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**DICHOTOMY BETWEEN TRADE AND ENVIRONMENT:  
AN UP-HILL ROAD FOR WTO TO PROPEL  
SUSTAINABLE DEVELOPMENT**

Dr. Hardik Daga \*

Ms. Latika Choudhary\*\*

**Introduction**

In May 2012, an accusation was levied on manufacturers in China for dumping their products unfairly in America's domestic market. China was consequently slapped with punitive tariffs up to 250%. China, in retaliation, challenged the rebates imposed by United States (U.S.) on renewable energy installations at the Dispute Settlement Body (DSB) of the World Trade Organization (WTO)<sup>1</sup> which has, finally in January 2022, authorized China to levy almost 645 million USD as compensatory tariffs against the United States<sup>2</sup>. The European Union commenced an investigation of its own in September 2012 to understand the unfair practices indulged in by China's solar panel manufacturers.<sup>3</sup> As a consequence of the investigation, a few weeks later, China filed a dispute in the WTO against the European Feed-in Tariffs (FIT) for violation of the

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\* Dr. Hardik Daga, Assistant Professor, School of Law, IMS Unison University, Dehradun.

\*\* Latika Choudhary, Assistant Professor, School of Law, UPES, Dehradun.

<sup>1</sup> Appellate Body Report, United States — Tariff Measures on Certain Goods from China, WTO Doc. WT/DS543/10 (adopted Jan. 26, 2022).

<sup>2</sup> WTO lets China impose tariffs on US in Obama-era case, T.O.I., Jan. 26, 2022, at [https://economictimes.indiatimes.com/news/international/business/wto-gives-china-right-to-impose-tariffs-on-645-million-of-u-s-goods/articleshow/89141071.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/international/business/wto-gives-china-right-to-impose-tariffs-on-645-million-of-u-s-goods/articleshow/89141071.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

<sup>3</sup> Keith Bradsher, Europe to Investigate Chinese Exports of Solar Panels, N.Y. Times, Sept 6, 2012, at <https://www.nytimes.com/2012/09/06/business/global/eu-prepares-to-investigate-chinese-dumping-of-solar-panels.html>

WTO rules. The dispute till date remains in the consultation stage.<sup>4</sup> Japan and the European Union approached the Dispute Settlement Body in 2013 regarding Ontario's FIT for renewable energy and succeeded in withdrawal of the same.<sup>5</sup> In February 2013, the United States challenged India at the DSB over certain measures of India concerning domestic content requirements under its FIT JawaharLal Nehru Solar Mission for solar cells and modules.<sup>6</sup> India, in turn, in 2016, requested to consult with the United States for measures pertaining to domestic content requirements and subsidies instituted by the US governments in a few states particularly in the energy sector.<sup>7</sup>

It needs to be observed from string of similar disputes at WTO's dispute settlement body in the past decade that every time a state pushed for a measure which either directly or indirectly protected the environment or was boasting renewable energy sector, met with challenge from member states, who in turn, considered it as trade protectionism measure.

The debate around trade and environment first emerged in the early nineties, both pre and post insurgence of WTO, when a series of disputes shed light on growing friction between trade liberalization and regulations aimed at protecting the environment. The famous environment disputes of

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<sup>4</sup> Request for Consultations by the China, European Union And Certain Member States – Certain Measures Affecting The Renewable Energy Generation Sector, WTO Doc. WT/DS452/5 (December 05, 2012).

<sup>5</sup> Appellate Body Report, Canada — Certain Measures Affecting the Renewable Energy Generation Sector, WTO Doc. WT/DS412/AB/R (adopted May 24, 2013).

<sup>6</sup> Appellate Body Report, India — Certain Measures Relating to Solar Cells and Solar Modules , WTO Doc. WT/DS456/13/Corr.1(adopted Oct. 19, 2016).

<sup>7</sup> Panel Report, United States — Certain Measures Relating to the Renewable Energy Sector, WTO Doc. WT/DS510/R (adopted June 27, 2019).

the 1990s were *Tuna/Dolphin*<sup>8</sup>, *Shrimp/Turtle*<sup>9</sup>, *U.S.- Gasoline*<sup>10</sup> and *European-Asbestos*<sup>11</sup>. *Tuna/Dolphin* pushed the same narrative that rich developed countries, often USA, introduced a domestic environment legislation to protect; either dolphins or turtles or improving air quality through cleaner burning of gasoline which in turn restricted exports from developing countries. The member countries challenging such domestic measures had concerns for its domestic manufacturers as it was detrimental to their interest if made to comply with such regulations. In all these disputes, the Panel/Appellate Body decided against such domestic measures as they were considered to be obstacles to free trade and giving undue advantage to the domestic market, and this was all claimed to be done in the garb of environmental protection. The only contrary decision was in European asbestos wherein both the Panel and the Appellate Body decided in favour of domestic measures which intended to protect human health. The DSB in all these disputes applied the balancing test wherein factors weighed against each other were- *contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.*<sup>12</sup> The DSB in its former decisions ascertained that the measure at hand had more drastic impact on imports than environment,

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<sup>8</sup> Panel Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Report of the Panel, WTO Doc. WT/DS381/R (adopted Sept. 15, 2011).

