

THE WTO AGREEMENT AND THE RIGHT TO HEALTH: CONFLICT OR CONSENSUS? A DEVELOPING COUNTRY PERSPECTIVE

*Shameek Sen**

I seek to delve deep into a problem area of the modern International Trade Jurisprudence – an issue of immense implications for the Developing World in particular, and all the nations of world in general. The issue is to ascertain how and in what ways has the globalization process and the ongoing Free Trade Regime affected Public Health – recognized as a basic Human Right. The necessary question to be addressed would be whether the International Trade regime needs to, and if yes, how much, care about the Human Rights Law, or, for that matter, any other principle of Public International Law principle? In answering this question, Health will be taken as a pointer which would indicate the WTO's intent of addressing this Right through the various covered Agreements, and seek to address in the process the oft-emerging question of the co-relationship between the two apparently conflicting ideals of Human Rights protection and Free Trade.

I. INTRODUCTION

The importance of Right to Health, or so to say, all Economic, Social and Cultural Rights, vis-à-vis the universally perceived necessity of a Free Trade Regime – that is what has been an intriguing facet of any discourse of International Law or Politics for a large part of the last decade of the last century. On one hand was the felt need for more and more of food, shelter and clothing, on the other hand was the enormous quest to bring the whole world under one trading umbrella where, if the need be, nations would be made to forego lots in order to achieve little – that is what the Single Entry Undertaking of the World Trade Organization stood out to be. Here and there, there were concessions thrown in inside the substantive

* Lecturer in Law, W.B. National University of Juridical Sciences, Kolkata.

contents of the various Agreements, as well as the wordings of the Doha Declaration, more as benevolent alms rather than as a result of a justified claim of substantive equality. However, one seemed to disregard, arguably willfully, that the WTO Agreement, as well its constituents, was born not out of vacuum, but into a global legal space already containing well-defined dicta of Human Rights. Hence, it would not have been possible for one Agreement, one system, to change everything all at once. One would need to build a jurisprudence by *contracting out* or by creating a *lex specialis* regime, as the case might be. This Article poses a question mark to that basic premise of the WTO jurisprudence, insofar as its interaction with the International Human Right to Health is concerned.

This Article is divided into five different parts. After Part I that outlines the key logical strand of the paper, Part II outlines the universal acceptance and recognition of Right to Health as an International Human Right. Part III seeks to look into the substantive contents of the WTO Agreements insofar as they pertain to the Right to Health, and their inherent difficulties in implementation, which are prevalent in more cases than not. Part IV seeks to reconcile the two sets of laws apparently moving in two different directions, by looking into different rules of Treaty Interpretations. Finally, Part V provides a summary of the arguments advanced in course of the Article and tries to answer the questions posed in course of it.

II. 'RIGHT TO HEALTH' AS AN INTERNATIONAL HUMAN RIGHT

Right to Health is internationally recognized as an Economic, Social and Cultural Right, which the countries are mandated to provide to their citizens in a non-discriminatory fashion. This is mandated by both International Human Rights documents and positive constitutional and other legal principles as prevalent in the individual countries.

Health is defined in the Constitution of the World Health Organization as “*State of Complete Physical, mental, and social well-being and not merely the absence of disease or infirmity.*” The UDHR states, “*Everyone has the right to a standard of living adequate for the health and well-being of himself and his family*”.¹ According to the ICESCR², “*The States Parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*”. The Declaration of Alma Ata (1978) declares that Health is a Fundamental Human Right and that the attainment of the highest possible level of health is a most important worldwide social goal whose realization requires the action of many other social and economic sectors in addition to the health sector. The Ottawa Charter for Health Promotion (1986) stressed the need of

¹ Universal Declaration of Human Rights, Dec. 10, 1948, art.25(1), <http://www.un.org/Overview/rights.html>.

² International Covenant of Economic, Social and Cultural Rights, Dec. 16, 1966, art.12(1), <http://www2.ohchr.org/english/law/pdf/cesr.pdf>.

