

Notwithstanding the stipulations contained in Principle 12, Dr. Gandhi asserted that the decisions of the WTO's DSB shows that developed countries have unilaterally invoked the exceptions under Article XX of the GATT to justify protectionist measures, which are not sustainable under WTO. The States affected have challenge such measures as discriminatory and not transparent.

GATT/WTO jurisprudence so far does not reveal a single adjudicated dispute that addresses the conformity of any MEA trade restrictions with GATT rules. However, to a limit extent, the consistency of certain trade measures enacted pursuant to environmental concerns have been the subjects for dispute resolution in GATT and WTO. Dr. Gandhi briefly described the facts and outcomes of these disputes - the Tuna-Dolphin Cases I and II; Shrimp-Turtle Case and the US Gasoline Case. All these disputes involved US and the panels had ruled against the administration of certain trade measures as being inconsistent with Article XX of GATT.⁷ He was of the view that, the rulings of the panels indicate that the prime focus of Art. XX was to a question of legality, but an examination as to whether any other alternative measures that are less trade-restrictive other than impugned measures could have been employed. The enquiry by the panel is often limited to the examination of the means employed to meet the objectives states in Art. XX. In other words, consistency of national trade

transboundary or global environmental problems should, as far as possible, be based on an international consensus.

⁷ The relevant portions of Article XX is as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, noting in this Agreement shall be constructed to present the adoption or enforcement by any contracting party of measures:

.....

(b) necessary to protect human, animal or plant life or health;

.....

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

measures are decided on the basis of the "least trade restrictive" test.

He was of the view that the issue of determining the respective spheres of operation (as regards trade and environment) cannot, in the long run, be deferred. Given an increasing number of MEAs which involves curbs of trade measures, the need to articulate a mutually supportive trade-environment framework to promote sustainable development, becomes imminent. While recognizing the utility of such a framework, Dr. Gandhi said that it should be done in a way consistent with the letter and spirit of Principle 12 of the Rio Declaration. Arguing that States must eschew unilateral and extraterritorial trade measures to enforce environmental objectives, he stressed the need to resolve trade-environment disputes within the dispute settlement framework as existing under the MEAs. Multilateral enforcement with an emphasis on dispute avoidance would, in his view, pave the way for a mutually supportive environment and trade compatible regime.

Prof. Bhattacharya examined, from a economic perspective, the rationale of resorting to trade restrictions as a means of implementing environmental goals. Two arguments are put forth by environmentalists in this regard. Firstly, environmentalists envisage a negative relationship between trade liberalization and environmental protection. Put differently, trade liberalization leading to increase in trade output and incomes would necessarily result from over-use of the world's resources, thus paving the way for environmental degradation. Prof. Bhattacharya conceded that though this may be true at the initial stage, but when a threshold level is attained, the demand for a clear environment' (as a matter of public policy) would restore a fair balance between trade liberalization and environmental concerns. Secondly, it is argued that the tendency for potentially environmentally hazardous industries to relocate to countries with lower environmental standards may affect the competitiveness of eco-friendly industries in other parts of the world. Prof. Bhattacharya refuted this as there was no empirical evidence supporting such a conclusion.

Questioning the validity of the hypothesis suggesting a negative relationship between trade liberalization and environment, Prof. Bhattacharya pointed out that "environment" is only one of the many factors/variables that influence the outcome of trade relations. An undue emphasis on regulating 'environment' without fine tuning other allied factors would not necessarily enhance global welfare. Moreover, contemporary mainstream economic theory provides no guidance to study the impact and function of trade restrictive measures to protect and preserve the environment.

Hence, he argued that, trade policies are not the optional tools to address environmental problems. The limited scope for trade measures in addressing the 'root causes' of environmental problems, in his view, rendered 'trade polices' inappropriate to regulate environmental matters. Attributing environmental degradation to 'over-consumption' by developed countries and 'poverty' in developing countries, he said that the trade-environment debate could make a meaningful progress by remedying the root causes of environmental degradation. At the level of concrete actions, he suggested the establishment of a financial mechanism to aid developing countries procure environmentally-sound technologies.

Two other specific aspects, which in his view, needs to be addressed in the ongoing debate were:

- (i) Danger of domestic producers and environmentalists joining hands to force governments adopt unilateral restrictions on trade;
- (ii) Status of non-signatories vis-a-vis signatories to multilateral environmental agreements, require closer examination within the framework of trade instruments.

