CHAPTER-III

ENVIRONMENT: A WTO CONCERN

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ENVIRONMENT: A WTO CONCERN

If one were to capture the essential trait that distinguishes the current environment-related discussions within the WTO, as opposed to a decade ago, it would be its absorption within the negotiating agenda. Indeed, for the first time in the history of the GATT/WTO selected environment-related topics have been elevated from mere interesting topics deliberated upon in the Committee on Trade and Environment to full-fledged negotiating items and bargaining chips. What is even more particular about the negotiations, launched at the Doha Ministerial Conference in November, 2001, is that most negotiating items form part of a so called “single undertaking” negotiations\(^1\). As under the long-drawn and comprehensive negotiations under the Third UN Conference on the Law of the Sea(1973-1982), the practice of “single undertaking” negotiations or “package deal negotiations”\(^2\) has been adopted within the GATT/WTO regime since the Uruguay Round of negotiations (1986-1992) as well.\(^3\) Single undertaking negotiations entail that WTO Members must agree on all issues as a single undivided package, in the trade round: From agriculture, services, market access for non-agricultural products, to trade and environment. Linking of numerous, and even unrelated, negotiating aspects is used to leverage an overall solution between all WTO Members since it creates ample room for

\(^1\) Doha Ministerial Declaration (DMD), Adopted 14 November 2001, directed that the conduct, conclusion and entry into force of the outcome of the negotiations would be treated as part of a single undertaking, with the exception of the mandate to improve and clarify the Dispute Settlement Understanding (para 47 DMD). “Ministerial Declaration –Adopted on 14 November 2001,” WT/MIN(01)DEC/1, 20 November, 2001.


“give-and take” negotiations between parties. It essentially seeks to avoid negotiations coming to a standstill due to disagreement on a few topics only, or between certain WTO Members only. Hence, the trade and environment negotiations must be seen against this background: it is one of the many and also new negotiating items, and its final outcome will to a large extent be coloured by the ‘trade-offs’ that took place throughout the Doha round of negotiations between other topics, such as agriculture, where, so it is expected, the EU in particular will have to make considerable concessions.

Submission that ‘environmental concerns’ have been included in the negotiations is certainly not precise enough, for the “trade and environment” heading in the Doha Ministerial Declaration (DMD)- that outlines the four corners within which negotiations must take place- only lists three narrowly circumscribed topics. The relevant part of paragraph 31 DMD reads as follows:

"With a view to enhancing the mutual sportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any member that is not a party to the MEA in question."
(ii) Procedures for regular information exchange between MEA Secretariats and the relevant WTO Committees, and the criteria for the granting of observer status;

(iii) The reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services[^4].

In the light of the above, it is noted that the negotiations identified under para 31(iii) pertaining to the reduction and elimination of tariffs on environmental goods and services forms is in many ways a more 'classic' GATT/WTO negotiation topic, given that the eight previous negotiating rounds were always dedicated to ever-expanding reductions in tariffs on non-agricultural goods, and that 'services' were included during the Uruguay round as well.

Paragraph 31(ii) is a rather practical negotiating item aimed at strengthening the institutional interactions between international environmental organizations and the WTO. Although there have been very few submissions by WTO Members under this topic[^5], the issue of granting observer status to, for instance, the Convention on Biological Diversity in the TRIPS Council, Committee on Agriculture, TBT Committee and SPS Committee does turn out to be rather contentious.[^6] Also, observer status to international organizations is from a strategic political angle linked to the granting of observer status to certain nations which are not WTO Members. In practice, six MEA Secretariats and

[^4]: See for detail, Doha Ministerial Declaration (DMD), para 31 on www.wto.org
UNEP have been invited on an ad hoc basis to attend the CTE Special Session or the negotiating meetings.\(^7\)

The negotiating mandate spelled out in paragraph 31(i) on the relationship between WTO rules and specific trade obligations (STOs) set out in Multilateral Environmental Agreements (MEAs), as between Parties to both international instruments is the most important area of concern.

It is pertinent to address the difficulty that may arise when a Party to both international instruments (the WTO Agreements on the one hand and a MEA on the other hand) is faced with conflicting obligations, and where compliance with one treaty may entail infringement of the other international treaty.\(^8\) For instance under the Convention on International Trade in Endangered Species (CITES) Parties have adopted a practice of “split listing” whereby populations of a species found in certain countries are not permitted to be traded, whereas the same species found in other countries would be allowed to be traded. This distinction from a CITES perspective is based on whether the population of the species is endangered or not. However, from a WTO perspective this may be viewed as submitting different countries to different trade treatment, although the products appear to be identical (or in WTO parlance ‘like

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\(^7\) WTO, “Summary Report on the Seventh Meeting of the Committee on Trade and Environment in Special Session -8 July 2003”. Note by the Secretariat, TN/TE/R/7, 1 August 2003. The six international organizations, apart from UNEP, are: Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; the Convention on Biological Diversity; the Convention on International Trade in Endangered Species; the International Tropical Timber Organization (arguably not an MEA in strict sense); the Montreal Protocol on Substances that Deplete the ozone layer; and the United Nations Framework Convention on Climate Change.

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This may violate the Most Favoured nation principle, a core WTO principle, contained in the General Agreements on Tariff and Trade. According to the Article I of GATT, 1994, WTO Member can not discriminate among products on the basis of their national origin and should extend immediately and unconditionally its most favoured trade regime to all other WTO Members. Since the MEAs and WTO Agreements are equal instruments of international law, one can not state that a MEA will always prevail over a WTO Agreement, or vice-versa.

From the outset one should point out three relevant facets to the paragraph 31(i) DMD negotiations. First, MEAs often have a large international membership, and may at times be signed or ratified by more countries than the number of WTO Members. Second, of the 250 or more MEAs only a few- the CTE identified 32 MEAs—further its objectives via trade measures. Third, the term “specific trade obligations” is a new nomenclature created within the Doha round, and is not found in the general public international law discourse. Fourth and importantly, no such dispute between MEAs and WTO Agreements has so far actually arisen. Quite rightly Van Calster observes that this negotiating item carries a rather symbolic value as it tests the WTO on how it will be able to relate to other international regimes.

