

WTO AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES: DEVELOPMENT, SCOPE AND EMERGING ISSUES

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ABSTRACT: *Sanitary and Phytosanitary measures have become predominant in the international trade regime. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) has imposed a new and comprehensive set of rules to regulate sanitary and phytosanitary protection regime of the member countries. The SPS Agreement has allowed the member countries to establish sanitary and phytosanitary measures to protect human, animal and plant health or life but at the same time it has ensured that such measures do not create unreasonable barriers to the international trade. This paper has attempted to address following issues (a) important subject relating to the link between SPS measures and international trade; (b) the necessity of establishing the SPS Agreement under the WTO in spite of the fact that the SPS measures were already the subject matter of pre WTO trade agreements and negotiations; (c) the framework of the SPS Agreement through which it regulates the international sanitary and phytosanitary regime; and (d) the applicability of the SPS Agreement to the new risks to human, animal and plant life or health which have emerged due to advanced scientific inventions and technological innovations.*

Key Words: *SPS Agreement, GATT Article XX (b), TBT Agreement, Agreement on Agriculture*

I. Introduction

According to Halsbury's Laws of England the word trade means (a) exchange of goods for goods or exchange of goods for money, and (b) any business carried on with a view to obtain profit.¹ It can be also defined as any trade, business, industry, profession or occupation relating to production, supply and distribution of goods and services.² The trade across the borders of the countries is called international trade and has been carried on since times immemorial. It can be also described as the sale of goods with international element. According to Simone Schnitzer, this element could be present due to the fact that the seller and buyer are established in different countries, or that the goods have to be transported from one country to another, or that the parties have chosen a jurisdiction other than their domestic one.³

The International trade has performed an important role in the world economy and has advanced the process of globalization. The merits of international trade is that it has promoted growth and has enhanced economic welfare in the world and has enabled people to obtain goods from efficient sources of supply. In addition to this, it has increased income and consumption which in turn has increased employment and has fostered economic growth.⁴ Further, liberalized international trade is responsible for reduction in global poverty. Countries that have embraced liberalized trade policies have reduced poverty at a far greater rate than those countries which have maintained barriers to trade.⁵ International trade in food is as old as nations and ever since nations have existed, they have exchanged food and other agricultural products. This trade in agricultural products has provided clear economic benefits and food and other products have become cheaper and the choice of products available has expanded.

In addition to these merits, international trade is a medium for transmission of bacteria, viruses, microbes and microorganisms which has caused diseases to human, animals and plants and is responsible

¹ P. Ramanatha Aiyar, *Concise Law Dictionary* 1150 (Wadhwa and Company, Nagpur, 2006).

² The Competitions Act, 2002 (Act 12 of 2003), Section 2 (x).

³ Simone Schnitzer, *Understanding International Trade Law* 3 (Universal Law Publishing Ltd, New Delhi, 2007).

⁴ S. R. Myneni, *International Trade Law* 4 (Allahabad Law Agency, Faridabad, 2008).

⁵ Simon Lester, Bryan Mercurio, *et.al.*, *World Trade Law Text Materials and Commentary* 13 (Universal Law Publishing Ltd, New Delhi, 2010).

for other threats to their life.⁶ As volume of trade has grown in the modern times the opportunities to spread diseases have expanded.⁷ The globalization of the food supply has further created conditions favourable for the spread of diseases in human, animals and plants and has complicated the challenge of detecting and effectively responding to such threats.⁸ The tension between trade and health interests has increased due to globalization of the world economies.⁹ For example a country's reputation as a producer of safe food suffer when there is out-break of a food-borne disease. Consumers have expressed concerns about the quality of the food and are curious about how their food is produced. This has modified the provisions of food safety.¹⁰

Food safety is ensured through pre-market clearance, mandatory production practices, inspections, labelling and by establishing standards for pesticides, herbicides and fungicides used on foods and agricultural products.¹¹ The history of food safety has bridged all civilizations together and ancient food regulations are referred in Egyptian, Indian, Chinese, Greek and Roman literature.¹² The multilateral trading system while pursuing trade liberalization has also been towards objectives of food safety, animal welfare and plant health.¹³ In multilateral trading system to avoid introduction of diseases and pests through trade, the member countries have liberty to impose sanitary measures (to protect human and animal health) and phytosanitary measures (to protect plant health).

The General Agreement on Tariffs and Trade (GATT) 1947 recognized the need to introduce trade restrictions to protect health. Under the GATT Article XX (b), exceptions from the GATT rules were allowed for measures necessary to protect human, animal or plant health or life.¹⁴ Under this provision, the member countries have right to impose these measures as long as they are not applied in a manner which would be a means of arbitrary or unjustifiable discrimination between the member countries, or create a disguised restriction on international trade. Through successive rounds of trade negotiations though tariffs were reduced but use of non-tariff barriers for protectionism increased and included in these non-tariff barriers were sanitary and phytosanitary (SPS) measures. Therefore, there was thus a grave need to give precision to the Article XX (b) of the GATT.

The Uruguay Round of trade negotiations which resulted in the establishment of the World Trade Organization (WTO) in 1995 addressed the sanitary and phytosanitary measures. The Marrakesh Agreement Establishing the World Trade Organization contains a number of trade agreements in its annexes including the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The main aim of the SPS Agreement is to maintain sovereign right of the member countries to produce the level of SPS protection it deems appropriate while at the same time ensure that these sovereign rights are not misused for protectionist purposes resulting into unnecessary barriers to the international trade.¹⁵ The SPS Agreement advocates harmonization of SPS standards where the member countries are encouraged to use international standards, guidelines and recommendations. The Codex Alimentarius Commission (CODEX),

⁶ In 14th century A.D., the bubonic plague was spread to Europe in part by fleas on rats on Genovese and Venetian cargo ships bound for Sicily from the near and far east.

⁷ Raj Bhala, *International Trade Law Interdisciplinary Theory and Practice* 1417 (Lexis Nexis, Newark, 2008).

