

Non-Tariff Barriers on Technical, Sanitary and Phytosanitary Measures: An Overview Under WTO Laws

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Abstract

The World Trade Organisation (WTO) is established to regulate and facilitate smooth and peaceful international trade between countries. This study explains the non-tariff barriers on technical, sanitary and phytosanitary measures agreements under the WTO and all WTO member countries are bound to follow them to ensure a convenient trade environment. Many WTO member countries are not aware of or understand non-tariff barriers on technical, sanitary and phytosanitary measures before drafting their domestic trade laws. If all countries are sincere and adhere to the rules and guidelines of the WTO, quality and standards of international trade can be adequately maintained. Non-tariff barriers have restricted and promoted international trade. Qualitative doctrinal research is utilised to explain and collect research data. This study found that all WTO agreements inspire its member countries to develop their trade standards as internationally recognised. Therefore, this study submits that in order to maintain the quality and standards of international trade, each member country of the WTO should understand and adopt all the WTO agreements on non-tariff barriers in their domestic laws.

Keywords: Non-tariff barriers; WTO; international trade regulations; domestic laws.

Introduction

The World Trade Organisation (WTO) covers several agreements or the treaties to maintain international trade, and the General Agreement on Tariffs and Trade (GATT) is considered the umbrella organisation (Alaeibakhsh, and Ardakani, 2012). The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) sets out the basic rules for food safety and animal and plant health standards (WTO, n.d.). In addition, the Agreement on Technical Barriers to Trade (TBT) is identified as the significant agreement as it measures about the technical matters which is the most relevant factor in trade at the present time (Ali, 2016). The TBT and SPS are widely used by the WTO members as Non-Tariff Barriers (NTBs) for environmental protection, safety, security, consumer interests and other trade related facilities (WTO, n.d.).

The WTO encourages all member countries to set their own standards in trade. It also says that the standardisation must be based on scientific evidence that they do not carry any unhealthy consequence (Staiger, 2012: 1). The measures of non-tariff barrier on Technical, Sanitary and Phytosanitary should be applied only to the extent necessary to protect human, animal or plant life or health. However, they should not unjustifiably or arbitrarily treat countries differently where identical or similar conditions exist.

Each WTO member country is encouraged by WTO agreements to adhere to international standards, guidelines, and recommendations where they are available. However, all members are entitled to implement measures that lead to higher standards if supported by scientific evidence. They can establish higher standards based on proper risk assessments, provided the approach is consistent and not arbitrary. (Forge, 1999). Therefore, this study explains the non-tariff barriers regulated by the WTO to encourage the development of international trade friendly regulations in national laws.

Definition of the Non-Tariff Barriers

Non-tariff barriers are anything that impedes normal access to international trade (Noor-E-Hera, n.d.: 169). It generally means any policy or measure that can create obstacle into the trade flows (Staiger, 2012: 2, 6). In order to have clear understanding of term “Non-Tariff Barrier,” both words “Tariff” and “Barrier” should be clarified. Therefore, the term “Tariff” means a tax or duty that government charges on goods coming into or going out of their country or a tax or duty to be paid to government on a particular class of imports or exports. On other words, a tariff is a tax on imports or exports between sovereign states. In short, it is called customs duties on merchandise imports or exports. According to the WTO, tariff is customs duty on merchandise imports; it gives a price advantage to producing the same product locally. In addition, the word “Barrier” means obstacle

to trade, something that prevents movement or access, putting something to block the ordinary movement, hindrance to the general access and so on.

