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Developing an International Framework for PPM and Like TREMS: Arguments and Principles for Developing Regulations

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ABSTRACT

The past few decades have shown us the impact on trade of the increasing consciousness among nations about environment. With respect to WTO we have also witnessed the extent of North-South divide. With the growing proliferation of multilateral agreements and unilateral measures to protect environment, the impact on trade has been undeniably huge. TREMs and PPMs have regulated trade among nations to a large extent. With questions of their legality arising every now and then, and the distance between the North-South increasing with every new regulation imposed, the need of the hour is to develop a framework to address the issue of trade and environment with respect to PPMs and like TREMs.

I. Introduction

In view of several growing phenomenon, the debate of free trade and protectionism and the interrelation between trade and environment has visited some hitherto unseen vistas. Since the 1970's environment protection has come up as an important factor in international trade.

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Environment, which was earlier regarded simply as a domestic issue has now grown to develop as a 'common concern' of nations. The consciousness of protecting the environment not just among the governments but among the civil society as well ¹ has to a large extent affected the trade policies of nations and is inextricably linked WTO to environmental issues. Environmental policy of a nation has a profound impact on the multilateral trading system. With the aim of environment protection nations inevitably impose restrictions on international trade. Recent times have hence witnessed a proliferation of various Trade Related Environment Measures (*hereinafter* TREMs). Often used as instruments of concealed protectionism, these TREMs have been the centre of controversy for long now. One such TREM which is often imposed on trade is based on the Process and Production Methods of the goods and services in question. Commonly referred as to PPM based restrictions, they have baffled the world community since the 1990s.² The legality of such measures on ground of the GATT obligations has since then been debated and challenged. Both the proponents and opponents of such measures have constantly come up with arguments to support their stand.

While the protection of environment and sustainable development have been the strongest weapons in the hands of the former, the latter have

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¹ See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, Harvard Law Review, Vol. 118, No. 2 (Dec., 2004), pp. 525-642 (For the role of consumers in framing of public policy)

² The emblematic decision in the sphere of environment and development was the GATT Tuna Dolphin dispute as it was the first to discuss the intrinsic linkages between trade and environment. See, Report of the Panel-Restrictions on the Imports of Tuna, L/5198, BISD (September 3, 1991) GATT B.I.S.D (39th Supp) 155 (1991) [*Hereinafter* Tuna Dolphin I report]

highlighted the inconsistency of such measures with the GATT obligations, their use as measures of coveted protectionism, the extraterritorial applicability, unilateral nature and the sovereign right of state to use its resources.³ The desire of nations to regulate trade on grounds of environment has in the recent times, increased and this signifies an almost exponential increase in PPM regulations based on environmental considerations. This necessitates the development of jurisprudence on PPMs. The WTO has handled the controversy of the PPM for quite some time now, but as highlighted by the authors in the next section, the regulatory framework for the PPMs is far from satisfactory. In this paper we attempt to delineate the present controversy and then suggest a model to develop a legal and economic framework to regulate the application of the PPM based trade restrictions and hence achieve the delicate balance between trade and environmental problems.

II. PPM: Definition & Controversy

A. Defining a Process and Production Method

A PPM, or Process and Production Method based regulation is directed at regulating the trade in goods based upon the method used in their production. A PPM may be executed in a variety of forms ranging from

³ See generally Robert Reed, *Process and Production Methods and Regulation of International Trade*, available at: <http://www.oas.org/dsd/Tool-kit/Documentos/ModuleIII.doc/Read%20Article%20on%20PPMs.pdf> (last visited: 28th July 2009.), Henry L. Thaggert, *A closer look at the Tuna-Dolphin Case: "Like Products" and the "Extrajurisdictionality" in the Trade and Environment Context*, TRADE AND ENVIRONMENT: THE SEARCH FOR THE BALANCE 69-95 (James Cameron et al. eds. 1994), Steve Charnovitz, *The law of Environmental "PPMs" in the WTO: Debunking the Myth of Reality*, 27 Yale J. Int'l L. 59 (2002)

taxation, bans, providing standards etc. and is usually imposed because of the use of products, processes' or technologies that the regulating country deems undesirable. In the realm of environmental law the Process and Production Method based regulations achieve great importance. They fall under the body of rules known as TREMS (Trade Related Environmental Measures). The increasing desire of nations to restrict production practices that degrade the environment has played a very pivotal role in international trade. The frequency of use of PPM based measures has increased manifold over the last few years and looking at the pattern this trend is all set to expand even further. As environmental consciousness dawns or rather the need for environmental protection becomes even more obvious to nations around the world the PPM based regulations are going to multiply, maybe even exponentially. But PPM's also come with their set of drawbacks. The most prominent of these are the much contested issue of their giving way to restrictive trade practices.