⁸ IOM (Institute of Medicine), Report on Improving Food Safety through a one Health Approach, 3 (2012), available at: <http://www.ncbi.nlm.nih.gov/books/NBK114508/#/workshopoverview.s1> (visited on January 2, 2019).

⁹ Carlos M. Correa, "Implementing National Public Health Policies in the Framework of WTO Agreements" 34 *Journal of World Trade* 5, 117 (2000).

¹⁰ Jean C. Bureau and Wayne Jones, "Issues in Demand for Quality and Trade" in Barry Krissoff, Mary Bohmann *et al.* (eds.), *Global Food Trade and Consumer Demand for Quality* 18 (Kluwer Academic/Plenum Publishers, New York, 2002).

¹¹ T. Ademola Oyejide and E. Olawale Ogunkola, "Quantifying the Trade Impact of Sanitary and Phytosanitary Standards: What is Known and Issues of Importance for Sub-Saharan Africa" in Keith E. Maskus, John S. Wilson *et al.* (eds.), *Quantifying the Impact of Technical Barriers to Trade: Can it be Done?* 195 (University of Michigan Press, Michigan, 2001).

¹² History of Food Safety: A Commentary, available at: <http://www.food-safety-and-you.com/historyofFoodSafety.html> (visited on February 3, 2019).

¹³ Melaku G. Desta and Moshe Hirsch, "African Countries in the World Trading System: International Trade, Domestic Institutions and Role of International Law" 61 *International & Comparative Law Quarterly* I, 141 (2012).

¹⁴ GATT Article XX (b). Members must give equal treatment to exports from all members, and members are barred from discriminating between locally produced and imported products. Exceptions were allowed for tariffs on specific products, which were bound at specific levels. Numerous other "general exceptions" were also allowed for many national policy purposes, such as protection of human, animal, or plant life or the conservation of exhaustible natural resources.

¹⁵ SPS Agreement, Article 2.3.

the International Office of Epizootics (OIE) and the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention (IPPC) is responsible for the development of such standards.¹⁶ The SPS Agreement has facilitated international trade by establishing international rules and by establishing minimum sanitary and phytosanitary standards. It is described as one of the most secure agreements of the WTO due to the fact that it is being ruled by modern science.¹⁷ The importance of this agreement lies in the fact that on one hand it acknowledges the member country's right for SPS protection but at the same time it restricts them from using such SPS measures which might create unnecessary barriers to international trade.

II. Concept of Sanitary and Phytosanitary Measures

One of the most important manifestation of economic globalization is the expansion of the international trade through liberalization. Concurrent with the liberalization of tariffs, there has been increased concern about the use and impact of other measures.¹⁸ In the present global trading system, liberalized trade norms have been threatened as countries have used a wide variety of non-tariff barriers for protectionist purpose.¹⁹ Among these various non-tariff barriers, sanitary and phytosanitary measures can impede trade. It is important to define trade barriers, tariff barriers and non-tariff barriers before explaining the concept of sanitary and phytosanitary measures.

What are Trade Barriers

Any restriction imposed on free flow of trade is a trade barrier. It is a general term that describes any government policy or regulation that restricts international trade. Most trade barriers work on the principle, which is to impose some sort of cost on trade that in turn raises the price of traded products.²⁰ Trade barrier can be classified as tariff barriers or non-tariff barriers.

What are Tariff Barriers

Tariff barrier is a custom duty or tax levied on import of merchandise goods. It can be ad valorem tariff or a specific tariff or a compound tariff which is made up of both of these elements. Tariffs raise revenue for the government and also give domestically produced products a price advantage by increasing the price of imported products, thereby discouraging the domestic consumers to use imported goods.²¹

What are Non-tariff Barriers

Non-tariff barrier is any trade barrier other than the tariff barrier. It is defined as policy measures other than ordinary customs tariffs that can potentially have an economic effect on the international trade. Since this definition is broad, a detailed classification is important so as to better identify and distinguish among the various forms of non-tariff barriers.²² Non-tariff barriers can be classified as direct or indirect. Direct non-tariff barriers are implemented for purpose of restrictive trade and indirect non-tariff barriers are implemented to meet some other policy target but affecting trade flows in the process.²³ According to the United Nations Conference on Trade and Development (UNCTAD) scheme, non-tariff barriers are of following three types (a) commercial policy measures to protect domestic producers from foreign competition; (b) measures used occasionally within an intention to restrict imports or stimulate exports; and (c) measures applied within little or no intent to protect domestic industries but have certain effects on foreign trade.²⁴ Non-tariff barriers also include whole range of trade defence measures both technical and

¹⁶ SPS Agreement, Annex A, Item 3.

¹⁷ Sanu M. K., "The SPS Agreement, Risk Assessment and Science: In Troubled Waters?" 50 *Indian Journal of International Law* 3, 402 (2010).

¹⁸ Spencer Henson and Rupert Loader, "Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements" 29 *World Development* 1, 85 (2000).

¹⁹ James M. Lutz, "To Import or Protect? Industrialized Countries and Manufactured Products" 28 *Journal of World Trade* 4, 123 (1994).

²⁰ Ida M. Conway, *Trade Barriers in Asia and Oceania* ii (Nova Science Publishers, New York, 2007).

²¹ Textile Committee Monograph, *Demystifying Tariffs and Non-tariff Barriers (NTBs)* 1 (Government of India Ministry of Textiles, Mumbai, 2012).

²² United Nations Conference on Trade and Development (UNCTAD/DITC/TAB/2012/2), *Classification of Non-tariff Measures* 1 (United Nations Publication, Geneva, 2012).

²³ Direct non-tariff barriers (Quantitative Restrictions, Tariff Quota, Voluntary Export Restraints, Orderly Marketing Agreement, Export Subsidy, Export Credit Subsidy, Government Procurement, Import Licensing etc). Indirect non-tariff barriers (Health and Safety Regulations, Technical Regulations, Environment Controls, Custom Valuation Procedures, Marks of Origin, Labour Laws etc). Interim Findings, *Non-Tariff Barriers faced by India and Policy Measures: A Study 2* (Department of Commerce Economic Division, 2001).

