

Reconciliation of WTO and MEAs: Bridging the Gap between Trade Liberalization and Environmental Protection

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Abstract

International trade liberalization and environmental protection are inseparably linked and mutually supportive of the objective of economic progress and sustainable development. Since the international policies regarding trade and environment have emerged in isolation, it is difficult to ascertain their actual relationship. Many environmentalists tend to think that trade liberalization is antithetical to environmental preservation, while the trade advocates view environmental safeguard as trade restrictive. This has led to a highly polarized debate on the trade-environment nexus, in which one side argues that trade liberalization results in pollutions, resource depletion and unsustainable environmental practices, while other encounters by maintaining that trade-induced economic growth allows the creation of the resources and means necessary for environmental management. Aside from the broad debate as to whether economic growth and trade negatively affect the environment, there are linkages between existing rules of the World Trade Organization (WTO) and rules established in various Multilateral Environmental Agreements (MEAs). This article examines the nexus of the two objectives of environmental protection and trade liberalization and revolves around the inter-relationship between multilateral environmental agreements and the multilateral trading system and is going to recommend to initiate an integrationist approach through reconciliation between the WTO and Multilateral Environmental Agreements rather than a separatist approach.

Key words: WTO, MEAs, Reconciliation, Trade Liberalization, Environmental Protection

Introduction

Environmental Protection is a pre-requisite for the attainment of sustainable development and human advancement.¹ Though the issues of environment

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are not ignored by the policies of WTO, it is difficult to establish a relationship between Trade Related Environmental Measures (TPRM) in Multilateral Environmental Agreements (MEAs) and World Trade Organization (WTO) rules.² The member states, after the establishment of WTO, have indulged in debates to change the rules of the multilateral trading system regarding environmental protection.³ Ministers in Doha Ministerial Conference, for the first time, agreed to initiate negotiations for setting down the relationship between existing WTO rules on environmental protection and specific trade obligations set out in Multilateral Environmental Agreements (MEAs) that may affect trade liberalization.⁴ Since environment and economic policies have now moved to the centre of the economic debates of the time, trade ministers took part in COP 13 to United Nations Framework Convention on Climate Change held in Bali in December 2007 to reinforce the policies linked to trade and environment.⁵ They agreed that the objectives of current and future human welfare are shared by both the global trade and environment regimes.⁶ In addition, both environment and trade policy-makers acknowledged that multilateral solutions to transboundary environmental problems, whether regional or global, are preferred to unilateral solutions.⁷ As the agendas of trade and environment have evolved largely independently through the years, it is indispensable to take actions to avoid unilateral action to deal with environmental challenges outside the jurisdiction of the importing country. Consequently, environmental measures addressing transborder or global environmental problems should, as far as possible, be based on international consensus.

¹ Najam, A., Halle, M., & Meléndez Ortiz, R., 2007, *Trade and Environment: A Resource Book*, 1st edn., IISD.org, viewed 10 May 2013, from http://www.iisd.org/pdf/2007/trade_and_env.pdf.

² World Trade Organization, *The multilateral trading system and climate change: introduction*, viewed 10 May 2013, from http://www.wto.org/english/tratop_e/envir_e/climate_intro_e.htm.

³ World Trade Organization, *The relationship between MEAs and WTO*, viewed 9 May 2013, from <http://www.oas.org/dsd/Toolkit/Documentos/MOduleII/The%20Relationship%20between%20MEAs%20and%20the%20WTO.pdf>.

⁴ World Trade Organization, *The Fourth WTO Ministerial Conference*, viewed 9 May 2013, from http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm.

⁵ United Nations Framework Convention on Climate Change, *Bali Climate Change Conference: December 2007*, viewed 9 May 2013, from http://unfccc.int/meetings/bali_dec_2007/meeting/6319.php.

⁶ United Nations Framework Convention on Climate Change, *Bali Action Plan: Decision 1/CP.13*, viewed 10 May 2013, from <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3>

⁷ World Trade Organization, *The relationship between MEAs and WTO*, viewed 10 May 2013, from <http://www.oas.org/dsd/Toolkit/Documentos/MOduleII/The%20Relationship%20between%20MEAs%20and%20the%20WTO.pdf>.

