CONSUMER PROTECTION UNDER WTO LAW: AN OVERVIEW

Dissertation submitted to Jawaharlal Nehru University

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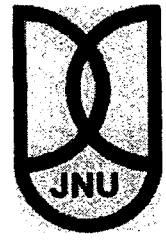
MASTER OF PHILOSOPHY

Submitted by

SAWMIYA RAJARAM



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DECLARATION

I declare that the dissertation entitled, **"CONSUMER PROTECTION UNDER WTO LAW: AN OVERVIEW"**, submitted by me in partial fulfilment of the requirements for the award of the degree of **MASTER OF PHILOSOPHY** of Jawaharlal Nehru University is my original work. This dissertation has not been previously published or submitted for any other degree of this University or any other University.

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CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

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My Parents and My Husband, Anil

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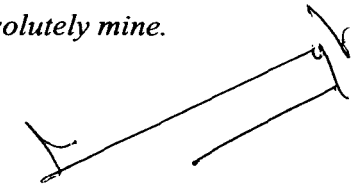

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LIST OF ABBREVIATIONS

AB	**Appellate Body**
ACTA	**Anti-Counterfeiting Trade Agreement**
ADA	**Antidumping Agreement**
CAC	**Codex Alimentarius Commission**
CCNFSDU	**Codex Committee on Nutrition and Foods for Special Dietary Uses**
CI	**Consumers International**
CIEL	**Centre for International Environmental Law**
COPALCO	**Committee on Consumer Policy**
CUTS	**Consumer Unity and Trust Society**
DSB	**Dispute Settlement Body**
DSM	**Dispute Settlement Mechanism**
EC	**European Communities**
EMR	**Exclusive Marketing Rights**
EU	**European Union**
FAO	**Food and Agriculture Organization**
FIELD	**Foundation for the Environmental Law and Development**
GATT	**General Agreement on Trade and Tariffs**
GMO	**Genetically Modified Products**
ICC	**International Chamber of Commerce**
IEC	**International Electrotechnical Organization**

IFI	**International Financial Institutions**
IMF	**International Monetary Fund**
INGO	**International Non-Governmental Organization**
IPA	**Indian Patent Act**
IPR	**Intellectual Property Rights**
ISO	**International Organization for Standardization**
ITU	**International Trade Union**
MNC	**Multi-National Companies**
NGO	**Non-Governmental Organization**
OECD	**Organization for Economic Cooperation and Development**
SCM	**Agreement on Subsidies and Countervailing Duties**
SPS	**Agreement on the Application of Sanitary and Phytosanitary Measures**
TBT	**Agreement on Technical Barriers to Trade**
TRIPS	**Agreement on Trade Related Aspects of Intellectual Property Rights**
TWN	**Third World Network**
UN	**United Nations**
UNCTAD	**United Nations Conference on Trade and Development**
US	**United States**
WHO	**World Health Organization**
WTO	**World Trade Organization**

CHAPTER 1

INTRODUCTION

CHAPTER I

INTRODUCTION

Trade plays an important role in promoting the economic development of a country. The history of humanity reveals that all civilizations in the world have prospered through international trade. The liberalization of trade has extended to non-trade issues. The protection of consumer rights is one major area among these non-trade issues. The initial violation of consumer rights started with the adulteration of food products. Later it extended to other goods and services. The impacts of international trade on consumers remain unaddressed due to various reasons. The advancement of consumer welfare is therefore an important goal of international trade.

Today the World Trade Organization (WTO) has been established to regulate international trade. Unlike GATT, the WTO is a permanent organization with its headquarters in Geneva. It incorporates a strong dispute settlement mechanism (DSM) to settle trade disputes. The WTO regime covers over 60 agreements. Almost all these agreements are crucial for the welfare of consumers. Key areas that the WTO regulates include agriculture, sanitary and phytosanitary measures, textiles and clothing, rules of origin, anti-dumping, safeguards, subsidies and intellectual property rights. The rules in these areas affect the consumer welfare directly. In these circumstances, the inadequate representation of consumers may result in a failure to protect consumer interests. There are many areas that call for reform. Hence, it is essential to examine whether these agreements uphold the interests of consumers, especially because the WTO is the best platform for securing consumer rights. Therefore, this study will concentrate on the provisions of the WTO law from a consumer welfare perspective.

I. Consumer Protection and the WTO Agreements

Presently there are no codified laws regarding consumer protection at the international level. Most countries have their own consumer protection legislations that guarantee the rights of consumers. The UN General Assembly adopted in 1985 UN Guidelines for Consumer Protection, which incorporates fundamental consumer rights of the consumer. The origin of these consumer rights was in former US President John. F. Kennedy's declaration of four basic rights. It included the *right to safety*, the *right to be informed*, the *right to choose* and the *right to be heard*[1]. The extensive market-oriented reform of 80's and 90's led to the emergence of International Financial Institutions (IFIs) like the WTO . They occupied the traditional space of States. This intervention of the WTO also made the institution responsible for State based issues like consumer protection.

There are several provisions that deal with consumer protection in the WTO agreements. These include first, Articles 6.12 of Anti-dumping Agreement (ADA Agreement), 19.2, 12.10 and 23 of the Subsidies and Countervailing Measures Agreement (SCM Agreement), and 3.1 of Safeguards Agreement. These Articles enables the participation of the consumer organizations in investigation process regarding the imposition of countervailing duties. Second, new generation Agreements like Agreements on Application of Sanitary and Phytosanitary Measures (SPS Agreement) and Agreements on Technical Barriers to Trade (TBT Agreement) deals with consumer protection. These agreements are mainly concerned with regulations in international standards with regard to food and non-food products. Third, there is the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). It carries a major impact on vital areas including health and education of the consumer. Two main provisions in TRIPS Agreement viz.,

[1]On 15 March, 1962, US President John F. Kennedy delivered an historic address to the US Congress in which he outlined his vision of consumer rights.

the compulsory licensing and parallel import provisions aimed at the welfare of the consumers.

Most of these agreements call for consumer participation and representation in the WTO. Nevertheless, a scrutiny of the provisions in this agreement will reveal the dismal condition of consumer protection in the WTO. The 'specific character' and 'economic institution tag' of the WTO is taken as justification from implementing these provisions. This negligence on the part of the WTO may be due to many reasons. It may include over protection for producers, affecting the consumers of the world. Therefore, there is a need for a study of relevant the WTO agreements. Hence, the study means an overview of the WTO agreements from a consumer point of view.

II. Consumer Protection and the WTO Decision Making Process

The examination of the WTO texts itself will however only help in promoting consumer welfare in the WTO agreements. There also needs to be progressive development in noting gaps in the WTO decision making for the sustained incorporation of consumer interests. The *effective* participation of consumer organizations in the decision making process of the WTO will help in assuring the rights of consumers in the WTO. The consumer representation in the decision making bodies is essential for the protection of health and other related issues of consumers. Presently there is no consumer organization that is given an observer status in the Committees and Councils of the WTO that concentrate on crucial areas related to consumers.

The participation of consumer organizations in the international standard setting institutions related to the WTO is also important. The SPS Agreement established three international organizations in setting international standards, for the 'use of harmonized sanitary and phytosanitary measures between members states'. This include the Codex Alimentarius Commission (Codex), the International Office of Epizootics, and the

relevant international and regional organizations operating within the framework of the International Plant Protection Convention. The Codex was established to set international food standards.

The Agreement for Technical Barriers to Trade (TBT) also consults with two important institutions for determination of standards in non-food products. They consist of International Organization for Standardization (ISO) and International Electrotechnical Organization (IEC). Almost all the standards formulated by these organizations are of vital importance to consumer. Therefore, it is desirable to have effective participation as well as consultation with consumer organizations. An analytical study into the present internal and external decision making structure of the WTO will help to reveal the deficiencies of consumer participation in the WTO.

III. Consumer Protection and the WTO Jurisprudence

The Dispute Settlement Body (DSB) may be described as the "judicial" organ of the WTO. The decisions of the DSB legitimize the interpretations of the WTO agreements. Most of the cases that come before DSB consist of a consumer element. There are many cases, which triggered the responses of the consumer organizations all over the world. This included the *EC-Asbestos, EC-Hormones and EC-Biotech* cases. Most of these disputes were related to the health and safety matters of the consumers. The participation of consumer organizations in the DSB will help in shaping the WTO laws from a consumer welfare perspective.

The important cases that are discussed here include the *Thailand-Cigarettes*, *EC-Sardines*, *EC-Asbestos* and *EC-Biotech* cases. The *Thailand-Cigarettes* case will help in recognizing the attitude of GATT Panel towards consumer protection. The *EC-Asbestos* and *EC-Biotech* cases reveal the continuing dictatorship of producer groups in the WTO

Dispute Settlement Mechanism (DSM). The *EC-Sardines* case explains the need for inclusion of consumer organizations into the DSB.

The focus of consumer rights advocates on health related the WTO disputes left the other areas like TRIPS and the WTO domestic regulatory agreements unattended. The participation of *interested parties* in the investigation process for imposition of countervailing duties in the WTO domestic regulatory agreements is discussed in *US - Steel Safeguards* and *US - Wheat Gluten* cases. These cases will help in pointing out the importance of consumer participation in the investigation procedure as *interested parties*. These cases assist in finding out the approach of DSB towards various consumer issues. This in turn will permit us to identify the consumer perspective aspects of the WTO in deciding trade disputes. The study will also concentrate on the participation of consumer organizations as *amicus curiae* for promoting the consumer welfare in DSB.

IV. Consumer Protection and TRIPS Agreement

The Agreement on Intellectual property rights has been a major attainment of the GATT Uruguay Round of Trade Negotiation. But the introduction of strong IPR regime has proved to be injurious to the interests of the consumers. They mainly help to prioritize the interests of giant pharmaceutical companies and other multinational companies. There is a conflict of interest between the private rights and consumer rights in the case of intellectual property. It questions the economic rights of a consumer guaranteed by UN Guidelines for Consumer Protection[2]. The TRIPS agreement mostly affects the poor class of consumers in the developing countries. There are many provisions in the Agreement, which helps the consumer. However, the interests of the producers mainly eclipse these provisions. The interests of consumers get mostly affected in the fields of education and health.

[2]Article 3 (b) of the UN Guidelines for Consumer Protection specifies the legitimate needs of the guidelines. It includes the protection and promotion of the economic interests of the consumer.

The TRIPS agreement affects the basic rights including the right to access, availability and affordability of the consumer. Firstly, increasing prices of the medicines affects the right to access of an average consumer in the developing country[3]. Secondly, the 20 years life span of a patented medicine decreases the chances of small firms producing medicines and this affects the availability or right to choice of a consumer. Thirdly, the TRIPS plus[4] enforcement violates the basic rights of the consumers. The main focus of this dissertation is given to the patenting of life saving drugs and the TRIPS Plus protection which affects consumer protection. Further, there is a need to analyze the present situation of compulsory licensing to ascertain the duty of the governments in protecting consumers. The debate on competition policy in the WTO is gaining weight. Despite its objectives, the competition policy also is meant for protecting the interests of producers. As a result, the enforcement of consumer protection laws depends upon the *effective* implementation of consumer protection provisions in the agreements. The study will help to recognize the consumer protection provisions contained in the WTO agreements and the deficiencies in its enforcement of incorporating consumer organizations interests. It will also focus on a detailed study of decision making structure and the disputes in the DSB to analyze the problems that the consumer organizations are facing due to lack of effective participation in the WTO.

Objective and Scope of Study

The principle objective of this study is to provide a general survey of the WTO agreements dealing with consumer protection. It will mainly focus on the overall analysis of provisions in the WTO agreements with respect to consumer protection. In this context, the study will seek to:

[3]Developing countries includes Least Developed Countries (LDC) also.
[4]TRIPS plus enforcement include EU Regulations, FTAs and Anti Counterfeiting Trade Agreement (ACTA).

- Examine the provisions dealing with consumer protection in the WTO agreements with special focus to the WTO related domestic regulatory agreements,
- Study the participation of consumer organization in the WTO decision making process,
- Examine the prominent disputes decided by Dispute Settlement Body related to consumer interests and to examine the issues from this perspective of *amicus curiae briefs,* and
- Analyze the effect of a strong IPR regime on consumer protection

Besides issues like eco-labels and participation of the consumer organizations are touched upon in a general way rather than going into great depth.

Research Questions

The study will try to address the following research questions:

- Are the legitimate interests of consumers protected under the WTO law?
- Does the inadequate protection of consumer interest secure producer interest?
- Are consumer organizations able to effectively participate in the WTO dispute settlement bodies?
- Are consumer interests adequately represented in the decision making of the WTO system?
- How does the TRIPS text affect the interests of consumers?

Hypotheses

The principal hypotheses of the study are:

- The WTO law does not effectively protect the rights of consumers.

- Inadequate protection of the consumer interests under the WTO law is an outcome of excessive safeguarding of producer interests.
- The participation of consumer organizations in the dispute settlement process is minimal.
- The WTO's decision-making process does not adequately represent the interest of consumers.
- Existing monopoly rights under TRIPS Agreement leads to the marginalization of the legitimate interests of consumers.

Methodology

The present study will mainly be based on the primary and secondary sources of trade law, economic law and other areas. The primary sources will include the UN Guidelines for the Consumer Protection, 1985, the WTO Final Act and the Vienna Convention on the Law of Treaties, 1969. The Reports of the WTO Panel and Appellate Body will also be used extensively. Secondary sources will include books, journals and internet sources.

Outline of the Study

The study has four further chapters.

Chapter II mainly focuses on the WTO agreements and Consumer Protection. Importance is mainly given for the participation of consumer organization in the WTO related domestic regulatory measures like Antidumping, subsidies and safeguards and inclusion of public interest clause for protection of consumer interest. The provisions of the WTO health related agreements like SPS and TBT agreements are also examined from a consumer perspective.

Chapter III intends to analyze the existing decision making structure of the WTO and the participation of consumer organization in this structure. Special focus is given to study the participation of consumer organizations in the WTO Councils and Committees. The study also examines the current role of consumer organizations in the working of International Standard Setting Organizations like Codex Alimentarius, International Organization for Standardization (ISO) and International Electro technical Organization (IEC).

Chapter IV examines the WTO jurisprudence related to consumer protection. It further points towards the necessity of participation of Consumer Organizations in the Dispute Settlement Body. It also undertakes to analyze the issue of amicus curiae briefs. The chapter also highlights the impact of the WTO decisions on consumers.

Chapter V discusses the impact of TRIPS Agreement on Consumers. It will mainly focus on the patenting of life saving drugs and violation of the economic rights of the consumers. Here special care is given for the Indian Patent Act 1970 and consumer protection.

Chapter VI summarizes the findings and puts forward some recommendations.

CHAPTER II

CONSUMER PROTECTION AND THE WTO AGREEMENTS

CHAPTER II

CONSUMER PROTECTION AND THE WTO AGREEMENT

II.1 Introduction

The rules and regulations framed at the international level carries an impact on the lives of ordinary people. This may differ from country to country. The World Trade Organization (WTO) is one organization that has introduced tremendous changes in the international trade regime. It now regulates services and intellectual property rights regimes. The impact of the WTO regime in developed country consumer cannot be equated with the impact of a developing country consumer.

The laws that deal with international trade in the WTO include antidumping, agriculture, textiles, sanitary and phytosanitary, technical Barriers to trade, rules of origin, intellectual property rights etc. These areas are crucial for the well-being of a consumer. The necessities of the consumer like food, water, energy, clothing, healthcare, education are cover by the WTO agreements.

Yet there is no explicit mention of consumer rights in the WTO Agreements. The term 'consumer' is not used in the WTO Agreements. Instead of this, the term used is 'industrial user'. Nevertheless, there is lot of space in the WTO agreements for the inclusion of consumer rights[1]. Most of the agreements in the WTO deal with the daily life of a consumer. It affects the fundamental interests of a consumer. Therefore, it is depressing that there is no reference to consumer rights anywhere in the WTO Agreements.

[1]Federation of German Consumer Organization, Consumer Interests and Sustainable Development in International Trade.

These agreements are shaped according to the needs of the producer. The platform set for the dispute settlement is crowded by the demands of the producer and the consumer is left behind unattended. The urgency for the attention to non-trade issues started in the system with the *Tuna Dolphin case*[2] in the GATT. However, the GATT contracting parties did not address the issue properly.

There are many justifications raised by the WTO for this evasion of consumer interest. First, that it is an economic institution. Therefore, it is not supposed to look after the welfare of the consumer. Rather it is to concentrate on trade issues. Second, national governments are responsible for consumer protection. However, this argument does not carry conviction as the WTO has occupied some of the traditional space of States. It is making laws in many areas that were the domain of the State. Due to this the WTO is accountable to consumers. According to Jackson there should be cooperative mechanism at international level for nation state governments are losing efficacy in many subjects (Jackson 2000: 11). The fundamental interests[3] of the consumer at the national level have been regulated by the State by domestic legislations. Yet when it comes to the economic interests now in this globalised world, the consumer cannot stay isolated from the international forces. The state alone is not in condition to protect the economic interests of a consumer because of international forces. As a result, there should be some space given in international trade agreements for consumer protection.

