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Public Trust Doctrine and International Trade and Investment Law

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Public Trust Doctrine and International Trade and Investment Law

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Abstract

The Public Trust Doctrine now stands as a major tenet for the State's duty to maintain and safeguard natural resources and the environment for present and future generations. The increasing overlap of environmental regulation and international economic law in the era of globalization has engendered significant conflict between the pursuit of environmental quality and those of international trade and investment. This article focuses on the question whether environmental measures based on the Public Trust Doctrine are compatible with States' international trade and investment obligations. It also explores the limits of environmental exceptions under Article XX(b) and XX(g) GATT, through which states can justify trade-restrictive environmental measures if certain requirements are met and the application of Bilateral Investment Treaties and investment arbitration where foreign investment challenges are raised by foreign investors challenging environmental regulations on grounds of violation of their investment protections. It suggests through references to international jurisprudence and India's constitutional environment regime that an environmental measure based on the Public Trust Doctrine might be a viable defence against India for the State in international trade and investment disputes as long as environmental regulations are non-discriminatory, proportional, and conducted in good faith. The study concludes that sustainable development is the normative ground for reconciliation between environmental concerns and economic prosperity.

Keywords : *Public Trust Doctrine, International Trade Law, International Investment Law, WTO, GATT Article XX, Bilateral Investment Treaties, Environmental Protection, Sustainable Development, Investment Arbitration, State Regulatory Power.*

1.1 Introduction

With the contemporary globalisation, international trade and investment have also taken a priori in leaping to a greater level, which has resulted in fast industrialisation and economic growth, plus exploitation of natural resources. On the one hand, economic development is a prerequisite of growing a country, but nowadays it has brought adverse effects of environmental degradation, natural resources depletion, and disequilibrium. This has posed a dilemma between environmental conservation and international trade and investment requirements.

Under the World Trade Organization (WTO), the goal of international trade is to ensure free trade and lower trade barriers among nations. The environmental protection measures of countries, however, are at times restricting trade, hence it can be some conflict between environmental protection and trade requirements. As an example, the environment regulations, which apply to controlling pollution and animal protection, climate change and conservation of natural resources can have impact on trade and investment.¹

¹ World Trade Organization, Marrakesh Agreement Establishing the World Trade Organization, 1994.

The Public Trust Doctrine also gains importance in this situation since it places a responsibility upon the State to conserve the natural resources and the environment to be used by the people and future generations. The doctrine expects the State to control the consumption of the natural resources and environmental degradation. Nonetheless, the State has environmental regulations that sometimes can be disputed on the basis of international trade and investment agreements.²

As such, the question arises whether the environmental protection moved based on the Public Trust Doctrine is in line with the international trade and investment law.³ There is also a need to consider the question of whether India can defend environmental protection in the international trade law and investment treaties.

This chapter focuses on the interaction of the international trade law, especially the WTO agreements, and environmental protection and observes whether environmental protection can be justified under the international trade law. The chapter also looks at the connection between environmental protection and Bilateral Investment Treaties and the possibility of environmental regulations to be contested by foreign investors.

1.2 WTO and green protection

The World Trade Organization (WTO) is a global body taking watch over global trade among nations. The key goal of the WTO is the free trade initiative through the minimization of congestion of trade like tariffs, quotas and trade restrictions. Nevertheless, the WTO understands that they must not trade at the expense of environmental protection and health of people as well.

The agreements of the WTO have some provisions that enables countries to implement some measures to protect the environment. Article XX of the General Agreement on Tariffs and Trade (GATT) which gives general exceptions in the trade obligations are one of the most crucial points. Article XX will enable the countries to take measures which are necessary to preserve human, animal or plant life, or health and measures concerned with the conservation of depleting natural resources.⁴

In such a way, the WTO law acknowledges the significance of environmental protection as an objective and permits the countries to implement environmental protection actions, although the measures should not be arbitrary, discriminatory, or disguised limitations of global trade.

Various international trade controversies and problems associated with environmental protection have been witnessed. The environment protection policies were sometimes defied on the grounds of a trade barrier. Nevertheless, WTO dispute settlement administrations have acknowledged that environmental protection is a valid aim and nations could accept environmental protection practices under a set of circumstances.