²⁴ Neela Mukherjee, "Multilateral Negotiations and Trade Barriers in Service Trade" 26 *Journal of World Trade* 5, 46 (1992).

non-technical.

Sanitary and phytosanitary measures are part of technical measures.²⁵ In a survey conducted by the UNCTAD, it was found that the share of complaints pertaining to sanitary and phytosanitary measures ranged from about 65 percent in India, Tunisia and Uganda to 93 percent in Thailand.²⁶ This clearly points to the fact that sanitary and phytosanitary measures have great significance.

Definition of Sanitary and Phytosanitary Measures

Sanitary and phytosanitary measures are applied to protect human, animal and plant health or life from risks arising from the spread of pests and diseases or from risks arising from additives, toxins and contaminants in foods and feedstuffs. Sanitary measures are associated with human and animals whereas phytosanitary measures are associated with plants.

According to Annex A of the SPS Agreement, sanitary and phytosanitary measures are defined as any measure applied (a) to protect animal or plant life or health within the territory of the member country from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) to protect human or animal life or health within the territory of the member country from risks arising from additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs; (c) to protect human life or health within the territory of the member country from risks arising from diseases carried by animals, plants or products thereof, or from entry, establishment or spread of pests; and (d) to prevent or limit other damage within the territory of the member from the entry, establishment or spread of pests.²⁷ These measures include all relevant laws, decrees, regulations, requirements and procedures including, end product criteria, process and production methods, testing, inspection, certification and approval procedures, quarantine treatments including relevant requirements associated with the transport of animals 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 labelling requirements directly related to food safety.²⁸ Therefore, a measure has to satisfy the conditions as provided in Annex A of the SPS Agreement so that it could be termed as sanitary and phytosanitary measure and the scope of SPS Agreement is limited by provisions of Article 1 which states that the agreement is applicable only to measures which may directly or indirectly affect international trade.²⁹

These measures vary from country to country due to differences in desired level of protection and due to various factors such as geography, demography, prevalence of disease and financial resources available to maintain and enforce a quarantine regime.³⁰ Trade related sanitary and phytosanitary measures are applied by all countries as part of a national quarantine regime and can sometimes be used to shield domestic producers from economic competition which may result in restrictions on trade.³¹

When SPS Measures become Non-tariff Barriers

When sanitary and phytosanitary measures restrict trade flows, they constitute a non-tariff trade barrier. There are four broad categories of situations where SPS measures can act as a non-tariff barrier to trade (a) prohibition on the sale of an imported product on health grounds; (b) positive requirements for imported products that discriminate and result in a burden being placed on foreign suppliers; (c) exclusion of imported products from compulsory approval for marketing; and (d) market driven requirements for compliance with voluntary standards.³² These measures are also linked with commercial considerations. Conforming to SPS standards (mandatory vapour heat treatment or irradiation of fruits, using new generation pesticides leaving lower traces of residue) imposes additional costs on exporters, resulting exports of most farm produce uncompetitive.³³ In a survey it was found that the United States of America

²⁵ T. K. Bhaumik, *The WTO: A Discordant Orchestra* 61 (Sage Publications, New Delhi, 2006).

²⁶ Michael J. Ferrantino, "Non-Tariff Measures" in Kenneth Heydon, Stephen Woolcock *et.al.* (eds.), *The Ashgate Research Companion to International Trade Policy* 94 (Ashgate Publishing Limited, Surrey, 2012).

²⁷ SPS Agreement, Annex A, Item 1 (a), Item 1 (b), Item 1 (c) and Item 1 (d).

²⁸ SPS Agreement, Annex A, Item 1, para 2.

²⁹ SPS Agreement, Article 1.1.

³⁰ Gavin Goh and Andreas R. Ziegler, "A Real World Where People Live and Work and Die Australian SPS Measures after the WTO Appellate Body's Decision in the Hormones Case" 32 *Journal of World Trade* 5, 272 (1998).

³¹ Arun Goyal and Noor Mohammad (eds.), *WTO in New Millennium* 323 (Academy of Business Studies, New Delhi, 2001).

³² Tracey Epps, *International Trade and Health Protection: A Critical Assessment of the WTO's SPS Agreement* 12-13 (Edward Elgar Publishing Limited, Cheltenham, 2008).

³³ Editorial, "Our Aam and their Tang" *The Indian Express*, Jan. 30, 2015.

ranked third among markets for which SPS requirements were considered to be the most significant impediment to trade, behind Australia and the European Union.³⁴

The Uruguay Round highlighted the importance of sanitary and phytosanitary measures as non-tariff barrier and lead to the adoption of the SPS Agreement. This agreement has defined rights and obligations of the member countries with respect to the development and implementation of SPS measures and has restricted them from using such measures as an excuse to create unnecessary barriers to trade.³⁵ The origin and development of the SPS Agreement is associated with the history of multilateral trade negotiations.

III. Negotiating History of the SPS Agreement

The removal of non-tariff barriers has received greater attention from trade policy makers in multilateral trade negotiations.³⁶ The health and safety concerns have become popular in the international trade regime.³⁷ Therefore, successive international trade agreements have attempted to address the issue of sanitary and phytosanitary protection through sophisticated legal framework.³⁸ In order to understand the application of the SPS Agreement, it is important to discuss the situation before the agreement came into being.

