of discourses including environmental, social, political, economic, and cultural arenas from the local through to the international level by both public as well as private sectors. This idea of Sustainable development has also extensively infiltrated the legal sphere. We have seen this emblematic ‘concept’¹ being incorporated in a number of international legal instruments. This concept is promoted by the United Nations and is significant to a quite a number of resolutions, declarations conventions, international judicial decisions. Quite predictably international lawyers have always shown interest in this idea of sustainable development, but the ambiguity surrounding its nature has always sparked their bafflement.²

The earliest close connection between the preservation of nature and economic development (which is the core element of the concept of sustainable development) originated during the 18th and 19th centuries.³ However the understanding of the modern concept and its recognition at the international community level is principally due to the vast promotion operation led by the United Nations. This operation officially started in 1972 with the Stockholm Conference on the Human Environment. The Principles of Stockholm Declaration

¹ See *Gabc'ıkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment ICJ Reports (1997) 7, at para. 140

² Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, The European Journal of International Law Vol. 23 no. 2, 2012

³ Sand, ‘Sustainable Development – Of Forests, Ships and Law’, 37 *Environmental Policy and Law* (2007) 2

though did not mention the term ‘sustainable development’ clearly established the link between environmental protection and economic development.⁴

The World Trade Organization (WTO), as we already know, deals with the international rules and regulations relating to trade between various countries. The primary function of the World Trade Organization is to guarantee that flows as effortlessly, predictably and spontaneously as possible. It aims to encourage free trade by lowering the trade barriers as it is one of the obvious methods of internationalizing trade. The trade barriers include among other things custom duties and measures including import bans or quotas that restrict quantities selectively. With time various other trade barriers such as red tape and exchange rate policies have also been included into this list. The World Trade Organization is usually described as a “*free trade*” institution which is not completely correct. It can be more accurately termed as a system of rules and regulations dedicated to open, fair and factual competition. The system allows protection in the form of tariffs and in limited circumstances some other forms of protection. There are two rules of non-discrimination, namely Most Favored Nation Principle and National Treatment are designed to secure fair conditions of trade. The concerns are multifaceted, and the rules and regulations attempt to establish what is fair or unfair, and how governments can respond, in particular by charging additional import duties calculated as compensation for damage caused by unfair trade. The WTO system also aims at development. A lot of attention has also been given to the developing nations. However, developing countries need flexibility in the time they take to implement the agreements of World Trade Organization. And these agreements themselves inherit the earlier provisions of GATT which allow special assistance and trade concessions for the developing countries.⁵

“As a society, our goals should be looking at development that sustains values reflecting progress in our relationships with one another as human beings, our place in the natural environment, and consequently developments in what it means to be human” (Stead and Stead, 2000). The above notion of sustainable development has been lately acknowledged by Meadows, Meadows et al. (1974) and Daly (1996), but looking further it reveals that they were of historical significance. For example, John Stuart Mill had made the following argument in Principles of Political Economy (1848, IV.6.9):⁶

“It is scarcely necessary to remark that a stationary condition of capital and population implies no stationary state of human improvement. There would be as much scope as ever for all kinds of mental culture, and oral and social progress; as much room for improving the Art of Living and much more likelihood of its being improved.”

⁴ Stockholm Declaration on the Human Environment, A/CONF.14/48/Rev. 1 See particularly principles 4,13, 15–20

⁵ Available at: www.wto.org

⁶ A. H. T. Fergus and J. I. A. Rowney, *Sustainable Development: Lost Meaning and Opportunity?*, Journal of Business Ethics, Vol. 60, No. 1 (Aug., 2005), pp. 17-27

The article also intends to discuss in details about the decades old debate on trade and environment. In this debate over trade and the environment both the positive as well as the negative aspects of the relationship between trade and the environment needs to be addressed. The positive portion includes expanding markets and increasing wealth which is caused by liberalized trade that would assist the environment as the governments of the states can now direct the additional resources toward environmental restoration and protection.⁷ Additionally, while raising incomes and expectations, market growth creates more interest in ecological developments.⁸ Nevertheless, the negative aspects of expanded markets as a result of free trade also cannot be ignored. Expanded trade may lead to such problems as creating pollution havens and the lowest common denominator approach to environmental regulation as trading partners try to harmonize environmental standards.⁹ Enabling polluters to use countries with negligent environmental laws as export platforms into markets with higher standards would penalize honourable firms staying at home, and would make raising standards more problematic for environmentalists everywhere.¹⁰

Origin of ‘Sustainable Development’

Today the world is plagued by a number of social diseases like increasing poverty, discrimination, inequality, and the latest problem faced across the world is environmental degradation. In this crisis, the global community has come up with the concept of ‘sustainable development’ through the Millennium Development Goals and also the World Summit for Sustainable Development.¹¹

The concept of ‘sustainable development’ has been best defined by the UN World Commission on Environment and Development in the “Brundtland Report” where it is stated that:

“Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two concepts:

- *The concept of ‘needs,’ in particular the essential needs of the world’s poor, to which overriding priority should be given, and;*
- *The idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.”¹²*

⁷ Laurie Henderson and Patricia Walsh, *Forging a Link: Two Approaches to Integrating Trade and Environment*, 20 Alternatives (Information Access Co.) No. 1, at 30 (Nov. 1993)

⁸ Candice Stevens, *The Greening of Trade*, OECD OBSERVER, Apr./May 1994, at 32

⁹ Erik Coulter Luchs, *Maximizing Wealth with Unilaterally Imposed Environmental Trade Sanctions under the GAIT and the NAFTA*, 25 LAW & POL’Y INT’L Bus. 727, 733 (1994)

¹⁰ The Cost of Clean Living, *ECONOMIST*, July 9, 1994, at 67

¹¹ Francisco Aguayo Ayala & Kevin P. Gallagher, *Subsidizing Sustainable Development Under The WTO*, The Journal Of World Investment & Trade, 131 (2009)

¹² World Commission on Environment and Development (1987).

