Jurisdictional Concerns in the Settlement of Environmental Disputes under the WTO Regime

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ABSTRACT:

The WTO has been playing a major role in international environmental law through its dispute resolution system, since the days of the GATT, 1994. At the Uruguay Round 1994, trade and environment were highly sensitive topics for the international trade regime. Thus, the WTO dispute settlement mechanism has subsequently become the most important international forum for settling disputes relating to trade and environment. Subsequently, the trade and environment controversy has generated several challenges to the competency of the WTO dispute settlement system, and continues to do so. As a result, there is a need to examine the current status of the WTO dispute settlement system in relation to whether it has jurisdiction to try trade-related environmental disputes or not. The following research paper delves into this issue and attempts to explore with regard to the matters concerning the ongoing disputes of trade and environment. It further touches upon the first Tuna-Dolphin case followed by the Shrimp-Turtle case that has drawn the attention of environmental activists to the working of the WTO dispute system from the environmental perspective that revealed a substantive bias and institutional discrepancy in favor of free trade in order to determine its suitability for dealing with environmental concerns and how far the WTO dispute settlement body is justifiable in interpreting the term "exhaustible natural resources" under Article XX (g) were challenged. This research paper further highlights the ongoing argument that while the WTO dispute settlement body has compulsory and exclusive jurisdiction in the field of WTO law, still its competence to apply other rules of international law is questioned. This also addresses the loopholes of the WTO dispute settlement mechanism for being inappropriately structured to address environmental disputes. This paper further emphasizes on the growing concerns as to the combination of a strong judicial system and reliance on panel and Appellate body decision which draws the attention of the environmentalists to think upon the justifiability of the WTO dispute settlement system and the safeguards that exist in the WTO along with the decisions that have already been made under the DSU so one-sided in their conclusions. The answers to these questions are very complex, thus require an examination of the general means with which the WTO interacts the environment. Hence, the real concern of the research paper is focused on the interaction between trade and environment and its current status, especially in relation to the operations of the dispute settlement system of the WTO.

I. INTRODUCTION

The WTO has been playing a major role in international environmental law making through its dispute resolution system, since the days of the GATT, 1994. Environmental issues are seen to be systematically addressed in the WTO following the Decision on Trade and Environment taken towards the end of the Uruguay Round at Marrakesh in 1994. The evolution of the dispute settlement procedures during the operation of the GATT became embodied in the 'Understanding on Rules and Procedures Governing the Settlement of Disputes'[1]. This agreement was one of the six pillars of the WTO legal framework as laid down in the creation of the WTO. It became known as the Dispute Settlement Understanding (DSU)[2]. While the role of the Dispute

[1] *Understanding on Rules and Procedures Governing the Settlement of Disputes in the Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge University Press, WTO, 2004).
[2] R. Wilkinson, *Multilateralism and the WTO* (Routledge , London,2000) p. 118.

Settlement Body (DSB) is not confined to the trade and environmental area, it is a central institution in managing the interaction of trade and environment within the WTO system.[3] At the Uruguay Round 1994, trade and environment were highly sensitive topics for the international trade regime.[4] Thus, the WTO dispute settlement mechanism has subsequently become the most important international forum for settling disputes relating to trade and environment. The DSU brought a significant change to the dispute settlement procedure. The DSU contended a formal system for dispute settlement that all member of WTO had to adhere to. The System consisted of the following components: the DSB; panels that were appointed for each dispute; and the appellate body. Taking each in turn, it is apparent that the WTO DSU had created a judicialised dispute resolution system. Considering the early years of the GATT, 1994, the exceptions embodied in Articles XX (b) and XX (g) were invoked several times. In each case, the actual action in question – a trade restricting measure alleged to be justified under either of the two clauses was held to be not covered by the Article XX exceptions. Despite its success in expanding International Trade rules, the GATT has been criticized for its failure to protect the environment. In other words, these rulings were perceived to be biased in favor of the objectives of free trade. It is seen that nowhere in the text of the GATT does the word 'environment' appear. However, a number of GATT provisions permit restrictions on trade to protect the environment. It is important to mention that WTO members can adopt trade-related measures to protect the environment and human health and life as long as such measures comply with GATT rules, or fall under the exceptions to these rules. This right has been affirmed by panels and the Appellate Body time and again.[5] Later, when the WTO came into existence in 1995, a number of its newer agreements, such as those relating to services, intellectual property, etc. contained provisions relating to environmental protection. Several disputes relating to environmental and trade continued to appear at the DSS. The way in which issues relating to environment have been handled by the WTO DSM, shows an interesting pattern in terms of the viewing of environmental protection. Later, when the WTO came into existence in 1995, a number of its newer agreements, such as those relating to services, intellectual property, etc. contained provisions relating to environmental protection. Several disputes relating to environmental and trade continued to appear at the DSS. The way in which issues relating to environment have been handled by the WTO DSM, shows an interesting pattern in terms of the viewing of environmental protection.