The correlation between WTO law and the environment is thus founded on the concept of sustainable development. The WTO acknowledges that trade and protection of the environment should be complementary and also environmental protection should be permitted as long as the measures are required and reasonably justified.⁵

In the case of unity such as India, the Article 21, 48A and 51A(g) of the Constitution, the Protection of the environment forms the part of the constitutional responsibility, and Article 48 of the Public Trust Doctrine asks the State to conserve natural resources. As such, the case of

² Philippe Sands, *Principles of International Environmental Law* 305 (Cambridge University Press, Cambridge, 2nd edn., 2003)

³ *Ibid.*

⁴ United States Gasoline Case, WTO Appellate Body Report, 1996

⁵ United States Shrimp/Turtle Case, WTO Appellate Body Report, 1998

environmental protection measures undertaken by India can be approved by WTO law as long as they do not exceed the environmental exceptions stipulated in GATT.

Therefore, the WTO law does not fully ban the acts of protecting the environment but permits the acts on the basis of some standards. The problem lies in the need to reconcile environmental protection and the international trade requirements.

1.3 GATT articles XX environmental exceptions

The General Agreement on Tariffs and Trade (GATT), 1994 is a legal system that establishes international trade and the goal of free trade can be achieved through minimization of trade barriers like tariffs, quotas, and restrictions to imports. But GATT is also aware that free trade cannot be absolute and that the countries belonging to the GATT are allowed to take some actions to preserve the health of the population, the environment, and natural resources. Hence, Article XX has general exceptions through GATT where countries are entitled to have measures that can limit trade in as much as these measures are justified to safeguard the environment and also safeguard natural resources.

Article XX of GATT stipulates that nothing in the agreement must impede the adoptions or implementation of actions needed to safeguard the moral and human, animal or vegetative life or well-being or prescriptions related to the preservation of wearisome natural assets. Article XX(b) and Article XX(g) are the most significant provisions pertaining to the environmental protection. Article XX(b) enables the countries to implement those measures needed to conserve the life and health of humans, animals or plants. Pollution, hazardous wastes, toxic substances, and harmful products have the potential to impact human, animal and plant life, thus the countries can take environmental control laws to regulate the pollution and environmental degradation. Nevertheless, the necessity of the measure should be necessary to safeguard health and the environment. The necessity test demands that there should not be any other measure that is less trade restrictive and can perform the same environmental objective.⁶

Article XX(g) enables countries to take steps associated with the protection of natural resources which are exhaustible. Exhaustible natural resources are referred to as including forests, fisheries, minerals, wildlife, clean air and water. The WTO Appellate Body has looked at exhaustible natural resources in a very broad manner to incorporate both living and non-living resources. That measure, however, should be connected with conservation, and should be enforced as well as domestic restrictions on production or consumption.⁷

Besides clauses (b) and (g), Article XX has a very introductory paragraph, the so-called chapeau of Article XX. The chapeau gives that the environmental measures should not be implemented in a fashion that would amount to dry eye discrimination existing between nations wherein the same conditions are common, or disguised limiting the international trade. What this implies is that environmental action must be taken in good faith, must be non-discriminatory and must not be regarded as a vehicle of trade protectionism.

In a number of significant cases involving environmental protection, the WTO dispute settlement body has construed Article XX. In the WTO Gasoline Case the Appellate body considered that environmental protection measures were permissible under Article XX although they should not be discriminative. The US had placed special environmental requirements on imported gasoline and WTO believed that even though safeguarding the environment is a valid

⁶ General Agreement on Tariffs and Trade (GATT), 1994, Art. XX(b)

⁷ General Agreement on Tariffs and Trade (GATT), 1994, Art. XX(g).

goal, the action was discriminatory in that it discriminated against the imported gasoline against local gasoline.⁸

Equally, in US -Shrimp/Turtle Case, the WTO Appellate Body interpreted that environmental protection and conservation of endangered species is a valid objective, pursuant to Article XX(g). The WTO though believed that environmental measures should be implemented in a non-discriminative and just way. The WTO understood that nations can implement environmental policies to preserve endangered species and natural resources, but the policies must conform to the chapeau of Article XX.⁹

Consequently, Article XX of GATT gives a legal framework on which a balance between environment protection and international trade is given. It gives the nations an opportunity to employ environmental protection measures and natural resource conservation measures as much as the measures interdict trade as long as they are needed, non-discriminatory, and not camouflaged restrictions on trade.¹⁰

Article XX of GATT in countries such as India is very significant since a protective aspect of environmental protection under the Public Trust Doctrine where forests, rivers, wildlife, and natural resources are protected may touch on the trade and investment. Nonetheless, these measures are defensible under Article XX (b) and Article XX(g) provided that they are made on the basis of environmental protection and conservation of natural resources.