Even though “sustainable development” received significance very recently, the idea had stemmed during the 1980s. What popularized the idea was the Brundtland Commission's report, *Our Common Future* (World Commission on Environment and Development, 1987) and the *World Conservation Strategy* (International Union for the Conservation of Nature, 1980). Also the Rio Declaration held in June 1992 was another platform to implement this idea, where the global leaders had gathered to discuss “sustainable development”.¹³

All these frequent discussions were enough for the realization that this sphere seeks some grave attention. During the 1990s, the term “sustainable development” gathered mixed criticism for itself. Where some environmentalists considered it as a brave attempt, for many others it was cliché, illogical, not consistent enough and one that can be easily manipulated. A few others opined that the implementation of this concept would make the economic, political, philosophical and epistemological roots of the environmental issues even more incomprehensible and ambiguous.¹⁴

As the name suggests, the primary focus of “sustainable development” is on development. The only criterion is that the development should be ‘sustained in the long run. No development is welcomed which does not pay appropriate attention to the environment. If this concept of sustainable development can be classified into under three different heads, namely, social, environmental and economic. Also as it is known that poverty is an alarming issue in today’s world, the key aim of sustainable development should be to attend the needs of the world’s poor and the disadvantaged.¹⁵

From the very beginning this concept of “sustainable development” has been very striking to the world but it still remains quite vague and intangible. With the evolution of humans this concept also needs to be evolving in order to keep pace with the changing dynamics. Presently, it is still in its embryonic stages with respect to its application in all spheres of life and a lot more needs to be done in policy and practice as compared to the work done in theory.¹⁶

Even though the idea relating to this kind of a development is simple, channelizing this concept and the procedural developments related pose a difficult challenge. For instance, the definition of “sustainable development” itself has often given rise to quality debates. However, debates in the academic community have also concluded amicably on various issues close to this concept.¹⁷

¹³ Bob Jickling, *Studying Sustainable Development: Problems and Possibilities*, Canadian Journal of Education, Vol. 19, No. 3(Summer, 1994), pp. 231-240

¹⁴ *Ibid*

¹⁵ Aaron Cosbey, *A Sustainable Development Roadmap for the WTO*, International Institute for Sustainable Development, (2009), website, 18 September, 2013

¹⁶ Richard Ballhorn, *The Role of Government and Policy in Sustainable Development*, Government and Policy in Sustainable Development, Vol 1 (1), Spring (2005)

¹⁷ Victoria Jenkins, “*Placing Sustainable Development at the Heart of Government in the UK: The Role of Law in the Evolution of Sustainable Development as the Central Organizing Principle of Government*”, Legal Studies, (2002), Vol 22(4)

The aim of this notion of “sustainable development” is to achieve 'environmental sustainability'. Usually critics have settled over the view that environmental sustainability cannot be achieved without social and economic sustainability.¹⁸ On one hand, economic sustainability can be defined as such economic growth which is achieved not at the expense of environmental degradation. On the other hand, in order to attain equity and social sustainability what is required is a robust civil society and proper participation of the different communities. Therefore, the crucial emphasis of sustainable development would be to intermingle environmental protection with socio - economic progress. However, this would require restructuration and modification of the present approaches of social and economic development built on the amalgamation of these aims. There is also some discord regarding the improvement required in the economic and political spheres to achieve this objective.¹⁹

Today the entire globe faces the challenges relating to sustainable development and analysts are of the opinion that there is a requirement to address the differences between the developing nations and the developed countries, increasing population and the economic supremacy of multi-national corporations. In such a situation the respective nations and their governments play an important part towards the evolution of sustainable development where the decisions made are based on comprehensive scientific statistics. Although scientific knowledge is required, it alone cannot command the needs of sustainable development.²⁰

Also with the changing circumstances the necessities change and situation might demand the need to adopt ‘precautionary principle’. In cases where there are chances of irreversible damage, cost – effective measures should be taken in order to prevent environmental degradation. Eventually, in order to push forward the accomplishments of sustainable development participation from each and every aspect of the society is required. This would further help in raising awareness around this concept of sustainable development, in gathering support for political action and assembling group action in the society.²¹

Similarly even in the sphere of international trade it is advisable to apply the principles of sustainable development as that will have a constructive effect on the protection of the environment, human rights and labor issues in a number of countries.²²

However, the fact still remains that as a concept sustainable development is inexact and vague. Although such is the case, both national and international bodies, non – governmental bodies and scholars have often extensively endorsed and recommended it. This concept has not only influenced regional, bilateral as well as international agreements relating to environment but has also aided legal and policy decisions on the national level. As has been rightly stated “*it would be an accurate assessment to state that sustainable development has*

¹⁸ See H Daly, *Towards a Steady State Economy* (WH Freeman, San Francisco), (1973) p 342

¹⁹ See A Dobson 'Strategies for Green Change' in Dryzek and Schlosberg', pp 539-557.

²⁰ I Christie and D Warburton “*From Here to Sustainability: Politics in the Real World*” (London: Earthscan, 2001)

²¹ Ibid

²² Supra note 26

*emerged as an international paradigm for the new millennium in reconciling and integrating the goals of economic development, social development, and environmental protection, goals that can often be at odds with one another.*²³

What still remains to affect is the need to balance this progress in trade with that of sustainable development. Even though the world has witnessed a remarkable growth in global trade, within the same time frame it has also observed a massive let down in attaining sustainable development.²⁴

A Brief History of the WTO

The World Trade Organization was created to liberalize trade and to negotiate trade agreements. It is a forum for the member states to solve their trade problems that they face with each other. The World Trade Organization was established on January 01, 1995. The WTO agreements form the basis of this institution. These instruments assist the organization to fulfill its role as a dispute settlement mechanism.

The dominant purpose of this organization is to assist in the free flow of trade, removing all possible side-effects since such a measure is required for economic development and welfare. It is run by the governments of the member states where the ministers meet once in every two years and the delegates meet more frequently in Geneva. It is a consensus based organization which makes it different from its counterparts such as the International Monetary Fund or the World Bank. The principles on which the institution stands are primarily non – discrimination, freer trade, fair competition and encouraging development and economic reform.²⁵

Previously the international trade regime was ruled by the General Agreements of Tariffs and Trade. Established in 1948, the GATT was a provisional agreement till its demise in 1994. Throughout forty seven long years it presided over international trade and was the ultimate decision maker in trade related conflicts.

Some of the basic pillars on which the GATT stood were the principles of non-discrimination, reciprocity and national treatment along with prohibiting quantitative restrictions and accepting tariffs, cross-border trade and safeguard mechanism.²⁶

WTO's role in Environment Protection

The WTO is a trade related organization but that should not restrict the organization to administer its duties in protecting the environment since trade policies must be

²³ Ved P. Nanda, *Sustainable Development, International Trade and the Doha Agenda for Development*, Chapman Law Review, Vol 8: 53, (2005)

²⁴ Nii Lante Wallace-Bruce, *Global trade and sustainable development: two steps forward in the WTO? The Comparative and International Law Journal of Southern Africa*, Vol. 35, No. 2(JULY 2002), pp. 236-255

²⁵ Available at: www.wto.org

²⁶ S.P. Shukla, “*From GATT to WTO and Beyond*”, Working Paper No. 195, United Nations World Institute for Development Economics Research, August 2000

environmentally inclined to some extent as the environment is an internationally shared resource. Danger to the environment means danger to the aquatic life, forestry, and various endangered species and also to the quality of air. Hence it is extremely important for the states to cooperate on all policies in order to manage the environment appropriately. Also without a collective effort by the governments chances are that countries will attempt to lower their environmental safeguards so as to be in a better position in the market as compared to its competitors.²⁷

