



## ENVIRONMENTAL PROTECTION AND WTO: ISSUES AND IMPLICATIONS



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### ABSTRACT

**H**uman life is largely affected by deteriorating environmental conditions. The poor environmental conditions lead to poor health and reduced quality of life. This has been clearly articulated in some ancient Indian text like Vedas which indicates importance of love and respect for nature. The emergence of environmental issues with the development of society is a serious concern now-a-days. Environmental issues refers to areas of human activity that have potentially adverse and direct impact on public health or the environment like acid rains, global-warming and loss of wetlands. In present scenario, there is strong need to analyze the interrelationship that exists between WTO agreements and its effects on environmental issues. It is generally believed that trade development and environment protection are generally opposite to each other. Especially, it is a daunting task for developing countries to achieve industrial development and to protect the environment. If this can happen, only then the overall aim of achieving sustainable development can be achieved. So the present study aims to analyze some of the important provisions in the WTO for the protection of environment.

**KEYWORDS:** *Environmental issues, Multilateral Environment agreements, World Trade Organization (WTO), World Commission on Environment and Development (WCED)*

### INTRODUCTION

Environment as a term is very widely used and means different things to different people. It is used in management literature to refer to the external environment in which the organization functions. Ecologically, environment refers to the sum of all the external conditions and influences affecting life and development of organisms (Webstar, 1961). Two main aspects of the environment are biotic and abiotic (living and non living organisms). The environment of the human being includes abiotic factors-land, water, atmosphere, climate, sound, odour and taste; biotic factors-animals, plants, bacteria and viruses; and social factors like aesthetics. Environment refers to all the surroundings things, conditions and influences affecting the growth or development of living things (World Book Dictionary, 1989).

Human life is largely affected by deteriorating environmental conditions. The poor environmental conditions lead to poor health and reduced quality of life. This has been clearly articulated in some ancient Indian text like Vedas which indicates importance of love and respect for nature. In ancient times, there were self-restrictions to avoid different forms of pollution by religious and spiritual measures rather than legal measures. The emergence of environmental issues with the development of society is a serious concern now-a-days. Environmental issues refers to areas of human activity that have potentially adverse and direct impact on public health or the environment like acid rains, global-warming and loss of wetlands. (Krishnamoorthy, 2012)



A growing number of developing countries look to trade and investment as a central part of their strategies for development, and trade considerations are increasingly important in shaping economic policy in all countries, developed as well as developing. At the same time, however, most of the world's environmental indicators have been steadily deteriorating, and the global achievement of such important objectives as the Millennium Development Goals remains very much in doubt. These trends are not isolated; they are fundamentally related. Much environmental damage is due to the increased scale of global economic activity. International trade constitutes a growing portion of that growing scale, making it increasingly important as a driver of environmental change. As economic globalization proceeds and the global nature of many environmental problems becomes more evident, there is bound to be friction between the multilateral systems of law governing both. As the integration of trade and environment is inevitable in practice, a proper framework within the WTO mechanism itself is essential to strike a balance between the two. (<http://www.ecoinsee.org/fbconf/Sub%20Theme%20H/Bhargav%20Manasatta.pdf>)

## **REVIEW OF LITERATURE**

*Bown (2005)* in their research study analyzed that measures undertaken by WTO for the protection of environment should facilitate international trade and it should not interrupt the smooth flow of traded goods. WTO had to play a bigger and responsible role for safeguarding global environment by adjusting trade induced environmental changes with the domestic environmental policies. *Roy (1996)* in his research study analyzed the relationship between development and the environment at the global as well as the national level for sustainable development. The researcher laid emphasis on the fact that development-environment interaction should be included primarily in global policies that were generated by conventions and international agreements, and after that it should be included in national policies on agriculture, industry and trade, to transform the economy on the global pattern. *Neumayer (2004)* in his research paper argued that debate on the impact of the WTO on the environment should be taken in its positive sense for the development of the world. He further argued that contribution of WTO for promoting environmental protection is not significant so far and there should not be large expectations from WTO in future also. The advanced countries had failed in their contribution for the development of Green WTO and at the same time they failed miserably to convince the developing countries to understand that Greening WTO is not a hurdle in their

economic development. *Oxley (2001)* in his research study argued that WTO procedures did not prevent effective protection or management of any environmental assets through its procedures in any case. The campaign to 'Green the WTO' is basically a political campaign so that the environment in the system of multilateral trade rules can be included. Trade measures were least effective tools for managing the global environment. In contrast to this, common standards set by the multilateral agreements that are applied domestically are much more effective approach to protect the environment.