Statement of problems

The trade and environment controversy has generated several challenges to the competency of the WTO dispute

[3] Fiona Macmillan, *WTO and the Environment* (London Sweet and Maxwell,2001) .
[4] K.Kulovesi, S.Shaw & S.W. Burgiel., *Trade and Environment: Old Wine in New Bottles?', in The Roads from Rio:*

Lessons Learned from 20 Years of Multilateral Environmental Negotialtion (Earthscan: forthcoming, 2012).
[5] Available at < https://www.wto.org/english/tratop_e/envir_e/envt_rules_intro_e.htm>accessed on 6th july 2018.

settlement system, and continues to do so. The competence of the WTO in the environmental field is open to interpretation today. As, there is a need to examine the current status of the WTO dispute settlement system in relation to whether it has jurisdiction to try trade-related environmental disputes or not. It was the first Tuna-Dolphin case, the Shrimp-Turtle case that draws the attention of environmental activists to the working of the WTO dispute system in which various serious challenges were emerged from the environmental perspective that revealed a substantive bias and institutional discrepancy in favor of free trade.[6] In these cases, the working of the dispute settlement system of the WTO has been scrutinized by environmentalists in order to determine its suitability for dealing with environmental concerns. Also, how far the WTO dispute settlement body is justifiable in interpreting the term "exhaustible natural resources" under Article XX (g).

Other major problem is WTO law does not adequately address the role of other relevant rules of international law in adjudicating dispute on trade and environment. Thus, the key argument here which is still debatable is the environmental disputes have challenged the jurisdiction of the WTO dispute settlement system because of the unclear role of the International Environmental law in the WTO dispute settlement system. It is also an ongoing argument that while the WTO dispute settlement body has compulsory and exclusive jurisdiction in the field of WTO law, still its competence to apply other rules of international law is questioned. Having said this, there are two putative limits on the role that the dispute settlement system can play within the WTO framework. First, the roles of the panels and the Appellate body are limited to those of interpretation. Article 3(2) of the DSU states, inter alias that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements". This, it seems, is intended to make it clear that the roles of the panels and Appellate Body do not extend to gap filling.[7] In particular, it would seem to limit the role of these bodies in exploring matters, such as the trade and environment issues, that are not dealt with under the Uruguay Round agreements. Considering the problem, it is still unclear whether the decisions of the Appellate Body do fill what might be described as gaps in the WTO agreements. The WTO dispute settlement mechanism is not structured appropriately to address environmental disputes.

The level of the judicialisation of the dispute system is an important consideration when determining the competence of the WTO to address policy matters that interact with trade. It is being seen that the combination of a strong judicial system ad reliance on panel and Appellate body decision increases the concerns of the environmentalists to think upon the justifiability of the WTO dispute settlement system and the safeguards that exist in the WTO along with the decisions that have already been made under the DSU so one-sided in their conclusions. The answers to these questions are very complex, thus require an examination of the general

[6] D.C.Esty, *Greening the GATT. Trade, Environment and the Future* (Washington DC:Institute for InternationalEconomics 1994), 29-31.

[7] Jackson, *WTO constitutional problems: dispute settlement and decision making* (2000) 24 Amicus Curiae4 at 5.

means with which the WTO interacts the environment. Hence, the interaction between trade and environment remains an ongoing and current concern, especially in relation to the operations of the dispute settlement system of the WTO.

Research questions

1. Whether the WTO dispute settlement system has jurisdiction in dealing with the cases pertaining to disputes between trade and the environment?
2. Whether WTO jurisprudence regarding trade and environment is consistent in the international trade and environmental regimes?
3. Whether the WTO dispute settlement has any jurisdiction on the interpretation of the term

   "natural exhaustible resources" under Article XX (g)?
4. Whether the competence of the WTO dispute settlement system is limited to agreements made between the parties or non-WTO norms of international laws can be directly taken into consideration?
5. What are the important environmental disputes that have come before the WTO dispute settlement system and its binding effect on the concerned parties?

Hypothesis

The WTO dispute settlement body is the appropriate forum to address environmental disputes.

Objective of Research

The objective of this Research paper is to assess the jurisdictional approach of the WTO dispute settlement system in dealing with International environmental disputes, and thereby:

- To assess whether WTO dispute settlement system has exclusive jurisdiction to decide the cases regarding environmental issues/problems.
- To find out whether the jurisprudence of WTO in solving the different cases is consistent.
- To assess whether the WTO DSB has jurisdiction to interpret the term "exhaustible natural resources" under Article XX (g).
- To assess that the WTO can directly take the cognizance or consideration of non-WTO norms of International law.
- To assess the binding effect of the cases decided by the WTO DSU, in other words, whether the decision has binding force over the concerned parties

Scope of The Research

This research paper is only restricted to the areas of:

1. The WTO Dispute Settlement System, which was established as a part of Uruguay Round Agreements and its jurisdictional approach in the settlement of environmental disputes .
2. Various trade-related environmental cases under the WTO dispute system.

This paper shall not include:

1. the issues relating to the interpretation of Article XX(b) and XX(g) of the GATT,1994.
2. the existing WTO institutions which are concerned with trade and environment issues such as the Committee on Sanitary and Phytosanitary Measures, the Committee on Technical Barriers to Trade, the Committee on Trade and Environment.