The World Trade Organization has a number of provisions in its agreements which deal with the environment. The Marrakesh Agreement established by the WTO refers to the concept of sustainable development as one of its objectives that needs to be served and the General Agreement on Trade in Services (GATS) has provisions on agriculture. However the most significant regulations on environment protection are available in Article XX of the GATT, the Agreement on Technical Barriers to Trade and the Agreements on Sanitary and Phytosanitary Measures.²⁸

“Article XX of the GATT states that the member states are permitted to take such steps as required for the following cases as mentioned below. However the only restriction that remains is that the countries should not act arbitrarily and unjustifiably by applying these restrictions as an opportunity to impose disguised restrictions on international trade. The conditions which are:

- *essential to protect public moralities;*
- *essential to protect human, animal or plant life or health;*
- *relating to the imports or exports of gold or silver;*
- *essential to secure compliance with laws or guidelines or principles which are consistent with the provisions of this Agreement, including those relating to customs enforcement, the protection of intellectual property including patents, trade marks and copyrights, and the prevention of deceptive practices;*
- *relating to the products of prison labor;*
- *imposed for protecting the national treasures of artistic, historic or archaeological value;*
- *relating to the conservation of exhaustible natural resources if such measures are made effective combining with restrictions on domestic production or consumption;*
- *undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the contracting parties and not disapproved by them or which is itself so submitted and not so disapproved;*
- *involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; this is subject to the condition that such restrictions shall not operate*

²⁷ Michael M. Weinstein and Steve Charnovitz, “The Greening of the WTO”, Foreign Affairs, Vol. 80, No. 6 (Nov. - Dec., 2001), pp. 147-156

²⁸ Alan Oxley, *WTO and the Environment*, September 2001, website, 18 September, 2013

to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

- *essential to the acquisition or distribution of products in general or local short supply; this is subject to the condition that any such measures shall not be inconsistent with the principle that all contracting parties are entitled to an just share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.*²⁹

We know that General Agreements on Tariffs and Trade (GATT) is the most vital agreement amongst all WTO agreements. The main purpose of GATT was to prevent discrimination in trade and impose regulations in trade for the member states to oblige. All international agreements include exemption clauses in their agreements in order to prevent the erosion of the states' capacity in performing functions when the treaty rules are applied. The most frequently used exemptions in international instruments are based on the protection of the national security and also the protection of the environment. Likewise GATT also lays its exemptions under the Article XX. The exemptions under Article XX primarily aim to protect the environment by giving extensive freedom to the member states to regulate trade. Article XX exempts the member states from applying fundamental commitments especially in cases relating to non-discrimination. Protecting the state's security and values, preserving the cultural heritage is included within this. The Article also includes the right to waive any rules that serve as a hindrance in the protection of animal and plant life and human beings. Article XX (b) allows any prohibitions on trade in order to protect human beings, flora and fauna and Article XX (d) allows such restrictions on issues that are not inconsistent with the WTO GATT objectives. There is also Article XX (g) also allows such restrictions that assist in the conservation of resources.³⁰

The WTO Agreement on the Application of Sanitary and Phyto-sanitary Measures (SPS) attempts to rule a state's laws relating to the protection of human health, endangered species of plants and animals from risks like diseases and pests. The SPS provisions also necessitates that the state must base the laws on scientific proof that illustrates whether health risks exists or not. If any risk exist and such has been proved in that case countries all over are free to set their own high standards according to their individual choice. For instance, in the *beef hormone*³¹ case the Agreement on the Application of Sanitary and Phyto-sanitary Measures (SPS) was invoked against the European Union since they did not submit sufficient proof to assist their claims.³²

It was the first case on the Agreement on the Application of Sanitary and Phyto-sanitary Measures to appear before the WTO Dispute Settlement Body. The United States and the

²⁹ Article XX General Exceptions, GATT, 1947

³⁰ Alan Oxley, *WTO and the Environment*, September 2001, website, 18 September, 2013

³¹ (EC—Measures Concerning Meat and Meat Products) (US v EC) (Panel Report 1997, WTO Appellate Body 1998)

³² Michael M. Weinstein and Steve Charnovitz, *The Greening of the WTO*, Foreign Affairs, Supra note 107

Canadian governments had complained against the ban on imported goods by the European Union since the meat used was produced by animals which were fattened with a certain growth hormones that were harmful for human health. The Appellate Body found that the allegations were not grounded on 'risk assessment' and hence it was decided that the European Union safety measures violated the Agreement on the Application of Sanitary and Phyto-sanitary Measures.³³

Further the agreement also states that the measures which are required for the protection of human, animal or plant life or health, taken by the states in their respective countries which are consistent with the global standards should also be consistent with the standards mentioned in the Agreement on the Application of Sanitary and Phyto-sanitary Measures and the GATT, 1994.³⁴

On the other hand, we also have the Agreement on Technical Barriers to Trade (TBT) which deals with human health and safety rules. Unlike the Agreement on the Application of Sanitary and Phyto-sanitary Measures (SPS) the Agreement on Technical Barriers to Trade (TBT) does not involve the production of scientific evidence to assess the risk. However, it contains a number of conditions including one that states that the standards set for preventing health risks should restrict trade to the extent that is required to achieve the goal.³⁵ That is they should fulfil the objective of preventing health risk and there only the restriction should end. It also states that the products of national origin should be treated in the same manner in which similar products of foreign origin are treated.³⁶

Further moving back to the concept of sustainable development and World Trade Organization it can be observed that WTO has contributed to this idea promoting trade in goods and services and hence promoting economic development. It also focused on the innovation possibilities by providing steady and foreseeable conditions to carry trade. These steps by the WTO have turned out to be very advantageous. Along with protecting the environment these aided in promoting effective distribution of resources, increase in the income levels and encouraged economic growth. The significance of WTO's efforts on promoting sustainable development has been recognized at the 1992 Rio Summit, 2002 Johannesburg Summit and 2005 UN World Summit.³⁷

³³ See G A TT Report of the Panel EC Measures Concerning Meat and Meat Products (Hormones) , WT/DS26/R/USA (Aug. 18, 1997), at WTO Website

³⁴ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instru- ments-Results of the Uruguay Round (1994)

³⁵ Michael M. Weinstein and Steve Charnovitz, *The Greening of the WTO*, Foreign Affairs, Supra note 107

³⁶ Steve Charnovitz, *Environment and Health Under WTO Dispute Settlement*, The International Lawyer, Vol. 32, No. 3, Symposium on the First Three Years of the WTO Dispute Settlement System (FALL 1998), pp. 901-921

³⁷ <http://www.wto.org/>

Other WTO agreements that contain provisions on environmental protection are The Agreement on Trade-Related Aspects of Intellectual property (TRIPS), The Agreement on Subsidies and Countervailing Measures and the Agreement on Agriculture.

Section 5; Article 27 (2) and (3) of the Agreement on Trade-Related Aspects of Intellectual property (TRIPS) deals with environmental protection:

It states that “the member states may eliminate such patent inventions that are required to protect human, animal or plant life or health, public morality or to avoid serious harm to the environment. However, such elimination cannot be made only based on the fact that such exploitation of the environment is prohibited by the national laws.

