

Reforms to the International Trade Regime for the Protection of Marine Living Resources

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Abstract- The World Trade Organization (WTO) was established, as the successor to the General Agreement on Tariffs and Trade (GATT), through Marrakesh Agreement giving birth to new arenas of international trade. Though the main objective of the WTO is to promote free and fair trade among the member states, the draftsman of the agreement has clearly identified the need of addressing the interdisciplinary perspectives of trade. There are number of agreements and provisions under the WTO umbrella, which focuses on these interdisciplinary issues including marine environmental concerns of international trade. Agreement on Technical Barriers to Trade, Agreement on Sanitary and Phiosanotary Measures and GATT provide explicit provisions to address trade related ecological issues. However, the world had witnessed a number of trade related marine eco system degradations where the Dispute Settlement Panels have used their discretionary powers in a trade favoured manner. This study is a literature based research that focuses on assessing the existing international trade regime in light of balancing global trade and marine environmental interests. The foremost output of the study is that free trade or open economy is not always in conflict with the protection of natural resources provided if necessary regulations are in place. The focal point is that the provisions under the current regime are not efficiently and effectively implemented in order to ensure the proper balance between the two disciplines. In conclusion, the WTO needs to ensure that they promote not only fair and free trade but also a green trading system and for that purpose, the WTO should encourage the member states and Dispute Settlement Panels to promote world trade while keeping an eye on the international environmental standards.

Keywords: Marine living resources, International trade law, Trade related environmental disputes, Sustainable trade goals

Introduction

The Dark era of the world history was the period of World War II which led to a halting of global commercial activities. The tariffs imposed by the developed countries were much higher during this time period. After World War II twenty three countries led by United States (US), United Kingdom and Canada started negotiation to create a multilateral agreement as a contributor for regulating world trade between state parties. The General Agreement on Tariffs and Trade (GATT) 1947 was the first multilateral agreement regulating international trade after World War II. GATT was established purely on economic interests, following the objective of promoting free and fair trade. Since 1947-1994 the primary objective of the GATT was to expand market access and eliminate tariffs and other barriers for liberalizing international trade.

However on the 1st of January 1995, The World Trade Organization (WTO) was established through Marrakesh Agreement giving birth to new arenas of international trade. Here the attention was drawn not only to the trade in goods, but also to trade in services, intellectual property rights and lot more. In the preamble to the Marrakesh Agreement (1995, p.09), it states '*..... Allowing for the optimal use of the world's resources in accordance with the sustainable development.....*'. This statement clearly indicates that the draftsman of the agreement has clearly identified the need of addressing the trade related environmental concerns and the need of fair exploitation of resources while establishing the inter-generational equity. Singer (1993, Ch.10) states '*If someone tries to justify any environmental damage, they have to take in to account not only the value of environment to the immediate future but also the generations to come in remote future*', which means the great power that WTO has, is coupled with a great responsibility to pay attention to prosperity of future generations as well as the present generation.

However, the world had witnessed a number of cases where trade related marine environmental issues were questioned and the Dispute Settlement Panels have interpreted the provisions of the WTO agreements using their discretionary powers in a trade favoured manner. As mentioned above, the sustainable development, protection and preservation of environment are some of the fundamental goals of the WTO. In the recent years, the trade related environmental issues were intensively discussed among WTO members, trade policy makers and academics. Steinberg (1997, p.231) states that '*the net result of WTO rules will maintain of, but little improvement in the level of global environment protection*'. That is to say even if the existing WTO regulations are implemented in proper place, it will only help maintaining the current environment standards. If the standard needs improvement, then the regulations will have to be reformed according to the expectations of preserving environmental natural resources.

Steve Charnovitz (1999) observes that in the nonexistence of proper environmental regulation and resource management including marine resources, increased trade might cause so much unpleasant harm that the gains from trade would be less than the ecological costs. Therefore this paper tries to identify whether there are any deficiencies in the scope of protection provided to the marine environment under the current regime and drawbacks of the implementation process.

Methodology

This study is conducted solely based on a literature review on the above mentioned topic. The reference is made to a huge collection of secondary sources such as multilateral trade agreements, published text books, local and foreign journal articles, international judgments with regard to the

research issue and electronic based resources. Special reference is made to the adapted and unadapted panel reports of WTO Dispute Settlement Panels and Appellate Bodies decided on trade related marine living resources destruction. The research is done on the following line.

- Historical Background of WTO
- Existing legal framework for the reduction of trade related marine environmental destruction
- Case study on international trade related marine eco system degradation disputes
- Analysis of the existing legal and institutional framework for the effect of sustainable use of non-renewable marine resources

Results and Discussion

WTO does not cater a single agreement which explicitly accommodate trade related environmental measures; rather provisions involving ecological preservation including marine living resources are dealt in a variety of agreements namely, GATT, General Agreement on Trade in Services, Agreement on Sanitary and Phytosanitary Measures and Agreement on Technical Barriers to Trade. Though GATT was established with the primary objective of general elimination of quantitative restrictions to international trade, the GATT itself provides ten general exceptions to the provisions of the agreement, two out of which are environment related exceptions;

- Measures related to protecting human, animal and plant life (Article XX (b))
- Measures related to conservation of exhaustible natural resources (Article XX(g))

However this article refers to two main requirements, namely, measures should come under one of the ten exceptions provided and it should fulfil the requirements of "*chepaeu*". "*Chepaeu*" requires that the measure should not be applied in a manner that constitutes 'arbitrary or unjustifiable discrimination between countries where the same condition prevail' and it should not be 'a disguised restriction on international trade'. Article XIV of the General Agreement on Trade in Services (GATS) also includes exceptions similar to the above provision, one of which is same as Article XX(b) of GATT.