Research methodology

This research study basically relies on doctrinal method for the purpose of writing this paper. Doctrinal method in a research means a research made by way of analyzing the existing statutory provision and cases by applying the reasoning power. The sources of relevant information are international agreements, official WTO documents , study opinion of the various legal authorities on this subject, judicial decisions, journal articles and electronic information. A legal historical research will be done throughout this study, therefore, questioning major legal, theoretical, practical and controversial ideas on the jurisdictional concerns for the trade related environmental issues at international level. The sources of International law are important because they play a great role to identify and clarify the nature and scope of this "competency of the WTO dispute settlement body in environmental disputes". Data will come from various areas of research, viz., documents, declarations, international instruments, international cases etc.

For the purpose of jurisdictional analysis of the problem, the researcher shall undertake a relatively detailed study of the following cases after going through the Panels and Appellate body's reports and shall use critical approach in dealing with the respective cases : *US-Restrictions on Imports of Tuna*(1993), *US- Restrictions on Imports of Tuna*(1993), *US-Import Prohibition of Certain Shrimp and Shrimp Products* (1998) , *EC- Measures Affecting*

Asbestos and Asbestos Containing Products (2000), *EC- Measures Concerning Meat and Meat Products* (1997), and *EC- Trade Description of Sardines* (2002).

II. BEFORE AND AFTER WTO SCENARIO: TRADE & ENVIRONMENT

Primary concerns about the outcome that increased trade would have on the environment surfaced as early as

1970s. During this period, international concern was gaining mainstream attention regarding the impact of economic growth on social development and the environment, which ultimately led to the 1972 Stockholm Conference on the Human Environment. The environmental movement during the same era in the industrialized states started gaining strength.[8]

There had been a substantial increase in the international environmental law after the Stockholm Conference. The dominant approach was to concentrate more and more on protecting specific sectors of the environment: marine and fresh waters, atmosphere, outer space, plants and animals.[9] These accords include the Convention on International Trade in Endangered Species (CITES) in 1973,[10] Convention on the Conservation of Migratory Species of Wild Animals (CMS) in 1979,[11] Vienna Convention for the Protection of the Ozone Layer in 1985.[12]

Evolution of international environmental law

At the time, when the GATT was negotiated in the aftermath of World War II, environmental protection was not a major concern and nowhere the text of the agreement makes any explicit reference to 'the environment'. Understandably, therefore, the creators of the GATT did not include in the agreement any special provisions on the relationship between trade and environmental policy. Still, they recognized that governments might occasionally need to restrict trade in the interest of public health or nature conservation.[13] Later on, the drafters of the trade agreement realized that there is a need to have reference of environment.

Thus two critical exceptions have been inserted to the GATT by the drafters along with the fundamental obligations of Most Favored Nations and national treatment, and tariff bindings. Specifically, Article XX (b) provides a WTO member to apply trade restrictive measure *"necessary to protect human, animal or plant life or health"*.[14] Also Article XX (g) allows a member to impose restriction *"relating to the conservation of exhaustible natural resources"*.[15]

[8] Pradeep S. Mehta, *Trade and Environmental Disputes at the WTO (CUTS)*, available on < http://www.mse.ac.in/trade/pdf/5.%20PMehta-TE.pdf> accessed on 1st August 2018.
[9] A.C. Kiss & D. Shelton, *Guide to International Environmental Law* (3rd edn, Transnational Press, 2004), p. 37.
[10] Convention on International trade in Endangered Species of Wild Fauna and Flora (Washington), 3 Mar. 1973, in force 1 Jul. 1975; 993 UN treaty series 243.
[11]Convention on the Conservation of Migratory Species of Wild Animals (Bonn), 23 Jun.1979, in force 1 Nov. 1983; 19 *ILM* 19 (1980), 15.
[12] Vienna Convention for the Protection of the Ozone Layer (Vienna), 22 Mar. 1985, in force 22 Sep. 1988; ILM 22 (1985), 1529.
[13] A comprehensive guide to WTO law and jurisdiction in relation to environmental matters can be found in Bernasconi-Osterwalder et al. (2006) referred in Robert Falkner and Nico Jaspers, Environmental Protection, International Trade and the WTO, (The Ashgate Research Companion to International Trade Policy,2 012) available at < http://static1.squarespace.com/static/538a0f32e4b0e9ab915750a1/t/538db556e4b038f0a6eff7c4/1401795926548/Falkner_Jaspers_2012_Environment_Trade_WTO_final_ms.pdf> accessed on 17th July,2017.
[14] See The Text of The General Agreement on Tariffs and Trade, Article XX (b).
[15] See The Text of The General Agreement on Tariffs and Trade, Article XX (g).

