
Legitimate Policy Objectives of Multilateral Trade and Indian Environment Measures

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Abstract : There is a direct link between Trade and Environment. The agreements of the World Trade Organisation(hereinafter referred to as WTO) and other intranational bodies like United Nations Commission on Trade and Development (hereinafter referred to as UNCTAD) mention about concerns related to environment. However, Environment and Economy have always been in opposition to each other. Trade requires environment to take a back seat and environment can be used as a justification for prohibiting trade. International trade has as one of its objectives the development of the people. Now does it mean sustainable development? Or the development which is envisaged in WTO mechanism only development without environmental concerns? From Stockholm to Rio, the discussions on environment developed not only the content of these declarations, but also there has been a great shaping of world trade policy and an eventual trickling down of trade policies concerning the environment at the domestic level. This article explores how and where there is a clash and the necessity to rebuild current law to bring out a balance.

Keywords: Trade, EIA, WTO, Environment, Sustainable Development, Hazardous Wastes, Globalisation, Liberalisation.

Introduction

Before the advent of factories which came into being in England and Europe, there was a large scale industrial production for international market and this did not take factories as base. This phase is referred to as proto-industrialisation. There was free trade but the concerns of environment were obviously not present in those times. Then came the industrialisation period and the only restriction in trade to least developed countries and the developing countries was that there was an upper hand of the industrialised countries. Industrialisation then led to globalisation and the current scheme of agreements of world trade.

There is a direct link between Trade and Environment. The agreements of the World Trade Organisation mention about concerns related to environment. Sustainable development also is recognized in the Agreement of Marrakesh.¹ Several recommendations have been made on the need of the committee on trade and environment to deal with the link between trade measures and concerns of the environment. This is to endorse sustainable development. Environmental dangers do not have a reverence for borders of nations. Countries have understood that to remove this hazard they should notify and take advice from the other countries on various big projects which are for consideration which may have negative environmental impact across the border. The Environmental Impact Assessment of India relates not just to its own policies but depends largely on the treatment meted to it by other countries under the Agreements which are a part of the World Trade Organisation.

Before the great depression, the policy of the United States and most other countries was protectionist in relation to trade. That is to say that the domestic suppliers and tradesmen were supported and imports were restricted only to those commodities which could not be produced locally. After the great depression² the protectionist policy of the United States was meant to change to a liberal one and the United States was among the first to initiate trade talks. Environmental concerns were never in focus. All countries wanted trade to be liberalised for mutual benefit. The theories of Adam Smith and David Ricardo further boosted the idea of free trade. At this stage the debates on environment were missing. What was needed was a push to the trade and

commerce.

The Post liberalisation period saw a great development in the jurisprudence of the impact of trade on environment but the dispute settlement understanding of the World Trade Organisation and discussions in general did not go beyond findings and reporting. The domestic judgments did not have any persuasive value on the reports of the panels set up for dispute settlement under WTO and not also in the consultations between members when objections were raised as to the obligations of the parties and the related impairment of the right under WTO in relation to free trade. This was in relation to the first block of countries, namely the developed countries of yesteryears and also today. Poverty could be alleviated in the second block of countries only through economic growth.

Environmental Policies as Barriers to Trade

Environmental policies or measures in relation to protection of environment at the national level are definite barriers to trade. But these barriers have not been given their due in terms of restricting imports as the panel reports of these mechanisms only limited itself to the finding of whether there was any nullification or impairment of the rights of the contracting parties under the scheme of GATT agreement or the related agreements of the WTO.

All the agreements related to trade under WTO provide for exceptions to free trade in a country, if the measures a member country takes, are of such a nature as which fall under the WTO scheme of exceptions. These include those measures which relate to public health, morality and environment among others. One Article which stipulates this is Article XX of the General Agreement on Tariffs in Trade³, GATT in short.

On the other hand, the most significant problems that the country faces today are concerned with relationship of dilapidation of environment, having lack of suitable living conditions and its consequences as well as growth of the nation from an economic perspective. These issues are related to ecological wealth including air, water and land. The National Environmental Policy 2006 says

The proximate drivers of environmental degradation are population

growth, inappropriate technology and consumption choices, and poverty, leading to changes in relations between people and ecosystems, and development activities such as intensive agriculture, polluting industry, and unplanned urbanisation.

Foreign Direct Investment

For development, in contrast to some of the peer countries, India does not have a financial institution tasked with the singular responsibility of overseeing national development financing needs.⁴ Instead, the Reserve Bank of India, its central bank, plays a direct role in supporting developmental activities.

