

Overview of the TBT and SPS Agreements and its possible Implications for INDIA

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Introduction

The Agreement on Technical Barriers to Trade (TBT) aims to ensure that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to trade. In that context, however, it recognizes that each country should not be prevented from taking measures necessary to protect human, animal and plant life or health or the environment, and that each country has the right to set the level of protection that it deems appropriate in these areas. The Agreement encourages countries to use international standards where these are available, but it does not require countries to harmonize their domestic regulations and standards upwards or downwards as a result of international standardization activities. This Agreement is subject to the same principles as the General Agreement, i.e Articles I and III are the cornerstone of it, and exceptions as under Article XX of the General Agreement also apply to it. This Agreement has also built a code Of Good Practices which has been developed on a best endeavour basis for voluntary standards.

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) addresses the variety of measures used by governments to ensure that human and animal food is safe from contaminants, toxins, disease-causing organisms and additives, and measures to protect human health from pests or diseases carried by plants and animals. These measures are not covered by the TBT Agreement. The SPS Agreement explicitly recognizes the right of governments to take measures to protect human, animal and plant health, but where trade restrictions result, these measures should be taken only to the extent necessary for health protection, on the basis of scientific principles and evidence. If there is not sufficient scientific evidence, governments may temporarily impose precautionary restrictions while they seek further information. Governments are to determine the level of health protection they consider to be appropriate on the basis of an evaluation of the risks involved. SPS measures are to be applied in a non-discriminatory manner. Furthermore, if there are a number of measures which could be used to ensure the determined level of health protection, governments are to use those which are no more trade restrictive than necessary to achieve the appropriate level, if these are technically and economically feasible.

In addition to the texts of these Agreements, it is also worth examining Article X of GATT which obliges contracting parties to publish laws and regulations relating to restrictions or prohibitions on imports or exports. In addition, the Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance adopted in November 1979 requires "contracting parties, to the maximum extent possible, to notify the contracting parties of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would, of itself, be without prejudice to views on the consistency of their relevance

to rights and obligations under the General Agreement." Further, the Agreement on Technical Barriers to Trade established a notification system to ensure transparency of technical regulations (mandatory standards) being adopted by parties to the Agreement. The Uruguay Round revisions of this Agreement will improve this transparency mechanism by widening participation to all contracting parties and by tightening requirements.

While the basic purpose of the Agreements have been described above, the implementation of the agreements and how they actually work in practice requires a further investigation of the details of the agreements. The Articles and the ways in which Panels have interpreted articles provide some indication of how they would be used as non-tariff barriers to trade. It may also be possible for India to use such standards to protect its domestic markets and this will be discussed in this article too. Given that tariff barriers are being dismantled progressively and that since the implementation of the Uruguay Round all member countries of the WTO have become signatories to these agreements, a clear understanding of the scope of these agreements is warranted. In the world of tomorrow these will be the most important non-tariff barriers to trade.

SECTION I: The Agreement on Technical Barriers to Trade (TBT)

The GATT rules governing the use of product standards are contained in the Agreement on Technical Barriers to Trade. The 1979 Agreement has been revised in the Uruguay Round TBT Agreement.

Standards lay down specifications regarding characteristics of a product, such as quality, performance, safety or dimensions as well as requirements providing how it should be packed or labelled. The Agreement makes a distinction between standards whose compliance is mandatory and those of which compliance is voluntary. The term technical regulation is used for mandatory standards, and the term standard is used to denote voluntary standards.

Technical regulations adopted for environmental objectives are explicitly within the scope of the Agreement. The preamble to the Agreement recognizes "that no country should be prevented from taking measures necessary" inter alia "for the protection of human, animal or plant life or health" or "for the protection of the environment", "at levels it considers appropriate, subject to requirements" that

- "they do not constitute a means of arbitrary or unjustifiable discrimination between countries were the same conditions prevail" or
- "a disguised restriction on international trade" and
- that they are "otherwise in accordance with the provisions of the Agreement".

The 1979 Agreement did not cover Process and Production Methods (PPMs). The revised Uruguay Round Agreement now defines technical regulations as referring to "product characteristics and their related production methods". However, this wording is understood to limit PPMs to those processes and production methods

which have an effect on the characteristics of the product itself. For example the revised text would allow prohibiting imports of pharmaceutical which do not meet certain requirements regarding good manufacturing practices and cleanliness of the plant, thus affecting the quality of the product.

The Agreement requires that standards are applied on an MFN basis to imports from all sources and that the imported product should not be extended treatment which is less favourable than that accorded to the 'like product' of national origin (national treatment rule). (Article 2.1).

The Agreement requires, however, that technical regulations do not create unnecessary obstacles to international trade.

The Agreement encourages countries to use international standards. Where technical regulations are required and relevant international standards or their completion is imminent, countries shall use them as a basis, except when such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued (Article 2.4).

Whenever a relevant international standard does not exist or the technical content of a proposed regulation is not in accordance with that of an international standard, and if the technical regulation may have a significant trade effect, it must be notified to the GATT Secretariat in draft form. The TBT text has a provision for the establishment of Enquiry Points (Article 10), which receives the notifications from the GATT Secretariat and facilitates the access to information on national standards. This notification system obligations will reduce the possibility of standards becoming barriers to trade.

Countries may deviate from international standards when such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems. The TBT Agreement explicitly recognizes that environmental protection constitutes such a legitimate objective.

The Agreement requires, however, that technical regulations do not create unnecessary obstacles to international trade. The revised TBT Agreement requires that technical regulations shall not be more restrictive than necessary to fulfil a legitimate objective, taking into account the risks non-fulfilment would create¹. In assessing such risks, relevant elements of consideration are, *inter alia*, available scientific evidence and technical information, related processing technology and intended end use of products. (Article 2.2).

The importance which the Agreement puts on the use of scientific evidence is further brought out by the dispute settlement provisions, in particular regarding the possible

¹ It has sometimes been mentioned that this provision is intended to ensure proportionality between regulations and the risks non-fulfilment of legitimate objectives would create, although this is not mentioned in the text.

establishment "of a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts" (Article 14.2). Specific procedures for the Expert groups are included in an Annex to the Agreement.

Further, in order to ensure that trade is not affected because of the differences in standards, the Agreement requests countries "to accept as equivalent" technical regulations, even if such regulations differ from their own, provided they are satisfied that they fulfil the objectives of their own regulations. (Article 2.7).

