

ENVIRONMENTAL PROTECTION AND WTO

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INTRODUCTION:

Since the setting up of W.T.O. in January 1995, the process of globalization has been accelerated. The structural adjustment strategies adopted by the developing countries at the behest of World Bank and IMF, has resulted in the introduction of LPG (Liberalization Privatization and Globalization) policies in India and other countries during the decade of 1980s and 90s. This coupled with W.T.O. and its various agreements have altered the international economic environment for trade in goods and services, agriculture, industry, IPR etc. The W.T.O. agreements have its impact on trade frontiers of almost all its member countries which is under study at all levels by the Govt., the academicians and researchers in India and in other countries of the World. Similarly the climatic conditions and environment of the world is also one of the issue which is rigorously debated and studied internationally because of the changes which are taking place in the global atmosphere leading towards "climate change and global warming." This issue is a global issue as almost all the countries of the world is experiencing the climate change and its impact on the very existence of all living beings and human beings. This paper is an attempt to study the relationship between W.T.O. and environment. The Border Trade Measures adopted by the member countries in order to protect the environment by controlling emission of carbon dioxide and other greenhouse gases. These measures influence the trade of developing countries. There are instances when certain environmental protection measures adopted by the developed countries for e.g. (Shrimp-turtle case) have affected exports of developing countries. Similarly proposed BTA measures are likely to affect the export of developing countries.

OBJECTIVES -: Keeping in view the scenario of environmental agreements and WTO the paper attempted to achieve the following objectives.

- 1) To know whether WTO has adopted environment specific agreement.
- 2) To review the main provisions of WTO related to environment.
- 3) To explain the concept of border trade measures.
- 4) To analyze the compatibility of BTM (border trade measures) and WTO.
- 5) To analyze the compatibility of BTM and UNFCCC and KYOTO protocol.

With these objectives The paper is divided into four parts..

- 1) Main provisions of W.T.O. in relation to environment.
- 2) Border Trade Measures and its W.T.O. compatibility.
- 3) Border trade measures and UNFCCC and KYOTO protocol
- 4) Conclusion.

Main provisions of W.T.O. in relation to environment.

The World Trade Organization i.e. W.T.O. came into existence on 1st January 1995, after a prolonged seven years round of negotiation at Uruguay. The Uruguay negotiations concluded 13 agreements on various issues related with trade in goods and services among the member

countries. However the W.T.O. does not have stand – alone agreement in the area of the environment or for climate change. However several W.T.O. agreement contain provision that relate to the environment. Promoting sustainable development is one of fundamental objectives of the W.T.O. The Preamble to the Marrakesh agreement establishing the W.T.O. emphasizes the optimal use of "the world's resources in accordance with objective of sustainable development.". The WTO agreement contain certain "Green Provision dealing with environmental issues. It allows a large measure of autonomy to members to adopt measures to protect the environment subject to certain specified conditions included in various WTO agreements. Some of these measures are as under.

(i) Article XX of the General Agreement on Tariffs and Trade (GATT), 1994 permits W.T.O. Members to depart from their GATT obligations for legitimate national policy objectives. These objectives include:

(a) Article XX (b): Measures to protect human, animal or plant life or health; and

(b) Article XX (g): Conservation of exhaustible natural resources.

(ii) The General Agreement on Trade in Services (GATS) also contains an exception to identical GATT Article XX (b).

(iii) Article 27 of the Trade Related Intellectual Property Rights (TRIPS) Agreement states that "Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary... to protect human, animal or plant life or health or to avoid serious prejudice to the environment".

(iv) Agreement on Subsidies and Countervailing Measures (ASCM) contained an exemption for certain environmental subsidies (provision has since lapsed).

(v) Agreement on Technical Barriers to Trade (TBT Agreement) recognizes protection of the environment as a legitimate objective and allows Members to take necessary measures towards this end subject to meeting certain requirements.

