

PROTECTION OF ENVIRONMENT THROUGH SPS MEASURES UNDER THE WTO: DILEMMAS & CHALLENGES

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Abstract

Sanitary and Phytosanitary (SPS) measures are measures in international trade under the World Trade Organization (WTO) legal regime those tend to protect the human, animal and plant health, the core component of our environment. Although the SPS mechanism under WTO projects to safeguard the environment ultimately, this paper will examine how far SPS measures can offset the harmful impact on the environment and will argue that SPS measures are often being undermined by WTO dispute settlement board labelling it a non-tariff trade barrier. When protection of environment and trade liberalization comes in a conflict, the WTO regime often goes in favor of trade liberalization rather than allowing SPS measures. In the SPS agreement itself, it does not cover environmental issues comprehensively. For instance, capacity to resort to precautionary approach by member states for protection of environment is limited. Even the compliance challenge in third world can even endanger the environment protection as it is. For an environment-friendly international trade regime, SPS measures need to be modified and WTO dispute settlement should prioritize it where it requires most.

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“Every part of this earth is sacred to my people. Every shining pine needle, every humming insect, all are holy in the memory and experience of my people. We know the sap which courses through the trees as we know the blood that courses through our veins. We are part of the earth and it is part of us. The perfumed flowers are our sisters. The bear, the deer, the great eagle, these are our brothers. The rocky crests, the juices in the meadow, the body heat of a pony, and man, all belong to the same family.”

- Chief Seattle's Letter to the President of the United States, 1852

INTRODUCTION

If a single plant or animal suffers, the whole environment suffers since those are inseparable and integrated part of our environment. For a viable environment, it is much needed to ensure the wellbeing, health and overall better life conditions of the plants and animals in addition to our age-old anthropocentric bias towards humans. Sanitary and Phytosanitary (hereinafter mentioned as SPS) measures are a set of measures in international trade regime under the World Trade Organization (WTO) those tend to protect not only the health of human but also the health and wellbeing of animal and plant, the core component of our environment.¹ Although trade-obsessed scholars often argue that such measures are disguised form of trade protectionism, very few can defy the importance of striking a balance between a green environment and a liberal trade environment free from protectionist mindset.

It is evident the proliferation of international trade has contributed to spreading of diseases more than ever.² We have witnessed that how far disease like Ebola could do in the very recent past. If we pledge to ameliorate the present standard of degrading environment by improving the standard of environmental components, a better treatment to the health and safety of flora and fauna is must in addition to general human well-being. Although the SPS mechanism under WTO projects to safeguard the environment by pledging a deep commitment to these standards, we will examine how far they could perform in turning their pledges into a reality. In doing so we will compare how far the overall WTO regime guided by the SPS agreement along with the interpretations of WTO dispute settlement body comes in conformity with the general principles of international environmental law. In doing so this paper tends to analyze Precautionary approach, Harm Prevention, Sustainable Development, Polluter Pays Principle and other general and customary international principles of International Environmental law to show how far the overall WTO set up could echo this overarching environmental principles.

HISTORICAL EXPERIENCE: FROM GATT TO WTO

¹ Cambridge Dictionary defines environment as ‘the air, water, and land in or on which people, animals, and plants live’.

² Charles Perrings, ‘Options for managing the infectious animals and plant disease risks of international trade’ (February 2016) 8(1) 27 Springer <<https://link.springer.com/article/10.1007/s12571-015-0523-0#citeas>> Accessed on: 16 October 2017

At the inception of GATT, environment was not focused and this continued till the Seventies. Before the rise of environmental issues in GATT arena in order to gain economic growth reckless trade practices took place. In 1972, at Stockholm environmental issues grabbed a small foothold. A Group on Environmental Measures and International Trade (EMIT Group) was formed and it met only once in 1991 prior to the 1992 United Nations Conference on Environment and Development in Rio³.

After the Stockholm Conference awareness regarding environment began to grow and several activities took place in order to hold the horses of profit maximization mentality. In Tokyo Round Agreement on Technical Barriers on Trade (TBT) was negotiated. In 1982, concern by the developing countries were raised regarding export of harmful products to them from the developed countries where such products were prohibited to use for being environmental hazard or risk to health and safety.⁴ Brundtland report of WCED- Our Common Future brought more focus on sustainable development. Rio Earth Summit took place in 1992 and sustainable development built a bridge between environmental protection and development in a more useful way.