Pre GATT International Health Regulations

At the time of industrial revolution the need to have international food law was felt due to the migration of people from rural areas to urban areas. Therefore, in the year 1887 in Vienna, the congress on public health appointed the members of an international commission which was responsible for the International Review on Adulteration and Analysis of Foodstuffs. The earlier trade agreements contained provisions for the protection of human, animal and plant health. In 1927, the International Convention for Abolition of Import and Export Prohibitions and Restrictions contained an exception for measures imposed for the protection of public health or for the protection of animals or plants against diseases, insects and harmful parasites.³⁹

Article XX (b) of the GATT 1947

The participating countries in the London Conference on Trade and Development advocated for extensive negotiations to reduce trade barriers. These negotiations participated by 23 countries resulted in an extensive set of bilateral trade concession which were extended to all participants and incorporated in the General Agreement on Tariff and Trade (GATT) 1947.⁴⁰

The GATT 1947, in Article XX has emphasized on protection of human, animal and plant health or life. This provision is divided into two parts- a Chapeau, followed by ten paragraphs, each dealing with a particular policy objective which were to be legitimately pursued under that exception. It contained an exception in Article XX (b) which stated that countries could adopt and enforce measures to protect human, animal and plant health or life subject to the conditions that such measures should not arbitrarily discriminate between the countries where same conditions prevail and should not act as disguised restrictions on international trade.⁴¹ Therefore, this provision must satisfy conditions as provided in Chapeau. When a particular member country invokes Article XX (b) does it involves violation of National Treatment principle as provided under Article III of the GATT. The answer to this question was provided by the Appellate Body in *EC-Asbestos* dispute where it ruled that since health risks are important in the competitive relationship between the products in the market place and influence tastes and habits of

³⁴ *Supra* note 11 at 195, 196.

³⁵ V. G. Dhanakumar, "SPS Dimensions of WTO and Emerging Competencies in Agri-business and Plantation" in P. Rameshan *et al.* (eds.), *WTO India and Emerging Areas of Trade: Challenges and Strategies* 145-146 (Excel Books, New Delhi, 2008).

³⁶ William A. Kerr, "Removing Health, Sanitary and Technical Non-Tariff Barriers in NAFTA: A New Institutional Economics Paradigm" 31 *Journal of World Trade* 5, 57 (1997).

³⁷ Jean C. Bureau, "Non-tariff Trade Barriers and Consumer's Information" 25 *European Review of Agricultural Economics* 437 (1998).

³⁸ Michael J. Trebilcock, Robert Howse, *et al.*, *Regulation of International Trade* 138 (Taylor & Francis Group, Routledge, 1995).

³⁹ Rudiger Wolfrum, Peter Tobias Stoll, *et al.* (eds.), *WTO: Technical Barriers and SPS Measures* 100 (Martinus Nijhoff Publishers, Boston, 2007).

⁴⁰ *Supra* note 4 at 28.

⁴¹ GATT 1947, Article XX (General Exceptions) from GATT rules - (Chapeau) 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: {Article XX (b)} necessary to protect human, animal or plant life or health.

consumers, they can be considered in determining whether products are like.⁴² The objective health or safety factor associated with a product is sufficient to distinguish it from closely associated products such that the two products are not like under the GATT Article III. The application of the Article XX (b) involves following two essentials (a) the party claiming the exception must submit that there is health or safety risk associated with the product and supported by evidence of such risk; and (b) the party should prove that the measure is necessary.

In *Thailand-Cigarette* dispute, the term necessary was construed very strictly. The GATT Panel in this dispute imagined very closely into whether a measure was necessary and whether it was the least trade restrictive measure available.⁴³ In *EC-Asbestos* dispute, the Appellate Body resorted to more flexible and less restrictive approach, emphasizing that term necessary means reasonably available. It ruled that reasonable available depends on the end pursued and issue of whether a measure is necessary should be determined in a weighing and balancing process. Hence, the word necessary in Article XX was given a rigid interpretation and this interpretation has resulted in higher standards to protect health.⁴⁴

In context of Article XX (b) the word 'necessary' should carry flexible meaning due to the fact that protection of public health is of great importance. The GATT Article XX (b) has in practice left the member countries with little room to design and implement public health measures.⁴⁵ The member countries debated that it is unjustified used by countries to protect their domestic food industry. Therefore, a need was felt for formulating a comprehensive international instrument governing health protection measures. The main purpose was to harmonize the various health measures being imposed by different countries in order to bring in some cohesion in the field of international trade law.⁴⁶ In addition to this, it was never easy to invoke Article XX (b) successfully as a justification for an otherwise illegal trade restrictive measure. There was nothing in Article XX that created a standard definition of the word 'necessary' as expressed in Article XX (b). This caused some tension among the GATT members and alerted them that something needed to be done to harmonize the health standards.⁴⁷

Though, the GATT successfully reduced tariffs, but many member countries feared that the use of non-tariff barriers would obviously eclipse those benefits. As a result, the attention of international trading community turned on towards reducing non-tariff barriers. Following trade rounds took note of the challenges posed by non-tariff barriers particularly those dealing with SPS protection.

The Kennedy Round (1963-1967)

The Kennedy Round was the most ambitious and comprehensive attempt to lower trade barriers and expand world trade.⁴⁸ The round acknowledged that non-tariff barriers has grown in significance and have seriously impeded the free conduct of trade. It was held that since their application was sometimes left to the discretion of technical departments of the member countries, it was difficult to make comprehensive inventory of them. The governments of the member countries also held public hearings in order to allow their traders, industrialists and other stakeholders to express their views on non-tariff barriers. The success of the Kennedy Round marked a major advancement in the process of minimizing barriers to the international trade.

The Tokyo Round (1973-1979)

The negotiations under the Tokyo Round were held on a wide range of non-tariff barriers which distinguishes this round from earlier multilateral trade negotiations. The aim was to reduce these barriers and the most important part of the round was concerned with negotiations on technical barriers.⁴⁹ These

⁴² Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, paras 115, 122, 123.

⁴³ GATT Panel Report, *Thailand-Restrictions on Importation of and Taxes on Cigarettes*, DS10/R, adopted 7 November 1990, BISD 37S/200.

⁴⁴ Mitsuo Matsushita, Thomas J. Schoenbaum, et.al., *The World Trade Organization Law, Practice and Policy* 491-494 (Oxford University Press, Oxford, 2003).

⁴⁵ *Supra* note 9 at 96.

⁴⁶ Sumedha Upadhyay, "The SPS Agreement and Harmonisation- A Challenge" 8 *Amity Law Review* 2, 59 (2012).

⁴⁷ Muhsin Serwadda, *An Assessment of the Application of the Sanitary and Phytosanitary Agreement of the WTO and its Impact on International Trade: A Sub-Sahara African Perspective* (2006) (Unpublished LL.M. thesis, University of the Western Cape).