Member states also can eliminate from patentability:

- diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
- plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.”³⁸

Additionally, there is also the Agreement on Subsidies which relates to non-agricultural products. The agreement, which is designed for regulating the use of subsidies, makes a distinction between ‘actionable’ and ‘non-actionable’ subsidies. Article 8 of the Agreement provides for the non-actionable subsidies which are generally permissible but it has also been mentioned that such subsidies should adapt the available facilities in order to satisfy the fresher environmental requirements.

Article 8.2 (c) clearly states that “*assistance should be given by states for promoting the adaptation of existing facilities to newer environmental requirements which is imposed by the law or regulations resulting in superior restraints and economic burden on the firms. Further the provisos states that assistance should be*

- *a one-time non-recurring measure; and*
- *limited to 20 per cent of the cost of adaptation; and*
- *it should not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and*
- *directly linked to and proportionate to a firm’s planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and*
- *available to all firms which can adopt the new equipment and/or production processes.”*³⁹

³⁸ TRIPS, www.wto.org

³⁹ Article 8.2(c), The Agreement on Subsidies and Countervailing Measures, Available at: www.wto.org

The World Trade Organization Agreement on Agriculture intends to make reforms in trade relating to agriculture. This WTO agreement provides for environmental protection in the Preamble which speaks about bringing about reformation in agriculture keeping in mind the protection of the environment.

The provision states that *“any reform commitments made under this programme should be made in a just and fair manner amongst all the member states. Proper attention should be given to food security and the protection of the environment. However, special and differential treatment needs to be given to the developing countries as a part of the negotiations. Also the possible negative effects that might occur due to the implementation of this reform programme on the least-developed and net food-importing developing countries should be taken into account”*.⁴⁰

Trade and Sustainable Development

*“The international community and the family of international organizations have all been guilty of incoherence and of conflicting priorities, initiatives and advice in the name of development, in the past. Great challenges remain for the United Nations system, the Bretton Woods Institutions and indeed the World Trade Organization to coordinate and cooperate better.”*⁴¹

There are a number of challenges that the world faces today. One such is to strike an appropriate balance between international trade and the concept of sustainable development. This challenge is contentious and devoid of any immediate solution. The existing data shows that there has been quite remarkable growth in the sphere of international trade but simultaneously there has also been huge failure in achieving sustainable development.⁴²

Theoretically, objectives relating to trade liberalization and protection of the environment should be compatible with each other. This is so because both aim for optimum use of resources either by maximizing the gains from the relative benefits of states, through trade, or by confirming that economic development develops into environmentally sustainable.⁴³

It is extremely essential for trade policies to have environmental dimensions as it happens to be globally collective resource. Hence in order to manage this efficiently governments must collaborate on all strategies including trade that has the possibility to threaten fisheries, forests, air quality, and endangered species. In the absence of collective agreements the states will be attracted to lower their environmental standards in an effort to increase their

⁴⁰ See Preamble, Agreement on Agriculture, Available at: www.wto.org

⁴¹ Mike Moore (Director-General of the WTO) 'The multilateral trading system in support of Africa-led and Africa-owned development' speech to ECOSOC, High-Level Policy Dialogue, United Nations, Geneva, 16 July 2001 at 1. Available at http://www.wto.org/english/news_e/spmm

⁴² Nii Lante Wallace-Bruce and NL Wallace-Bruce, *Global trade and sustainable development: Two steps forward in the WTO?* Supra note 74

⁴³ Duncan Brack, *Balancing Trade and the Environment*, International Affairs Supra note 15, Ethics, the Environment and the Changing International Order (Jul., 1995), pp. 497-514

competitive advantage. In such a situation there needs to be some sort of international cooperation on environmental issues, but the question remains what kind of cooperation there should be, and under what institutional supports. Some consider that environmental regulations should be left to specialized agencies, whereas many environmentalists consider that they should be enforced by the WTO. Out of all other international organizations World Trade Organization is the chosen one since it has the mechanism for the enforcement of its ruling through trade sanctions. The WTO summons panels of experts to rule on disputes relating to trade among member governments. If the state which loses refuses to comply with the ruling, the panel then authorizes the winning state to impose trade sanctions. This international trade organization has begun embracing environmental protection, but it certainly needs to do more. The challenge that lies ahead is to find an effective middle ground among the rival parties in this dispute: free traders and the environmentalists, the United States and the EU, and the industrialized and developing worlds and the developed and the developing nations. The organization has the ability to take several solid steps to answer its critics. There need not be any drastic changes in the policies for instance an ill-considered adoption of any precautionary principle. As an alternative, a series of measures, incremental changes could pass both the tests of environmental effectiveness as well as political viability. WTO jurisprudence has come a long way since the tuna – dolphin rulings with the efforts of the environmentalists but advocates need to remain attentive and fight any sign of backpedalling if the trade body takes any inconsistent steps. However WTO rules make public oversight problematic by keeping most discussions and negotiations undisclosed, thereby breeding distrust. The organization has made some efforts to answer its critics. Lately, panels have been permitted to evaluate unsolicited "friend of the court" briefs submitted by nongovernmental organizations. Nevertheless, this practice is fiercely contested within the organization and may not continue. For reasons of both sound jurisprudence and sound public relations, the WTO ought to regularly accept briefs by independent experts.⁴⁴

There are three set of WTO rules under which a particular state can restrict the imports of such goods that cause to threaten or cross the limits of chosen levels of health, safety of humans or animals and environment protection. Firstly, the general exceptions given under Article XX of the General Agreements of Tariffs and Trade allow the ban of imported goods, any discrimination against imported goods and similar such shift from the WTO/GATT rules in certain circumstances. These circumstances may embrace conservation of exhaustible natural resources, any goods which is harmful to the health, safety and life of plants or animals. The second WTO law is the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) which was adopted during the Uruguay Round of Negotiations. This agreement concluded the Uruguay Round agricultural negotiations and was mainly framed owing to the on-going disputes between European Union and United States regarding health and safety issues of imported beef, wine and other such agricultural products. This agreement also covers measures connected with health and safety measures of humans, animals and

⁴⁴ Michael M. Weinstein and Steve Charnovitz, "*The Greening of the WTO*", *Foreign Affairs*, Vol. 80, No. 6 (Nov. - Dec., 2001), pp. 147-156

plants in agriculture such as fungicide, pesticide, meat infection etc. Finally the WTO Agreement on Technical Barriers to Trade (TBT) which was also adopted during the Final Act of the Uruguay Round of Negotiations. This agreement was made to deal with the technical standards and regulations which were not addressed by the Agreement on the Application of Sanitary and Phyto-sanitary Measures (SPS).⁴⁵

All of these WTO laws namely the GATT, the SPS Agreement and the TBT Agreement speak of a rule that is every country needs to maintain such regulations which is necessary to protect the life and health of humans, animals and plants and also to conserve the exhaustible natural resources. The countries should also determine the level of risk appropriate to exemplify in its product standard.⁴⁶