Therefore, a non-tariff barrier is a type of restrictive trade measure where obstacles to trade are imposed in forms other than tariffs (Staiger, 2012: 2). It includes quotas, embargoes (an official ban on trade or other commercial activity with a particular country), sanctions, levies and other restrictions which are frequently used by large and developed economies. There are many non-tariff barriers can be found under international trade laws such as export restrictions, quality conditions, general or product-specific quotas imposed by the importing country on the exporting countries, labelling conditions, packaging conditions, product standards, incompatible conventions for contracts, determination of eligibility of an exporting country by the importing country, determination of eligibility of an exporting establishment (firm, company) by the importing country, over-valued or under-valued currency, intellectual property laws (patents, copyrights), quota shares, import licenses, minimum import pricing, export subsidies, occupational safety and health regulation, sanitary and phytosanitary conditions, and many others. In this study we will discuss non-tariff barriers only on technical, sanitary and phytosanitary measures. Therefore, non-tariff barriers are such measures that imposed on imports that include domestic legislation covering technical, product, labour, health, environmental standards, internal taxes or charges, and domestic subsidies. Overwhelmingly, Tariff and Non-Tariff Measures (NTMs) are imposed to protect the import competing industrial sector of the home country.

Legal framework of the Non-Tariff Barriers under WTO

There are some specific covered agreements under WTO that are linked to trade and health in international law. If any country suffers any threat connected with technical, sanitary and phytosanitary measures, it shall claim under those agreements. The agreements are as follows:

1. Agreement on Technical Barriers to Trade (TBT);
2. Agreement on the Application of Sanitary and Phytosanitary Measures (SPS);
3. General Agreement on Tariffs and Trade (GATT).

Many researchers suggested that the above stated agreements must be properly addressed to all member countries of the WTO in order to make sure that all member countries take protective measures to avoid violation of these agreements (Noor-E-Hera, n.d.: 172-73). Therefore, all covered agreements are briefly discussed accordingly.

1. Agreement on the Technical Barriers to Trade (TBT)



The TBT has deliberated several matters associated with technical barriers to international trade. Some are as follows:

a. General Overview on the TBT

Every country is having different types of rules and regulations in order to have peaceful trade inside the country (WTO, n.d.). These doctrines include all matters related to technical and standards of products (Johnson, 2014, 6-7). These rules and regulations taken by a country could be used as a protectionist tool (Office of the United States Trade Representative, n.d.). These domestic rules and regulations can become obstacles or barriers to international trade. Thus, the TBT was negotiated during the Tokyo Round of multilateral trade negotiations (1974-1979) to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles to trade (Forge, 1999).

The TBT covers all technical regulations, voluntary standards and conformity assessment procedures except when the SPS measures are defined by the SPS. It also recognises countries' rights to adopt the standards they consider appropriate - for example, for human, animal or plant life or health, for the protection of the environment or to meet other consumer interests. Moreover, according to the TBT, members are not prevented from taking measures necessary to ensure their standards are complied with. In order to prevent too much diversity, the TBT encourages countries to use international standards where these are appropriate, but it does not require them to change their levels of protection.

b. Scope and Key Concepts of the TBT

The TBT is applicable to “technical regulations”, “standards”, and “conformity assessment procedures” of trade. These terms are each defined in Annex 1 of the agreement. These definitions establish the general scope and key concepts of the agreement. Therefore, all characterisations are discoursed accordingly to know them clearly.

i. Technical Regulation

The “technical regulation” is used as a term in the TBT Agreement. In pursuant to paragraph 1 of Annex I of the TBT a “technical regulation” is defined that:

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.

According to this definition, if a specific law provides that a product has a mandatory procedure, then it must be followed accordingly in order to maintain quality of the product. It could be included in terminology, symbols, packaging, marking or labelling (Office of the United States Trade Representative, n.d.). This definition can be explained in following examples:

Example 1: A law stating that only refrigerators that are one meter high can be sold in State X is a technical regulation.

Example 2: A law stating that all product packaging must be recyclable in the State Y.

It can be identified from example1 that the mandatory rule of the refrigerators is one meter in the market of State X. Similarly, example2 provides a mandatory characteristic of packaging of a product in State Y. Therefore, these mandatory rules must be observed in trade to avoid claims under TBT Agreement.

ii. Standard

Every product must be maintained a standard. It is one of the requirements for trade in the TBT. Based on paragraph 2 of Annex I of the TBT, a “standard” is defined as:

Document approved by a recognised 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.

It is understood from this declaration that all mandatory requirements must be followed but if the product does not reach the mandatory level, it would be sold without levelling the mandatory requirements. That means, this product will not be considered as standard product, but can be sold in the market.