## **NEED OF THE STUDY**

In present scenario, there is strong need to analyze the interrelationship that exists between WTO agreements and its effects on environmental issues. It is generally believed that trade development and environment protection are generally opposite to each other. Especially, it is a daunting task for developing countries to achieve industrial development and to protect the environment. If this can happen, only then the overall aim of achieving sustainable development can be achieved. So the present study aims to analyze some of the important provisions in the WTO for the protection of environment.

## **ENVIRONMENT AND UNITED NATIONS**

The relationship between economic development and environmental degradation got attention in UN conference on the Human Environment held in Stockholm in 1972. The deliberations led to the formation of United Nations Environment Program (UNEP) which laid foundation for various programs to protect the environment. In that conference, a preamble and 26 principles was adopted. Among these, principles 17 and 25 are of special importance for the protection of environment. Principle 17 states that "appropriate national institutions were to be entrusted with the task to plan, manage and control the environmental resources of state with a view to enhance environmental quality". Principle 25, which also states to coordinate international cooperation's towards this goal. It states that "states were to ensure that international organizations played a coordinated, efficient and dynamic role for the protection and improvement of the environment". But little work was done in the coming years based on UNEP. It resulted into continuous deterioration of environment; and problems like ozone depletion, global warming and water pollution increases significantly.

In 1983, UN set up the World Commission on Environment and Development (WCED). In this commission it was felt that environmental degradation

has become a matter for survival for developing nations. This commission was led by Harlem Brundtland of Norway. Brundtland Report gave the concept of 'Sustainable Development' as an alternative to the approach based on economic growth. Sustainable development means "meeting the needs of the present without comprising the ability of future generations to meet their own needs". (Krishnamoorthy, 2012)

In 1987, after considering the Brundtland report, the UN General Assembly called for the UN Conference on Environment and Development (UNCED). The main objective of this conference was to understand the concept of 'development' that is going to support socio-economic development and prevent the continued deterioration of the environment.

After the twenty years of global environment conference, the UN sought to help governments to rethink the process of economic development and to find measures to reduce environmental deterioration. The UN adopted *Agenda 21*, which is framework for obtaining sustainable development. In addition to Agenda 21, the UN conference adopted RIO declaration on Environment and Development which is a collection of principles defining the rights and responsibility of states regarding environment issues. The UN conference also adopted "The statement of Forest Principles" which is a set of principles that emphasis the sustainable management of global forests. Two legally binding conventions were also opened for signature at the summit:

1. The United Nations Framework Convention on Climate Change
2. The Convention on Biological Diversity.

The governments of the various countries reached at the centre point that integration of efforts regarding the environment and development are required for a safer environment. The program highlighted the fulfillment of basic needs improved standards for all, better managed ecosystems and improved environment for all. For this various groups like trade unions, farmers, scientific community, local authorities, business class, industry, non-governmental organizations (NGOs), women, children young people etc. have to play a bigger and more responsible role in achieving sustainable development. The UN conference also negotiated an international legal agreement on desertification, preventing the depletion of certain fish stocks, program of action for the sustainable development of small island developing states, and effective implementation of Rio accords. (Krishnamoorthy, 2012)

## INDIA'S ENVIRONMENTAL CONCERNS

India showed its concerns for environmental problems when the then Prime Minister, Smt. Indira Gandhi made efforts to establish a National Committee on Environmental Planning and Coordination (NCEPC). It was followed by establishment of new legal frameworks and the creation of governmental bodies designed especially to protect the environment and prevent pollution. In the *42nd Amendment Act of 1976*, environmental protection and improvement were explicitly incorporated into the constitution. *Article 48A* was added to the Directive Principles of State Policy which states that "The state shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country. *Article 51A(g)* in a new chapter entitled "Fundamental Duties", imposes a similar responsibility on every citizen" to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures"....So collectively, these provisions highlighted the national consensus for the importance of environmental protection and improvement. The 42nd amendment also expanded the list of concurrent powers in the constitution. This amendment introduced a new entry "Population Control and Family Planning" while "Forests" and "Protection and Wild Animals and Birds" were moved from the state list to the concurrent list where the parliament can legislate new powers or environmental matters. *Article 253* empowers parliament to make laws implementing India's international obligations as well as any decision made at an internal conference, association or other body. Article 253 apparently gives parliament the power to enact laws on virtually any entry contained in the state list. Parliament used its power under Article 253 to enact Air (Prevention and Control of Pollution) Act of 1981, and the Environment (Protection) Act of 1986. Another significant Acts are wildlife (Protection) Act, 1972, wider (Prevention and Control of Pollution) Act of 1974, Indian Forest Act of 1927, Factories Act of 1948, Atomic Energy Act of 1962, the insecticides act of the 1968, Forest Conservation Act of 1980, The Air (Prevention and Control of Pollution) Act of 1981. (Krishnamoorthy, 2012)