Thus, Article XX GATT is highly significant in the reconciliation process of environmental protection and international trade requirements and gives nations the freedom to defend the environment without breaking the WTO law.

1.4 Trade and environment conflict

The connection between global commerce and eco-conservation has been controversial over several years. The international trade law is meant to facilitate free trade and to lessen trade barriers whereas the environmental law is directed towards safeguarding the environment and the natural resources. In some cases, environmental protection of countries can limit international trade and hence there can be conflicts of trade and environmental goals.¹¹

The trade and environment conflict result when a given country initiates environmental policies that limit imports, exports or even production or industrial activity to protect the environment. Other nations can dispute such environmental acts stating it to be a breach of international trade agreements. An example is when a country will impose restrictions on imports of some goods which pollute the environment, or may enforce environmental standards on imports. The measures can be regarded as trade barriers in the international trade law.¹²

Nevertheless, environmental protection is a valuable goal and is required to achieve sustainable development. International trade law, especially WTO law, thus tries to reconcile the trade and the environment. The WTO acknowledges that nations are allowed to implement environmental protection practices but these should not be in the form of discrimination or veiled bans on global trade.

⁸ Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* 862 (Cambridge University Press, 3rd edn., 2013).

⁹ United States Standards for Reformulated and Conventional Gasoline, WTO Appellate Body Report, 1996.

¹⁰ United States Import Prohibition of Certain Shrimp and Shrimp Products, WTO Appellate Body Report, 1998.

¹¹ Philippe Sands, *Principles of International Environmental Law* 310 (Cambridge University Press, Cambridge, 2nd edn., 2003).

¹² United States Restrictions on Imports of Tuna, GATT Panel Report, 1991.

The clash between environment and trade has been subject to a few WTO dispute settlement cases. In the case of United States of America Tuna Dolphin, the US restricted the importation of tuna, which was caught in a manner that harmed dolphins. The WTO panel was of the opinion that the United States was not allowed to subject trade restrictions on the production process used by another country. In this case, the tension between the environmental protection and the free trade was evident.

In the United States Shrimp Turtle Case, the United States put a ban on the importation of shrimps harvested using the processes that killed sea turtles which are also endangered species. WTO Appellate Body found that protection of the environment is a justifiable goal and that states may embrace the process of preserving endangered species, but that such action must be taken in a non-discriminatory way.

The European communalities in EC Asbestos Case prohibited importation of asbestos in order to safeguard human health. The WTO Appellate body determined that the justification to the ban was that it was necessary as a safeguard to the human health. This case demonstrated that the protection of the environment and health may be rationalized in terms of WTO law.

These examples demonstrate that a conflict of interest existed between trade and environment however the WTO law tries to provide a balance between environmental protection and the free trade by providing a balance by saying that environmental exceptions in Article XX of GATT is allowed. Protecting the environment is permitted when required, is non-discriminatory and the protection is undertaken in good faith.

In the case of such countries as India, this aspect is of great concern since any policies, which will be implemented regarding environmental protection within the framework of the Public Trust Doctrine, can impact trade and investment. Nonetheless, these measures can be met in WTO environmental exceptions when it is done in response to environmental protection and conservation of natural resources.

Therefore, trade and environment conflicts can be solved through the balancing of environmental protection and free trade as well as through environmental exceptions within the WTO law.

1.5 Bilateral investment treaties and environmental regulation

Bilateral Investment Treaties (BITs) signify contracts among two nations to promote and safeguard foreign investment. The primary aim of BITs is to invite foreign investment to take place through offering legal safeguards to foreign investors against capricious conduct of the host State. Protections that are usually under BITs include fair and equitable treatment, safeguards against expropriation, non-discrimination and movement of funds freely.

Nevertheless, there can be a conflict of interest between environmental regulation and investment protection under BITs. Environmental regulations may have an impact on the profits of foreign investors when a State implements environmental laws in order to safeguard natural resources, environment, forests, water, or the health of the populace. Under these circumstances, foreign investors can appeal environmental regulations to the international tribunals of investment by arguing that such regulations constitute indirect expropriation, or other violation of fair and equitable treatment.

Environmental laws can limit mining, industrial operations, forestry, water usage, or land usage to conserve the environment and the natural resources. Nonetheless, the complaints of foreign investors can be that such regulations diminish their profits and thus breach into the treaties on investments. This brings a clash of environments and protection of investments.