Marrakesh agreement established the new WTO regime and gave more importance to environment as the preamble of the agreement suggests optimal use of world's resources in order to achieve sustainable development and preservation and protection of environment. The hopes and dreams of pro-environment thinkers were still not given the demanded importance within the new framework as no WTO agreement contained trade-environment issues and GATT Article XX brought only two exceptions of the non-discriminatory principle under which environmental measures may be taken by any member.

Art XX (b) permitted measures for protection of human, animal or plant life or health and Art XX (g) permitted measures for conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. These measures can be availed of after wearing the shackles of conditions mentioned in the Article and it was intended that these measures do not become non-tariff trade barriers to trade liberalisation⁵. Particularly to elaborate rules for the application of the provisions of Article XX(b) for the use of sanitary or phytosanitary measures Agreement on the Application of Sanitary and Phytosanitary Measures came into existence.

GLOBALIZATION OF TRADE: ENVIRONMENT AT A STAKE

It is evident that the globalization of international trade has contributed to a rapid transmission of human, plant and animal diseases. In particular livestock, rural habitats, native wildlife population have been adversely affected throughout breaking of different pests

³ M Rafiqul Islam, *International Trade Law of the WTO* (1st Edition, Oxford University Press 2006) p515

⁴ World Trade Organisation, 'Early years: emerging environment debate in GATT/WTO' <https://www.wto.org/english/tratop_e/envir_e/hist1_e.htm> Accessed on: 16 October 2017

⁵ M Rafiqul (n 3) p516

and viruses. For instance Ebola virus has marked a massive widespread adverse effect on environment resulting in more than 1300 human deaths only in West Africa.⁶ It has significant effect on the economies like Guinea, Liberia, and Sierra Leone.⁷ In Europe the number of plant disease has quadrupled during the 20th century.⁸ Many animal diseases like Foot and Mouth, H9N2 Avian Influenza, Swine Fever and Bovine Spongiform Encephalopathy have increased keeping pace with the ever expanding new markets and new species under international trade regime.

Diseases like Cinnamomi root, Dutch elm, Chest blight, Raspberry collar rotm dogwood anthracnose, Box blight, various phytophthora diseases including oak root rot, sudden oak death and other diseases had been frequent before 1990 but these have expanded like anything in the realm of international trade under WTO resulting in gross negative impact on environment. Moreover disease linked with macroparasites was a notable one found at national frontiers. Bacterial, Viral and Fungal crop diseases have been opened out with the help of trade in risk materials.

The mechanism of trade-related disease risks of plants and animals is generally covered by the WTO Agreement on Sanitary and Phytosanitary measures (SPS Agreement). Current assessment of risk procedures for pathogens spread via trade activities aim at SPS capabilities of member states. In particular it focuses on exporting countries. Still the possibility of transmission in different location depends mainly on the prevalence of trade routes between them, be it direct or indirect. The other factors are the volume of goods and the third being biosecurity.⁹ In terms of epidemic disease spreading, Dixit-Stiglitz trade model has demonstrated how international trade can facilitate the transmission of infectious diseases¹⁰ So, it is apparent that with the passage of time, in the era of liberalized economy we have witnessed more vulnerable state of our core environmental components.

Secondly, if we tend to visualize the problem from another viewpoint, we remark how trade contributes to a negative development in environment. A critical issue has had attention and recently been discussed in the WTO forum. That is about Invasive Alien Species. Invasive alien species can be threatening to a particular new area as a consequence of export and import. Those who enter in a new habitat are said to be alien and since they threaten the biodiversity, they are often called as invasive. Biodiversity consists of domestic and agricultural species and also it cover wildlife. The very reason behind taking this as threat is likelihood of food competition, spreading of disease and predators. It is inevitable that one

⁶ William B. Karesh and others, 'Wildlife Trade and Global Disease Emergence' (July 2005) 11(7) Pubmed <<https://www.ncbi.nlm.nih.gov/pubmed/16022772>> Accessed on: 16 October 2017

⁷ Richard Hamilton, 'Ebola Crisis: The Economic Impact' (BBC, 21 August 2014) <<http://www.bbc.com/news/business-28865434>> Accessed on: 16 October 2017