Mr. William Davey, while generally agreeing with the presentations by panelists, examined the WTO Appellate Body view in the Shrimps-Turtle Case (India, Pakistan, Malaysia and Thailand were complainants against USA). Mr. Davey said the pronouncements of the Appellate Body which quoted

extensively from environmental agreements was the first case within the WTO dispute settlement framework wherein concerns for environmental protection received extensive coverage. The Appellate Body indicted US measures as being flawed in its application on two grounds:

- (i) The failure of US to negotiate and discuss technical assistance for implementing the exclusive fishing devices with the complainant States, though such a process was initiated with some other States-amounted to discrimination.
- (ii) The most conspicuous flaw, in the view of the Appellate Body, was that Sec. 609 of the US Act had a coercive effect, both intended and actual, on the policy-making by foreign governments and hence in effect amounted to an economic embargo.

Notwithstanding the concerns towards environment, he said, the Appellate Body's view does not clarify the ambiguity involving a situation of direct conflict between trade-environment obligations. More particularly no guidance is available on the interpretation of Article XX of GATT and the status of non-signatories to a MEA.

The observations of the Appellate Body on protection of environment has been perceived by some WTO Members as an act of transgression by a judicial body into the political domain of negotiations by parties. However, Mr. Davey was of the view that the decisions of DSB could provide the needed impetus to break the stalemate within the CTE and facilitate further progress in the trade-environment debate.

Dr. B.S. Chimni said that the review of the GATT/WTO jurisprudence reveals that the dispute settlement procedure has progressively moved towards legitimizing legality of trade measures undertaken pursuant to an environmental objective. This initiative emanating from the DSB would, in his view, constrain the negotiating space for WTO Members to agree on a future framework on the interlinkages between trade - environment.

Dr. Veena Jha in her intervention stated that instances of a lead role being taken by a dispute settlement body on substantive policy issues was not new in the context of the trade-environment debate, as such a process was earlier seen in the field of anti-dumping and other similar issues. Responding to the concerns that the DSB could impede the developments in other negotiating forums, she stressed the need to distinguish between a 'rule' and the 'interpretation' of a rule. While the inherent powers to negotiate binding rules were vested with WTO Members, the role of the dispute settlement mechanism was confined to interpreting these rules.

Mr. Atul Kaushik, an official from the Ministry of Commerce, Government of India reiterated the need to address 'root causes' of environmental degradation, as a necessary component of the international efforts to protect and preserve the world environment. Agreeing with the issue raised by *Dr. Chimni*, *Mr. Kaushik* said that the WTO panels could, if they find that there are grey areas relating to trade-environment interface, recommend the WTO Members to codify the requisite guidelines for practical application in WTO disputes. In this context he cited the precedent offered by a GATT panel in a dispute that involved Nicaragua and USA, wherein the panel requested GATT Contracting Parties to negotiate devise the criteria for interpreting the phrase "essential security interest" as found in Article XXI of GATT.

H. Closing Session

The closing session was chaired by *Dr. P.S. Rao*, the President of AALCC. *Dr. W.Z. Kamil*, Deputy Secretary General, AALCC, briefly reported on the general line of discussion in the two days' Seminar. He stated that the AALCC Secretariat would prepare a summary report of the proceedings at the Seminar, which could be subsequently distributed to AALCC Member States. The Secretariat could also undertake publishing a comprehensive report of the Seminar, provided financial support for this venture was available.

Mr. William Davey, Director, Legal Affairs, WTO stated that his participation at the Seminar was beneficial in gaining useful insights as to the views of the Asian-African States on the functioning of the WTO. *H.E. Gehard Mady*, Ambassador of Egypt to India, expressed his appreciation 'for the AALCC's timely initiative in organizing this Seminar and termed the deliberations as 'comprehensive and educative'.

Mr. Tang Chengyuan, Secretary General of AALCC thanked the President, *Dr. P.S. Rao* and the Government of India for the successful conduct of this Seminar. He also expressed his gratitude to *Mr. William Davey*, other panelists and participants for their active involvement in the deliberations. A report on the proceedings of the Seminar would be presented to the thirty-eighth session of the AALCC scheduled to be held at Ghana in 1999. While the subject of WTO could continue to be considered by the Committee, the Secretary General sought the President's good offices towards ensuring adequate financial support, to facilitate the publication of the verbatim records of the Seminar.