(vi) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) allows Members to use sanitary or phytosanitary measures to protect humans, plants and animals from contaminants, disease-carrying organisms, and pests. It elaborates rules for the application of the provisions of Article XX (b).

(vii) The Preamble of the Agreement on Agriculture (AOA) reiterates Members' commitment to reform agriculture in a manner that protects the environment. Under the agreement, domestic support measures with minimal impact on trade (known as "green box" measures) are allowed and are excluded from reduction commitments. Among them are expenditures under environmental programs, provided that they meet certain conditions.

The autonomy in taking environmental measures under the W.T.O. regime is, however, circumscribed by the requirement to respect the agreed rules of international trade as enshrined in several W.T.O. agreements. Where any national action taken for environmental purposes has trans-border effect, the requirements of the GATT and other covered W.T.O. Agreements will have to be complied with. This is because, it is often noticed that national measures taken for environmental purposes are actually a subterfuge for serving other interests, such as, protection of the domestic industry and can thus adversely affect the trade interests of other Members. The

W.T.O. rulebook thus allows a large degree of flexibility to its Members to adopt environmental measures within their territories, provided this is done in a non-protectionist manner. It is not a case of trade “trumping” the environment.

In order to deal with the trade and environmental issue WTO created Trade and Environment Committee. The 2001 Doha Ministerial conference kicked off negotiations in some aspects of the subject. The two basic principles of the committee are as follows:

1. The WTO is competent to deal with trade. In the case of environmental issues its task is to study the question that arise when environmental policies of member countries have significant impact on trade.

If the committee does identify the problems its solution must continue to uphold the principles of WTO trading systems. Under W.T.O. the member countries are of the view that an open equitable and non-discriminatory multilateral trading system can contribute, both at the National and global level to better protect and conserve environmental resources and promote sustainable development. The provisions of agreements on goods and services and intellectual property allow governments to give priority to their domestic environmental policies.

THE RELATIONSHIP BETWEEN MULTILATERAL ENVIRONMENTAL AGREEMENT (MEAS) AND WTO AGREEMENTS.

The environmental issues since 1960s has been dealt by different agreements and conventions which are outside the WTO, There are about 200 such international agreements or MEAs. About twenty of these include provisions that affect trade. E.g. the convention on International trade in endangered species (CITES), Basel convention on the trade or transportation or Montreal protocol, ban trade in certain products or allow countries to restrict trade in certain circumstance. The WTO committee doesn't see any conflict or contradiction between the MEAs and WTO's green provisions. Sometimes the environmental policies and actions of WTO members may conflict with the trade agreement of WTO, in such case the countries should not put restrictions rather they can take alternative actions like helping countries acquire environmentally friendly technology providing them financial assistance and training. The WTO rule allows a large degree of flexibility to its members to adopt environmental measures within their territories provided it is done in a non-protectionist manner.

Border Trade Measures and WTO compatibility

In order to protect environment and to achieve the goals of reducing the carbon emission the developed countries like U.S. and European countries are using a number of measures which are termed as "Border Trade Measure" which include measures like carbon tax, cap and trade system or Emission Trading System (ETS) carbon leakage Border Tax Adjustment (BTA).

1. **Carbon Tax :** A carbon tax is a tax on the carbon content of Fuels i.e. effectively a tax on the carbon dioxide (CO₂) emissions from burning fossil fuels. These taxes are levied at a fixed rate that may be linked to their carbon content. Some environmental taxes also include other Green House Gases (GHGS) .The European countries such as Sweden, Finland and Denmark have used carbon tax successfully to cut carbon emission. The carbon tax can generally be levied in four different ways.

- Product tax e.g. tax on consumption of fossil fuels or tax on motor vehicle.
- Tax on inputs that are physically incorporated in the final product.
- Tax on emissions of CO (embedded energy tax) during the production process.
- Tax on inputs that are not physically present in the final product.