⁸ Charles (n 2)

⁹ Charles (n 2)

¹⁰ Tuotuo Yu, 'Epidemic Geography: A Theory of International Trade and Disease Transmission' <<https://www.parisschoolofeconomics.eu/IMG/pdf/jobmarket-1paper-tuotuo-pse.pdf>> Accessed on: 16 October 2017

species which is in a balanced ecology can be invasive in a new habitat. Since Through fasten trade regime such alien species can be placed into new set up. Domestic pets, ornamental plants, farm animals or crops and even introduction of predators in controlling pests and unintentional spread in shipment of goods can be few example of this.¹¹ Realizing the necessity of such trade and environment crossroads, the WTO secretariat has held a special seminar on this very recently.

From the real experience that we have encountered in recent past, we can feel the importance of having a proper balance between the indiscriminate inclinations towards liberalization and maintaining a viable safer, and sustainable environment with utmost well-being of its core components.

THE SPS AGREEMENT OF WTO: AN OVERVIEW

SPS agreement sets a set of rules which an importing country can set including any measure, requirement, rules and detailed process to protect the life of human, plants and animals. Not only to protect life but also they can be inflicted to save human, flora and fauna from potential risks arising from the spread of pests, diseases, organisms those cause diseases and from toxins, contaminants, additives in trade channels. In doing so the SPS agreement tends to ensure the standard of international standard setting organizations. In terms of food safety SPS agreement ensures the standards of Codex alimentarius commission (Codex) under the auspices of World Health Organization, for plant safety- the international Plant protection Convention, 1951 and for the protection standards of animals, International Office of Epizootics. However, according to the agreement, SPS measures cannot be used to create barrier in international trade.¹² It is apparent from the agreement that, it is indeed another tool of trade liberalization and has been introduced to offset the erstwhile protectionist use of SPS mechanisms under the then GATT and to promote a transparent, consistent and predictable trading regime.¹³ Critical scholars argue that it does not cover environmental interests primarily.¹⁴

Although Both Technical Barriers to Trade Agreement¹⁵ and SPS agreements tend to protect the environmental interests externally but the very fabric of these instrument along with their pro-liberalization construction in judicial forum has undermined the environmental concerns repeatedly. Although in few instances the Dispute Settlement Board of the WTO has underscored the importance of environmental protection but the overall approach of the adjudicating board towards environment is secondary in comparison to their ultimate inclination to trade facilitation.

¹¹ World Trade Organisation, 'Defending Biodiversity from 'alien species'- role of trade rules examined' <https://www.wto.org/english/news_e/news12_e/spis_18jul12_e.htm> Accessed on: 16 October 2017

¹² The WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Preamble

¹³ M Rafiqul (n 3) p119

¹⁴ *ibid*

¹⁵ Agreement on Technical Barriers to Trade 1994

Unlike past times SPS agreement has ensured a harmonized system of compliance. It has introduced a system of complying by mutual recognition of standards and the equivalence of those standards.¹⁶ Where the measures are supposed to be different country to country generally, the SPS agreement requires the members to accept equivalent measures as much as the other state party. Thus an exporting country needs to comply the standards not less than that of the importing country. Such mutual recognition of SPS standards has paved the way to build up certainty and harmonisation which is ardently important for multilateral trading regime. It is permitted to engage in bilateral recognition understanding in the shadow of SPS agreement without violating the basic Most Favoured Nations treatment.¹⁷

Under SPS Agreement, SPS measures need to be taken based on risk assessment procedure made according to befitting mechanisms and tools developed by relevant international authorities.¹⁸ However there must be a causal link between the probable risk and the measures taken for mitigating those risks.¹⁹ And an important feature of the SPS agreement is it is incumbent upon member states to maintain utmost transparency.²⁰ Control, inspection and approval procedures including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs are to be maintained within the tenets of Annex C²¹. Such procedures cannot be less favorable than they are towards domestic like products and cannot cause undue delay thus resulting in loss of exporting countries.

But the systems are too complex to avail its intrinsic benefits for a number of reasons. Although Developing countries are entitled to enjoy a bit longer period of time to comply the SPS measures undertaken by a member, it cannot enable the exporting developing and least developed countries to come up with environment friendly production to cater the needs of erstwhile market. Since the developed countries are mostly the consumers of those agricultural products those comes under SPS regulation, they indirectly contributing to such environmental vice at the starting point of supply chain. But unfortunately the hefty price has to be extracted from the direct producers not from the consumers for whom such products are being made. So, it is apparent that polluter does not pay all the time.