Although trade and environment-related issues have been included for the first time within GATT/WTO negotiations, they were being discussed within the WTO well before that. Indeed, the WTO

Committee on Trade and Environment had been set up pursuant to a
decision taken at the Marrakesh ministerial Meeting in April 1994.\(^\text{12}\) Its
set-up had largely been influenced by the UN Conference on
Environment and Development held in 1992 to which the GATT
Contracting Parties made a contribution.\(^\text{13}\)

The CTE’s monumental tasks were to identify the relationship
between trade measures and environmental measures in order to
promote sustainable development, as well as to make appropriate
recommendations on whether any modifications of the provisions of the
multilateral trading system are required.\(^\text{14}\) The Marrakesh Decision
further listed ten items, encompassing all areas of the multilateral
trading system: goods, services and intellectual property that would
define the regular 10-point work programme of the CTE. It included,
\textit{inter alia} the relationship between the provisions of the multilateral
trading system and trade measures for environmental purpose, including
those pursuant to MEAs; as well as the relationship between WTO
provisions and environmental taxes, ecolabels, requirements for
packaging, recycling; and the effect of environmental measures on
market access, especially in relation to developing countries; and Trade-

In the light of the CTE’s broader agenda, the Doha Ministerial
Declaration in its paragraph 32 also instructed the CTE, to pursue work
on all items on its agenda within its current terms of reference, to give
particular attention to (1) the effect of environmental measures on

\(^{12}\) WTO, Trade and Environment- Decision of 14 April 1994, MTN/NC/45(MIN).
\(^{13}\) Hakan Nordsrom and Scott Vaughan, WTO Special Studies, Trade and
Environment, 1999 (Annex I-Background Note by the Secretariat).
\(^{14}\) Ibid.

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market access; (2) the relevant provisions of the Agreement on Trade-
Related Aspects of Intellectual Property Right; (3) and labeling
requirements for environmental purposes. Furthermore, the CTE was
asked to report to the Fifth Session of the Ministerial Conference, and
make recommendations, wherever appropriate, with respect to future
action, including the desirability of negotiations.

Another important aspect: agenda topics for discussions within
specialized WTO Committees are often included with the ambition of
integrating them in a more binding manner within the WTO regime,
with its exact terms to be agreed upon during negotiating rounds. India,
for instance, has always been of the view that existing WTO provisions
are "adequate to deal with trade measures taken pursuant to legitimate
environmental objectives in existing MEAs", and was unlike the EC-not
in favour of including this regular agenda item in the negotiating
mandate.

Relevant WTO Rules

It is pertinent to recall that the WTO Members are asked to agree
on how the relationship between existing WTO rules and specific trade
obligations set out in MEAs should be approached, as between parties to
both regimes. This question implies a potential conflict between both
international treaties. For instance, what should the outcome be if a

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15 Paragraphs 32 of the Ministerial Declaration – Adopted on 14 November 2001,
WT/MIN(01)/DEC/1, 20 November, 2001.
16 India, Non-Paper, 23 July 1996; also referred to in: "Multilateral Environmental
Agreements (MEAs) and WTO Rules: Proposals Made in the Committee on Trade
"Trade and Environment: Doha and Beyond" in India and the WTO, Edited by
Aditya Mattoo and Robert M Stern, Co-publication of the World Bank and Oxford
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WTO Member/MEA party banned the import of certain products originating from another WTO member/MEA party based on its obligations under on MEA but would still allow trade with third WTO members/MEA parties, which have incorporated certain environmental management practices prescribed by the MEA. Should the obligation under WTO Agreements not to discriminate between like products of the WTO members prevail or should the environmental concerns contained in the MEA prevail? The interpretation rules of public international law, do not allow to conclude uniformly and unambiguously that in such a situation WTO Agreements would always prevail over MEAs, nor can the reverse be said. Within the Special Sessions of the CTE this issue has mainly been taken up from a WTO centric point of view and only incidentally been scrutinized from a public international law perspective.

The fundamental WTO rules embedded in the overall principle of non-discrimination between WTO Members and the relevant exceptions that one must be familiar with for the purpose of this topic are: (1) the Most-Favoured nation principle; (2) the National Treatment principle; (3) the general elimination of quantitative restrictions; and (4) the General Exceptions clause of GATT, 1994.

1. The Most-Favored-Nation Principle

The Most-Favoured-Nation (MFN) treatment embedded in GATT Article I requires that each WTO member, with respect to customs duties, charges of any kind, all rules and formalities imposed on or in connection with import or export, provides immediately and unconditionally any advantage, favour, privilege or immunity granted to
a product originating from one WTO Member to like products imported from, or exported to all other WTO Members. In short, a member cannot discriminate among like products on the basis of their national origin.17

2. **The National Treatment Principle**

Once products have met tariff and other import requirements, and entered the market, the national Treatment (NT) principle of principle of article III of GATT requires parties to treat foreign products the same as “like” domestic products. It directs Member States not to apply internal laws and taxes “to imported or domestic products so as to afford protection to domestic production”. The obligation permits parties to impose domestic regulatory requirements on imported products at the point of import provided that the imported product is treated no less favorable than the like domestic product.18

3. **Elimination of Quantitative Restrictions**

The goal of the GATT was to remove all border restrictions and have the remaining trade barriers reflected in the form of tariffs, and subsequently to reduce these tariffs through successive, binding multilateral negotiations.19 It is submitted that no prohibition or restriction other than duties, taxes or other charges made effective through quotas, import or export licenses or other measures may be introduced or maintained by a contracting party on the export of any product.  

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18 Ibid.  
4. **General Exceptions**

In case a measure violates a core GATT obligation, a WTO Member may be able to justify it under any of the ten paragraphs of the General Exceptions clause, GATT articles XX.\(^{20}\) Article X provides that:

"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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures."

For the purpose of this study the three sub-paragraphs of article XX are relevant in environmental cases:

- a) "necessary to protect human, animal or plant life or health";
- b) "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to the protection of patents, trade marks and copyrights";
- c) "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

The WTO member invoking Article XX bears the burden of proving that the contested measure meets the requirements contained in

\(^{20}\) Other sub-provisions are: (a) necessary to protect public morals; (c) relating to the importations or exportations of gold or silver; (e) relating to the products of prison labour etc.
those provisions. This is an important aspect for the WTO rules-MEA negotiations as some WTO members suggest altering this burden of proof. Furthermore, the Appellate Body of the WTO has explicitly developed a two-tiered test to scrutinize whether a measure can genuinely be justified under article XX: first, the measure must be identified as falling under any of the sub-paragraphs of article XX and only subsequently will the measure be benchmarked against the WTO headnote of Art. XX This is a logical order since one would first want to identify the type of measure that lays at the essence of the dispute prior to analyzing whether it is being applied in a discriminatory manner.

The reason that disputes pertaining to GATT article XX are particularly relevant is because the global trade in goods is largely governed by the GATT. As a consequence, the debate on the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to MEAs as debated within the CTE mainly focused on the general exception contained within this prime agreement.

Specific Trade Obligations (STOs) and MEAs

One of the key terms of the negotiating mandate that has also received most attention so far within the Special Sessions of the CTE is as to what type of trade measure set out in MEAs could qualify as specific trade obligations (STOs)- admittedly a term not used in other
international forums or instruments? For clearly, not all ‘trade measures’ contained in MEAs are STOs.