⁴⁸ The Activities of GATT 1967/68 (The General Agreement on Tariff and Trade) Geneva March, 1969, Sales no: GATT/1969-2, p. 1.

⁴⁹ The Tokyo Round of Multilateral Trade Negotiations (General Agreement on Tariffs and Trade) Report by Director General of GATT Geneva April, 1979, pp. 1, 49, 52, 57, 62.

discussions resulted in the first agreement dedicated to technical barriers, 1979 Agreement on the Technical Barriers to Trade (Standards Code). While the Standards Code incorporated the classic General Agreement on Tariffs and Trade principle of most favoured nation principle (MFN) and national treatment principle (NT), its predominant rationale was reduction of trade restricting effects of divergent technical regulations by means of harmonization of domestic regulations.⁵⁰ It was not developed primarily for the purpose of regulating sanitary and phytosanitary measures but covered technical requirements resulting from food safety and animal and plant health measures. The countries which were members of the Standards Code agreed to use international standards except when they considered that these standards would not adequately protect health. The Code also included provisions for settling of trade disputes arising from the use of food safety and other technical restrictions.⁵¹

The Standards Code was first step to reduce non-tariff barriers but within decade it was observed that it lacked effectiveness.⁵² The Code was backed by little enforcement due to the fact that they were largely free to pick and choose among rules.⁵³ Secondly, there was not enough legal force behind the GATT dispute settlement procedure which created problems in the enforcement of the Code.⁵⁴ It was only in the Uruguay Round that the SPS Agreement was concluded to deal with sanitary and phytosanitary measures.

The Uruguay Round (1986-1994)

The Uruguay Round was the eighth round of negotiations to be held under the General Agreement on Tariffs and Trade. Initially, the negotiations were to be completed in four years but due to deadlocks, they were dragged on for more than seven years. The aim of the Uruguay Round was to minimize the adverse effects of SPS regulation on agricultural trade and were thus discussed as a branch of agricultural sector.⁵⁵ In November 1990, Working Group on Sanitary and Phytosanitary Regulations produced a draft text which contained discipline related to sanitary and phytosanitary measures. In December 1991, Dunkel Draft was issued by the GATT Director General which closely followed the draft text produced by the Working Group on Sanitary and Phytosanitary Measures. The draft provided for more stringent national regulations and excluding economic considerations. The final text of the SPS Agreement that was approved at the end of the Uruguay Round was largely based on the Dunkel Draft.⁵⁶

The SPS Agreement has established a specific regime for SPS measures by elaborating and refining the GATT obligations and by adding new substantive and procedural obligations for the member countries.⁵⁷ It has adopted the basic structure as provided in the GATT Article XX, Technical Barriers to Trade Agreement (TBT Agreement) and other WTO agreements. It is therefore important to look for the relationship between them.

IV. Relation of the SPS Agreement and WTO Agreements

The SPS Agreement is applicable only to sanitary and phytosanitary measures to protect human, animal or plant health or life.⁵⁸ The General Agreement on Tariffs and Trade permits measures that are necessary to protect human, animal or plant life or health.⁵⁹ The Technical Barriers to Trade (TBT) Agreement applies only to technical regulations and recognizes that the protection of human, animal and plant health or life may be a legitimate objective of such regulations.⁶⁰ The Agreement on Agriculture (AOA) recognizes that the member countries should give effect to provisions of the SPS Agreement.⁶¹ Hence, a comparison of the SPS Agreement with the GATT, the TBT Agreement and the Agreement on Agriculture is essential.

⁵⁰ Veijo Heiskanen, "The Regulatory Philosophy of International Trade Law" 38 *Journal of World Trade* 1, 6 (2004).

⁵¹ 1979 Agreement on Technical Barriers to Trade, Article 14.

⁵² *Supra* note 38 at 141.

⁵³ A. K. Koul, *The General Agreement on Tariffs and Trade (GATT)/World Trade Organisation (WTO) Law, Economics and Politics* 400 (Satyam Books Co, New Delhi, 2005).

⁵⁴ Michael R. Reed, *International Trade in Agricultural Products* 68 (Prentice Hall, New Jersey, 2001).

⁵⁵ *Supra* note 13 at 143, 144.

⁵⁶ Simonetta Zarrilli, "WTO Sanitary and Phytosanitary Agreement: Issues for Developing Countries" Trade-Related Agenda Development and Equity Working Paper, p. 4, available at: http://www.carib-export.com/obic/documents/WTO_Agreement_On_Sanitary_and_Phytosanitary_Measures.pdf (visited on December 7, 2018).

⁵⁷ *Supra* note 39 at 395.

⁵⁸ SPS Agreement, Article 2.1.

⁵⁹ GATT Article XX (b).

⁶⁰ TBT Agreement, Article 2.2.

⁶¹ Agreement on Agriculture, Article 14.

The SPS Agreement and the GATT 1994

The GATT covers all measures relating to trade in goods, hence, it is broader in its application than the SPS Agreement, which applies only to sanitary and phytosanitary measures. Those measures that are discriminatory will be GATT inconsistent and are to be examined under Article XX (b), whereas the SPS Agreement applies to all SPS measures, whether they are discriminatory or non-discriminatory. In this sense, the GATT is narrower in its application. The SPS Agreement does not replace the provisions of the GATT nor is it subordinate to it, instead the two agreements operate in complement to each other.⁶²

Now the question arises whether a violation of the GATT provision is to be shown before the SPS Agreement can be applied. Since, Article 1.1 of the SPS Agreement has provided that there are only two requirements for the applicability of the SPS Agreement, namely, the existence of sanitary and phytosanitary measure and a direct or indirect effect on international trade, there is no further requirement to show violation of the GATT. Like the other Annex 1A agreements, the SPS Agreement would prevail over the GATT in case of conflict between the two.⁶³ The Panel in *EC-Hormones* dispute has stated that it is not necessary to show prior violation of the GATT in order to take recourse to the SPS Agreement.⁶⁴

The SPS Agreement and the TBT Agreement

Even though the SPS Agreement and the TBT Agreement have a shared origin in the Standards Code and have many similarities in the substance of their rules, they are mutually exclusive in their scope. The SPS Agreement is applicable to sanitary and phytosanitary measures where the purpose is to protect human, animal and plant health or life.⁶⁵ The TBT Agreement covers all regulations and standards excluding sanitary and phytosanitary measures as defined in Annex A of the SPS Agreement.⁶⁶ In order to determine which of the two agreements applies to a particular measure, it is important to look at the exclusion articles of both the agreements.