Trade and environment scenario in the Uruguay round

The final days of the Uruguay Round Negotiations had greater influence on the global environmental awareness. The result of the Uruguay Round (including the Agreement Establishing the World Trade Organization (WTO)) is one of the most indispensable efforts to face up to some of the problems associated with trade and environmental disputes. The WTO dispute settlement system is taken as the unique part in international law especially because it is juridical and legalistic system for disputes dedicated to preserve the rights and obligations of WTO Members.[16] Central and vital to the WTO institutional structure is the dispute settlement procedure derived from decades of experiment and practice in the GATT, but now (for the first time) elaborately set forth in the new treaty of the Dispute Settlement Understanding (DSU), as part of the WTO charter.[17] In addition to it, the WTO is described as the *"central international economic institution"*[18] and more and more involved in the processes of its dispute settlement procedure. Also the term 'sustainable development' has found its way into the Preamble to the WTO Agreement, which qualifies the call of the GATT Preamble for *"full use of the resources of the world" with language about "optimal use of the world's resources in accordance with the objective of sustainable development."*[19]

Agreements under wto reflecting environmental concerns

There is no one comprehensive document under the WTO legal system which deals with the relationship between trade, environment and sustainable development. Rather, environmental issues are scattered through many of the agreements which is annexed to the Marrakesh Agreement Establishing the World Trade Organization. Some of them are very essential in the field of trade and environment which includes The Marrakesh Agreement Establishing the World Trade Organization ('WTO Agreement"). It sets out the objective of sustainable development and the need to protect and preserve the environment,[20] General exception of The General Agreement on Tariffs and Trade ("GATT"), The Agreement on Technical Barriers to Trade ("TBT Agreement") which is considered to be the most important agreement from the environmental perspective,[21] it is, on the other hand, amore modem Agreement having its roots in the Tokyo Round in the

[16] Article3 of Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU): "The Members recognize that it serves to preserve the rights and obligations of members under the covered agreements in accordance with customary rules and interpretation of public international law".

[17] Final Act Embodying the results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, 33 ILM 1140 (1994). See also the primary part of the Final Act concluded to dispute settlement, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO Agreement, 33 ILM at 1226(hereinafter to be referred as DSU).

[18] L. Bierman, *The General Agreement on Tariffs and Trade form a Market Perspective* (University of Pennsylvania Journal of International Economic Law, 1996) p.821 at 845.

[19] Emphasis Supplied. See also Appellate Body Report, United States- Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R,Para.152 (adopted 6 November 1998) discussing the respective Preambles).

[20] *Agreement Establishing the World Trade Organization, Preamble*, Reprinted in World Trade Organization, The Legal Texts- The Results of the Uruguay Round of Multilateral Trade Negotiations 3-14 (1999), ('WTO Agreement").

[21] See TBT Agreement, Annex 1.

1970s, with updates in the Uruguay Round in the early 1990s.[22] Not surprisingly, the TBT Agreement has mentioned 'the environment' as a relevant policy purpose. This Agreement is lex specialis with respect to the more generally applicable GATT.[23]

The Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") is designed to protect human, animal and plant life or health under the WTO framework,[24] The Agreement on Agriculture where several references to environmental protection have been included, The Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS") which has implications for environmental management, and The Understanding on Rules and Procedures Governing the Settlement of Disputes (" DSU") sets out the framework where WTO adjudicators settles trade and non-trade issues, including environmental matters.[25]

A committee on trade and environment (cte)

At the end of the Uruguay Round, in 1995, a Committee on Trade and Environment (CTE) in the WTO has been established by the 1994 Marrakesh Ministerial Decision in order to promote the relationship between environmental and trade measures with the ultimate aim that both should be mutually supportive also a view provided in Agenda 21. Ministers had also adopted a decision on Trade and Environment, which had emphasized that: there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other hand.[26] It was the outcome of the Uruguay Round which brought trade and environment much closer. Therefore, we can say the trade-related environmental issues were seriously started taking up after the establishment of the WTO dispute settlement body.

III. Determination Of The Jurisdiction Of WTO In Trade Related Environmental Matters

Before 1991, the relationship between protections of the environment an international trade was an arcane specialty that attracted little attention.[27] The WTO dispute settlement system has jurisdiction to try trade-related environmental issues is the critical area to be discussed. Since the GATT panel reports has clearly showed an institutional bias in favor of free trade and has left controversial questions for the WTO dispute settlement

[22] See The Agreement on Technical Barriers to Trade, WTO Agreement Annex 1A (hereinafter to be referred as TBT Agreement).
[23] See Panel Report, European Communities-Trade Description of Sardines, WT/DS231/R, (29 May 2002).
[24] See SPS Agreement, Annex 1.
[25] See Matthew Stilwell and Jan Bohanes, *Trade and the Environment :The World Trade Organization: Legal, Economic and Political Analysis* (Vol.II Springer publication, 2005) p. 513.
[26] Decision on Trade and Environment, adopted by ministers at the meeting of the Uruguay Round Trade Negotiations Committee in Marrakesh on 14th Apr. 1994.
[27] See William J. Baumol, *Environmental Protection, International spillovers and TRADE* (1971).

body. A question is raised that WTO dispute settlement body, being a trade forum is competent and justifiable in dealing with cases pertaining to environmental issues. It can be said that the Appellate Body in the WTO has seen adopting balancing approaches in the issues involving environment related trade measures such as Gasoline and Shrimp-Turtle. In these cases, the Appellate Body has paid much attention to balancing the promotion of trade with environmental protection while interpreting Article XX of GATT.