<sup>9</sup> Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

<sup>10</sup> Panel Report, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/R (adopted Jan. 29, 1996).

<sup>11</sup> Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001).

<sup>12</sup> Appellate Body Report, Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WTO Doc. WT/DS161/AB/R (adopted January 10, 2001).

but in *Asbestos*, effect on human health was given a priority. Therefore, it can be inferred that WTO (GATT) made a conscious decision to put the interest of free trade over the environment.

### **Nature of new conflicts- The times, they are a-changin<sup>13</sup>**

It is interesting to note that during the enforcement of the WTO in January 1995, the preamble of the Marrakesh Agreement included as one of its objectives *notable mention of sustainable development*<sup>14</sup> but the same cannot be attested by their practice. There has been a drastic shift in the nature of disputes at WTO in the recent past as the conflicts currently are driven by meteoric rise in green industrial policies. Much like the industrial policies prevalent in the past, the new policies are allowing contentious trade disputes as they often ignore the established trade norms of *non-discrimination and fair pricing*.<sup>15</sup>

The first and foremost change is caused due to a major shift in geopolitics and its complex effect on the nature of trade and environment conflicts. Earlier there used to be a plain North-South divide but now both developing and developed countries are embracing the green industrial policies and it has consequently erased this divide.

Second, trade disputes of the past were fueled by the efforts of environmental groups with the support of blue-collar workers and their labour unions of the member states legislating such policies. But now this baton is primarily carried by the same blue-collar workers and the

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<sup>13</sup> Bob Dylan, *The Times They Are a-Changin'*, Columbia Records (1965).

<sup>14</sup> Sofía Baliño, *Revisiting Past Debates and Weighing New Options*, INTERNATIONAL INSTITUTE OF SUSTAINABLE DEVELOPMENT (April 14, 2022, 10:04 PM), at <https://sdg.iisd.org/commentary/policy-briefs/trade-and-environment-revisiting-past-debates-and-weighing-new-options/>

<sup>15</sup> Mark Wu & James Salzman, *The Next Generation Of Trade And Environment Conflicts: The Rise Of Green Industrial Policy*, 108 (2) NORTHWESTERN UNIVERSITY LAW REVIEW 12 (2014).

environmental groups have taken a back seat as it is against their interest. They are stuck in the dichotomy of either supporting measures which may seem to be against the rules of international trade but in the longer run serve the agenda of sustainable development or face the wrath of their governments and the industries they lobby for.

Third, with the advent of the Committee on Trade and Environment and subsequent introduction of the Environmental Goods Agreement (EGA) in addition to several environment protection treaties, the scope of applicable law and principles is expanding.<sup>16</sup> The applicable law in classic disputes was Article XX (General Exceptions) of the General Agreement on Tariffs and Trade (GATT) and the implicit balancing test. In contrast to old issues like market access, the new green policies consist of issues like local content requirements, tax rebates, conditional subsidies, and artificial limits of inputs.<sup>17</sup> So long a green industrial policy is in violation of trade obligations it must be eliminated even if it aims to address the environmental issues because the balancing test does not apply in these situations.

Finally, the increase in forums of dispute resolution has complicated the situation. Earlier disputes were adjudicated by a multilateral dispute settlement body under GATT and its successor DSB under WTO. But the new generation of conflicts are being challenged and adjudicated by domestic administrative tribunals, also known as trade remedies, and due to such unilateral actions against green policies, the green trade war has commenced.

### **Studying recent disputes**

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<sup>16</sup> Members Launch Discussions Under Trade And Environmental Sustainability Work Plan For 2022, WTO NEWS March 31, 2022, at [https://www.wto.org/english/news\\_e/news22\\_e/tessd\\_31mar22\\_e.htm](https://www.wto.org/english/news_e/news22_e/tessd_31mar22_e.htm)

<sup>17</sup> Id. at 15.



### **Sector-Targeted Subsidies.**

Subsidies can be categorised in three kinds; the first being in the form of research and development grants provided to the universities and other centres of research. Second given directly to the firms in the form of financial aid, such as equity infusions, low-interest guaranteed loans and tax credits. The third and the most controversial in recent times is FIT programs. FITs generally constitute a guarantee to the renewable energy producers of minimum buying price by the government which is always higher than its actual market price. Even with the advent of superior technology, the cost of producing renewable energy is higher and the government's higher purchasing price offsets the production cost. Such long term policies of the government aim to bring greater investments and innovation in renewable energy.