Example 1: A government guideline says that all eggs weighing 62 grams or more are entitled to be labelled “Grade A” is a standard. However, it is provided that eggs weighing less than 62 grams may still be sold in the market.

Example 2: A law guideline defines that products can display a “recyclable symbol” as a standard, but other products that do not bear the symbol may still be sold in the market.

According to these examples, it can be specified that a government may provide a standard of products, but other products which do not attain the fixed standard can still be sold in the market. However, the products which are not having

the stated standard cannot be sold in the name of such standard. If they are sold in that standard, the injured party or parties can claim for injunction and damages under paragraph 2 of Annex I of the TBT.

iii. Conformity Assessment Procedure

“Conformity assessment” is also a terminology used in the TBT. In pursuant to paragraph 3 of Annex I of the TBT, a “conformity assessment” procedure is “Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.” Paragraph 3 further explains that conformity assessment procedures include procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations (Forge, 1999).

Example: Assume a country requires a condition for the sale of spirits that “the correct weight be displayed on the bottle.” An official test of the beverage will determine that weight. Thus, the correct weight is displayed would be a conformity assessment procedure implemented to verify compliance with a technical regulation.

The conformity assessment affirms technical regulation and standard. The conformity assessment identifies the fulfilment of the mandatory rules of trade. However, if any product is not covering any obligatory decree, it can be sold in the market, but it will not be identified as trade qualified product (Forge, 1999). There are many cases settled by Dispute Settlement Unit of the WTO related with technical barriers. Such as in the case of *Peru vs EC (DS231)*, Peru requested consultations with the EC Concerning Regulation (EEC) 2136/89 which, according to Peru, prevents Peruvian exporters to continue to use the trade description “sardines” for their products. It is submitted that according to the relevant Codex Alimentarius standards, the species “*sardinops sagax sagax*” are listed among those species which can be traded as “sardines”. Therefore, Peru considered that the above Regulation constitutes an unjustifiable barrier to trade, and, hence, in breach of Articles 2 and 12 of the TBT and Article XI:1 of GATT 1994. In addition, Peru also argued that the Regulation is inconsistent with the principle of non-discrimination, and, hence, in breach of Articles I and III of GATT 1994. As a result, the Appellate Body set forth three-part test for determining if a measure is a technical regulation:

- i. The document applies to an identifiable product or group of products;
- ii. The document must lay down one or more product characteristics;
- iii. The compliance with stated characteristics must be mandatory.

In this case, the Appellate Body had found that European Community was selling product in the name of “sardines” which was not reach the standard of the

mandatory rules. Therefore, it breached the TBT which led to breach of Articles I and III of GATT 1994. However, later this case was mutually settled by the parties.

c. Special and Differential Treatment to the Developing Countries under the TBT

The TBT requires the member states, in particular developed country members, to provide more favourable treatment to developing country members based on the financial and trade needs of the latter (developing country). Article 12 of the TBT (containing 10 sub-articles) sets forth a broad range of provisions providing special and differential treatment to developing country members. Thus, implementing TBT often requires developing countries to adhere to standards is more appropriate for their industrialised counterparts. The lack of developing country's input in the formation of standards translates into what some observers have called techno-imperialism, or the imposition of standards by the rich countries upon the poor ones (Maskus, and Wilson, 2000, p. 2). Article 12 of the TBT requires that:

Members to recognise and to take into account the special needs of developing countries in the promulgation and application of technical regulations, standards and conformity assessment procedures.

According to this Article, there are two facilities are provided to the developing countries, such as:

- Encouraging developing country participation in the standardisation and conformity assessment process;
- Ensuring that international standards are prepared for products of interest to developing countries.