Thus ideologically free trade and environmental protection seem to stand at odds with each other. At the same time the most basic issues of sustainable development in the form of balancing industrial growth with maintenance of environmental standards, and it gains particular importance in the case of developing countries. These issues shall be dealt with in detail in the second part of this paper.

B. Rationale Behind Imposing a PPM

A PPM regulation is based on the simple assertion that by providing regressive measures towards environmentally harmful products the

balance of trade will shift in favor of products made by eco-friendly methods.

First of all, by imposing these regulations nations may desire to avoid facilitating environmental degradation. Secondly, in the name of eco-friendly ideals they may also wish to assert their influence on the exporting nation. This may be to adversely affect the other nations economic profile or for political purposes, etc. Thirdly there may be the desire to enforce the minimum environmental standards they enforce upon their domestic manufacturers so as to not only avoid any anti-competitive impact on the domestic producer but provide a level field that protects the global environment. Lastly we cannot rule out the possibility of enforcing PPM's as an excuse for purely restrictive trade practices.⁴

C. Parties Affected by PPM

To successfully tackle the subject of these trade regulations it becomes fundamentally important to recognize the parties affected by them. This is important to make sure we understand all the different aspects and viewpoints and thus be in the best possible situation to draft a set of guidelines. Also the nature of interest of a party reflects the substantive nature of the issue itself while also highlighting the key players who must necessarily be addressed for the guidelines or principles to be completely effective. These affected parties are the Producing Nation, the Importing Nation, the Supplier Nation and Other Interested Parties. In most situations the Producer and supplier would be the same. They are the

⁴ Davies, Gareth T., '*Process and Production Method Based Trade Restrictions in the EU*', available at: SSRN: <http://ssrn.com/abstract=1118709>, last visited 9th July, 2009.

parties against whom the PPM regulations are enforced and the Importing Nation is the one usually enforcing the regulation. The term Other Interested Parties is of great importance as well. Under this category the parties such as the domestic producers of the supplier nation as well as the producers in the importing nation who are their competition who are the actual parties affected⁵, consumers of the importing nation and other parties directly or indirectly⁶ affected by the regulation. The consumers of developed nations are the ones most often pushing for PPM's and their inclusion in the WTO rules.⁷ This sole criterion greatly differentiates PPM from other protectionist or trade restrictive measures as usually it is the government that pushes for the regulation of trade and the consumers who are usually deprived of cheaper and varied options.

D. Clashing Considerations between Developed and Less Developed Nations

Central to the problems faced in attempting to create a globally acceptable framework for PPM based regulation is the extremely polarized debate involving developed nations imposing the PPM regulations at the one hand and the trade interests of developing and under-developed nations on the other.

⁵ Even if these parties are not given any power under the proposed guidelines even then their opinions should be necessarily sought to get a better understanding of the situation.

⁶ If the indirect effect has to be considered then it would require its own regulation in the form of there being substantial harm done to it by the regulation and the harm has to be of a category that would allow it a redressal opportunity if it was directly affected. It may also provide for the nation to necessarily a party to the existing trade relation that has been regulated.

⁷ Robert Read, 'Process and Production methods in the regulation of International Trade', *The WTO and the regulation of international trade; recent trade disputes between the European Union and the United States*, Perdakis & Read (eds), 2005, Edward Elgar Pub. Co., p 239, 243

Developed countries seek to impose PPM's to protect the environment. At the same time these measures are strongly opposed by the third world as they destroy the competitiveness of their products in the international markets. Not only this but at times the goods are either banned or the regulations are so stringent that the producer cannot meet the standards at even a level where he is no longer competitive. Other than this the country imposing the PPM may have many other considerations behind imposing the regulation. Even when justified, a PPM is restrictive in the sense that the developed countries producers have the technology with them to use the desired process and maintain competitiveness while the other producers cannot.

Alternatively if these regulations are not implemented on the third world producers then the domestic producer of the developed nation is forced to fulfill the environmental standards required by his national law while his competitors in the developing countries are not faced with these additional costs.