GATT Panel Reports's Impact on Environmentists

The critical question among many issues raised in this jurisprudence are those of institutional power distribution, treaty compliance, role of tribunals in settlement negotiations, use of prior reports as a sort of *"precedent"*, legal authority of an organization to interpret its own character, and third party interests in a procedure between two other disputants, to say nothing of the heading-grabbing questions such as those in the 1991 *Tuna-Dolphin case* mediating a clash between international trade and environmental treaties.[28]

Everything changed with the decision in the *Tuna Dolphin I case*. In which a GATT panel declared a U.S. embargo on tuna caught by fishing methods causing high dolphin mortality to be illegal.[29] This holding was reiterated by the second GATT panel in Tuna Dolphin II decision, which involved the legality of a secondary embargo of tuna products from countries that processed tuna caught by the offending countries. [30] This was the very first clash from where trade specialists versus environmentalist's issues were raised up.

From an environmental perspective, however, it is often the production process that gives rise to concern and that is targeted by environmental measures (for example greenhouse gas emissions of manufacturing processes). Indeed, many international environmental agreements are about restricting the environmentally damaging side effects of global economic activities, and environmentalists have long complained about the GATT's 'chilling' effect on taking out trade measures focused on polluting production methods (Eckersley 2004).[31]

Interpretative problem with articles xx (b) and xx (g)

There are a number of important interpretive problems with respect to Article XX, and some of them are key to the environmental-trade liberalization clash. Two interpretive questions in particular stand out, namely the interpretation of the word "necessary", and the question of "whose health", or which "exhaustible natural resources" can be left to the decision of the WTO dispute settlement body. A major question here is whether

[28] *Tuna/Dolphin case*, GATT, DS21/R of September 3, 1991. Also see J.H. Jackson, *Dolphins and Hormones: GATT and the legal Environment for International Trade after the Uruguay Round* (Little Rock Law Journal, 1992) p.429-454.
[29] *United States-Restrictions on Imports of Tuna*, GATT B.I.S.D. (39TH Supp.) at 155 (1993), reprinted in 30 I.L.M. 1594 (1991) (unadopted) (hereinafter to be referred as Tuna Dolphin I).
[30] *United States-Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, reprinted in 33 I.L.M. 839 (1994) (unadopted) (hereinafter to be referred as Tuna Dolphin II).
[31] *supra* note 8.

TO dispute settlement system has jurisdiction on the interpretation of such terms under Article XX as these words clearly need interpretive attention.[32]

Article xx (g) of GATT

US-Shrimp is one of the best examples in the WTO jurisprudence of the diversity of extraneous legal material which has been taken into account in the interpretation process. In this case, a compliant had been filed by several countries with the WTO alleging that United States had violated its WTO obligations by putting ban imposition on the importation of certain shrimps and shrimp products from WTO members.[33] In the case, the Appellate Body reversed panel's method of analysis, and proceeded with the interpretive approach thus, interpreting article XX(g). While doing so, the Appellate Body recognized that environmental protection should be justified as part of GATT 1994 with the policy consideration behind this ruling, i.e., importance of environmental protection within the framework of the WTO. The Appellate Body overruled the Panel and held that American measure qualified provisionally under Article XX (g) as necessary to conserve the life and health of sea turtles. Appellate Body held sea turtles are a "natural resource". They are "exhaustible" and all seven of their species is listed in App.1 of CITES as threatened with extinction.[34]

In this context, the Appellate Body referred to a number of legal instruments but also modern biological sciences, which "teach us that living species, though in principle, capable of reproduction and, in that sense, 'renewable', are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as 'finite' as petroleum, iron ore and other non-living resources.[35] Surveying the modern international environmental agreements, the Appellate Body showed the references in them to 'natural resources' embraces living organisms and non-living objects.[36] Thus, the Appellate Body held the term "natural resources" in Article XX (g) covers both living and non-living stocks.

The Appellate Body pointed out the complete lack of evidence from that history to indicate the drafters intended to exclude living assets from the category of "natural resources". To the contrary, two adopted GATT panel reports ruled fish is an "exhaustible natural resource" under Article XX (g): the 1988 of Canada-Measures Affecting Exports of Unprocessed Herring and Salmon; and the 1982 case of United States-

[32] John H.Jackson, *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (1st edn., The Press Syndicate of the University of Cambridge, 2000).
[33] Marina Foltea, *International Organizations in WTO Dispute Settlement: How much institutional sensitivity?* (1st edn., Cambridge University Press, 2012).
[34] See Appellate Body Report, United States- Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R,Para.132 (adopted 6 November 1998).
[35] US-Shrimp, ABR, para.128.
[36] See Appellate Body Report, United States- Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R,Para.130 (adopted 6 November 1998).

Prohibition of Imports of Tuna and Tuna Products from Canada.[37]

In *the Reformulated Gasoline case*, clean air was accepted as being an exhaustible natural resource as were sea turtles in *the Shrimp-Turtle case*.[38] The Appellate Body also emphasized the key word in Para. (g) "were actually crafted more than 50 years ago." The Panel read "exhaustible natural resources" as static, i.e. as neither requiring nor amenable to evolutionary definition. The Appellate body declared these words "must be read by a treaty interpretation in the light of contemporary concerns of the community of nations about the protection and conservation of the environment".[39] Those concerns are also evident from the Preamble to the WTO Agreement, which informs GATT and expressly recognizes the importance of sustainable development.