The year 2020 witnessed an increase in the annual renewable capacity additions rising upto 45% to almost 280 gigawatts (GW) which is the highest year-on year increase since 1999. Exceptionally high capacity additions, it is safe to say, have become the *new normal* in 2021 and 2022, considering renewables which account for 90% of new power capacity expansion worldwide.<sup>18</sup> The bulk of subsidies are provided by the developed economies but China and India are not far.<sup>19</sup> In 2017, the European Union accounted for around 54 % (USD 90 billion) of total estimated renewable subsidies, followed by the United States, with 14 %

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<sup>18</sup> Renewable Energy Market Update 2021, INTERNATIONAL ENERGY AGENCY (April 14, 2022, 09:00 PM), at <https://www.iea.org/reports/renewable-energy-market-update-2021>.

<sup>19</sup> India to overtake EU as world's third largest energy consumer by 2030: IEA, TOI, Feb 9, 2021 at [https://economictimes.indiatimes.com/news/economy/indicators/india-to-overtake-eu-as-worlds-third-largest-energy-consumer-by-2030-ia/articleshow/80766446.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/economy/indicators/india-to-overtake-eu-as-worlds-third-largest-energy-consumer-by-2030-ia/articleshow/80766446.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

(USD 23 billion), Japan with 11% (USD 19 billion), the United States with 9 % (USD 16 billion), India with 2 % (USD 4 billion) and the rest of the world with slightly less than 9% (USD 15 billion).<sup>20</sup> According to IEA projections, China is the largest and India is the fourth largest energy consumer in the world<sup>21</sup> and collectively, they will account for at least 20% of global subsidies soon in order to meet their local demand, let alone export.<sup>22</sup>

The renewal power subsidy for the year 2022 has been fixed by China at 3.87 billion yuan which is approximately 607.26 million USD. The Finance Ministry of China is also to allocate 1.55 billion yuan to wind farms, 2.28 billion yuan to solar power stations and 38.24 million yuan to biomass power generators.<sup>23</sup> Although because of lack of regulations and supervision led to massive wasted investment, a large withdrawal of subsidies happened, accounting for over 10 billion RMB in 2013.<sup>24</sup> Additionally, China also allows subsidies through FIT programs on wind energy and biomass electricity. Although India's capacity additions in 2020 declined almost over 50% from 2019, the country is expected to set new records for renewables expansion in 2021 and 2022 as delayed projects from previous competitive auctions are commissioned.<sup>25</sup> India plans to quintuple the size of a subsidy scheme for domestic solar

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<sup>20</sup> MICHAEL TAYLOR, ENERGY SUBSIDIES: EVOLUTION IN THE GLOBAL ENERGY TRANSFORMATION TO 2050 (International Renewable Energy Agency, ISBN 978-92-9260-125-6) at, [https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2020/Apr/IRENA\\_Energy\\_subsidies\\_2020.pdf](https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2020/Apr/IRENA_Energy_subsidies_2020.pdf)

<sup>21</sup> Supra at 18.

<sup>22</sup> Supra at 20.

<sup>23</sup> China Sets 2022 Renewable Power Subsidy At \$607 Mln, REUTERS, (May 14, 2022 at 12:05 PM) at <https://www.reuters.com/article/china-renewables-subsidy-idAFB9N2RH02I>

<sup>24</sup> Huizong Tan, Solar Energy in China: The Past, Present, and Future, CHINA FOCUS (April 14, 2022, 09:00 PM), at <https://chinafocus.ucsd.edu/2021/02/16/solar-energy-in-china-the-past-present-and-future/>

<sup>25</sup> Supra at 18.

photovoltaic (PV) module makers, pushing forward with the country's Atmanirbhar Bharat (Self-reliant India) strategy for decarbonizing its economy.<sup>26</sup> India's FIT programs subsidize solar, biomass-electricity, hydropower, and wind energy projects.

But subsidies which target certain specific enterprises or apply any specific criteria are violative as per the SCM Agreement. Therefore, subsidies which are contingent upon local content requirements and export performance are not permissible.<sup>27</sup> The remaining subsidies fall under the ambit of 'actionable subsidies' in WTO parlance and are permissible as long as they do not hamper the trade interest of other states.<sup>28</sup>

### **Conditional Local-Content Subsidies and Policies**

Local-content subsidy as defined under WTO law is "*a subsidy contingent . . . upon the use of domestic over imported goods.*"<sup>29</sup> A subsidy in the context of green industrial policy could be in the form of rebate to consumers purchasing renewable energy, a minimum support/purchase price guaranteed by the government, and/or any kind of preferential grant or loan to producers of renewable energy. But the grant of this subsidy is contingent upon use of local raw material or finished goods or services.<sup>30</sup> In 2009, a similar dispute arose when the Canadian province of Ontario's FIT scheme, under its legislation Green Energy and Green Economy Act,

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<sup>26</sup> Max Tingyao Lin, India Boosts Subsidies For Domestic Solar Module Makers In Annual Budget, IHS MARKIT, Feb. 1, 2022 at <https://cleanenergynews.ihsmarket.com/research-analysis/india-boosts-subsidies-for-domestic-solar-module-makers-in-ann.html>

<sup>27</sup> Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14., art. 3.1(b).