Health Promotion. In addition, Human Rights Instruments for specific groups of people (CERD, CRC, CEDAW) stress the need for Healthcare and Health Protection for those particular groups. Even, State Practice shows the recognition of this Right as a paramount Human Right. In India, although a Directive Principle of State Policy, a duty is cast upon the State to implement adequate healthcare measures by expansion of Article 21 of the Constitution of India to include Right to Health³. Thus, there is adequate recognition of Right to Health as an enforceable Human Right. Moreover, the many of the principles of the UDHR being recognized as Customary International Law by virtue of extensive State Practice and *opinio juris*, its provisions are binding on all states unless they are ‘contracted out’ by Treaties.

Thus, it can be said that the positive responsibilities of the individual jurisdictions of making commitments towards the utmost procurement of the highest attainable levels of Public Health has been adequately highlighted.

III. WTO PROVISIONS PERTAINING TO HEALTH AND ITS PROTECTION

The question that appears here is very obvious – how much is the World Trade Organization, a body that has been universally regarded as Trade Facilitators and Liberalizers only, sensitive towards the issues pertaining to Public Health? A discussion on the provisions and analyses of the provisions of the different Agreements covered within the ambit of the WTO Agreement will throw some light on the issue.

A. GENERAL AGREEMENT ON TARIFFS AND TRADE

The General Exceptions to the GATT Obligations envisages, in A/XX (b) of the GATT⁴, that Measures necessary to protect human, animal or plant health can be excepted from the requirements of complying to the General GATT

³ See *Paramanand Katara v. Union of India* AIR 1989 SC 2039; *Paschim Banga Khet Mazdoor Samity v. State of West Bengal* (1996) 4 SCC 37.

⁴ “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (c) relating to the importations or exportations of gold or silver; (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; (e) relating to the products of prison labour; (f) imposed for the protection of national treasures of artistic, historic or archaeological value; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with

obligations of Most Favoured Nation (A/I), National Treatment (A/III) and Elimination of Quantitative Restrictions (A/XI). However, the imposition of a A/XX(b) restriction is not very easy since it has to satisfy few very essential conditions.

First, the Measures have to be *necessary*⁵ to protect human, animal or plant health' as opposed to 'measures relating to conservation of exhaustible natural resources...'⁶, which A/XX(g) compliance requires. This is clearly indicative of the higher degree of proof needed to be adduced by a country to justify its A/XX(b) measure, since a conformation to the *principle of necessity* becomes necessary. The Principle of Necessity essentially demands a clear and cogent proof that the impugned measure was indeed *necessary* and no other measure taken under the similar fact situations could have existed that would have been lesser GATT-inconsistent than the impugned one. In other words, the said GATT measure should be "*least GATT-inconsistent*"⁷, as aptly illustrated in *Thailand Cigarettes Case*⁸, *US Gasoline Case*⁹ and a host of other landmark Trade-Environment Cases. Thus, the members of the Dispute Settlement Body, from way above, tend to sit in judgment to ascertain whether there could be other less GATT-inconsistent measures that were '*reasonably available*' under the given circumstances. If not anything else, one can easily say that the ground realities that had gone into a country's decision-making process often go unnoticed and

restrictions on domestic production or consumption; (h)undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the Contracting Parties and not disapproved by them or which is itself so submitted and not so disapproved; (i)involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non discrimination; (j)essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The Contracting Parties shall review the need for this sub paragraph not later than 30 June 1960." See General Agreement on Tariffs & Trade, Oct. 30, 1947, art.XX, 55 U.N.T.S. 194 [hereinafter GATT 1947].

⁵ Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, BISD 37S/200, Report of the Panel adopted on 7th November 1990, http://www.wto.org/english/tratop_e/dispu_e/90_cigart.wpf [hereinafter Thailand-Cigarettes].

⁶ United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, Report of the Appellate Body adopted on Apr. 29, 1996, http://www.wto.org/english/tratop_e/envir_e/gasoline.wp5 [hereinafter U.S.-Gasoline].

⁷ See Thailand-Cigarettes, *supra* note 5.