By being restrictive the PPM's sometimes also affect the availability of products that a consumer may prefer buying compared to a costlier product of like quality made from a cheaper 'dirty technology'. Even the inclusion of PPM's under a harmonized regulatory framework would be unacceptable to many developing nations. As such for the actual acceptance of a legal framework on PPM's requires the developed countries winning the approval of the others.⁸

⁸ *Id.*

III. WTO Law on PPMs

The controversy of PPM based trade measures has baffled the world enough with regards to their legality. It would not be right to say that all PPMs are GATT inconsistent or illegal under the WTO regime, though it is true that the WTO panel has upheld the validity of few PPMs.⁹ In this section of the paper we have attempted to explain the existing jurisprudence of PPMs and an enquiry as to whether the present system is capable of handling the PPM issue has been made. The most controversial aspect is the legality of PPMs under the WTO regime. The law of PPMs received a useful clarification in 1998 when the WTO Appellate body gave the *Shrimp Turtle* case¹⁰ to the International Community, not only by clarifying the nature of GATT obligations but also on the of legality of the PPMs and whether they are permitted by the WTO.

Evidently, GATT permits nations to discriminate between imports made in prohibited ways, but whether PPMs are permitted and if so to what extent is the question.¹¹ GATT has also permitted PPM based restrictions in the Sanitary and Phytosanitary Agreement (SPS) and the Agreement

⁹ The Report of the Panel, United States-Import of Certain Automotive Spring Assemblies (Canada) GATT B.I.S.D (30th Supp) at 107-28 (1984), is one of the few instances where a PPM regulation was upheld under GATT Article XX(d). Canada here complained about an exclusion order against certain automotive springs assemblies produced in violation of a valid U.S. patent and without a license from the patent holder. The panel held it to be a valid restriction under XX(d).

¹⁰ WTO Appellate Body Report on the United States Import Prohibitions of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), available at <http://www.wto.org>.

¹¹ GATT Article VI:3 implicitly authorizes countervailing duties against imports produced using Government subsidies, Article VI:2 authorizes antidumping duties against dumped products, Article XX(d) implicitly authorizes trade measures to protect patents, trademarks, and copyrights.

on Technical Barriers to Trade. Both of these are a proof that PPMs are not *prima facie* illegal.

With respect to PPM's and GATT we may limit our discussion to GATT Article I (most favoured nation), GATT Article III (national treatment), GATT Article XI (elimination of quantitative restrictions) and finally GATT Article XX (General Exceptions). With respect to the aim of our paper however we have limited our discussion of the WTO jurisprudence on issues that materially affect the next section. We shall hence discuss the:

1. General Structure of GATT obligations;
2. "Like Products" under the GATT;
3. Extraterritorial application of PPMs: validity under the GATT;
4. PPMs and the not so generally accepted General Exceptions under GATT Article XX.

The aforementioned are some of the aspects that have raised heated debates in the legal circles with respect to the legality of the Environmental PPMs and are central to our suggestions for the creation of a new framework.

A. General Structure of GATT Obligations

Though, many have suggested that the relationship between the Articles I, III and XI and Article XX is that of the rules and its exceptions, the WTO seems to support another theory. In the Shrimp Turtle case, the

Appellate Body suggests that Article I, III and XI grant the “rights” of the members to have the exports of its private actors accepted by the other WTO member nations, while Article XX grants the right to the importing country to “invoke an exception” listed therein and make an action, though inconsistent with GATT Article I, excusable.¹² By using the language of rights, the Appellate Board has undermined the exceptions of the exceptions which are a potent means to justify TREMs. The usage now would imply a narrow restriction of the exceptions, since exporting and importing products is a “substantive right” in the language of the Appellate Body and hence will weigh over the Exceptions. This tendency to minimize the exceptions is visible in the Brazil Aircraft case¹³, the Salmon case.¹⁴

B. “Like Products” under the GATT and PPM based Trade Measures

One of the most important aspects in understanding the obligations under the WTO is the definition of “like” products. In banning the discriminating treatment of “like” domestic and foreign products, Article I puts a major mark on the legality of a PPM. Similarly in Article III, the pivotal points are “like products” and “unfavorable treatment” of the like products. The applicability of Article I and III depends of whether the products are ‘like’. Hence, if a NPR PPM can make the products

¹² The Appellate Board in this case said, “Exercise by one Member of this right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the *substantive treaty rights* in, for example, Article XI:1, of other Members.”