Special and differential treatment of developing countries is focused on providing developing countries more time to comply with the obligations of the TBT, i.e with the notification of their domestic regulations. It does not give them a differential schedule for meeting standards in OECD countries. Further while there are provisions for harmonizing measures or accepting the rules of other countries as equivalent, it is possible that establishing equivalence may be a slow process. There also appears to be a recognition by the regulators that such measures used by countries will inevitably have trade limiting effects -the important issue will be to learn how.

THE SPECIAL CASE OF ECO-LABELLING AND VOLUNTARY STANDARDS

TBTA Agreement deals with Technical Regulations, Standards, and Conformity Assessment Procedures. Eco-labelling schemes come under the umbrella of the TBTA when they are either mandatory Eco-labelling measures according to the definition of a "technical regulation", or a voluntary measure according to the definition of a "standard" (Annex 1).² In either case, compliance procedures for an Eco-labelling scheme must meet the definition of "Conformity Assessment Procedures" (Annex 1).³ Voluntary Eco-labelling programs are within the scope of the TBTA to the extent that they are based on requirements about the product's design, characteristics or performance as well as PPMs that have a direct impact on the product's characteristics.

The relationship between the Agreement, voluntary measures and non-product-related PPMs is less clear. The first sentence of the definition of a Standard is ambiguous. The term can be interpreted to exclude non-product-related PPMs. However, it can also be argued that a plain reading of the definition cannot support such an interpretation (i.e., non-product-related PPMs are included in the definition). Moreover, the second sentence of the definition could be interpreted to include non-product-related PPMs that are used as criteria and indicators for Eco-

² *Technical regulation* – Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Standard – Document approved by a recognized body, that provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking, or labelling requirements as they apply to a product, process or production method.

³ *Conformity Assessment Procedures* – Any procedures used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

labelling schemes. Participation in Eco-labelling schemes is generally voluntary. As such, criteria and indicators for certification are not mandatory. If non-product-related (i.e., unincorporated) PPM's do not come within this definition they are not covered by GATT Rules even if the scheme is state-sponsored.

Compliance procedures for both mandatory and voluntary Eco-labelling schemes are the equivalent of conformity assessment procedures which govern the determination that relevant requirements in technical regulations and standards are fulfilled (Articles 5, 6, 7, 10). Eco-labelling programs, as described above, are covered by the TBTA and are subject to the fundamental TBTA provisions requiring that measures be non-discriminatory, no more trade-restrictive than necessary, based on international and performance-based standards, and transparent. Under the GATT's dispute settlement system the burden of proof for satisfying these points rest with the party adopting the measure.

THE CODE OF GOOD PRACTICE

Contracting Members must ensure that official standardizing bodies comply with the Code of Good Practice.⁴ Moreover, governments are to take reasonable measures to have non-governmental standardizing bodies and local governments who adopt trade standards follow the Code of Good Practice. The main features of the Code of Good Practice include:

- Treat domestic and foreign products alike;
- Product standards will specify performance rather than design or description where it is appropriate;
- Adopt international standards unless they are ineffective or inappropriate;
- Participate in the harmonization prepared by international bodies;
- Submit draft standards to WTO Members and allow a period of at least 60 days for comment;
- Publish work programs and standards and provide copies to WTO Members;
- Provide adequate opportunity for consultation and give objective consideration to comments on proposed standards submitted by WTO Members.

There are no procedures for obtaining an NGO's compliance with the Code of Good Practice. In some cases, such as the ban on the use of tropical timber by provincial governments in the Netherlands, matters involving local governments or NGO's are better resolved under policies imposed by regional trade bodies like the European Community or Association of Southeast Asian Nations. In the absence of a clear enforcement mechanism, conformity is a voluntary process that is mainly achieved through the dissemination of information and consultation. This role is principally handled by the International Standards Organization.

The revised TBT Agreement establishes a Code of Good Practice for the Preparation, Adoption and Application of Standards (Annex 3). In accordance with Article 4, members shall ensure that their government standardizing bodies accept and comply with the Code. In addition, they "shall take such reasonable measures as

⁴ Technical Barriers to Trade Agreement, Annex 3 "Code of Good Practice for the Preparation, Adoption and Application of Standards.

may be available to them to ensure that local governments and non-governmental standardizing bodies within their territories ... accept and comply with this Code of Good Practice".

The Concept of "Like Product"

At the heart of this debate is one of the fundamental principles of international trade: governmental policies of an importing country should not unfairly distort the comparative trade advantage of another country in producing a particular product. Simply stated, this means that in international trade like products should be treated equally regardless of national origin. This principle is reflected in the national treatment requirements of Article III of the GATT which prohibits trade measures that discriminate between imported products and "like products" or "like domestic products".

Where an importing country wishes to distinguish between an imported and domestic product for regulatory or tax treatment or for the imported product to be treated "less favourably" than the domestic product, the products must not be "like products" under the GATT. However, there is no established definition of this concept in the GATT. The determination of whether any particular imported product is "like" a domestic product is made on a case by case basis when a dispute arises. GATT panels have consistently followed the reasoning of the Working Party Report on Border Tax Adjustments which states:

"With regard to the interpretation of the term 'like or similar products', which occurs some sixteen times throughout the General Agreement, it was recalled that considerable discussion had taken place in the past, both in GATT and in other bodies, but that no further improvement of the term had been achieved. The Working Party concluded that problems arising from the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality..."⁵

The distinguishing criteria are based on the final product and its physical characteristics. The processing or production methods of a given product are irrelevant for "like product" determinations under the GATT.

The GATT panel report, United States - Measures Affecting Alcoholic and Malt Beverages,⁶ appears to broaden the criteria to be considered in the determination of "likeness" by including the policy purpose of the measure affecting the imported product. This panel reasoned that the purpose of Article III is not to prevent an importing country from using taxes and regulation for purposes other than to afford protection to domestic production. Further, the purpose of Article III is

⁵ Working Party Report on Border Tax Adjustments, adopted 2 December 1970, L/3464, BISD 18S/97, 102, para. 18.

⁶ Panel Report on "United States - Measures Affecting Alcoholic and Malt Beverages", adopted 19 June 1992, BISD 39S/206.

not to prevent differentiating between different product categories for any policy purpose that is unrelated to the protection of domestic production. Consequently, the Panel considered that the limited purpose of Article III has to be taken into account in interpreting the term "like products".

Therefore, according to this interpretation, if the purpose of a trade measure affecting an imported product is to further a policy other than to "afford protection to domestic production" then the imported product would be determined to be "unlike" the domestic product and could be treated differently or less favourably and that treatment will be acceptable under Article III of the GATT.