The consumer protection issue is not a new concern, which is to be addressed. Many experts in this area have addressed these issues. The major focus has been given for the social interests of the consumer. Social interests consist of ecological and environmental needs of consumer. The consumer sovereignty in international trade is thus focused in some areas but unattended in other vital areas.

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[2] *US- Prohibition of Imports of Tuna and Tuna Products from Canada*, (L/5198-29S/91), Report of the Panel adopted on 22 February 1982

[3]Consumer interests are divided into three: - fundamental, economic, and social interests. Fundamental interest deals with the basic necessities of the consumer like water, food or medicine. The economic interest deals with the consumer protection within the market. And the social interest deals with the ecological and social environment in which a consumer survives.

This chapter examines the existing provisions in the WTO Agreements dealing with consumer protection. First section will deal with objectives of the WTO agreements. Then it will focus on the WTO related domestic regulatory measures and the participation of the consumer organization in the investigation procedures in these agreements. The fourth section will deal with the provisions in the Agreement on Sanitary and Phytosanitary Agreements (SPS) and Agreement on Technical Barriers to Trade (TBT) regarding consumer protection. The final part will conclude the findings in the chapter.

II.2 Objectives of the WTO Agreements

The preamble of the WTO clearly states the objectives as

> "raising the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development".[4]

The Preamble takes into consideration the importance of consumer protection implicitly. The 'concerns of people' and raising standards does not merely mean the economic growth (Evenson and Santaniello 2004: 86). These words points towards the public interest elements in the text (Alavi and Ahamat 2004: 81). According to Robert Howse, the Preamble of the WTO agreement carries special status. The Appellate Body of the WTO Dispute Settlement Body has also mentioned the importance of the Preamble several times[5]. In other words, the whole agreement should be interpreted keeping in mind the purpose and objectives stated in the Preamble (Howse and Mutua 2000: 12).

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[4]Preamble, Marrakesh Agreement Establishing the WTO, 1995 (Marrakesh Agreement). This Preamble is applicable for 30 Uruguay Round Agreements and about 200 previous GATT Agreement which forms part of single undertaking. (Ravindran, 2002:63FN)

[5]*US-Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/RW (22 October 2001), Report of the Appellate Body.

II.3 Consumer Protection and the WTO related Domestic Regulatory Agreements

Domestic regulatory measures are repeatedly used by the Member States as a trade barrier. Domestic measures include tariffs, quantitative restrictions, anti dumping duties, safeguard measures, subsidies etc. This type of measures violates the right of the consumer. They are often used to protect the interests of the domestic producers. The consumer experiences the impacts of these measures. A barrier to trade in the form of domestic regulatory measures can increase the price of the product and violate the right of choice of a consumer. Consequently, the purchasing power of a consumer is injured because of these domestic regulatory measures. The government should therefore invoke these regulatory measures only when there is apprehension of injury to the domestic industry due to the imports from a foreign country. Despite this fact, many governments invoke the measure as a protectionist one. Most of the developed countries have used this measure to protect its domestic markets from the imports of foreign products.

The WTO related domestic regulatory agreements consist of mainly three agreements. They are Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti- Dumping Agreement), Agreement on Subsidies and Countervailing Measures (the SCM Agreement) and the Agreement on Safeguards. These agreements consist of provisions for the inclusion of interests of consumer organizations investigation procedures. The provisions dealing with consumer protection are rarely invoked by the authorities (Aggarwal 2004: 10). And due to this the participation of consumer organization rarely happens. The upcoming sections in the chapter will analyze the present situation of these provisions in each agreement.

II.3.1 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti- Dumping Agreement)

The anti-dumping agreement is a major domestic regulatory measure used by countries. The anti- dumping duties are imposed on the foreign firms that dump their products into the domestic market of a country. Anti-dumping duties are levied on firms, which dump their products in the importing countries market below the normal price. According to Matsushita, it means exporting a product at an unduly low price to drive out competition in the importing country (Matsushita 2006: 397). The domestic industries report this dumping to the national anti dumping authorities and they when other preconditions are met an investigation of dumping on their request. The injury being caused to the domestic industry is stopped by imposing anti-dumping duties.

To escape anti-dumping duty the foreign firms have three options: (1) the company concerned will unilaterally increase the price of the commodity, or (2) it will establish a subsidiary in the country carrying out investigation, or (3) it will negotiate with the complaining country for voluntary export restraint. All these three agreements are negotiable at the government level. This makes the anti-dumping duty a favorite domestic measure for the countries (Evans 2005: 60). Mainly the anti-dumping duties are imposed advancing predatory dumping[6] as a reason. However as time passed the idea of predatory dumping got eroded (Alavi and Ahamat 2004:63). It led to the evolution of antidumping duty become a protectionist tool by governments.

The anti-dumping issue can be seen from three different welfare perspectives. These consist of the welfare of the importing country, welfare of the exporting country and global welfare (Alavi and Ahamat 2004: FN.76). Unilateral application of the anti-dumping duties serves the interest of only one group, i.e., the importing country's welfare. The consumer and global welfare are not at all considered by the Member States while imposing antidumping duties. In addition, this leads to many imbalances in the

[6]Predatory dumping is used for the purpose of driving competitors out of the market and then raising the price.

social behavior of the state. According to experts anti-dumping duties imposes a 'substantial burden on consumer[7] and is considered to be a transfer of wealth from consumers to producers (Alavi and Ahamat 2004: 81).

The interests of the consumers are thus impaired due to the anti-dumping duty. First, it violates the economic rights of a consumer. The imposition of anti-dumping duty acts as a warning for other foreign producers. This will make them to increase the price of the product. The domestic producer will increase the price of the commodity and this again affects the affordability of the consumer. Another shortcoming of the rule is the fear of the companies to reduce the price due to anti-dumping duties or otherwise known as the 'silent policeman effect' (Fels 2010: 213). This has also injured the interest of the consumers to buy a product in fewer prices. Second, it reduces the choice of the consumers. By allowing the foreign producer, the market will be having varieties of products. If there is no product to compare with the quality then the consumer's right to choice is violated. Finally, the antidumping duties reduce the availability of the product in affordable prices. These factors stipulates for active involvement of consumer participation in the investigation leading to the imposition of antidumping duties.

Article 6 of the Anti-dumping Agreement is an important provision for consumers. It mainly deals with the gathering of evidence in the anti-dumping investigations. The evidence is taken to verify the injury caused to the domestic industry due to dumping. Article 6.1[8] provides for many opportunities for the interested parties to participate in the investigation procedures. It requires the authorities to take serve notice and take evidence from the interested parties. Article 6.1 thus gives an option to the interested parties to

[7]Joseph stiglitz, a Nobel Prize Winner and former chief economist at World Bank , highlighted the anticompetitive effects of these laws adding that the unfair trade laws that are themselves unfair thus imposes substantial burden on our consumers and on our most efficient exporters while protecting our least efficient import competing firms"(Jose Tavares de Arauju jr., 2001:10)

[8] "All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question"

participate in the investigation process. Interested parties are defined in Article 6.11[9] of the agreement. This definition of interested parties mainly includes the producer group. No mention of consumer is there in the list of interested parties. It is assumed that the consumer also is there in the list. The participation of consumer organization is stated directly in Article 6.12[10]. This provision is the most crucial ones for the consumers. In this the industrial users is given opportunity to provide 'information' regarding the dumping, injury and causality for the investigation. The participation is possible only if the product under investigation is commonly sold at the retail level. Through this provision the agreement tries to involve industrial users and private consumers in the investigation of the dumping claim (Evans, 2005: 60). There is no provision in the law that places an obligation on the national investigation authority to take the information supplied into consideration (Aggarwal 2004: 4).

This provision has never been invoked before the WTO Dispute Settlement Body. Article 6.12 gives the consumers a chance for the participation in the investigation process. According to Evans consumers and industrial users are made to focus mainly in three main areas in the investigation- the dumping, causality and injury which lead to avoidance of the implication of the anti-dumping duty and its implications on the global welfare. This limited entry of consumer organization without any effective voice in investigation undermines the credibility of the investigatory process (Evans 2004:62).

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[9] Article 6.11 states: For the purpose of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

(ii) the government of the exporting Member; and

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member. The list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties

[10] Article 6.12 reads as follows: the authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

The participation of consumer in the investigation process is also limited by the condition of retail products usage. In anti-dumping agreement, the consumers are concerned because they are the ones whose right to choice is affected. Other is that the anti-dumping (revenue) compensation is paid from the pocket of the consumer by the government. Another issue is that this marginalized section is not even included in the investigation and compensation process. In short, the effects of Anti-dumping legislation are borne by consumers.

II.3.2 Agreement on Subsidies and Countervailing Measures (SCM Agreement)

Subsidies and countervailing duties (CVDs) are complementary measures. A subsidy is a payment to a producer, or the exemption from payment of a tax by that producer (Philip Evans 2005:66). A measure is deemed to be subsidy if the financial contribution is given by a government or any public body within the territory (Article 1.1(a) (1)) or if it is to a specific recipient (1.1 (a) (2)) and if it confers a benefit (1.1 (a) (b)). A subsidy is classified into prohibited, actionable and non-actionable subsidies. According to Article 3, subsidies on agriculture may be provided in circumstances as provided in the agreement. There are procedures for remedies if a Member has reason to believe that a prohibited subsidy is granted by another member (Article 4). According to Article 10, a countervailing duty can be imposed pursuant to investigations initiated and conducted in accordance with the provisions of SCM agreement and the Agreement on Agriculture. The initiation and subsequent investigation for imposing countervailing duties is stated in Article 11 of the agreement. According to these procedures if a Member State is found to have granted actionable or prohibited subsidies, the a countervailing measures will be imposed on such subsidies. For imposing countervailing measures, a WTO member has to satisfy certain conditions (Article 11.2). First, it must prove that the Member State has granted a subsidy scheme. Second, the grant of subsidy has caused injury to the domestic industry producing the like products and thirdly the Member has to establish a causal link between the subsidy granted and injury caused to domestic product.

Article 12 of SCM agreement deals with the presentation of evidence by interested parties and interested members in the countervailing investigation. The interested parties have to present the evidence in writing. Sufficient time is provided to the interested parties to reply (12.1.1). The interested parties are also provided with the right to present information orally (12.2). Non-confidential information is also accessible to the interested parties. The interested parties are given more rights. Article 12.9 gives the definition of interested parties. This is same as that of anti-dumping agreement. There is no special reference of consumer organization as interested parties.

Another provision in the Subsidies agreement that deals with consumer protection is Article 12.10. At this point, the authorities has to provide opportunities for the industrial users and consumer organizations, if the product is 'commonly used at the retail level' to give information regarding subsidization, injury and causality. Therefore, the framers of the text did want to give representation to consumers in the investigation process. However, as in the case of the anti-dumping agreement there is no obligation in the authorities to take into consideration the information given by the consumer organizations.

Another agreement that deals with consumer protection is Article 19. This article deals with the imposition and collection of countervailing duties. Preference is give for lesser countervailing duty. If a lesser duty is adequate to compensate the injury caused then the Members has to prefer lesser duty rule. Compared to other agreements, the SCM agreement gives place for consumer organizations in determination of countervailing duties. It is stated in the agreement that procedures should be established which would allow the authorities concerned to take due account of representation made by domestic interested parties whose interest might be adversely affected by the imposition of a countervailing duty. Footnote 50 of this agreement states that the domestic interested parties include consumers too.

According to this article, the authorities have to provide opportunities for the consumer organization in the investigation procedures. This article is same as Article 6.12 of the Antidumping Agreement. Nevertheless, only on one condition the consumer organization can proceed i.e. the product should be sold in retail level. Therefore, a consumer organization is given opportunity for participation in the determination of subsidization, injury and causality but with conditions. Here too the authorities have no obligation to take into consideration the recommendations and findings of the consumer organizations.

II.3.3 Agreement on Safeguards

A safeguard is another important domestic regulatory measure applied by the governments. According to Matsushita, safeguards and safeguards measures refer to the right of a WTO Member to impose temporary tariffs, quotes, tariff-rate quotas or other measure to ensure that its economy or domestic industries do not suffer serious harm from imports and trade concession. The preamble of Safeguards agreement recognizes it as a 'structural adjustment' path for the Member States. It affects the consumer in various ways. The safeguard measures as that of anti-dumping duties affect the right to access of the consumer[11]. The increase of price of the commodity will affect the economic rights of the consumer. However, the agreement clearly distance from labor-market conditions, to market structure, and even to consumer welfare (Evans 2005:68). It acts as breathing space to adjust the economic competition or to cope with the sudden change in consumer tastes. Safeguard measure affects all imports of a product compared to antidumping duties, which affect a peculiar firm. The firms should be compensated for the injury caused by the safeguard measures. Provisional safeguard measures are another important instrument that the WTO Member States can employ at the time of emergency (Article 2.1). These provisional measures are supposed to manage the injury that is anticipated to the domestic industry.

[11]When a safeguard measure is applied, it blocks the entry of such product into the market and this causes the sudden rise of the price and thereby causing problems for the access of the consumers.

The Safeguards agreement does not explicitly refer to consumer participation in the investigation process of safeguard measures. Article 3 of the agreement deals with the investigation procedures. Members can apply a safeguard measure following an investigation by the competent authority. In addition, for this investigation reasonable public notice should be served to all interested parties. Accordingly, the *interested parties* present their views regarding the safeguard measures. They are permitted to question the public interest element in the safeguard measures. According to Aggarwal, the WTO does not so far define the public interest. After taking the evidence from the *interested parties,* the competent authorities will decide whether to impose the safeguard measures or not (Article 3.1). There is no specific mention of consumer organization involvement in the investigation process of safeguard measures. The stakeholders in the agreement are recognized as importers, exporters and *other interested parties.*

Article 3.1 has been invoked in the WTO Dispute Settlement Body[12]. In *US- wheat Gluten* dispute the term *interested parties* was discussed widely by the Appellate Body. In all this cases, the interested parties were either producers or exporters. The well-being of the producers was protected through these cases. DSB correctly pointed out the stake of interested parties in the investigation process. The safeguard agreement contains both positive and negative elements. The use of safeguard measures was intended for emergency uses. But the countries tend to use this measure for ten or more years. The provisional measures on the other side reduced the choice of the consumer. All this has lead to the idea of public interest clause in these Agreements in the WTO.

[12] *Unites States – Definitive Safeguard Measures on Imports of Certain Steel Products (US-Steel Dispute)*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, 11 July 2003; *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (US – Wheat Gluten)*, Appellate Body Report, WT/DS166/AB/R, adopted 19 January 2001

II.4 Consumer Protection and Public Interest Clause

Antidumping, Safeguards ad Subsidies agreements calls for active participation from consumer organizations. In the present text of ADA consumer has a 'quiet voice'. They do not have any rights or privileges. The anti-dumping authorities are not obliged to take the consumer views seriously (Aggarwal 2004: 3). As pointed out above there are many implications of anti-dumping duties on consumers. Moreover, the dumping duty is imposed without taking into consideration these welfare issues. To respond to this problem in many countries we have the public interest clause in ADA legislations. The examples of this are European Union, Canada, Brazil, Paraguay, Thailand, Malaysia and China (Aggarwal 2004: 37).

The EU anti-dumping legislation has inbuilt community interest clause in it. The efficiency of the clause is however questionable. However, later on there were changes brought to into in 1994[13] by the EU authorities. In addition, these provided more detail as to how community interest is to be considered. Thus, consumer organization and industrial users were specifically recognized as interested parties in and investigation and were given permission to inspect the non-confidential files of the case.

Basically the community interest clause works as a safety valve preventing the unnecessary imposition of the anti-dumping duties (Wellhausen 2001: 1030). The effective use of this clause will start only by the mandatory inclusion of this provision in the WTO agreement. Till now in 350 cases only one entire case[14] has explicitly been turned down on grounds of community interest (Aggarwal 2004; Kempton 2000: 4, 10).

According to critics, the public interest clause increases the uncertainty and administrative complexity of the anti-dumping process. They also argue that it really

[13] *See* Council Regulation 522/94 of 7 March 1994 on the Streamlining of Decision-Making of Commercial Defense, 1994 O.J. (L 66) 10 (facilitating actions by European Community members against dumping by streamlining the procedural requirements to bring a grievance).

[14] Ferro-silicon originating in Brazil, China, Kazakhstan, Russia, Ukraine and Venezuela

increases the expense and cost of the parties. According to them the technicalities in the antidumping agreement will get increased by the inclusion of public interest clause in the agreement and bring delay in the cases. However, the counter argument is that 'a properly devised public interest clause with appropriate substantive provisions could prove to be useful in reforming trade defensive measure' (Aggarwal 2004: 13).

By incorporating, a public interest clause into the anti-dumping code in the WTO will not only ensure the consumer welfare but also will ensure the free flow of trade between countries. The incorporation of public interest clause will not affect the objectives of the WTO agreement. It is in full accordance with the objectives, principles and concepts of the ADA. The significance of incorporation of the public interest clause in the ADA in the WTO is clearly pointed out in these words:

> "Anti-dumping duties negatively affect the consumers interests as prices are increased in the market....Anti-dumping duties only be imposed only after taking into consideration of the public interest. The competition situation in the domestic market and the origin of the trade distortions in the exporting country market need to be given proper consideration. In short, the public interest test should be introduced in Anti-dumping Agreement. The Anti-dumping agreement should be amended to include a public interest clause enabling the participation of consumer organization in the basic anti-dumping proceedings" (Raju 2008: 315).