The SPS Agreement has provided that nothing in the agreement should affect the rights of the member countries under the TBT Agreement with regard to measures which fall within the scope of the TBT Agreement.⁶⁷ Similarly, the TBT Agreement provides that the provisions of the TBT Agreement do not apply to sanitary and phytosanitary measures as defined in the SPS Agreement.⁶⁸ Therefore, where the SPS Agreement is applied, the TBT Agreement would be inapplicable and vice versa. It is possible that the components of a particular measure could be covered by the SPS Agreement and by the TBT Agreement, depending on how one defines a measure.⁶⁹ If a dispute involves both, then separate dispute Panels could be formed with SPS matters given priority.⁷⁰

In addition, there are other major differences between the SPS & TBT Agreements. The TBT Agreement requires that product regulations be applied on most-favoured-nation principle, whereas the SPS agreement permits the member countries to impose different sanitary and phytosanitary requirements, provided that they do not arbitrarily or unjustifiably discriminate between the member countries where identical or similar conditions prevail.⁷¹ The SPS Agreement requires that the SPS measure should be based on scientific principles and maintained with sufficient scientific evidence⁷² while under the TBT Agreement

⁶² Refer to SPS Agreement Article 2.4 and Interpretative Note to Annex 1A of WTO Agreement.

⁶³ In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.

⁶⁴ Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, complaint by the United States, WT/DS26/R/USA, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, para. 8.41.

⁶⁵ SPS Agreement, Article 1.1.

⁶⁶ TBT Agreement, Article 1.5.

⁶⁷ SPS Agreement, Article 1.4.

⁶⁸ TBT Agreement, Article 1.5.

⁶⁹ Gabrielle Marceau and Joel P. Trachtman, "The Technical Barrier to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods" 36 *Journal of World Trade* 5, 877 (2002).

⁷⁰ *Supra* note 9 at 104.

⁷¹ TBT Agreement, Article 2.1. SPS Agreement, Article 2.3. See also Article 5.5 which restricts arbitrary or unjustifiable distinctions between different situations, if such distinctions result in discrimination or a disguised restriction on international trade.

⁷² SPS Agreement, Article 2.2. Article 2.2 is subjected to provisions of Article 5.7.

domestic measures should be based on various legitimate objectives such as national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment and scientific information is only one of the relevant elements to be considered.⁷³

The SPS Agreement introduces the precautionary principle which permits the member countries to adopt sanitary and phytosanitary measures provisionally based on available information from the relevant international organizations as well as from other member countries in case where relevant scientific evidence is insufficient.⁷⁴ Under the TBT Agreement, there is no requirement of any form of specific evidence and no provision for situations where scientific evidence would be insufficient to justify a norm.⁷⁵ The SPS Agreement obligations are generally more open to adjudication than the TBT issues due to the fact that sanitary and phytosanitary measures are based on scientific principles and are not maintained without sufficient scientific evidence.⁷⁶ Since, the SPS Agreement has adopted the basic structure seen previously in the TBT Agreement, there are certain important similarities between the two. Both aim for establishing a global regulatory infrastructure by harmonizing domestic regulations on the basis of international standards.⁷⁷ Secondly, both have similar requirements for notification of proposed measures and creation of information offices known as the enquiry points.⁷⁸

The purpose of the measure determines applicability of agreements under the World Trade Organization.⁷⁹ Food labelling is an issue that can come within the terms of the SPS Agreement or the TBT Agreement, depending on purpose of the label. Measures regarding consumer or nutritional labelling not aimed at providing information about one of the risks listed under the SPS Agreement Annex A 1(a-b) would come under the supervision of the TBT Agreement and measures regarding consumer or nutritional labelling aimed at providing information about one of the listed risks would come under the supervision of the SPS Agreement.⁸⁰ The Panel in *EC-Approval and Marketing of Biotech Products* dispute has suggested that one part of a particular regulation could be governed by the SPS Agreement and other by the TBT Agreement.⁸¹ In such a case, the first step in determining the applicable agreement will always be to establish whether the measure at issue is SPS measure.

The SPS Agreement and the Agreement on Agriculture

The Agreement on Agriculture in Article 14 has provided that the member countries should give effect to the provisions of the SPS Agreement. Therefore, the SPS Agreement complements the Agreement on Agriculture. Since, Article 21.1 of the Agreement on Agriculture has provided that the provisions of the GATT 1994 and other agreements of Annex IA are applicable subject to the provisions of AOA.⁸² Therefore, in case of conflict between the Agreement on Agriculture and the SPS Agreement, the former will prevail.

V. Overview of the SPS Agreement

The Agreement on the Application of Sanitary and Phytosanitary Measures is an innovative agreement and forms a part of an innovative system for managing trade.⁸³ The agreement has been designed

⁷³ TBT Agreement, Article 2.2.

⁷⁴ SPS Agreement, Article 5.7.

⁷⁵ TBT Agreement, Article 2.2 (Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment 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. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products).

⁷⁶ Todd Weiler, "International Regulatory Reform Obligation", 34 *Journal of World Trade* 5, 77 (2000).

⁷⁷ *Supra* note 50 at 16.

⁷⁸ *Supra* note 47.

⁷⁹ Marsha A. Echols, *Food Safety and the WTO: The Interplay of Culture, Science and Technology* 97 (Kluwer Law International, Hague, 2001).

⁸⁰ *Supra* note 39 at 390.

⁸¹ Panel Report, *European Communities-Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.167, 7.2524.

⁸² Agreement on Agriculture, Part XII, Article 21 (Final Provisions), Article 21.1- The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.