Environmental regulation and investment protection have been considered in several cases of investment arbitration. Investment tribunals have ruled that States have a sovereign right to make decisions in the interests of the people, which may be environmental protection, health of the people, and preservation of natural resources. But these regulations should not be arbitrary or discriminative and unfair to the foreign investors.

In the case of Modern Bilateral Investment Treaties, they have clauses whereby the states are granted the right of regulating to protect the environment and ensure sustainable development. These are referred to as right to regulate clauses. These clauses enable the States to implement environmental rules without breaching the investment treaty.¹³

In the case of the countries such as India, this point is of great concern since India has incorporated a number of environmental policies concerning the preservation of forests, animals, waterways and natural resources through the Public Trust Doctrine. These environmental regulations can have an impact on foreign investment in mining, infrastructure and industrial projects. Thus, some effort should be made to make sure that the environmental laws are compatible with the investment treaty.¹⁴

However, in 2016, India has made a new Model Bilateral Investment Treaty that contains several provisions regarding the protection of the environment and the right of the State to act in the public interest. The Model BIT acknowledges the right of the State to take the steps in order to protect the environment, health of people, and to achieve the sustainable development.¹⁵

Therefore, Bilateral Investment Treaties bring a possible conflict between environmental regulation and investment protection, however, the contemporary investment treaties are trying to create the balance between investment protection and environmental protection, by prioritising the right of the State to regulate in favour of environmental protection.

1.6 Investment arbitration and environment disputes

Investment arbitration is now a significant tool of solving disputes between foreign investors and host States. In Bilateral Investment Treaties and Free Trade Agreements, foreign investors have currency to initiate claims against host States, in the international arbitration tribunals, in the event they feel that their investment has been negatively impacted by State action. States sometimes place environmental controls which become the focus of investment case as environmental controls can have an influence on the profits and operations of the foreign investors.

Some of the cases of investment arbitration have been related to environmental disputes and environmental laws. In the case of *Te med v-Mexico*, a foreign investor questioned the move by the Mexican government to deny a foreign investor the right to establish a hazardous waste land fill on the basis of environmental issues. The tribunal opined that the State has a valid operational role in environmental regulation, though this regulation has to be fair and it should not contravene the principle of fair and equitable treatment.¹⁶

In *Methanex v. United States*, a Canadian corporation was appealing against environmental laws given by the State of California against a chemical which posed hazard to the environment. The tribunal held that environmental regulation undertaken on the welfare of the populace and

¹³ *Methanex Corporation v. United States*, NAFTA Arbitration, 2005.

¹⁴ *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award (2003).

¹⁵ Government of India, Model Bilateral Investment Treaty, 2016.

¹⁶ *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award (2003).

environmental protection is not expropriation and the States are allowed to regulate towards environmental protection.¹⁷

On the same note, the tobacco company in reality took legal action in a case called Philip Morris v. Uruguay seeking to appeal the state regulations on public health orders that were made against resistance in Uruguay. The tribunal committed to the sovereign principles of States to regulate in such that assists the greater good and that such regulations do not always breach the commitments of investment treaties.¹⁸

The cases indicate that the international investment tribunals understand that the States have rights to act in specific ways (to protect environment and the overall interests of the people). Nevertheless, the environmental regulations should be fair, not discriminatory, and in good faith. Therefore, investment arbitration tribunal tries to create a compromise between investment protection and protecting the environment. Environmental rules which are embraced on the interest of the people and protection of the environment are mostly tolerated when they are fairly and not discriminatory.

1.7 Does India act as a defence relying on public trust doctrine

The Public Trust Doctrine exists as a constitutional obligation of the State to conserve the natural resources like forests, rivers, lakes, wildlife and coastal regions to be used by common people and the future generations. Thus, environmental protection not only in India, but also on a constitution, is a policy goal. Whether India as a country can invoke the Public Trust Doctrine as a defence to international trade disputes and investment arbitration.¹⁹

It is recognized in the international law that States are allowed to exercise the sovereign right to control in the interest of the State, such as its environmental protection, health of the people, and safeguarding of natural resources. Under the doctrine of international investment law, this principle is referred to as the police powers doctrine. According to this doctrine, it allows States to make regulations to promote the national interest without compensating, as long as they are not discriminatory and in good faith.

