

# The TBT Agreement and Global Environmental Concerns: Re-evaluating LDC's Reaction to Eco-Labeling Programs

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## Abstract

*Concerns of environmental protection are at the forefront of numerous global forums. Especially in the context of international trade and other development practices, the subject attracts huge debates among scholars, interest groups and policy makers aligning themselves in to differing positions. The TBT agreement is one of the WTO laws which turn out to be at the heart of the trade and environment debates. There are different perceptions about the relationship between the agreement and the global environmental protection efforts. Eco-labeling programs are one of the typical tools widely adopted to ensure environmental protection and natural resource conservation. There is no debate as to whether eco-labeling practices can fall under the TBT agreement. Much of the controversy arises in relation to the scope of application of the agreement in relation to eco-labeling. Developing countries, as opposed to developed trading partners, are seriously concerned about whether or not the agreement covers production process methods that does not impact the final output of a commodity. Developing countries choose the agreement's narrower scope. In this article I will disprove the argument that non-product related process and production methods are outside of the scope of the TBT agreement. I will divulge, based on analysis of relevant laws, that the TBT agreement governs eco-labeling programs regardless of whether or not the relevant production-process method affects the environment only through the final product. I will also argue and try to demonstrate why the agreement's wider scope is in the best interest of developing countries. Finally, I will recommend developing countries to re-evaluate their position concerning the TBT agreement.*

## Introduction

Members have been in serious disagreement about the relationship between the WTO rules and eco-labeling programs based on process and production methods unrelated to products.<sup>1</sup> This issue

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<sup>1</sup> Process and production methods unrelated to products (referred as NPR-PPMs here in after) are those production methods or harvesting techniques that may affect environment with out their effects being reflected in the final product.

has been raised more in the context of the agreement on technical barriers to trade.<sup>2</sup> At one extreme of the debate are developing countries that reject the scope of the TBT agreement to include eco-labeling programs based on NPR-PPMs.<sup>3</sup> These countries base their argument on both the textual interpretation and the negotiating history of the agreement. The fear that eco-labeling programs may be used for disguised protectionism, coupled with limited economic capability and lack of technical expertise to comply with requirements of various eco-labeling programs, make them to hold strong position against the wider scope of the TBT agreement.<sup>4</sup> On the opposite side of the debate are found developed countries arguing that the scope of application of the TBT agreement is extended to cover eco-labeling programs based on NPR-PPMs.<sup>5</sup> The Doha-declaration assign the committee on trade and environment (CTE here in after) to study the issue of labeling requirements for environmental purposes and to make recommendation as to whether there is a need to clarify their status

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<sup>2</sup> Agreement on Technical Barrier to Trade, here in after referred to as TBT; see World Trade Organization, Trade and Environment at the WTO, available at [www.wto.org](http://www.wto.org) . Accessed on 23 March 2008

<sup>3</sup> Id.

<sup>4</sup> Atsuko Okubo, Environmental Labeling programs and The GATT/WTO regime, *Georgetown International Environmental Law Review*, 1999, p. 600.

<sup>5</sup> Dr. Wendy Hollingsworth, Eco-Labeling and International Trade, Trade Hot Topics Commewaelth, Issue No. 21 available at [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/%7B4228B06C-6A9A-434D-BEB3-BAE1CD5C36B1%7D\\_trade%20hot%20topics%2021.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B4228B06C-6A9A-434D-BEB3-BAE1CD5C36B1%7D_trade%20hot%20topics%2021.pdf) ,accessed on 22 march 2008

under WTO rules and whether there is a need for further negotiation.<sup>6</sup> The committee is far from bringing solution to the issue.<sup>7</sup>

In this article I will argue that the scope of application of the TBT agreement extends to Eco-Labeling programs based on NPR-PPMs. I will also try to argue that the wider scope of application of the TBT agreement is not more prejudicial to the interest of developing countries as compared with the situation where eco-labeling programs are out side of the scope of the agreement. However, it does not mean that the wider application of the TBT agreement perfectly suits the situations of developing countries.

Part I of the article will provide general background on the purpose and nature of the TBT agreement. Part II will provide the conceptual understanding of PPM and related concerns. Part III will provide back ground discussion on eco-labelling programs and the TBT agreement. Part IV will focus on the textual interpretation and the negotiating history of the relevant provisions of the TBT agreement. Part V will concentrate on the relative advantage that developing countries may have with the wider scope of application of the TBT agreement. Part VI will deal with policy objectives which justify eco-labeling based on NPR-PPMs under the TBT agreement.

## **I. Purpose and nature of the agreement on Technical Barrier to Trade (TBT)**

The coming in to effect of the General Agreement on Tariff and Trade (herein after the GATT) in 1947 has immense contribution

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<sup>6</sup> Doha WTO Ministerial Declaration at Para. 32, WT/MIN(01/) /DEC/1, 20 December 2001, available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindedcl\\_e.htm#32.3](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindedcl_e.htm#32.3)

<sup>7</sup> Erik P. Bartenhagen, The Intersection of Trade and the Environment: an Examination of the Impact of the TBT agreement on Eco-Labeling Programs, Virginia Environmental Law Journal Vol. 17, No.52, 1997-98, P. 78

towards the culmination of tariff barriers to international trade.<sup>8</sup> Contracting parties to the GATT have given significant tariff concessions that helped to dismantle one of the then existing hurdle to free movement of goods between countries. A significant increase in the extent of access to international market has perceived to be one of the principal outcomes of the GATT. Although contracting parties have undertaken the reduction of excessive tariffs on their imports and exports, protectionist<sup>9</sup> interests compelled them to find escape routes to promote favouritism towards local producers. As the GATT rules were principally meant to fight against tariff barriers, contracting parties had to look for non-tariff barriers that might help them to put obstacles for foreign producers and suppliers who sought for access to international market. The numerous non-tariff barriers were put with the objective to reduce the competitiveness of foreign goods in the importing countries' markets.