By amending the Anti-dumping Agreement, the Member States should include the public interest clause in their national legislation. The principle will then act as a mandatory rule rather than a consultative one.

Consumer organizations also face other problems. This includes the transparency issue. The huge amount of confidential information in dumping cases calls for a greater transparency in the investigation process. The authorities are too reluctant to share the information with the consumer organizations. Due to this, the right to information of a

consumer gets violated. There are many cumbersome technicalities in the anti-dumping process and these technicalities are unfamiliar for the consumer organizations that appear only on rare occasions when called for the evidence. A weak consumer movement is another important difficulty that consumer organizations face. The consumer movements in the many countries are not coordinated. Although on the other side, the producers are well organized. Consumer movements pose the typical problem of diversity and co-ordination (Kempton, 2000:9). The organized domestic producers are taking real advantage of this inability. Financial constraint (court expense) and delay in cases increases the hardships of consumer organizations.

The effective solution of these problems will ensure the participation of the consumer organization in the functioning of these agreements. By the incorporation of the public interest clause, the burden of proof will shift from the dumping party to the domestic producers thereby reducing the unnecessary antidumping cases.

II.5 Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and Agreement on Technical Barriers to Trade (TBT Agreement)

The SPS agreement contains provisions that are very crucial for consumer protection. It relates to measures taken by Member States 'to protect human, animal or plant life or health within the territory from the risks arising from the entry, establishment of spread of pests, diseases, diseases carrying organisms or disease causing organisms, additives, contaminants, toxins or disease causing organisms in foods, beverages and to prevent or limit other damage within the territory of the member from such entries'[15]. The SPS measures include all relevant laws, degrees, regulations, requirements and procedures. Thus, any measure taken by the State comes under the purview of SPS agreement. The SPS measure consequently takes the form of technical specification (Covelli and Hohots 2003: 777). The preamble of SPS agreement reminds Member States that the measure

[15] Annex A1 contains the definitions of an SPS measure.

used for protection should not impede international trade. The agreement thus acts as a test for ensuring that it is not used as protectionist tool.

The rights of the Member States to issue SPS measures are not absolute. There are conditions to be taken into consideration while formulating these measures. Article 2 of the agreement deals with the basic rights and obligations of the Member States. The conditions are listed in this Article. First, the measure should be applied only to the extent necessary to protect human, animal and plant life. Second, it should be based on scientific principles and is not maintained without sufficient scientific evidence (Article 2.2). Third, the measures employed should not be used arbitrarily or unjustifiably to discriminate between Members having the identical or similar conditions (Article 2.3). Finally, the measure should not constitute a disguised restriction on international trade (Article 2.3). These conditions should be read along with the two conditions provided in Article XX (b) of the GATT agreement, 1947.

The agreement also requires that the standards acquired should be in harmony with the international agreements. In addition, Article 5 is another provision that plays a significant part in determination of risk contained in a product. The risk assessment justifies the measure taken by the Member States. The risk assessment testifies the scientific justifications brought by the Member States. If a particular product should be restricted from entering a territory then it should be based on the risk it carries. If the risk of such product get assessed then the measure taken by a Member is justifiable. Here the burden of proof lies in the Member imposing SPS measure. Risk assessments are based on several factors. First, it should use the risk assessment techniques developed by relevant international organizations (Article 5.1). Second, the SPS measures should be based on scientific principles (Article 2.2). For this purpose, the Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection; sampling and testing methods; prevalence of specific diseases or pests; existence of pest or disease free areas; relevant ecological and environmental conditions and quarantine or other treatment (Article 5.2).

Article 5.7 is another provision that is of importance for consumer protection. According to Article 5.7, a Member State may adopt SPS measures where scientific evidence is insufficient based on available 'pertinent information'. This recognizes the precautionary principle in the agreement. This principle helps the governments in protecting the health of the consumer through banning dangerous products into the territory (Evans 2005: 45). The right of the government to take appropriate actions in time of lack of scientific evidence was confirmed by the AB in the *EC-Hormones* case. The measures taken by Member States for regulation of food safety standards protect the health of consumers (Athukorala and Jayasuriya 2003:1402).

There are three main organizations established under this agreement for the regulation of food safety measures. They are Codex Alimentarius Commission (CAC), the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention. They formulate the safety standards that should be used in international trade.

These agreements are of great importance to consumers. They determine the quality of food products and non-food products that consumer uses in his daily life. The importance of the consumer recommendation in the food production is very important. A consumer is not only a person who consumes but she is also one who 'buys, prepares and forms opinions on the product' she consume. Therefore, her involvement in the corresponding productions process is very important (Korthals 2001: 208). The Appellate Body in the EU-Biotech dispute also points out the producer orientation of the SPS Agreement.

> The negotiating history confirms that it was intended to have a precisely limited scope. Of particular note are the discussions that took place on whether environmental risks should be covered. Those that opposed this stressed that environmental risks were of a different nature and that rules designed for SPS measures would not necessarily be appropriate for environmental risks. This view

> ultimately prevailed, and consequently the *SPS Agreement* does not cover measures for the protection of the environment *as such* (or based on consumer concerns, moral grounds etc.) Para 138, page 576.

Genetically modified products triggered the analysis of existing SPS Agreement. In the *EU-Beef Hormones* and *EU-Asbestos case* the power of the government to regulate the safety standards was challenged. The latest of *EU-Biotech dispute* also witnessed the same. The dispute gave less importance to the issue of hazards of biotech products which is a big loss for the consumer. The dispute settlement body rather focused on the issue of moratorium and its violation of the SPS agreement.

The Agreement on Technical Barriers to Trade (TBT) is another important agreement for consumers. TBT mainly focused on the standards of non food products. TBT allowed more flexibility compared to the mandatory application of Codex rules in SPS. There was more liberal way of setting standards and confirming to international standards. *EC-Sardines case* is one important case in the TBT agreement. In this case the UK Consumers Association intervened in the DSB to prove that the measure taken by Peru was not against the interests of the consumers.

Two important organisations are established under the agreement for setting standards for non food products. They include International Organisation for Standardisation (ISO) and International Electrotechnical Organisation (IEO). The two organisations are termed as sister organisations. These two organisations are crucial in determining the rights of consumers.

Here the main issue regarding consumer is that whether a member state can take appropriate measures to rescue its consumers from unwanted consequences posed by dangerous food products. The question of scientific justification and others is really preventing the Member States from protecting its consumers. Rather most of the governments use this as a protectionist measure to impede trade. So first there should be

some criteria to distinguish between protectionist method and real consumer protection. In Biotech dispute itself EU allowed the domestic bio-tech products but banned foreign biotech products. This brings doubt on the intention of the government.

II.6 Conclusion

The economic decisions of the WTO impair the rights of a consumer. The consumer should be considered as the central actor in an economy. However, the governments and producers do not consider this truth. The objectives of the WTO preamble will be realized only when there are appropriate consumer protection provisions, NGO participation and good and fair Dispute Settlement Body decision regarding consumer grievance in the WTO. Until now, the provisions only show the ineffectiveness in consumer redress and consumer representation. There is no efficient participation of consumer organizations in the national anti-dumping investigations as well as in the WTO anti-dumping cases.

Most of the agreements in the WTO are very crucial for consumers in the world. They influence the ways of life of a consumer. This largest economic actor is least given importance in the trading system. There are provisions in the WTO agreement that deals with the consumer protection and participation in the trading system. This includes the agreements like anti-dumping, safeguards, SCM, SPS and TBT agreement. The WTO related domestic regulatory agreements and health related agreements include provision related to the participation of consumer organization. However, these provisions are rarely invoked. The situation of consumer in the WTO is a mixed situation. At one side, the consumer is provided with participation rights, which are expensive for the consumer organizations to act upon. The lack of participation is due to many reasons. The important reason is the lack of mandatory provision regarding consumer participation in the investigation process. Presently the provision does not put any obligation on the authorities to take into consideration the evidence given by the consumer group. If there

is a public interest clause in the Anti-dumping agreement then it will help in putting an obligation on the national anti-dumping authorities to ensure the participation of consumer organizations. Many countries incorporate public interest clause in its anti-dumping, safeguards and subsidies legislation. However, even in those cases the implementation of this clause is very weak. This problem will also get solved by the inclusion of the clause in the WTO anti-dumping agreement.

The participation of the consumers should be limited to retail products. There should be no condition imposed on the active participation of the consumer. There should be extension of the definition of the interested parties. The rights of the consumer will be enriched by the inclusion of consumer in the interested parties. They will get an explicit right to defend their rights in the antidumping agreement. It will also help them to access all the non-confidential information relevant to the presentation of their cases. This will also ensure them to present oral evidence and to receive the oral information given during the trial. Present situation is that the consumer organization will be regarded as interested parties only if the investigating Member State extends the privilege. The public interest should be specified. Until now there is no specific criteria defined. There should be established procedures for the balancing the interests of consumers and producers (Aggarwal 2004:14). All these steps will ensure the participation of consumer organization in the investigation procedures of the WTO related domestic regulatory measures.

There should be active involvement of the consumer organization in the international and national standard setting organizations. Consumers should get involved with the code of good practices related to the TBT agreement. *EC-Hormones* case proved that the introduction of higher standards needs a strong backing of scientific evidence. As the higher standards are open to challenge, the countries must prove that they do not distort trade. The incorporation of the precautionary principle itself is a boon to consumers. This provides a space to the governments to bar goods that are suspected of being a danger to

consumers, animals and environment. But these should not be used as a protectionist measure by the government and this will again cause problems to the consumers.

These instances clearly show the inadequate protection of consumer rights in the WTO law. These violations of consumer rights are especially because of more concern to the producers. The need for consumer protection in the WTO texts is quite essential for the balancing of the rights of the consumer.

CHAPTER III

CONSUMER PROTECTION AND THE WTO DECISION MAKING PROCESS

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III.1 Introduction

It has been seen that the existing laws in the WTO rarely address the issue of consumer protection. Any new reform in the WTO can only be initiated through decision-making process of the WTO. Even though the laws and rules are made by the Member States they do in fact affect the life of individuals who is not a party in the decision making process. It is said that the member states takes into consideration the needs of their citizens. However, when a State takes a decision, the prior concern will be given to the economic development rather than consumer welfare. Therefore, it is very essential to know whether the consumer interest is sufficiently represented in the decision making process of the WTO. The WTO is a 'Member-driven' organization (Bronkers 1999, Jackson 2000:565, 14) which walks through the wheels of consensus based decision making process. Here the member states are good enough to address the cause of the citizens (consumers) in the WTO. However, it could be in a more radiant manner be presented by the consumer organizations who are familiar with the needs and necessities of the consumers. Consumer organizations are specialized in the causes that the consumer faces, more than that of the member states that regulate many areas.

The decision-making system in the WTO comprises of Ministerial conference and General Council as its legislative wing. The councils and committees comprise of its executive wing and the Dispute Settlement Body is its judicial organ. The Ministerial Conference meets every two years and has the power to take decision concerning any multilateral agreements in the WTO. Until date, seven Ministerial Conferences were held in the WTO[1]. The General Council permitted NGOs to attend the Ministerial Conference in 1996 but they were not allowed to make statements in the conference (Charnovitz

[1]First ministerial conference was held in 1996 in Singapore. The latest was held in 2009 in Geneva.

2000, Alqadhafi: 5, 5). The participation of the NGOs was widely discussed in the WTO after Seattle Ministerial conference. The member states carried different opinion regarding the inclusion of NGOs in the Ministerial conference.

The protest brought by the consumer organizations in the Seattle and Doha Ministerial conferences showed the need for the inclusion of consumer organizations in the Ministerial Conferences. In addition, these protests the NGOs like International Consumers for Civil Society, and Consumers International participated in full strength. They also recommended an accreditation system for international NGOs in the WTO (Charnovitz 2000: 11). Unfortunately, there have been no references to consumers in any of the Ministerial Declarations since the entry into force of the WTO in 1995. Similarly, the WTO procedural rules do not refer to consumers (Evans 2005:12-18)

Nevertheless, compared to Ministerial Conference the General Council is a powerful body as it takes decision in the absence of Ministerial conferences. The General Council also acts as Dispute Settlement Body and Trade Policy Review Body in the WTO. Apart from these bodies there are three Councils regarding goods, services and TRIPS. Under these councils, there are many committees and working groups, which discuss various issues related to various agreements in the WTO. The WTO Councils and Committees work on a wide variety of issues of direct relevance for regulatory and governance issues, including the technical work associated with services regulation (Consumers International 2005b:24).

The decision making in the WTO includes other international institutions like Codex, ISO and IEC organizations. These play an important part in the crucial decision-making concerning consumer interests. Agreements like Sanitary and Phytosanitary Agreement (SPS) and Agreement on Technical Barriers on Trade (TBT) depend on international standardization institutions to determine the standards for food products and non-food products. SPS agreement has three such organizations for the standard determinations.

The international standards and guidelines are developed by Codex Alimentarious Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention. Agreement on Technical Barriers to Trade consults with two important international standardization institutions for non-food products. These are International Organization for Standardization (ISO) and International Electrotechnical Commission (IEC). Therefore the participation of consumer organization is not only required in the internal decision making process of the WTO for external international organizations determines the food standards for the trade products in the WTO.

However, if the decision-making and rule-making processes fail to produce results, there is a tendency to throw the issues to the dispute settlement process. Therefore, there could be a tendency to ask the dispute settlement process to take on issues that it ought not to. For instance, there could be temptation to put in the hands of the dispute settlement process, issues that are really "rule making" instead of "rule applying. (Jackson 2000: 17).

This chapter deals with the question of how consumer interest is protected within the institutional framework of the WTO. The first section deals with relationship between civil society organizations and the WTO. It will help understand the role of consumer organizations in the WTO. The second section deals with the recent debate over expert evidence. This is especially with regard to the expert evidence taken by Dispute Settlement Body. The third section deals with the representation of the consumer organizations in the Councils and Committees of the WTO. The recommendation and briefs of these councils and committees influence the decision making of the Member states in the WTO. The fourth section deals with the decision making of the international standard setting organizations like Codex, ISO and IEC. The final section concludes with some recommendation for the reform of the institutional mechanisms in the WTO for providing space for consumer interests.

III.2 Consumer Protection in the WTO Councils and Committees

The Councils and Committees of the WTO constitute an extension of the WTO's executive wing. There are mainly three councils under the supervision of the WTO General Council. These are the Council for Goods, Council for Services and Council for Trade Related Aspects of Intellectual Property Rights (TRIPS). Each of these councils consists of subsidiary committees for the working of each agreement under their supervision. All members of the WTO are also members of all the WTO bodies including committees and councils[2]. The committees and councils form an important part of the WTO.

There are committees on trade and environment, trade and development, regional trade agreements, balance of payments and budget, finance and administration. The Council for Trade in Goods consists of committees on market access, agriculture, sanitary and phytosanitary measures, technical barriers to trade, subsidies and countervailing measures, anti-dumping measures, customs valuation, rules of origin, import licensing, trade related investment measures and safeguards. There are no committees under the Council for Trade-Related Aspects of Intellectual Property Rights.

The importance of the councils comes at the time of the interpretation of an agreement. The interpretation of agreements is very important in the WTO. In this case, the positions of the councils overseeing the individual agreements carry importance. Any interpretation is often based on their recommendation (Evans 2005: 8). The power of the councils is not limited to interpretation. They can also propose amendments to the present agreements. Thus the role-played by the councils and committees are equal to that of a Member State in the WTO. The work of the TRIPS Council in Doha Round regarding Paragraph 6 was notable. Therefore, there should be sufficient participation of consumer

[2] http://www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm.

organizations in the WTO committees and councils to forward the interest of the consumers.

Presently there is no place for any civil society organizations in these councils. There are only international organizations that attend the committee and council meetings as observers. The IMF and World Bank are among them. The civil society organizations are granted *observer status* only in Ministerial Conferences. There were only three consumer organizations that were reported as observers in the seventh session of Doha Round in 2009.

III.2 Consumer Protection and International Standard Setting Institutions

The importance of consumer participation in the decision making structure is very crucial. This will help in assuring many rights to the consumer. The basic right that is violated consists of right to information, right to safety and the right to be heard. The international standard setting institutions are many related to the WTO health related agreements like SPS and TBT. The SPS agreement directly establishes the institutions like the Codex Alimentarius Commission (CAC), the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention. The case of the TBT agreement is different from SPS agreement. The TBT agreement does not directly establish the institutions. According to Article 2.4, it gives the directions to the governments to follow the standards of non-governmental organizations like International Organization of Standardization (ISO) and International Electrotechnical Organization (IEC). These organizations mainly focus on the formulation of the standards for food and non-food products related to the consumers. Here the consumer participation through consumer organization is very crucial to establish the intensity of standards for consumer health safety. They are the direct stakeholders in these areas.