This interpretation of "likeness" recognizes that without broader criteria than strictly physical characteristics, once products are designated as like products, a regulatory product differentiation for standardization or environmental purposes will be inconsistent with Article III even if the regulation is not "applied...so as to afford protection to domestic production".

The general approach under the GATT rules is to require the exclusion of production processes and methods as a valid means for restricting trade access unless they are directly related to the characteristics of the product at the market in question.⁷ The TBTA expanded upon this principle in two ways. First, the TBTA addresses more subtle forms of trade discrimination such as mandatory legal requirements of governments ("Technical Regulations") as well as voluntary measures adopted by private standardizing bodies ("Standards"). Second, it recognizes that governments are free to adopt technical regulations to protect the environment so long as the measures are not more trade-restrictive than is necessary to achieve a legitimate objective. The test for legitimacy considers the following factors:

- Whether the category of regulation is one that is recognized under the GATT/TBTA (national security, human health or safety, protection of the environment)?
- Were the risks assessed on the basis of available scientific and technical information related to processing methods or consumers?
- Are the regulations applied equally to domestic and imported products?
- Is there a means for achieving the objective that is less restrictive of international trade?

In all cases, technical regulations that deal with product performance standards are preferable to those which control the design or description of the product. If international standards have been adopted, GATT members are obliged to incorporate the relevant portions in their technical regulations.

There is a pitfall in the general approach because many environmental certification programs are administered as voluntary schemes in the private sector.

⁷ Non-product related process and production methods are referred to as "Unincorporated PPMs", whereas those which are product related are known as "Incorporated PPM's". For example, product characteristics affecting product disposal in the importing market are Incorporated PPMs, while processes which affect the local environment in the exporting country are Unincorporated PPMs. For example, sustainable management criteria and indicators concern production as well as use and disposal. Production criteria and indicators would be treated as Unincorporated PPMs.

Strictly speaking, these are essentially private programs which are neither Technical Regulations nor Standards. An application of the traditional approach would mean that many voluntary Eco-labelling schemes that are based upon Unincorporated PPMs would not be within the scope of GATT or the TBTA. After the Uruguay Round Negotiations, the framework under GATT for notification, participation and consultation is only applicable to the final characteristics of products, in other words, what the OECD has termed "product-related PPM requirements". For example, this means that ASEAN countries are not likely to be able to contest a purely private Eco-labelling scheme directed at tropical timber and timber products in the same manner they successfully challenged the Austrian tropical timber Eco-labelling law before the GATT-Council in 1992.

Recently, an argument has been made for a broader interpretation of the TBTA which would include the coverage of Non-product-related PPM's. Advocates of this view accept voluntary Eco-Labelling schemes as a market reality and suggest the expanded interpretation is a means to accommodate different approaches that produce equivalent environmental benefits. This approach also avoids a drawn out process for defining the acceptable features of Eco-Labelling through a series of case-by-case bilateral conflicts that would otherwise need to come before the WTO's Disputes Body.

There is another interpretive approach that can be applied which avoids the need to either redefine the scope of GATT / TBTA or develop the application of GATT rules through case and controversy. The OECD has suggested that recognition should be given to the fact that when based on Unincorporated PPMs, such as cradle-to-grave assessments, Eco-Labelling schemes have the same potential to discriminate against all products equally regardless of national origin.⁸ Therefore, the certification criteria does not discriminate on the basis of national origin *per se*. Since the product's geographic origin is not the focus of the assessment procedure, such schemes are trade neutral. Similar logic was adopted in the decision reached by the WTO Panel in the Tuna-Dolphin I case which is discussed in Section IV.2. This approach leads to an outcome which places mandatory as well as purely voluntary Eco-Labelling schemes outside of the GATT framework. As a result, grievances by member countries come within the procedures for notification, consultation and dispute resolution.

SECTION II: The Agreement on Sanitary and Phytosanitary Measures (SPS)

The revised TBT Agreement does not specifically deal with sanitary and phytosanitary regulations which most countries adopt to protect their domestic agricultural production and animal life from pests and diseases that may be brought in the country by imported products. A separate Agreement on Sanitary and Phytosanitary measures (SPS) was therefore negotiated in the Uruguay Round.

SPS measures include, among other things, any measure to protect human or animal life or health within the territory of the importing country from risks arising from additives, contaminants, toxins, or disease-causing organisms, in foods, beverages

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Environmental Labelling in OECD Countries, OECD (Paris 1991).

and feedstuffs, as well as to prevent establishment or spread of pests. The agreement calls on countries to base their SPS measures on international standards and, in order to develop such international standards, to participate in the activities of international organisations like the Codex Alimentarius Commission and the International Office of Epizootics.

The SPS provisions differ from those of the TBT Agreement in three important aspects: First, while the TBT Agreement requires that product regulations be applied on a MFN basis, the SPS permits Members to impose different sanitary and phytosanitary requirements on food, animal or plant products sources from different countries, provided that they "do not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail". The rationale for this is due to differences in climate, pests or diseases and food safety conditions. Second, the provisions of the SPS Agreement explicitly permit governments to choose not to use international standards. National standards which are higher than international standards are allowed and should they result in a greater restriction of trade, the government may be asked to show scientific justification for the measure, or the could demonstrate that the international standard would not result in the level of health protection it considers appropriate. Third, the SPS Agreement introduces the Precautionary Principle and permits member countries to adopt SPS measures on a "provisional basis", in cases where "relevant scientific evidence is insufficient" by taking into account "pertinent information" that may be available from them or from other Members or from the relevant international organizations. The Rio Declaration stipulates, the precautionary approach should be adopted only where non-adoption of the measure, because of the lack of full scientific certainty, could lead to "threats of serious or irreversible damage". As such risk of irreversible damage occurring as a result of spread of pests and diseases exists in the case of trade in animal and plants and their products, the SPS Agreement incorporates the precautionary principle.

The SPS agreement like the TBT may reflect a concern that rules which are identical may in their application be trade distorting, and do not provide the "equivalent competitive opportunities" to imported products as they do to like domestic products. However, article 9 do provide for technical assistance for developing countries, and article 6 allow exporters to adapt to regional pest and disease free conditions. Article 10.2 recognizes that it may take developing countries longer to comply with new regulations. It remains to be seen how this concern will be translated into the national legislation of importing countries. Time limited exceptions to the obligations under Article 10.3 may be of some help to developing countries, but invoking this article will not be in their export interest.