Technical barriers, such as product standards and quality regulations, were the principal mechanisms applied mainly for protectionist purpose. Adding to that problem was the fact that technical regulations and standard are not treated in detail under the GATT rules. The trade-disruptive acts, that the GATT has purported to remedy, have persisted through non-tariff technical barriers, which demanded additional legal regime. After prolonged compromises in the Tokyo round of trade negotiations, a plurilateral agreement (only some of the GATT members are signatories) was concluded in 1979. This early agreement, dubbed as the "standard code", has served as a base for the WTO's TBT agreement. Both the standard code and the TBT agreement were meant to strike the proper balance between

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<sup>8</sup> High tariff was a significant negative factor for trade between countries before the coming in to effect of the General Agreement On Tariff and Trade (GATT) in 1947

<sup>9</sup> Protectionism refers to an act of affording protection or of favouring of domestic businesses and industries against foreign competition by imposing high tariffs or restricting imports etc.

importing countries' legitimate interest to have technical regulations and standards on goods flowing to their market, on the one hand, and exporting and supplying countries' concern on protectionism, on the other. In other words, the standard code and the TBT agreement have been founded on the premise that importing countries have the right to regulate goods imported in to their territories to achieve legitimate policy objectives different from protectionist purpose.

The TBT agreement, under article 2.2, provides a non-exhaustive list of regulatory goals that are deemed to be "legitimate" for regulatory purpose.<sup>10</sup> These include: protection of human health or safety, animal or plant life or health, or the environment. The legitimate policy goals that the importing country tries to achieve may be served either by formulating technical regulations or standards. Annex I of the TBT agreement defines what technical regulation and standards are. Accordingly, technical regulation is a document which lays down product characteristics or their related production and process methods with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to product, process or production method.<sup>11</sup> For example an importing country's law requiring all product packaging must be reusable is a technical regulation. Standard, with in the meaning of article 2 of annex I, is similar with technical regulations, in terms of content, except that it is not mandatory requirement.<sup>12</sup> For example, a government guideline defining what products can bear

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<sup>10</sup> See the preamble and article 2.2 of the TBT agreement.

<sup>11</sup> Annex I article , TBT agreement.

<sup>12</sup> Standard is defined as " document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for product or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, and packaging, marking or labeling requirements as they apply to product, processes or production method."

“reusable symbol” is a standard, provided that similar products that do not bear the symbol can still be sold in the market.<sup>13</sup>

In parallel with the recognition accorded to importing countries’ legitimate policy objective for regulation, the TBT agreement accommodates concerns of exporting countries against protectionism. With the view to avoid discriminations, the agreement adopts the most favoured nation treatment and the national treatment principle.<sup>14</sup> Accordingly, in the preparation, adoption and application of technical regulations, members must ensure that products imported from the territory of another member shall be accorded treatment not less favourable than that accorded to like products of national origin or originating in any other country. A technical regulation is expected not to pose unnecessary barrier to international trade. It should not be more trade restrictive than necessary to achieve legitimate policy objectives.<sup>15</sup> The TBT agreement provides other stringent requirements on countries which want to develop technical regulations.<sup>16</sup>

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<sup>13</sup> This requirement is optional in the sense that exporters may not be denied market access in the importing country’s market based on the fact that they do not comply with the latter’s requirement of reusable standard. However, goods from exporting countries are not entitled to affix “reusable” labeling without attaining the importing country’s standard. If it were technical regulation, however, goods from exporting countries, without complying with the requirement in the regulation, would not be allowed to be sold in the importing country’s market.

<sup>14</sup> The Most Favoured Nations Treatment and the National Treatment principles are meant to ensure non-discriminatory treatment between like products of foreign origins, and between national products on one hand and all other like products of foreign origin on the other hand. See Article 2.1 TBT.

<sup>15</sup> See Art 2.2 TBT

<sup>16</sup> It is beyond the scope of this article to make analysis on all these relevant requirements. The writer urges readers to see articles 2.1-2.12 TBT.