The European Community, which favours a ‘top-down’ approach tabled four, rather ambitious, conceptual categories of measures ‘arising from trade obligations which could qualify as STOs’. The four categories are:

i) Trade measures explicitly provided for and mandatory under MEAs:

ii) Trade measures not explicitly provided for nor mandatory under the MEA itself but consequential of the “obligation de resultat” of the MEA. This category covers cases where a MEA identifies a list of potential policies and measures that parties could implement to meet their obligations.23

iii) Trade measures not identified in the MEA which has only an “obligation de resultat” but that Parties could decide to implement in order to comply with their obligations. In contrast to the previous category, the MEA does not list potential policies and measures, so countries have greater scope as regards the exact nature of the measures they might decide to deploy to reach the objectives of the MEA.

iv) Trade measures not required in the MEA but which Parties can decide to implement if the MEA contains a general provision

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24 The term “obligation de resultat” (French for result-oriented obligation) stems from contract law in civil law countries indicating a liability to achieve an agreed result, for which only limited exceptions can be invoked in the event of failure to achieve the said result.
stating that parties can adopt stringent measures in accordance with international law.

Japan supported this four-class categorization in its submission by submitting four similar categories, and Switzerland explicitly supported EC’s submissions. Since the EC’s third and fourth category could easily be dismissed as not covering trade obligations that are specific, the main attention has been drawn to the second and first categories. Undoubtedly, as a trained negotiator, the EC tabled four categories, knowing that at least two categories would outrightly be rejected, one possibly rejected, and one most likely agreed upon. A consensus seemed to be emerging on the first category (trade measures explicitly provided for and mandatory under MEAs) that could qualify as an STO. However most WTO Members, including India, find the second EC category too broadly defined to qualify as a ‘specific trade obligation’. Their rationale is that as soon as any discretion is provided, the trade measure no longer remains specific enough to qualify as an STO. In this regard, India’s submission stated that “the term “specific trade obligation” has three elements that must be considered together i.e. the provison must be specific with a trade element and should be in the

27 WTO, “Summary Report on the Sixth Meeting of the Committee on Trade and Environment Special Session – 1-2 May, 2003”, Note by the Secretariat, TN/TE/R/6, 12 June 203, paras 6,8,14,19,38 and 40.
28 Ibid, paras, 8,9,19,22,26,30,36,38 and 40.
nature of an obligation.” In its view, to qualify as an STO the provision in a MEA must be specific and mandatory in character, and so precise in its direction that there can be no doubt about the action or restraint that a party to the MEA must adopt.30

The next issue that has attracted the attention of the negotiators within the Special Session of the CTE is the exact meaning of the words in paragraphs 31(i) according to which specific trade obligations must be “set-out” in MEAs. All agree that an STO explicitly mentioned in the text of the treaty would be “set-out” in an MEA. The debate, however, moves beyond this minimum threshold and revolves around the more contentious issue of whether STOs contained in Conference of the Parties (COP) decisions, recommendations, resolutions, etc. would also qualify as being “set-out” in a MEA. That is, numerous MEAs have established institutional arrangements to govern a treaty, such as the creation of Secretariat, setting-up specialist subsidiary bodies, holding regular meetings in the form of Conference or Meeting of the Parties. The COP has various tasks that may be different for each MEA and can range from:

i. Administrating internal matters (e.g. establishing subsidiary bodies, deciding on arrangements for meetings, adopting rules of procedure for itself and subsidiary bodies, providing guidance to those bodies and the Secretariat).

ii. Supervising parties’ implementation of and compliance with MEAs and deciding on the consequences of non-compliance with the MEAs.

30 Submission by India, “Relationship Between Specific Trade Obligation Set out in MEAs and WTO Rules,”, TN/TE/W/29, 30 April 2003, paras 8-10.
iii. Acting at the external level adopting arrangements with international organizations.

iv. Contributing to the development of new substantive obligations by the parties by amending an MEA or adopting new Protocols\textsuperscript{31}.

Hence, the issue is blurred by the fact that such COP decisions generally tend to relate to the administration of the MEA, but may at times also have genuine law-making powers.

Several WTO Members, including India, agree that STOs which are contained in Annexes, Protocols and amendments to MEAs that have been adopted by parties of the MEAs could qualify as being “set-out” in the MEAs\textsuperscript{32} but refuse the linkage according to which all COP decisions which are legally binding would automatically be covered by the mandate.\textsuperscript{33} In such a situation it is actually the amended treaty, once the amendment entered into force, which is legally binding, not the COP decisions itself.\textsuperscript{34}

**WTO, Environmental Provisions and the CTE**

Towards the end of the Uruguay Round, the issue of the environment featured prominently in the multilateral discussions with


\textsuperscript{32} Submission by Malaysia “Paragraph 31(i) of the Doha Ministerial Declarations,” TN/TE/W/29, 30 April, 2003 para 14.


respect to the role that WTO has in trade related environmental issues. The Decision of Trade and Environment, signed by the trade ministers at Marrakesh in April 1994, laid the foundation of continuing work undertaken in the WTO, and mainstreaming environment into the multilateral; trading system. Moreover, the first paragraph of the Preamble to the Marrakesh Agreement establishing the WTO recognized sustainable development as an integral part of the multilateral trading system, and the importance of environmental protection. The preamble observed that in the endeavor to promote trade, raise standards of living and ensure full employment, the WTO Members recognize that the optimal use of the world resources would be made in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.”

While the WTO Agreements contained provisions on the environment and health, the Decision on Trade and Environment laid the foundation of continuing work on the trade-environment interface under a Committee on Trade and Environment (CTE). The principle of the Decision was that “there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other”. Thus the foundation of the WTO was based firmly on the principle that free and fair trade would be promoted along with sustainable development and environmental protection.
The work of the CTE was to ensure that the rules of multilateral trade support environment and sustainable development. While upholding the GATT/WTO basic principles of national treatment and non-discrimination, the CTE was mandated to take on the unresolved issues from the Uruguay Round. Two of ten items in the CTE’s agenda related to MEAs have been typically considered in conjunction: (i) (Item i)- The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environment agreements. (ii) (Item v)- The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements.

The issues for the CTE pertaining to the first item on relationship between MEAs and WTO included: (a) ensuring the compatibility of trade measures taken pursuant to MEAs and the WTO, and (b) the adequacy of WTO transparency mechanisms concerning trade measures included in relevant MEAs. For the fifth item, the issues included (a) environmental expertise in trade dispute settlement, and (b) trade expertise in environmental dispute settlement. The CTE’s work on the first item examined whether there was a need to clarify the scope under the GATT/WTO provisions to accommodate trade measures pursuant to MEAs. Several members made proposals in this regard, and many felt that the existing WTO provisions allowed for trade measures within MEAs to be applied in a consistent manner.