## ROLE OF WTO IN ENVIRONMENT PROTECTION

With the formation of WTO (World Trade Organization) in 1995, the governments of various countries called for the establishment of WTO committee on trade and environment. The primary task assigned to the committee was to explore the link between trade and

environmental policies. However, the committees work was bound by the two parameters:

1. WTO competence for policy coordination is limited to trade
2. Problems of Policy coordination must be resolved in a way that upholds the principles of the multilateral trading system.

The committee presented report to the Ministerial Meeting in Singapore in December 1996. The committee focused on the impact on trade of so-called “eco-labeling” schemes and the relationship between Multilateral Environmental Agreements (MEAs) and WTO trade disputes. It was looked upon that insistence of higher environmental governance standards were in support of vested interests of developed countries. So it was a matter of great concern that there should be less adverse effects of international environmental standards on developing countries.

*Multilateral Environmental Agreements (MEAs)* are voluntary commitments among sovereign nations that seek to address the effects and consequences of global and regional environmental degradation. MEAs address environmental problems with transboundary effects, traditionally domestic environmental issues that raise extra jurisdictional concerns, and environmental risks to the global commons. International agreements to protect human health and the environment have used trade measures in varying forms since the 1870s.

Despite the early examples of employing trade provisions to advance the objectives of environmental agreements, the vast majority of MEAs currently in force and to which the United States is a signatory were negotiated in the last twenty-five years.<sup>1</sup>The dramatic growth of MEAs as an integral component of international relations is attributable to unprecedented environmental threats to our planet. There is a need to address cooperative multilateral solutions among sovereign nations to address global environmental threats. (<http://www.ecoinsee.org/fbconf/Sub%20Theme%20H/Bhargav%20Manasatta.pdf>)

The predecessor of WTO, GATT (General Agreement on Tariffs and Trade) was limited to trade in goods, whereas WTO also include trade in services like banking, issuance, transport, tourism, telecommunication as well as provision of labor. WTO also covers all aspects of trade-related intellectual property rights (copyrights, patents, trademarks etc). WTO's stature is in accordance with that of World Bank or IMF (International Monetary Fund). The WTO will help in resolving the “the free-rider” problem in the world trading system since membership is

only available to countries which were contracting parties to the GATT and they have agreed to follow the Uruguay Round Agreements and has submitted schedules of market access commitments for goods and services. Since WTO was established to liberalize international trade, the impact of free trade on environment has become an issue of debate. The Uruguay Round includes a number of agreements aimed at reducing or eliminating non-tariff barriers to trade. These include specific agreements on safeguards, anti-dumping and subsidies and countervailing measures, import-licensing procedures, technical barriers to trade and customs valuation. It also includes non-tariff barriers in the areas of investments, rules of origin and pre-shipment inspection. Countries imposed special duties (countervailing measures) to counter subsidized exports and other exports from subsidizing country. It establishes clearer rules in this area by defining which subsidies are legal and which are not. It also differentiates categories of subsidies and remedies.

The measures for the environment in the international trade are taken through multilateral trading framework. Though, there has been close relationship between trade and environment in the WTO forum but the question like whether a country can impose trade restrictions unilaterally on another country, is the biggest problem to tackle with. This issue has affected loyalty of the trade negotiations by WTO. Regarding the environment, earlier WTO has taken the position that important countries had the freedom to choose their own standards so that they are able to protect people of their own country. At the same time, they are also able to protect their own country's environment. However, they should be very careful to impose standards aimed at improving the environmental standards or practices of other countries especially the exporting countries. This would lead to “trade tyranny” and this can be easily used by the developed countries for projection of their own industries.