However, there is a limited time in this exception obligation. For example, in the case of Indonesia—Chicken (*Brazil v Indonesia-DS484*), Brazil requested consultations with Indonesia concerning certain measures imposed by Indonesia on the importation of meat from fowls of the species *Gallus domesticus* and products from fowls of the species *Gallus domesticus*. Brazil claims that the measures are inconsistent with Articles 2.1, 2.2, 2.4, 5.1 and 5.2 of the TBT. The action has been approved by the Dispute Settlement Body. However, the claim had been waived as Indonesia is a developing country. Similarly, in the case of Indonesia—Bovine Meat (*Brazil v Indonesia-DS506*), Brazil requested consultations with Indonesia regarding certain measures imposed by Indonesia on the importation of meat from cattle of the species *Bos taurus*. Brazil claims that the measures are inconsistent with Articles 2.1, 2.2, 2.3, 2.4, 5.1 and 5.2 of the TBT. Indonesia accepted the requests to join consultations under DSU. As the consultation is settled, thus, it is initially proved that Indonesia is causing the injury. This case is pending for

consultation. However, it could be a ground of defence under Article 12 of the TBT as Indonesia is a developing country.

2. Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)

The SPS concerns the application of food safety and animal and plant health regulations (WTO, 1998). This Agreement maintains measures to ensure that food is safe for consumers, and to prevent the spread of pests or diseases among animals and plants (Johnson, 2014, p. 4-6). Therefore, the understanding of the SPS is very essential to address all sanitary and phytosanitary measures to ensure that all international trades are having healthy services. Here, we discuss the SPS related matters accordingly.

a. Aim of the SPS

The SPS sets out a series of rules within which WTO members can set health and safety standards. The objective of the SPS is not to limit the right of members to set a standard which they consider to be the appropriate standard for their citizens. Rather its object is to provide a series of rules by which these health and safety standards should be set and enforced.

b. Basic Right of the Member to Adopt SPS Measures

Article 2 of the SPS provides basic rights and obligations to the member states. It is provided that sanitary and phytosanitary measures must have three elements such as measures must be (a) necessary to protect human, animal or plant life or health, (b) it is based on scientific principles and (c) it has sufficient scientific evidence. It is also noted that members must ensure that the measures do not arbitrarily or unjustifiably discriminate between members as well as they do not constitute a disguised restriction on international trade. Therefore, sanitary or phytosanitary measures which conform to the relevant provisions of the SPS shall be presumed to be in accordance with the obligations of the members under the Article XX(b) of GATT 1994.

According to the SPS's basic rights and obligations, the WTO members give specific rights and obligations to set the health and safety standards they deem appropriate but to do so in a way which least hinders continued trade. In addition, under the basic rights and obligations the WTO members remain free to set whatever human, plant and animal health and safety standards that they consider appropriate to their domestic circumstances because Article 2 of the SPS begins with stating that the WTO members have the right to adopt the SPS measures that are necessary to protect health, provided that they are consistent with the provisions

of the SPS. However, these basic rights and obligations are qualified in 3 ways such as:

- i. The SPS measures should only be applied to the extent necessary to achieve their objective;
- ii. They should be based on scientific principles and not maintained without sufficient scientific evidence;
- iii. The SPS measures may not be applied in a manner which would constitute a disguised restriction on international trade.

c. Measures Covered by the SPS

In order to take action under the SPS, a measure must first of all have the subjective intent to protect human, animal or plant life or health. Once this intent has been established, two additional criteria must be met such as firstly, the measure must aim to protect against either food-borne risks or against pest or disease related risks and secondly, the measure needs to directly or indirectly affect international trade.

The SPS does not set out any specific SPS measure per se but it operates by mandating general procedural requirements for the setting of such standards. This skeleton system aims to ensure that any SPS measure is scientifically based and protects against actual health risks and is not a disguised non-tariff barrier to trade (Forge, 1999). For this reason, the SPS is more specific and stricter than many of the other WTO agreements and, in particular, the GATT 1994.

d. Standard Based on Science

Article 2 of the SPS provides that measures must be based on scientific principles. Furthermore, Article 2.2 of the SPS provides that

Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal, or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence...