⁸ *Id.*

⁹ See U.S. Gasoline, *supra* note 6.

unaddressed at the DSB, but, unfortunately, that's the way it is – very often judgmental, subjective and hegemonic, unconcerned with the humane issues that can at all exist under a Global Trade Umbrella.

Moreover, there is an enormous procedural difficulty in application of the said measure, since the measure also has to satisfy the requirements of the Chapeau: that there is no *arbitrary or unjustifiable discrimination between countries where the same conditions prevail*, and the measure is not a *disguised restriction on international trade*¹⁰. Both these tests have to be satisfied in conjunction, thus outlining the reason due to which even apparently foolproof pro-environment measures could be held as unjustifiable.

However, despite the stringency in the operation of A/XX(b), there have been other leeways that have been forcefully opened up by the DSB itself through which beneficial interpretations protecting the pro-health and/or pro-environment measures can be held tenable. Although unadopted, the *Tuna-Dolphin* Decision by the Panel¹¹ is very important because in it, the Panel did not expressly overrule an A/XX(g) measure on the basis of its Extraterritorial Application. A positive assertion and extension of the same followed soon in the Appellate Body Decision in *Shrimp-Turtle*¹² by not dismissing unilateral measures aimed at protection of the global health and environment, provided that these procedural safeguards like prior consultations with parties concerned, etc. are fully complied with.

Another notable decision in this regard is the one by the Appellate Body in the *EC Asbestos Case*¹³ where '*Health Hazard*' was identified as a criterion for distinguishing two products as *unlike products*. This case is notable because it categorically asserted the Sovereign Right of each member country to decide on the level of protection that should be made available to its people. Moreover, member states are not obliged to follow the majority scientific opinion when it comes to health policy. Although this decision can be looked at as the WTO's aim at garnering popular support after the failure of the Seattle Ministerial Talks owing to protests by the Environmentalist Groups targeting the WTO as an Anti-Environment Organization, since the clarity and quantum of the scientific opinion in this case could unerringly point at the sustainability of France's health-protectionist measure.

¹⁰ United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, Report of the Appellate Body adopted on October 12, 1998, http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf [hereinafter *Shrimp Turtle*].

¹¹ United States – Restrictions on Import of Tuna, DS21/R - 39S/155, not adopted, Report of the Panel circulated Sep.3, 1991, 30 I.L.M. 1594 (1991) [hereinafter *Tuna Dolphin I*].

¹² See *Shrimp Turtle*, *supra* note 12.

¹³ European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted on March 12, 2001, http://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf [hereinafter *EC-Asbestos*].

B. AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES

This is a Specific (Annex 1A) Agreement with Standards that are more stringent than the GATT (A/XX) standards. According to the Interpretative Note to Annex 1A, this Agreement is to prevail over the GATT provisions, if at all a situation arises when a conjunctive reading of both is necessary.

The Objective of the SPS Agreement is primarily Food Safety and Prevention of Plant and Animal carried Diseases (*zoonoses*), as well as minimizing negative trade effects. However, there is a view linking it to the Negotiations leading upto the drawing up of the Agreement on Agriculture in the Uruguay Round of Multilateral Trade Negotiations, 1994. It is argued that considering the possibility of the Countries using non-Tariff barriers to protect Domestic Agriculture following the lowering of Agricultural Tariff in the AoA, the SPS Agreement, with stringency written all over it was negotiated.

The SPS Agreement also requires the impugned measures to satisfy a Test of *Necessity*, in this case assessed by International Standards, such as those set by the *Codex Alimentarius* in case of Products, and so on¹⁴. The Standard of protection envisaged in the SPS measure can be more than international standards, but a *scientific justification* for the same is required¹⁵. This Scientific Justification requires Sufficient Scientific Evidence. In absence of this Sufficient Scientific Evidence also, the member may use provisional measures, but they have to be for a reasonable time only¹⁶.