Thus, a generous view has been taken by the Appellate Body regarding this matter and concluded that "resource" may be living or non-living, and in order to come under the permit of "exhaustible", it need not to be amongst rarest and endangered one. Thus, any living or non-living resource specifically addressed by MEAs would be qualified under its interpretation of exhaustible natural resources.

Article xx (b) of GATT

The Appellate Body has fashioned a new approach to consider the GATT compatibility of health measures "necessary to protect human, animal or plant life or health" under Article XX (b).[40] The Appellate Body in the *EC-Asbestos case* provided a new interpretation of "necessary "of GATT Article XX (b) as *"reasonably available"*.[41]

According to the GATT panel in *Thailand-Restrictions on the Importation of and Internal Taxes on Cigarettes*,[42] a measure will be "necessary to protect human, animal or plant life or health" under the Article XX (b) exception if there are no alternative measures that are consistent, or more consistent, with GATT.

From the above-discussions, it can be very well said that WTO dispute settlement body has a jurisdiction to interpret the expressions under Article XX.

Trade related environment disputes under GATT/WTO

It is evident that there are ample of disputes linking trade and environment protection which has been

[37] See GATT Panel Report, Canada- Measures Affecting Exports of Unprocessed Herring and Salmon, B.I.S.D.(35th Supp.) 98 at Para.4.4 (1989) (adopted 22 March 1988); GATT Panel Report, United States-Prohibition of Imports of Tuna and Tuna Products from Canada, B.I.S.D.(29th Supp.) 91 at Para 4.9 (1983) (adopted 22 February 1982).
[38] Fiona Macmillan, *WTO and the Environment* (Sweet & Maxwell Limited, 2001).
[39] See Appellate Body Report, United States- Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R,Para.129 (adopted 6 November 1998).
[40] M.Matsushita, *World Trade Oganization* (2nd edn., Oxford University Press, 2006).
[41] Appellate Body Report, *EC-Asbestos*, para.172.
[42] *Thailand-Restrictions on the Importation of and Internal Taxes on Cigarettes*, Panel Report, B.I.S.D. (29TH Supp.) at 200 (1991), 37S/200,DS10/R, adopted 7 November, 1990.

highlighted more into the international trade regime. In fact, these matters are seemed to become a regular matter for consideration by the WTO dispute settlement system. This chapter provides a picture of the classic environmental disputes during the WTO era.

In reality, GATT has talked very less about the environment. The 1992 *Tuna Dolphin I case* "essentially pitted the United States against the rest of the world…".[43] It was in 1991, tuna-dolphin controversy between Mexico and the United States relating to free trade and environment issues came to the light. The new principles which were established in the Shrimp-Turtle case were made in light of considering environment at the edge than those that had been established by GATT panels in the earlier *tuna-dolphin cases.* [44]

Considering too, the Appellate Body's reliance on the findings in a subsequent case, Turtle Shrimp: "As we emphasized in United States-Gasoline, WTO members are free to adopt their own policies aimed at protecting the environment as long as, in doing so, they fulfill their obligations and respect the rights of other members under the WTO Agreement."[45]

Taking the controversial Shrimp-Turtle panel report, there was a statement made by the Director General of the WTO which put an open threat to the jurisdiction of WTO dispute settlement system. The WTO Director General, Renato Ruggiero, pleaded with the members that there is no good reason to make the WTO Dispute Settlement System the judge, jury and police of global environmental values. The central work of the WTO, he said, "is trade liberalization, and Members should not ask it to resolve matters that are better addressed in other contexts."[46]

In spite of such arguments, the WTO dispute settlement body had been seen resolving matters related to environmental disputes and with the objective of promoting the balancing approach between trade liberalization and environmental protection, the WTO dispute settlement is fully aware of the necessity and importance of the environmental protection as a goal for national and international policy. The Appellate Body in its reasoning in Shrimp-Turtle case also stated that it has never pointed out that protection and preservation of the environment has no significance to the members of the WTO. It furthers added by stating it is free to the discretion of members to adopt measures in order to protect endangered species.[47]

From the above-discussed jurisprudential aspects of the trade and environmental issues, and the dispute settlement body's approach, it clearly indicates that they are more and more concerned about the environmental

[43] United States International Trade Commission, *Trade Issues of the 1990s-Part I,* (International Economic Review, November 1994).
[44] R. Daniel Kelemen, *The Limits of Judicial Power Trade-Environment Disputes in the GATT/WTO and the EU* (Sage Publication, Vol. 34 No. 6, August 2001) p. 622-650
[45] Appellate Body Report, United States-Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, pt.III.B (adopted 20 May 1996) (emphasis added).
[46] See e.g. Raj Bhala, *Modern GATT law* (London Sweet & Maxwell Ltd. ,2005) pg.662
[47] Autar Krishen Koul, *Guide to the WTO & GATT: Economics, law and Politics* (4th edn.,Satyam Law International , 2013) pg.607.

