

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 4

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Interpretation of Exhaustible Natural Resources under Article XX(g) GATT and Sustainable Development

ANJUSREE P. L.¹ AND ANUSREE P.L.²

ABSTRACT

Trade and environment are interconnected. The WTO, being one of the prominent international institutions that deals with trade, recognized the importance of environment protection through its provisions. The World Trade Organisation has been collaborating with the United Nations Department of Economic and Social Affairs to implement the UN's Agenda 2030 for Sustainable Development. Protection and conservation of natural resources is one of the means to achieve sustainable development. Article XX(g) of the GATT enables the member nations to impose trade restriction, if it is for the conservation of exhaustible natural resources. However, the term 'exhaustible natural resources' is not defined anywhere in the agreement. This paved the way to various interpretations. Some member nations succeeded their claim under Article XX(g) where some other nations which tried to misuse the provision failed. The WTO Dispute Settlement mechanism and the GATT Panel took various factors into consideration while deciding the cases related to the conservation of exhaustible natural resources. Even though the absence of a definition was a problem in the beginning, later it got resolved. The attempt of some nations to limit the scope of the term to certain category of resources can be seen while examining the history. However, now the term 'exhaustible natural resources' now includes a vast variety of natural resources including living and non-living species and minerals.

I. INTRODUCTION

The World Trade Organization is one of the foremost denominations that come to the mind of a person when he thinks about international trade, irrespective of the background he is from. The preamble of the WTO Agreement 1994 clearly indicates the intention of the organization towards the accomplishment of sustainable development goals. The wording of the preamble suggests that the world's resources should be used optimally with an objective of obtaining sustainable development.³ In addition to this objective, it also seeks to protect and preserve the

¹ Author is a LLM PhD Student at National University of Advanced Legal Studies, India.

² Author is a student at N.S.S Law College Kottiyam, Kollam, India.

³ Preamble, WTO Agreement

environment. Such efforts must be consistent with the economic development in various levels⁴. Sustainable development can be interpreted in several ways. The general idea of the principle is that, meet the needs of the present, without compromising the ability of future generations to meet their own needs. Even though it includes climate change and other facets of social issues, this article will be focusing on the environmental aspect of sustainable development.

However, except for the preamble to the WTO, no other provisions in the agreement explicitly mentions anything with respect to the sustainable development goals. Hence, how can a WTO member country could strike a balance between their interest in expansion of trade horizons and protection of environment? If a member nation compromises the trade policies imposed by WTO, that nation may have to go through the multilateral system of dispute settlement or may be restrained from enjoying the benefits that are available to member nations. Nevertheless, they can justify such negotiation of WTO obligation, if their act falls under the purview of any of the general exceptions provided under the General Agreement on Tariffs and Trade (GATT). Among other exceptions Article XX(b) and XX(g) are meant for the protection of environment. The term 'exhaustible natural resources' in Article XX(g) has been interpreted in several ways which expanded the scope of environmental protection through the protection and conservation of natural resources.

II. INTERNATIONAL TRADE AND SUSTAINABLE DEVELOPMENT

As mentioned in the preamble to the WTO Agreement, trade should be conducted with a view of improving standard of living of people. The environment in which the people are living can, to an extent, determine their standard of living. WTO has been working in collaboration with the UN's Department for Economic and Social Affairs to achieve the UN's Agenda 2030 for sustainable development. The same can be achieved through trade liberalization and facilitating a mutually supportive trade and environment system. Article XX(b) and Article XX(g) of GATT explicitly enables the member nation to protect the environment even if it may be in contradiction with the trade policies. In addition to the WTO Agreement and GATT provisions, there are such other international institutions which are supposed to actively participate in the conjunction of trade and sustainable development. Such institutions include the United Nations Conference on Environment and Development (UNCED) and the International Institute for Sustainable Development (IISD). Also, the Millennium Declaration's primary objectives also state that environmental security can only be achieved through effective conservation policies implemented by national governments. Besides these various regional, multilateral, and

⁴ *Ibid.*

bilateral treaties call for global environmental protection for current and future generations.

III. INTERPRETATION OF ARTICLE XX(G) OF GATT

Article XX of GATT provides ten general exceptions, among which two are exclusively related to the protection of environment. Article XX(g) provides that

“(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”⁵

Even though this exception seems to be simple, it has the capacity to protect a vast variety of living and non-living species, through this the environment can be protected. The term ‘exhaustible natural resources’ not being defined, paved way to several discussions. However, the WTO Dispute Settlement Mechanism and the Appellate body, through the interpretation of the term in the given provision, expanded the scope of sustainable development.

When the original GATT was concluded in the year 1947, primary concern was the enhancement of free trade. Also, environment protection and sustainable development was not a blazing picture during that time. On the other hand, those who constructed the international trading system were not completely unaware of the need for some restraint upon the ‘full’ exploitation of the resources of the world.⁶ However, the principal rationale behind the inclusion of Article XX into GATT was for ensuring the signatories that the agreement will not be stringent, rather it will be flexible enough to protect the necessary interests of the member nation. Although this provision ultimately paved way to the goal of sustainable development.

It is evident from the preamble of GATT and the words of the framers of the Agreement that they never included the term ‘exhaustible natural resources’ to be interpreted and expanded in a way which they are being interpreted and expanded in the current scenario.⁷ In the Shrimp – Turtle⁸ case, there was an argument between India, Pakistan and Thailand on one side and US on the other side on whether sea turtle should be included under exhaustible natural resources. Here the former countries argued that biological and renewable resources can’t be considered as exhaustible natural resources. However, the US heavily relied on the general exception

⁵ Article XX(g) GATT.