## II. Overview of PPM

### A. What is PPM?

In the context of trade and environment relation ship, process and production method (PPMs) becomes one of the most controversial issues in the international trade regime.<sup>17</sup> Generally applied in the international trade context, PPM refers to the way in which a certain product is produced or a natural resource is exploited.<sup>18</sup> The broad understanding of PPM, therefore, encompasses the issue of environment, labour and human rights during the manufacturing or harvesting stage of a product.<sup>19</sup> With in the specific context of trade-environment debate, PPMs reflects the adverse effect on the environment of a certain production method. PPM rules, regardless of their context in environment, labour or human rights, regulate the production or harvesting stage of products before they are distributed for sale.<sup>20</sup>

The OECD paper classified PPMs in to two broad categories depending on the point at which the environmental effect of a product

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<sup>17</sup> Tetarwal & Mehta *Process and production methods (PPMs)-Implications for developing countries* (2000) CUTS BRIEFING PAPER No. 7 at 1.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> PPM standards can be formulated in a variety of ways. A country may follow a positive list approach in which it sets out specific process and production methods which demands manufacturers to adopt those methods in their production of commodities. The other approach is a negative list approach by which a PPM regulation forbids the use of specific methods of production and allows all other methods. Countries may still specify emission or performance effects that need to be avoided. In some circumstances, it happens to be difficult to make clear demarcation between these different methods as some regulations lie at the boundary of one and another. See OECD Secretariat: *Process and Production Methods (PPMs): Conceptual framework and Considerations on Use of PPM-based trade measure* (OECD/GD (97)137) 1997.

manifests itself.<sup>21</sup> These categories are product related PPMs on one hand and non-product related PPMs (NPR-PPMs) on the other.<sup>22</sup> The classification is meant to identify whether the environmental effect of a certain PPM manifests itself during consumption or manufacturing stage.<sup>23</sup> In other words, the classification is a means to make distinction between a PPM requirement that deals with consumption externalities and those that address production externalities.<sup>24</sup> Accordingly, a product related PPM measure related exclusively with production method that has a negative impact on the final product.<sup>25</sup> Product related PPM measure is used to ensure the safety, quality and usability of products.<sup>26</sup> For example, a PPM requirement which regulates the residue level of pesticides added to fruit during the production stage is

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<sup>21</sup> *Ibid.*

<sup>22</sup> Following the OECD's model, several writers adopt the product related PPMs and non-product related PPMs distinction; See, for example, Bernasconi-Osterwalder *et al Environment and Trade: A guide to WTO Jurisprudence* (2006) 204; Gains "process and production methods: How to produce sound policy for Environmental PPM-Based trade measure?" (2002) 27 *Columbia Journal of Environmental Law (Colum. J. Envtl. L.)* 383 at 396-399.

<sup>23</sup> OECD Secretariat, *supra* note 20.

<sup>24</sup> PPM requirements which address consumption externality concern about the environmental effects of production methods which manifest themselves at the latter stage of the products' life cycle-at distribution or consumption stage, or when goods are consumed or disposed of after consumption. These requirements deal with physical or chemical characteristics of the product (affected by the method of production adopted) to be offered to the market. On the other hand, a PPM standard which purports to regulate production externalities deals with the environmental effects of production methods which manifest themselves at the production stage of the product before it is offered to the market. See *Ibid*; See also United Nations Environmental Program & International Institute for Sustainable Development(UNEP & IISD): *Environment and Trade: A Hand Book* 2000, available at [www.iisd.org/trade/handbook/5\\_1.htm](http://www.iisd.org/trade/handbook/5_1.htm) accessed on March 16, 2008.

<sup>25</sup> Bernasconi-Osterwalder, *supra* note 22, at 204.

<sup>26</sup> Charnovitz, "The Law of Environmental 'PPMs' in to the WTO: Debunking the Myth of Illegality" (2002) 27 *Yale Journal of International Law* at 65.



purely a product-related PPM.<sup>27</sup> The typical characteristics of product related PPM is that the production methods utilized can be directly detectable in the final product.

There are PPM requirements that have nothing to do with the physical characteristics or chemical property of the final product. The product, which the PPM regulation meant to govern, serves the same purpose or assures the same quality as “like” products produced in a different and environmentally-friendly manner.<sup>28</sup> Nevertheless, social or ecological policies make a government to put a regulatory regime on those PPMs.<sup>29</sup> These PPMs are referred as NPR-PPMs as they are nothing to do with the usability and quality of the final output.<sup>30</sup> These PPM requirements address production externality in the form of restriction on input use in the production or cultivation of product, or requirement to adopt a specified technology.<sup>31</sup>

The OECD paper further classifies NPR-PPMs in to three categories based on the jurisdictional scope with in which PPM may cause adverse environmental effects.<sup>32</sup> Certain PPMs, though not discernable in the final product through sale, distribution, conception and disposal, may still have environmental spillover beyond the country in which the product is produced. The adverse environmental effect thus may be global, transboundary or national.<sup>33</sup> The spillover of PPM is said to have transboundary effect where it affects, directly or indirectly, plant, animal, human health and life, soil, water, forest etc. of

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<sup>27</sup> See UNEP & IISD, *supra* note 21; see also Bernasconi-Osterwalder, *supra* note 22, at 204.

<sup>28</sup> OECD Secretariat, *supra* note 20F.

<sup>29</sup> *Ibid.*

<sup>30</sup> The typical characteristic of NPR-PPM is that the method of production used can not be directly detected from the final product. See. Bernasconi-Osterwalder, *supra* note 22, at 204; see also the *Ibid.*

<sup>31</sup> Bernasconi-Osterwalder, *supra* note 22, at 204

<sup>32</sup> OECD Secretariat, *supra* note 20.