Trade and Environment: Relation, Conflict and Influence

The world's trade and environment scenario had dramatically changed and became restructured owing to two significant events which took place in the last two decades. One was the establishment of World Trade Organization (WTO) in 1995 which provides the principal forum for negotiation on multilateral trading relation among the member states and enhances world economic welfare.⁸ The other was the Rio Conference on Environment and Development (commonly known as the 'Earth Summit') held in 1992 which stressed on environmental protection and sustainable development.⁹ After these two international events, environmental protection and trade liberalization have turned into the central part of strategies for development for both developed and developing countries.¹⁰ In an attempt to examine the relationship between trade and environment, Principle 12 of the Rio Declaration of Environment and Development acknowledged that trade policy measures for environmental purposes should not constitute a mean of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.¹¹ Furthermore, The Preamble of Agreement Establishing the World Trade Organization enunciated that WTO allows to expand the production of and 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 which is quite analogous to the Principles of the Rio Declaration.¹² Environmentalists have contended that much environmental damages and climate changes are happening due to the increased scale of global economic activities. As more economic endeavor proceeds, more environmental changes become visible.¹³ Moreover, multilateral trading system may pose difficulties for the

⁸ World Trade Organization, *Understanding the basic: What is the World Trade Organization?*, viewed 10 May 2013, from http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm.

⁹ United Nation General Assembly, *Rio Declaration on Environment and Development: A/CONF.151/26 (Vol. I)*, viewed 10 May 2013, from <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

¹⁰ World Trade Organization: Trade and Environment Division, 2004, *Trade Topics: Trade and Environment at the WTO*, WTO.org, viewed 10 May 2013, from http://www.wto.org/english/res_e/booksp_e/trade_env_e.pdf.

¹¹ United Nation General Assembly, *Rio Declaration on Environment and Development: A/CONF.151/26 (Vol. I)* viewed 10 May 2013, from <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

¹² World Trade Organization, *Legal Text: Agreement Establishing the World Trade Organization*, viewed 10 May 2013, from http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

¹³ Tamiami, L., Teh, R., Kulaçoğlu, V., Olhoff, A., Simmons, B., & Abaza, H., 2009, *Trade and Climate Change: A report by the United Nations Environment Programme and the World Trade Organization*, WTO.org, viewed 11 May 2013, from http://www.wto.org/english/res_e/booksp_e/trade_climate_change_e.pdf.

implementation of multilateral environmental agreements that use to protect the environment.¹⁴ On the contrary, it is also condemned that Multilateral Environmental Agreements inflict negative impacts or trade restrictions on trade liberalization and free trade among the states.¹⁵ As the blending of trade and environment is usual in practice, a proper framework within the WTO mechanism itself is essential to strike a balance between the two for ensuring environmental protection and trade liberalization.

Institutionalization of Environmental Issues in the WTO Regime

The WTO began life on 1st January 1995 under the Marrakesh Agreement Establishing the World Trade Organization as a successor of the General Agreement on Tariffs and Trade (GATT).¹⁶ Under the GATT (created into force in 1947) the environmental issues were not considered with much attention as these issues had not become prominent at that point of time.¹⁷ In between 1947-1970's there were some developments and few changes occurred within the regime of GATT. The connection and linkage between trade liberalization and environmental protection were first recognized in 1970. In 1972, United Nations held the Stockholm Conference on Human Environment where the implications of environmental protection policies on international trade were taken into account and a study entitled Industrial Pollution Control and International Trade was conducted.¹⁸ This study focused on the implications of environmental protection policies on international trade, and reflected concerns that these policies could create new barriers to trade.¹⁹ Following this study, the members formed the GATT

¹⁴ Brack, D., & Gray, K., 2007, *Multilateral Environmental Agreements and WTO*, IISD.org, viewed 10 May 2013, from <http://www.worldtradelaw.net/articles/graymeawto.pdf>.

¹⁵ Brack, D., & Gray, K., 2007, *Multilateral Environmental Agreements and WTO*, IISD.org, viewed 10 May 2013, from <http://www.worldtradelaw.net/articles/graymeawto.pdf>.