protection at the same time and hence, WTO dispute settlement body is considered to be the appropriate forum to address trade-environmental disputes and thus, it has jurisdiction to try such cases

IV. Application Of International Environmental Law In The WTO Dispute Settlement System

There are three categories of International law based on its role in the WTO dispute settlement system.[48]The first category consists of rules of international law that have been incorporated into the WTO system by explicit reference.[49] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), for instance, assimilates provisions of certain international intellectual property conventions. The second category contains general principles and customary rules of public international law.[50] Here, it is useful to note that customary rules of treaty interpretation have been incorporated into the body of WTO law through Article 3.2 of the DSU and have been codified in the Vienna Convention on Law of Treaties (VCLT), which has also been frequently referred to in the WTO jurisprudence.[51]And the third category includes international treaties not explicitly referred to in the WTO Agreement.[52] Here, the second and the third categories are referred as 'non-WTO norms' or 'non-WTO law'.

Role of non-WTO norms under WTO as a debatable issue

It is vivid that WTO panels and the AB are competent to apply any incorporated international rules whenever it is required in a dispute. Such norms have no doubt effectively become a part of the WTO law and thus serve as a direct source of law in WTO dispute settlement proceedings. But which is disputable here is whether the WTO dispute settlement system may directly apply non-WTO norms. In theory, non-WTO norms of international law could play its role in the WTO DSM through direct application, or as a source of interpretative material, or as factual evidence.[53]There are set of influential scholars such as Marceau and Trachtman who have given restrictive interpretation of the substantive competence of the WTO dispute settlement system. According to them, the applicable law in the WTO dispute settlement is restricted to the covered agreements and incorporated international law. It simply means non-WTO norms of international law such as international environmental law cannot be directly applied.

[48] M.Oesch, *Standards of Review in WTO Dispute Resolution* (Oxford University Press, 2003) p.209.
[49] Ibid., 209-211.
[50] Oesch, supra n. 10.
[51] A.H. Quereshi, *Interpreting WTO Agreements : Problems and Perspectives* (Cambridge University Press,2006), p.3-29
[52] Oesch, supra n.10.
[53] Kati Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Wolters Kluwer Law Intenational,2011).

Scope of the WTO dispute settlement system

According to Article 1.1 of the DSU, its provision apply to disputes 'brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 of this Understanding', in other words only to the disputes concerning the 'covered agreements'. The reference to 'covered agreements' is repeated in Articles 7.2[54] and 11[55]of the DSU. Article 3.2[56] of the DSU is also important for dealing the scope of the WTO dispute settlement system. Further, Article 19.2[57] also confirms the same intention. Therefore, in the light of the above-mentioned provisions of the DSU, it seems clear that the jurisdiction *ratione materiae* of the WTO dispute settlement system is limited to the covered agreements.[58]

However, there have been several other WTO influential scholars who have kept a different set of views and argued that WTO panels and the AB can apply non-WTO norms of international law. One of the leading WTO law textbooks indicates that the covered agreements do not exhaust the sources of relevant law but all sources mentioned in Article 38(1) of the Statutes of the International Court of Justice ' are potential sources of law in WTO dispute settlement'.[59]

This is because the terms of this provision ' are effectively brought into the WTO dispute settlement by Articles 3.2 and 7 of the DSU.[60] In case of conflicts that cannot be solved through interpretation, the situation should be resolved using 'recognized public international law interpretative tools to break the conflicts.[61]

As also indicted by the International Law Commission (ILC), that a limited jurisdiction does not imply a limitation to the scope of the law applicable. It further explains that: "even if it is clear that competence of the WTO bodies relevant rights and obligations, WTO bodies must situate those rights and obligations within the overall context of general international law (including the relevant environmental and human rights treaties)."[62]

Others, such as Pauwelyn, tried to make a more interactive and flexible approach to the boundaries between the

[54] Article 7.2 of DSU states Panels "shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".
[55] See Article 11 of DSU states that a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".
[56] Article 3.2 of the DSU states "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".
[57] Article 19.2 of the DSU states " in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements".
[58] *Supra* note,52.
[59] M. Matsushita & T.J.Schoenbaum & P.Mavroidis, *The World Trade Organization. Law Practice and Policy* (1st edn, Oxford University Press, 2003) p.54.
[60] *Ibid*.
[61] *Ibid*., 74-75
[62] International Law Commission, 28-29

WTO system and other norms of international law and argued that unless an international treaty by an explicit wording contracts out of general international law, general international law automatically applies to the regime created and fills gaps left by the treaty.[63] He indicates that since the WTO Agreement contains no such 'contracting out' provision, it is unnecessary for the DSU to explicitly refer to general international law as a source of law: The WTO system is automatically part of general international law.[64] Here, Pauwelyn's legal argumentation conveyed the meaning that international environmental law must be placed on a more equal footing as that of WTO norms.

Thus, from the above-discussed arguments, it can be said that the practice adopted by the WTO dispute settlement system has been seen citing both as supporting the narrow view on its substantive limits and disagreeing conclusion.