<sup>33</sup> *Ibid.*

the physically adjacent countries or shared geographical region.<sup>34</sup> A PPM is said to pose global environmental adverse effect where it affects global commons or resources which are shared by all countries.<sup>35</sup> This latter environmental problem includes ozone layer depletion, climatic change, harm to biodiversity, and effects on endangered species.<sup>36</sup> When the environmental effect of a certain PPM is limited to the country where it situates, it is said to be national.<sup>37</sup> It may include resource depletion, air, water soil pollution and loss of biodiversity.<sup>38</sup> In some instances a PPM may be used in a place where no country exercise jurisdiction under international law, such as the high sea.<sup>39</sup>

## **B. Controversies over PPM**

Trade measures that purport to discipline patterns of production have become the primary focus of international policy debate that threatens to make trade interest and environmental protection antagonistic.<sup>40</sup> Environmentalists claim that most environmental problems trace their root-causes to environmentally destructive PPMs.<sup>41</sup> Environmentalists underscore the need to regulate PPMs for two principal reasons. First, environmentally unsustainable production methods add to environmental stress which may be irreversible.<sup>42</sup> Second, in the absence of regulatory regime which ensures that

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> Snap & Lefkovitz, "Searching for GATT's Environmental Miranda: Are "process Standards' Getting "Due process'?" (1994) 27 *Cornell International Law Journal*, at 779.

<sup>41</sup> *Ibid.*

<sup>42</sup> International Institute for Sustainable Development & Center for International Environmental Law: *The State of Trade Law and The Environment: Key Issues for the Next Decades Working Paper*, 2003.

imported products are subject to high environmental standard, the effort to apply high environmental standard to domestic products will be hindered.<sup>43</sup> Higher environmental standards most likely add to cost of production to producers. In a situation where only domestic producers are subjected to higher standards, they may not be able to equally compete with foreign producers that may offer their products with relatively cheaper price. It is logical to assume that no country wants to make its producers less competitive by imposing higher environmental standards without ensuring that producers in exporting countries are subjected to the same standards. Lobbyists of environmental protection argue that efforts to protect environment cannot be realized without successfully regulating PPMs.<sup>44</sup> Snap and Lefkovitz suggested that trade measures are the most effective tools to deal with the environmental externalities of destructive PPMs.<sup>45</sup> Environmentalists often criticize the multilateral trading system for not allowing to distinguish between products produced in a sustainable manner and those produced in unsustainable manner.<sup>46</sup>

The other side of the debate saw opposite view, especially motivated by development concerns. Many developing countries and small trading powers are suspicious that making environmental conditionality on trade will create additional barrier to trade, which in turn, erode the development objectives of trade liberalization.<sup>47</sup> These countries perceive environmental conditions, through PPM measures, as systematic and “veiled” “protectionism” devised by developed

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<sup>43</sup> *Ibid.*

<sup>44</sup> Snap & Lefkovitz, *supra* note 40, at 779.

<sup>45</sup> *Ibid.*

<sup>46</sup> The general trend adopted by the GATT and WTO panels treat products as “like” or “similar” in so far as two commodities are similar in respect of their physical characteristics and end use irrespective of their difference in their PPM. See Tatarwal & Mehta, *supra* note 17, at 4.

<sup>47</sup>International Institute for Sustainable Development & Center for International Environmental Law, *supra* note 42.

countries in order to protect their industries from increased competition due to other changes in trade law.<sup>48</sup> For developing countries and LDCs the issue of PPM is closely associated with the question of market access.<sup>49</sup> For example, by demanding exporters to adopt a certain production methods, countries may make it burdensome and expensive for exporters of economically poor countries to sell in importing countries' market. Developing countries also expressed concern that developed countries can use their commercial power to impose their environmental standards on other nations without their consent to those standards.<sup>50</sup> Some environmental standards may not reflect the social, economic and environmental realities of developing countries.<sup>51</sup> Many developing countries worry that allowing PPM-based trade measures may serve a precedent for consideration of other social programs, such as labour standards and human rights.<sup>52</sup> Besides, sovereignty argument is raised, especially in relation to environmental externalities limited to exporting country.<sup>53</sup> The decision as to the method of production must be left to the discretion of the exporting country where the adverse effect of PPM is limited to that country alone. An expression of state sovereignty under general international law includes the authority of a state to decide on matters exclusively within its territory.

A number of countries developed policies to reduce the various negative effects that PPMs have on environment.<sup>54</sup> These measures may, directly or indirectly affect international trade.<sup>55</sup> These measures,

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<sup>48</sup> *Ibid*; See also Tatarwal & Mehta, *supra* note 17, at 1.

<sup>49</sup> Bernasconi-Osterwalder, *supra* note 22, at 204; Pots, *supra* note 3, at 1-2; see also Tatarwal & Mehta, *supra* note 14, at 1

<sup>50</sup> Tatarwal & Mehta, *supra* note 17, at 5

<sup>51</sup> *Ibid*.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid*.

<sup>54</sup> Bernasconi-Osterwalder, *supra* note 22, at 203.