In *EC Beef Hormones Case*¹⁷, the Panel had held that the impugned measures were not in conformity with the international standards or the standards followed in other countries. However, the AB ruled in favour of the possibility of having a more stringent standard than the internationally recognized standard, but subject to proper *Risk Assessment* (not in the scientific laboratory, but in the real world) and establishment of a *rational relation* between the impugned measures and the risk assessment. None of these was done properly in the instant case where the AB held that a Precautionary SPS measure will not be valid unless it is preceded by satisfaction of the two conditions given above.

¹⁴ The WTO Agreement on Sanitary & Phytosanitary Measures, Apr. 15, 1994, art.3.2, [hereinafter SPS Agreement]. Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND VOL. 1: 33 I.L.M. 1140 (1994) available at http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

¹⁵ SPS Agreement, *supra* note 14, art.3.3.

¹⁶ SPS Agreement, *supra* note 14, art.5.7.

¹⁷ EC – Measures Concerning Meat and Meat Products, WT/DS26/AB/R and WT/DS48/AB/R, adopted on 16th January, 1998, <http://docsonline.wto.org/DDFDocuments/t/WT/DS/26ABR.WPF> [Beef Hormones Case].

A cursory reading of the said provisions will lead one to the impression that the provisions are all very justified, but a deeper look will point to a different picture. Let us envisage a situation where a country's SPS measure is one that is in excess of the international standards, and that there is no sufficient scientific evidence justifying such imposition immediately at the time of imposition of the SPS measure. This necessarily means that the country is entitled, by virtue of the Agreement, to use a provisional measure. But this provisional measure is to be used for a *reasonable time* only, a span not defined in the books of law. A reasonable prudent man's perception of *reasonable time* would be that it must be one year, or, at the most, two years. However, this artificial construction of *reasonable time* may not hold ground of any nature, when it comes to microbes that might take an eternity to germinate and propagate its harmful nature of disease-causing and the like.

This stringency of dealing with both imposition and satisfaction of the Requirements of a SPS measure entails an enormous difficulty for a Developing Country, which finds it difficult meeting standards of the importing country as well as setting their own standards of SPS compliance.

C. AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Like the SPS Agreement, the TBT Agreement also requires the measures complying by the standards of *Necessity* and *appropriateness* – that the measures should not be creating unnecessary obstacles to international trade¹⁸, and should be for a *legitimate objective*¹⁹. *Legitimate Objective* in the TBT Agreement means, *inter alia*, protection of human health or safety, animal or plant life or health²⁰. The relevant elements of consideration required to ascertain whether a TBT measure is justifiable is, *inter alia*, available scientific and technical information²¹.

The Standard of Regulation in the TBT Agreement is less rigorous than the SPS requirements insofar as no express scientific risk assessment or scientific basis requirement and international standards merely recommended, and not mandatory. There is no prior publication or notification requirement during urgent problems of health, etc., thus making the application of such a measure easier than its SPS counterpart.

¹⁸ The WTO Agreement on Technical Barriers to Trade, Apr. 15, 1994, art.2.2, Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND VOL. 1; 33 I.L.M. 1140 (1994), available at, http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

D. GENERAL AGREEMENT ON TRADE IN SERVICES

This Agreement is very important from the perspective of the Developing Countries who are notable suppliers of cheap and efficient services (e.g. – India). Under GATS, Member countries enter into legally binding ‘*positive commitments*’²², thereby creating an option in favour of the National Jurisdictions for exercise of discretion for domestic policy options and constraints. Thus, there is a policy option for countries whether or not to commit to *Market Access* or *National Treatment* in individual sectors, as also to set internal standards, licensing requirements, qualifications etc., provided that the commitments are applied on a MFN Basis.

However, the Developing Countries hardly stand to gain even from such an Agreement where there is an ample room for exercise of discretions and policy choices, by the Strategies adopted by Developed Countries who tend make no limitations on Consumption Abroad, however, show reluctance to make commitments on cross-border supply of services, on Technical Feasibility Grounds, and often put foreign equity ceilings on Commercial Presence. Thus, basic purpose of having *Positive Commitments* is lost.