WHY SPS MECHANISMS ARE FAILING TO ADDRESS THE NEED:

A) A trade obsessed SPS regime

It should be kept in mind that the SPS agreement came into force in encountering the protectionist attitudes of different countries in disguise. So, the main focus was never to improve the human, animal and plant health or the environmental considerations. All it did

¹⁶ SPS Agreement (n 12), Article 4

¹⁷ SPS Agreement (n 12), Article 4(2)

¹⁸ SPS Agreement (n 12), Articles 5(1) and 5(2)

¹⁹ M Rafiqul (n 3) p112

²⁰ SPS Agreement (n 12), Article 7 read with Annex B

²¹ SPS Agreement (n 12), Article 8

was setting up a mechanism to make the SPS very cumbersome to apply and use. This intrinsic pitfall has shaped the SPS regime leaving a very limited scope of improvement. Such intentional complexities are seen in different set up of SPS agreement along with different judicial decision relating to it.

A1. Excessive procedure complexity to comply which makes sanitary and phytosanitary measures to be very tough to apply

The procedure of control and inspection is very complicated for the importing countries. Annex C provides that the importing country is duty bound to inform the time period of completion of such procedures and has to explain any kind of delay. Importing country has to have a body that has to review complaints by the exporting countries regarding control and inspection procedure. The most common complaints are that importing countries are not following the international standards. Long delays in completing risk assessments or allowing imports is another frequent complaint.²²

A2. It needs a costly and time-consuming procedure to assess the risk to meet the threshold of the agreement

According to Article 5.2 of the agreement, there is a list of different factors ranging from certain scientific factors to technical factors that members need to keep in mind while assessing risks. These factors are available scientific evidence, sampling and testing methods, prevalence of specific diseases or pests, relevant processes and production methods, existence of pest-or disease-free areas, relevant inspection, relevant ecological and environmental conditions and quarantine or other treatment²³ Each and every method of assessing risk calls for a sizeable amount of money and time, which makes the whole regulatory system very troublesome for the country who needs environmental protection. Even in emergency situation consequence may come too imminently to bother these complex procedures.

As a result the Agreement itself has been serving the interest of trade liberalization more than any other consideration. Even the face of the agreement guide us to think it pro-environment, it tends to ensure the agenda of capitalist market economy.

A3: Tension between local standards and a 'desirable' global standard

In WTO regime if members blindly obey the standards set internationally, it is comparatively less likely to be legally challenged.²⁴ The chances of being challenged under SPS measures become higher if any particular member state tries to set their own formulas although they are, functionally, at liberty to fix their befitting standards according to scientific requirements

²² World Trade Organisation, 'Current issues in SPS' <https://www.wto.org/english/tratop_e/sps_e/sps_issues_e.htm> Accessed on: 16 October 2017

²³ Appellate Body Report WT/DS26/AB/R; WT/DS48/AB/R European Communities- Measures Concerning Meat and Meat Products(Hormones) [187]

²⁴ World Trade Organisation (n 22)

and national necessity. In realm of this textual flexibility, the practical data shows that such departure can negatively affect them since they have to face legal challenges every now and then. Should not particular countries have some customized standards that best suits with their respective environment and ecology?

Generally, even after underscoring the importance of SPS measures, private sector exporters presuppose that the original intent of SPS is offsetting protectionism that shields the producers rather than shielding crops, livestock and consumers.²⁵

A4: Judicial attitudes towards SPS regime

In interpreting the SPS agreement the WTO panel opined in EC- Approval and Marketing of Biotech products²⁶ that SPS agreement through its subparagraph (d) included the risks to environment in general along with other economic and property damages. However the panel even emphasized on adverse effects on biodiversity, population dynamics of species or biogeochemical cycles by expanding the protection from mere health of plants and animals. In doing so the panel rejected the European Communities' argument that SPS did not intend to cover the risks of environment in general.²⁷ However, we see that the EC's argument is not tenable since there is a specific mention of adverse consequence on environment in the risk assessment procedure of the agreement.