¹⁶ Agreement Establishing the World Trade Organization is fairly brief. It contains a preamble stating its goals and sixteen articles establishing its scope, functions, structure, relationship to other organizations, secretariat, legal status, decision-making principles, membership, methods for amendment, admission/withdrawal of members, and so forth. Annexes to this agreement contain most of the substantive provisions. World Trade Organization, *Agreement Establishing the World Trade Organization*, viewed 10 May 2013, from http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

¹⁷ World Trade Organization, *The GATT years: from Havana to Marrakesh*, viewed 10 May 2013, from http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

¹⁸ United Nation Environment Programme: Environment for Development, *Declaration of the United Nations Conference on the Human Environment*, 5-12 June 1972, viewed 10 May 2013, from <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>.

¹⁹ General Agreement on Tariffs and Trade, *International Pollution Control and International Trade: Note by the GATT Secretariat*, 9 June 1971, viewed 11 May 2013, from http://www.wto.org/gatt_docs/English/SULPDF/90840247.pdf.

Group on Environmental Measures and International Trade (EMIT). Though some steps had been taken during the Tokyo Round of trade negotiations (1973–1979) and during the Uruguay Round (1986–1994), the linkages between policies of environmental protection and trade came to the light in 1991 when the dispute between Mexico and United States (‘Tuna-Dolphin’) came into spotlight.²⁰ The panel in Tuna-Dolphin noted that, on the basis of its article XX (g) of GATT, countries are not prevented from using trade measures to protect the global commons or environmental resources outside their jurisdiction. After this period, important developments were also made in environmental forums.²¹ In 1991, members of the European Free Trade Association (EFTA) requested the Director-General of GATT to convene the EMIT group as soon as possible.²² The 1992 United Nations Conference on Environment and Development (UNCED) drew attention to the role of international trade in poverty alleviation and in combating environmental degradation.²³ In 1994, Marrakesh Agreement established the World Trade Organization (WTO) with a view to promoting trade and also promised to protect and preserve the environment.²⁴ Identifying the relationship between trade measures and environmental rules a Ministerial Decision on Trade and Environment was adopted in 1994, calling for the establishment of a Committee on Trade and Environment (CTE).²⁵ The CTE is composed of all WTO members and a number of observers from inter-governmental organizations.²⁶ The CTE has charged with making appropriate recommendations on ‘the need for rules to enhance the positive interaction between trade and environment measures for the promotion of sustainable development’.²⁷ This committee has taken numerous arrangements and

²⁰ World Trade Organization, *Environment early years: emerging environment debate in GATT/WTO*, viewed 11 May 2013, from http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm.

²¹ GATT, *United States-Restrictions on import of tuna*, viewed 11 May 2013, from <http://www.worldtradelaw.net/reports/gattpanels/tunadolpinI.pdf>

²² World Trade Organization, *Environment early years: emerging environment debate in GATT/WTO*, viewed 10 May 2013, from http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm.

²³ United Nations, *United Nations Conference on Trade and Development 1992*, viewed 11 May 2013, from <http://www.un.org/geninfo/bp/enviro.html>.

²⁴ World Trade Organization, *The GATT years: from Havana to Marrakesh*, viewed 12 May 2013, from http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

²⁵ World Trade Organization, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, viewed 10 May 2013, from http://www.wto.org/english/docs_e/legal_e/03-fa.pdf.

²⁶ World Trade Organization, *The Committee on Trade and Environment (‘regular’ CTE)*, viewed 12 May 2013, from http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm.

²⁷ World Trade Organization, *The Committee on Trade and Environment (‘regular’ CTE)*, viewed 12 May 2013, from http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm.

mandates regarding trade and environmental issues till now. Committee on Trade and the Environment (CTE) kept continuing its work on the broader effects of environment measures on market access. For addressing these environmental issues, a Ministerial Meeting in Doha was held in November 2001, where members of the World Trade Organization (WTO) agreed to launch a new round of multilateral trade negotiations.²⁸ In Doha Ministerial Declaration members of the WTO agreed to negotiate on:

- “(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;
- (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
- (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.”²⁹

Along with the WTO rules relating to environmental protection, there are about two hundred international agreements currently in force (outside the WTO) dealing with various environmental issues and in combination they are called Multilateral Environmental Agreements (MEAs).³⁰ About twenty of these include provisions that can have impact on trade: for example they ban trade in certain products, or allow countries to restrict trade in certain circumstances.³¹ Among them the Convention on International Trade in Endangered Species (1973), Montreal Protocol on Substances that Deplete the Ozone Layer (1987), Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989), Cartagena Protocol on Bio-safety (2000), Rotterdam Convention on the Prior Informed

²⁸ World Trade Organization, *Doha WTO Ministerial 2001: Ministerial Declaration*, 20 November 2001, viewed 12 May 2013, from http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf.