The SPSA can also be used to prevent or limit potential damage to a country that could result from the entry, establishment, or spread of pests. SPSA measures include relevant laws, decrees, regulations, requirements and procedures, including end product criteria, processing and production methods, and packaging and labeling requirements directly related to food safety. The formulation of these measures are to be based upon standards, guidelines and recommendations developed by international organizations. However, each Government has the discretion to determine its own level of acceptable risk and are explicitly permitted

to impose more stringent requirements than those based upon international standards. A country that selects a standard that exceeds international guidelines is required to justify its use if a trade dispute results.

SECTION III: TRADE DISPUTES CONCERNING THE SPS AGREEMENT

EC-Measures Concerning Meat and Meat Products (Hormones)

In 1989, EC banned imports of meat produced with hormones from US and Canada. EC claimed that the hormones contained in the meat might be carcinogenic. The WTO Appellate Body ruled against EC in Jan 1998, and the EC was given 15 months to bring its law in conformity with SPS rules. As of mid-1999, EC not yet removed the ban. US and Canada are threatening trade retaliation because of EC's failure to implement the ban. Various aspects of the panel findings are discussed below.

1.Australia-Measures Affecting the Importation of Salmon

In 1975, Australia banned imports of uncooked Salmon from Canada, as Australia wanted to prevent the introduction of exotic pathogens in its environment. In Oct 1998 Australia was given 8 months to bring its law into conformity with SPS. As of mid-99, Australia has not yet removed the ban. Canada is threatening trade retaliation if Australia fails to revoke this ban.

2.Japan-Measures Affecting Agricultural Products

In 1950, Japan banned imports of apples, cherries, nectarines and walnuts. Japan deemed them potentially infested with codling moth. In 1987, Japan had provided for lifting this ban subject to certain quarantine and fumigation requirements, however each variety of fruit was to be individually tested. The separate testing provoked the WTO dispute. The Appellate Body ruled against Japan in Feb 1999. At the end of 1999, Japan agreed to bring its regulation into conformity with SPS rules.

THE HISTORICAL CONTEXT OF THE SPS AGREEMENT

GATT rules on syto and phytosanitary measures were hardly ever tested by Panels. A GATT standards Code written in 1979 proved inadequate to provide the level of protection desired by the members in the sphere of health related standards. Efforts to draft SPS Agreement began in late 1980s. SPS has more stringent disciplines than GATT. Health exception in GATT Art XX (b) is not available to a government as a defence in an SPS lawsuit. No SPS violation if a ban is imposed on the use of hormones so long as it is not applied to imports
 “improve the human health, animal health and phyosanitary situation in all Members”.

3.SPS rules and case-law

SPS pertains to laws or regulations to protect against exposure to pests, microorganisms, additives, contaminants and toxins in foods. Protection against insecticide in fruit is covered by SPS. Protection against bio-engineering in food however might not be covered. A measure governed by SPS is excluded under TBT (WTO Agreement). In all SPS cases, panels consulted experts (provision in SPS), but the burden of proof lies with the government lodging the complaint.

4.The Science requirement

SPS Art 2.2 requires that SPS measures are applied to extent necessary to protect health, based on scientific principles and maintained with sufficient scientific evidence. In the *Agricultural Products Panel of Japan versus Canada*, the Appellate Body interpreted this provision to require “a national or objective relationship between the SPS measure and the scientific evidence.”

The panel and the Appellate Body concluded that Art 2.2 was being violated because Japan could not show that the quarantine and fumigation used for one variety of fruit or nut would be inadequate for other varieties. While the SPS Agreement requires use of “sound science”, this term does not appear in the Agreement. Scientific study for an SPS measure can be challenged by other scientists, and while the Agreement has no provision for dealing with conflict of science, no doubt future panels will throw some light on this.

5.Risk assessment requirement

Art 5.1 requires SPS measures are based on assessment, as appropriate to the circumstances, of the risks to life or health. However, according to Panel interpretations both “mainstream” and “divergent” views on risk assessment would be admitted. Further the agreement does not require any quantitative conclusions, but does mandate that the complainant must find evidence of an “ascertainable” risk. In the *Salmon case of Australia versus Canada*, “unknown and uncertain elements” made for improper risk assessment. In the *Beef Hormones case*, evidence on record showed that the use of hormones as a growth promoter was safe, yet EU argued that the evidence on risk assumed “good veterinary practice”, which may not have been practised. EC was faulted for not conducting a risk assessment of this prospect – a violation of Art. 5.1.

SPS disciplines can disallow health regulations aimed at genuinely unsafe practices, by insisting that health measure in dispute should be “based on” the risk assessment. In the *Beef Hormones case*, the panel required reliance on risk assessment and undertook an analysis of EU’s decision-making process. In this case it rejected EC’s attempt to incorporate minimum procedural obligations into SPS. It brought into play terms such as “sufficiently warrant”, “sufficiently support”, “reasonably warrant”, “reasonably support”, or “rationally support” using the health measure, “objective relationship” or “national relationship” between the risk and the measure.

In the *Beef Hormones case*, this test found that the EU risk assessment did not support the ban and one expert who testified that one in a million women would get breast cancer out of eating the meat produced with growth hormones. It is unclear if the expert was deemed speculative or the risk unimportant.

It is to be noted that Violation of Art 5.1 perforces a violation of science requirement in Art. 2.2. This conclusion was upheld in *Salmon* panel.

However, there is no direction in the Agreement to apply benefit-cost analysis in determining risk assessment.

6.The requirement for national regulatory consistency

Art. 5.5 states that “with the objective of achieving consistency”, a government shall avoid arbitrary or unjustifiable distinctions if such distinctions result in discrimination or a disguised restriction on international trade. SPS Agreements call on WTO Committee on SPS Measures to develop guidelines for the implementation of this provision. Neither of the first two SPS panels were willing to await those guidelines.

Three elements of violation of Art. 5.5 are to be noted:

First the defendant government must be seeking different levels of helath protection in “comparable” situations.

Second, differences in the government’s intended level of protection must be “arbitrary or unjustifiable”.

Third, the health measure embodying these differences results in discrimination or a disguised restriction on internatioanl trade.