Although Panel and appellate board liberally construed the agreement to encompass the environmental issues, at many instances they have shown over inclination towards trade liberalization through undermining the environmental safeguards. For example with regard to the risks, it has been mentioned in the Appellate Body of EC-Hormones that, in the process of risk management, risk must be actual not theoretical.²⁸ Such pro-liberalization construction of the agreement has paved the way of unregulated free market often resulting in environmental vulnerability.

In some cases, DSB has showed their concern on negative impact on environment. For instance, in Beef hormone, the judges said that scientific evidence needs not to be corroborated by mainstream scientific authority/opinions.²⁹ In a separate para the panel held that even minority science cannot be discounted outright. However, the political reality and the invisible force of free market economy have often led the forum to champion liberalization agendas.

B) Trade Liberalization vis-a-vis Environmental Protection: How far SPS regime resonates the International Environmental Law principles

²⁵ World Trade Organisation (n 22)

²⁶ Panel Report WT/DS291/R ; WT/DS292/R ; WT/DS293/R

²⁷ *ibid*[197] - [211]

²⁸ Appellate Body Report (n 23) [184] - [186]

²⁹ Appellate Body Report (n 23) [116] - [117]

B1: *Scientific Surety vis-a-vis the principle of 'Precaution'*

SPS measures can be applied only after availing sufficient scientific evidence³⁰ and may not be availed where the evidence is not certain. This principle directly clashes with one of the significant environmental principles 'Precautionary approach'. This approach suggests that where there are threats of serious environmental damage, scarcity of detailed scientific certainty should not be used as a reason for postponing cost effective measures to prevent environmental damages.³¹ Although debatable, many regard this principle as a customary international law.³² If not customary it is agreed to be one of the general principles of international environmental law. But the panel rejected precautionary argument in Beef Hormone dispute decision. The AB also reiterated its stand by saying that precautionary approach is yet to be placed in the SPS agreement and thus cannot be placed in a place superior to the liberalization obligations. The stringent threshold of fulfilling 'Three-Tier Test' as laid by Australia- Measures Affecting Importation of Salmon³³ is very difficult to achieve. For passing the test it must be shown that there is an alternative SPS measure which is, *inter alia*, significantly less trade restrictive than the present one. The AB in Australia-Measures Affecting Importation of Apples from New Zealand³⁴ also resonated Salmon to explain article 5.6 of the agreement.

AB in Australia-Salmon³⁵ has held that

"If the level of protection achieved by the proposed alternative meets or exceeds the appropriate level of protection, then the importing member's SPS measure is more trade-restrictive than necessary to achieve the its desired level of protection"

In crux of this difficult test many countries are not being able to safeguard their environment and health issues. However provisional measures can be taken in case there is insufficiency of scientific evidence.³⁶ But no way can't the measures be more trade-restrictive than necessary, which is a reproduction of GATT Article 20.³⁷ And provisional measures can only be taken for a definite period of time. In Japan- Measures Affecting Agricultural Products³⁸ the AB opined that the reasonable period of time depends on obtaining necessary information for forming the review decision.³⁹ Although this provisional measure echoes the precautionary

³⁰ SPS Agreement (n 12), Article 2

³¹ UNESCO, The Rio Declaration On Environment And Development 1992, Principle 15

³² Patricia W. Birnie and Alan E. Boyle, *International Law and Environment* (Clarendon Press,Oxford 1992) p122

³³ Appellate Body Report WT/DS18/AB/R

³⁴ Appellate Body Report WT/DS367/AB/R

³⁵ Appellate Body Report (n 33) [200] - [201]

³⁶ SPS Agreement (n 12), Article 5(7)

³⁷ SPS Agreement (n 12), Article 5(6)

³⁸ Appellate Body Report WT/DS76/AB/R [93]

³⁹ *ibid*

principle⁴⁰, the final decision of SPS measure is in no way in conformity with Precautionary Principle.