Still, the GATS provides some Positives for Developing Countries, including Lowering of import barriers to bring in drugs, equipments etc, and inward direct investments through Modes (2) and (3) (*Consumption Abroad* and *Commercial Presence*).

But, one should not for once disregard the Negatives for Developing Countries which the GATS often tend to create, including an enormous increase in Public Sector Costs due to more Privatization, more and more *Brain Drain*, etc.

Thus, if one eulogizes the GATS with the expectation that this Agreement would enable a global and universal access to Healthcare Services, it is contended that such an aspiration can at best be called a glorified myth, in view of the practices of the Developed Nations who tend to avail themselves of all services of the world, at the cost of utter impoverishment of the Third World economies.

²² General Agreement on Trade in Services, Apr. 15, 1994, arts.XVI, XVII, Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1B, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND VOL. 1; 33 I.L.M. 1140 (1994), available at http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm.

E. AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

The TRIPS Agreement is largely aimed at enforcing monopoly control by the Patent holder – thereby raising costs and seriously jeopardizing Access to Drugs by Developing Countries and LDCs.

A/8(1) and A/27(2) of the TRIPS expressly enable State Parties to adopt measures *necessary* to protect Health, subject to consistency with the provisions of the TRIPS. Moreover, there are general exceptions to patentability on grounds of *ordre public*, National Security, etc. Thus, there arises a situation of conflict between the *Private* – the Holder of the Patent, and the *Public* – Public Interest, a paramount consideration of all States. In this context, it is argued that²³:

- IP Protection is a Human Right (Just Reward for Labour), but it has to be subject to public interest.
- TRIPS does not directly address universal concerns like Right to Health.
- Thus, TRIPS, as it stands, is violative of Human Rights.

The Doha Declaration on TRIPS and Public Health (2001)²⁴, a landmark development in the field of Globalization and Public Health Jurisprudence, stressed the need for:

- Promoting Access to existing Medicines.
- Research and Development into new medicines.
- Establishing relationship between the TRIPS and, *inter alia*, Convention on Bio Diversity, protection of Traditional Knowledge and Folklore, etc.
- TRIPS Council to take into account Development Dimensions.
- Countries to take measures *they consider necessary* to protect health. – Flexibility to the developing world to make beneficial interpretations.

²³ See generally UN SUB COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (2000). E/C 12/2000/12, 3rd October 2000 at [http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/951444022ab674cbc1256999005aadbo/\\$FILE/G0044783.pdf](http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/951444022ab674cbc1256999005aadbo/$FILE/G0044783.pdf).

²⁴ See Declaration on TRIPS and Public Health, adopted by the WTO Ministerial Conference, Doha, Nov. 2001, WT/MIN(01)/DEC/2.

- *In applying the customary rules of interpretation of public international law*, each provision in TRIPS to be read in the light of the object and purpose of the Agreement.
- Each member would have the right to grant compulsory licenses, and freedom to determine the grounds upon which such licenses would be granted.
- Each member would have the freedom to determine what constitutes a national emergency, or a matter of extreme urgency.
- Special sops to LDCs including technology transfer, non-requirement of enforcement of Patent Regime till 2016, etc.

Thus, one can look at the Doha Developments as a positive step in preventing the monopolization of the Drugs industry, and ensuring the protection of Developing Country interests in the Drug Trade, with a view to achieve the best possible healthcare standards in all domestic domains, by virtue of an well-aspired transnational consensus. However, Doha Declaration, however well-intentioned it might be, is merely *Soft Law* - with words like *recognize*, *agree*, *affirm* and *reaffirm*, thereby meaning that this Declaration is not Binding on the Members, thus raising serious doubts about the its implementation, if ever. Still, the Declaration can be looked at a big step by Developing Countries to turn the wheel the other way round in terms of trying to strike a balance between the *Private* and the *Public* Interest.