The 1990s decade was considered to be the decade of economic globalization. It was during this time that most states became part of the global economy. States aspired towards the elimination of trade barriers and even flow of goods and services from one state to another. But whereas on one hand states pursue the advantages of open and free trade, on the other hand they also have to restrict imports of some goods which they consider undesirable. Sometimes the primary concern of the importing state is that a particular product produced by the state can end up threatening the health of humans, plants or animals or the environment. This may result in trade dispute between states where one country desires for market access and the other country focuses on the sovereignty over its environmental policies.⁴⁷

Even though the precise legal nature and status of the concept of sustainable development remains controversial, the concept still needs the integration of environment issues in the decision making relating to investment and development projects.⁴⁸

In 1947 when GATT was adopted, the framers were more concentrated on liberalizing trade and gave little or almost no importance to environmental protection. Their aim was to promote free trade. Even the adoption of article XX of GATT relating to the protection of the environment was not in the manner in which environmental protection is understood today.⁴⁹

The Preamble of the GATT states that trade and economic effort

“.. should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the

⁴⁵ Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO*, pp. 231-267; Supra note 16

⁴⁶ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Arts. 2,5 [hereinafter SPS Agreement], Agreement Establishing the World Trade Organization, Annex 1A, in FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, MARRAKESH, 15 APRIL 1994, at 69 (1994)

⁴⁷ Charles W. Schmidt, *Caught in the Middle: Should the World Trade Organization Settle Environmental Disputes?*, Environmental Health Perspectives, Vol. 107, No. 11 (Nov., 1999), pp. A562-A564

⁴⁸ Iron Rhine Railway (Belg. v. Neth.), ¶ 59 (Perm. Ct. Arb. 2005) [hereinafter Iron Rhine Railway].

⁴⁹ Nii Lante Wallace-Bruce and NL Wallace-Bruce, *Global trade and sustainable development: two steps forward in the WTO?* Supra note 74

*full use of the resources of the world and expanding the production and exchange of goods.*⁵⁰

Here we find that there has been no mention of the term “sustainable” in the GATT Preamble. On the contrary it states about the “full use of” the resources of the world in order to expand trade globally.

During the Stockholm Conference, 1972 the global trade community was anxious about the anti – pollution measures which could lead to hindrances in trade. This led to the establishment of a Group on Environmental Measures and International Trade (the EMIT Group).⁵¹ It states that:

*“..any specific matters relevant to trade policy aspects of measures to control pollution and protect the human environment especially with regard to the application of the provisions of the General Agreement taking into account the particular problems of developing countries.”*⁵²

The concept of sustainable development was first recognized overtly in the US – Tuna II⁵³ case. Gradually over the years the international trade became more open to new developments and changes in the framework.

The Uruguay Round of Trade Negotiations that took place during the establishment of the WTO was carried out under totally different circumstances. During this time environmental protection was given extreme importance as by then international environmental law had developed largely and the global awareness regarding the same was quite noticeable. Hence this globalization of the environmental law presented the negotiators of the Uruguay Round with a challenge to incorporate the concept of sustainable development into the international trade regulations.⁵⁴

However the end result that we have seen of incorporating sustainable development into trade measures was that the negotiators of the Uruguay Round even though were very much aware of the issue of sustainable development did not confer high priority to it in the WTO trade measures.⁵⁵ Important provisions and exceptions on human health, conservation of natural resources were not transferred into the articles of the trade agreements. Also no addition or

⁵⁰ Preambular paragraph 2 of GATT 1947

⁵¹ Mirina Grosz, SUSTAINABLE WASTE TRADE UNDER WTO LAW, Martinus Nijhoff Publishers. Vol: 4, (2011), Print

⁵² GATT, Trade and Environment, Factual Note of the Secretariat, 18 September 1991, L/6896

⁵³ GATT Panel US – Tuna II, para. 5.42

⁵⁴ Nii Lante Wallace-Bruce and NL Wallace-Bruce, *Global trade and sustainable development: two steps forward in the WTO?* Supra note 74

⁵⁵ Eric Neumayer 'Greening the WTO Agreements: can the Treaty Establishing the European Community be of guidance?' (2001) 35J World Trade 145,149. Also see Richard H Steinberg 'Trade-environment negotiations in the EU, NAFTA, and WTO: regional trajectories of rule development' (1997) 91AJIL 231, 243.

alterations were made in those exceptions and they were left in the same manner as they were in GATT 1947.⁵⁶

Towards the end of the 1990s, international instruments laid more stress on sustainable development. The Singapore Ministerial Declaration of 1996⁵⁷ emphasized on the achievement and enhancement of sustainable development. The 1998 Geneva Ministerial Declaration⁵⁸ recognized sustainable development as a definite goal of the WTO.

Sustainable development was incorporated into the Preamble of the WTO agreement as a goal to achieve, but no proper effort was made to go beyond that. This shows that the negotiators were not committed to achieve the goals of sustainable development. They still considered trade negotiations to be their pure and primary role. During the Marrakesh Ministerial Declaration Meeting where the WTO Agreement was adopted a decision was taken directing the first meeting of the General Council of WTO to establish a Committee dealing with both trade and environment. Critics said that this decision was taken in order to avoid any derailment by the environmentalist during the Uruguay Round of Negotiations.⁵⁹ The primary function of the Committee was to identify the relationship between environment and trade and give appropriate recommendations for its improvement. After some positive work from the Committee it soon reached a deadlock due to the on-going disputes between and within the countries of the North and the South.⁶⁰

In an attempt to establish a relation between international economic rules and sustainable development the Preamble of the 1994 WTO Agreement clearly referred to the concept of sustainable development in the following manner:

“Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in the manner consistent with their respective needs and concerns at different levels of economic development (...).”⁶¹

The Preamble of the WTO Agreement howsoever does make an effort to conserve the natural resources by limiting its use. It overtly states how sustainable development is an essential objective similar to the protection and preservation of the environment since it connects the protection of environment with developmental concerns. So finally it is the judicial bodies

⁵⁶ 16See Reformulated Gasoline appellate body report, WT/DS2/9 29.

⁵⁷ WTO Singapore Ministerial Declaration, 13 December 1996, WT/MIN (96)/Dec, para 16.

⁵⁸ WTO Geneva Ministerial Declaration, 20 May 1998, WT/MIN (98)/DEC/1, para 4

⁵⁹ Gregory C Shaffer *The World Trade Organization under challenge: democracy and the law and politics of the WTO's treatment of trade and environment matters* (2001) 25 Harvard Environmental Law Review 1, 20.

⁶⁰ *Ibid*

⁶¹ *Ibid*

that are left to deal with those trade disputes which relate to trade and sustainable development. Also they hardly receive any guidance from the law makers.