²⁹ World Trade Organization, *Doha WTO Ministerial 2001: Ministerial Declaration*, 20 November 2001, viewed 12 May 2013, from http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf.

³⁰ World Trade Organization, *WTO and environmental agreements: how are they related?*, viewed 12 May 2013, from http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm or *Supra note 14*

³¹ Sawhney, A., 2004, *WTO-Related Matters in Trade and Environment: Relationship between WTO Rules and MEAs*, ICRIER.org, viewed 13 May 2013, from <http://www.icrier.org/pdf/wp133.pdf>.

Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998), Stockholm Convention on Persistent Organic Pollutants (2001) may impose the most stringent effect on certain products in market access.³² A possible source of conflict between the trade measures contained in MEAs and WTO rules could be the violation by MEAs of the WTO's non-discrimination principle. Such a violation could take place when an MEA authorizes trade between its parties in a specific product, but bans trade in that very same product with non-parties.³³ For resolving these conflicts, members are currently discussing ways to ensure a harmonious co-existence between WTO rules and specific trade obligations in various agreements that have been negotiated multilaterally to protect the environment.³⁴ So the integration between WTO Agreements and Multilateral Environmental Agreements could resolve the sixty years long lasting debate on the creation of balance between trade and environmental policies.

WTO Rules and Policies Relevant to Environmental Concern

Although the objectives and aspirations of establishing the WTO were not to generate an environmental agency but to provide an institution for protecting and promoting free trade among the members, WTO rules and jurisprudence generally do relate to environmental issues.³⁵ A number of WTO rules may be relevant for protecting and preserving the environment.³⁶ For example, WTO members are free to implement national environmental protection policies provided that they do not discriminate between imported and domestically produced like products (National Treatment Principle, GATT Article 3 of GATT 1947), or between 'like products' imported from different trading partners (Most-Favoured Nation Clause, GATT Article 1 of GATT 1947).³⁷ GATT Article XI: 1 discusses the rules on 'General Elimination of

³² Sawhney, A., 2004, *WTO-Related Matters in Trade and Environment: Relationship between WTO Rules and MEAs*, ICRIER.org, viewed 13 May 2013, from <http://www.icrier.org/pdf/wp133.pdf>.

³³ World Trade Organization, *The relationship between MEAs and WTO*, viewed 13 May 2013, from <http://www.oas.org/dsd/Toolkit/Documentos/MOduleII/The%20Relationship%20between%20MEAs%20and%20the%20WTO.pdf>

³⁴ World Trade Organization, *Activities of the WTO and the challenge of climate change*, viewed 14 May 2013, from http://www.wto.org/english/tratop_e/envir_e/climate_challenge_e.htm.

³⁵ Intergovernmental Panel on Climate Change, *Climate Change 2007: Working Group III: Mitigation of Climate Change*, viewed 14 May 2013, from http://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4_wg3_full_report.pdf.

³⁶ World Trade Organization, *The multilateral trading system and climate change: Introduction*, viewed 14 May 2013, from http://www.wto.org/english/tratop_e/envir_e/climate_intro_e.htm.

³⁷ Most-favoured-nation (MFN): Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members.

Quantitative Restrictions’ which is used by member states in imposing restrictions on importation and exportation of certain products.³⁸ This provision as contained in Article XI: 1 has been violated in the context of a number of environmental disputes in which countries had imposed bans on the importation of certain products and is thus relevant to trade and environment discussions.³⁹

GATT Article XX on General Exceptions further lays out a number of specific instances in which WTO Members may be exempted from GATT rules. Two exceptions, paragraphs (b) and (g) are relevant to environmental protection. The Article states that:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”⁴⁰

The introductory phrases commonly known as the ‘Chapeau’, prohibits measures taken by member states which are arbitrary or creates unjustifiable discrimination between countries where the same condition prevail or imposes disguise restriction on international trade.⁴¹ If a state would like to

National treatment: Imported and locally-produced goods should be treated equally — at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. World Trade Organization, *General Agreement on Tariffs and Trade 1947*, viewed 14 May 2013, from http://www.wto.org/english/docs_e/legal_e/gatt47.pdf.