In the *Salmon Panel*, the Appellate Body offers five arguments: the first two points to the lack of risk assessment and to the different levels of health protection being sought. The third argument is that there was a “substantial” difference in the level of health protection being sought. The fourth argument is that an Australian government draft report in 1995, which would have been tolerant of salmon imports, was revised in the final report of 1996. The fifth argument is that Australia lacks strict internal controls on salmon equivalent to those it imposes at the border against foreign diseases. According to the Apellate Body, whereas no single one of those arguments might be conclusive, together they add up to a trade law violation.

It is unclear why the Appellate Body did not realize that an island nation might need stricter health controls at the perimeter than internally. According to Australian government, there are at least 20 diseases of salmon not currently found in Australia.

The requirement of least trade restrictiveness

Article 5.6 states that governments shall ensure that SPS measures are "not more trade restrictive than required to achieve their appropriate level" of protection. To prove a violation there must be an alternative measure, reasonably available that is significantly less restrictive to trade. In two cases the parties were found to have violated this article, but this charge of violition was withdrawn on appeal. However, in analysing an alternative measure, panels will consider whether it matches the intended level of protection, not the level of protection actually achieved by the SPS measure. Additionally, the complainant must show that such an alternative measure exists.

7.The requirement to use international standards

Art 3.1 states that governments “shall base” their SPS measures on international standards (Codex Alimentarius, IOE, IPPC). When such standards do not exist, Art. 3.1 has no effect. When international standards exist, a member country may nevertheless use a higher standard, lower standard or conform to the international standard. It is not clear how much of a “safe harbor” using international standards will be? Even if a country uses standards higher than international standards, they must nevertheless meet all SPS requirements, i.e the sound science, risk assessment, the regulatory consistency, and the least trade restrictiveness conditions. However it is worth noting that by using an international standard a country signals a rebuttable presumption of non-discrimination. In *the beef hormones case*, the burden of proof shifted to a government not using an international standard.

8.The recognition of equivalence

Art 4.1 requires an importing country (or a government refusing to import) to accept an SPS measure by an exporting country as equivalent to its own, if the exporting government can objectively demonstrate that its health measure achieves the level of protection chosen by the importing government.

9.The Transparency requirement

Annex B requires governments imposing a regulation to notify the WTO and to allow time for affected governments to make comments and for the regulators to take such comments into account.

THE PRECAUTIONARY PRINCIPLE

"*Precautionary Principle*", is an emerging tenet in international environmental law. It implies that

"where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation",

a definition that has been set out by the 1990 *Bergen Ministerial Declaration on Sustainable Development* and reiterated by the *Rio Declaration* (principle 15).

The precautionary principle has recently been cited in several international legal instruments. Besides the Rio Declaration, it has been fixed in the *Framework Convention on Climate Change* (art.3 para.3), the *World Charter for Nature* (principle 11 *lit.* b) and the *Treaty of Maastricht* which will amend art.130 R para.2 of the EEC Treaty by adding the precautionary principle to the guidelines for European environmental policy and legislation.

The principle could, for instance, be implemented by the application of the best available, and not excessively expensive, technology. Once an obligation in international law, it would influence the regime of State responsibility by representing a primary obligation of States, that, in the case of its infringement, could lead to the payment of damages.

The nuances in the usage of the principle concern:

- the **circumstances** under which the principle can be applied (only when there is a serious threat perceived);
- the amount of **scientific proof** required (ie some or none);
- how **cost-effective** are the measures (which could undermine the principle itself, since it would imply that non-cost effective measures to prevent serious or irreversible damage should not be taken);
- the extent of **co-operation** required in implementing preventive measures;
- **concessions** for developing countries;
- the **specificity** of definitions (vague recommendations can effectively operate as legal loopholes); and
- the **legal status** accorded to the principle.

In the SPS Agreement there is no reason to conclude that the existing language in Art 5.7 is inadequate. Proposals to tighten or loosen this article in the light of its usage as an internationally agreed principle in the environmental context may be considered as premature. Proposals to incorporate the precautionary principle into Art 5.7 are problematic, as outside the realm of environment this principle does not have general acceptability. In addition, there is a consideration of cost-effectiveness in justifying precautionary measures, as the Rio principles do advocate that “measures based on Precautionary principle must include a cost/benefit assessment”. On the other hand SPS does not mandate the use of cost-benefit analysis.

Section IV: IMPACT OF SUCH MEASURES ON INDIA⁹

Marine products:

Marine exports are at some risk, partly because of failure to adhere to or attain international standards. India's marine exports attract automatic detention in the United States. Automatic detention means the product must be sampled and tested before it gains entry into the country, which means delays, storage costs and may be a substantial refusal rate. According to some estimates at present the value of detained fisheries products in US is valued at US\$ 14 million (or 15%) out of total exports of US \$ 108.2 million to the country in 1996-97 (Chemonics- ACE Project1998).

Fishery products

⁹ This section draws from a study done by Atul Kaushik and Mohammed Saqib for UNCTAD under project IND/97/955.

In August 1997 the European Commission banned fishery products from India. The ban stated that:

- *Community inspection in India has shown there are serious deficiencies with regard to infrastructure and hygiene in fishery establishments and there is not enough guarantee of the efficiency of the controls by the competent authorities.*
- *There is a potentially high risk for public health with regard to the production and processing of fisheries products in this country.*
- *The results of checks of the community border inspection ports on fishery products imported from India have indicated that these products may be contaminated by micro organism which may constitute a hazard to human health.*
- *Import of fishery products from India must therefore not be further allowed.*

The Government, faced with the EC ban, issued an Order dated 21st August 1995 that specified elaborate process standards, because, inter-alia, “it is necessary to maintain the highest quality standards as per the health requirements of the importing countries that would encompass the standards like unified directive No. 91/493/EEC dated 22nd July 1991 of the European Community ...”. As a result of the EC ban on Indian fisheries products, and as a condition for the partial lifting of that ban, certain seafood processing plants and freezer vessels have been re-inspected and approved for exporting to the EC countries. Currently about 90 plants out of 404 plants in the country are approved for fishery products export to the EC.