⁶ Nii Lante Wallace-Bruce and NL Wallace-Bruce, Global trade and sustainable development: two steps forward in the WTO?, *The Comparative and International Law Journal of Southern Africa*, JULY 2002, Vol. 35, No. 2 (JULY 2002), pp. 236-255, Published by: Institute of Foreign and Comparative Law, https://www.jstor.org/stable/pdf/23252209.pdf?refreqid=excelsior%3Aa702cd4119bd169fcc18b72f17aa64b2&a_b_segments=&origin=&initiator=&acceptTC=1

⁷ *Ibid.*

⁸ United States — Import Prohibition of Certain Shrimp and Shrimp Products panel report (1998) 37 ILM 832.

provided under Article XX(g) of GATT. Those who argued for the exclusion of sea turtle under the term pointed out that, during the drafting of Article XX(g), discussions were occurred only on finite resources like minerals. Irrespective of all these arguments, today the said term includes a vast variety of natural resources including living and non-living species and minerals.

IV. WTO DISPUTES AND EVOLUTION OF THE TERM

As already mentioned in the article, the role of WTO Dispute Settlement mechanism and the Appellate body is prominent in the expansion of Article XX(g). Each term in the article was interpreted while keeping the trade and environment balance in mind. The changing perspective of the GATT panel and WTO dispute settlement body towards sustainable development can be traced through the decided disputes. For instance, even though the contention of United States under Article XX(g) was rejected by the GATT panel in Tuna I⁹ by stating that the protection of natural resources was not the primary intention behind the import restriction, Tuna II¹⁰ the panel explicitly recognized the importance of adhering into the principle of sustainable development.

In Shrimp Turtle¹¹ case, the United States imposed prohibition on the import of certain kind of shrimp and shrimp products. The United States justified this prohibition by citing environmental protection through the preservation of exhaustible natural resources. India, Malasia, Pakistan and Thailand who were against the prohibition argued before the appellate body that the reasonable interpretation of the term 'exhaustible natural resources' must be based on the drafting history of Article XX(g) of GATT. The Appellate body placed its reliance on the United States' argument by citing that sea turtles were listed in the most endangered index of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Besides the panel declared that the term "turtle" refers not only to turtles found in US waters, but also to those found outside of the country's borders. Hence, sea turtle fell under the purview of Article XX(g) because of the said dispute.

Living in a clean and pollution free atmosphere is a fundamental right in many of the nations. Over and above that it also contributes towards the achievement of sustainable development

⁹ United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products - Appellate Body Report and Panel Reports pursuant to Article 21.5 of the DSU - Action by the Dispute Settlement Body - Revision WT/DS381/49/Rev.1.

¹⁰ United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products - Appellate Body Report and Panel Reports pursuant to Article 21.5 of the DSU - Action by the Dispute Settlement Body - Revision WT/DS381/49/Rev.1.

¹¹ United States - Import Prohibition of Certain Shrimp and Shrimp Products - Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU - Action by the Dispute Settlement Body WT/DS58/23.

goals. In the *US Gasoline*¹² case the United States' regulating measure on the composition as well as emission impact of gasoline lead to the dispute. The regulation was imposed with the intention of reduction of air pollution in the US. In order to justify such a measure, the member state must show that the said measure and the environmental policy of the nation have a substantial connection. The US succeeded in establishing the connection between the regulation and the environmental policy on conservation of clean air and hence the regulatory measure fell under the purview of Article XX(g).

While discussing the successful claims under Article XX(g), the attempt of certain nations to misuse this general exception, to impose unreasonable trade restrictive practices, can also be seen. The *China Raw Materials*¹³ case is one example for such an attempt. China imposed an export restriction on nine different raw materials which are necessary for the functioning of various industries. The restriction was in violation of the obligations imposed on China under Article VIII, Article X and Article XI of the GATT 1994. In addition, China's Accession Protocol to the WTO was also violated. China justified its export restrictions by claiming that they were required to protect its natural resources under Article XX(g) of GATT along with other provisions. However, the panel and the Appellate body rejected the argument of China and hence China modified its regulation. The latest discussion with respect to the conservation of exhaustible natural resources is in relation to the case *China – Rare Earth Elements*¹⁴ where China failed to claim the benefit of exception under Article XX(g).

V. CONCLUSION

The phrase 'exhaustible natural resources' was coined more than a half-century ago. However, they should not be read as if they were frozen in time; rather, they should be read "in light of contemporary concerns of members of nations about environmental protection and conservation" as observed in the *US Shrimp*¹⁵ case. The concerned bodies interpreted and expanded the term as per the changing concerns of the transforming world. Even though the absence of a definition for the term 'exhaustible natural resources' was a hitch in the initial stages, later it expanded the scope for a generous interpretation of the same. The inclination of the dispute settlement bodies towards the fulfilling of the sustainable development goals was

¹² United States - Standards for Reformulated and Conventional Gasoline - Status Report by the United States - Addendum WT/DS2/10/Add.7.

¹³ China - Measures Related to the Exportation of Various Raw Materials - Understanding between China and the United States regarding procedures under articles 21 and 22 of the DSU WT/DS394/20.

¹⁴ China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum - Understanding between China and the United States regarding procedures under articles 21 and 22 of the DSU WT/DS431/17.

¹⁵ *Supra* note 10.

also appreciable.

The advantage as well as the disadvantage of every legal provision is that it can be set into motion only through interpretation and implementation. The inclusion of various living and non-living species into the term exhaustible natural resources assisted the member nations in conservation of their natural resources to an extent. Hence it can be said that Article XX(g), if constructively interpreted and effectively expanded, has the potential to be used as a tool to achieve the environmental facet of sustainable development. Even though, some of the settlement did not come out in favour of the intention to protect environment, if more disputes raised and settled in the future, such settlements are likely to influence the momentum of fulfilling of sustainable development goals.