Agreement on Sanitary and Phytosanitary Measures (SPS) deals with the basic policy related to the food safety, animal and plant health and protectionism. These include sanitary and phytosanitary actions taken to protect the health of fish and wild fauna, as well as of forests and wild flora. SPS allows member countries to set their own standards with regard to its coverage. Restrictions can be imposed to the extent necessary to protect human, animal or plant life or health, provided they do not arbitrarily or unjustifiably distinguish between countries where identical or similar conditions prevail. Agreement on Technical Barriers to Trade (TBT) deals with product standard issues. The eco friendliness of the production process also can be taken as a consideration that comes under the purview of the TBT.

Though the provisions relating to the safeguard of environment had been introduced by WTO umbrella, they had failed to provide due consideration to those recommendations in the practical implementation. In most of the time, the Dispute Settlement Panel decides the matters solely based on elimination of trade barriers. The panel in ***United States – Prohibition of imports of tuna and tuna products from Canada (US- Tuna and Tuna Products from Canada, 1982)*** had failed to

appreciate the measures taken by United States (US) for the conservation of exhaustible marine natural resources.

Later in ***United States- Restriction on imports of tuna (US- Tuna/ Dolphin I, 1991)*** the US imposed certain import limitations on tuna and tuna related products which were harvested in a manner harmful to the dolphins in high sea, resulting in a massive number of dolphin deaths. As a result of this restraint, US banned the tuna and tuna products imported from Mexico. Then Mexico initiated the dispute settlement proceedings, demanding the US ban to be an unfair and arbitrary restriction on international trade. US supported their argument based on the exceptions in Article XX based on the need to protect the dolphins since it has become an exhaustible marine natural resource. The panel objected to the concern about the extra territorial marine environmental concerns, establishing that GATT is a trade oriented structure.

Again in 1998, after the establishment of the WTO umbrella, a case concerning trade and marine eco system was brought before the dispute settlement mechanism. ***United States- Import Prohibition of Certain Shrimp and Shrimp Products (United States- Import Prohibition of Certain Shrimp and Shrimp Products, 1998)*** was a dispute with regard to the enforcement of exceptions provided in GATT Article XX. A list of five endangered sea turtles had been recognized under the US Endangered Species Act of 1973. Under the provisions of the Act, US made it compulsory for the fishermen to use a Turtle Excluder Device (TED), when the fishing is done in high sea where there is a probability of encountering the sea turtles in danger of extinction. US provided technological and financial assistance to the Caribbean countries for the adaptation of turtle excluder devices, which was not given to the Asian countries. India, Malaysia, Pakistan together with Thailand brought an action challenging the ban imposed by the US on the importation of shrimp and shrimp products which were harvested in a manner harmful to the recognized sea turtles. Again the US attempt to protect the endangered sea turtles was unsuccessful before the dispute settlement panel and Appellate Body, since they failed to satisfy the requirement of Chapeau.

It is evident although there are sufficient provisions included in the WTO regime to protect the marine living resources; implementation process has become a barrier to the achievement of the sustainable development goal. In absence of proper enforcement mechanism to pursue the WTO's marine environmental obligations, the need for an appropriately balanced institutional and policy framework has moved toward the agenda.

Conclusion and Recommendations

The Green Economy Concept has become a global trend among many countries in the world, multinational companies and non-governmental organizations. Free trade or open economy is not always in conflict with the environment provided if necessary regulations are in place. The matter that the world has to face today is not whether WTO lacks adequate provisions to protect the environment, but rather the main focus has to be drawn to the point that the provisions under the current regime is not efficiently and effectively implemented. Reforming the current implementation process to recognize eco-friendly products, production processes and trading practices would create mutual benefit to both trade and marine environment.

Further the provisions do not specifically define the nature and scope of what exhaustible natural resources are, and what measures can be categorised as legitimate barriers to free trade. Therefore it is apparent that the term 'exhaustible natural resources' in Article XX(g) creates some kind of uncertainty. Since the agreement does not provide specific interpretation for such words, WTO

Dispute Settlement Panel will have to interpret these provisions in conflicting situations, where they use their discretion in interpreting these terms in a trade favoured manner. Therefore it is necessary to bring reforms to define these phrases in order to establish the balance between trade and environment including marine living resources.

On the other hand implementation of legitimate environmental safeguards had been allowed only with regard to properties of the product while eco friendliness of the production process has been kept unaddressed. Trade and consumption of eco friendly production process should be encouraged for the purpose of achieving the sustainable goals of the WTO.

In addition, the accountability and transparency of the rulings and opinions of the dispute settlement panels have always been criticised by Academics and Non-Governmental Organizations. Therefore introducing institutional reforms to the dispute settlement mechanism for the balancing of trade related multi-disciplinary matters is a timely requirement. The failure to acknowledge the trans-boundary effects of trade related environmental matters has created a huge global discussion on the drawback of WTO's side. Ultimately it is evident that WTO had failed to achieve its fundamental goal of sustainable development.

A better implementation mechanism is a timely requirement for the WTO to protect the marine environmental standards of the world. Rather than having a separate World Environmental Organization to deal with the matters of this nature, WTO has the ability to preserve the balance between trade and environment for the benefit of both current and future generations. Allowing legitimate trade related environment protection measures on countries based on their capacities would be justifiable towards all. Therefore WTO needs to outlook the concept of international trade in a broader sense and ensures that they promote not only fair and free trade but also protect the natural resources for the benefit of the generations yet unborn.

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