The European standards are higher than the HACCP standards. The Seafood Exporters Association of India claims to have spent US\$ 25 million on upgradation of their facilities to meet the regulations. Appropriate training of the personnel involved in various stages of production and processing also need to address. Many of the standards adopted in the Order dated 21st August 1995 are either not relevant for the product quality or are too stringent given the Indian fishing conditions and the legitimate objective, if any, behind the standards could be met through less cumbersome and less costly procedures. Some examples of the Standards applied through this Order, which are clearly beyond HACCP standards, are given below:

- Fishes/Fillets of uniform size and colour shall be packed together.
- The (shrimp) can exterior shall be free from major dents, rust and seam distortions.
- ‘Potable water’ means water used for processing which means tolerance levels as per EEC Directive No. 80/778-EEC.
- Sufficient supply of potable water ... shall be provided.
- Non-slip floor that is easy to clean ... structures and fixtures must have limber holds that are large enough not to be obstructed ... Walls and ceilings that are easy to clean

- Adequate ventilation ... proper vapour extraction ...
- Adequate lighting
- The immediate approaches of the processing areas shall be concreted or tarred or tufted to prevent wind blown dust.
- The layout of different sections shall be in such a way as to facilitate the smooth and orderly flow of work to prevent possible cross contamination.
- The floor of the food handling and cold room areas shall be waterproof.
- Walls shall be free from projection and all pipes and cables shall be neatly covered. Junctions shall be rounded off ...
- All windowsills shall be sloping inwards.
- An anteroom should be provided to the cold rooms/storage.
- Potable water or clean sea water shall be used for all purposes.
- Staff must wear clean working clothes with headgear, which completely covers the hair.
- When recruited, any person working on and handling fishery products shall be required to prove, by a medical certificate, that there is no impediment to such employment.

The EC approved plants are normally bigger plants with capacity of more than 10 tons per day. Before you enter the plant you have to take off your shoes for rubber boots, put on a hair cover, facemask and a gown. These units have chilling room with -28 degree C temperature. These factories are spotless with excellent facilities. EC approved plants are as good as any plant in Europe and USA and even better than them at times. The floors were marble and spotless clean, the equipment stainless steel, very comfortable temperature, workers in uniform, enough space to work comfortably, provision for water for periodic cleaning of hands and raw material. Every effort was made to re-ice the shrimp or to put them in the freezer in brine between steps in the processing. The workers were similarly garbed, and while the women who were de-heading the shrimp did not wear gloves (because they were too easily punctured), there were chlorine baths permanently put near them for hand dipping. There were more than adequate facilities for workers to change, rest and washrooms.

There was in-house peeling facility and records were meticulously maintained. A microbiological laboratory was also part of the facility. It was clean and well equipped. There was a microbiologist. According to her there are regular checks of the incoming material as well as finished products. The microbiological tests are done at external laboratories also to be doubly sure. According to her the most common occurrence is presence of coliform bacteria but they rarely found salmonella. Since the first step is to wash the shrimps in cold brine the contamination gets removed. There are some 84 processing units like this in the country out of total 404.

The second types of units were the ones who have applied for EC approval. These are the units which were exporting to EU before ban came into effect but now exporting to US, Japan and other places except EU. These units also have pretty decent facilities. They didn't have marble floors, polythene covers were provided as shoe covering rather than boots and head cover. The change rooms and laboratories were not luxurious but there were all provisions for hygiene. They also have

laboratories. They have all the provisions required by HACCP manual but may be of a lesser standard than the EC norms. Basically their handicap is infrastructure. Probably they will not have the change room of the size required by the EU. However it does not effect the hygiene part of the product.

The third kind is typically small companies with annual turnover of around Rs.2 crore or US\$ 0.5 million. These are small structures. They do not have in-house peeling facilities and get peeling done from outside. They do have laboratories but few are functional. They are inferior than EC approved units. They have plenty of water and cleaning facilities. The hygiene conditions apparently were not bad but scope for contamination was quite high. These companies are exporting to China etc.

The exporters felt that the concept is good but its adoption in totality for a developing country is rather difficult. For example even potable water which is an absolute necessity is in shortage in the Cochin area, moreover the EU standards require that even floors and ceilings should be washed by potable water. It is not easy to use 100,000 litres of water every day when most people in the area do not have sufficient quantities of potable drinking water. The units, of course, often have their own treatment plants for potable water. They feel that EU norms are too strict and a few things are irrelevant for product safety. They have been asked to follow norms that even European plants do not follow. In this sense there are double standards. For example they have to undertake 62 tests to check water standards. For some of the tests, they don't even have the equipment to test in India.

Following these norms increases the cost of production also. Earlier production was mainly in bulk form; the equipment required was plate freezers, refrigeration equipment for freezing, and building for processing hall and cold storage. But the EU requirement of infrastructure to meet standards involves heavy investment in equipment and building apart from the running cost. It is now necessary for each factory to have Potable Water System, Continuous Power (Standby Generators), Effluent Treatment Plants, Flake Ice Machines, Chill Rooms and Laboratories. It is estimated that such upgradation involves an expenditure of rupees 1 to 2 crore, about US\$250,000 to US\$500,000 per unit as a fixed cost. The banks are not willing to give loans. They want to see the performance for the last three years. Last few years were bad because of EU ban on exports from India. Even if they get loan the cost, at 18% interest plus other running costs, is prohibitive.

PEANUTS

Peanut exporters have a feeling that foreign markets put non-tariff barriers on their exports of agriculture products because they have to sustain their domestic agriculture, which involves higher costs than in India. They also face situations where they have to make distress sales in the face of buyers expressing their inability to accept the supplies because of some domestic standards in the importer's market. They feel, therefore, that Indian exporters may have to depend upon their domestic market or, at the most, the SAARC region for sustenance. Their importers have informed that standards still higher than the current ones are going to apply after 31.12.2000 in their export market.

Some of the problems faced by the exporters appear to be genuine. For example, they find that different testing procedures and conformity assessment standards are required in different markets. Each test costs Rs.6000, or US\$150.00. Nobody has informed them of the justification for most of the tests. Further, tests are required by these foreign markets (EU) only for exports from Egypt and India and not for exports from USA and Argentina. Another problem is that while there is no import duty on 50-Kg bags, there is a duty on 5-Kg bags. This is because the foreign markets want to discourage retail consignments. They also face problems regarding genetically modified peanuts. While, some years ago, one foreign market encouraged use of GMOs, now another market has wanted an assurance that the peanuts supplied are without GMOs.

A more detailed study was done on the issue of aflatoxin presence in peanuts, as this appeared to be a major threat to peanut exports.

The EU Commission in Brussels has specified tolerance limits for aflatoxin contamination in peanuts and also testing methods. The proposed levels are 10 ppb (5ppb B1) for raw material and 4 ppb (2ppb B1) for consumer ready products. The new proposed sampling plan is similar to the Dutch Code i.e. the analysis is to be done based on a 3 test Dutch code methodology from a randomly drawn 30 KGs sample. The new procedure is much more rigorous than is currently in force, as should any of the 3 tests be found to be over the limit, the lot will be rejected.