Now trade agreements also talk of Foreign Direct Investment. Right now a lot of debate on this and the environmental concerns revolves around the concept that companies would shift their business location to places having less regulations and purposefully a lot of countries undervalue their environmental concerns to draw investments from offshore.⁵

Apart from being a critical driver of economic growth, foreign direct investment is a major source of non-debt financial resource for the economic development of India.⁶ Foreign companies invest in India to take advantage of relatively lower wages, special investment privileges such as tax exemptions, etc. For a country where foreign investments are being made, it also means achieving technical know-how and generating employment.

The Tuna Dolphin Case

The differences between trade agreements and environment legislation reached disrepute after the 1991 Tuna-Dolphin case, determined in the General Agreement on Tariffs and Trade.⁷ While declaring that a American environmental provision was not at par with U.S. commitments under the agreement on trade, the Tuna/ Dolphin finding told that trade protagonists could disagree with the rationale of local and multiparty environmental legislations, also these differences can be paid attention to by trade tribunals prejudiced and on the side of the commitments under trade agreements.⁸

Since the early 1990s, environmentalists have proposed several reforms

to resolve this conflict. Yet although governments have discussed the proposed reforms, they have not adopted them in any political agreements.

However, the green protagonists wished for reforming the trade system in the beginning of the nineties to save environmental legislations at the domestic level clashing with the general obligations under trade agreements while taking care not to destroy the principles of which are basic to trade law and the freedom of trade. Governments were requested to take on some reorganization in political agreements but in vain.

National governments surrendered these disputed to the trade tribunals that helped to create them. Also these pacts made stronger the authority of these tribunals by declaring that their pronouncement would constantly remain but for if the parties to the agreements decided otherwise. Opponents forecasted that the consequence had to be a large number of findings saying that environmental laws are not in tune with these trade agreements. But a very powerful of these tribunals, the Appellate Body of the World Trade Organisation, has done what governments failed to do.

It reached a comprehensive resolution of trade/environment legal conflicts that incorporates most of the proposed reforms.

This tribunal has overturned a lot of components of the Dolphin understanding of the agreement on trade and had kept away from interpreting trade agreements in methods that would lead to disputes with environmental laws, and also hailed suggestions into its considerations by environmental experts.

This researcher seeks to find if trade agreements have in any way kept environmental concerns in India on a back foot. Does the environmental policy of India have enough guard to assess the environmental degradation due to foreign investments, imports and exports? Whether the policy objectives of trade clash with or are in tune with the environmental policies of India. Also the environmental policies have generally been given a back seat when it was the question of implementing WTO agreements. For example, in the Shrimp Turtle Case⁹, in the name of free trade, negated the ability of the United States to protect the turtles, simultaneously undermining the international environment and national sovereignty. There were protests by anti globalisation

campaigners during the Ministerial Conference at Seattle. It is widely understood that the direct affects of globalisation on the Gross Domestic Product are remarkable but the concern is of the non economic benefits.¹⁰

Of these, some, such as labour rights, might be considered to be a subject properly of national sovereignty, with each nation bearing the responsibility of deciding to what extent it wishes to protect its own labour force, based on its own values, capabilities, and politics.

In relation to the environment and the influence on it there have been observations that countries intrude into the policies of each other and the case of sticking their noses into each other's business is stronger. The reason is that they all divide up their territories on the same global platform.

The Agreements of WTO

The law of WTO emanates from its agreements which are rules for its members brought forth after a series of negotiations between them. The present set of negotiations included a review of the old GATT agreement on trade law. The General Agreement on Tariffs and Trade is presently the norm setting book for trade in goods. This round also created a scheme for trading in services, intellectual property, dispute settlement and a review mechanism for trade policy.

The WTO's rules are the result of negotiations between the members. The current set were the outcome of the 1986–94 Uruguay Round negotiations which included a major revision of the original General Agreement on Tariffs and Trade. GATT is now the WTO's principal rule-book for trade in goods. The Uruguay Round also created new rules for dealing with trade in services, relevant aspects of intellectual property, dispute settlement, and trade policy reviews.¹¹ The complete set runs to some 30,000 pages consisting of about 30 agreements and separate commitments (called schedules) made by individual members in specific areas such as lower customs duty rates and services market-opening. Through these agreements, WTO members operate a non-discriminatory trading system that spells out their rights and their obligations. Each country receives guarantees that its exports will be treated fairly and consistently in other countries' markets. Each promises to do the same for

imports into its own market. The system also gives developing countries some flexibility in implementing their commitments.