<sup>28</sup> *Id.* Article 5.

<sup>29</sup> *Supra* at 25.

<sup>30</sup> Tom Moerenhout, Local Content Requirements and the Renewable Energy Industry – A Good Match, UNCTAD, June 13, 2013, at [https://unctad.org/system/files/non-official-document/DITC\\_TED\\_13062013\\_Kuntze.pdf](https://unctad.org/system/files/non-official-document/DITC_TED_13062013_Kuntze.pdf)

was challenged by Japan and the European Union. Under this FIT, the government was assured to buy electricity produced from renewable energy at fixed price for 20-40 years if the local content requirement (ranging from 25 to 60 percent) was met by the manufacturers. Challenge at Panel was again based on Article III:4 & III:5 of GATT<sup>31</sup>, Article 2.1 of TRIMS<sup>32</sup> and Articles 3.1 (b) & 3.2 of Agreement on Subsidies and Countervailing Measures. The Canadian government defended its claim by citing the exception of government procurement that *“the laws and requirements that create and implement the FIT Program are laws and requirements that govern the procurement of renewable electricity for the governmental purpose of securing electricity supply for Ontario consumers from clean sources, and not with a view to commercial resale.”*<sup>33</sup> The Panel and the Appellate Body rejected this argument but differed in their reasoning i.e. panel asserted that the purpose of electricity bought was for commercial sale whereas the Appellate Body claimed that the product which is subject to local content requirement is renewable energy generation equipment whereas the government in effect is purchasing electricity. Therefore, due to this lack of competitive relationship between both the products there shall be no applicability of government procurement exception. Both, the panel and the appellate body, did differ in applicability and interpretation of the above mentioned Article of SCM agreement and meaning of the term ‘benefit’ under Article

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<sup>31</sup> GATT 1994:General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

<sup>32</sup> TRIMS Agreement: Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186

<sup>33</sup> GATT 1994:General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), art. III:8.

1.1(b) under the same Agreement. Due to constraints of Article 17.6 of the Dispute Settlement Understanding<sup>34</sup>, the Appellate Body did not delve into it even though it considered the subsidy in question to be prohibited under the SCM Agreement.

In October 2016, the WTO Appellate Body affirmed that India was in violation of principle of National Treatment under GATT 1994 and Trade Related Investment Measures (TRIMS) by maintaining a measure, under its FIT JawaharLal Nehru Solar Mission, mandating local content requirements for solar cell modules. India tried to justify its position under Article XX(d) of GATT that it is bound by principles of international environmental law like United Nations Conventions on Climate Change (UNFCCC)<sup>35</sup> *“to take steps to achieve energy security, mitigate climate change, and achieve sustainable development, and that this includes steps to ensure the adequate supply of clean electricity, generated from solar power, at reasonable prices”*<sup>36</sup> Both the Panel and the Appellate Body rejected this claim citing that domestic environmental policies and international environmental agreements cannot be considered as ‘laws or regulations’ under Article XX (d). This decision was an addition to a long list of prior disputes that have ruled that local content requirement is in violation of non-discrimination obligation under both GATT and TRIMS. Therefore, the FIT of India met the same fate as the FIT of Canada.

India, on the other hand, retaliated by challenging United States regarding certain measures of the United States relating to domestic content requirements and subsidies instituted by the governments of the states of

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<sup>34</sup> An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

<sup>35</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997 37 I.L.M. 22 (1998); 2303 U.N.T.S. 148; U.N. Doc FCCC/CP/1997/7/Add.1

<sup>36</sup> *Supra* at 29.

Washington, California, Montana, Massachusetts, Connecticut, Michigan, Delaware and Minnesota, in the energy sector<sup>37</sup> under the same provisions of GATT, SCM Agreement and TRIMS. The Panel found that all of the measures at issue are inconsistent with Article III:4 of the GATT 1994 because they provide an advantage for the use of domestic products, which amounts to less favourable treatment for like imported products. The Panel exercised judicial economy<sup>38</sup> on India's claims under Articles 2.1 and 2.2 of the TRIMS Agreement and Articles 3.1(b) and 3.2 of the SCM Agreement. The dispute has been with the Appellate Body since 2019.