⁸³ Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* 1 (Oxford University Press, Oxford, 2009). The Agreement Establishing the World Trade Organisation consists of Annex 1 (Annex 1A, Annex 1B,

to improve sanitary and phytosanitary situation in all the member countries and to establish a multilateral framework to guide development, adoption and enforcement of SPS measures.⁸⁴

Structure of the SPS Agreement

The SPS Agreement has a Preamble and 14 Articles followed by three Annexes (Annex A, Annex B and Annex C).

- Article 1: General provisions
- Article 2: Basic rights and obligations of the member countries
- Article 3: Harmonization
- Article 4: Equivalence
- Article 5: Assessment of risk and determination of the appropriate level of sanitary or phytosanitary protection
- Article 6: Adaptation to regional conditions, including pest- or disease- free areas and areas of low pest or disease prevalence
- Article 7: Transparency
- Article 8: Control, inspection and approval procedures
- Article 9: Technical assistance
- Article 10: Special and differential treatment for the developing countries
- Article 11: Consultation and dispute settlement
- Article 12: Administration
- Article 13: Implementation
- Article 14: Final provision

Annex A governs definitions of sanitary and phytosanitary measures, harmonization, risk assessment, appropriate levels of sanitary or phytosanitary protection, pest- or disease- free areas, and areas of low pest or disease prevalence. Annex B allows transparency of sanitary and phytosanitary regulations by publishing regulations and establishing enquiry points and notification procedures. Annex C provides procedure governing the control, inspection and approval systems (including sampling, testing and certification).⁸⁵

Scope of the SPS Agreement

The SPS Agreement applies to product standards which are used to protect human, animal or plant life from additives, contaminants, toxins or disease carrying organisms in food, beverages or feed stuffs.⁸⁶ Thus, it could be argued that the SPS Agreement only covers agricultural products as most of these risks relate to these products, but it is not absolutely correct.⁸⁷

The scope of the SPS Agreement covers all sanitary and phytosanitary measures which directly or indirectly affect international trade.⁸⁸ These also include SPS measures taken to protect health of fish and wild fauna, as well as of forests and wild flora. The member countries can also take measures to protect human health from risks arising from unsafe colour additives that may be a source for contaminants and disease-causing toxins.⁸⁹ The SPS Agreement does not cover international movement of pet animals from one country to country. Though, it is an extension of the GATT Article XX (b) exception, however, the SPS Agreement's application is not contingent on a prior breach of the GATT. Article 2.4 of the SPS Agreement has stated that sanitary and phytosanitary measures that conform to the Agreement are presumed to be in accordance with the obligations of the member countries under the GATT Article XX (b).⁹⁰

Annex 1C), Annex 2, Annex 3 and Annex 4. The Agreement on the Application of Sanitary and Phytosanitary Measures is placed under Annex 1A (Multilateral Agreements on Trade in Goods).

⁸⁴ S. R. Myneni, *World Trade Organisation (WTO)* 102 (Asia Law House, Hyderabad, 2005).

⁸⁵ K. R. Gupta (ed.), *World Trade Organisation Text Volume I* 180-197 (Atlantic Publishers & Distributors, New Delhi, 2006).

⁸⁶ Debashis Chakraborty, "Non-Tariff Barrier on Indian Primary Exports" Rajiv Gandhi Institute of Contemporary Studies (RGICS) Working Paper Series, Number 27, 7 (2001).

⁸⁷ *Supra* note 47.

⁸⁸ SPS Agreement, Article 1.1.

⁸⁹ Palle Krishna Rao, *WTO Text & Cases* 45-46 (Excel Books, New Delhi, 2005).

⁹⁰ David Collins, "Health protection at the World Trade Organisation: The J-Value as a Universal Standard for Reasonableness of Regulatory Precautions" 43 *Journal of World Trade* 5, 1074 (2009).

VI. Emerging Issues

A genetically modified organism (GMO) is created in the laboratory from specific genetic material with the help of biotechnology and with the help of modern engineering, functional systems are constructed at a molecular scale. Such products has given rise to debate whether they are safe for human, animal or plant health. Now, the question arises whether trade involving such products could be regulated by provisions of the SPS Agreement.

GMO Debate

Genetically modified organisms are defined as organisms in which genetic material has been altered in a way that does not occur naturally by mating or by natural recombination. This technology is called 'gene technology' or sometimes referred as 'recombinant DNA technology' and allows selected individual genes to be transferred from one organism into another. There is a vehement debate over the use of GMO products and the reason of opposition are following (a) there are concerns about the possible adverse effects on human health from a wide variety of genetically developed food stuffs; and (b) there are concerns that transgenic plants could generate negative effects on the environment directly or through inter action between existing and new genes.⁹¹

Whether the SPS Agreement could regulate trade involving genetically modified organisms is a major issue of concern.⁹² The element of human intervention might constitute an additive, contaminant or toxin within the meaning of the definition in Annex A of the SPS Agreement. Applying this in the genetic engineering area, human manipulation of the genetic structure of plants or animals is likely to be regarded as being capable in some cases of constituting an additive, contaminant or toxin. Accordingly, measures in relation to genetically modified organisms may fall within the definition of sanitary and phytosanitary measure in Annex A.⁹³

While interpreting the meaning of 'pests' in Annex A Item 1, the Panel in *EC-Approval and Marketing of Biotech Products* dispute held that pests include any animal or plant that is destructive or that is troublesome. Thus, genetically modified plants that grow where they are undesired are pests within the scope of Annex A Item 1. Therefore, measures taken to avoid invasion of genetically modified plants are sanitary and phytosanitary measures.⁹⁴ The Panel also held that the unintended expression of modified genes in agricultural crops are additives if they infect or pollute the food chain, poisonous substances produced during metabolism or growth of genetically modified crops and food allergens which might be produced by GMOs could be toxins,⁹⁵ and lastly food includes genetically modified plants that are processed.⁹⁶