B2 : No Extraterritorial Application vis-a-vis principle of Harm Prevention

The principle of harm prevention generally deals with trans boundary harm between states which reflects the idea of extraterritorial measures by any state.⁴¹ A state has to stop actions in its own territory if it causes harm to the environment of another state.⁴² The production or processing system is not a matter of consideration under the SPS Agreement. So, if any trans boundary harm is committed by any state no measures under the SPS Agreement can be availed of. Trans boundary harm can also extend to harm caused in global common areas like Antarctica or areas beyond national jurisdiction as the high sea, deep sea and outer space⁴³. So, for protecting such areas harm prevention principle may apply. Such extra jurisdictional measures in the nature of SPS are not available for protecting global common areas i.e. areas beyond national jurisdiction or common property goods are those to which everyone has free access under the SPS Agreement. Consequently, they can be over utilized because when producers use common property goods or global common areas they do not consider the impact of their use.

By virtue of Annex A(1)(a) of the SPS agreement, SPS measures can only be taken to protect the importing country from the negative effects on its environment which may take place from the imports of any goods. So the Shrimp Turtle case⁴⁴ will clearly show that how SPS agreement has become incapacitated to protect environment. In this case, the complaint was brought by India, Thailand, Pakistan and Malaysia against United States that its restriction on import of Shrimp was violative of the WTO rules. The US imposed import ban on shrimp and shrimp products which was according to its own Endangered Species Act 1973 which states that all shrimp imported into the US must be caught with methods that protect marine turtles from incidental drowning in shrimp trawling nets. The legislation required that the US government would certify that (a) the importing country has comparable laws to the US regulations on incidental taking of sea turtles, and (b) the average rate of incidental taking is comparable to the US. US lost the case not because the Appellate Body found that US cannot put any restriction on territories outside of it.

The AB dismissed the validity of the restriction by the US because there was discrimination by the US and the right of sovereign states to protect endangered species or otherwise protect

⁴⁰ Appellate Body Report WT/DS321/AB/R US/Canada-Continued Suspension [680]

⁴¹ Trail Smelter Case, (United States, Canada), 3 UNRIAA, 1905

⁴² Md. Ikbāl Hossain, *International Environmental Law: Bangladesh Perspective* (Dhaka, 4th edition, Ain Prokashon 2011) p172

⁴³ ASEAN Convention on the Conservation of Nature and Natural Resources 1985, Article 20

⁴⁴ WT/DS58/AB/R United States – Import Prohibition of Certain Shrimp and Shrimp Products

the environment was hailed⁴⁵. The Caribbean countries were favored as they were technical and financial assistance and longer transition periods for their anglers to start using turtle-excluder devices and the Asian countries were discriminated. Only because of this discrimination the validity of the measures of US rejected or otherwise such measures would have been found valid under article XX.⁴⁶ The measure in question taken by the US was under article XX(g) and not under XX(b) by dint of which SPS measures can be taken by a member. If the extraterritorial application was not barred, states could impose restriction on importing countries to protect environment in the importing country.

The preservation of the global environmental commons has to be the most significant talking point in the existing scenario of world trade. Physical or biological systems that are wholly or largely outside the jurisdiction of any of the individual members of society but that are valued resources for many members of society are considered as global commons.²³ For example, atmosphere, the ozone layer, and endangered species can fall within the category of the global environmental commons. It would be possible to deal with the problems of over utilizing the global environmental commons by invoking Environment-orient Trade Measures (ETMs). For example, in *Shrimp/Turtle*, the US tried to preserve seven kinds of sea turtles, which are listed in Appendix 1 of Convention on International Trade in Endangered Species of Wild fauna and flora(CITES), by banning the imports of shrimps from those countries which did not adopt regulatory programs comparable to those of the US in order to prevent the incidental capture of sea turtles by shrimp trawlers. This US measure can be regarded as an ETM aimed at dealing with problems concerning the overutilization of a common environmental good. Once again, it is also hotly discussed to what extent ETMs for preventing the overuse of the global environmental commons should be allowed under the WTO.

B3: *Pro-liberalization vis-a-vis Principle of Sustainable Development*

No discrimination can be made between like products i.e. some consider the debate regarding definition of like product has stayed in the heart of the in trade or environment struggle.⁴⁷ Through WTO case law four categories have been set to determine the likeness of products⁴⁸ and process and production methods are not included in them. Unless process and production methods have an impact on the final characteristics of the product they are not to be considered to determine likeness.⁴⁹ So, if a product is produced or processed in a manner which is detrimental to environment the importing country cannot put objection and impose ban or create barrier to stop or reduce import of such product. From environmental

⁴⁵ WTO, 'India etc versus US: shrimp-turtle' <https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm> Accessed on: 16 October 2017