Besides the carbon emission tax another alternative approach is used by the developed countries, which is known as carbon cap and trade system or emission trading system (ETS) e.g. the U.S. Sulphur dioxide cap trade system instituted in early 1990s, the draft America clean energy & security Act 2009 (Waxman –Markey Bill) is also based on ETS.

a) **Product taxes on consumption:** The carbon tax directly levied on domestic products e.g. taxes imposed on domestic fuels and imported "like fuels is eligible for tax – adjustment at the border under the W.T.O. rules. The GATT Article II:2(a) allows W.T.O. members to impose a charge equivalent to an internal tax levied on a like domestic product, on the importation of any product. Taxes directly levied on products such as excise duties, sales tax and value added tax are eligible for adjustment.

b) Taxes on inputs that are physically incorporated.

The carbon tax on product inputs that are physically incorporated into the final product is also border adjustable under GATT Article III:2, thus the taxes on articles used in the manufacture on BTA i.e. in imposing an equivalent tax on "like imported products.

c) Taxes on inputs that are not physically incorporated.

The W.T.O. rules are not clear whether the tax levied on certain inputs such as fuels, energy oil etc., that are not physically incorporated into the final product can be adjusted at the border. Many commentators are of the view that the tax on fuels, oil & energy consumed during tax production process cannot be adjusted at the border because energy is consumed and not physically incorporated. This stand is evident from a plain reading of Article II:2(a) of GATT, 1994 is clear that this Article allows the tax adjustment to be based on an "article from which the imported product has been manufactured or produced in whole or in part and not "with the help of which the imported and the like domestic product were produced. This implies that the tax on fuels, oil & energy consumed during the production process is not border adjustable.

TAX ON EMISSIONS OF CARBON DIOXIDE (CO₂) DURING PRODUCTION PROCESS.

There have been proposals that carbon taxes should be imposed on imported products based on the emissions of carbon dioxide generated in the production process. This is called a carbon footprint tax or a tax on embedded carbon. The carbon footprint of a product varies widely. The embedded carbon of a product will also vary widely depending upon the method of calculation. In a BTA scheme based on the emissions of carbon dioxide during the production process the practical challenge is of the measurement or quantification of such emissions.

Depending upon the manufacturing process technology adopted and the source of energy the CO₂ emission for manufacturing will differ from firm to firm from country to country. Hence the use of BTA scheme based on carbon emission generated in the production process is very difficult to administer. Besides it may also lead to violation of non-discrimination principle of GATT Article

1 as under this scheme the products originating from different countries would be treated differently whereas the origin based discrimination is completely prohibited under the W.T.O. rules.

Similarly BTA based on ETS (Emission Trading System) according to experts is not W.T.O. compatible. The US Govt. has passed a bill regarding import allowances. The provision is that the importer should submit emission allowance as a condition of import from the countries that are not taking emission control measures. The US importers will be required to submit international reserve allowances for GHG emissions. However as per the US Bill submissions of international reserve allowances would not be required if the product is imported from a country that is taking emission reduction measures and such measures are at least as stringent as that of the US. However the proposed import allowance requirement bill would be a violation of GATT Article – 1 because of discrimination between countries based on the criterion of having taken or having failed to take emission reduction measures. The developing countries like India will be discriminated against the developed countries say France, which are taking action to reduce emission comparable to that of US. Hence such discrimination will be a clear violation of the most favored nation (MFN) principle of GATT/W.T.O.

The developed countries have been adopting unilateral trade measures in order to protect environment. The shrimp turtle case, or Tuna – Dolphin cases, Beef hormone cases are the examples of such unilateral trade measures. This section of the paper attempts to highlight how far the UNFCCC and KYOTO protocol are WTO compatible.

BORDER TRADE MEASURES UNFCCC AND KYOTO PROTOCOL

Article 3.5 of the UNFCCC clearly states that “The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Further, the measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade”. The language of second sentence of the Article has been borrowed from the Chapeau of Article XX of GATT.