Globalization and Environment

The first question is if globalisation has had its impact on the environment and how far the environmental concerns have should weigh over the policy of world trade liberalisation. Economic growth definitely is important. Trade surely contributes to investments and technological growth and eventually national richness. It also removes poverty and alleviates the condition of the masses. The nation then becomes capable of taking care of the environmental concerns too. Many argue therefore that poverty has impact on the environment and therefore to remove this defect in a nation the liberalisation of trade is most important. Initially the trade may be bad for water and air pollution as many would argue, but studies have shown that cross border trade may not have environmental effects and increase in pollution levels. Trade has some of its effects through the channel of accelerating economic growth, because trade contributes to growth analogously to investment, technological progress, and so on. Although growth is bad for air and water pollution at the initial stages of industrialization, later on it reduces pollution as countries become rich enough to pay to clean up their environments.¹² Some researchers have recommended border measures to control affects on environment which do not affect world trade.

Researchers have spoken about extreme form of environmental activist ideologies which mention that the clock should be turned back to the stage before industrialisation to reverse the affects of environmental degradation and man made pollution. They argue that hunter gatherer stage if still existed in a significant population it would save the environment.¹³

Committee on Trade and Environment

The committee on trade and environment was created in the 90's to understand the relationship between trade and environment and also to push for sustainable development. It was open to the whole of the membership of WTO and also had some members were given the observer status. The committee's mandate is broad, and it has contributed to identifying and

understanding the relationship between trade and the environment in order to promote sustainable development.¹⁴

Conflict between MFN and Domestic Environmental Laws

In spite of the fact that the General Agreement controls international trade, two non-discrimination requirements are at its centre. One, known as the *most favoured nation* and the other *national treatment* standards. Article I of GATT requires every member nation not to discriminate between like products from different trading members. That is to treat products from all other countries the equal to the way it treats goods from her most favoured trading partners. Article III requires each member to accept and treat goods from other countries no less favourably than it treats its domestic products.

Trade and the Environmental Jurisprudence

Domestically and in relation to domestic traders and businesses the Environmental Impact Assessment rules have been instrumental in judging the tradeoff between trade and environment. The rules of the Ministry of Environment categorize and assess the environment worthiness of the projects and disputes have been settled by the courts in several cases including *Abhilash Textiles v. Rajkot Municipal Corporation*¹⁵. In this case the main question was

Is there any right to carry on business or trade in unregulated manner and cause nuisance to the public and also become a health hazard to the society at large? If no, can the petitioners claim any right to be heard before they are asked to discontinue or prevent the nuisance?

The court observed this question and held that the fundamental right of trade is subject to reasonable restrictions under Article 19 itself. If a business activity becomes a health hazard to the entire society, there is no right on carry on such business. Though the courts reasoning was good but it was an anthropogenic approach to dealing with trade. Environmental laws were in that era repeatedly scrutinised by the Indian Judiciary not from the perspective of the environment itself but human beings as part of that environment. The court said

One cannot carry on the business in the manner by which the business activity becomes a health hazard to the entire society. The fundamental right to carry on trade or business is subject to reasonable restrictions and regulations that may be placed in the interest of the general public.

Till the beginning of the first decade of 21st century, the imports of hazardous substances from India were not banned if they were meant for recycling and a big quantity moved into India through this loophole. The international trade on hazardous waste was governed by the Basel Convention to which India was a party.¹⁶ Imports of such kind were virtually exempt from controls.¹⁷

Imports and Environmental Goals

The Foreign Trade Act¹⁸ regulates the imports into India. It says in Section 11 (1) that¹⁹ “No export or import shall be made by any person except in accordance with the provisions of this Act, the rules and orders made there under and the export and import policy for the time being in force.” Under 11 (2) it says “Where any person makes or abets or attempts to make any export or import in contravention of any provision of this Act or any rules or orders made thereunder or the export and import policy, he shall be liable to a penalty not exceeding one thousand rupees or five times the value of the goods in respect of which any contravention is made or attempted to be made, whichever is more.”²⁰

According to the provisions of this Act, the Government of India can make and announce Export and Import policy. It can also amend it from time to time. A policy like this is chiefly meant for India, as the exports and imports of goods has a crucial role to play in balancing budgetary goals, as well as in the economic development of the country. Foreign Trade Policy of India which is currently for the years from 2015 to 2020 is based on these provisions.