III.2.1 Codex Alimentarius Commission (CAC)

Codex Alimentarius Commission (CAC) is one of the important organization that look after the food standards of the international market. After the establishment of the WTO SPS agreement, it has made Codex a legal reference for food standards. Codex, established on 1962 was the result of joint FAO/WHO Program on Food Standards. So far, it has produced hundreds of standards. The mushrooming of multiple national food regulations of 1950-1960 led to the emergence of Codex for the protection of consumer health (Bartlett and Friedmann 2006:30). The main objectives of the Codex are (i) to facilitate trade and (ii) to ensure consumers are provided with sound, wholesome food. Codex decisions were not binding on the Member states till 1995. However, its arrival into the WTO made its decisions binding on the Member States. Before the WTO, Codex was a marginal organization oriented mainly to creating ready-made standards and national food safety infrastructure for developing countries that lacked these abilities (Jukes 2000: 182).

Therefore, today the food quality is influenced by Codex. Post WTO these standards attain importance. The national governments are under pressure to adopt the Codex standards as their standard. If they want, they can adopt standards that are more severe but should not be to restrict trade. In addition, if these standards are challenged by another country, the country imposing measure should prove that a higher level of safety or protection is necessary must be able to prove it in Dispute Settlement Body. Here there is producer in one hand and consumer in the other. To maintain the equilibrium is the important factor for the Codex.

Decision making structure of CAC

The decision making structure of Codex is complex as compared to other two organizations in the TBT agreement[3]. The highest body in the Codex is Codex Alimentarius Commission. There are subsidiary bodies under the commission. The Executive committee and the Secretariat are the organs below the CAC. The work of Executive committee includes coordinating meetings, making proposals of general orientation and agenda of the work program. It comprises of a chairperson and six members.

Under the Executive committee, there are different committees, which overlook different subjects in Codex[4]. Consumers International is one active consumer organization that takes part in the meetings of the general committees of the Codex Alimentarius Commission. There are two types of membership in the commission. One is for the National Governments and the other is for the NGOs as observer status[5]. All the members including the observers can attend the meeting of the committees except that of Executive Committee. This situation should be changed. There should be effective participation of the consumer organizations in the Executive council too (Bonzon 2008:287, Evans 2000: 11-18). All the codex decisions should get approval from the higher body, the Codex Alimentarius Commission. The funding of the Commission depends upon the members. The industrial countries are beneficiaries of this. Moreover, the drawback is for the poor counties and the public interest gets affected due to this attitude of the Commission (Evans 2000:14) decision making in the Codex is done through consensus of the members present.

[3] "Step Procedure for developing standards and related texts", Codex Procedural Manual 11th Edition, (FAO/WHO, 2000: 19-30)

[4]Currently there are thirty committees under Codex. All committees are not active ftp://ftp.fao.org/codex/Publications/understanding/Understanding_EN.pdf

[5]'Principles concerning the participation of International Non-Governmental Organizations in the work of the Codex Alimentarius Commission. http://www.codexalimentarius.net/web/ngo_participation.jsp

The fundamental concern in the Codex decision making is to balance the interest of the consumers and producers. The observer status is given to all INGOs. There are mainly three groups of INGOs: those from industry, public interest and professional organizations. However, the representatives of the industry crowd most of the meetings and this indirectly affects the interests of the consumers. The member states of the Codex represent mainly the interest of the producers thereby increasing the possibility of death of the beneficiaries of the consumer. The report by the Consumer International is very interesting in this behalf:

> 'In 1997, the Codex approved list of 111 observer organizations comprised 104 industry-funded groups, six health and nutrition foundations and one broad-based international consumer group –Consumers International' (CI, 2000: 23)

There is no change in this situation. In 2010, twenty-seven INGOs participated in the thirty-third session of Codex. Among them fourteen were industry sponsored INGOs and only one consumer organization (Consumers International) was there to represent the interests of consumer[6]. This clearly shows the pathetic condition of the participation of NGOs in Codex. The Codex Committee on Nutrition and Foods for Special Dietary Uses (CCNFSDU) is the Committee that deals with standards on baby foods. Well-known manufacturers like Nestle, Nutricia, Monsanto, Milupa, Amway, Hoffman-La Roche, Proctor and Gamble, Nestec and Novartis (Fels, 2000: 78) crowded these committees. Therefore, the producer interests prove to have a good voice over the consumer interests.

The inadequacy of the consumer groups will cause harm to the interests of consumer. Lack of proper representation of consumer in these forums is due to financial constraint. Therefore, there should be proper funding given to these bodies by the government or the Codex. The activities of the Codex Trust Fund to promote consumer and developing country participation are not active in promoting their motive.

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[6] Codex Alimentarius Commission, Joint FAO/WHO Standards Programme, Thirty-Third Session International Conference 2010, http://www.codexalimentarius.net/web/archives.jsp?year=10

III.2.2 International Organization of Standardization (ISO)

The standards for non-food products in Agreement on Technical Barriers to Trade are determined by the NGOs called International Organization of Standardization (ISO) and International Electrotechnical Commission (IEC). Article 2.4 of the TBT Agreement directs governments to use international standards as a basis for technical regulation except when such standards: 'would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic geographical factors or fundamental technological problems.' The technical standards developed by ISO and IEC determine the safety standards of a product. Therefore, consumer presences in these institutions should be inevitable. ISO promote the development of standardization to facilitate international exchange of goods and services and cooperation in the spheres of intellectual, scientific, technological and economic activity.

The body of ISO is comprised of General Assembly that consists of member bodies, subscriber members and correspondent members. Under this comes the Council and Secretariat. Under these Council and Secretariat, there are many committees. There are many standards developed by this Organization. ISO has issued 14,251 international standards and standards-type documents. The issue with consumer is the accountability of the organization. For this purpose, Committee on Consumer Policy (COPOLCO) was established in 1978. COPOLCO reports to the ISO Council. ISO has also developed a Code of Ethics. The major problem is with the consumer representation in these councils. The consumer representation is preferred through the national delegations. There is no direct stakeholder involvement. Therefore, the representation of the consumer organizations depends upon the national delegations. Other organizations attend COPOLCO meetings as observers. Major participant from consumer side is Consumers International. Other committees of the ISO are closed to public. The access of documents of ISO is also restricted. They are password protected in the website.

III.2.3 International Electrotechnical Commission (IEC)

International Electrotechnical Committee[7] is another non-governmental organization for the determination of consumer safety standards in the WTO. IEC and ISO are considered as sister organizations. The IEC has 5,204 publications including some 4,737 international standards.

The Council Board or otherwise known as the Executive Committee (Exco) is the prime body of IEC. This Exco consist of the member national committees. The other three boards under the Council Board consist of Standard Management Board, Market Strategy Board and the Conformity Assessment Board. The Standard Management Board is concerned with the standards that should be maintained in the products. There is no membership for consumer organizations in these boards. There is no specific committee for consumer participation in the IEC. It takes part in the COPALCO for this purpose. The information regarding the selection of standards is not given to consumers and is protected by passwords. There is little transparency in the operation of the organization. However, unlike ISO, IEC has openly declared that it prepares 'platform for includes governments, companies and industries'. There is lack of consumer participation in this organization.

There should be a national electrotechnical committee for membership in the IEC. The issues for consumer organizations include the lack of conflict resolution mechanism in these systems; there is also no accreditation process for the civil society organizations. The national committee delegations are only party to important meetings of TMB and Standard Management Board. Other organizations can be observers in the COPALCO. The lack of participation of consumer organizations leads to development of reduced quality products that are harmful for consumers.

[7]http://www.iec.ch/about/

III.3 Consumer Protection and Expert Evidence

The use of experts in the WTO is increasing nowadays[8]. They are called for asking opinion in a dispute and to determine the quality of the standard of food products and non-food products in standard setting institutions. The opinions of experts are crucial for consumers. Therefore, if the experts are persons who can be influenced by producers it may cause harm to the consumer interests.

The International Organization for Standardization (ISO) has four experts who have knowledge in the safety matters[9]. Appointments of these experts are done in their own personal capacity. The sad truth is that there is no specific provision for consumer participation. The documents regarding the expert advice is also not available to the public (CI, 2005b: 47-49).

There are three areas where consumer representation is lacking in rendering expert advice. They are (1) lack of transparency; (2) the operation of international scientific committees; and (3) the risk reporting to a consumer. The lack of transparency is mainly in three areas (i) in selection criteria of the experts, (ii) public meetings of the experts and (iii) access to the documents. The selection criteria of the experts are scrutinized in their own personal capacity. No consumer representation has a say in the selection committee or their concerns are not taken into consideration while electing a expert in that field (CI, 2005b: 47-49). Another problem in the selection criteria of the experts is that most of them are funded directly or indirectly by the industry. Therefore, it affects the decision of the expert thus selected in future thereby leading to producer-oriented decisions (CI, 2000: 59).

[8]EU-Biotech Dispute
[9] http://www.iso.org/iso/home.html

The public meetings of the experts are completely out of reach for the consumer organizations. Most expert body meetings are closed to the public (CI, 2005b: 93-99). The justification for keeping public away is the confidentiality matter regarding the products. Nevertheless, the importance of including a consumer representative as a participant at expert scientific meetings cannot be overstated.

A final issue but the important is the access of the consumer to relevant documents. The documents of the experts are not available to the public for months and years. (Evans 2005b: 77). This violates the right of a consumer to be informed. She can exercise her right only if she is properly informed about the standards that are adopted and implemented by these experts. The publication should be in plain language, as this will ensure consumer awareness in the expert evaluation. The draft of the international institutions as if ISO, IEC and Codex contain many technical terms, which are unknown for a consumer (Evans 2005b: 98). Therefore, there should be better access to documents of the experts and this will enable to lower the distrust vis-à-vis the experts.

The lack of risk reporting to the consumer is another problem, which a consumer faces in the international standard setting institutions like Codex, ISO, and IEC. These institutions decide the standards of the products that should be sold in the international and national markets. 'Right to safety' of the consumer is not always taken cognizance of. The risk reporting should be done to make consumer aware of the risk of the products.

Criticism leveled against publication of the reports include opposition to access to expert meetings is based on concerns about the business confidentiality of data, and fear that the efficient production of scientific advice could be impeded if the scientific advisory process were opened up to a broader range of scientific perspectives. These concerns should be met through other ways.

III.4 Consumer Protection and Civil Society Organizations

Article V of the Agreement establishing the WTO defines the relationship of General Council with NGOs. This provision directs the General Council for having consultation with the NGOs. Therefore, this provision tries to foster the relationship of the WTO with NGOs and other International Organizations. The provision is partly given effect by granting many international organizations an observer status in the General Council meetings and in the Committees and Councils of the WTO. Their recommendations are often taken into consideration. It however took the WTO General Council, eighteen months to implement the NGO provision in the Agreement on Establishing the World Trade Organization (Charnovitz 2000:4).

The General Council of the WTO adopted in 1996 the 'Guidelines for Arrangements on Relations with Non-Governmental Organizations' (the 1996 Guidelines)[10]. According to 1996 Guidelines, it was agreed that interaction with NGOs should be developed through the organization of symposium for NGOs on specific the WTO-related issues; informal arrangements to circulate among interested Members' position papers and information that NGOs may wish to make available; the continuation of the practice of the WTO Secretariat of responding to requests for general information and briefings about the WTO; and participation of chairpersons of the WTO councils and committees, in their personal capacity, in discussions and meetings with NGOs.(Charnovitz 2000: 9)

There are many advantages of NGO participation in the WTO. This is widely accepted in academic circles all over the world. Jackson identifies the advantages that accrue:

> First, they can be quite useful. Sometimes they have resources for study and analysis that governments lack. They can bring to the table information that can be very useful in the proceedings. They can also transmit information to

[10]Decision by the General Council, Guidelines for Arrangements on Relations with Non-Governmental Organizations, WT/L/162, dated 23 July 1996.

> concerned and important constituencies in the various countries. They can come to an understanding and then explain the issues to a broader constituency that has not had the time or the information to try to grasp them. In addition, they have real power, as demonstrated by the MAI (Multilateral Agreement on Investment) exercise and the impact of the Internet, and in Seattle, to some extent. (Jackson 2000:22)

The civil society or NGOs participation is also very essential for improving the public support to the WTO (Charnovitz 2000: 16). The WTO has started addressing the non-trade issues after the serious demonstrations of the NGOs in Seattle and this recognition led to addressability of non-trade issues in Doha Ministerial Conference (Guzman 2004:2). According to Guzman the WTO should either incorporate the non-trade issues or move forward without listening to the crowd outside. Many legislative and judicial actions of the WTO affect a consumer. These dispersed interests of the consumer can be included in the non-trade issue that should be addressed by the WTO (Sapra 2009:98).

Even though strong external demonstrations from NGOs in Seattle made the WTO recognize the value of public participation, the opposition from the Member States was strong. Many member states are not in favor of accommodating NGOs into the world trading system. They say that the 'special character of the WTO' is itself a barrier for the accommodation of NGOs. This 'WTO exceptionalism' argument is used to keep away NGOs from the WTO. Others argue that diverse interests of the NGOs are likely to complicate the decision making process of the WTO (Schott and Watal 2000: 2). Nevertheless, these do not seem to be a valid reason to distance NGOs from the decision making process. As long as they are not demanding voting rights, the observer status in the WTO is not a harmful choice (Charnovitz 2000: 14). The WTO does not have an accreditation process for NGOs. In contrast, UN and other specialized bodies like UNCTAD, and others have a accreditation process for civil society. Therefore, this shows that their contribution will help in framing the WTO laws with public welfare clauses in it.

The active participation of the consumer organization will help in incorporating the consumer interest in the WTO laws. For this, they should be given access to the documents and observer status in the three organs of the WTO. In addition crucial committees like Committee on Rules of Origin, Committee on Trade and Environment, Committee on Trade and Development , Committee on Sanitary and Phytosanitary Measures, Committee on Safeguards, Committee on subsidies and countervailing measures and Committee on Anti-dumping practices should definitely contain consumer representation for effective law making and policy recommendation.

Consumer organizations like Third World Network, Consumer Unity and Trust Society, Consumers International are actively involved to bring reform in the WTO (Rachagan 2010: 18). The participation of civil societies in the international organizations is very essential because it conveys the needs of the public directly to the authorities and these directions or observations of the civil societies will help in framing public friendly rules in international level. The participation of the civil societies including consumer organizations for 1998 Ministerial conferences was again discussed in the WTO (Charnovitz 2000: 10).

NGO participation will increase the legitimacy of the WTO[11]. NGO participation will enhance the effectiveness of the WTO decision-making process for transnational interests and any national government may not adequately represent these concerns. For the present unquestioned participation of International Chamber of Commerce ("ICC") in the GATT organs indicates the precedence of producer interest over consumer.

[11]http://www.idrc.ca/cp/ev-151624-201-1-DO_TOPIC.html, Non-Governmental Organizations and the WTO: Limits to Involvement? Peter Van den Bossche

IiI.6 Conclusion

The effective participation of consumer organizations in decision-making structure of the WTO will help in processing the consumer friendly laws in the international trade system. Another advantage is that this will ensure the protection of consumer in all the Member States of the WTO. It will also help to remove the criticism of democracy deficit that the WTO faces in the present situation.

The decision-making structure of the WTO consists of external and internal decision making structure. The internal decision-making consists of Ministerial Conference, General Council and the Dispute Settlement Body. There are also many Councils and Committees which oversee the individual agreements. Presently there is observer status provided for the consumer organizations along with other civil society organizations in the Ministerial Conferences. However, they are restricted from making statements or recommendations. Other than this, there is no participation of consumer organizations in any of the councils or committees.

Another important problem that should be addressed is that of the expert evidence and the consumer protection. The process of taking by the experts who are called upon in the Dispute Settlement Body, Codex, and other international standard setting organizations is not open to the consumer organizations. The reports of the experts are available to the world only after months of implementation of the standard. This has lead to considerable damage in the trust of the consumers.

The participation of consumer organizations in the standard setting institutions is also very weak. The Codex Commission holds an accreditation process for civil society organizations. But the platform is crowded by the representatives of producers. Multinational companies to dominate their interests in these forums back the business organizations. Due to financial constraints, there is scarcity in the participation of the

consumer organizations. The activities of the Codex Trust Fund are also insufficient in financing the developing countries and other organizations. The situation in ISO and IEC is different from that of Codex. The two sister organizations are primarily non-governmental organizations which primarily uphold the interests of manufacturers. The percentage of developing countries in the decision making structure itself is scarce. The consumer organizations are represented through national delegations. Until now, there is no accreditation process or any conflict management process in the organization for active consumer organization participation. The documents of the organizations are not open for the consumers and most of the important bodies in the organizations are closed to consumers. This reduces the accountability of the organizations.

There should be revolutionary changes in the attitude towards the civil society organizations in the WTO. The lack of accreditation process for civil society organizations shows the obscurity in the decision making process of the WTO. An accreditation process exists with other international organizations like United Nations (UN), International Trade Union (ITU), Organization for Economic Cooperation (OECD) and Development and United Nations Conference on Trade and Development (UNCTAD). Accreditation of consumer organizations will ensure effective representation of consumer interests in the WTO. It will in turn help in reducing the criticisms that the organization face from NGO world. Financial constraints are another important factor, which keeps many consumer organizations from participation in the WTO. There is open access for business NGOs and multinational companies in the organization (Charnovitz 2000: 19-23). This evidently shows the promotion of producer interest by the WTO and related international standard setting institutions.