Developed countries often used ‘trade’ to influence poorer or developing countries. Due to this, developing countries see the concerns of environment as against them. The developing countries want to have trade with developed countries but they think that the environment concerns are not going to help them. In fact, it is going to put them at least advantageous position in free trade. The products of developing countries are not purchased by developed countries on the issues of health and safety of their people and country. The developed countries view the goods from developing countries as of low quality standards which can be injurious to the health of their people. This type of attitude makes the developing

countries to lose competitive advantage. This situation has been highlighted in the trade and development report of United Nations Conference on Trade and Development (UNCTD). This report stated that developing countries had to work hard to get the gains of free international trade. And often, this can lead them to bear considerable costs if they want to integrate them with world economy. The environmentalists from the developed countries observe that the WTO decisions are the greatest threats to environment. In 1999, Director General Renato Ruggiero, at the WTO ministerial meeting held in Geneva, called for "renewal politics impetus for the committee on the trade and Environment (CTE). He emphasized that there should be more productive interactions among the trade and environmental groups. The then US president, Bill Clinton called for high level meeting of trade and environmental efforts. The British Prime Minister said that the environmental protection has been the major challenge of world trade. The former South African president, Nelson Mandela said that the matters regarding labor standards, social issues and the environmental should be discussed carefully before making any judgments. But at the same time, the developing countries feel that there is nothing to gain except further burden on them. Then those critical matters should be carefully analyzed. The issues like food safety and environmental protection have become sensitive reasons on which these two groups cannot agree regarding trade. This has emerged as new laid of trade disputes besides conventional issues like import tariffs or quotas. These trade disputes are about domestic regulations but they have international effects.

Article I of GATT, MFN (Most Favored Nation) clause states that members should grant to the products of all the countries same treatment which they are giving to the favorable nations. In other words, there should be no differentiation of treatment to the goods of any country whether they are coming from favored nations or other countries. Another clause of similar nature is 'National Treatment' clause of Article III of GATT, which states that any goods which enter a market should be treated as favorably as the domestically produced goods.

## **ENVIRONMENTAL CONCERNS AND WTO**

The concerns about the environmental were sparked by actual setbacks to environmental protection imposed by the GATT/WTO, and by other free trade agreements such as NAFTA. National laws to protect the environment are now being challenged under WTO by other countries as being non-tariff trade barriers. As a result, countries that have signed the WTO agreement

have voluntarily stuck down the national laws. The environmental groups are seeing a secondary trend under the rubric of free trade that involves neutralizing the many national environmental laws and multinational environmental agreements (MEA's). Canada has been one of the leading advocates in asking other nations to rethink their environmental laws under WTO and expressing concern about the negative trade impacts of multi-lateral environmental agreements such as the Kyoto Climate Change Protocol. Canada's Department of Foreign Affairs and International Trade (DFAIT) has seen a number of important environmental laws implemented by other countries as non-tariff trade barriers aimed at restricting the sales of Canada's natural resources. Issues that concern DFAIT are for instance:

1. England and France's decision restricting the use of asbestos in construction; DFAIT is challenging this decision since Canada is a major exporter of asbestos.
2. Europe has decided to restrict consumption of seal pelts and restrict the purchases of furs from animals trapped in inhumane ways.
3. Canada wants to continue and expand the sales of sealskins and wild animal furs trapped in the north.
4. European countries' decisions to restrict purchases of lumber and paper products that are clear-cut or come from old growth forests.

DFAIT is challenging these environmental decisions under WTO, which try to force the countries to buy Canada's wood and paper clear cut from Canada's last stands of old growth forests. The purchasing with Canada's provinces reducing their own environmental protection budgets by more than 40 per cent and making decisions to get environment out of the way of economic progress, Canada may become a nation that must meet environmental requirements imposed by other nations' environmentally friendly purchasing decisions or by Multilateral Environmental Agreements (MEAs).

### **1. Venezuela Wins Trade Challenges to Sell Dirty Gasoline in the United State**

Venezuela launched a challenge under GATT against a decision by the US Environmental Protection Agency (EPA), under the US Clean Air Act, to reduce emissions from reformulated gasoline. Venezuela successfully challenged the amendment to the US Clean Air Act that required foreign gasoline refiners to make the same improvements to gas quality as the average US refinery. The Venezuelan government faced the challenge, but the

real pressure to challenge the regulation came from the subsidiaries of the same multinational oil and gas companies that had failed to keep the US EPA from passing tougher environmental laws in Washington, DC. Now foreign importers like Venezuela and Canada can choose to export to the US gasoline that is dirtier than refineries in the US were required to make, resulting in imported gasoline damaging air quality and human health in major US cities.