The *President, Dr. P.S. Rao* in his closing remarks stated that the discussion at the Seminar had helped focus attention on certain important issues that are of concern to the Asian-African region. He expressed his gratitude to *Amb. Narayanan*, Permanent Representative of India to WTO for his guidance and co-operation in organizing the Seminar. Thanking *Mr. William Davey*, Director, Legal Affairs, WTO for his participation and valuable contribution towards the successful conduct of this event, he hoped that this Seminar could lead to more intense cooperation between the AALCC and WTO. He also expressed his gratitude to all panelists, participants and the AALCC Secretariat. He expressed the hope that the Secretariat would at the earliest prepare a comprehensive report on the proceedings of the Seminar.

III. Future Work - Programme

In the view of the AALCC Secretariat, the Seminar provided an opportunity for a focused consideration of specific

issues on the functioning of the WTO's dispute settlement mechanism. While the Thirty-seventh Session of the Committee (New Delhi, 1998) was a preliminary step in studying the general functioning of the WTO dispute settlement mechanism, this Seminar could be regarded as one that seeks to consolidate and enhance the understanding of the dispute settlement process, with a view to address the specific concerns of the developing States from the Asian - African region.

It may be recalled that the Seminar had coincided with the start of the review process of the dispute settlement system within WTO. The WTO General Council had at its meeting in December 1998 decided to continue and complete the review process by the end of July 1999.⁸ Hence the Committee may wish to consider the outcome of the review process to decide upon its future course of work on this topic.

Besides this, at the institutional level, the Second WTO Ministerial Conference met at Geneva in May 1998. The Conference accepted an offer from the Government of the United States to host the Third Session of WTO Ministers, and invited the General Council to determine the date and duration of that session. The Ministerial Declaration adopted thereat, also outlined the agenda for the Third Ministerial Conference. Emphasizing the importance of full and faithful implementation of the WTO Agreement and Ministerial Decisions in maintaining the momentum for expanding global trade, and raising standards of living in all parts of the world, the Declaration states that the Third Ministerial Conference would further pursue its evaluation of the implementation of individual agreements and the realization of their objectives. Such evaluation, *inter alia*, seeks to cover the consequent impact on the trade and development prospects of Members.⁹

⁸ See General Assembly, Annual report (1998) WT/GC/15, at p.29.

⁹ For more details, see "Second WTO Ministerial Conference Focuses on Global Electronic Commerce", *AALCC Bulletin*, vol.22, Issues No. 1, June 1998 at p.73-75.

The General Council has agreed on the dates of 30 November - 3 December 1999 for the Third Ministerial Conference. The preparatory process for the Ministerial Meeting is currently underway. The substantive agenda of the Ministerial Conference is likely to cover important issues relating to trade and environment; work Programme on electronic commerce; trade and development; assessment of the functioning of the Working Group on Trade and Investment; Trade and Competition Policy and Transparency in Government Procurement etc. The Committee may wish to take note of the significance of this process, and provide suitable directions to the Secretariat as to its future Programme of work.

B. Report on the Legislative Activities of the United Nations and Other Organisations Concerned with International Trade Law

I. Work Done by the United Nations Commission on International Trade Law at its thirty-first Session

The General Assembly of the United Nations, by its resolution 2205 (XXI) established the United Nations Commission on International Trade Law (hereinafter referred to as 'UNCITRAL' or 'Commission') as the primary organ of the United Nations system to harmonise and develop progressive rules in the area of international trade law. A substantial part of the Commission's work is carried out at meetings of the Working Groups, while the Commission meets annually to review and adopt such recommendations towards guiding the progress of work on the various topics on its agenda. The Commission is also mandated to submit an annual report to the General Assembly, as to the tasks accomplished at its yearly sessions.

The thirty-first session of UNCITRAL was held in New York from 1 to 12 June 1998. It had on its agenda, *inter alia*, the following four substantive topics for consideration:

- (i) Privately financed infrastructure projects;
- (ii) Electronic commerce;
- (iii) Receivables financing: assignment of receivables; and
- (iv) Monitoring implementation of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

On the topic 'Privately financed infrastructure projects' the Commission had at its 29th Session in 1996 decided to prepare a legislative guide on build-operate-transfer (BOT) and