Local content requirements, even though conflict with the founding principles of WTO, end up contributing towards the growth of the green-energy industry by incentivising the domestic and foreign manufacturers to shift towards production of renewable energy and related products. But it can be concluded from these disputes that WTO is in no mood to let the member states introduce any such measures in the future and can be attested by WTO's ruling as late as January 2022 in the *United States-Tariff Measures on Certain Goods from China*.<sup>39</sup>

### **Export Restrictions-**

The purpose of above mentioned green industrial policies is to promote competition in the domestic green energy sectors. In addition to these two policies, China has introduced a third policy of restraining export of scarce natural resources. This policy aims to boost competition amongst its downstream domestic industries who use such resources as raw materials

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<sup>37</sup> Supra at 7.

<sup>38</sup>F. Palombino, *Judicial Economy and Limitation of the Scope of the Decision in International Adjudication*, 23(4) LEIDEN JOURNAL OF INTERNATIONAL LAW (Cambridge University Press, 2008).

<sup>39</sup> Supra at 1.

for manufacturing end products. Mechanisms such as quota, a tax or amalgamation of the two i.e. tariff quota is used to implement such policy. More often than not, these resources are a set of nine minerals (bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc) and a group of “rare earth” elements.<sup>40</sup> China justifies its policy on environmental grounds as the extraction and refinement of such resources causes serious ecological harm and constitute serious environmental risks. There have been numerous instances where extraction of certain rare minerals has caused contamination of local water sources and has been a major cause of infliction of deadly diseases such as cancer amongst the civilians residing in the vicinity. Therefore, export restrictions like this contribute to curtailment of such mining and refining processes.<sup>41</sup>

Such policies have two major challenges; first, it’s in violation of Article XI of GATT<sup>42</sup> and is in violation of National Treatment Principle as only foreign entities suffer due to non-availability of such rare earths to them. China’s claim of such polices being environmentally friendly doesn’t hold water as a complete restriction on production will accomplish more and will also not be discriminatory.<sup>43</sup>

In China’s defence, it carries a disproportionate burden on its shoulders of supplying 97% of the world’ rare earths when it has only one-third of the global reserves. Whereas, most of the developed nations have shut all their

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<sup>40</sup> Appellate Body Report, *China— Measures Related to the Exportation*, WTO Doc. WT/DS394/20 (adopted Jan. 23, 2013).

<sup>41</sup> *Supra* at 15.

<sup>42</sup> Art. XI , GATT Prohibition of Quantitative Restrictions , “No prohibitions or restrictions other than duties, taxes or other charges shall be instituted or maintained by any Member . . . .”

<sup>43</sup> Frank van Tongeren et. al., *Natural Resources And Export Restrictions*, WTO (April 14,2022, 09:00 P.M.),at [https://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_forum\\_e/wtr10\\_oecd\\_e.htm](https://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_oecd_e.htm)

production to save their community from disastrous effects of mining, including the US (way back in 1998) after the California desert's radioactive spill, it seems unfair to expect China to exhaust its resources and bear damage on its ecology to meet the demands of others. It will rather use minerals domestically at the price of negative environmental externalities. At least, it will be compensated in form of taxes by downstream Chinese manufacturers.

This debate is only restricted to China as other member states can maintain taxes on their exports as they wish, but as per Article 11.3 China's Protocol of Accession, it has unabled itself from applying export taxes except for exceptional circumstances. The ruling of WTO in *China-Raw Materials<sup>44</sup> & China Rare Earths<sup>45</sup>*, where China has been asked to remove export restrictions on certain scarce minerals, once again confirms WTO's outlook on trade and environment debate.

### **Green Products**

In a rapidly advancing world, where technology has made our lives utmost convenient, it has brought with us many unnecessary evils. In light of the same, while eliminating our dependency on technology is not even considered a worthy option, it is technology itself which is being utilized to come to the rescue. A new age phenomenon called 'green products' or 'green goods' has been making rounds as it promises to turn technology more environmentally friendly than it already is. Green products are essentially those goods which possess characteristics such as biodegradable, non-toxic and eco-friendly, thus ensuring they do not pose

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<sup>44</sup> Appellate Body Report, China — Measures Related to the Exportation of Various Raw Materials, WTO Doc. WT/DS394/AB/R (adopted Feb. 20, 2012).

<sup>45</sup> Appellate Body Report, China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, WTO Doc. WT/DS431/AB/R (adopted Sept. 02, 2014).



threat to the environment.<sup>46</sup> Most of such goods are made up of glass, cans or paper. While there is no concrete definition or ambit of green products, it is often viewed from multiple perspectives to get clarity on. For instance, from a societal perspective, green products are those which are recyclable and reusable such as aluminum cans, glass etc. In addition to possessing the quality of being biodegradable, it is important, as stated by researchers, that green products be easy to dissolve or decompose in soil, air and water to be accepted as truly green.