Jurisprudential aspects of the WTO

Practically taken, In Shrimp- Turtle decision, the Appellate Body has referred several international environmental instruments such as the Rio Declaration, Agenda 21, Convention on Biological Diversity, Convention on Migratory Species of Wild Animals (CMS) and Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[65]

There are two important possibilities where non-WTO rules can be considered during the WTO proceedings. The first possibility is the role of the non –WTO rules of international law through interpretation. This can be best understood with the customary rules of treaty interpretation and more specifically Article 31.3 (c) of the Vienna Convention on the Law of Treaties which provides that " in the interpretation process, there shall be taken into account, together with the context …any relevant rules of international law applicable in the relations between the parties. Therefore, The WTO Agreement, as with any other treaty, should be interpreted taking into account other relevant and applicable rules of international law, including human rights law. In this context, it should be generally be possible to interpret WTO provisions in a way that allows and encourages WTO members to respect all their international law obligations.[66]

In US-Gasoline, the Appellate Body stated for the first time that, under Article 3(2) of the DSU, reference to 'customary rules of interpretation of public international law' had to be understood as reference to the rules of interpretation as laid down in the Vienna Convention on the law of Treaties.[67] Ever since, panels and appellate

[63] J.Pauwelyn, *How to win a World Trade Organization Dispute Based on Non-World Trade Organization Law* (Journal of World Trade, 2003) p.1001-1002.
[64] *Ibid*.
[65] Supra n.19.
[66] See G. Marceau, *A Call for Coherence in International Law: Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement System*(Journal of World Trade 33 ,1999) p.108.
[67] *US-Gasoline*, ABR, part III.B,16-17.

body have constantly reiterated that Article 31 and 32 of the VCLT are customary international laws and part of the binding principles for the interpretation of WTO law.[68] They are binding on every WTO member regardless of whether they have ratified the Convention.[69]

The second possibility through which non-WTO norms can be considered as an important aspect in the WTO dispute settlement is using them as facts or evidence in the WTO proceedings. A practical example witnessed from the WTO jurisprudence can be seen in Shimp-Turtle case, where the Appellate Body emphasized the reference by the Article 21.5 panel to the Inter- American Convention for the Protection and Conservation of Sea Turtle "as factual reference in this exercise of comparison".[70] Thus, it is vivid to some extent in the light of Article 31.3 (c) of VCLT that non-WTO norms should be taken into consideration for interpretation of WTO laws by the WTO dispute settlement system as and when relevant.

Although the jurisdiction of WTO panels is limited to WTO norms, in the examination of those claims, panels may have to refer to or apply other non-WTO norms of international law. It can be pointed out here that if the WTO dispute settlement were restricted to the WTO-covered agreements, then such reference to non-WTO norms as taken by the Appellate Body in the above-discussed cases would not have been possible. Based on explicit case law to date, it is by now beyond doubt that scope of non-WTO rules that panels may do so for the interpretation of terms set out in WTO provisions.[71]

V. CONCLUSION

There are no dispute resolution mechanisms as powerful as the WTO dispute settlement system with its compulsory jurisdiction and competence to authorize sanctions to enforce their decisions.[72]The WTO dispute settlement body is the only appropriate international forum for settling disputes pertaining to trade and environment issues. As trade law and Environment law are two highly specialized areas of the international law and thus, there should be harmony and constructive approach in dealing with the same.[73]Seeing the scenario, in my opinion the WTO has to focus on giving a specific recognition to environmental values. There is a need to amend Article XX (b) and (g) of the GATT in order to bring changes to the current general exception for trade measures to address more and more measures protecting trade and environmental issues. Also, there is a need to

[68] E.g. *Japan-Alcoholic Beverages II, ABR*, part D, 10; India-Patents, ABR, paras, 43-46.
[69] See, Lennard, 'Navigating by the Stars', 18; See also Pierre Pescatore, William J. Davey and Andreas F. Lowenfeld, *Handbook of the WTO/GATT Dispute Settlement* (Transnational Publishers Inc., 1998) p.12.
[70] See WTO Appellate Body Report, United States- Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, 22 Oct.2001, Para.122.
[71] Joost Pauwelyn, *The Application of Non-WTO rules of International Law in WTO dispute settlement :The World Trade Organization: Legal, Economic and Political Analysis* (Vol.1 Springer publication, 2005) p.1424.
[72] See M. Koskennieni, *New Institutions and Procedures for Implementation Control and Reaction, in Greening International Institutions* (London: Earthscan, 1996) p.236.
[73] See M.Koskenniemi ,*Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*(International Law Commission 13 Apr. 2006) UN. Doc. A/CN.4/L.682.

declare WTO dispute settlement system as an appropriate forum for addressing trade-related environmental disputes and thus, somehow, alleviating the controversial question of jurisdiction issue of the WTO dispute settlement in relation to environment issues. Therefore, allowing the trade liberalization and environmental protection to share a common goal and for the redressal of the environmental issues, the WTO dispute settlement body has complete jurisdiction and competent enough to deal with trade related environmental disputes.

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