<sup>55</sup> *Ibid*.

referred generally as trade-affecting PPM measures, include import ban of products produced in environmentally-unfriendly manner, tax schemes based on production methods, border tax adjustment to offset PPM based domestic taxation etc.<sup>56</sup>

## V. Conceptual Underpinnings of Eco-Labeling

Eco-labeling is a device that informs consumers about the environmental characteristics of a product.<sup>57</sup> It can, in most cases, be made effective by way of affixing piece of information on the package about its production process including the effect of the product on the environment. Taking lesson from the introduction in Germany of the Blue Angle eco-seal in 1977, a number of countries came up with legislations dealing with eco-labeling.<sup>58</sup> Eco-labeling provides information and assurance to consumers that a product fulfils a minimum environmental standard set by an issuing entity, either public or private.<sup>59</sup> In most instances it involves a “life cycle analysis” by which the issuing entity investigates the overall aspect of a product from ‘cradle-to-grave.’<sup>60</sup> Eco-labeling thus concerns not only the final aspects of the product, such as pesticide residue of a product and recyclable nature of the package, but also the process and production methods

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<sup>56</sup> *Ibid.*

<sup>57</sup> Wendy Hollingsworth, Eco-Labeling and International Trade, Trade Hot Topics Commen waelth, Issue No. 21 available at [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/%7B4228B06C-6A9A-434D-BEB3-BAE1CD5C36B1%7D\\_trade%20hot%20topics%2021.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B4228B06C-6A9A-434D-BEB3-BAE1CD5C36B1%7D_trade%20hot%20topics%2021.pdf), accessed on 22 march 2008.

<sup>58</sup> The Germany Blue Angle program, established in 1977, makes Germany the first country to implement a national eco-labeling program. See for more explanation, The united States Environmental Protection Agency, International Eco-Labeling Programs, available at <http://www.epa.gov/innovation/international/ecolabel.htm> accessed on 25 March, 2008; see also Bartenhagen at note 7 above, P. 54

<sup>59</sup> Wendy, at note 57 above.

<sup>60</sup> *Id.*

such as the level of energy consumption and emissions of ozone depleting substance during production stage, and waste management. Eco-labeling is predicated on the idea that consumers possess the ultimate decisive force, through their choice, to compel manufacturers to adhere to environmentally friendly approach in their production of commodities.<sup>61</sup>

The relationship between WTO rules and the issue of various environmental measures based on process and production methods become the crux of debate since the establishment of the world trade organization in 1994.<sup>62</sup> The bulk of the controversy focus on the issue whether the existing WTO rules, especially the TBT agreement, cover eco-labeling programs that are devised to differentiate the environmental impact of products based on the process or method in which they are produced.<sup>63</sup> Developing countries persistently counter any argument that extends the application of the TBT argument to eco-labeling programs that target non-product related PPMs.<sup>64</sup> The fear to lose market access in developed countries' market make developing countries to persistently object any likely hood that the TBT agreement applies to NPR-PPMs. Developing countries expressed their concern that Eco-labeling programs based on "life cycle analysis" may be disguised trade restriction whereby access to developed countries' market may be deterred.<sup>65</sup> Besides, they are concerned that the likelihood that the TBT agreement applies to eco-labeling programs

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<sup>61</sup>Atsuko Okubo, Environmental Labeling programs and The GATT/WTO regime, *Georgetown International Environmental Law Review*, 1999, p. 600 Okubo, Environmental Labeling programs and The GATT/WTO regime, *Georgetown International Environmental Law Review*, 1999, p. 600.

<sup>62</sup>Transatlantic Consumer Dialogue, Breifing Paper and Recommendation on Product Labels and Trade Rules, Doc No. Trade-12pp-03, 2003. Available at [www.tacd.org/db\\_files/files/files-254-filetag.doc](http://www.tacd.org/db_files/files/files-254-filetag.doc) , accessed on 24 March 2008

<sup>63</sup> Id.

<sup>64</sup> Id

<sup>65</sup> Wendy, at note 57 above

based on NPR-PPMs may provide unnecessary precedent that the agreement's scope may be extended to use for social and humanitarian considerations such as labour standards.<sup>66</sup> They firmly argue that the negotiating history of the TBT agreement indicates that there was no any intention to legitimizing measures based on social or environmental factors that are totally not intrinsic to the product in question, and that measures based on NPR-PPMs are inconsistent with the TBT agreement and other provisions of GATT.<sup>67</sup>

#### **IV. The TBT Agreement and Eco-Labeling Program**

##### **A. The text of the TBT agreement**

Whether non-product related PPMs are dealt with by the TBT agreement is one of the most argued topics in the field of trade and environment.<sup>68</sup> A close scrutiny in the scope of the TBT agreement may illuminate the issue at stake. The scope of the TBT agreement extends to technical regulations, standards and conformity assessment procedures. Annex 1 of the agreement gives definition to technical regulations, standards and conformity assessments. Accordingly, a technical regulation is:

*“Document which lays down product characteristics or their related process and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deals exclusively with*

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<sup>66</sup> Id.

<sup>67</sup> Committee on Trade and Environment, *Report (1996) of the Committee on Trade and Environment*, WT/CTE/1 (Nov. 12, 1996) para. 70

<sup>68</sup> Erik P. Bartenhagen, *The Intersection of Trade and the Environment: an Examination of the Impact of the TBT agreement on Eco-Labeling Programs*, *Virginia Environmental Law Journal* Vol. 17, No.52, 1997-98, p. 65

*terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process and production method.*"<sup>69</sup>

Standard, on the other hand, is

*"document approved by recognized body that provides for common and repeated use, rules, guidelines or characteristics for products or related process and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production methods."*<sup>70</sup>

Conformity assessment procedure is *"any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled."*<sup>71</sup>

As can easily be recognized from the above definition, technical regulations are similar with standards except that the former is mandatory while the latter is not. Conformity assessment deals with procedural aspects of the agreement while technical regulations and standards govern substantive requirements.