The understanding of green products may paint a picture whereby it should become a popular and acceptable phenomena worldwide considering the rising concern and quest to find solutions towards environmental degradation. However, as wonderful and simplistic as it sounds, so is not the situation. 8th July, 2014 witnessed a group of WTO member nations launching plurilateral negotiations for establishing Environmental Goods Agreement (EGA), which is aimed at promoting trade in environmental products such as solar panels, wind turbines etc. As many as 18 participants (initially, currently 46)<sup>47</sup>, engaged in negotiations pertaining to elimination of tariffs on many important environment related goods. These goods, it is being argued, have the ability to help achieve the necessary environmental and climate protection goals of generalizing clean and renewable energy, improvement of energy efficiency, regulation of air pollution, waste management, monitoring water and noise pollution etc. to name a few. Those participating in the negotiations account for the majority of world trading particularly in environmental goods. If

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<sup>46</sup> L. Ying-Ching & C. Chang, *Double Standard: The Role Of Environmental Consciousness In Green Product Usage*, 76 (5) JOURNAL OF MARKETING 125, 134 (2012).

<sup>47</sup>Environmental Goods Agreement, WTO (April 14, 09:00 P.M.), at [https://www.wto.org/english/tratop\\_e/envir\\_e/ega\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/ega_e.htm)

successful, the benefits of the negotiation will accrue to every member of the WTO.

COP26 Climate Summit witnessed deliberations on green products and the possibility of elimination of tariffs on the same. Surprisingly, while many major power holders of the world were seen supporting the agenda, India showed reservations. Based on the information brief released by WTO Secretariat on trade, climate and related issues, India did not support the negotiation on lowering tariffs on environmental goods. This unwillingness is rooted in the concern for dual use of such green goods which could ultimately lead to import of products which may not be environmentally friendly or may have non-environmental end use. Considering the 'environmental goods' are not clearly defined, it may be risky to allow lowering of tariffs on the same. These goods may be traded under the garb of being environmentally friendly but having a non-environmental end use. For example, a pipe, which prima facie may seem to be made to be used in a renewable energy plant, could find use in other plants as well.

There are multiple factors which are raising concern for India to support the said negotiation, some very rightly so. Every member nation, while it is true, needs to put dedicated effort and energy to tread on the low carbon pathway, any greening of the economy in developing countries must be in consonance and balance with creation of employment opportunities and generation of income through domestic manufacturing of the said green products.<sup>48</sup> It is important that developing countries such as India set up indigenous industries, technology and systems to fight the battle of climate

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<sup>48</sup> Amiti Sen, India May Red-Flag WTO Push For Liberal Trade in Green Tech, BUSINESS LINE-THE HINDU, Nov. 07, 2021, at <https://www.thehindubusinessline.com/economy/policy/india-may-red-flag-wto-push-for-liberal-trade-in-green-tech/article37360436.ece>

change and not be dependent upon other nations' widely expensive imports. Few concerns which implore the situation are-

1. To lure WTO members to eliminate customs duty on environmental goods, there may be a renewed incentive provided for the same, thus creating a situation where members will ultimately end up accepting the fate.

2. To achieve the professed objective of improvement of resource efficiency, the proponents of trade and sustainability will push the 'circular economy' narrative, which essentially involves phenomena of repair, refurbish, recycle existing material. An integral component of this phenomena emphasizes on removing restrictions of all kinds to boost trade of remanufactured products. Importing remanufactured goods, which are generally cheaper than new ones, will pose a hurdle for existing producers in developing economies to compete in the market. Consequently, an increase in remanufactured goods will shift the burden on developing countries to dispose of the same in an environmentally friendly manner. In addition to this issue, developing nations are likely to be burdened with ineffective and outdated technologies, which may end up consuming more energy than new goods.<sup>49</sup>

3. The trade and sustainability agenda requires pushing for creation of international standards which are derived from the circular economy and the prevailing environmental performance considerations in developed nations. If the developing nations are obligated to follow such technical regulations and standards, it will automatically set the bar extremely high for their respective domestic producers, preventing them from being able

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<sup>49</sup> Pushing exports behind the sustainability veil at WTO, FINANCIAL EXPRESS, Nov. 23, 2021 at <https://www.financialexpress.com/opinion/pushing-exports-behind-the-sustainability-veil-at-wto/2374007/>

to sell in their own domestic market and eventually increasing reliance on imports.

4. It is predicted that one major implication of the negotiation will hit renewable energy, which is a crucial measure of any green plan. As per the existing WTO rules, many developing nations have substantial flexibility while deciding purchasing requirements as also favoring domestic suppliers in relation to procurement by the government bodies. These flexibilities with regard to renewable energy goods, have wrinkled substantially as is evidenced by recent FTAs. Considering the trend gets followed in the WTO, the developing countries will end up losing an effective policy instrument which facilitates boost to the domestic manufacturing activities.