Through the Public Trust Doctrine, India can contend that environmental protection measures undertaken by it are one of its constitutional responsibilities and therefore it is needed to protect the environment and promote sustainable development. These actions can be credited under the WTO law in Article XX(b) and Article XX(g) of GATT as measures that are taken to protect the human, animal, or plant life and to conserve the natural resources.²⁰

Equally, environment regulations can be regarded by India under the law of under investment since it is a sovereign right of India to control the environment and environment regulations are needed to protect environment and natural resources. States have been understood by the investment tribunals to be entitled to using regulations to protect the environment and the general welfare of the people.

Thus, one of the legal defences or justifications which India can employ to defend and justify its case in international trade and investment disputes is the Public Trust Doctrine by stating that the protection of the environment is a constitutional duty and a valid purpose of the people.

¹⁷ Methanex Corporation v. United States, NAFTA Arbitration, 2005.

¹⁸ Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, Award (2016).

¹⁹ Shyam Divan and Armin Rosencranz, Environmental Law and Policy in India (Oxford University Press, New Delhi, 2nd edn., 2001).

²⁰ *Ibid.*

1.8 Environmental protection and economic development

One of the most important challenges in modern environmental law is balancing environmental protection and economic development. India being a developing country requires economic development, industrialisation, industrial development, and foreign investment to grow economically. Nonetheless, too much industrialisation and use of natural resources may result in ecological harm and environmental disparity.²¹

Sustainable development offers a solution to this issue through balancing between the protection of the environment and economic development. Sustainable development implies that the economic development must occur in a way that is not harmful to the environment and which does not jeopardize the needs of the future generation.²²

Sustainable development is also supported by the Public Trust Doctrine since the State must conserve natural resources and sustain natural resources usage. The doctrine also averts excessive exploitation of natural resources and makes the natural resources make common good.

Sustainable development and environmental protection can also be considered as legitimate goals of international trade and investment law. The current trade agreement and investment treaties contain provisions pertaining to environmental protection and sustainable development. Hence there is need to strike the balance between environmental protection on one hand and economic development on the other hand via sustainable development, environmental regulation and good governance of the natural resources. All three the Public Trust Doctrine, sustainable development, and the international environmental law give a legal framework on how to balance the environmental protection and economic development.

Therefore, environmental protection and economic development are not opposing, but they are complementary and they can be provided by sustainable progress and appropriate legal provisions.

1.9 Conclusion

The connection between environmental protection and international law on trade and investment is complicated and usually gives rise to clashes between environment protection and the economic development. The international trade law seeks to ease free trade and minimise barriers to trade whereas the environmental law seeks to preserve natural resources, environment, and human health. In the same vein, Bilateral Investment Treaties are designed to provide security to foreign investment, but environmental laws placed on States can also have an impact on foreign investors and investment projects.

Although, the environmental protection is a significant aim which is acknowledged by the international law, the States have the sovereign right to regulate in the best interest of its people, environmental protection, public health and protection of natural resources. Stated in WTO, it can provide environmental protection under Article XX(b) and Article XX(g) of GATT, which permit measures necessary to protect human, animal, or plant life and measures regarding the preservation of exhaustible natural resources.

Likewise, the international investment law acknowledges the right of the States to exercise regulations in the interests of the environment and the sake of the people. A number of cases have been held in investment arbitration tribunals that the environmental regulations which are implemented with reasonability, free of discrimination and in good faith to benefit the people do not constitute expropriation.

²¹ S.C. Shastri, Environmental Law (Eastern Book Company, Lucknow, 5th edn., 2019).

²² *Ibid.*

This is because the Public Trust Doctrine places a constitutional responsibility on the State to conserve natural resources and the environment to be used and enjoyed by the people and the future generations. Hence, the environmental protection actions ordered under the Public Trust Doctrine are not just the policy choices rather the constitutional duties. India is thus justified in pursuing environmental protection policies under the international trade and investment law on the ground that the environmental policies are essential to environmental protection and sustainable development.

In this way, one can conclude that there need not be a conflict between the environmental protection and the international trade and investment law. The WTO law and international investment law will accept that environmental protection measures are justified where legitimate public purposes, that include environmental protection, public health, and preservation of the natural resources are taken.

Thus, the Environmental Protection of the Environment According to the Public Trust Doctrine can provide a legal basis to the environmental protection activity in the international trade and investment cases. It is however important that the environmental regulations must be reasonable, aid non discrimination, transparent and in good faith such that they do not contradict international trade and investment requirements.

Therefore, this requires a balance between sustainability of the environment and economic activities using sustainable development, environmental governance and appropriate legal frameworks. A legal framework that will achieve a balance between environmental protection and economic development is comprised of the Public Trust Doctrine, international environmental law, and international economic law.

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