While California had been a world leader in legislating cleaner auto emissions, Japan is considering revolutionary legislation that would substantially reduce the amount of pollutants that cars can emit in Japan. The legislation would virtually require most people to drive small cars with small engines and more mileage. None of the mid to large size cars manufactured in the US and Canada could meet the proposed new stringent requirements. The US government has told Japan this could violate WTO rules because the requirements would fall mainly on medium sized cars, which is the class of the cars US exports to Japan. While the new Japanese legislation may be interpreted as a non-tariff trade barrier, it was also a potential new leader for other countries to follow its lead in actually cleaning up urban air pollution.

## **2. GATT/WTO Decision Stopped Dolphin Protection**

The United States, under its Marine Mammal Protection Act, attempted to stop the practice of tuna fishermen following pods of dolphin that were chasing tuna and scooping up both tuna and dolphins in their nets. The dead and dying dolphins were thrown out and the tuna harvest sent to market. The US stopped its own tuna fleets from harvesting tuna in this manner. But the Mexico tuna fleets challenged at the GATT/WTO the decision by the US not to import tuna that was caught using the environmentally harmful method. Surprisingly, Mexico won the challenge and the US was forced to allow import of tuna into the United States, which were caught by the old method. Environmental groups cooperated with grocers in the US and started labelling cans of tuna as “dolphin safe” for those tuna that were caught without harming dolphins. But that labelling may also be subjected to a WTO challenge as an impediment to free trade. It is possible that US laws such as these will no longer be implemented and eco-labelling may not be applicable at all under WTO. That is why the environmental groups are calling for “safe trade” measures that include rules for environmental protection.

## **3. Why Are All the Protestors Wearing Turtle Shells?**

The protestors are concerned about a recent WTO decision against the US in its decision not to purchase shrimp from regions that are destroying turtle habitat and incidentally capturing endangered species of turtles in their shrimp nets. The WTO decision will require the US to voluntarily continue to purchase shrimp from process and production methods (PPMs) that are resulting in the decimation of endangered turtle species.

The Sierra Club, National Audubon Society and others wrote that “United State Administration must also reject as a solution to the dispute (proposed by the WTO) the use of “shipment-by-shipment certifications” of shrimp caught with turtle excluder devices. Due to the nature of the industry, the certification of individual shrimp shipments cannot be verified, and will not adequately protect sea turtles. Such a solution will also not immunize US law from future WTO challenges. Put simply, a shipment-by-shipment solution to this decision is both substantively and politically unworkable.” The major US environmental groups continued in their letter to President Clinton, “the WTO Shrimp/Turtle case is a critical opportunity for the Administration to reestablish its former leadership role in trade and environment by confronting this damaging WTO panel decision. The decision renders meaningless the environmental exceptions in Article XX and contorts the language of the WTO’s own charter in order to maintain a uniform ban on policies targeted at preventing environmental damage-from the way a product is produced (process and production methods). It also fails to respect an international consensus, reflected in legitimate multilateral environmental agreements, concerning the importance of protecting endangered species.”

## **4. WTO Strikes Down Effort by Europe to Keep Hormones Out of Beef**

Canada and the United States use hormones and other chemicals in cattle to enhance their growth, milk and meat production. New health studies show that the hormones are suspected of increasing cancer cases and other diseases in the populations that consume huge amounts of milk, milk products and meat. European countries have taken the lead in trying to get hormones out of beef and milk. However, Europe lost a challenge at the WTO in their attempts to ban the import of beef from Canada and the United States loaded with artificial hormones. The action by Europe was interpreted as an attempt to protect its beef industry by establishing a non-tariff trade barrier using environmental and health concerns to better their economic sales of meat.

## 5. Genetically Modified Foods Ban Challenged Under WTO

Canada and the United States plan to use the WTO to challenge Europe's decision not to continue food items that contain genetically modified organisms (GMO's). Europe is concerned that GMO food production and consumption can harm the environment and health. Canada and the United States want to challenge Europe's plan not to produce or import GMO food such as soya bean and potatoes. A draft Seattle WTO Ministerial Declaration contains a proposal by the US and Canada that the WTO establish a working party on biotechnology to look at the "adequacy and effectiveness" of existing rules on GMOs.