³⁸ General Elimination of Quantitative Restrictions: No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party. World Trade Organization, *General Agreement on Tariffs and Trade 1947*, viewed 14 May 2013, from http://www.wto.org/english/docs_e/legal_e/gatt47.pdf.

³⁹ World Trade Organization, *General Agreement on Tariffs and Trade 1947*, viewed 14 May 2013, from http://www.wto.org/english/docs_e/legal_e/gatt47.pdf.

⁴⁰ World Trade Organization, *General Agreement on Tariffs and Trade 1947: Article XX*, viewed 14 May 2013, from http://www.wto.org/english/docs_e/legal_e/gatt47.pdf.

⁴¹ World Trade Organization, *General Agreement on Tariffs and Trade 1947*, viewed 14 May 2013, from http://www.wto.org/english/docs_e/legal_e/gatt47.pdf.

acquire environmental protection under this Article XX of GATT, it has to satisfy both these two requirements, first, that its measure falls under at least one of the exceptions (e.g. paragraphs (b) and/or (g)), and, second, that the measure has to satisfy the requirements of the introductory paragraph (the “chapeau” of Article XX).⁴² Moreover, if a trade-related environment measure is found to be inconsistent with one of the core provisions of the GATT (e.g. Articles I, III or XI), justification could still be sought under Article XX. Article 5(2) of the Agreement on the Application of Sanitary and Phytosanitary Measures of WTO also covers a range of measures. It states that:

“Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.”⁴³

Designed to enhance the protection of intellectual property rights, the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement makes explicit reference to environment in Section 5 on Patents. Article 27 (2-3) of Section 5 of states that:

“Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law”

The language of Preamble of the Agreement on Agriculture as well denotes the commitments having regard to non-trade concerns, including food security and the need to protect the environment.⁴⁴ The exemption under Annex 2 of the Agreement enables Members to capture positive environmental externalities.⁴⁵ Under the Article 8 of the Agreement on Subsidies and Countervailing Measures deals with non-actionable subsidies which are used to promote the adaptation of existing facilities to new

⁴² World Trade Organization, *General Agreement on Tariffs and Trade 1947: the Chapeau of Article XX*, viewed 15 May 2013, from http://www.wto.org/english/docs_e/legal_e/gatt47.pdf.

⁴³ World Trade Organization, *Agreement on the Application of Sanitary and Phytosanitary Measures*, viewed 15 May 2013, from http://www.wto.org/english/docs_e/legal_e/15-sps.pdf.

⁴⁴ World Trade Organization, *Agreement on Agriculture*, viewed 15 May 2013, from http://www.wto.org/english/docs_e/legal_e/14-ag.pdf.

⁴⁵ World Trade Organization, *Agreement on Agriculture*, viewed 15 May 2013, from http://www.wto.org/english/docs_e/legal_e/14-ag.pdf.

environmental requirements.⁴⁶ Article XIV of the General Agreement on Trade in Services and Preamble of the Agreement on Technical Barriers to Trade encourages taking measures for the protection of human, animal or plant life or health and of the environment.⁴⁷ Under Article 3.2 of the WTO Dispute Settlement Understanding, the WTO agreements are treaties to be interpreted in accordance with customary rules of interpretation of public international law. MEAs are international treaties, and therefore form part of international law. The WTO is relevant to environment measures as the policies of WTO crisscrosses with international trade and environment in a number of different ways.⁴⁸

Efficiency and Sufficiency WTO Rules to Address Environmental Protection

The WTO has recently initiated its first ever trade and environment negotiation under the Doha Development agenda.⁴⁹ But as a highest organ of multilateral trading system, it has been sometimes criticized that WTO has had insignificant or insufficient policy to tackle environmental problems in a large scale though certain environmental related measures have been initiated by this organ (WTO) after the Doha negotiable round. Under the WTO, countries have great flexibility to design environmental regulations that have effects only within their territories.⁵⁰ It seems to have considerable scope for a Panel or the Appellate Body under the WTO to consider MEAs in its interpretation of the WTO agreements, including the exceptions listed in GATT Article XX. This is constrained by the fact that they are not authorized to interpret the WTO agreements in a way that adds to or diminishes WTO rights. Under the GATT, six panel proceedings namely United States - Canadian Tuna, Canada - Salmon and Herring, Thailand - Cigarettes, United States - Tuna (Mexico), United States - Tuna (EEC), United States - Automobiles were involving examinations of environmental

⁴⁶ World Trade Organization, *Agreement on Subsidies and Countervailing Measures*, viewed 15 May 2013, from http://www.wto.org/english/docs_e/legal_e/24-scm.pdf.