The effective implementation of Article V: 2 will ensure the participation of consumer organizations in the WTO. The heads of the committees should meet with consumer organizations and ask for recommendations. There should be more transparency in the expert selection and the decisions of the experts should be available to the consumer in

simple language. The decisions of the experts should be advertised through Medias and internet. This will help in increasing the trust of the consumers in the system.

The lack of participation of the consumer organizations in the Codex Alimentarius can be ensured by effective activation of the Codex Trust Fund. This will help the consumer organizations in overcoming the financial constraint that they face. There should be introduction of accreditation process in the ISO and IEC for participation of civil society organizations. Other boards in these organizations should be open for consumer organizations. This will help in conveying the interests of consumers to the bodies. These objectives can be enforced by including direct voice of the consumers in the WTO. Governments alone will not be able to enforce these objectives. There need for formal relationships between the WTO and consumer organizations

These gaps in the WTO law should be filled through the amendment or recommendations from the committees and councils in the WTO. The democratization of decision making in the WTO will only help in progressive reform of the WTO law. So it is important that there should be appropriate consumer representation in the decision making body to incorporate consumer interest.

CHAPTER IV

CONSUMER PROTECTION AND THE WTO JURISPRUDENCE

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IV.1 Introduction

The Dispute Settlement Body (DSB) is a powerful body in the WTO. Already 420 cases have been brought before the DSB. It has the task of interpreting the WTO agreements. However, within the space available the approach of DSB towards consumers is not very encouraging. There needs to be given greater consideration to consumer welfare in adjudicating disputes. It will help to forward the interests of consumers. This can be done through improving the consumer participation in the WTO.

At present there is no effective participation of consumer organization in the dispute settlement process. The participation of the consumer organization can be ensured through two modes: (i) through submitting *Amicus Curiae Briefs,* and (ii) through participation of the consumer organizations as '*interested parties*' is the anti-dumping, subsidies and safeguards investigation process.

There are many problems in consumer organizations to participate in the DSB. One such problem is the expense involved. This reduces the chances for participation of consumer organizations in the DSB. Another problem is the delay in dispute settlement. These problems are common in DSB. The preferences of the consumer are shaped according to the judgments or tastes of producers. Therefore, there needs to be effective participation of consumers in the WTO to uphold their interests.

In this chapter, the first section discusses on the approach of the Dispute Settlement Body towards consumer protection. In this context it looks on the *Thailand-Cigarettes, EC-Sardines, EC-Asbestos and EC-Biotech* cases. These cases are concentrated on health

related issues which are of grave concern to consumers. The second section deals with the effective participation of consumer organizations as *Amicus Curiae*. Here a general evaluation is done on the history of *amicus Curiae Briefs* in the WTO. The third section examines disputes related to Article 3.1 in Safeguard Agreement. The final section summarizes the arguments.

IV.2 Consumer Protection in Dispute Settlement Body (DSB)

Almost all the disputes that come to DSB are related directly or indirectly to consumer interests. But there is little attention given by DSB on the consumer protection aspects of the case. The cases listed above helps to identify the approach of DSB towards consumer protection. The *Thailand-Cigarette case* helps in identifying the approach of GATT Panel towards consumer protection. The *EC-Sardines* case demonstrates the role of consumer organisations in helping DSB to sort out the protectionist measures of countries in the name of consumer protection. The *EC-Asbestos* and *EC-Biotech* cases illustrate the producer centric approach of the DSB in the WTO.

IV.2.1 The *Thailand-Cigarette* Case

The health related issues of consumers were also addressed by the GATT Panel in the *Thailand-Cigarette* dispute[1]. The complainant in the dispute was United States. The measure in dispute was a Thailand regulation that banned the import of cigarettes from US importers. The case mainly focused on the similarity in the 'necessity' test in Article XX (b) and in the SPS agreement. Thailand contended that the prohibition on imports of cigarettes was to reduce the harmful effects of American cigarettes on Thai consumers. Thailand argued that the measures was consistent with GATT Article XX(b). The authorization of domestic sale of cigarettes was justified by Thailand. The domestic

[1] *Thailand- Restrictions on Importations of and Internal Taxes on Cigarettes*, GATT Panel Report, GATT Doc, DS10/R of 7 November 1990

production of cigarettes was encouraged to eliminate the consumption of narcotic drugs such as opium, marijuana and kratom (a plant with fragrant yellow flowers and intoxicating leaves). The narcotic drugs were considered as more dangerous than cigarettes smoking. The cigarette production was a State-monopoly under Tobacco Act to control the production of cigarettes. There was sufficient evidence from World Health Organisation (WHO) regarding the impact of cigarettes on human beings. The WHO report showed that once a market is opened, the United States cigarette industry would exert great efforts to force governments to accept terms and conditions, which undermined public health, and governments were left with no effective tool to carry out public health policies. Advertising bans were circumvented and modern marketing techniques were used to boost sales[2]. The harmful content present in cigarettes produced by US was of concern for Thailand.

US argued that the Thailand measures were inconsistent with Article XI of GATT agreement and it was not justified under Article XX (b) as the measure was not necessary to protect human health. US defended the arguments of Thailand and pointed out that the changed economic situation of Thailand will only lead to a shift of consumer preference from Thailand cigarettes to US produced cigarettes. In short, US argued that the import of US cigarettes will not lead to increase in the total demand.

The Panel found that the ban was not 'necessary' to protect human health because there were other measures available, which could have protected human health without violating the GATT. The Panel held that a measure is 'necessary to protect human, animal or plant life or health' if there are no alternative measures that are more consistent with GATT. The analysis of the dispute points towards the least bothered attitude of GATT Panel towards consumer protection. This interpretation was quite narrow and seemed to impose an insurmountable hurdle for regulators (Covelli and Hohots 2003: 792).

[2] *Ibid.* Para 27.

The recent WHO fact sheet on smoking statistics proves that the entry of multinational tobacco firms has increased the ratio of smoking in females and youth[3] of Thailand. The female consumers prefer light cigarettes which are imported from other countries including US. The impact of the decisions of DSB on consumer is innumerable. The ingredients present in the foreign cigarettes affects the life of teen consumers. The sovereign right of the States to protect their consumers is getting impaired due to these decisions. This case clearly shows the necessity of taking into consideration the consumer protection while adjudicating a case..

IV.2.1 The *EC-Sardines Dispute*[4]

Brief History of the Dispute

In *EC-Sardines Dispute*, the DSB took into consideration the letter presented by the United Kingdom Consumer's Association. This helped the DSB to understand the protectionist measure adopted by EC in the name of consumer protection. In 2001, a Panel was established on request of Peru to examine the EC regulation which was in violation of TBT agreement. The dispute was related to two small fish species namely *Sardina pilchardus Walbaum* ("*Sardina pilchardus*") and *Sardinops sagax sagax* ("*Sardinops sagax*") which belong, respectively, to genus Sardina and Sardinops of the *Clupeinae* subfamily of the *Clupeidae* family. The fish of the *Clupeidae* family populate almost all oceans. Despite the various morphological differences that can be observed between them, *Sardina pilchardus* and *Sardinops sagax* display similar characteristics. They live in a coastal pelagic environment, form schools, engage in vertical migration, feed on plankton and have similar breeding seasons. Regulation 2139/89 of EC was adopted in 1989 which lays down common marketing standards for preserved sardines. According to Article 2 of EC Regulation (EEC) 2136/89 defines this standards. Article 2

[3] http://www.wpro.who.int/media_centre/fact_sheets/fs_20020528.htm, smoking statistics of 28 May 2002.
[4] *European Communities-Trade Description of Sardines*, WTO Doc WT/ DS231/R (29 May 2002) (Report of the Panel).

of the EC Regulation provides that only products prepared from fish of the species *Sardina pilchardus* may be marketed as preserved sardines.

In international level, Codex Alimentarius Commission of the United Nations Food and Agriculture Organization ("FAO") and the World Health Organisation ("WHO") ("Codex Alimentarius Commission") adopted, in 1978, a standard ("Codex Stan 94") for canned sardines and sardine-type products. Article 2.1 of Codex Stan 94 provides that canned sardines or sardine-type products are prepared from fresh or frozen fish from a list of 21 species. This included *Sardina pilchardus* and *Sardinops sagax.*

Several issues were raised in the case. It included first, EC regulation 2136/89 was inconsistent with Article 2.4 of the TBT Agreement. The European Communities did not use the naming standard set out in paragraph 6.1.1(ii) of Codex Stan 94 as a basis for its Regulation even though that standard would be an effective and appropriate means to fulfill the legitimate objectives pursued by the Regulation. Second, Peru argued that the regulation was in violation of Article 2.2 of the TBT agreement because it is more trade restrictive than necessary to fulfill the legitimate objective of market transparency that the European Communities claims to pursue[5]. Third, it argued that the measure was a technical regulation under Article 2.1 of TBT agreement[6]. Finally, Peru argued that the measure was in violation of Article III: 4 of the GATT 1994[7].

The defense of the EC included the 'legitimate objectives of ensuring market transparency, consumer protection, and fair competition' (Shaffer, 2002: 5). According to EC, a European consumer presumes that a sealed container labeled simply as 'sardines' contains *Sardina pilchardus.* The European consumers, when offered a can labeled 'sardines' expect to buy the product they know under this name, the European sardines, even if it has been caught in non-European waters. To defend this argument

[5] *Ibid.* Para 7.8 (b)
[6] *Ibid.* Para 7.8 (c)
[7] *Ibid.* Para 7.8 (d)

Peru submitted a letter from United Kingdom Consumers' Association (dated 11 April 2002). The letter established that the term sardines, 'either by itself or combined with the name of a country or geographic area, is a common name for *Sardinops sagax* in the European Communities'[8].

The Panel gave its report on 28 March 2002. The Panel found that there was infringement of the obligation under Article 2.4 of the TBT agreement. The Panel held that it prima facie constituted violation of TBT agreement. Thus the Panel found out that this violation led to the nullification and impairment to the benefits of Peru under the WTO agreement[9] and requested EC to bring its measure in conformity with its obligations under TBT agreement. The Panel also held that "Codex Stan 94 allows Members to provide precise trade description of preserved sardines which promotes market transparency so as to protect consumers and promote fair competition'[10]. Therefore the Panel held that the codex standards are effective and appropriate to fulfill the "legitimate objectives" pursued by the European Communities through the EC Regulation.

On 8th July 2002 appeal was forwarded by EC on certain legal matters in the case. EC argued that Panel has erred in taking into consideration the consumer expectations of the Member States of EC. Second, it noted that the Panel should not have taken the letter of UK Consumers' Association as 'it was prejudiced and included the incorrect appreciation of UK law' (violation of Article 11 of DSU)[11].

The Appellate Body held that the Panel did not exceed its bounds of discretion while considering the letter from UK Consumers' Association. The Appellate Body further upheld the findings of the Panel that the technical regulation of EC was in violation of

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[8] *Ibid.* Para 6.12
[9] *Ibid.* Para 8.12
[10] *Ibid.* Para 7.133
[11] *European Communities-Trade Description of Sardines*, WTO Doc WT/DS231/AB/R, AB-2002-3 (26 September 2002), Para 51.

Article 2.4 of TBT agreement. However it rejected the Panel's view that the burden of proving the ineffectiveness and inappropriateness was with EC. Further the Appellate Body held that the burden of proof was with Peru.

The major achievement of the consumers in this case is the acceptance of letter of UK Consumers' Association by Panel and Appellate Body. The letter was accepted as rebuttal evidence by the Panel. This helped Peru in bringing to light the protectionist measures of EC. The letter clearly articulated that the measure was against the interests of consumers. The same was accepted by Appellate Body.

IV.2.2 The *EC-Asbestos* Case

Brief History of the Dispute

The continuous protest against the harmful defects of asbestos forced the French government to ban all forms of asbestos fibres and products containing asbestos fibres in 1996. The prohibition included 'the manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres'. There was temporary exception for 'certain existing materials, products or devices containing chrysotile fibre when no substitute was available'.

In 1998, Canada filed a complaint with the WTO alleging that the ban imposed by France is not in consistence with TBT and GATT agreements. Canada challenged the decree of the French Government on ban on asbestos. They contended that the ban had severely affected the exporters of the country.

Canada challenged the ban imposed by EC saying that it was in violation of Articles 2, XI and III: 4 of TBT Agreement and GATT, 1994 respectively. Canada argued that the regulation imposed by France comes under the purview of technical regulation under

TBT. Canada considered the regulation unjustified on health grounds and as a 'technical regulation' on the exporters of Canada. It also argued that the ban nullified or impaired comparative advantages accruing to Canada within the meaning of Article XXIII: 1(b) of the GATT.

In 2000[12], the WTO Panel addressing the complaint of Canada ruled that there was violation of principle of differential national treatment. The Panel held the measure as justified the measure on the grounds of human health in accordance with Article XX(b) of the *GATT* and fulfilled the conditions set out in the chapeau of that same article (Footer and Zia Zariffi, 2002:122). Thus, the unilateral measure taken by the government of Canada was justified by the Panel on the grounds of protection of health of consumers and workers.

In 2001, the EC and Canada launched its appeal of the panel ruling. The Appellate Body reversed the findings of the Panel and ruled that the decree passed by the French Government was in violation to TBT agreement. The Appellate Body rejected the idea of giving product's characteristics within the meaning of the TBT agreement. The AB rejected to give a complete analysis of TBT agreement.

Even though the unilateral measures of the governments were recognized by the WTO dispute settlement, there was many questions which were left unanswered. There are many elements in this dispute which are of concern for consumers. The recognition of unilateral measures for protection of health of the consumer is one major achievement for the consumer. The first and main issue was the handling of amicus curiae briefs by the WTO. Another issues included the transparency and the analysis of the expertise in the case. Extensive expertise was used by the multinational companies to revert the decision according to their needs. The controversies also existed in regard to the determination of

[12] WTO Panel, *Report of the Panel: EC — Asbestos*, WTO Doc WT/DS135/R (18 September 2000) [8.101]–[8.158]; WTO Appellate Body, *Report of the Appellate Body: EC —Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001).

like products. EC contented that the AB has not considered the health risks associated with the asbestos and thereby has erred in the application of 'like products'.

IV.2.3 The *EC-Biotech Dispute*

The decision in *EC-Biotech* case invoked the debates relating to intersection between international trade and health of the consumers. There are four cases related to SPS agreement prior to *EC-Biotech* case in DSB. This includes *EC-Hormones*[13], *Australia-Salmon*[14], *Japan-Apples*[15] and *Japan-Agricultural Products*[16]. The complainant in the dispute included US, Canada and Argentina. Three allegations were alleged by the complainants against EC. Firstly, the allegation was on the moratorium issued by the EC on approvals of biotech products. It was alleged that EC has placed a de facto moratorium on the approval of biotech products. Secondly, it was alleged that there were various product specific measures maintained by EC which affected the approval of specific biotech products. Third, that there are various domestic safeguard measures that was employed by EC Member States for prohibiting the import and approval of biotech products. US and other complainants alleged that the measures caused undue delay in the approval of biotech products.

In 2003, the complainants requested for establishment of a panel regarding the ban imposed by EC on biotech products. They challenged the measures taken by EC inconsistent with the SPS agreement, TBT and GATT articles. The SPS agreement allows a member state to impose stringent trade measures to prevent harmful effects of an export on consumers (to protect health and environment). But these measures should not be used

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[13] *EC measures concerning meat and meat products (Hormones)*WTO Docs WT/DS26/AB/R, WT/DS48/AB/R, AB–1997–4 (16 January 1998) (Report of the Appellate Body);
[14] *Australia — Measures Affecting Importation of Salmon*, WTO Doc WT/DS18/AB/R, AB–1998–5 (20 October 1998) (Report of the Appellate Body)
[15] *Japan — Measures Affecting the Importation of Apples*, WTO Doc WT/DS245/AB/R, AB–2003–4 (26 November 2003) (Report of the Appellate Body).
[16] *Japan — Measures Affecting Agricultural Products*, WTO Doc WT/DS76/AB/R, AB–1998–8 (22 February 1999) (Report of the Appellate Body).

as a protectionist method to impede international trade. The burden of proof lies on the imposing member to prove the measure through scientific justifications. Imposition of measures depends upon certain conditions. First, that the measure should be to an extent necessary to protect human, animal or plant life or health. Secondly, it should be based on scientific principles and is not maintained without scientific evidence. Third, it should not arbitrarily or unjustifiably discriminate between Members. Finally the measure should not constitute a disguised restriction on international trade. Along with these conditions the Member States should also take into consideration the conditions in Article XX (b) of GATT 1994.

The Panel released a confidential interim report to the disputing parties in May 2006 and published its final public report in September 2006. The panel found that EC has applied de facto moratorium intentionally to ban the approval of biotech products. These included effectively suspending consideration of applications, causing delay in assessing applications and preventing the final approval of products. The Panel found that the de facto moratorium was not a SPS measure. It affected the EC's SPS measures by causing undue delays in product approvals. Further the Panel further pointed out that a de facto moratorium had also arisen in relation to the bans placed by five EC Members on the import and marketing of biotech products at national level. Further the Panel also found out that EC has reviewed the products in issue by using relevant scientific committee. Still it did not alter its decision for approval of the products. Hence the Panel came to the conclusion that EC Member States has failed to meet the EC's obligation under the SPS agreement. Thus the Panel concluded that EC intentionally avoided the options of less trade restrictive measures. The Panel left many questions unanswered. The important question was regarding the dangerous impacts of GMO's on consumer health. It did not find whether the de facto moratorium was in breach of Article 5.1 or Article 2.2 of SPS agreement. Nor did it find out that the EC had acted inconsistently with Articles 5.5 or 2.3 of the agreement.