## 6. Eco-labelling and Green Procurement Threatened by WTO

Eco-labels provide consumers with information that a product was made with minimal impacts on the environment. Some governments have argued that eco-label programs may violate WTO rules on product standards. Canada has an excellent program called the 'Environmental Choice Program (ECP)' that provides the 'three doves entwined' eco-label to products that meet environmental guidelines. The program was started by Environment Canada and has been privatized and is run by Terra choice.

There are other ecological label programs including Blue Angel in Germany, Dutch Eco-label in the Netherlands, and Green Seal in the United States. The Green Seal program is the independent, nonprofit organization dedicated to protecting the environment by promoting the manufacture and sale of environmentally responsible consumer products. It sets environmental standards and awards a 'Green Seal of Approval' to products which are less harmful to the environment than other similar products. By setting standards for environmentally responsible products, Green Seal seeks to (i) reduce air and water pollution; (ii) cut the waste of energy and natural resources; (iii) slow ozone depletion and the risk of global warming; (iv) prevent toxic contamination; and (v) protect fish and wildlife and their habitats.

How to achieve the necessary coordination in the light of the fact that it is not a matter of negotiating a single and separate new undertaking? Should there be an enhanced role of NGOs, independently from national or EC shaping of negotiating positions? How to represent the interests of the global commons?

The following two examples are of paramount importance to the handling of environmental concerns in WTO law.

## 1. The scope of national treatment

The interpretation of like products in Article III, GATT amounts to what perhaps is the most important issue defining the scope of environmental policies within GATT. It is submitted that the ruling, narrow doctrine and purely textual interpretation of like products in Article III paragraph 2, GATT, essentially relying upon physical characteristics and consumer preferences<sup>5</sup>, strongly limits the scope of governments to use product differentiation for environmental protection purposes. It should be reexamined in the light of the emerging constitutional function of the WTO. In effect, assessment and product differentiation by national governments made for regulatory purposes are today fully supplemented by a *de novo* assessment of panels on the basis of the mentioned criteria, whether or not the product differentiation in case has projectionist and welfare reducing effects.

## 2. Environmental exceptions

The interpretation of Article XX (g), GATT is yet another key area defining the scope of environmental policies of governments. Unlike the interpretation of like products, case law has moved towards a broader interpretation of the provision. While formerly measures inconsistent with national treatment themselves had to be primarily aiming at conservation of natural resources, it is now accepted in result that the policies, of which these measures are part, need to meet this requirement. This is a good example of constitutional interpretation in light of interfacing trade and other policies within the existing text of the GATT and WTO rules. A fundamental aspect of a GEO, and one implicitly evident throughout this commentary, is scientific information. Different types of environmental stress have varying 'thresholds' when such stress can no longer be assimilated by ecosystems, or the magnitude of environmental degradation greatly increases when a critical threshold is reached. Environmental agreements would require built-in flexibility to respond to new scientific information as it became available. Agreements would need to be dynamic, rather than static. A GEO has to develop a credible and sound scientific footing on such issues as fisheries, climate change and forestry. This would be of great use to less economically wealthy countries, as few countries have the resources to develop the technical and scientific expertise on every global environmental issue. A GEO structured in this manner would help ensure that countries would be working from the same data set. A multilateral agency providing such data could reduce the likelihood that those countries would resort to their own

potentially skewed studies to develop positions. It would also be politically more difficult for a country to allege that the GEO data are intentionally biased in another country's favor. Moreover, objective scientific research conducted or scrutinized by a GEO and that served to underpin multilateral agreements would work against domestic pressure or temptation to use environmental concerns as protectionist tools. (Krishnamoorthy, 2012)

### **The Implications of Continued Confusion in the Relationship between Trade Measures of MEAs and the GATT/WTO Regime:-**

Clarification of the relationship between the MEAs and the GATT/WTO regime will

#### **1. Reduce International Trade Friction:-**

Immediate clarification promotes many of the major goals of U.S. corporations, investors, consumers, environmentalists, and the objectives of the GATT/ WTO regime. Further elucidation as to the status of the trade measures contained in MEAs will enhance the principles of nondiscrimination, national treatment and fair market access. It improves transparency in rule making, assists dispute resolution and, promotes rule-based disciplines to enforce non-participation in the obligations of the MEAs and/or the GATT/WTO regime.