In 1996, the CTE endorsed multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a
transboundary or global nature. It acknowledged that WTO Agreements and MEAs are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them due respect must be afforded to both. In particular, the CTE recognized that a range of provisions in the WTO could accommodate the use of trade-related measures needed for environmental purposes, including measures taken pursuant to MEAs. The CTE noted that trade measures are within the scope provided by the relevant criteria of the general exception provisions of GATT Article XX, and this accommodation within the multilateral trading system is valuable and it is important that it be preserved by all.

Environmental provisions were also included within some of the new agreements under the WTO, including: the Agreement on Technical Barriers to Trade (TBT); the Agreement on the Application of sanitary and Phytosanitary Measures (SPS); the Agreement on Agriculture and the Agreement on Trade Related Intellectual Property Rights in respect of ineligibility of certain inventions for patenting to protect human, plant or animal life or health, to avoid serious harm to the environment contained in Article 27.2 and 27.3. The TBT and SPS, which accommodated the calls for harmonization and level-playing field in product and process specifications, contained provisions for the use of standards to protect health and the environment.\(^{35}\)

The Agreements on TBT and SPS

While the 1979 Standards Code covered technical aspects of both non-food and food tradable products, under the WTO two separate agreements, namely the Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) Agreement, now covered the non-food and food items respectively.

SPS and TBT come broadly under the term NTB. It is important at this stage to define the scope of Non Tariff Barriers (NTB) in general, and SPS and TBT in particular. Hillman defines NTBs as "Any governmental device or practice other than a tariff which directly impedes the entry of imports into a country and which discriminates against imports, but does not apply with equal force on domestic production or distribution." This definition includes standards of identity, measure, and quality, SPS measures, and packaging measures\textsuperscript{36}.

Distinguishing an NTB from a legitimate regulation for protecting consumers can be difficult. That is why other authors emphasize that the term "barrier" should not be applied to measures that may have an incidental effect of restricting trade but whose principal objective is to correct market inefficiencies. Baldwin, who restricted the concept to measures that decrease world global revenue, trade-restricting regulations that have overall positive welfare effects should not be considered NTBs\textsuperscript{37}. Some authors believe that NTBs relies on the idea that a regulatory measure should be compared to the measure that would

have been implemented if it had been designed for domestic purposes only.

A category of non-tariff barriers to trade, TBTs are the widely divergent measures that countries use to regulate markets, protect their consumers, or preserve their natural resources among other objectives, but they also can be used or perceived by foreign countries to discriminate against imports in order to protect domestic industries. TBTs with the greatest impact on agriculture are the various sanitary and phyto-sanitary (SPS) measures designed to protect humans, animals, and plants, from diseases, pests, and other contaminates. Examples of TBTs, other than SPS measures, are rules for product weight, size, or packaging; ingredient or identity standards; mandatory labeling; shelf-life restrictions; and import testing and certification procedures. While in general terms SPS can be considered to be a sub-category within the larger group of TBT, in the WTO context, especially with regards to disputes, a distinction is made between SPS and TBT, as two separate agreements exist within the WTO for SPS and TBT.

The SPS Agreement is a new agreement concluded during the Uruguay Round, a plurilateral Agreement on Technical Barriers to Trade (TBT), applying only to those countries that chose to accept it. It had been negotiated during the Tokyo Round (1974-1979). The TBT agreement, while not primarily negotiated, having SPS concerns in mind, covered, nevertheless, requirements for food safety, animal and plant health measures, inspection and labeling. This agreement was modified during the Uruguay Round and constitutes an integral part of the Final Act of the Uruguay Round, thus applying to all WTO Members, it covers all technical regulations and voluntary standards and the
procedures to ensure that these are met, except when these are sanitary or phyto-sanitary measures as defined by the SPS Agreement. The TBT Agreement also covers measures aimed at protecting human health or safety, animal or plant life or health.

To identify whether a specific measure is subject to the provisions of the SPS or the TBT Agreement, it is necessary to look at the purposes for which it has been adopted. As a general rule, if a measure is adopted to protect human life from the risks arising from additives, toxins, plant and animal-carried diseases; animal life from the risks arising from additives, toxins, pests diseases, disease-causing organisms; and a country from the risks arising from damages caused by the entry, establishment or spread of pests, this measure is a SPS measure. Measures adopted for other purposes, to protect human, animal and plant life, are subject to the TBT Agreement. For instance pharmaceutical restrictions would be a measure covered by the TBT Agreement. Labeling requirements related to food safety are usually SPS measures, while labels related to the nutrition characteristics or the quality belong to TBT discipline.

The TBT categorized product technical requirements under regulations and standards: The compliance with regulations being mandatory, but that with standards being voluntary. The TBT largely drew from the 1979 Standards Code, but further clarified the basis of using technical regulations to ensure that unnecessary obstacles to trade are not created while protecting the environment: According to the code technical regulations shall not be more trade-restrictive than necessary

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to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. The assessments of such risks are to be based on “available scientific and technical information related to processing technology or intended end-uses of products”. Moreover, if members used technical regulations “for one of the legitimate objectives explicitly mentioned in paragraph 2 of TBT in accordance with relevant international standards, it shall be presumed not to create an unnecessary obstacle to international trade”.

Another significant change in the TBT, as compared to the Standards Code, was the expansion in the definition of technical regulation to include more than just product characteristics. While members were to adopt regulations in terms of performance rather than design or descriptive characteristics, the definition in the annex was different. Technical regulations now were defined as “product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory ... also include or deal exclusively with terminology, symbol, packaging, marking or labeling requirements as they apply to a product, process or production method”.

Similarly, the SPS Agreement covered the quality/safety specifications of food products, including the process and production methods of food. The SPS agreement elaborated “rules for the application of the provisions of GATT 1994 which relate to the use of

39 Articles 2.8 of TBT, comparable to Article 2.4 of Standards Code
sanitary or phytosanitary measures, in particular the provisions of Article XX(b) including the chapeau (headnote) of the Article XX\(^{40}\). The agreement defined sanitary and phytosanitary measures to “include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animal or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety”\(^{41}\).