In the matter relating to precautionary principle, the Panel followed the decision of AB in *Japan- Apples*[17] case. The Panel further looked at Article 5.7 through the lens of Article 5.1. By emphasising on the earlier decision of AB, the Panel pointed out that once a risk assessment was not undertaken under Article 5.1 then a member was disqualified from adopting a measure under Article 5.7 (Henckels 2006: 294). This assessment prohibits the Members to provisionally ban GMOs on the basis of new and alarming evidence of risk (Henckels 2006; 295). EC did not appeal the decision because of its normal functioning of the approvals regime and it has already authorized ten GMO products since the establishment of Panel (Young 2007: 911).

IV.3 Consumer Participation in Anti-dumping and Similar Agreements

The WTO related domestic regulatory agreements on anti-dumping, safeguards and subsidies call for participation of *interested parties* in the investigation procedures. There are similar provisions in these agreements regarding the participation of *interested parties*. Article 6.1 of the Anti-dumping agreements authorizes the national anti-dumping authority for serving notices and collecting evidence from the *interested parties* regarding dumping. The definition of the *interested parties* is included in Article 6.11 of the antidumping agreement. It includes an exporter or a foreign producer, importing country producers, and government of the exporting country. Similar provisions regarding the participation of interested parties include Article 19.2 and Article 3.1 of SCM agreement and Safeguards agreement respectively.

The consumer organizations are not mentioned in the definition of the WTO related domestic regulatory agreements. However foot note 50 of the SCM Agreement mentions about consumer organizations in definition of domestic interested parties. The important party who is affected by the impact of these domestic regulatory measures is not explicitly addressed in the definition.

[17] *Japan — Apples*, WTO Doc WT/DS245/AB/R, AB–2003–4 (26 November 2003) [179] (Report of the Appellate Body)

The Appellate Body has given importance regarding the participation of *interested parties* in one major dispute. The veracity of the evidence given by the interested parties was questioned in US-Wheat Gluten dispute. Appellate Body firmly confirms the place of interested parties in the investigation process.

> "The focus of the investigative steps mentioned in Article 3.1 is on 'interested parties', who must be notified of the investigation, and who must be given an opportunity to submit 'evidence', as well as their 'views', to the competent authorities. The interested parties are also to be given an opportunity to 'respond to the presentations of other parties'. The *Agreement on Safeguards*, therefore, envisages that the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities."[18]

However, the Appellate Body in this dispute affirmed the importance of the interested parties. So far only producers and manufactures have been appeared as interested parties before the DSB. There should be possible amendment of the definition of *interested parties* for the active involvement of consumer organizations. The issue of consumer participation in the investigation was raised by Brazil[19] against EU in the EC-*Antidumping duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* dispute in the Panel. The Appellate Body upholds the relevance of disclosure of the information to the interested parties in this case. Therefore, in this case the AB confirms the right of the interested parties[20]. Even though long and detailed interpretation is given regarding the participation of the interested parties, the interested parties are mainly said to be domestic producers. Here the consumer was not given much relevance.

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[18]Appellate Body Report, *US – Wheat Gluten*, para. 54.

[19]*European Communities – Malleable Cast Iron Tube or Pipe Fittings from Brazil*, Request for the Establishment of a Panel by Brazil, page 122,16 preliminary issue

[20]Appellate Body Report, pg 58 reverses the Panel's finding, in paragraphs 7.348 and 7.349 of the Panel Report, and finds, instead, that the European Communities acted inconsistently with Articles 6.2 and 6.4 of the *Anti-Dumping Agreement*, by failing to disclose to the interested parties during the anti-dumping investigation the information on the injury factors listed in Article 3.4 that is contained in Exhibit EC-12

IV.4 Issue of *Amicus Curiae Briefs*

Amicus curiae briefs are important tools for consumer organizations to make the DSB acknowledge the facts of a certain dispute. It helps in depicting the consequences of certain decisions on the consumer interests. *Amicus Curiae* mean 'the friends of the court'. They take some issues into the attention of the DSB that states have left. The attitude against *amicus curiae briefs* has undergone many changes from time to time. However these changes are not in favor of consumer organizations.

There are mainly two reasons for the accommodation of *amicus curiae briefs* into any DSB and this include (i) to provide some information and (ii) to sensitize a court about the interest that a particular case might have for the wider public[21]. Major cases where the *amicus curiae briefs* was brought included *US-Shrimp* case, *EC- Asbestos* case, *EC-Hormones* case, *US-Shrimp* case, *US-Steel* case, *Australia-Salmon* case , *US – Lead and Bismuth II, US – Softwood Lumber etc.* In most of these cases the *amicus curiae briefs* were rejected by the DSB.

According to Article 13 of DSU "Each Panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. There is no direct provision in the DSB which speaks of *Amicus Curiae Briefs* (Charnovitz, 2000: 8-9). Article 16(1)[22] of the legal provision allows the Appellate Body to request submissions of *amicus curiae briefs*. . Even though amicus *curiae* briefs are allowed to be submitted, there is no obligation on the AB to consider them.

The latest *amicus curiae briefs* were submitted in the *EC-Biotech* case. The briefs were submitted by Foundation for International Environmental Law and Development (FEILD), Centre for International Environmental Law (CIEL), Gene Watch, the Centre

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[22] Appellate Body working procedures

for Food Safety (USA), Centre for Human Rights and the Environment (CEDHA), Gene Campaign, Forum For Biotechnology and Food Security, Green International, International Forum on Globalization, and Californians for GE-Free Agriculture. There was not even one consumer organization that has submitted *amicus curiae briefs* to DSB in this case. No consumer organizations have yet used this opportunity of *amicus curiae briefs* in the DSB (Mavroidis, 2002:2). Almost all the health related issues are very well related with the consumers. Therefore, there should be enough participation of the consumer organizations in the form of *amicus curiae briefs* in the WTO system.

This will also in future become the playgrounds of producer/business NGOs to shape the rule according to their interests. Therefore, the non-participation of the consumer organizations will turn to be the most dangerous situation in DSB. Most of the important business-NGOs are funded by the multinational companies for submitting the amicus curiae briefs in DSB. The expense of the court is one reason for non-participation from consumer organizations. Therefore, there should be attention paid to this by DSB.

IV.6 Conclusion

The legitimacy of the DSB will be enhanced through the effective participation of consumer organizations and the accommodation of consumer interests in the DSB. The DSB does not presently take into consideration the rights of the consumers. Almost all the cases related to right to health of the consumer reflects the favorable attitude of the DSB towards producers. Most of the decisions of the DSB tend to uphold the ideology of the system that it is an economic body with a limited mandate and therefore cannot respond to social welfare issues.

This producer chauvinism was visible in the latest *EC-Biotech* dispute. There was no special attention given by the DSB to the side effects of genetically modified products. Many Member States who appeared as third parties in the case pointed towards this issue.

The decision of DSB carries far-reaching effects on the right to health of the consumers. While there will be sufficient regulatory and technological methods to check the after effects of GMOs in developed countries. This is not the case in the developing countries. They lack in technologies and regulatory authorities. Thus, the major defects of the decisions of the DSB are borne by consumers in the developing countries.

The decisions of the DSB have not still helped consumers in the AD Agreements. The participation of the consumer organizations as the interested parties will help in reducing the anti-dumping duties that impede trade. Therefore, the conditions that are imposed in the participation of consumer in the anti-dumping and similar investigations should be amended. The decisions that violate the rights of a consumer should not be encouraged. The definition of interested parties does not include consumers. If there is a positive interpretation from DSB by including consumers into the investigation process, as their interest also gets injured due to these imposition of duties, the national domestic regulatory authorities will also take this into consideration.

Another important issue is related to the situation of *amicus curiae briefs*. Consumer organizations should start giving *amicus curiae briefs* in the DSB. Particularly this should be in the field of health related disputes. Health related issues mainly affect the 'right to safety' of a consumer. Therefore, there is need for effective participation from the consumer side. For ensuring effective participation there should be some financial support given by the DSB to the consumer organizations of the developing world. These measures will ensure in effective participation of consumer organizations in the Dispute Settlement Body of the WTO

CHAPTER V

CONSUMER PROTECTION AND THE TRIPS AGREEMENT

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V.1 Introduction

The GATT Uruguay Round witnessed the arrival of intellectual property rights into the WTO. TRIPS Agreement grants mainly seven types of protection. They are copyright, trademarks, patent, geographical indications, industrial designs, integrated circuits and protection of undisclosed information. These protections are granted to protect the rights of the IPR owners. TRIPS agreement set the minimum standard of protection for all member countries. The developed countries sought and secured a strong IP protection, as they were the innovators of many technologies. Strong intellectual property law negatively affects the rights of the consumers by providing maximum protection to the producers. The agreement does not set up a single and universal IPR system but gives some requirements that the Member States has to follow (Guennif and Lalitha 2007: 471).

The patent protection was the major protection, which the US wanted to get from other countries. If the enforcement is not strong in the importing countries then the exporter suffer lose. Moved by the MNCs, the American authorities pushed the subject into the WTO. The introduction of TRIPS agreement thus made many countries to amend their legislations to come in consistency with the WTO agreement. Other countries (especially importing countries) were thereby obliged to increase their enforcement measures as the TRIPS agreement was part of single undertaking in the WTO. However, the defense of the developing countries carried substance. The reasons they cited included the cost, technical expertise and the court system of the developing countries (Howse and Trebilcock 2007:410).

The strong enforcement procedures adopted by TRIPS is another hurdle for the consumer. A consumer gets much affected by the excessive rights granted to the IPR owner. This can be in many ways. Excessive protection increases the price of products. Thus, the product is not accessible to a consumer. Another right which got violated was the right to access. As the owner gets product patent, other small production firms, which used to imitate the product was removed out of the market. Thus, a consumer was deprived of his right to access to a less expensive product with affordable cost. This again was a challenge for the purchasing rights of the consumers in the developing countries. Strong patent protection also increased the chances of counterfeit products and thereby increased the health risk to a consumer. The right to safety of a consumer is thus violated. For tackling these counterfeit products, Anti-Counterfeiting Trade Agreement is signed by few Countries. Nevertheless, on the hunt for the counterfeit products, developed countries started keeping generic medicines also. The victim was again consumers. The purchasing power of the poor consumers in the developing country got diminished by the grant of patent to all pharmaceutical products as per the TRIPS agreement. Earlier to prevent this monopoly abuse most developing countries delayed in giving patents.

About forty countries never provided the patent for pharmaceutical products prior the TRIPS agreement (WTO Agreement on Public Health 2002: 32). Countries including India did not give product patent for the pharmaceutical products. However, with the arrival of TRIPS agreement the countries were compelled to grant 20 years patent for the pharmaceutical products. Thus, they were forced to lend the rights of their consumers to the pharmaceutical companies. The strong patent regimes introduced by TRIPS agreement have its impact on the developing countries. Thailand is a good example for this. A strong patent regime was adopted by Thailand in 1990s due to international pressure. This brought negative effects into the accessibility and availability of medicines in the country. The generic versions of the patented medicines took 5-6 years to get into the market due to 20 year period offered by the TRIPS agreement. This affected the affordable supply of medicines to the poor consumers of the country. Prior to the amendment it only took 2 years for production of generic versions. Thus by availing the strong patent regime the multinational pharmaceutical companies extended its life span of

the patented medicine and were keen to ensure the supply after the expiration of patented period.

Most of the international human rights treaties including Universal Declaration of Human Rights (UDHR)[1] and International Covenant on Economic, Social and Cultural Rights call for the balancing of private and public rights (Rachagan 2010: 59). The objectives of the TRIPS agreement in Article 7 also confirm this. However, the ever greening of patents also threatens the lives of consumers. The increasing importance of biotechnology products also was one reason for enforcement of strong IP regime (Howse and Trebilcock 2007:410).The TRIPS Agreement in the Uruguay Round Final Act represents a conflict between the interests of the consumer and the producer. The larger groups of persons are deprived out of their legitimate rights when the private person or firm is granted monopoly.

This chapter focuses on the impact of strong IPR laws on consumers. First section discusses the provisions in the agreement along with the flexibilities available. The second section will highlight the consumer rights that were available in the Indian Patent Act, 1970. This will help us to understand the issues concerning consumer protection in the TRIPS world. The third part will deal with the patenting of life saving drugs and its impact on consumers. This section will include the controversies regarding the seizure of legitimate generic drug by EU. The fourth section will deal with compulsory licensing and parallel importing by countries. The final section summaries the above findings.

V.2 Consumer Protection under TRIPS Agreement

The Preamble of the TRIPS agreement starts with the protection of producer right. It recognizes the intellectual property right as private rights (Chimni 1999: 339). It sets

[1]Article 27 of the UDHR and Article 15 of International Covenant on Economic, Social and Cultural Rights 1976.

minimum standards for the protection of intellectual property rights. When states have already abandoned the idea of property rights from their fundamental rights, the WTO is revising these rights into its text and compelling Member States to recognize it. Thus, the Preamble of the TRIPS agreement openly supports the rights of manufacturers. Development and technology is used to justify this private right protection.

Article 7 of the TRIPS agreement gives a breathing space for consumers. The objectives of the TRIPS text are laid down in this article[2]. Here the agreement sets a platform for the balancing of the rights of the consumer and producer. In addition, Article 8 states the importance of protecting the public health and nutrition by adopting necessary measures consistent with the provisions of TRIPS agreement. Therefore, the rights of private owner overshadow the rights of consumer. The implementation of the private rights not only affects the consumer in the health sector but also in education and essential commodity sectors like water.

Article 27 is another provision, which gives latitude for consumer protection for the countries. According to this provision, the Member State can exclude patentability if it affects lives of human, animal or plant life. This provision also gives the freedom for Member States to exclude the diagnostic, therapeutic and surgerical methods from patenting. However, this does not include the means used to perform treatment. Thus again it gives a blow to the consumer and it neither avoids the damages caused by product patenting (Gopakumar and Ganu 2005: 121).

Article 31 is another provision in the TRIPS agreement, which provides exception to the granting of private rights. There is a close link between Article 7 and Article 30, which, when read together leads to the conclusion that States should make compatible the

[2]Article 7. 'The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conductive to social and economic welfare and to a balance of rights and obligations'.

protection of the rights of the patent holder and the need to consider the legitimate interests of third parties (Howse and Trebilcock,). Article 31 of the TRIPS deals with compulsory licensing which is very much important for consumers. The developing countries rarely utilize this possibility.

There are flexibilities available in TRIPS agreement to ensure affordable access. And the above mentioned provisions are examples for this. Compulsory licensing, parallel imports and differential pricing between developed and developing countries have been suggested as instruments to improve access within the TRIPS agreement (Mashelkar 2002:321). But the technological deficiency faced by the developing countries

V.3 Consumer Protection in Indian Patent Act (IPA), 1970

The Indian Patent Act (IPA) 1970 was considered as model legislation for developing countries. It earned its name through its distinctive features. The act gave 14 years period of protection for the patents. However, only 5 years was provided for drugs, chemicals and food items. There was provision for compulsory licensing when the patent holder failed in making his patent within 3 years after grant of patent. Thus, more importance was given for social welfare at the same time patent holder was rewarded for his invention. Here equal importance was given to the patent holder and the consumer.

However, the introduction of TRIPS agreement into the WTO obligated India to amend its patent legislation. It was amended three times to maintain consistency with TRIPS agreement. In 1995, the mailbox provision and Exclusive Marketing Rights (EMR) were introduced. The second time the amendment included the extension of life of patent to 20 years. In 2000, product patent in the pharmaceuticals and agrochemicals products was included into the Patent Act (Gopakumar and Ganu 2005: 117).

Consumer Protection and Reverse Engineering

One of the essential features of the IPA, 1970 was reverse engineering. It implies the 'decoding of an original process for producing a bulk drug' (Ray 2010: 244). This was to provide consumers with adequate supply of medicines at affordable prices. The Indian authorities tried to increase the production of medicines through reverse engineering. This contributed two things for the consumers (i) the availability of medicines and (ii) the affordability. Therefore, the government itself took the initiative of improving the purchasing power of the poor and middle class consumers through producing the product through reverse engineering.

In developing countries, we can ensure the consumers their rights only through getting them economically empowered. Those who do not have the economic rights cannot dream about consumer rights in developing countries like India. Affordability matters much to the consumers of the developing world. The price of the product was brought down by the small-scale manufactures by providing them with reverse engineering products. Reverse engineering was possible at that time because of lack of product patent.

These methods helped in securing the rights of the consumers even though there was skepticism as to the quality of the product. However, the whole scenario changed due to the WTO TRIPS agreement. The countries where asked to bring their intellectual property laws in line with the TRIPS agreement. Subsequently India was made to change its patent act to comply with the TRIPS Agreement. Thus, the period of protection was raised to 20 years, and all the changes mentioned in the TRIPS Agreement were included in the Indian Patent Act.