#### **2. Improve Global Environmental Protection and Cooperation:-**

Trade measures in the MEAs are integral components of the agreements and are critical to the overall success of the MEAs. The use of trade measures provides for the most effective and efficient means of achieving the environmental objective on a global scale while supporting the aims of the multilateral trading system. The current experience with such MEAs as CITES, the Basel Convention, and the Montreal Protocol substantiate these claims.<sup>48</sup> For example, the measures embodied in the Montreal Protocol have been effective in achieving the goals of broad participation in the agreement. In general, multilateral solutions discourage the development of alternative unilateral measures.

#### **3. Provide Much Needed Clarity of Policy and Certainty of Implementation in the Business and Environmental Communities:-**

In order to achieve their respective goals, the business and environmental communities require a consistent and well-established set of rules. The potential for disruption of previously formed expectations may produce competitive disadvantages if legitimate rules agreed to and implemented are subsequently thrown out. The current uncertainty surrounding the trade measures

in the MEAs creates confusion and frustrates essential future planning.

#### **4. Minimize Distortions and Discrimination of Goods in Open Markets:-**

MEAs promote the same environmental standards for imports and exports throughout the global economy.

#### **5. Stabilize the New WTO Regime:-**

Clarification on these issues will signal an important early victory for the WTO and avoid hobbling the organization with unnecessary trade tension in its formative years. Resolution of the MEA-GATT/WTO regime relationship may also further defuse North-South Friction in the trade policy area in general.

#### **6. Provide Certainty and Predictability in Further:-**

Negotiations of MEAs A consistent understanding of the relationship between the GATT/ WTO regime and the MEAs will provide important guidance to negotiators of current and future MEAs.

### **ALTERNATIVE APPROACHES IN RESOLVING THE CONFLICT**

#### **1. Criteria Approach and Article XX:-**

This approach to clarifying the relationship between the MEAs and the GATT/ WTO regime involves the development of specific criteria or list of attributes to determine whether the trade measures of the MEAs satisfy the objectives of the Article XX exceptions. The trade measures of MEAs that meet the flexible list of criteria (no single criterion would be determinative) would qualify per se for an Article XX exception to the other GATT/WTO obligations as long as the national measure chosen by the party state to the MEA also did not conflict with the Article XX Preamble. For example, in the context of Article XX(b) and XX(g), relevant trade measures in MEAs that satisfy the criteria and the Article XX Preamble would be deemed consistent with the GATT exceptions because they are "necessary" and "primarily aimed at conservation."

#### **2. The Waiver Approach:-**

Many trade and environment fora, including meetings of the GATT/WTO regime members, have discussed the potential adoption of a waiver as a means to clarify the relationship of the MEA trade provisions with the obligations of the GATT/WTO regime. As generally envisioned, a waiver would be granted by the GATT/WTO members to allow derogations from members' obligations for actions taken pursuant to the MEAs. A waiver may be specifically directed at a select group of named agreements



or it could encompass all MEAs that use trade measures to accomplish their environmental objective. In order to secure a waiver regarding the MEAs, a member will have to demonstrate “exceptional circumstances” and generally obtain three-fourths of the members support for such action.

Requests for a waiver are to be submitted to the Ministerial Conference and the request is to be decided upon by consensus within ninety days. If the request is not considered within ninety days, three-fourths of the members’ support will be required. Waivers must state the terms and conditions governing their application and the specific date of termination. All waivers, regardless of length of time, are to be reviewed annually by the Ministerial Conference.

In addition to cumbersome procedural hurdles, the adoption of a waiver presents several other potential impediments to its ultimate effectiveness. A waiver will be viewed by those non-parties that have been resisting membership in the MEA as a *de facto* acceptance of the MEA. If the waiver applies only to specifically named MEAs, there are no assurances that future MEAs will be eligible for the waiver’s protection. Criteria involved in weighing the appropriateness of a waiver may vary from case to case. This uncertainty creates an atmosphere of unpredictability that may produce more problems than it resolves. On the other hand, a successful waiver does establish a positive precedent in the GATT/WTO regime of cooperation between the trade and environment disciplines. It also has the potential to ease current North/South tension exacerbated by mutual distrust in the trade and environment policy relationship. Finally, it does provide immediate effective clarification of the MEA-WTO relationship and places it in a context of limited duration (i.e. through the annual review of the waiver). However, the annual review process may also create uncertainty about the durability of the agreement and the legitimacy of the trade measures used that may work against the desirability for certainty which both business and environmental interests seek.