⁴⁷ World Trade Organization, *Annex 1B: General Agreement on Trade in Services*, viewed 14 May 2013, from http://www.wto.org/english/docs_e/legal_e/26-gats.pdf, and World Trade Organization, *Agreement on Technical Barriers to Trade*, viewed 14 May 2013, from http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf.

⁴⁸ Sawhney, A., 2004, *WTO-Related Matters in Trade and Environment: Relationship between WTO Rules and MEAs*, viewed 15 May 2013, from <http://www.icrier.org/pdf/wp133.pdf>.

⁴⁹ Indira Gandhi Institute of Development Research, *Conflicts and Failures – Impact on Sustainable Development*, viewed 16 May 2013, from <http://www.igidr.ac.in/vks/IJSI/conflict-and-failures-sanja-paper.pdf>.

⁵⁰ Hufbauer, G.C., & Kim, J., 2009, *The World Trade Organization and Climate Change: Challenges and Options*, PIIE.com, viewed 16 May 2013, from <http://www.piie.com/publications/wp/wp09-9.pdf>.

measures or human health-related measures under Article XX and under the WTO Dispute Settlement Understanding, three such proceedings i.e. United States – Gasoline, United States - Shrimp, European Communities – Asbestos have been completed.⁵¹ But neither the Panel nor the Appellate body of the WTO has given any direction for addressing the results derived from changing the environment. It was also argued that MEAs might form a *lex specialis*, recognizing their specific nature and the WTO's principles as general principle of international law.⁵² Under this principle, no conflict would arise, since the MEA provisions would override general international trade obligations under the WTO agreements. However, there is absence of guidance in the WTO Panel reports and Appellate Body decisions on the question whether the dispute settlement bodies of WTO is bound by *lex specialis* of MEAs.⁵³

Recommendation - An Approach Towards Reconciliation and Bridging the Gap between WTO Agreements and MEAs

International cooperation is particularly important in addressing transboundary and global environmental challenges beyond the control of any individual nation. This would be true even if nations do not trade with one another.⁵⁴ International economic integration and growth reinforce the need for sound environmental policies at the national and international level. The WTO Secretariat's Trade and Environment report that was on 14 October 1999, addresses the economic and political economy dimensions of the interface between trade and environment.⁵⁵ This report underscores that trade and environment need not be contradictory but can indeed be complementary. It is also acknowledged by the several environmentalists and economist that whilst trade restrictions are neither the only nor necessarily the most effective policy instrument to fulfill the objectives of MEAs, in certain case they can play an important role. The Committee on Trade and Environment (CTE) agreed on the ministerial conference held in Singapore

⁵¹ World Trade Organization, *Trade Topics: Trade and Environment at the WTO*, 2004, viewed 16 May 2013, from http://www.wto.org/english/res_e/booksp_e/trade_env_e.pdf.

⁵² Voigt, C., 2004, *The Role of General Principles in International Law and their Relationship to Treaty Law*, viewed 16 May 2013, from http://www.retfaerd.org/gamle_pdf/2008/2/Retfaerd_121_2008_2_s3_25.pdf.

⁵³ Brack, D. and Gray, K., 2007, *Multilateral Environmental Agreements and WTO*, IISD.org, viewed 16 May 2013, from <http://www.worldtradelaw.net/articles/graymeawto.pdf>.