The adoption of the changes into a developing country law will matter lot. The norms and values of the developed world were imposed on the developing countries irrespective of concern to their geographic, financial, technological gaps. The differences in the

economy and supply due to the changes are obvious. The granting of product patenting affected many sectors of India. The advantages were more for the MNCs compared to consumers. The victims of this included the small and medium sector units and public sector units. The small and medium sector units, which helped in regulating the high price in the pharmaceutical products, have been the victims of this change. Most of the small and medium sector units are dead or in the process of death (Nair 2002: 408).

In the time of IPA, 1970 no competition was restricted and the products were exclusively kept for the public sector. At the same time, licensing and tariff mechanisms were restricted. Today inefficient management and low productivity led to the decline of public sector. All these fields were got privatized leading to the monopoly of the producers. Today India's pharmaceutical sector has 20,000 MNCs (Nair 2002: 405). The absence of product patent enabled Indian companies to manufacture and market even patented drugs in India as well as export them to countries where they were not patented. To stop the mounting disadvantages of the patent system, the Indian government also had Drug Price Control Order (DPCO). This was enacted especially to protect the consumers against high prices of pharmaceutical products (Chandran, Sanjeev and Roy 2005: 279). In 1995, DPCO was revised. It has also declassified 70 out of 146 drugs and at the same time dropped some clauses that focused on small companies and newly produced products from price control that was produced locally.

The IPA, 1970 resulted in the increase in R&D and helped in decreasing the cost of the pharmaceutical products. This statuesque was to continue till 2007. But after 2007 as the multinational companies started to launching their patented molecules which will raise the price of the products (Chandran et al 2005:272). This will affect the affordability of lifestyle drugs which are used for allergies, cholesterol, ulsers, depression, anxiety, diabetes, arthritis and high blood pleasure. Along with this there are chances for the increase of cost of drugs used for treatment of cancer or AIDS.

V.4 Consumer Protection and Patenting of Life Saving Drugs

TRIPS and public health is one of the important areas, which carry a lot of importance to the consumer. Consumer as a patient is a puppet in the hands of the pharmaceutical companies. The effort of the governments to give importance to the consumers is struck down by the dispute settlement body in many cases. An example for this includes *Canada-Generic Medicines* case[3]. The dispute was related to testing of patented products before the expiration of patented period. The Canadian provision allowed the testing for making generic medicines in order to make the medicine available to the public in reasonable price after the expiration of patent. But this was held inconsistent with the TRIPS agreement by the DSB.

Health is one of the important factors pertaining to a consumer. This factor is now questioned due to many problems in the society. The health of the consumer is affected mainly in two ways. Firstly, due to the patenting of genetically modified products. Secondly, due to the patenting of life saving drugs. Genetically modified products have been one reason that triggered the initiation of strong patent law in TRIPS agreement (Howse and Trebilcock 2005: 410). The *EC-Biotech* dispute further fueled the debate over use of genetically modified products for consumption. Unfortunately, the subject was not taken into consideration by the DSB. The patenting of the GMOs and its experimentation on the people is happening in the developing countries because of lack of efficient regulatory measures. Presently consumer rights advocates do not take the issue of patenting of GMO seriously. The effects of patenting of genetically modified products are like a chain reaction. Giant companies like Monsanto are injecting 'suicide gene' into the genetically modified crops to stop infringement of patent (Whitman 2000:4). Due to this injection, the sterility of the seed is controlled. So the farmers are compelled to buy new seeds for next season. The cost of genetically modified crops are double than traditional ones. Hence as the farmer ruins it will directly affect the economy

[3] Canada-Generic Medicines case (Panel Report, Canada-Patent Protection of Pharmaceutical Products, WT/DS170/AB/R, adopted 12 October 2000).

of a country and will lead to food crisis. Here the economic viability of a consumer is questioned. His rights to access to food products, right to safety, and economic rights are challenged. These reasons urges for limited patenting of GMOs. Patenting of the GMO will force the farmers to buy seeds from multinationals and this will ultimately destroy traditional farming methods. Countries including India is urging for limited patenting of GMOs (Uzogara 2000:186-187).

The patenting of life saving medicines is another vital area which matters for the consumers. Many countries prior to TRIPS, refrained from giving patents for pharmaceutical products. However, the arrival of TRIPS compelled them for the inclusion of pharmaceutical products. The main reason for the detrainment was to avoid the commodification of health sector. There were many disadvantages for the patenting of life saving drugs. The patenting led to the increase of the price and affected the availability of medicines to the consumers in cheaper prices. Most of the poor section of the developing countries gets affected because of this. Another defect was that the non-availability and higher price of the drugs would force them to buy counterfeited medicines, which were available in the market at cheaper price. This will lead to violation of their right to safety. Therefore, the patenting of life saving drugs leads to many dangers to the consumers.

There are mainly three types of medicines viz., falsified medicines[4], substandard medicines[5] and counterfeit medicines. The national regulatory authorities in the border should regulate these medicines. However, developing countries lack technology that will prevent the entry of substandard and falsified medicines into the market. These technologies are expensive in nature. The existing methods are insufficient for these countries to sort out the problem. This situation is exploited by the rich countries and

[4] Falsified medicines are those which are fake ones, which does not contain the correct type of ingredients .it may also be falsely labeled (Oxfam, 2011)

[5]Substandard medicines are those that do not meet the WHO standards. It does not meet the standard specifications for the product.

pharmaceutical sectors. They put counterfeited medicines into the realm of the falsified and substandard medicines.

Counterfeit products[6] are products that cause problem to patent holders. The TRIPS Agreement defines 'counterfeit trademark goods' as goods that bear, without authorization, a trademark that is identical to, or which cannot be distinguished in its essential aspects from, a registered trademark. They are included under criminal infringement. The counterfeit products are said to cause injury to the patent holder. Many developed countries are asking for a hard patent regime for removal of these counterfeit drugs. There is no differentiation made between the substandard drugs or counterfeit medicines. There is a new attempt being coming for the draft of the (ACTA) Anti-counterfeiting Trade Agreement, a plurilateral agreement, (not part of the WTO and WIPO) for tightening the approach against counterfeiting drugs. The developed countries who are members to this are coming up with an expanded definition to the 'counterfeit drugs'. The developing countries are being pressed to sign the agreement. *The definition even includes legitimate drugs into the category of counterfeiting ones.* If the authorities in the ACTA signatories suspect that the drugs in transit are counterfeit drugs, then they will be having authority to destroy it and will also be able to punish the person who sends the shipment. This is taking the face of the EU regulation 1383/2003 that was controversial after it confiscated around 12 shipments of India in the name of counterfeit medicines.

Subsequent patenting also causes problems for access of medicines (Gopakumar and Gane 2005: 122). Usually minimum protection given by TRIPS Agreement for patenting a product is 20 years. However, in a single drug there will be several patents. For example the formulations , pharmaceutical salts, isomers, polymorphs, combinations, new drug delivery systems, new use of manufacturing process all can be patented. So even if the patent period of that drug gets over it still can continue its monopoly in the market through this subsequent patents. This will delay the product getting into public

[6]Footnote 14, the WTO Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

domain. The subsequent product patenting is not sufficiently addressed by the TRIPS. According to Gopakumar and Gane:

> '....These types of patent should not be given in order to safeguard accessibility and availability of drugs. The question is whether TRIPS permits exclusion of such patents. The TRIPs is silent as to what should be patented and what should not be patented in pharmaceuticals. It is up to each Member to decide that what should be excluded (Gopakumar and Gane 2005: 122)

Public health of a generation is one of the most important treasures that a government has to take care off. It is one of the basic rights of the consumer and a fundamental right which a citizen bears. As a patient, the consumer should have a purchasing power otherwise he will have to adhere to the laws of the nature.

There are many other laws because of which a poor consumer is deprived of his fundamental right to avail medicines. The patenting of life saving drugs is considered as incentive to promote more invention in the field of vaccines and new drugs to treat and prevent diseases[7]. For this protection of the patent owner, the WTO is searching for more TRIPS plus measures through international cooperation. The international cooperation is available for the countries through the Article specified in the TRIPS Agreement[8]. The international cooperation is sort mainly to prevent counterfeiting of medicines which is one of the important infringements of patent in medicines.

[7]WTO (2002), *WTO Agreements and Public Health 2002*, WTO Secretariat, Geneva.

[8] Article 69 states that the 'Members agree to cooperate with each othe with a view to eliminating international trade in goods infringing property rights. For this purpose, they shall establish and notify contact points in their administrations and be ready to exchange information on trade in infringing goods. They shall, in particular, promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit trademark goods and pirated copyright goods'.

V.5 Consumer Protection and TRIPS Plus Agreements

TRIPS plus agreements is going to become another hurdle to the interests of the developing country consumers. The urge is for strong enforcement of patent protection through extra measures. TRIPS plus measures mainly consists of three measures. They are EU regulation 1383/2003, the Anti- Counterfeiting Trade Agreement (ACTA), International Medical Product Anti- Counterfeit Task force (IMPACT) and regional and bilateral agreements. TRIPS plus rules will lead to more the enhancement of monopoly that already exists in the TRIPS agreement of the WTO. The major impact of these rules include enhancement of powers to the companies to enforce IP rules, expansion of monopoly rights of the pharmaceutical companies and shifting of burden of enforcement from the companies to the public authorities like customs and border officials. These strong enforcement measures will also disrupt the supply of medicines to the developing country consumers especially South African consumers. The supply of medicines will be affected by the many factors. It includes the withdrawal of third party or intermediate suppliers from the chain[9].

The proliferation of FTAs is threatening the rights of consumer in the TRIPS agreement. Many developed countries are trying to establish a new network of bilateral FTAs with developing countries. Most of the FTAs contain provisions dealing with IPR, which sets a minimum standards which is to be applied by the Member States and this standard is higher than that of the TRIPS agreement. CAFTA-DR-USA FTA and Morocco-USA FTAs are example for this (Guennif and Lalitha 2007:476). This will help the pharmaceutical companies from preventing the generic competitors from entering the market. The FTAs also have a provision on extended patentability criteria which helps the ever greening of the products. They also contain provisions that withhold the clinical data from generic competitors. Clinical trials of medicines are usually very expensive. Usually the generic competitors depend on the clinical trials of used by the patent

[9]The third party and the intermediate parties include the suppliers of bulk ingredients for medicines to the small firm medicine manufactures. (Oxfam, 2011 : 29)

holders. But to delay this process, the FTAs have provisions which give patent holder five years protection from disclosing the clinical data (Guennif and Lalitha 2007: 479). Thus the generic companies either have to wait for five years or have to do the clinical trials on their own expense. This will increase the cost of the product and will transfer the burden to the consumers. The provisions in the FTAs are overriding the flexibilities conferred by the TRIPS agreement. The stringent measures applied by the FTAs compels the member countries to follow these measures which delays in marketing of generic drugs. Thus IPR regime is shaped by FTAs according to the needs of the producer.

The EU regulation 1383/2003 enhances the powers of the EU border authorities to seize 'confusingly similar products'. Using this regulation the EU authorities within a gap of 12-18 months seized nineteen shipments of countries, including India and China, which were carrying legitimate generic medicines. The seizure was made in the disguised name of confusingly similar products. Some were seized on behalf of multinational companies that wanted to enforce their patent rights in EU. Most of the seizure included the life saving medicines like *abacavir.* These shipments reached the destination place after four months. Thus, the consequences of this stronger enforcement measures were poor consumers in the developing countries. The EU regulation is inconsistent with Article 40 of the TRIPS agreement. The case was taken by India and Brazil to the DSB. Intense negotiation led to withdrawal of the case by India. Brazil is yet to reach to agreement (Oxfam 2011: 26-36)

All these initiatives are taken by the developed countries in the name of preventing the supply of counterfeit medicines. The changes include the expansion of the definition consisted in the TRIPS agreement and by including civil trademark and patent infringement into the definition of the counterfeit medicines. The definition even sometimes includes the 'lawfully generic medicines which are not intended to device consumers'.

These initiatives for strong enforcement measures are to protect the rights of the producers especially that of pharmaceutical companies. The pharmaceutical companies and other companies are trying their best to remedy the enforcement measures for infringement of patents. Sterilized seeds and the criminal infringement all come in this category. Besides this, they want to legitimize their monopoly in stronger ways. For this, they are formulating new laws through bilateral ways.

V. 6 Compulsory Licensing and Parallel Import

Article 31 states the compulsory licensing in TRIPS agreement. The term compulsory licensing is not there in the text. It helps to strike a balance between the patent holder and the consumer (Amaral 2005: 6). Compulsory license is an authorization to a third party to use the patented invention (Gopakumar and Ganu 2005: 128). Compulsory licensing was considered as a breathing space for member states. However, the implementation of compulsory licensing is not easy. There are procedures and requirements that should be fulfilled for the implementation of compulsory licensing. Due to these cumbersome procedures, developing countries have rarely used this mechanism. A Member State can use the compulsory licensing in times of an HIV/AIDS, malaria or even tuberculosis epidemic, or to prohibit the increasing price of medicines or to cover the inadequacy of medicines. A compulsory licensing option can be taken by the countries only after the exhaustion of voluntary license. This option of compulsory license is available for a public organization or a private firm.

The procedures required the governments to use compulsory license only under certain circumstances. These circumstances include national emergency and extreme emergency, anticompetitive practices, dependent patents and public non-commercial use[10]. The license granted under this mechanism is granted on a non-exclusive[11] and non-

[10] Article 31(b)
[11] Article 31(d)

assignable[12] basis. It also has the remedy of judicial review[13]. The important thing to take note is that the public health concern is not at all a condition for granting compulsory license.

The right to determine the grounds for granting of compulsory license is conferred on the States. After all these procedures, the patent can be used only in the domestic market of that member[14]. This otherwise took away the essence of the provision which it was suppose to serve. Despite the permission of the patent owner, the regional exhaustion calls for the limitation of the right of circulation for the product in a region.

The Doha declaration on TRIPs and public health in 2001 maintained the flexibility of the Agreement negotiated during the Uruguay Round, which allowed the implementation of public policies that facilitate access to medications (Amaral 2005L: 12). The right of the Member States to use parallel importing and compulsory licensing in case of national health emergency was confirmed by the Paragraphs 5b and 5c of the Declaration. It also confirmed the freedom of the Member States for establishing their own exhaustion principle for IPR (Guennip and Lalitha 2007: 473). The declaration thus opened the way for re-exporting of products to the developing countries which lacked the technological means to manufacture life saving drugs. There were stringent conditions laid by the declaration regarding the production volume, unequivocal identification of products, the country of consignment and adequate remuneration to the patent owner as provided by the TRIPS agreement (Article 31(h)). Many obligations are laid down in the declaration for preventing misuse of the CI provision. This includes the detailed notification from the eligible country and its intention to grant compulsory license. The exporting country must ensure that only the required quantity of medicines is manufactured and is limited to the eligible importing countries. The exporting country is also required to notify the details the CI to the TRIPS Council and has to publish it in the designated website. The exporting country is also under the obligation to take steps to prevent the diversion of the

[12]Article 31(e)
[13]Article 31 (i)
[14] Article 31 (f)

trade by re-exporting of the products. These cumbersome obligations and procedures again nullified the objectives of CI.

Compulsory licensing was believed to be a flexibility that helps consumer to regain her legitimate rights. But the clarity of the legal instrument that should be used for differential pricing and market segments is unclear (Mashelkar 2002:321). The substance of the provision is defeated by the non-allowance of the product into other countries. Most of the developing countries are ill equipped in technological and manufacturing facilities. So to get rid of this it can be manufactured in the country that owns facility. Article 31 of the TRIPS took this opportunity. Most of the African countries are in need of medicines and they lack the facility for the manufacture of costly medicines.

The changes in the draft excluded the developing country. It took away the flexibility provided under Paragraph 4[15] of Doha Declaration. The delay in procedures has again resulted in the non-use of this mechanism by developing countries. Thus here again the producer is the winner. The paragraph defeats the purpose for which it was amended. These rights of compulsory licensing and parallel importing are impaired due to the provisions in FTAs. The FTAs lay down restrictive exhaustive principles which prevent the approval of drugs. They insist for the consent and acquiescence of the patent owner for compulsory licensing and parallel importing. So a State member to the FTAs finds it problematic to override these provisions.

V.7 Conclusion

The case study of TRIPS agreement was selected due to its gross violation of consumer rights. Most of the fundamental rights of the consumer including safety is affected due the stronger implementation of TRIPS agreement. The stricter IP enforcement also leads

[15]Paragraph 4 of Doha Declaration: "the agreement should be interpreted and implemented in a manner supportive of WTO Members right to protect public health and , in particular, to promote access to medicine to all"

to gross violations of consumer rights. These violations affected the sectors including health and education.

The Indian Patent Act of I970 efficiently balanced the rights of consumers and producers. There was sufficient space in the Act to maintain the rights of the consumers. However, these were removed due to introduction of TRIPS agreement. Today the rights of the producers or manufactures eclipse the rights of the consumers.