The twist came through the GATT panel decision in the Tuna II⁶². The panel decision stated that sustainable development was widely recognized by the international trade community.⁶³

With the establishment of the Committee on Trade and Environment and the reference of the concept of sustainable development in the Preamble of the WTO Agreement, this idea got a new boost in the international sphere. Later as specified by the Marrakesh Agreement two more committees were established namely, the Committee on Trade and Development and the Sub-Committee for Least Developed Countries.⁶⁴

MEAs conflicting with WTO rules

The multi-lateral agreements are based on the idea that humans are surrounded by natural resources and it is the duty of all states to cooperate in developing policies for the protection of these resources.⁶⁵

Since multilateral environmental agreements use more and more trade measures to implement and enforce their objectives it is but apparent that these two international regimes will have significant problems while resolving international environmental issues. These multilateral environmental agreements form a significant part of the international environmental management structure. These are formulated to organize policy action to handle global and trans-boundary environmental problems cooperatively. Due to a number of reasons the states who are parties to these agreements selected trade related provisions to achieve their goals of protecting the environment. For instance, trade measures were incorporated by international negotiators into multilateral environmental agreements since they considered them to be crucial and operative implementation tools. Such trade measures have been mainly operative in the speedy implementation of the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).⁶⁶

The relationship with trade agreements is necessary to make the MEAs work effectively. For instance trade measures proved vital while persuading some states which produce or consume

⁶² United States Restrictions on Imports of Tuna (1994) 33 ILM 839

⁶³ Nii Lante Wallace-Bruce and NL Wallace-Bruce, "Global trade and sustainable development: two steps forward in the WTO?" Supra note 74

⁶⁴ Marrakesh Ministerial Declaration on Trade and Environment. 14 April 1994, MTN.TNC/45(MIN), 33 ILM 1267 (1994)

⁶⁵ Shannon Hudnall, "Towards a Greener International Trade System: Multilateral Environmental Agreements and the World Trade Organization", 29 COLUM. J.L. & SOC. PROBS. 175, 177-78 (1996)

⁶⁶ Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), Sept. 1987, 26. I.L.M. 1550 (1987)

chlorofluorocarbons (CFCs), such as Korea and Israel, to come and join the agreement, and to reduce the production and use of substances which deplete the ozone layer.⁶⁷

International environmental agreements have different policy reasons for using trade instruments which differ in accordance with the subject matter of the agreement. According to these policy objectives trade restrictions in multilateral environmental agreements can be classified under the following categories:⁶⁸

First, MEAs which are used to control trade which itself promotes harm to the environment. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)⁶⁹ regulates global trade in endangered and threatened species. The trade in species for pets, clothing, trinkets, and other products lead to the overexploitation of a number of species. When a particular species reach a certain level of vulnerability, the states that are parties to CITES list it under any one of the three' appendices to the treaty. The CITES limits trade in varying degrees, that depends on the ecological status of the species.⁷⁰

Second, MEAs which are used to protect states from substances those are harmful to the domestic environment. Likewise, the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal (Basel Convention)⁷¹ imposes trade restrictions on the transportation of hazardous wastes because this type of trade itself is considered to be hazardous. The Convention imposes general conditions on member states preceding shipment of hazardous wastes and prohibits trade in hazardous waste with states which are not parties. They are used to support agreements to protect the global commons. For example, the Montreal Protocol⁷² imposes trade restrictions on parties as well as nonparties to tempt more parties to reduce or eliminate the production and consumption of ozone depleting substances, such as chlorofluorocarbons (CFCs). Since the ozone layer is a protective shield for the entire world it is necessary that more number of states participate to prevent states which are not parties from enjoying competitive advantages and also to discourage the production of CFC and such facilities to the non-parties.⁷³ Accordingly the protocol requires parties to terminate trade relations with non-parties in substances that deplete the ozone layer as well as products that contain ozone depleting substances.⁷⁴

⁶⁷ World Wide Fund For Nature (WWF) et al., Joint Statement on Relationship Between WTO and Multilateral Environmental Agreements, posted online by WWF, undated, http://www.panda.org/news/press/news_71.htm

⁶⁸ Lakshman D. Guruswamy Et Al., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER, 867 (West Pub. Co. ed., 1994).

⁶⁹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 12 I.L.M. 1085 (1973)

⁷⁰ Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841, 870 (1996).

⁷¹ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, March 22, 1989, 28 I.L.M. 657 (1989)

⁷² The Montreal Protocol on Substances that Deplete the Ozone Layer, 1990

⁷³ Wold, supra note 245, at 868-69

⁷⁴ Montreal Protocol, supra note 7, Article 4

No WTO or GATT case has ever challenged any trade measure taken pursuant to Multilateral Environmental Agreement. However there were three trade environment disputes where the possible conflict between WTO obligations and MEAs were raised. They were Tuna Dolphin Case I, Tuna Dolphin Case II and the Shrimp Turtle Case.⁷⁵ Coincidentally in all of these above cases the GATT/WTO panel decided against the measures taken by the United States considering them to be biased, unilateral and extraterritorial. In each of these cases the measures were essentially taken by the United States particularly to force the developing countries to adopt the U.S. environmental policies. Furthermore, the interpretative approach taken by the WTO panels evolved with the addition of interpretative provisions to the WTO Agreements that was a result of the Uruguay Round negotiations. The decisions of all the three cases were considered to be legally correct and justified in their result. The rules of international trade pursued the result which it indeed they were meant to achieve, restricting the capacity of an economically stronger state to abuse weaker states.⁷⁶

The relationship between the MEAs and WTO agreements are governed by the international law. Article 3.2 of the WTO Dispute Settlement Understanding, provides that the provisions of the WTO agreement are to be interpreted according to the '*customary rules of interpretation of public international law*'. Hence the MEAs are international treaties that very much form a part of international law. Besides, in the Gasoline Case the Appellate Body stated that the WTO agreements are not to be viewed in clinically different from other rules of international law, which includes treaties.⁷⁷

So the Appellate Body or the Panel has ample amount of scope to consider the MEAs while interpreting the WTO agreements, including the exceptions listed in GATT Article XX. But there lies a limitation since the Appellate Body or the Panel are not authorized interpret the WTO agreements in a manner that enhances to or reduces WTO rights.⁷⁸ This however is not a big challenge since Article XX of the GATT allows for exceptions to the WTO rules but the Appellate Body or the panels may probably be sensitive to charges that if they permit MEA trade measures under WTO rules, they would be setting aside WTO provisions. Generally most states prefer multilateral actions to unilateral action under the WTO agreements. Therefore when in the Shrimp – Turtle dispute a unilateral trade-related environmental measure was accepted it suggested that a measure taken under a broader, multilateral agreement would survive a WTO challenge.⁷⁹

⁷⁵ WTO Appellate Body, US – Shrimp Case

⁷⁶ Bradley Condon, Multilateral Environmental Agreements and the WTO: Is the Sky Really Falling, Tulsa Journal of International and Comparative Law, Volume 9, Issue 2, Available at: <http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1089&context=tjcl>

⁷⁷ See Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted on 20 May 1996, DSR 1996:I, p. 18.