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<sup>69</sup> Agreement on Technical Barrier to trade, Annex 1.A to the Marrakech Agreement Establishing the World Trade Organizations (April 15, 1994), Annex 1.1

<sup>70</sup> Id., Annex 1.2

<sup>71</sup> Id., Annex 1.3



## B. Interpretation of elements of the definitions in the TBT agreement

It is quite straight forward that the TBT agreement applies to labeling program in general.<sup>72</sup> Express reference to “labeling” is made under the definitional part of technical regulations and standards in the necessary annexes. It is not also debatable that the agreement applies to eco-labeling programs in general.<sup>73</sup> A heated debate is going on regarding the relationship between the TBT agreement and eco-labeling programs based on NPR-PPMs. The crux of the issue whether the TBT agreement covers NPR-PPM related eco-labeling lies on the ambiguously worded definitions of technical regulation and standard.<sup>74</sup> The second part of both definitions triggered enormous academic discourse.<sup>75</sup> Some scholars argue that the second part which reads “...It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, *process or production methods*” is simply an explanation of the first part of the definition that entirely deals with products and **related** process and production methods.<sup>76</sup> In the view of these scholars the second part should not be construed to extend the scope of the TBT agreement to PPMs that are not intrinsic to the final product.<sup>77</sup> The logical conclusion from this premise seems that the agreement’s scope is limited to those PPMs the effect of which is reflected in the final outcome or the product. The TBT agreement, in this view, does not therefore govern mandatory regulations or standards, including eco-

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<sup>72</sup> See Annex 1.1&1.2 of the TBT agreement.

<sup>73</sup> The term labeling in the definition of technical regulation and standard include eco-labeling, among other similar schemes.

<sup>74</sup>Erik, at note 68 above, p.73

<sup>75</sup> Id.

<sup>76</sup> Id. 74

<sup>77</sup> Id.

labeling programs, which regulate processes which do not have any effect on the final out put. Developing countries, almost unanimously prefer this line of interpretation.<sup>78</sup>

The other extreme on the debate saw the argument that the second part of the definitions of technical regulation and standard is not mere elaboration of the first part of the definitions.<sup>79</sup> This, in effect, means that the second part adds elements lacking in the fist part. The logical conclusion of this premise seems that although the scope of the TBT agreement is limited to products and **related** PPMs in pursuance of the first part of the definitions, the second part extends the application of the agreement to NPR-PPMs. The fact that the word “**related**” is mentioned in the first part, but not in the second, seems to lend support for those who argue for wide scope of application of the TBT agreement.

The other very important word, “**also**”, in the second part of the definitions which is included only in the Uruguay round of negotiation<sup>80</sup> may also help to decide whether the TBT agreement covers NPR-PPMs. The literal interpretation of the word “**also**” in any statement indicates that there is an addition to what is provided in preceding sentence(s). The fact that the word “**also**” is included, coupled with the absence of the term “**related**”, in the second part of the definitions enables to construct a stronger argument that NPR-PPMs are

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<sup>78</sup> Wendy, at note 57 above

<sup>79</sup> Erik, at note 68 above, pp. 73-74

<sup>80</sup> WTO Document. Negotiating History of the Coverage of the Agreement on Technical Barrier to Trade with Regard to Labeling Requirements, Voluntary Standards, Process and Production Methods Unrelated to the Final Products, G/TBT/W/11, 29 August 1995. available at <http://www.docsonline.wto.org-G/TBT/W/11~WT/CTE/W/10> accessed on 25 march 2008.

with in the scope of the TBT agreement. For the reasons forwarded above, the writer of this essay concurs with the latter argument.

### C. The Negotiating History

Before the Uruguay round of negotiation, the standard code clearly excluded PPMs, both related or unrelated, from its scope as the terms "Technical Regulation" and "Standard" were defined solely in terms of product characteristics. The term "Technical specification" was a common phrase used both in technical regulation and in standard. It was defined as:

*A specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions. It may include, or deals exclusively with terminology, symbols, testing and test methods, packaging, marking, or labeling requirements as they apply to a product.*<sup>81</sup>

The definition of the term standard in the draft standard code, which the TBT sub-group agreed to be a basis for further work to the agreement, included labeling to the extent that it affected products rather than processes.<sup>82</sup> The United States proposed that "processes and production methods should be subject to the provisions of the Code when they are directly related to the characteristics of a product". This proposal was meant to halt circumvention of obligation under the code by the drafting of technical specifications in terms of processes and production methods rather than in terms of the characteristics or performance of products. The text was therefore carried forward into the Agreement as Article 14.25, which reads:

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<sup>81</sup> Agreement on Technical barrier to Trade, Reprinted in GATT B.I.S.D.(26<sup>th</sup> Supp.), at annex 1.

<sup>82</sup> WTO Document, at note 80 above.