It is seen that Article 2.2 of the SPS that sanitary or phytosanitary measure has two limbs such as scientific principles and proved by sufficient scientific evidence. Therefore, this Article is considered as the central pillar of the SPS. However, there an exception to this basic obligation appears in article 5.7 of the SPS, which establishes a temporary precautionary principle that if relevant scientific evidence is insufficient, a member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information.

e. Standard Based on International Standard

The WTO members are encouraged in Article 3 of the SPS to harmonise their measures by conforming to international standards, guidelines or recommendations, where they exist (WTO, 1998). For example, three organisations or standards are expressly mentioned in the text of the SPS that:

- i. In the field of food safety, the Codex Alimentarius Commission (Codex);
- ii. For the animal health standards, the International Office of Epizootics (OIE);
- iii. For the plant health, another UN/FAO organisation, the Secretariat of the International Plant Protection Convention (IPPC).

If a country forms its food standards on an international standard which is accepted by one of these three organisations, it is presumed that the standard is based on science, is proportionate to the objective and, if it restricts trade that it is compatible with WTO rules.

f. Standard Based on Risk Assessment

Specifically, the WTO members must sure that anymore-stringent measures can be scientifically justified and are based on risk assessments as provided for in Article 5 of the Agreement which states that:

Members should ensure that their sanitary or phytosanitary measures are based on an assessment as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organisations.

The Article 5 should be read together with Article 2.2 of the SPS Agreement which states that:

SPS measures should be based on science, not maintained without sufficient scientific information and only applied to the extent necessary. (as we have discussed in the previous slides).

Additionally, Annex A (4) of the SPS recognises two distinct types of risk assessment that SPS measures whose aim is to protect against the establishment or spread of a pest or disease, and any measures designed to protect humans and animals from so-called “food-borne” risks.

g. Principle of Non-Discrimination

Article 5.5 of the SPS aims to achieve consistency in the application of appropriate levels of protection that the WTO members choose to adopt through their SPS measures. However, Article 5.5 prohibits discrimination between similar products or situations when assessing risk. It obliges WTO members to:

... avoid arbitrary or unjustifiable distinctions in the levels they consider to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international Trade.

This language aims to prevent WTO members from maintaining different levels of protection for different products that, in reality, pose a similar risk to health. Therefore, Article 5.5 applies equally to imported and domestic products in order to take non-discretionary effects with member countries.

h. Relevant Factors Should Be Looked at When Assessing Risk

Articles 5.1- 5.3 of SPS provide rules that the WTO members must follow some factors when making risk assessments. Specifically, Article 5.2 provides a list of what the WTO members should take into account (WTO, 1998), such as:

1. available scientific evidence;
2. relevant processes and production methods;
3. relevant inspection, sampling and testing methods;
4. prevalence of specific diseases or pests;
5. existence of pest or disease-free areas;
6. relevant ecological and environmental conditions and quarantine or other treatment.

Moreover, Article 5.7 of the SPS provides an exception on risk assessments. This exception, however, has been read very narrowly in the case law and does not limit a WTO member's obligations to the rest of the SPS. On the other hand, the WTO members may provisionally or temporarily adopt SPS measures so long as certain conditions are met such as;

1. the relevant scientific information has to be insufficient;
2. the measure must be adopted on the basis of available pertinent/ relevant scientific information.

Furthermore, the WTO members may maintain provisional measures under Article 5.7 so long as WTO members seek to obtain the additional information necessary for a more objective risk assessment, and WTO members review the SPS measure accordingly within a reasonable period of time.

i. Provisions Relating to Developing Countries

According to Article 9.1 the SPS, the WTO members agree to facilitate the provision of technical assistance to other members, especially developing country members, either bilaterally or through the appropriate international organisations. Such assistance may be, ...sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets.

In addition, Article 10.4 provides the objective of giving facilities to the developing country members and states that “Members should encourage and facilitate the active participation of developing country Members in the relevant international organisations.” However, Article 14 the SPS delivers a time limitation in the facilities to the developing country members. It shapes that the least-developed country members may delay application of the provisions of this Agreement for a period of five years with respect to their sanitary or phytosanitary measures affecting importation or imported products. Therefore, other developing country members may delay application of the provisions of this Agreement with respect to their existing sanitary or phytosanitary measures affecting importation or imported products, where such application is prevented by a lack of technical expertise, technical infrastructure or resources (Food Quality and Standards Service Food and Nutrition Division, 1995).