⁷⁸ Article 3:2, Dispute Settlement Understanding. See G. Marceau, 'Dispute Settlement and Human Rights', 13:4 European Journal of International Law 753–814 (2002)

⁷⁹ United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia, AB-2001-4, Report of the Appellate Body (shrimp-turtle II)

Also sometimes the MEAs are the preferred for trade measures when dealing with related disputes. In the US Shrimp case both the Panel and the Appellate Body noted that good-faith efforts of the US which tried to negotiate an MEA with several parties, including the claimant state (Malaysia) even though the US shrimp restriction was not essential under any international agreement.⁸⁰ Debatably, this might have been a legal requirement at least to try to negotiate.⁸¹ Though the Appellate Body significantly had found the element that the United States had already reached an agreement with Caribbean nations, but it initially did not attempt to reach any agreement with south-east Asian countries (i.e. it was treating WTO members differently).⁸²

Also due to their specific nature the MEAs can form a *lex specialis*. Accordingly a law that is general in character will not repeal a previous law that is specific in character⁸³ which is applicable to MEAs as was agreed before the establishment of the WTO. This idea of considering MEAs to be specific treaties and giving them the status of *lex specialis* is supported by some commentators as MEAs contain specific measures which are applied to specific categories of products.⁸⁴ According to this principle the provisions of the MEAs would override the general principles of international trade under the WTO agreements and hence no conflict will arise between them. Nevertheless, it is not certain that the Dispute Settlement Body of the World Trade Organization would respect the *lex specialis* giving preference to MEAs and it may not apply where the agreement expressly states the general rule where there is some form of savings clause giving the treaty supremacy.⁸⁵

In the case of any conflicts arising between the MEAs and the WTO agreements the rules of interpretation of treaties would apply to resolve them. The Vienna Convention on the Law of Treaties sets out the rules and regulations to interpret treaties when they appear to be in conflict with other treaties. Accordingly, when two treaties deal with the same subject matter the treaty which is later in time will prevail between parties to both the agreements.⁸⁶ In cases where only party is party to both the treaties and the other is not and a conflict arises, the treaty which both parties have ratified will prevail over the other. Again according to Article 30(2) of the Vienna Convention provides that in case a treaty states that it is not to be considered as not compatible with an previous or later treaty, the provisions of the other

⁸⁰ Gonzalez-Calatayud and Marceau, *The Relationship Between the Dispute-Settlement Mechanisms of MEAs and those of the WTO*, p. 283

⁸¹ IISD/CIEL, *The State of Trade Law and the Environment: Key Issues for the Next Decade*, p. 23

⁸² See Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate* *Columbia Journal of Environmental Law* 27:2 (2002), pp. 489–519

⁸³ See *Upper Silesia Minorities*, 1928 PCIJ Ser A, No. 15 (1928)

⁸⁴ Stilwell & Tarasofsky, *Towards Coherent Environmental and Economic Governance*; Yu, *Discussion Paper on the World Trade Organisation and Multilateral Environmental Agreements*

⁸⁵ Duncan Brack and Kevin Gray, *"Multilateral Environmental Agreements and the WTO"*, *Supra* note 238

⁸⁶ Article 30(4).

treaty are to prevail and the earlier treaty would apply only to that extent till its provisions are not compatible with the later treaty.⁸⁷

As concluding remarks, it can be stated that more transparency is required over the purpose and impacts of the Multilateral Environment Agreements so that it supports the WTO members who might be cautious of the legal and political significances of adopting trade measures which are pursuant to MEAs, or such trade measures that are even acceptably harsher. Till date the WTO debates have focused more on narrow legal issues including probable conflicts and emphasized on hypothetical rather than practical linkages. There needs to be better understanding between the parties so that it tones down the chilling effect seen during MEA negotiations as some states are usually reluctant to embrace any language that might come in conflict with the WTO requirements. Greater focus should be given as to how this mutually supportive relationship can be expressed, contextualized and realized. This mutually supportive relationship between MEAs and WTO should include the design of institutions and measures that confirms this status. This should also involve greater assistance between MEA secretariats and the WTO in both negotiations and dispute settlement procedures.⁸⁸

Conclusion

The dispute between international trade and sustainable development is a persistent issue for the entire global community that should not be easily ignored. In the past few decades the world has witnessed remarkable growth in international trade. It has also witnessed an enormous failure to achieve sustainable development. Therefore this issue is not going anywhere so easily. The World Trade Organization is gradually moving towards freer trade and a new international trade round. In case that happen the issues relating to the goals of sustainable development will become even severe. Nonetheless the judicial branch of the WTO has made some development on this matter. But this progress is done on an evolutionary basis as and when suitable cases come forward. Environmentalists state that this is not enough to handle such a vital issue. The issue, hence, has to be tackled head on. For obvious reasons the WTO cannot be held exclusively responsible for the accomplishment of sustainable development throughout the world. Nevertheless, it has a critical part to play as the World Trade Organization is now practically widespread, covering more than ninety-seven per cent of international trade. During the Doha Declaration, this international trade organization gained a new impetus, successfully acquiring a new mandate. It has brought developmental issues into the forefront and it has specified that it would be looking more carefully at issues relating to social justice. This is a golden opportunity for the WTO to

⁸⁷ Duncan Brack and Kevin Gray, “*Multilateral Environmental Agreements and the WTO*”, Supra note 238

⁸⁸ Duncan Brack and Kevin Gray, “*Multilateral Environmental Agreements and the WTO*”, Supra note 238

tackle the whole question of universal trade and sustainable development without further delay. It is now mandatory for the law-makers to define a clear path for the judicial branch.⁸⁹

Recommendation

One of the primary barriers towards sustainable development still happens to be the dispute between international trade and environment. Again even in this regard it is considered that action by WTO member states would be more effective in resolving disputes between environmental agreements and GATT/WTO provisions conflicting with environmental rules because such action would create rules for all parties having trade rights.