*The dispute settlement procedures set out above can be invoked in cases where a Party considers that obligations under this Agreement are being circumvented by the drafting of requirements in terms of processes and production methods rather than in terms of characteristics of products.*

Members differ in their understanding of the implication that the inclusion of article 14.25 has regarding the relationship between the code and PPMs.<sup>83</sup> Subsequent discussions give rise to an express inclusion of PPMs in the TBT agreement; article 14.25 was deleted and article 2.8 was included which established a preference for regulation based on product performance and characteristics than PPMs.

The successive discussion on the TBT agreement reflects that parties were not in agreement regarding the scope of the agreement to the NPR-PPMs. It was with all these successive debate that TBT agreement took its current shape. It is difficult to conclude that parties agreed the wider scope of PPMs or otherwise. This writer is convinced that the text of the definition on technical regulation and standards in the current TBT agreement is relatively clearer than the various documents on the negotiating history. This, in effect, means that examining the negotiating history cannot change the conclusion made under part IV.B above.

## **V. Why developing countries are against the TBT agreement's wider scope?**

The fate of eco-labeling programs on NPR-PPMs remains controversial even a decade after the coming in to effect of the TBT agreement. Developing countries and industries are suspicious of any

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<sup>83</sup> See WTO document at 80 above for more detail.

labeling program that targets NPR-PPMs.<sup>84</sup> A Moment contemplation on the strict discipline in the TBT agreement and the current trend in the WTO jurisprudence may give a momentum for developing countries to change their position towards the scope of the agreement to cover eco-labeling programs targeting NPR-PPMs. If the TBT agreement does not apply for NPR-PPMs eco-labeling program, the subject is more likely to fall under the general provisions of GATT.<sup>85</sup> It seems that developing countries firmly believe that the GATT rules totally prohibit trade measures based on PPMs. The ruling in the *Tuna/Dolphin* case lent support for this line of argument.<sup>86</sup> This, in effect, means that the WTO system is totally against measures based entirely on NPR-PPMs. However, The Appellate body in the *shrimp/turtle* case came up with a decision which contradicts the conventional view towards NPR-PPMs.<sup>87</sup> According to the appellate body's ruling, the United States' trade measure which targets the method of production or harvest was not *a priori* inconsistent with the GATT rules, although it found the measure inconsistent with the chapeau of article XX.<sup>88</sup> This fact can show that developing countries may not successfully contest measures targeted on NPR-PPMs any longer. At least they cannot be so sure, after Shrimp/Turtle case that the WTO system is totally against NPR-PPMs. The best that developing countries can do is to weigh up between the TBT agreement and the GATT provisions, as which system is less costly and less painful to them.

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<sup>84</sup> See the discussion under part I. *supra* to understand the reasons why developing countries are not comfortable with NPR-PPMs.

<sup>85</sup> Wendy, at note 57 above, page 76

<sup>86</sup> See also Robert Howse and Donald Regan, The Product/ Process Distinction: An Illusory Basis for Disciplining "Unilateralism" In trade Policy, *European Journal of International Law*, Vol. 11, No 2, 2000 pp. 249-50

<sup>87</sup> The conventional view being that the WTO rule does not support trade measures based on NPR-PPMs. See *Id.* for more detail.

<sup>88</sup> United States-Import restriction Shrimp and shrimp Products, Reports of the Appellate body, 12 October 1998, WT/DS58/AB/R, para. 121 & 176

Both the TBT agreement and the relevant GATT provisions provide strict requirements for members to take measures to protect the environment. Article XX of the GATT provides that measures shall be non-discriminatory, for non-protectionist purpose and less trade restrictive.<sup>89</sup> In relation to the TBT agreement, members must follow mandatory procedural requirements to prepare or adopt both technical regulations and standards.

Viewing the above attributes of Article XX of the GATT and the TBT agreement, one can conclude that members' right to adopt eco-labeling program based on NPR-PPMs may not be arbitrary whether the issue is within the scope of either of the agreements. Compared to the Chapeau of article XX, the TBT agreement's procedural requirements are more stringent. I would argue that the fact that the scope of the TBT agreement extends to such eco-labeling programs is not more prejudicial to the interest of developing countries as compared to the fact that the current trend in the appellate body's decision may not denounce NPR-PPM measures as *a priori* WTO inconsistent.

The focus of the argument should be shifted to what policy objectives are legitimate to use eco-labeling under the TBT agreement. The following sub-topic will dwell on this issue with special emphasis on NPR-PPMs.

## **VI. Legitimizing Eco-Labeling Under the TBT Agreement**

One of the controversies in the heart of PPMs debate is the extent that a member may invoke the TBT agreement to legitimize its actions with respect to some technical regulations or standards. Members have diverse policy objectives that they want to achieve through their

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<sup>89</sup> General Agreement on Tariffs and Trade 1994, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994), on the Chapeau.

regulations. Some members set forth such rules based on single or multiple policy objectives, such as “consumers’ right” to get information about the good they purchase. On the other hand, the TBT agreement, both as disciplining and legitimizing measures, set forth strict conditions that members must adhere to while preparing, adopting and implementing their technical regulations and standards. One such important condition is that technical regulations should not be more trade restrictive than necessary to fulfill legitimate objective taking account of the risks that non-fulfillment would create. Article 2.2 of the TBT agreement, provides a non-exhaustive list of legitimate objectives. These objectives are, *inter alia*, national security requirement; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.