India-US Solar Cells Dispute

In the India US Solar Cells dispute²¹ the complainant United States maintained some concerns in relation to the domestic content requirements

of India the respondent, for the National Solar Mission. This requirement forced on solar power developers who are selling electricity to the Indian government, deal with solar cells and modules which are put to use during the generation on solar power.

The WTO Panel established that these DCR measures are trade-related investment measures related to words enclosed in paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement. The Panel found that this suffices to establish that they are inconsistent with both Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. In relation to the government procurement derogation mentioned in Article III 8(a) of the GATT 1994, the Panel had made a finding that the Domestic content requirement measures are not any different from the one established by the Appellate Body in *Canada - Renewable Energy / Feed-In Tariff Program*. Here is a reproduction of the text of the dispute.²²

Following the Appellate Body's interpretation of Article III:8(a) of the GATT 1994 in that case, the Panel found that the discrimination relating to solar cells and modules under the DCR measures is not covered by the government procurement derogation in Article III:8(a) of the GATT 1994. In particular, the Panel found that the electricity purchased by the government is not in a "competitive relationship" with the solar cells and modules subject to discrimination under the DCR measures.

India disagreed and said that the DCR measures are warranted due to general exception in Article XX(j), on the basis of a requirement of domestic manufacturing capacity building in solar cells and modules, and/or the risk of a disruption in imports, makes these "products in general or local short supply" within the meaning of that provision.²³

Environmental Impact Assessment and India

Impact assessment is the process of identifying the future consequences of a current or proposed action. It is used to ensure that projects, programmes and policies are economically viable, socially equitable and environmentally sustainable.²⁴ Indian measures in relation to imports for Environmental Protection can be assessed by the following:

- a. Imports into India and EIA
- b. Indian Exports and EIA of other GATT contracting parties

While imports in India are dealt with for a licensed importer, the erasable restrictions on the number and tariff barriers are definitely hampering the environment and the EIA does not cater to it. EIA is largely dealing with mining, tourism and energy sectors and the hazardous products which have an impact on the environment are dealt with by the HW Act, the water and air acts deal with water and air pollution. Projects are scrutinised under the other Acts when violations take place, whereas EIA is a pre screening process. All sectors should therefore come under the EIA when dealing with international trade.

Conclusion

For India, environmental intra generational equity has been the approach to be followed due to its basic nature of a continuous reconciliation between man and environment. Indian legislations are at par with most of the world legislations in relation to sustainable environmental goals. The Environment Impact Assessment mechanism which India follows under its rules is at par with Conventions like the Environmental Impact Assessment Convention of Europe. The importing countries have to take a permit from the regulator for any investments and imports affecting the environment. Policy in India is aimed at the promotion of trade as well as taking care of its environmental needs. The Hazardous Waste (Management and Handling) Rules, 2000 which were framed under the Environment Protection Act are catering to regulating imports which affect the ecology.

However there is no comprehensive assessment of the imports under the EIA and the environmental effects of those falling out of the scope of both the HWA and the EIA rules are a grey area. For example if India had a comprehensive legislation in relation to not just hazardous but also other trade related measures, then situations like the solar case can be avoided. The legislation in such case could have an in built mechanism to invoke the relevant provision of GATT to form an exception to free trade. The trade off between trade and environmental policies however have to be delicately balanced. The reasons why this is to be done are manifold. One can be the need of the hour to have a healthy competition for the consumers, and the other is to

protect the environmental need of the current and future generations. The EIA has rules only related to large scale projects in the oceans and forest areas largely, whereas hazardous wastes act is limited in scope in terms of penalties for example. Trade and Environment are interrelated.

The trade objectives of the world might clash with the domestic environmental policy objectives of India. But when it comes to construing the environmental conditions as exceptions to agreement like GATT then the panel of the WTO gives an upper hand to the legitimate policy objectives of trade. The loophole lies in having a comprehensive measure in relation to imports into the country which would clearly set a benchmark as to what would constitute an environment policy and what a trade policy. The quality of legislation therefore has to improve in order to have an automatic invocation of the provision when there is certain kind of imports. While on the one hand there needs to be a stronger legislation for environmental concerns for the reason that in a polity like India development cannot take a back seat, trade needs to be promoted and the trade conditions for foreign players have to be very easy so as to give its populace a clear growth by alleviating poverty and improving the quality of life. The provisions under other legislations like Water and Air Act are not sufficient mainly for the reason that they are not punitive in nature and civil penalties do not have a prohibitive scope.

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