6.2.1. Exemption of Multilateral Environmental Agreements through Waiver

The WTO parties have one option to resolve this existing dispute between global trade and environment by exempting the multilateral environmental agreements through waiver. In such a case the each multilateral environmental agreement that authorizes trade restrictions would be submitted, after negotiation to be waived under Article IX.⁹⁰ According to the provisions of WTO Agreement parties are permitted to waive obligations if approved by a three-fourths majority under exceptional circumstances. The provisions state that parties can waive all or only certain obligations. As an instance we have seen that the parties to the North American Free Trade Agreement (NAFTA) waived the trade obligations for CITES, the Basel Convention and the Montreal Protocol and specifically included those waivers into the text of the treaty.⁹¹

However, this solution comes with a few hurdles. Under the GATT rules waiver can be permitted only under exceptional circumstances so there lays a fundamental conflict between the proposed restriction and the GATT.⁹² The suggested case-by-case waiver tactic will create a supremacy which will place the GATT and WTO above the multilateral environmental agreements. Besides, a waiver is generally time-bound and needs to be renewed periodically, which implies that the multilateral environmental agreement will be accepted only temporarily. This complicates the negotiations of international environmental agreements where trade measures may be regarded as a essential implementation measure.⁹³

⁸⁹ Nii Lante Wallace-Bruce and NL Wallace-Bruce, *Global trade and sustainable development: two steps forward in the WTO?* Supra note 74

⁹⁰ The World Trade Organization (WTO) is both an institution and a system of global trading rules that was established via the Agreement Establishing the WTO, 33 I.L.M. 1144 (1994) WTO Agreement, supra note 3, art. IX (3)

⁹¹ North American Free Trade Agreement (NAFTA), Dec. 17, 1992, 32 I.L.M. 289 (1993), art. 104. Article 104 (1)

⁹² United Nations Department for Policy Coordination and Sustainable Development (DPCSD), Research on linkage between trade, environment and sustainable development, preliminary note posted online by DPCSD.

⁹³ Annick Emmenegger Brunner, *Conflicts Between International Trade And Multilateral Environmental Agreements*, 4 Annual Survey International & Comparative Law 74 1997

6.2.2. Amendment of the GATT

Amendments of the provisions of the GATT or the WTO by the parties would add new exceptions especially for multilateral environmental agreements. Such an amendment would need to specify that trade restrictions in conformity with the multilateral environmental agreements would be consistent with the provisions of GATT. A different GATT provision that is consistent with the multilateral environmental agreements would specify that a country's status as a party or non-party to an environmental agreement will not be considered in the GATT's presumption of environmental legitimacy for actions taken in accordance with the recognized international agreements. The exception should be extensively drawn so that any existing international environmental agreement is not excluded or to prejudice any establishment of legitimate trade measures in a future environmental treaty.⁹⁴

The following wording of a new exception has been proposed:

“Each Party affirms its respective rights and obligations with respect to measures under existing and future bilateral or multilateral environmental and conservation agreements to which it is or may become a Party. Nothing in the WTO/GATT agreements shall be construed to prevent or impede Parties from taking actions to implement or enforce existing or future international environmental agreements.”⁹⁵

But again even this solution has its share of obstacles. Developed states come up with the concerns that if provisions relating to the environment are unified with international trade policy then by incorporating environmental considerations into GATT would provide tools that could be used to disguise protectionism and will result in trade barriers. These apprehensions arise from one of the most universal complications of the universal approach to environmental protection, namely in the vast economic discrepancy that exists between developed and developing countries. The developing countries generally tend to view environmentally destructive development as a prerogative. Most of the countries of the South, especially those that try to develop export markets as parts of their development programs consider that the stress on environmental values in the North seems to present a artifice intended to maintain the economic dominance of the industrialized world. They strongly object to the use of environmental trade measures to eradicate any competitive advantage that might arise when their environmental choices differ from northern preferences.⁹⁶

Additionally, an amendment of GATT is not probable because of two technical hindrances. First, two-thirds of the WTO parties need to agree to vote on the proposed amendment. Second, each party's legislature must accept the amendment before it binds that party.

⁹⁴ FOUNDATION FOR INTERNATIONAL ENVIRONMENTAL LAW AND DEVELOPMENT ET AL., *International Institute of Environment and Development*, 2008, at 17

⁹⁵ *Ibid*

⁹⁶ Daniel C. Esty, “GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE” 219 Peterson Institute, 1994, Print.at 182 -185

According to the rules of international law, a treaty does not bind a country until the country formally consents, through ratification, acceptance, or accession to the treaty.⁹⁷

6.2.3. Criteria for Using Trade Measures in Multilateral Environmental Agreements

This idea of evolving criteria for using trade measures in multilateral environmental agreements has received substantial attention. There are several methods of using these criteria. The criterion could be indicative to draft new multilateral environmental agreements so as to avoid conflict with the provisions of GATT and WTO. There can also be criterion for standards in WTO panels to use in adjudicating disputes. In intergovernmental discussions, several criteria have been put forward to review the use of trade measures in multilateral environmental agreements. Among these are:

- Legitimacy of the multilateral environmental agreement,
- Non-protectionist intent,
- Necessity of the trade measure,
- Non-discriminatory use of the trade measure,
- Least-trade restrictiveness and
- Effectiveness of the multilateral environmental agreement.⁹⁸

Among the above mentioned solutions this criteria method has value but they could be used to prohibit the use of trade measures. Such a criteria-related approach also raises the difficult question concerning their implementation as to who will implement these criteria. On the other hand, environmentalists are suspicious of a WTO panel or other WTO institutions applying these criteria and the free-traders are equally cautious of the environmentalists. The Commission for Sustainable Development and the International Court of Justice has been proposed as the neutral fora that would pacify both the environmentalists and the free-traders.⁹⁹

6.2.4. Coordination of Trade and Environmental Policy-Making

A coordinated trade and environmental policy-making would possibly minimize the chances of a GATT/WTO conflict over enforcement. A parallel practice that will have the environmental officials participate in trade negotiations and trade officials participate in environmental negotiations should become a standard practice. The cooperation and coordination of the WTO with institutions of multilateral environmental agreements and the inoculation of the views of the NGOs into the WTO would support such a practice.¹⁰⁰

⁹⁷ Vienna Convention, arts. 11-16, 34, 39

⁹⁸ Steve Charnovitz, *Multilateral Environmental Agreements and Trade Rules*, 20 *Environmental Law and Policy*, 163 (1996) at 167

⁹⁹ Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 *ENVTL. L.* 841, 870 (1996) at 917.

¹⁰⁰ Annick Emmenegger Brunner, *Conflicts Between International Trade And Multilateral Environmental Agreements*, *Supra* note 272

6.2.5. A Global Environmental Organization

Lastly, the creation of a global organization for the solitary objective of promoting the goals of environmental protection and trade liberalization has been proposed by many scholars. We have seen that there is no single institution, like GATT in the international trade sphere, charged with coordinating international environmental policy-making. Decisions are made and strategies are set one by one based on issues and agreements with separate secretariats looking after each effort. The central problem is that there is no existing organization that has a mandate or the resources to coordinate worldwide efforts to protect the environment.¹⁰¹

Over the time a Global Environmental Organization has the capacity to create an extensive but unified body of international environmental law and a set of methodologies and procedures for individual countries to follow in endeavouring towards common goals. As the GATT built the fundamental concept of non-discrimination as a means to liberalize trade, a Global Environmental Organization would establish strategies, focused on the polluter pays principle, promotion of international cooperation in addressing environmental matters and the integration of economic and environmental policy goals. A Global Environmental Organization would therefore provide an institutional counterbalance and counterpart to the GATT.¹⁰²

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¹⁰¹ Ryan L. Winter, *Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?*, Supra note 19

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