In the case of India—Agricultural Products (*United States v India- DS430*), the United States requested consultations with India with respect to the prohibitions imposed by India on the importation of various agricultural products from the United States purportedly because of concerns related to Avian Influenza. It claimed under Articles 2.2, 2.3, 3.1, 5.1, 5.2, 5.5, 5.6, 5.7, 6.1, 6.2, 7, and Annex B, paragraphs 2, 5 and 6 of the SPS; and Articles I and XI of the GATT 1994. Therefore, DSU formed the panel for settlement and held that India needs to stop such importation products as products violate the sanitary or phytosanitary measures. Moreover, US—Clove Cigarettes (*Indonesia v US- DS406*), Indonesia requested consultations with the United States with respect to a provision of the Family Smoking Prevention Tobacco Control Act of 2009 that bans clove cigarettes. Indonesia alleged that Section 907 prohibits, among other things, the production or sale in the United States of cigarettes containing certain additives, including clove, but would continue to permit the production and sale of other cigarettes, including cigarettes containing menthol. Therefore, Section 907 is inconsistent, inter alia, with Article III:4 of the GATT 1994, Article 2 of the TBT, and various provisions of the SPS Agreement. The DSU formed an arbitration body to settle the dispute, but the parties agreed in a mutual solution.

3. General Agreement on Tariffs and Trade (GATT)

The GATT is the main or major international covered agreement which concerns sanitary or phytosanitary measures in international trade. Article XX(b) of the GATT provides that;

Measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- a. necessary to protect public morals;

- b. necessary to protect human, animal or plant life or health.

It is clearly formed in the GATT that measures that are necessary to protect human, animal or plant life or health will not be violated by any trade and even by any emergency trade.

The Features of The SPS vs TBT Agreements

SPS Annex A:1	TBT Annex 1.1
<p>Sanitary or phytosanitary measure - Any measure applied;</p> <ul style="list-style-type: none"> a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests. 	<p>“technical regulation” is that; “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” Article 1.5 of the TBT Agreement provides the exception that; “The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures. Sanitary or phytosanitary measures that are also technical regulations should be analysed under SPS agreement rather than TBT Agreement.</p>

In the case of *EC- Asbestos (Canada vs France) (DS135)*, the measure at issue in this case where French decree, prohibited the sale of Asbestos and products containing asbestos fibres in France (because of dangers to human health), but provided certain exceptions to the prohibition. The Dispute Settlement Body had examined part of the decree and concluded that it was not technical regulation because it did not define the “characteristic” of specific product. Finally, the Panel



Body had also examined part of the decree - Concluded that it was a technical regulation because it was specific product. Therefore, Panel concluded that under Article XX(b) of the GATT 1994, that the French Decree is “necessary to protect human ... life or health.” On appeal, appellate body decided that the French decree should have been examined as an “integrated whole.” Therefore, it ruled that the decree was a “technical regulation” because the product covered by the measure (decree by France) are identifiable, compliance with the prohibitions is mandatory, and the exceptions set out is “applicable administrative provisions”, with which compliance is mandatory for products with certain “objective characteristics.”

In the case of *Canada v Brazil (Aircraft)(DS70)*, Brazil requested consultations with Canada in respect of certain subsidies granted by the Government of Canada or its provinces intended to support the export of civilian aircraft. The request was made pursuant to Article 4 of the SCM Agreement. Brazil contended that these measures are inconsistent with Article 3 of the SCM Agreement. The panel Body had found that certain of Canada’s measures were inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement, but rejected Brazil’s claim that EC assistance to the Canadian regional aircraft industry constitutes export subsidies which is mandatory in trade. It created the technical barrier in trade.

Current Position of Sanitary or Phytosanitary Measures

The current position of the Sanitary or phytosanitary measures can be found by analysing the case principles which are decided by the WTO Dispute Settlement Unite (Forge, 1999). For Example, in the case of EC- Asbestos (*Canada vs France*) where the appellate body stated that “the TBT agreement imposes obligations on members that seem to be different and additional to the obligations imposed under GATT 1994.” Furthermore, in the case of EC- Bananas Case (*US vs EC- DS27*), the appellate body stated that when both GATT and TBT agreement and Annex A1 of the SPS Agreement on Import Licensing Procedures appear to the issue, the measure should be examined under the agreement that deals “specifically” and “in detail” with class of measures.