The SPS measures necessary to protect human, animal or plant life or health, have to be based on scientific principles and cannot be maintained without sufficient scientific evidence, nor “be applied in a manner which would constitute a disguised restriction on international trade”\(^{42}\). Moreover, according to the Article 3 of the agreement, the SPS measures have to be harmonized with international standards, in particular with those in the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention. Members, however, are allowed to introduce or maintain sanitary/phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or

\(^{40}\) SPS Agreement, paragraph 8  
\(^{41}\) See Annexure 1, SPS.  
\(^{42}\) The Article 2 of the SPS Agreement covers the rights and obligations of the WTO members.
recommendations, if there is a scientific justification, or if it is determined to be appropriate (by the Member) in accordance with the relevant provisions of risk assessment contained in Article 5.\textsuperscript{43}

According to Article 5 of SPS when introducing SPS measures, Members should make risk assessments, using risk assessment techniques developed by relevant international organizations, with the available scientific evidence. Moreover, it requires that members ensure that the measures are not more trade restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility. In case relevant scientific evidence is insufficient, Article 5.7 allows a Member to provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information. Since such measures can be adopted only on provisional basis, Members are required to “seek to obtain the additional information and review” the measure accordingly within a “reasonable period of time.”\textsuperscript{44}

It is submitted that both the TBT and SPS Agreements have a common objective, namely that of harmonization and transparency of standard, in order to eliminate unnecessary trade restricting measures. At the same time, however, the Agreements allow departures from international standards. The SPS Agreement allows departure from international standards on the basis of a scientific justification, or as a result of risk assessment when a Member chooses to adopt higher standard. Similarly, under the TBT Agreement when a Member adopts technical regulations with the legitimate objective of protecting health or

\textsuperscript{43} See Article 3.3 of SPS
\textsuperscript{44} Supra note 38.
the environment, a risk assessment is required to compare between fulfillments versus non-fulfillment of the objective.\(^a\)

**Cases on SPS**

**a) EC-Beef Hormones** - In this case, US and Canada challenged the EU's ban on the import of beef affected with growth hormones. Several directives promulgated under the authority of the European Communities prohibited the sale of meat products, including foodstuff imparted into the communities, derived from cattle treated for growth promotion purposes with any of three synthetic or three natural hormones. Three of the hormones which were natural: Oestradiol, Testosterone and Progesterone; while three were synthetic: trenbolone autate (TBE), Zeranol and melengestrol acetate (MGA). This ban initiated in 1981 by the European Community, included a synthetic hormone known as diethylstilboestrol (DES). Based on the risks described in a study conducted by WHO, the U.S. banned the use of DES in 1975.

As regards, scientific justification and risk assessment on the question of scientific justification, 'the dispute panel was presented with substantial evidence, that treatment of cattle with growth hormones raised the level of those hormones in the flesh of the treated animals and that exposure to each of the hormones at issue increased the incidence of cancer in laboratory animals. The panel was satisfied by the European Communities articulation regarding the scientific justification which complied with the Article 2.3 of SPS agreement. However, the WTO

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\(^b\) Epps Epps, Tracy, International Trade and Health protection a critical assessment of the WTO's SPS agreements, Edward Edgar, Massachusetts, 2008, P. 208.
dispute panel agreed with the challengers that there was not sufficient evidence of a risk to humans. The panel and appellate body found that, for five of the hormones, the EC had obtained assessment of some risks in particular, a 1982 Report of the EC veterinary committee (the lambing report) and two reports in 1988 and 1989 by the Joint FAO/WHO expert committee on food additives (JECFA) were placed on record. However, these risks associated with particular hormones were not treated as relevant evidence by the panel, particularly since more specific assessments showed no particular risk. Although the appellate body modified the panels’s reasoning somewhat, it nevertheless armed its conclusion that the European ban violated the SPS Agreement.

As the EC was unable to act accordingly and failed to lift its import ban, on 12 July 1999, the WTO authorized the United States and Canada to impose compensatory measures in the form of suspension of tariff concession covering trade to a maximum amount of $ US 116.8 million per year the United States and CDM $ 11.3 million per year for Canada.\(^ {47}\)

b) **Australian Salmon** – In this case Australia applied an import prohibition on fresh, chilled or frozen (uncooked) salmon from various places including Canada. Canada requested a panel under the WTO dispute settlement understanding (DSU) in March 1997. The panel and appellate body ruled against Australia. The ruling was determined by some critical aspects like the prohibition lacked appropriate assessments of risks; it was a hidden restriction on trade as Australia did not apply such strict measures on other similar articles like batfish and

\(^ {47}\) Ibid.
uncookedness of the fish was again found to be a mere a disguised trade restriction.

c)  **Japan Agricultural Products & Apples** – Japan’s import prohibition on eight products like apricots, cherries, plums, pears, quince, peaches, apples and walnuts from other places including U.S. was challenged in WTO. The rationale behind the ban was codling moth present in those restricted areas, entered in Japan and destroyed its fruit production. The panel and appellate body ruled against Japan’s prohibition. The panel found that Japan’s testing requirements were inconsistent with the SPS agreement for three reasons. Firstly, the varietals testing methods requirement was not based on a risk assessment. Secondly the panel found that the varietals testing requirement was more trade restrictive than necessary and therefore violated article 3.6 of the SPS agreement. Third, the Panel and Appellate Body both found the Japan had violated the requirements to make its SPS measures transparent, especially the requirement in Article 7 that members publish their SPS measures. Whereas the apples case was requested in 2002 by the US, regulating Japanese quarantine restriction that prohibited import of US apples to protect against the introduction of fire blight (enwinia amylovora), the panel found that two of the requirements in the measure at issue were maintained without sufficient scientific evidence as required by article 2.2 of the SPS agreement namely; (1) the prohibition on imports where fire bright is detected within a 500 meter buffer zone surrounding an orchard; and (2) the requirement that exported orchards be inspected three times a year. The panel found that these requirements did not bear a rational relationship
to scientific evidence. The challenge of US made against Japanese restriction was upheld in the Panel and Appellate rulings.

d) **EC Biotech Products** – Among the Key players in this debate, were the limited states, supported by many companies who have developed GMO-based products. European Communities (EC) and its member states, have tried to restrict their use through various regulations. In 2003, Argentina, Canada, and the United States brought a complaint under the WTO dispute settlement understanding against various parts of the regulation of the EC and certain of its member’s states as to the approval and marketing of biotech products. The applicants marked the case with three issues, (a) the general moratorium on the biotech products, was based on political considerations and not on sound science. (b) EU failed to consider final approval application, concerning certain specific biotech products; (c) that contrary to WTO obligations, certain EC member, states had adopted and minted various ‘safeguard’ measures prohibiting and restricting the marketing of biotech products. In the dispute, EC failed to register valid arguments and ended in violating WTO regulations and the articles 5.1 and 2.2 of he SPS agreement. After concluding as a factual matter that such a moratorium existed between June 1999 and August 2003, the panel rejected most of the EC decisions as to apply a general moratorium on approvals was not an “SPS measure” within the meaning of either SPS Agreement Annex I of the specific provisions under which claims were made.48

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48 Lester, Simon : European Communities measures affecting the approval and marketing of Biotech Products ; American Society of international law; Vol 101 Apr 24, 2007, P. 453.
e) Brazil-Retreated Tyres- EC challenged the Brazil's imposition of trade restrictive measures regarding the import of retreated tyres from EC. Retreated tyres are those manufactured from recycled used tyres materials. The EC claimed, interalia, the Brazil’s measures violated Articles III of the GATT. It also claimed that the prohibition of import was discriminatory as it supported the domestic tyres manufacturing industry of Brazil. Brazil answered the anxiety of EC ones the restriction, by arguing the point that acumination of tyres may lead to advance risk of mosquito borne diseases like dengue and yellow fever and tyres fire may lead to the emission of toxic substances leading to adversely affecting human and animal life. The appellate body stated the import ban being applied in manner that constitutes arbitrary or unjustifiable discrimination.