5. The trade and environment agenda may seek a legal justification for the imposition of restrictions on trade, on the pretext of protection of the environment. Due to this, there is an apprehension among the developing nations that the restrictions will mostly be aimed at restraining their exports and may also be utilized by the developed countries for imposing rigid protectionist purposes.

While there is no doubt regarding the urgency to address the concern of climate and environment degradation, it does not imply that global trade rules end up creating imbalance between the developed and developing nations, stunting the economic growth for the latter.

### **Mitigation of scenario**

Assuming that environmentalists are serious about the environmental concerns and determined to find a solution which is acceptable to the majority, they should be focusing on trade remedies. Trade remedies, it is safe to say, provide a much speedier, more direct and more politically

acceptable & popular way to address unfair industrial policies as opposed to the WTO disputes. Few of such possible solutions are stated below which may provide a helpful balance to achieve and address the greater good of the environment -

1. Governments, prior to imposing any trade remedy, could be directed to undertake an economic analysis of the effects of the duty or tariff increase on a good/goods, which is proposed to be imposed on prices. Estimation of the amount of surplus tariff revenue which the proposed tariff would result in, should also be made part of the process. Depending upon the analysis, a portion of the additional tariff revenue would be designated into a fund which will provide rebate to consumers of the said goods. The decision would be in the hands of the negotiators to calculate the precise proportion as a percentage of the tariff revenue or predictable increase in price, and whether the same is to be made applicable in prospective or retrospective. For instance, assume that the Indian solar panel costs 30% more than a Chinese solar panel. Also assume that the consequence of Indian trade remedy reflects as 100% tariff imposition against Chinese imports. On the assumption that the entire cost of additional tariff is passed on to consumers, the Chinese panels will now cost 54% more than the Indian made. This scenario is beneficial for the Indian manufacturers, but not so much for the environment. This hurts the environment more as due to the trade remedy the actual lower priced product is now more expensive. The solution provided requires India to provide some amount of the increased tariff revenue, back to the consumers who purchase solar panels irrespective of the country of manufacture. Assuming that after the required analysis by the government, the rebate is established at 15% of the purchase price, the consumers, regardless of which country's panels they buy, will be eligible for the said rebate. Thus, environmental damage

is softened, even if not completely eliminated, as the lowest priced goods will only be slightly above 10% more expensive than it was before the imposition of the trade remedy. On the assumption that prices drive the purchase flow for a consumer, the consumption pendulum will now shift away from Chinese imports and towards the Indian made solar panels. The rebate on the panels would thus mitigate environmental fallout on one hand and benefit primarily the domestic producers, on the other.<sup>50</sup>

2. Another possible remedy is to limit the number of trade remedies which are allowed simultaneously on environmental goods. For instance, the WTO member states may agree on a decision which fixes the limit at maximum three trade remedies on environmental products. This decision gives the flexibility of taking an action against acts of dumping or unfair subsidy as they may deem fit. It also ensures that countries retain the alternative of taking action in extreme harmful scenarios involving predatory pricing. This will however prevent the countries from abusing the flexibility of enacting a major swath of trade remedies on the pretext of protecting domestic industries by artificially enhancing the prices of environmentally friendly foreign goods. Putting a cap will require the government to thoroughly consider whether a situation or product is important enough for it to use one of its allotments, rather than having to take measures on almost every case filed by domestic producers. High tariff rates as a trade remedy for long durations is an anticipated danger of a trade remedy. To add to the misery, WTO law does not place any limit on the duration of antidumping or countervailing duties, as long as the same are reviewed every half a decade and the investigation establishes that termination would result in injury. Limiting the same will invoke the

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<sup>50</sup> Supra at 7.

vanishing of certain long standing trade remedies so as to provide room for new ones. In addition to this solution, it must be ensured that the peace clause should not only use unilateral domestic trade remedies imposed on environmental issues so as to avoid any conflict in dispute resolution under other forums.

3. Placing a strict time limit on the duration of trade remedies for environmental goods is another possible answer. The WTO safeguards agreement permits the safeguards to exist for a specific period of three years after which compensation has to be paid.<sup>51</sup> WTO member states could impose a likewise time limit on trade remedies on environmental goods. This suggestion acknowledges the fact that while imposing a tariff, a government desires granting its domestic industries enough time to recuperate from the effects of dumping or subsidization by the competitor. Thus, setting a time period will ensure limiting environmental costs to the near term.

4. There are as many as 200 international agreements, outside of WTO, which deal with many environmental concerns which are currently in force, known as multilateral environmental agreements. Around 20 of such agreements have provisions which can impact trade such as ban on trade in some products or allowing countries to restrict trading under specific circumstances. Few of such agreements are the Montreal Protocol which focuses on protection of ozone layer, Basel Convention dealing with hazardous waste and its trade or transportation and the Convention on International Trade in Endangered Species.<sup>52</sup> While the WTO asserts that basic principles of WTO of non-discrimination and transparency, do

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<sup>51</sup> Agreement on Safeguards art. 8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154.