The basic problem is the marginalization of the interests of the consumers for the protection of the private rights. The patenting of genetically modified products and life saving drugs points towards this direction. Unlimited patenting of genetically modified products will result in the deprivation of right to safety of a consumer. Indirectly it will affect the availability of food products to the consumer. The economic rights of the consumer will also be questioned by the rising food prices.

Another big problem is related to the patenting of the life saving drugs. Presently there is acute scarcity for drugs in African countries for HIV, AIDS and other cardiovascular diseases. This right to availability is affected due the increased patenting of the life saving drugs. Earlier many countries refrained from granting patent to the medicines. The consequences of the strong patent regime have resulted in the violation of many rights of consumers of developing countries. Instead of lowering these rules the developed countries has turned to initiate stronger rules for infringement.

There are many recommendations given by experts in saving the rights of the consumers. According to Srinivasan (2000) there are three ways to alleviate the impact of TRIPS agreement. This consists of retaining the price control of drugs, acquiring hard-core technologies for developing our research capacity and reinterpreting and renegotiating the WTO TRIPS agreement. According to Oxfam the developing countries should reject the TRIPS plus formulas initiated by the developed countries. It also recommends for

promoting generic competition in national medicine policies and using the flexibilities in TRIPS agreement.

A stronger cooperation between the Asian and African countries will help in reducing the monopoly of producers. The asymmetrical structure of the many countries makes it difficult to attain hard-core technologies in near future. Reducing the south-south divide will help in ensuring the rights of consumers in developing countries.

CHAPTER VI

CONCLUSIONS AND RECOMMENDATIONS

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CONCLUSION AND RECOMMENDATIONS

The WTO was established with the aim of encouraging open and fair trade in the world economy. For this purpose, the WTO has established rules and procedures to regulate international trade. The rules and procedures were formulated for the well-being of the producers, exporters and importers who conduct their business. On the other hand, international trade affects the choice of goods available to consumers and the prices they have to pay for them. The consumers in both developed and developing country face this situation. However, the impact is more on consumers in developing countries due to the low incomes of large sections of the population. In other words, major sections of the consumers in the developing countries are struggling to attain their economic rights. In these circumstances, there is a need for a balance of interests of consumers and producers in the WTO.

The objective of consumer protection has however received scarce attention in the WTO. There are of course some provisions in the WTO that deal with consumer participation and protection. The agreements that carry consumer friendly provisions include the WTO related domestic regulatory agreements (anti-dumping agreement, safeguard agreement and SCM agreement) and health related agreements (SPS Agreement and TBT Agreement). The WTO domestic regulatory agreements require an investigation process by national authorities before imposing any countervailing measures. There are provisions for the participation of *interested parties* in these investigation processes. The definition of *interested parties* mainly includes an exporter or foreign producer, the importer of a product subject to investigation, the government of the exporting Member or a producer of the like product of the importing Member. However, the consumer organizations or industrial users (consumers) are not included in the definition of *interested parties*. This impairs the interests of the consumer organizations in availing the rights enjoyed by *interested parties*. Presently the industrial user and the interested

parties are divided into two categories. The *interested parties* enjoy defined rights like giving oral evidence, having access to the documents of investigation etc. On the other hand, the industrial user or consumer organizations are presented with a conditional privilege. An industrial user or consumer organization can take part in investigation process only if the 'product is commonly sold at the retail level'. Furthermore, the investigation process is initiated if it is supported by those domestic producers whose collective output constitutes more than 50 percent of the total production of the like product produced by that domestic industry. However, consumers have no such right. The producer centric approach of the WTO is also visible in the case of provisional measures imposed against the importing firms to prevent injury caused during the investigation process of the WTO domestic regulatory agreements. These pre-emptive measures affect the interests of the consumers. Most of the consumer related provisions are written in soft law language and are essentially used for giving legitimacy to the actions of the producers. For example, the provisions regarding participation of consumer organizations are used to legitimize the act of imposing anti-dumping duties by the member countries. There has been no change in the attitude of the WTO even after massive demonstrations in Seattle and in the course of the Doha Round.

The SPS and TBT agreements are two important agreements that are crucial for consumer protection. The agreements do set out the basis for setting standards for foods and non-food products used by the consumers. There are however no express provisions relating to consumer participation in the agreements. The ultimate aim of the agreement is to prevent the protectionist measures of Member States from impeding international trade. The SPS Agreement gives the Member States right to take SPS measures based on certain conditions. The rights of the countries to protect their consumers are thus fettered to some extent. Important achievement in the SPS Agreement for consumers was the adoption of precautionary approach. The precautionary approach helps the Member States to take necessary sanitary and phytosanitary measures in cases where relevant scientific evidence is insufficient. This will help the Member States to protect the rights of the consumers. Presently there are many debates in international level regarding the

application of precautionary principle. The DSB has interpreted Article 5.7 of SPS Agreement in many cases.

The interpretations given by the DSB regarding Article 5.7 is generally not in favor of consumers. Article 5.7 provides requirements for Members before adopting 'provisional measures' to address such risks. The DSB has discussed the issue of precautionary approach, directly or indirectly, in four major the WTO cases. In *Japan-varietals* case the Appellate Body held that the four conditions should be met to apply the provisional measures. The dispute was regarding the Japanese regulation which prohibited the entry of certain fruits that could harbor the parasites of the codling moth. The Report of the Appellate Body made it clear that the insufficiency of scientific evidence alone was not sufficient to invoke Article 5.7 by the Member States. The sufficient scientific evidence was interpreted by the Appellate Body as the existence of a sufficient or adequate relationship between the SPS measure and scientific evidence. And this will vary from case to case. In other words, there is no definition of what constitutes 'insufficiency of scientific evidence'. In *Japan-Apples* case the issue of precautionary principle was again discussed. The dispute was related to Japanese SPS measure which restricted the import of US grown apples due to its introduction of bacteria called *erwinia amylovor* which caused 'fire blight' (a disease that affects apple trees). The Appellate Body noted that to avail Article 5.7 a Member State has to perform the risk assessment under Article 5.1. In addition to this the definition of 'new uncertainty and unsolved uncertainty' was left incomplete by the Appellate Body. In the *EC-Hormones* case one of the issues raised against the hormone ban by EC included the violation of risk assessment in the SPS Agreement. EC defended this by invoking the precautionary principle. EC's submission that the precautionary principle has become a general customary rule of international law was rejected by the Appellate Body. The same was again referred in the *EC-Biotech* case. Thus, the freedom of the Member States to protect the health of consumers by restricting the entry of dangerous products through the application of precautionary approach was not appreciated by DSB. This approach impairs the rights of States from providing the right to safety to their consumers. Apart from this there are many challenges related to science-based risk assessment system in the SPS Agreement. The lack of scientific and

technical training of the WTO panelists who analyze the SPS risks again interferes with the right to safety of the consumer.

Another problem is related to the participation of consumer organizations in the decision making structure of the WTO. Presently the consumer organizations are allowed to participate only in the meetings of Ministerial Conferences. Moreover, the participation is limited to 'observer' status. The consumer organizations do not have the right to offer suggestions in the meetings. The participation of consumer organizations in the General Council and other Councils and Committees is absent. The General Council does not properly utilize the consultation process, which is envisaged in Article V.2 of the Agreement establishing the WTO. There is also no active participation of the consumer organizations in the international standard setting institutions like Codex, ISO and IEC. The reasons for the lack of participation differ from institution to institution. Despite its accreditation process for civil society organizations, there is lack of transparency in the Codex. The organization is not allowing or encouraging the participation of consumer organizations. The inactive state of Trust Fund of the Codex confirms the discouraging attitude towards the developing country consumer groups. On the other hand, there is appropriate representation of producers due to the backing of multinational companies. This indirectly influences the standards Codex formulates. The producer groups overcrowd most of the committees that deal with health standards. In these circumstances, the limited participation of consumer organizations is to the detriment for the interests of consumers. The other two sister institutions (ISO and IEC) do not have an accreditation process for civil society organizations. Here the issue is 'direct stakeholder participation'. However, the national delegations rarely reflect the problems of consumers.

Another issue is related to consumer protection in the Dispute Settlement System. Consumer interests do not seem to be adequately represented in disputes. This is despite the fact that most of the cases that come before DSB are somehow related to consumer interests. The only case where the proposition of consumer organizations was taken into

consideration was the *EC-Sardines* case. The dispute was related to EC ban on the Peruvian imports made out of a species of sardine. EC defended the SPS measure taking the justification of consumer protection. In this case the UK Consumers' Association intervened by writing to the Peruvian delegation in Geneva that the measure was not in the interests of the European consumers. Finally Peru won the case, as the Panel accepted the letter in support of their position. This case proved that the consumer organizations will be helpful in finding out the protectionist measures of the Member States. Most of the cases in DSB are adjudicated from a producer centric approach. The GATT Panel was also not different regarding consumer protection. The producer centric approach of GATT Panel was very much visible in the *Thailand-Cigarettes* case. The dispute related to the Thailand ban of US imported cigarettes in the country. The Panel held that the ban imposed by Thailand was inconsistent to Article XX(b) of the GATT agreement, 1947. It also did not take into consideration the report submitted by WHO regarding the dangerous impact of American cigarettes on Thai consumers. Thus the health and safety of the consumers was neglected by the GATT Panel to uphold the interests of consumers. Later this approach of the DSB was reinstated in *EC-Biotech* case. The dispute related to the EC ban on the approval of biotech products into the European markets. The complainants in the case were US, Canada and Argentina. The biotech products were not given approval due to insufficiency of scientific evidence. However, the Panel held that the EC ban was not consistent with SPS measures. The Panel deliberately avoided the question of impact of genetically modified products on consumer health. These case laws illustrate the lack of protection of consumer interests in the DSB. To challenge the interests of producers there should be effective participation of consumer organizations in the DSB. The financial dependency and strong organizational power of producer groups helps in undermining consumer protection in DSB. The legal representation in DSB is very expensive. This is one major reason for lack of effective consumer participation in DSB. Until now not even one consumer organization has come up with *amicus curiae briefs*. The producer groups are backed by strong multinational companies to present their case in DSB. Therefore, there should be certain funding from the WTO for representing consumer interests in the DSB.

Finally, the case study of TRIPS agreement reveals the lack of consumer friendly laws in the WTO. The impact of intellectual property rights on consumer interests is enormous. Strong IPR laws have great impact on the life of consumers. They affect basic needs like education, health, and food. This impact is not seriously addressed in the agreement. The agreement upholds the private rights at the expense of public. The agreement entitles many flexibilities and room for interpretation. However, until now these flexibilities are interpreted according to the needs and interests of the producers. The WTO Doha Ministerial Declaration on TRIPS Agreement and Public Health Para 6 is a good example for this. The declaration which came into existence after many rounds of negotiation put undue burden of obligations on the part of exporting countries. The declaration was initiated for exporting life saving drugs to developing countries which lacked technology. But the developing countries are reluctant in commencing this due to its cumbersome conditions. Most important impact for consumers is in the patenting of life forms and in the product patenting of life saving drugs. A strong IPR regime is initiated to promote the welfare of producer community. These strong rules rarely address the problems related to disclosure of patent and all. They focus on the infringement and stringent rules to punish consumers. The definition of counterfeit is expanded to include the civil trademark infringement and patent infringement. In addition, this expanded definition includes the legitimate generic medicines. These initiatives of the developed countries point towards the overwhelming support given to the producers at the expense of consumer protection. The implementation of TRIPS plus agreements is limiting the flexibilities provided by TRIPS agreement. Thus the raising producer centric nature of TRIPS agreement leads to the marginalization of the rights of consumer in the WTO.

As analyzed above the problem of the lack of participation in the WTO related domestic regulatory agreements can be solved through the incorporation of a public interest clause. The incorporation of public interest clause in the WTO Antidumping Agreement will oblige the Member States to incorporate the same in their national legislations. In addition, the mandatory provisions will guarantee the rights of the consumer organizations. The consumer should be included in the definition of interested parties.

This will help in attaining the rights conferred on the interested parties by the AD agreement.

As suggested by the consumer rights advocates the only solution for consumer participation in decision-making process of the WTO is to provide accreditation procedures for consumer organizations in the WTO. This will also ensure in making the WTO accountable for its activities. The three organs of the WTO should be open to consumer organizations. The General Council should consult with consumer organizations in matters regarding consumer protection. There should also be active and stable participation of consumer organizations in the international standard setting organizations. The participation should be ensured through financing the consumer organizations from developing countries. The SPS and TBT agreements should be amended to include mandatory provisions regarding the participation of consumer organizations.

The present attitude of the DSB towards the *amicus curiae briefs* should be reformed. Most of the *amicus curiae briefs* presented before the DSB have been rejected. They should be taken into consideration for these organizations can inject consumer perspectives into disputes. The present stand of DSB puts doubt on its rule-oriented approach. DSB should act as a platform in balancing the interests of consumers and producers.

The effort of the developed countries to bring stringent IPR laws should be stopped. The flexibilities of the TRIPS agreement should be properly used by the countries to protect consumer interests. In addition, the Global North should cooperate to compensate the deficiencies in technologies of the developing countries. The incorporation of consumer friendly laws is not against the objectives of the WTO law. It will only help in promoting international trade through balancing the interests of consumers and producers.

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ANNEXURES

ANNEXURE-I

MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, 1995

REFERRED PROVISIONS

Preamble

The *Parties* to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system.

Annex

AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Article 6

Evidence

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.[1] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters[2] and to the authorities of the exporting Member and shall make it available,

[1] As a general rule, the time limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

[2] It being understood that, where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association.

upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.

6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[3]

[3] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

6.5.1 The authorities shall require interested parties providing confidential information to furnish no confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[4]

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made

[4] Members agree that requests for confidentiality should not be arbitrarily rejected.

on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

6.11 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

(ii) the government of the exporting Member; and

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

Annex

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Article 12

Evidence

12.1 Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

12.10 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidization, injury and causality.

Article 19

Imposition and Collection of Countervailing Duties

19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties[5] whose interests might be adversely affected by the imposition of a countervailing duty.

Annex

AGREEMENT ON SAFEGUARDS

Article 3

Investigation

1. A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not

[5] For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.

the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

Annex

AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

Members,

Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade;

Desiring to improve the human health, animal health and phytosanitary situation in all Members;

Noting that sanitary and phytosanitary measures are often applied on the basis of bilateral agreements or protocols;

Desiring the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade;

Recognizing the important contribution that international standards, guidelines and recommendations can make in this regard;

Desiring to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and

recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health;

Recognizing that developing country Members may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary or phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard;

Desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX (b)[6];

Hereby agree as follows:

Article 1

General Provisions

1. This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.

2. For the purposes of this Agreement, the definitions provided in Annex A shall apply.

3. The annexes are an integral part of this Agreement.

[6] In this Agreement, reference to Article XX(b) includes also the chapeau of that Article.

4. Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement.

Article 2

Basic Rights and Obligations

1. 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.

2. 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, except as provided for in paragraph 7 of Article 5.

3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

4. Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

Article 3

Harmonization

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.

3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.[7] Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

4. Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.

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[7] For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

5. The Committee on Sanitary and Phytosanitary Measures provided for in paragraphs 1 and 4 of Article 12 (referred to in this Agreement as the "Committee") shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.

Article 5

Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection

1. Members shall 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 organizations.

2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

5. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

6. Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.[8]

7. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

8. When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant

[8] For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure.

Annex

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

Article 7

Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8

Principles

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Article 27

Patentable Subject Matter

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.[9] Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

Article 30

[9] For the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively.

Exceptions to Rights Conferred

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

Article 31

Other Use Without Authorization of the Right Holder

Where the law of a Member allows for other use[10] of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

(a) authorization of such use shall be considered on its individual merits;

(b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

(c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-

[10] "Other use" refers to use other than that allowed under Article 30.

commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;

(d) such use shall be non-exclusive;

(e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

(f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

(g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

(i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive

practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;

(l) where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent"), the following additional conditions shall apply:

(i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;

(ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and

(iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

ANNEXURE II

DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

Adopted on 14 November 2001

1. We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.

2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.

3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.

4. We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:

In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.
Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.
Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

6. We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

7. We reaffirm the commitment of developed-country Members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country Members pursuant to Article 66.2. We also agree that the least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least-developed country Members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement. We instruct the Council for TRIPS to take the necessary action to give effect to this pursuant to Article 66.1 of the TRIPS Agreement.

ANNEXURE III

GUIDELINES FOR ARRANGEMENTS ON RELATIONS WITH NON-GOVERNMENTAL ORGANIZATIONS

Decision adopted by the General Council on 18 July 1996

I. Under Article V:2 of the Marrakesh Agreement establishing the WTO "the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO".

II. In deciding on these guidelines for arrangements on relations with non-governmental organizations, Members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs.

III. To contribute to achieve greater transparency Members will ensure more information about WTO activities in particular by making available documents which would be derestricted more promptly than in the past. To enhance this process the Secretariat will make available on on-line computer network the material which is accessible to the public, including derestricted documents.

IV. The Secretariat should play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate. This interaction with NGOs should be developed through various means such as inter alia the organization on an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO.

V. If chairpersons of WTO councils and committees participate in discussions or

meetings with NGOs it shall be in their personal capacity unless that particular council or committee decides otherwise.

VI. Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.