Harmonization of International Standards

Different sets of standards in different countries increases the cost of compliance, a vital issue for the competitiveness of developing country exporters. Different sets of measures will result in multiple tests and requirements, forcing the exporter to seek separate sets of certification to access different markets, increasing costs. India and several other developing countries have been pushing for harmonization of standards acceptable globally on a product-by-product basis. An emergency safeguard clause that allows countries to adopt a higher level protection than the global norm should be allowed for specific periods to deal with unusual circumstances or severe health and safety challenges such as the Bird flue case in South-East Asia. India, along with other

49 Ibid.
developing countries believes that a stringent global norm coupled with an emergency mechanism provided enough protection and can be used as the basis for harmonization of standards.

Article 3 of the SPS Agreement encourages countries to use international standards as a basis for their regulations. It recognizes for food-safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission, for animal health those developed by the International Office of Epizootics (OED), and for plant protection those developed under the auspices of the Secretariat of the International Plant Protection Convention (IPPC). For matters not covered by these organizations, standards developed by other relevant international organizations open for membership to all members, as identified by the SPS Committee, are recognized. For TBT related issues that are not covered by these institutes, the ISO (International Standards Organization) is accepted by the TBT as the relevant organization.

Developing countries, often led by India, have repeatedly expressed their concern about the way in which international standards are developed and approved in such bodies. Developed countries often hold the edge in terms of scientific data and knowledge. Developing countries do not have the institutional capacities to match the developed world in terms of research and technical capacities and as a result their participation is very limited from the point of view of both numbers and effectiveness. As a consequence of the inadequacy of the process, international standards are often inappropriate for use as a basis for domestic regulations in developing countries and these countries face
problems when they have to meet regulations in the importing markets developed on the basis of international standards.

India in association with several developing countries has pointed out that SPS and other such Technical Standards are often used deliberately as protectionist measures. A very common occurrence vis-à-vis agricultural produce is delaying tactics used by customs to clear such produce citing health and safety reasons in the name of the SPS. In view of the perishable nature and high cost of preserving and storing such produce, such delays often result in the loss of the whole consignment. Such losses are potentially disastrous for developing country exporters. Another protectionist tactic is to keep changing the ‘goalposts’ i.e. periodically change standards for a product to force exporters to seek new approvals. With such frequent changes in standards and specifications, the costs of ‘keeping up’ with such measures are often beyond the capacity of smaller exporters in the developing countries. The reason that many developed countries avoid the entire issue of harmonization is because harmonization will eradicate such practices. It is precisely the same reasoning that informs the developed world reluctance to enter into Mutual Recognition Agreements (MRAs) with developing country trade partners.

The impact of protectionism that arises out of SPS and TBT measures can have major impact in India, especially given the increasing importance of the food sector and its exports in the Indian economy.\(^{50}\)

\(^{50}\) Pritam Banerjee : SPS-TBT measures : Harmonization and Diversification, in, ‘Beyond the transition phase of WTO, Academic Foundation, New Delhi-2006, P. 59
Process and Production methods and the concept of “like product”

Determined not to have their mistakes repeated by less developed countries, and in an attempt to remedy a ‘global commons’ problem, developed countries have been making attempts to utilize trade measures, such as import bans, in order to cause producers in developing countries to change their environmentally harmful process and production methods (PPMs) to more benign methods that do not have such a negative impact on the environment.

Conversely, the immediate need and primary concern of developing countries is rapid economic growth. Developing countries perceive the use of trade measure for environmental ends, by ‘North’ countries as a unilateral attempt to export the latter’s domestic environmental laws, which may be appropriate for the ‘North’s level of industrial development, but which are very restrictive for ‘South’ countries. Developing countries consider that such use of trade measures by the ‘North’ as an unfair attempt to penalize them for global environmental problems. Thus, ‘South’ countries have been quick to accuse a developed country’s use of restrictive trade measures to enforce the latter’s own laws governing PPMs and, in some instance, product standards as being, discriminatory, and in violation of their sovereign rights to develop and exploit their own resources. In view of this ‘North-South’ tension, the question that comes up is whether certain multilateral environmental agreements that authorize import and export bans against uncooperative, non-parties would have to withstand scrutiny by GATT/WTO.
Process standards can be applied in a manner which is consistent with the obligations in GATT Articles I, III and XX. For example, most states apply process standards on certain imports including meat and drugs. These standards generally relate to the sanitary conditions of production, raw material inputs quality control and testing. They are a unique class of process standards because they are intended to regulate product characteristics, even though they are applied at the production stage. These standards are consistent with the non-discrimination obligation of GATT Article III. While it might appear that they discriminate on the basis of process standards, but ultimately they manifest in the character of the product as such. These are characterized as ‘product-related process and production methods’ (PR-PPMs). In sharp contrast, the different processes which do not manifest themselves in the characteristics of the products as such are ‘non-product related process and production methods’ (NPR-PPM)-generally considered inconsistent with GATT mandate.

‘Product standards’ prescribe the physical or chemical properties of a product for example, lead additives in gasoline, the maximum permissible polluting emissions from a product during its use for example, automobile emissions, detergent biodegradability and the rules for making up, packaging or presenting a product (for example, prescribed conditions for the elimination of packaging materials, product labeling). These apply to a product in its finished stage or if in its use, these are concerned with the creation of pollutants in the use and/or disposal of a good, and must be complied with in order for the goods to be sold in the market-place.
‘Production process standards’ include emission and effluent standards and other standards governing the production process. Such standards apply at the ‘pre-finished product’ stage and, in general, are not reflected in the character of the finished product\(^{51}\).

Process and Production Methods or PPMS are mainly responsible for the depletion of the environment. Important thing is that environmental law regulates how products are made both at the national and the international levels. The regulation of PPMS itself is not in conflict with international trade law. Friction only arises if harmful PPMS are controlled by means of trade measures. Since Articles I and III of GATT 1994, the cornerstone of the GATT/ WTO system, only apply to like-products, there is a strong reluctance to extend these rules beyond product characteristics. In an increasingly ecologically interdependent world, this distinction is difficult to justify. However, because of the extraterritorial dimension of the problem and its fundamental challenge to the established product based GATT approach, the PPM matter is a politically sensitive issue under international trade rules.