F. THE OUTCOME

On analysis of the provisions of the different Agreements contained in the WTO Framework, it can be safely said that the individual countries' independence has been curtailed to a large extent formulating policies on public health issues, since such a policy could mean curtailment or restriction of Free Trade, and would be immediately struck down by the DSB, whose members would sit down in judgment about the *necessity* and *viability* of such national value. On the other hand, the countries' commitments to the International Human Rights documents like the ICESCR would entail their taking *all appropriate steps within available resources* to ensure providing Right to Health to all. Moreover, the national Courts would also impose mandatory duties on the State for the same.

Of course, there are non-WTO measures that a country must take, for example, proper distribution of post-globalisation income increases (as, not doing so would further aggravate the inequities between the rich and the poor, ultimately affecting a universal access to healthcare). However, when it comes to the conflict between the WTO norms (many like the TRIPS already earmarked as being violative of Human Rights norms) and the instruments like the ICESCR, an apparent conflict looks imminent. Upholding one would mean hierarchising between two Treaties, or between a Treaty and a norm of Customary International Law (like the UDHR),

which is not allowable in Public International Law. This takes us to yet another intriguing question - whether the WTO Agreements are part of the larger Domain of Public International Law, or are they independent, 'self-contained' domains?

IV. WTO AND PUBLIC INTERNATIONAL LAW: INCLUSION OR INDEPENDENCE?

It is a Standard Rule of Public International Law that a Treaty is born into the Domain of General International Law (International Customs and General Principles), and the existing Treaty Law, and has to be read in their terms, unless the said Treaty specifically *contracts out*²⁵. Moreover, there can be no hierarchy between the General International Law and a Treaty, nor between Treaties²⁶. Only if there is a specific *Conflict Rule* envisaged in the body for covering instances of interpretational conflicts between two Treaties or Agreements, then such a *Conflict Rule* would prevail. Otherwise, a Treaty would be considered as a *continuing jurisprudence* upon existing rules of International Law. Putting it in perspective, the WTO Rules cannot override the existing General International Law – hence, a harmony needs to be achieved between them²⁷.

Looking at the issue in this perspective, it can be said that there can be different types of interphase between the WTO and non-WTO Rules²⁸: -

- When the WTO Norm *changes* or alters an identically internationally prevalent norm, like the Tokyo Round Codes. Here, the creation of a new norm would be very much allowable by the *Lex Posterior* Rule of Interpretation of Treaties.
- When the WTO Norm *adds* something that hitherto did not exist, like the *Non-Discrimination Principle* in Trade in Services.
- When the WTO Norms are *confirmatory* of existing Rules of International Law, like A/3.2 of the Dispute Settlement Understanding.
- Already existent non-WTO Rules that have impact on WTO Rules and have not been contracted out by the WTO Agreement. The two have to be read in conjunction.
- Non-WTO Rules that emerged post-WTO, that have impact on WTO Norms and do not contract out from it. A similar interpretation.

²⁵ See Joost, Pauwelyn, *The Role of Public International Law in the WTO: How far can we go?*, 95 AM. J. INT'L L. 535, 537 (2003).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

- A later norm which *contracts out* from the WTO framework. Then, it should be construed as a *Lex Specialis* and should be interpreted as the existing Law.

As regards Case (3), it should be noted that confirming some rules of Public International Law does not in any way mean that other rules are excluded from its ambit – the confirmation is just a matter of abundant caution. This interpretational trend can be noted in PCIJ/ICJ Decisions (*Chorzow Factory*²⁹, *South-West Asia Advisory Opinion*, *Electronica Sicula*³⁰, *Iran-US Claims Tribunal*) and in DSB Reports:

- “GATT is not to be read in Clinical Isolation from Public International Law.” – AB in *US Gasoline Case*³¹.
- “Customary International Law applies generally to the economic relations between WTO members...to the extent the WTO Treaty Agreements do not contract out of it.” – Panel in *Korea Government Procurement Case*³².

Looking at Case (4), one can conclude that all norms of Human Rights – UDHR, ICESCR etc. are contained in it, and have to be harmoniously interpreted. Thus, there is a presumption of continuity or against conflict in between the apparently dissimilar normative structures.

Even when there are apparent conflicts in interpretation, reliance on the Vienna Convention on Law of Treaties, 1969 as existing customary rules of interpretation of Public International Law³³, are adequate evidences of the WTO being subservient to the broader domain.