### **3.The Status Quo Option:-**

In addition to the criteria and waiver approaches to clarifying the relationship between the MEAs and the GATT/WTO regime, the possibility of taking no action should also be explored. In essence, the status quo option can be reduced to a continued reliance on GATT/WTO dispute settlement panel decisions. In the dispute settlement procedures of the WTO, a complaint by one member challenging the actions taken by another member in compliance with a MEAs. The burden is on the member

being challenged to rebut the complaint that its actions infringe on the complainant state’s obligations to the GATT/ WTO regime and have an adverse impact on other members. Within sixty days of a panel report being issued, the report will be considered prima facie to constitute a case of nullification or impairment adopted by the Dispute Settlement Body (DSB) unless there is an appeal or the DSB refuses to adopt the report by consensus.

In the rare instance that a panel report is not adopted under the new WTO regime, the report is not likely to have any binding legal status on the members and probably serves only as an advisory opinion of important GATT/WTO regime experts. In the more probable event of the panel report being adopted by the members, it is generally recognized that the panel’s decision settles the dispute between the members and is binding exclusively on the parties involved in the dispute. The panel decisions do not have stare decisis effect and thus, no future panel is bound to the precedent of the previous panel’s ruling as to the subject of the dispute. In practice, however, GATT/WTO regime panels frequently rely on a previous panel’s reasoning in the interpretation of the GATT/ WTO regime’s obligations and often refers to earlier panels in their opinions. Nevertheless, a later panel is under no obligation to follow a previous panel’s reasoning as to a particular dispute or even the same dispute involving the same parties.

In current practice, a panel could be called upon to assess whether a particular member’s action in compliance with a MEA was a violation of its MFN, national treatment, quantitative restriction prohibition, or other GATT/WTO obligations. A panel may also offer its interpretation of the applicability of the Article XX exceptions to the trade measures in MEAs. In particular, a panel report could clarify the “arbitrary and unjustified discrimination” standard in the preamble to Article XX and the “necessary” and “primarily aimed at conservation” standards of Article XX (b) and (g). In addition, a panel could explain the extraterritorial applicability of Article XX.

Despite the potential for increased clarity on these issues a panel report offers, the current confusion on the relationship between MEAs and the GATT/WTO regime is strong evidence that this practice will not be satisfactory in the long term. Previous panel decisions have arguably contributed significantly to the inconsistent interpretations of GATT/WTO regime obligations *vis a vis* actions taken in the name of the environment. The result is a lack of a coherent and predictable policy from which to base actions taken with the trade measures in the MEAs.

The recent facilitation of panel report adoption procedures will approve and implement decisions more quickly but it may also expedite the adoption of fundamentally flawed panel reports. An increased reliance on the dispute settlement system will ensure uncertain interpretations of GATT/WTO regime obligations and may exacerbate future trade disputes (Caldwell, 1998).

## **CONCLUSION**

The present study suggests that many provisions in the WTO are ambiguous and it has given birth to various disputes for the issues related to environment. The various negotiations which have taken place over the time have focused primarily on the clarifying the relation between WTO agreements and MEAs but the countries which are not the member of MEAs are not covered in this aspect. Though the waivers are granted under Article IX:3 of Marrakesh agreement and Article XX of GATT provisions, the major problems that are highlighted in the present study are concerned with the negotiations that should take place with regard to WTO rules. The developing and least developed countries should be consulted while negotiating. WTO has to play bigger and responsible role in the protection of the environment by negotiating and keeping the interest of developing and least developed countries into consideration. The non-tariff barriers like domestic regulations, mandatory and non-mandatory labeling schemes for biodiversity products or potentially polluting products, import bans and environmental taxes etc. can affect the trade and expectations of WTO member states. These can also violate essential principals and provisions of WTO agreements. A proper review of trade disputes is needed to check the compatibility of measures related to environment and human health. Member countries should use (or abuse) WTO-legal antidumping and countervailing duties and safe-guard measures while trading. The WTO should not indulge in discretionary administered protection by permitting certain members to allow trade restrictions on the issues of alleged eco-dumping. Presently, the gains by developing countries are relatively very less than the developed countries. This has

put the developing countries to a trade-loser's position from free international trade. So, we can say that the environmental concerns are becoming the bone of contention among the developed and developing countries. This has been proved to be the greatest problematic areas in achieving WTO objectives.

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