One has to distinguish between environmental effects caused by PPMS during the production and consumption of the product. PPMS are therefore categorized according to whether or not the environmental impact of the PPMS is transmitted by the traded product. If the environmental impact of the PPM is indeed transmitted by the trade product, it causes consumption externalities. This means that the way the product is made has changed its performance to such an extent that it

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\(^{51}\) Annupam Goyal: The WTO and international environmental law: Towards conciliation: Oxford University 2006 P. 89
causes, or threatens to cause damage to the importing country's environment when it is consumed, used or disposed of. These product-related PPM are generally regulated through product standards. They are less troublesome since they are regulated under the TBT Agreement. Members are basically allowed to restrict trade in products due to product-related PPMs as long as they do not violate any other GATT/WTO principle.

The term 'like-product' appears in different provisions of the agreements under WTO. Examples are Articles 1:1, II:2, III:2, III:4, VI:1, IX:1, XI:2(c), XIII:1, XVI:4, and XIX:1 of the GATT 1994. The term is also a key concept in the Agreement on Subsidies and Countervailing Measures, the Agreement on Implementation of Article VI of the General Agreement 1994 (the 'Anti-Dumping Agreement'), the Agreement on Safeguards and other covered agreements.

The purpose of the like-product concept is to prevent discriminatory measures on the basis of artificial product differentiations. This is of paramount importance to the GATT/WTO system and is the basic principle upon which rests the most favoured nation (MFN) treatment in Article 1 and the national-treatment obligation in Article III of GATT. GATT itself does not explain what like-products are. A definition is only given in the 1979 Anti Dumping Code, which later became Article 2.6 of the WTO Anti Dumping Agreement.

As the term 'like' is used several times in the GATT, the interpretive approach taken by panels reviewing this language has varied from Article to Article, and each problem that has arisen has been
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treated on a case-by-case basis. The WTO Appellate Body in the
Measures Affecting Asbestos products case noted that in each of the
provisions where the term ‘like-products’ is used, the term must be
interpreted in the light of the context, and of the object and purpose, of
the provision at issue, and that of the covered agreement in which the
provision appears. The Appellate Body recalled its decision in an earlier
case concerning Article III: 2 of the GATT 1994 in the following words:

...there can be no one precise and absolute definition of what is
‘like’. The concept of ‘likeness’ is a relative one that evokes the image
of an accordion. The accordion of ‘likeness’ stretches and squeezes in
different places as different provisions of the WTO Agreement are
applied. The width of the accordion in any one of those places must be
determined by the particular provision in which the term ‘like’ s
encountered as well as by the context and the circumstances that prevail
in any given case to which that provisions may apply...

In European Communities- Measures Affecting Asbestos and
Asbestos Containing products, the dispute was relating to an import ban
on asbestos and asbestos products, which was introduced by the French
Government in 1997. In this case, the Panel examined whether
chrysotile asbestos fibers and cement-based products containing
chrysotile asbestos fibers are respectively, ‘like’ certain other fibers,
namely polybestos fibers are respectively, ‘like’ certain other fibers,
namely polyvinyl alcohol fibers, cellulose and glass fibers (PCG fibers)
and cement-based products containing one of the PCG fibers. The panel
concluded that chrysotile and PCG fiber and cement-based product
containing those fibers were all ‘like’ products.

52 WTO, Appellate Body report
One of the issues that was considered by the Appellate Body was the Panel’s finding that cement-based products contain chrysotile fibers are ‘like’ cement-based products containing PCG fibers. The Appellate Body found that the Panel’s reasoning was insufficient to support a finding of ‘likeness’, among other things, because it failed to take into account the ‘risk to health’ associated with asbestos-based products.

In the case, the Appellate Body deliberated in detail as to the meaning of ‘like’. The Appellate Body observed, on the basis of definition that ‘like’ products is products that share a number of identical or similar characteristics or qualities. But this meaning is not sufficient for assessing the likeness of products under Article III:4 of the GATT, because it does not indicate which characteristics or qualities are important as there are a range of considerations in qualities and characteristics in most of the products. Further, in determining the degree or extent to which products must share qualities or characteristics in order to be ‘like products’, the criterion is not clear as they may share few or many qualities or characteristic. The dictionary definition of ‘like’ does not indicate from whose perspective that is consumers or inventors/producers, ‘likeness’ should be judged. The Appellate Body recalled the Report of the Working party on Border Tax Adjustments which outlined an approach for analyzing ‘likeness. This approach has, in the main, consisted of employing four general criteria in analyzing ‘likeness.’

The criteria are:

(i) the properties, nature and quality of the products;
(ii) the end-uses of the products;
(iii) consumers' tastes and habits – more comprehensively termed consumer's perceptions and behavior- in respect of the products; and

(iv) The tariff classification of the products.

The Appellate Body considered that these general criteria, or groupings of potentially shared characteristics, provide a framework for analyzing the 'likeness' of particular products on a case-by-case basis. These criteria are tools to assist in the task of sorting and examining the relevant evidence. They are not a closed list of criteria that will determine the legal characterization of products. Besides a particular framework to aid in examination of evidence, all other pertinent evidence must also be taken into consideration. Although each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are interrelated.

Thus, the process by which like products are determined is an important one because the discrimination prohibited by Articles I and III is between 'like' products. Thus, discrimination between products, which are not like, may be permissible. When determining whether products are like, the analysis focuses on the characteristics of the products themselves rather than on differences in production methods or other characteristics of the country of origin which do not result in differences in the resulting products. The GATT practice has been that differences in production processes which are not reflected in the

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characteristics of the finished products cannot be used to distinguish products.

Emerging Non-Tariff Barriers to Developing Countries’ Trade

(i) Precautionary Principle

WTO jurisprudence related to trade-environmental disputes prove in certain terms that Precautionary Principle has relevance to the trade regime and secondly, by consciously avoiding ruling on its status as custom, as strongly advocated by the European Union, the Appellate Body implicitly recognizes that it will have to revisit the issue in future trade disputes. In the Hormones Case, though Appellate Body upheld the spirit of Article 5.1, 5.2 and 5.7 of SPS of WTO in justifying its applicability by ignoring the basic tenet of Precautionary Principle as customary rule, the EU preferred silence on that issue in the expectation of future permanent rule based on further research. The Appellate Body clearly mentioned that “the precautionary principle, whether, or to what extent is relevant in the interpretation of SPS Agreement of the WTO is the subject of debate among academics, law practitioners, regulators and judges.” It clearly indicates that the status of precautionary principle in international law is something it should not rule on. Nevertheless, many areas of US laws, such as system of pharmaceutical approvals, are based on the precautionary principle. If the ruling of the Appellate Body sets the future standards, the potential effect of WTO determination on a range of US laws is immense. If precautionary principle of the Cartagena Protocol on Biosafety becomes customary rule of all environmental related disputes of the WTO, the potential damage of the
trade interests of the developing countries would be enormous. The first casualty will be the prospect of agricultural exports to the markets of the developed countries.