⁵⁴ Håkan Nordström, *WTO report: the need for environmental cooperation*, viewed 17 May 2013, from http://www.wto.org/english/tratop_e/envir_e/environment.pdf

⁵⁵ Steve Charnovitz, *World Trade and the Environment: A Review of the New WTO Report*, viewed 16 May 2013, from http://www.iatp.org/files/World_Trade_and_the_Environment_A_Review_of_th.htm

in 1996 that WTO rules have already provided broad and valuable scope for trade measures to be applied pursuant to MEAs in a WTO-consistent manner.⁵⁶ It is also suggested that there is no need to change WTO provisions to provide increased accommodation in this regard. But if we would desire to bring on a radical solution, GATT Article XX could be amended so that measures pursuant to a MEA could be deemed a justifiable restriction on trade. Alternatively, a new MEAs agreement may be drafted under the WTO regime which may be given the similar status as an agreement of WTO. The advantage of this approach is that it avoids attempting to amend existing rules, with probable implications for a wide range of topics, and it creates a very clear set of rules which would apply only to MEA trade measures. Furthermore, both MEAs and the WTO possess dispute settlement mechanisms and WTO offers a relatively strong mechanism, whose decisions are binding on all WTO members. Since WTO dispute settlement is compulsory, it is often perceived to be more effective than MEAs equivalent mechanisms, and therefore countries may prefer to use WTO dispute settlement in trade disputes involving environment. The CTE agreed that better policy coordination at the national level between trade and environmental policy-makers can help prevent WTO disputes from arising over the use of trade measures contained in MEAs. In the negotiation of future MEAs, particular care is to be taken over how trade measures may be considered for application to non-parties. In the event of a conflict in the WTO over the trade measures of an MEA, the WTO dispute settlement provisions can tackle any such problems. For this, Panels and the Appellate Body could exercise their prerogative under Article 13 of the Dispute Settlement Understanding to request information from a MEA secretariat on relevant matters, and could also interpret a decision taken by an MEA body as evidence of a justification of a measure under Article XX. Other potential ways to better integrate dispute settlement mechanisms include increasing contact between the UNEP and WTO secretariat staff responsible for dispute settlement, increasing information flow between MEA secretariats and the WTO secretariat and promoting expert participation in the WTO process for alternative dispute settlement, which includes good offices, conciliation and mediation may be treated as an effective way to reconcile environment and trade policies. Additionally, under Article 30(2) of the Vienna Convention on the Law of Treaties it has been laid down that where a treaty expresses that it is subject to, or not to be considered as incompatible with an earlier or later

⁵⁶ WTO, The first WTO ministerial conference, viewed 17 May 2013, from http://www.wto.org/english/thewto_e/minist_e/min96_e/min96_e.htm

treaty, the provisions of the other treaties shall prevail.⁵⁷ For MEAs negotiated after 1995, this would include the WTO agreements, so that WTO rules would be applicable to the parties to the MEAs regarding any conflict between a measure taken pursuant to an MEA and WTO obligations.

Conclusion

The debate regarding reconciliation between MEAs and WTO has been in existence since the establishment of the WTO, without much sign of progress. The inclusion of Para 31 in the Doha agenda was hoped to give it a new momentum, though there is little sign of any conclusions emerging as yet. The policy makers of trade and environment have faced the strongest resistance by the developing countries to any codification of the MEAs relationship in the WTO agreements. Developing countries argue that trade-related measures, even if carried out pursuant to a MEA, will have a negative economic impact through restricting market access, and that the costs of compliance can be significantly outweighed by any perceived environmental and developmental benefits. For this, WTO and MEAs policies should also address the concerns of developing countries. For bridging the gap between trade liberalization and environmental protection, it is high time to define, contextualize and actualize a mutually supportive relationship which should receive greater focus. For achieving this goal, it has to focus on a wider set of legal issues, primarily addressing potential conflicts which will emphasize theoretical as well as practical linkages. The mutually supportive relationship should involve the design of institutions and procedures that assures this status. This should involve greater cooperation between MEA and WTO secretariats in both negotiations and dispute settlement procedures. But if the Doha agendas fail to address the environmental and trade relationship in an effective manner, which seems to be quite probable, the whole trade-environment debate will experience a setback, and the distorted image of WTO as an institution that has no interest in environmental issues will be reinforced. To achieve reconciliation between the two categories of regimes, the WTO should have the power to assess whether a trade measure is arbitrarily discriminatory or protectionist, while MEAs should have jurisdiction to determine the legitimacy of the environmental objective and the proportionality and necessity of any trade measure. The implications for trade and the environmental effectiveness of these measures will, however, depend on how these policies are planned and on the specific conditions for their implementation.

⁵⁷ United Nations, *Vienna Convention on the Law of Treaties*, viewed 17 May 2013, from http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

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