<sup>52</sup>The Environment: A Specific Concern, WTO (April 14, 2022, 09:00 P.M.), at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm)

not contradict with the trade measures which are required for protection of environment such as actions taken in lieu of the environmental agreements. In addition to this, the clauses in the agreements such as on goods, services and intellectual property permit governments of countries to prioritize their domestic policies on environment. In fact, WTO states that the best way to deal with problems of environment is via the environmental agreements as this approach runs in consonance with WTO actions for seeking solutions to trade concerns, which are internationally accepted and agreed upon. Thus, utilizing the provisions of such agreements is any day a better approach in contradiction to one nation attempting to modify or change others' environmental policies.

5. Recreating environmental exceptions becomes necessary to take care of market failures. It is important to allow government regulators to offer appropriate incentives to remedy the issues of public externality. Thus there is a need to push for an environmental "safe harbor". The Agreement on Subsidy & Countervailing measures originally provided for an exemption in the form of "non-actionable or green light" subsidy which allowed environmental subsidization even though the same expired long back in 2000 and hasn't been renewed since.<sup>53</sup>

6. In case of a dispute arising from a trade action arising from an environmental agreement where both parties to the dispute are signatory to the agreement, they should ideally utilize the agreement itself to settle the dispute. This preference of dispute settlement under the environmental agreement does not imply ignoring environmental concerns in WTO

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<sup>53</sup> Doha Development Agenda: Negotiations, Implementation And Development, WTO (April 14, 2022, 09:00 P.M.), at [https://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/dda_e.htm)



disputes as WTO agreements ensure that a panel examining a dispute seeks expert opinion on the issues.

7. Trade law simultaneously infuses environmental well-being while it enables global flow of environmental products at low tariff rates. Thus pushing for reducing tariff rates on such goods by way of sector-based agreement is the need of the hour. The accomplishment of this will be paved via WTO permitting negotiations of stand-alone, sector specific treaties which countries will have the option to opt for. A successful example of this model is the Information technology Agreement, which ensured low tariffs on a number of information technology goods.

### **Conclusion**

In the prevailing scenario pertaining to this debate the very first question which arose is whether there is a need for legal reforms in the WTO framework to deal with the new generation disputes. When the next generation disputes emerged, there began a discussion that Article XX exceptions are outdated and being *lex specialis* do not extend to other agreements. Thereafter, discussions regarding WTO framework providing for stand-alone sector specific treaties which can resolve the problem of lack of reforms emerged. The EGA was the first agreement to come out of it but the underwhelming response it has received is a setback. It must be observed that WTO is created to facilitate arrangements which are mutually and reciprocally advantageous, and therefore it's unfair to expect a country's environmental friendly measures to be accepted by others when it hampers free trade. No number of reforms can change these clashes if they are not symbiotically beneficial to all. This will only happen if persistent negotiations continue for the cause of environmentally friendly trading practices. The proposed suggestions in addition to many other recommendations which emerge from world-wide deliberations on

the above concern will only hold good if countries are willing to accept and implement the same, however painful the adoption process may be for them. New initiatives by Committee on Trade and Environment such as Informal dialogue on Plastics Pollution and Sustainable Plastics Trade (IDP), Trade and Environmental Sustainability Structured Discussions (TESSD) and Fossil Fuel Subsidy Reform (FFSR) have kickstarted a positive dialogue amongst the member countries.

Considering the ever emerging and bettering technology, the cost of renewable energy is falling and will continue to further fall, eliminating the need for subsidization of the same.<sup>54</sup> Thus allowing subsidy will probably eventually vanish as fodder for disputes. The future disputes would rather concern issues such as border carbon tax. Already taking the lead, the European Union has already phased out its plan to introduce the said tax in the next four years and the U.S. too will follow the suit.<sup>55</sup> This step towards forcing developing countries to agree to the EGA Agreement will lead to several clashes and will continue the ongoing trade war amongst the two major fractions; the US & EU and China, India, Brazil. With changing dynamics in Geopolitics and China and India emerging as the new world leaders in manufacturing and renewable energy production, the future of trade and environment debate seems interesting and we will have to sit back and observe the situation folding out in front of us.

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<sup>54</sup> Yujie Xue, China To Remain Renewable Energy Leader With Strong Capacity Growth In 2022, Despite Subsidies Phase-Out, SOUTH CHINA MORNING POST, Jan. 02, 2022.

<sup>55</sup> Pia Krshnakutty, How EU's Proposed Carbon Border Tax Will Work & Why India Is Among The Nations Opposing It, THE PRINT, July 27, 2021, at <https://theprint.in/theprint-essential/how-eus-proposed-carbon-border-tax-will-work-why-india-is-among-the-nations-opposing-it/703214/>