Some of the policy objectives on which members base their technical regulation may be contested by other members as if not legitimate with in the meaning of article 2.2 of the TBT agreement. For example a technical regulation which requires labeling of the fact that the process production PPMs employed to manufacture a certain product is unfriendly to bio-diversity in the home country may be considered as illegitimate. The member state which prepares this regulation may invoke “consumers’ right to information” about the product they purchase. Even if other aspects of the regulation are not to be refuted, exporting countries may challenge it based on extra-territoriality. The issue is whether it is with in the legitimate policy objective of a member to preserve “consumers’ right to information” to demand trading partners to convey information about the environmental nature of PPMs which may not in any ways affect the regulating member.

The extra-territorial nature of the regulation alone may not probably succeed to obliterate “consumers’ right to information” about the product they purchase, as arguing otherwise may have the same effect as NPR-PPMs are out side of the scope of the TBT agreement. It

would rather be wise to raise another question as to whether eco-labeling programme to inform consumers about the overall aspects of the product is less trade restrictive within the meaning of article 2.2 of the TBT agreement. Some WTO members argue that labeling may not be least trade restrictive.<sup>90</sup> They proposed alternatives to eco-labeling such as toll free hotline and informational brochures.<sup>91</sup>

In some instances effects of some PPMs may extend beyond national territories, such as to affect global commons; shared natural resources or migratory species. In these cases an issue may arise whether it is within the legitimate policy objective of a member to prepare or adopt eco-labeling program with respect to these PPMs. The answer to this seems relatively straight forward than the issue of eco-labeling targeting PPMs the effect of which is confined within the exporting country. It can be said that member states have legitimate interest to protect environment that may directly or indirectly affect them. Nevertheless, the issue of less trade restrictive measure remains arguable. The question is whether eco-labeling is the only less trade restrictive measure available under a given circumstance. It is my view that this question may not be answered in the abstract. Rather it may be resolved on a case by case basis.

With respect to the preparation and adoption of standards, the TBT agreement set forth guide lines that members must comply.<sup>92</sup> Members are required to comply with the code of good practice in the preparation, adaptation and implementation of their standards.<sup>93</sup> Members also have responsibility to influence local government and nongovernmental standardizing bodies within their territories to accept

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<sup>90</sup> Tom Rotherham, *Labelling for Environmental Purposes: A review of the state of the debate in the World Trade Organization*, 2003, p. 14.

<sup>91</sup> *Id.*

<sup>92</sup> See article 4 of the TBT agreement

<sup>93</sup> *Id.* article 4.1



and comply with the code of good practice.<sup>94</sup> The code of good practice demand members to apply most favoured nation treatment and national treatment principles of GATT in their standards.<sup>95</sup> The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.<sup>96</sup>

The agreement also provides differential and favorable treatment for developing country members.<sup>97</sup> Members have obligation to take into account the special development, financial and trade needs of developing country members in the implementation of the Agreement.<sup>98</sup> In particular, members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take into account of the special development, financial and trade needs of developing country members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country members.<sup>99</sup>

All the above stated facts witness that the aim of the TBT agreement is more of disciplining measures that are thought to be technical barrier to trade. Perceiving the TBT agreement as more of disciplining than legitimizing unnecessary disguised measures may lead developing countries to withhold their firm position against the wider scope of the TBT agreement to apply NPR-PPMs.

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<sup>94</sup> Id.

<sup>95</sup> Agreement on Technical Barrier to trade, Annex 3(D)

<sup>96</sup> Id, Annex 3(F)

<sup>97</sup> See article 12 TBT agreement.

<sup>98</sup> Agreement on Technical Barrier to trade, article 12.1

<sup>99</sup> Id. article 12.3

## **VII. Conclusion**

The trade-environment debate persists for long since the inception of the GATT 1947. One of the subjects that attracted heated debate is the issue of PPM. Both the GATT provisions and The TBT agreement deal with PPM, explicitly or by way of inference, for the purpose of protection of Environment. Eco-Labeling programs are among the various types of measures based on PPM. The ambiguity on the scope of application of the TBT agreement further contributed a lot for the debate to sustain. Moreover, the negotiation history of the agreement is far from being clear. A closer look at the definitions on technical regulation and standards, where the crux of the matter lies, suggests that the issue of non-product PPMs is included in the scope of the application of the TBT agreement. The issue of Eco-Labeling, as the TBT agreement applies to symbols, labeling etc, appear to be controversial as the requirement of “less trade restrictive” measure is central to the agreement. Whether or not a certain Eco-Labeling program is less trade restrictive is an important issue that cannot be answered in the abstract. A case by case analysis is mandatory to decide on the TBT compatibility or otherwise of a specific Eco-labeling program.

Developing countries will benefit if the TBT agreement is found to include both product related and unrelated process and production methods (PPM). The general GATT provisions will apply if the TBT agreement’s scope does not include non-product related PPMs. The GATT articles, which provides exceptions for the purpose of environmental protection, do not require special treatment in favour of developing countries while the use of these exceptional provisions. The TBT agreement, however, requires members to take in to account of the special needs of developing countries, especially least developed country members, in the course of preparation, adaptation or implementation of technical requirements and standards.