The WTO Dispute Settlement Body has a Compulsory Substantive Jurisdiction on *Claims-Specific* Basis (claims made under the *Covered Agreements* only – thus, even Ministerial Declarations cannot be grounds on whose violation claims can be brought)³⁴. Thus, Bilateral Agreement between members cannot be subject-matter of claims in the WTO.³⁵

²⁹ Case concerning the Factory at Chorzow (Ger. v. Pol.), 1927 PCIJ (Ser. A) No. 9.

³⁰ Case concerning Eletronica Sicula SpA (USA v. Ita.) (1989) ICJ Rep 15.

³¹ See *supra* note 7.

³² Korea – Measures Affecting Government Procurement, WT/DS163/R, Report of the Panel adopted on 19th June, 2000, <http://docsonline.wto.org/DDFDocuments/t/WT/DS/163R.DOC> [hereinafter Korea - Government Procurement]

³³ Understanding on Rules and Procedures Governing the Settlement of Disputes, art.3.2, [hereinafter DSU], Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1B, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND VOL. 1; 33 I.L.M. 1140 (1994), available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm [Hereinafter DSU].

³⁴ DSU, *supra* note 33, art.1.

³⁵ See *supra* note 15.

However, nowhere in the DSU is excluded *defense* to the claims on the basis of tenable justifications based on the basis of concepts and Principles of General International Law.

This is an issue the interpretation of which has created an ambiguity in the operation of the DSS, basing it more on objective assessment of facts on the basis of scientifically identifiable standards. Thus, it can be seen that '*Precautionary Principle*' as a Defense was held to be not justified in *EC Hormones Case*³⁶ by the Panel and the AB. The AB, on the other hand, did not hesitate to uphold the EC Defense in the *Asbestos Case*³⁷ where amongst others was considered something as abstract as '*Contemporary Community Concerns*.'

Hence, it can be said that the DSB's ways of interpretation of Dispute very often leave an element of subjectivity, leading us to the conclusion that there is always more than one *Permissible Interpretation*. More importantly, a Country's Public Health Policy can be looked at as a permissible interpretation if it bases its defense on its ICESCR commitments, of course after establishment of the fact that the policy is not *discriminatory* and is not a *disguised restriction on Trade*.

V. SUMMARY AND CONCLUSION

The WTO is an integral part of Public International Law. Hence, Public International Law Policies apply to it unless specifically contracted out. Thus, the WTO DSB has to operate in wider context of Public International Law, insofar as there is no bar even in the DSU to hold national defenses tenable on the basis of a Public International Law Policy, for example, an International Human Right, subject to the minimum requirements of non-discrimination and non-restriction of Trade. Even if the individual nations have difficulty in adopting PPM in strict conformity to General International Law, a body of principles that is uncodified in places and ambiguous ever-changing, they should not, and must not, be given an option to deviate from these, insofar as the Social Audit Requirements are concerned.

It has to be admitted in this context that the DSB, far removed from the ground reality prevalent in the country which is aiming to impose its Public Health Policy, is not the proper forum to find out the *Necessity* of such a measure. Hence, there should be more freedom on States to abide by their Human Rights Commitments without the hawk-eye of a stringent DSB. However, the Countries would essentially need to do a Balancing Act between their commitments to Free Trade and Human Rights, based on their ground realities.

that the DSB needs to acknowledge the ground realities and accept the National Interpretation, if it finds an interpretation to the issue bordering on the lines of ambiguity and the national defense not impermissible, in view of the factual, legal and interpretative realities. In other words, the National Deference

³⁶ *Id.*

³⁷ *Id.*

Principle (as prevalent in A/17.8 of the Anti-Dumping Agreement) needs to be incorporated in the DSU as well, to make the voices of the Third World being audible to the ivory towers, to straighten the creases, and to ensure a Free Trade Regime that is not oblivious of the international responsibility of all nation states to ensure the observance of Human Rights norms, and carry forward the global initiative of Right to Health for All.