Since the inception of the World Trade Organization, India has been encountering with the plethora of non-trade related measures in the markets of developed countries that adversely affect its trade potentials. Many of these measures are taken unilaterally and do not pass through the multilateral route. Emergence of stringent environmental standards in the pretext of sustainable development poses serious threat to Indian exporters. Majority of the newly emerging standards are still opaque in nature and their obvious and instinct lineage with the international trade is yet to be ascertained by the scientific proof. Yet, trading communities of the developing countries have been riddled with the proliferation of non-tariff barriers to their trade in the form of “green standards” being applied in the name of environmental protection.

The emergence of PP in the trade-environment dispute is a recent phenomenon though it has been a part of international convention/treaties related to environment for quite sometimes. More prominently it began to appear in international legal instrument only in the 1980s but has since experienced what has been called as a meteoric rise in the international law. Precautionary principle is commonly called as “statement of commonsense” and its role is to balance the competitive concerns of economic development against limited environmental resources. Due to advancement of science and technology and the rapid progress of globalization, economic development puts increasing pressure on the existing natural resources. The demand for higher economic development coupled with the trade
liberalization lead to extensive exploitation of natural resources, supply of which is limited. In order to effect balance between the increasing trade and most optimal use of natural resources, environmental lobby has been advocating the use of precautionary approach to minimize environmental damage. Due to its immense importance in environmental related matters, PP has now entered the jurisprudence of the WTO’s dispute settlement body through indirect way. It is no longer a remote concept exclusively located in the sphere of environmental law54.

(ii) Polluter Pays Principle

The ‘polluter pays principle’ has been accepted by the majority of industrialized nations, as the mechanism for controlling global pollution. Different environmental standards are of much concern to industries for their competitiveness. A successful application of the polluter pays principle relies in part on harmonized environmental policies and standards. The PPP was initially devised by economists to maximize resource allocation. Since then, most industrial nations have recognized the value of the principle as a pollution abatement device. In 1972, the Organization of Economic Cooperation and Development (OECD) endorsed the use of PPP to further its goals.

The principle is used for allocating costs of pollution prevention and control measures to encourage rational use of limited environmental resources and to avoid distortions in international trade and investment. This Principle means that the polluter should bear the expenses of

54 Swapan K. Bhattacharya : Precautionary Principle in beyond the transition phase of WTO, Academic Foundation New Delhi 2006, P. 543
carrying of the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption.

The economic rationale on which this principle is based is that when the environmental costs are fully internalized, and are thus reflected in the price, the market mechanism can be expected to help in the adoption of techniques for abatement of pollution and for the conservation of exhaustible resources to levels consistent with sustainable development. In summary, the PPP has been allegedly advanced as a means to increase market efficiency on one hand and the abatement of pollution on the other. If polluters bear the cost of pollution prevention and control, market failure and distortions of trade can be avoided. At the same time national environmental goals can also be realized. In fact, the PPP is one of the devices through which the integration of economy and ecology can be achieved which ultimately leads to realizing sustainable development\(^{55}\).

Because of its ability to fulfill the twin objective of realizing market efficiency and environment protection, the PPP found its place in Rio Declaration. Declaration says-

> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should,

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\(^{55}\) Anupam Goyal : WTO and International environmental law towards conciliation ; Oxford University Press 2006, P. 232
in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment\textsuperscript{56}.

The objectives of the PPP and the GATT/WTO are somewhat similar except that environmental protection was not an issue with the GATT. However similarity between PPP and GATT exists in the following respect –

(a) Both aim at achieving the ideal of market efficiency.
(b) Both relate to duties and subsidies.
(c) Both aim to prevent trade distortions.

Despite the similarity in the objectives of the PPP and the GATT/WTO strives to achieve, the developments in the past as regards the resolution of trade disputes concerned with environment protection, have indicated the refusal of PPP in the GATT/WTO mechanism. Some trade disputes involving environmental claims under Article XX of the GATT have arisen. Important among them are The Superfund Tax case, Tuna/Dolphin I, Tuna/Dolphin II, Reformulated Gasoline, Shrimp/Turtle cases.

In the Superfund Tax case the GATT panel held that the GATT had not adopted the ‘Polluter Pays Principle’.\textsuperscript{57} In Tuna/Dolphin I the Panel noted that the GATT places few restrictions on the enforcement of domestic environmental regulations as they do not discriminate against imported products but, a contracting party may not restrict imports of a

\textsuperscript{56} See for detail Rio Declaration, Principle 16
\textsuperscript{57} Superfund Tax, p. 1614.
product merely because it originates in a country with environmental policies different from its own.\textsuperscript{58}

The position has not changed much even after the ‘Final Act’ of Uruguay Round came into existence. The Final Act did not render any change in Article XX of the GATT. In Tuna/Dolphin II and Reformulated Gasoline case, the GATT/WTO Panels respectively considered the interpretation of Article XX in the same way as in Tuna/Dolphin I. However, in the Reformulated Gasoline Appellate Decision and Shrimp/Turtle Appellate Decisions, showed some flexibility in the interpretation of Article XX but did not speak on the relationship between the PPP and GATT/WTO.

The GATT Report points out that its provisions do not prevent nations from pursuing their own environmental policies, since GATT provides exemptions from its obligation if the international standards ‘are inappropriate for the Parties concerned, for \textit{inter alia} such reasons as protection for human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors."\textsuperscript{59} But, these exemptions, as pointed out in GATT Report, are to be construed narrowly, in order to prevent contracting parties from imposing ‘unwarranted, trade-inhibiting restrictions.’\textsuperscript{60} It argues strongly against the use of ‘trade policies to influence environmental measures in other countries.’\textsuperscript{61} Undoubtedly, the purpose of the GATT

\textsuperscript{58} Tuna/Dolphin I, para .6.2.
\textsuperscript{59} GATT, ‘Trade and Environment’, GATT Doc. 1529, 3February, 1992, reprinted in Wld. T. Mater., 4,1992, p.8 (referring GATT Article XX(b) nad (g)).
\textsuperscript{60} Ibid., p.9
\textsuperscript{61} Ibid., p.5
is to prevent discrimination between domestic and foreign products in order to facilitate trade, not to build protectionist walls to keep out trade.

Unless all polluters internalize the externalities, there will be a misallocation of resources, and thus pollution and distortion of trade. The success of the Polluter Pays principle depends on proper product pricing, and until GATT adopts the principle as part of its jurisprudence, the PPP can not be applied in its true sense.