The Codex Alimentarius Commission (CODEX) first considered the issue of biotechnology in relation to food in 1989. In 1991, it considered the Report of the joint FAO/WHO Consultation on the Assessment of Biotechnology in Food Production and Processing as Related to Food Technology and endorsed its conclusions and recommendations. The CODEX through the Ad Hoc International Task Force on Food Derived from Biotechnology has coordinating consideration of the development of appropriate international standards with respect to foods derived from biotechnology.⁹⁷ The SPS Agreement is most

⁹¹ In Philippines protestors destroyed a field where Gold Rice was being tested. In India anti-GMO protests are frequent. But at the same time developing countries have planted more biotech crops than industrialised nations. The area under GMO crops in India is now 11.6 million hectares which is equivalent to Canada and more than China's. India has enhanced income from Bt cotton by about Rs 98,000 Crore in the 12 year period between 2002 and 2003, Zia Haq, "India's GM Crop Area is more than China's" *Hindustan Times*, Jan. 1, 2015. Joint FAO/WHO Consultation on Biotechnology and Food Safety showed that use of biotechnology does not result in food less safe than that produced by conventional ones, Sara Pardo Quintillan, "Free Trade, Public Health Protection and Consumer Information in the European and WTO Context" 33 *Journal of World Trade* 6, 178 (1999).

⁹² Parties on the Convention on Biological Diversity agreed on the Protocol on Bio-safety in 2000. Under the Protocol, parties may take into account socio-economic considerations arising from the trans- boundary movement of living modified organisms resulting from modern biotechnology that may have an adverse effect on the conservation of biological diversity. Notification should be based on risk assessment to identify and evaluate their potential adverse effects on environment and human health.

⁹³ Fiona Macmillan, *WTO and the Environment* 142 (Sweet & Maxwell, London, 2001).

⁹⁴ Panel Report, *European Communities-Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.240, 7.247, 7.255, 7.2581, 7.2579 and 7.2580.

⁹⁵ *Ibid.*, paras 7.301, 7.313, 7.323, 7.333 and 7.337.

⁹⁶ *Ibid.*, para. 7.299.

⁹⁷ *Supra* note 93 at 145.

adequate multilateral legal instrument regulating trade in the genetically modified organisms.⁹⁸ The applicability of this instrument to these organisms is a complex issue and there is no doubt that it has to be determined by Panels and Appellate Body in future disputes.⁹⁹

Nanotechnology Debate

A basic definition of nanotechnology is the engineering of molecular level functional systems and is also referred as projected ability to construct high performance products. Trade in goods containing nanoparticles has increased and in addition to benefits these goods bring to consumers, they are also associated with risks. The SPS Agreement is applicable to all sanitary and phytosanitary measures which may directly or indirectly affect international trade.¹⁰⁰ In case measures regulating trade in nanotechnology affect international trade, then they will be subjected to the provisions of the SPS Agreement, provided such measures are sanitary and phytosanitary measures. The Appellate Body and Panels has provided little help in determining whether nanotechnology or nano-particles are pests, diseases, disease carrying organisms or disease causing organisms.¹⁰¹ In the light of risks to human, animals and plants, the member countries should establish measures to regulate trade in nanotechnology. In this case the SPS Agreement's reliance on scientific evidence would provide for an objective balance between the risks and benefits in trading in nanotechnology.¹⁰²

VII. Conclusion

Initially, the sanitary and phytosanitary measures were specified under the GATT Article XX (b) and the Standards Code. With the introduction of sanitary and phytosanitary measures under the World Trade Organization framework, such measures has also emerged as a matter of interest for the member countries. The internationalization and standardization of standards relating to SPS measures has made the member countries to make their domestic sanitary and phytosanitary measures conform to international standards. The requirement of scientific evidence with regard to risk assessment and determination of appropriate level of SPS protection restricts a particular importing country to raise a dispute against an exporting country as long as latter has justified its position based on scientific evidence. The introduction of risk assessment has assisted in determining the appropriate level of sanitary and phytosanitary protection by the member countries and puts obligation on them to resort to risk assessment system in domestic measures.

The SPS Agreement also upholds the spirit of the Preamble of the World Trade Organization by providing a uniform platform for the developing countries under technical assistance and special and differential treatment provisions. The principles of harmonization, equivalence, transparency and risk assessment runs like a golden thread in entire framework of the SPS Agreement. These provisions promote international trade by balancing the conflict which arises between a member country's right to protect human, animal and plant health or life and obligations not to use such measures to create disguised restrictions to international trade.

In spite of the fact that the SPS Agreement has promoted growth of international trade, it has also raised complex issues such as state of scientific evidence, domestic quarantine, national sovereignty, issues concerning the developing countries and new risks which have emerged due to scientific advancement and technological innovations. The fault lines and contentious issues between domestic and foreign interests and between the developing and developed countries is likely to give rise to high profile disputes for resolution before the dispute settlement body.¹⁰³ The Appellate Body and the Panels is going to play an important role pertaining to the interpretation of the provisions of the SPS agreement.

⁹⁸ Simonetta Zarrilli and Irene Musselli, "The Sanitary and Phytosanitary Agreement, Food Safety Policies and Product Attributes" in Merlinda D. Ingco, John D. Nash *et.al.* (eds.), *Agriculture and the WTO Creating a Trading System for Development* 230 (World Bank Publications, New York, 2005).

⁹⁹ Steve Charnovitz, "Improving the Agreement on Sanitary and Phytosanitary Standards" in Gary P. Sampson, W. Bradnee Chambers *et.al.* (eds.), *Trade Environment and the Millennium* 175 (United Nations University Press, New York, 1999).

¹⁰⁰ SPS Agreement, Article 1.1.

¹⁰¹ James D. Thayer, "The SPS Agreement: Can it Regulate Trade in Nanotechnology" 13 available at: <http://www.scholarship.law.duke.edu/cgi/viewcontext.cgi?article=135&context=dltr&sei=1&referer=http%3A%2F%2Fwww.google> (visited on January 15, 2019).

¹⁰² *Ibid.*, at 14.

¹⁰³ Michael J. Trebilcock, *Understanding Trade Law* 160 (Edward Elgar Publishing Ltd, Cheltenham, 2011).