⁴⁶ *ibid*

⁴⁷ UNCTAD, *Trade, Environment and Development* (Module 2) p19

⁴⁸ WTO, 'WTO rules and environmental policies: key GATT disciplines'

<https://www.wto.org/english/tratop_e/envir_e/envt_rules_gatt_e.htm> Accessed on: 16 October 2017

⁴⁹ UNCTAD (n 47)

perspective one may consider it essential to take into account the environmental effects of production of any goods during its production. For example, a consumer may want to know whether or not timber or timber products came from sustainable managed forests, or whether tuna which he is going to buy has been harvested in a manner which does not involve incidental killing of dolphins. To put ban or restriction on the import of such product the importing country itself has to produce the product in the way it wants the exporting country to produce it. If the country is not the producer it cannot easily reflect its pro-environment mindset while going beyond internationally set standards. The Principle of Sustainable Development started to get recognition worldwide after Rio Declaration in 1992. It is actually a combination of various principles⁵⁰ and it was argued by the principle that the environmental protection is not be isolated from development process⁵¹. The cornerstone of sustainable development has been argued to be integration of environmental, social, and economic concerns into all aspects of decision making.⁵² SPS agreement can be justified if they are taken for the safety of animal and plant.⁵³ As the agreement has kept process or production system out of its arena, the safety of animal or plant which are part of environment cannot be in consideration to enable the importing countries to take SPS measures. Moreover, excessive trade practice by hampering the environmental standard can deteriorate the sustainability of environment. Principle of sustainable development tends to ensure the sustainable and judicious use of natural resources without compromising the need of future generation but the current trade regime with delicate SPS mechanism is indifferent to the needs of future rather obsessed with instant profit.

RECOMMENDATIONS

In light of aforementioned arguments we can remark how SPS mechanism is underperforming to meet the increasing necessity of global environmental protection. To make the SPS regime more environment friendly without compromising trade facilitation few recommendations can be made here.

Firstly, SPS regime should reflect the main principles of international environmental law. In an immediate revision, the agreement should reshape its structure to cater the need of environmental upliftment.

Secondly, besides resonating international environmental law principles, SPS agreement should comply with different international conventions like Convention on Bio Diversity, The

⁵⁰ Liaquat Ali Siddiqui, 'The Legal Status of the Emerging Principles of International Environmental Law' IX(1) The Dhaka University University Studies (Part-F) 47

⁵¹ The Rio Declaration (n 31) Principle 4

⁵² Rachel Emas, The Concept of Sustainable Development: Definition and Defining Principles (Brief for GSDR 2015)

<https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf> Accessed on: 16 October 2017

⁵³ WTO, *The SPS Agreement: An Overview*, (The WTO Agreements Series)10

https://www.wto.org/english/res_e/booksp_e/agrmntseries4_sps_e.pdf> Accessed on: 16 October 2017

Cartagena Protocol on Biosafety to the Convention on Biological Diversity etc. to meet the ever-growing challenges of biodiversity.

Thirdly, the agreement should ensure a less complex mechanism to avail the aid of SPS. In the earlier part it has been shown how tough it is to get an environmentally sound remedy.

Fourthly, the Panel and Appellate board of WTO should demonstrate its positive attitude to environment. Since we are in the era of rampant climate degradation, they should bear the very fact in their mind. In addition, in the issues where Human Rights and Environment are intrinsically related, appeal provision can be made to International Court of Justice. That can avoid the conflict of interest of WTO panel members.

Finally, what is most needed is the whole scenario should be seen from a balancing point of view. Trade facilitation should not be overemphasized over the environmental necessity. It is expected that the SPS mechanism will be more pro-environment if these measures can be taken.

CONCLUSION

It is inevitable that, free trade obsession dictated by free market economic force will tend to imprint its notorious influence in every sphere of our life. Global trade instruments like SPS is one of such instances where the business interest has been injected thoroughly. But the dilemma is we cannot indiscriminately and whimsically dominate the environment. If we cannot ensure the safe life and health of core environmental components, then the ecology where we thrive in will suffer resulting in disastrous environmental consequences. The main challenge we face today, how to strike a balance between the trade interest and the environmental protection. For the sake of our very existence we should opt for green since it is linked with our very existence.