This step is unwarranted from the scientific angle (as submitted by various agencies/governments). Laboratory test with small animals such as touts and rats which were fed highly contaminated feed (B1) on a daily basis have concluded that aflatoxin can cause cancer of the liver. But there is as yet, no clear evidence to prove that aflatoxins are carcinogenic in humans. This should be viewed against the backdrop of the fact that should a shipment of peanuts be found to contain aflatoxin, this does not mean that all peanuts are contaminated since aflatoxin is concentrated on very few nuts. Statistically, one would expect to find one contaminated nut in a sample of say, 5000 to 10,000 uncontaminated nuts. Experts have concluded that 75% of the lots rejected under the proposed procedure would be below the established tolerance i.e. uncontaminated material.

Further, the world over, especially the peanut supply origins like Argentina, China, India, South Africa, U.S.A., Vietnam etc. where peanut consumption is very high, nowhere has there been any findings/reports so far, to the effect that aflatoxin in peanuts led to increase in cases of liver cancer. And peanuts are consumed in a very big way by all strata of society especially the middle and lower class.

JECFA report says that Aflatoxin contamination of foodstuff is very low among EU nations and only a few members of the population suffer from hepatitis B. Considering the estimated risk at 20 ppb, it will be 0.0041 cancer cases per 100,000 population annually. Considering the risk at 10ppb, it will be 0.0039 cancer cases per 100,000 population annually. This shows that the downward adjustment of the standard from 20 ppb to 10 ppb would bring a reduction of the estimated cancer risk only by approximately 2 cancer cases annually per 1 billion

people. It seems improbable that there would be any measurable risk differential between the hypothetical standards (20 and 10ppb) in populations with a low hepatitis B incidence like in the EU countries. And consider the possibility that denial of export market to farmers of a developing country like India could result in starvation deaths in multiples of the estimated harm to life in Europe.

The JECFA had previously recommended that maximum permissible aflatoxin levels should be fixed as low as possible. But now, on the basis of further data available, it has modified its recommendation to reducing the intake as far "as is reasonably possible". Further, it should be noted that the JECFA's risk estimates are based on data that made no allowance for the substantial reduction in aflatoxin contamination achieved by mechanical removal of the nut skins and by the use of optical and electronic methods for sorting the nuts. The risk computations are thus based on aflatoxin levels, which are no longer applicable. This new data should be taken into account when finally specifying the future EU tolerance limits. For example, the Codex Alimentarius Commission had proposed a maximum limit of 15 ppb.

SAMPLING PROCEDURE

The proposed sampling plan is similar to the Dutch Code (3x10 Kg). The analysis is to be derived from a 3-test Dutch Code methodology from a randomly drawn 30-Kg sample. The new procedure is much more rigorous than is currently in force, as should any of the three tests be found to be over the limit, the lot will be rejected.

In the case of bulk raw nuts, the implementation of a regular monitoring policy presents difficulties because the aflatoxin will seldom be evenly distributed throughout a given batch and only a few nuts may be contaminated. For example, the contamination rate is estimated at 1:10,000 for groundnuts (peanuts).

The question is how large should the sample be in order to ensure that the test yields reliable data on the degree of aflatoxin contamination. Opinions differ on this point:

The FAO has recommended testing a single 20 kg sample for aflatoxin content from a batch of between 15 and 24 t. The FAO is of the opinion that this sampling procedure would yield results that are reliable enough to eliminate the risk for the consumer and that stricter requirements would bring no significant safety measure.

Whereas the EU Commission wants three samples of 10 kg each tested from a batch of between 15 and 24 t. According to the new regulation, the whole shipment will be rejected if only one of the three samples exceeds the tolerance level. It would be far more logical to calculate an average value from all 3 samples as an end result. On the basis of the risk estimate computed by JECFA, several experts object that the new procedure would mean an

unnecessary waste of good product without actually benefiting consumer safety. It is also certain that this practice would lead to adverse effects on prices. The EU regulation is also criticised because it fails to specify how the sampling and testing of the final products circulating in the trade should be performed. Uniform criteria which are binding for all EU member states are also necessary for these products.

The implementation of the EU Commission's proposals would endanger the export of peanuts to the EU member countries. The planned tolerance limits of 2 ppb aflatoxin B1 and 4 ppb total aflatoxin in finished products are so low that they would almost certainly cause insurmountable difficulties and immense costs for production and export to the EU countries. Producers within the EU itself would also suffer unreasonably from these regulations. Whereas the WHO is proposing a limit of 15 ppb for all aflatoxin, the EU Commission is insisting on an upper limit of 10 ppb for the raw nuts, despite the fact that the aflatoxin content decreases during subsequent processing of peanuts. The latest JECFA study published in June 1997 demonstrates clearly that an increase in the upper limit for all aflatoxin from 10 ppb to 20 ppb would involve a theoretical risk of only two additional cases of liver cancer annually per one billion populations.

The European Snack Association's Nut Working Group has already expressed concern of the industry about the testing programme and analytical methodologies through CIAA (the European Food and Beverage Association). The American Peanut Council has submitted documents showing significant increase in costs and rejections as a result of multi sample system. The UK Ministry of Agriculture - MAFF - (UK is the largest consumer of peanuts in Europe - approx. 25% of the peanuts imported into Europe) has already stated that the proposals were more of a burden than required by current UK regulations and could result in unacceptable costs to both industry and enforcement without any prospect of improved consumer safety. Despite these protests the revised draft of the sampling plan still recommends a multiple sampling system. It is evident that such a change will have very serious implications on the peanut industry. It is also significant to note that this EU proposal possibly contravenes the GATT/WTO agreement as this will erect artificial barriers and seriously discriminate against a number of producing origins, particularly third world status and developing countries including India. Consider these facts:

- Europe represents 47% of world imports of groundnuts and groundnut products - a value of \$1.4 billion.
- Assuming all of Europe moves to a multi-test plan, the increase in cost of testing alone will be \$4 million - this does not include re-testing costs in Europe.
- The UK government reported that compliance with the proposed EU directive would average 8% of turnover (lb 3.2 million).
- Exporters will lose the ability to ship goods to an alternate European market. As a consequence, the overall cost of the lot would have to be priced with consideration for recovering the cost of the rejected goods which must be diverted for crushing or

sold at a significant discount for animal feed.