Thus Article 3.5 of the UNFCCC encourages Parties to promote an open international economic system but also permits unilateral trade measures provided they are not arbitrary or unjustifiable discrimination. The Art 3.5 needs to be interpreted in the context of the other provisions of the UNFCCC. These provisions provide the framework within which Art. 3.5 should be exercised. The relevant Articles are as under:

- (i) Art 3.1 UNFCCC: Emphasizes that the Parties protect the climate system on the basis of equity and in accordance with their common but differentiated responsibilities (CBDR) and respective capabilities. Also, the developed country Parties should take the lead in combating CC and the adverse effects thereof.

However, with unilateral trade measures the developing countries would be forced to undertake legally binding emission reduction commitments at the same level as the developed countries,

once they are confronted by such measures, in order to be able to retain the competitiveness of their exports. Further, they will be required to undertake mitigation measures comparable in terms of stringency with those adopted by developed countries, else their emissions are likely to be higher than those in the importing country.

- (ii) Art3.3 UNFCCC: Enjoins on the Parties to make efforts to address climate change cooperatively by interested Parties. Unilateral actions are opposed to cooperative efforts, especially when the developing countries are willing to join the battle through voluntary efforts (recent announcements by many developing countries, including India and China) and also through multilaterally agreed deals such as the recent Copenhagen Accord between US and BASIC countries. In contrast countries such as US have been laggards by refusing to ratify the Kyoto Protocol as yet.
- (iii) Art 3.4 UNFCCC: Clarifies that the policies and measures to protect the climate system should be appropriate to the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change. Under such a dispensation asking developing countries to either take measures commensurate with the developed countries or risk losing their export markets (because of border measures) is a clear obstacle in their economic development path and disregards their specific conditions.
- (iv) Art4.5 UNFCCC: Enjoins on the developed country Parties and other developed Parties included in Annex II to take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention.
- (v) Art 4.7 UNFCCC: Clarifies that the extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology. Further, it will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.

The above two provisions of Article 4 UNFCCC clarify that the developed countries should take lead to make finance and technology available to the developing countries before they are asked to implement their commitments under the Convention. However, with unilateral trade measures, the developing countries may be required to use similarly advanced technology as developed countries (else emissions are quite likely to be more and their exports would lose competitiveness in face of a carbon tariff). This is turning the UNFCCC provisions on their head. Naturally, this will affect the capacity of the developing country Parties to address their economic and social development and poverty eradication needs.

Further, it needs to be kept in view that adhoc unilateral measures can only have some degree of legitimacy when there is a lack of multilateral agreements to deal with an issue. However, the UNFCCC Treaty and now the US-BASIC Copenhagen Accord has created an enabling platform on which to build multilateral agreements to address CC rather than use ad-hoc, non-transparent and unilateral measures to achieve the intended objectives.

CONCLUSION:

The W.T.O. is not a watch dog for protection of environment, as it is an institution for promoting free and fair trade among its member countries. But it does care for environment and climate change in its countries as number of provisions dealing with environmental issues. It created a special committee Trade and Environment Committee to deal with such issues. However the practices of the developed countries dealing with trade as well as environment indicates that these countries in one guise or the other, have initiated unilateral trade measures e.g. carbon tax, ETS, BTA measures restricting imports from developing countries in the guise of protection of environment. Such policies termed as unilateral trade measures are not W.T.O. compatible such unilateral protectionist policies are also prohibited by the UNFCCC and the Kyoto protocol such measures imposing restrictions on imports on the ground of providing "level playing field" or maintaining the complete newness of the domestic industry etc. are likely to be viewed as were protectionist measures by the developed countries to block the exports of the proper nations.

Similarly efforts to address climate change through unilateral trade measures will lead to trade restriction such policies may lead to massive justified W.T.O. legal retaliation by the affected countries.

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