Therefore, the idea is if a measure qualifies as a technical regulation, it should be first examined under the TBT agreement. In addition, if it concerns health, it should be scrutinised under GATT Art XX(b) as discussed before. In contrast, General Exceptions Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;

Consequently, the SPS is consistent with GATT Art XX(b), and is an elaboration of its more general norms. Because the preamble of SPS Agreement states that its purpose is to “elaborate rules for the application of ...Article XX(b).”

The SPS Art 2.1 states that “Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.” Additionally, Article 2.2 of the SPS Agreement contains additional requirements that

- i. SPS measures must be based on the scientific principles, and
- ii. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence.

It is noted that there are also some similarities in GATT and SPS Agreement in relation with Sanitary or Phytosanitary Measures. Both agreements require that a nationally pursued health or safety policy must be “necessary”. This sanitary or phytosanitary measure can also be identified as the common rights of the human beings to live healthy and comfortable life in this world.

Differences Between SPS And TBT Agreements

There are some basic differences between SPS and TBT Agreements. These differences are shown in a table to differentiate them very conveniently.

SPS Agreement	TBT Agreement
<ol style="list-style-type: none"> 1. The measures in SPS are based on risk assessment which is from pests, diseases, additives, contaminants, toxins.... 2. They are based on scientific principles 3. This measure is based on scientific evidence 	<ol style="list-style-type: none"> 1. The measures are based on legitimate objectives such as <ol style="list-style-type: none"> a. National Security b. Prevention from deceptive practice c. Environmental protection

Relationships among the Agreements

There are some major connections can be found among these agreements. These agreements harmonise the establishment, recognition and application of common sanitary and phytosanitary measures by members (Food Quality and Standards Service Food and Nutrition Division, 1995). These agreements appear to be complimentary. All governing rules have seemed to be same but a bit difference in the place of application. Moreover, there is no direct conflict between the

agreements. In most cases of overlap, the Panel or Appellate Body is likely to apply either the SPS or TBT alone because it makes more specific or detail. Article XX(b) of GATT will then be applied as supplementary to either SPS or TBT.

The WTO members are entitled to determine their own SPS measures provided they are in accordance with the terms of the SPS. However, under the principle of harmonisation, the WTO members are encouraged to base their SPS measures on international standards, guidelines and recommendations, where they exist. The SPS committee promotes and monitors international harmonisation (Australian Government, n.d, p. 9). This harmonisation of laws will also liberalise the trade policies in the WTO member countries (Melitz, 2003, pg. 1616–18).

Conclusion

Non-tariff barriers are set up and taken a form to lead a healthy and peaceful trade system among the member countries. Different countries are using different types of trade systems for their convenient trade all over the world. These sanctions, levies and other restrictions frequently used by large and developed economies. Therefore, non-tariff barriers rules and regulations are formed to officially ban on trade or other commercial activity with particular countries which disrupt sanitary and phytosanitary measure.

In addition, this is the era of technology. People are always trying to find something which can speed up daily trade around the world. Therefore, the SPS, TBT and GATT agreements' rules of sanitary and phytosanitary measures are formed to develop trade system consistence with technological development. It is one of their necessary obligations that the protection of human health or safety, animal or plant life or health must be concerned in trade. Otherwise, the world will become inappropriate for live creations.

The WTO categories the TBT and SPS measures into sub requirements, specific trade concerns, emergency and regular are requirements for SPS measure while specific trade concern and regular are requirements of the TBT measure (Beverelli, and Bacchetta, 2012). However, the emergency procedure allows a notification of an emergency measure after it is in force; therefore, its initiation date occurs after its enforcement date. While regular notifications shall be made soon after the SPS and TBT regulation has entered into force and shall be made at an early stage when amendments can still be introduced, and comments taken into account (up to 60 days) before a SPS/TBT regulation is finalised.***

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