- Exporters may be forced to absorb the costs for additional cleaning, re-sorting, blanching, of rejected lots of peanuts - implications for increased costs of doing business in the European market could be more than \$200 million according to JECFA.

TESTING PLAN COMPARISON - COST IMPLICATIONS FOR PEANUTS

Current Single Testing Procedure	Proposed EU Multi-Testing Procedure
Average MT cost: \$800	Average MT cost: \$800
Cost of testing : \$50/lot (Lot = 20 tons)	Cost of testing : \$200/lot (Lot = 20 tons)
Rejection: 30% (Based on experience of USA and Argentine testing under the Dutch Code of Practice)	
<u>Final Cost US \$ 802/MT</u>	<u>Final Cost US \$ 1157/MT</u>

** Scientific data has documented that reducing aflatoxin levels for raw material (e.g. from 15 ppb total to 10 ppb total) has little or no effect on the levels of aflatoxin found in finished product.

** There is no justification for restrictive aflatoxin levels on the basis of consumer protection, given the fact that aflatoxin levels in raw materials can be substantially reduced through processing.

** Introduction of rigorous, expensive import requirements puts undue burden on suppliers, distorting trade as it will limit the volume and number of origin suppliers who can routinely meet the criteria. This could, quite obviously, result in an artificial trade barrier and the possibility of a WTO action.

** Rigorous testing programmes are extremely difficult to monitor and enforce. If not applied uniformly, both suppliers and importers are at a disadvantage. In a crop year when supplies are short, there may be an effort to manipulate results or encourage alternative import schemes through markets where surveillance may not be as stringent.

** Assuming the need to increase pricing to take the anticipated rejections into account, European importers will be forced to consider the following options:

- Blanch peanuts prior to importation (which adds costs on to raw materials and raises issues with regard to splits and shelf-life).

- Move production to a non-EU site, where stringent testing of raw materials is not mandatory-leading to job losses in both the manufacturing sector and ancillary business.

** This stringent system will increase the price of raw material in Europe.

** Lastly, none of the European countries is a producer of peanut and to bring about such stringent import restrictions on a commodity for which they have to fully depend on other origins, without giving any heed to the suppliers, other experts and JECFA/ WTO will be unhealthy and may prove to be more troublesome than serving any useful purpose.

All this goes to indicate that the proposed legislation will be counter-productive both to the buyer as well as the seller, apart from paving way for numerous problems and bottlenecks for no reasonable cause. In other words, the risk that non-fulfilment would entail is not commensurate with the costs incurred.

Mango pulp

Exporters have fixed buyer for years in the case of mango pulp. So, their relationship is good. If there is any trouble with authorities due to quality or any other reason most of the buyers are helpful in sorting out the problems at their end. It is also due to their stake in the clearance of consignments. The quality issue becomes a major hurdle when buyers have excess stock or the prices of the goods have fallen in international market below the agreed/contracted price. In such cases, sometimes the exporters have to accept price discounts, especially because of the perishable nature of the goods.

Tea

In recent years, there have been growing reports of pesticide residues in tea affecting its market access. For example, Germany complained about high residue levels of ethion in Darjeeling teas. Complaints were also received about high levels of bicofol in Assam, Terai and Booras teas. In addition, the Government has banned the application of DDT, BHC, aldrin, aldrex, endrine, heptachlor, chlordane and tetradifon. Moreover, there are Government guidelines providing that if chemicals such as thjionton, dimethoate, monocroptos, fenicyphermethrin, fenvalerate, phorat, phosphomodon, formothian, acephate and carboxin are applied during the plucking season, the plucking that immediately follows these sprays should be discarded.

Doubts have been raised some time back about the justification of some of the objections about pesticide residue in the European market. In 1995, the German limit of 0.01 mg of tetradifon and 2 mg of ethion per Kg of tea were somewhat arbitrarily imposed because of lack of data from India on its pesticide safety limits for tea. Later, the Teekanne Darjeeling Gold brand of tea was rejected because it contained 0.24 mg of tetradifon per Kg, 24 times the limit set by Germany. The rejection was soon followed by a report by the German Institute of Environment Analytics, Messzelle, denouncing the brand as unsafe. On the other hand there were no rejections from UK, another of the European markets. This led some to believe

that the German ban was protectionist, or there was no ban in UK because most of the Indian tea firms have British principles.

The tea estates are largely well managed and employ sufficiently educated people to take care of these guidelines. The production process is also sufficiently well oiled to ensure the meeting of these standards. However, there is a problem regarding testing and conformity assessment for these standards. There is only one institute, the Pesticide Residue Laboratory, which can test commercial samples of tea in India. Another problem is the cost factor. It is reported that the test required to clear a consignment for Germany costs roughly US\$ 234 per analysis. This is unaffordable at least for the bulk tea exporters who get a much lower realization.

Tea Research Association now very well monitors pesticide residues. Exporters apply ISO 3720 standard. The Indian standards are even more stringent than ISO and all other countries' domestic standards with the exception of Japan. The best tea is supplied to UK and Japan, while lower quality goes to countries like Russia, Poland, Iran etc. The stricter EC standards apply to exports to UK, while for Japan it is enough to get EIC inspection done.

SECTION V : CONCLUSIONS AND RECOMMENDATIONS

While both the provisions themselves and the experience of India show that such measures have a high potential for being non-tariff barriers to trade, so far most of the panel rulings have gone in favour of the complainant. This shows that WTO rules in these agreements would uphold its basic principles of non-discrimination and most favoured nation. However the experience of India and some other developing countries show that both these principles are wilfully flouted and many of the TBT and SPS measures applied may not be in conformity with the agreements. Therefore it is surprising, that not just India but very few developing countries have ever raised a panel under these measures, especially under SPS measures.

One reason for this could be that an SPS complaint could be very difficult to lodge against a rich country. The regulatory mechanisms and domestic case law for testing such standards may not be adequate. SPS disputes may also be very complicated and only countries with large governmental legal staffs that are repeated litigants may have an advantage in SPS adjudication. Moreover the economic harm from an unjustified SPS measure may be very small in comparison with the economic harm of protectionist barriers such as tariffs, quotas, and subsidies.

While panels and the clarification of rules obtained through panels may be an expensive procedure for countries such as India, it is imperative that India compiles a record of all such cases where these measures are seen to be discriminatory. This may provide valuable evidence for the review processes which are likely to come up. Moreover if standards are the way that non-tariff barriers would go in the future, it is important that India starts developing regulatory and other assistance mechanisms for meeting these standards.