¹³ Decision by the Arbitrators Concerning Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, WT/DS46/ARB (Aug 28, 2000).

¹⁴ Canada-Measures Affecting Exports of Unprocessed Salmon and Herring Report of the Panel adopted on 22 March 1988 (L/6268 - 35S/98), available at <http://www.worldtradelaw.net/reports/gattpanels/canadaherring.pdf>

dissimilar, they shall have no applicability¹⁵. In the unroasted coffee beans case¹⁶ and the Indonesia Automobile case¹⁷ the Panel has held that differing PPM's can not imply that products are unlike, however PPM's per se are not inconsistent with GATT.

In the EU Asbestos case,¹⁸ the Board came up with four criteria¹⁹ to determine "likeness" and included "consumer tastes and habits" as one criterion. This gives importance to the consumer's treatment of a non-eco-friendly product." This decision acquired importance especially with respect to eco labeling as it gives importance to the consumer's treatment of a non-environment friendly product. It recognizes the rising importance of the consumers in matters relating to PPMs.

An analysis of the above decisions leads to the conclusion that goods involving NPR PPM, cannot be treated as "like" as long as the tariff classification and the consumer tastes and habits; which would include the differing attitude towards eco friendly goods, differ. In spite of differing PPM's the products can still be like if the four criteria given in the Asbestos case are satisfied.

¹⁵ In the un-adopted Tuna-Dolphin cases, the Panel has held that where the factors were not based on the product as such, Article III:4 would not apply

¹⁶ Spain-Tariff Treatment of Unroasted Coffee, June 11, 1981, GATT B.I.S.D (28th Supp.) at 102, 112. The Panel held that unwashed Arabica and Robusta was a like product to the mild coffee that could be imported duty free.

¹⁷ WTO Dispute Panel Report on Indonesia-Certain Measures Affecting the Automobile Industry, WT/DS54/R. The Panel held that imported products that did not use sufficient Indonesian products or labor could not be treated as unlike.

¹⁸ WTO (1998d), European Communities – Measures Affecting Asbestos & Products Containing Asbestos, Request for Consultations by Canada, Geneva: WTO, WT/DS135/1.

¹⁹ The 4 criteria are 1. Physical properties, nature and quality; 2. End uses; 3. Consumer tastes and habits; and 4. Tariff classification.

C. Extraterritorial Application of PPMs: Validity under the GATT

Another strand of legal argument to be found in the debate on PPMs is the extraterritorial application of PPMs. The controversial issue of the North South argument with respect to the PPMs also traces its source to their extra territorial application. With the environment being seen as a global concern, the ideological and legal basis of sovereignty are weakening and PPM based trade restrictions evidence the same. In the Tuna Dolphin I case²⁰ it was held that such regulations could not have extra territorial application. However, this was reversed by the Second Tuna Dolphin case.²¹ This finding of the panel was reiterated in the US Gasoline case.²² The law hence does not make extraterritorial application of a national measure illegal per se.

It is obvious that if PPMs are not applied extraterritorially they shall in all cases lose their efficacy and also act to the detriment of the domestic producers as discussed above. Since the Trail Smelter Arbitration²³ and in light of Article 21 of the Stockholm Conference,²⁴ it is amply clear that sovereignty carries with it the responsibility to protect the environment of other states from acts carried out within its jurisdiction. Simply, the use of unilateral measures should not per se invalidate the measure. The use

²⁰ *Id. supra* note 2.

²¹ Report of the Panel United States – Restrictions on Imports of Tuna, Report of the Panel, Geneva: GATT, DS29/R. (hereinafter Tuna Dolphin II)

²² *Id. Supra* note 26

²³ UNRIAA, vol. III (Sales No. 1949.V.2), p. 1965.

²⁴ *Stockholm Declaration of the Human Environment*, UN Doc. A/CONF.48/14 (1973), where Principle 21 states that States have “the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

of PPMs to prevent trans-boundary damage, environment of the importing states and protect global concern should be well accepted.

D. PPMS and the Not so Generally Accepted General Exceptions under GATT Article XX

The main savior of PPM's is Article XX. Though in the GATT Tuna Dolphin cases, the exception of Article XX(g) has been denied on the ground of the "extra jurisdictional" application of the regulation. However in the consecutive cases it was the requirements of the *chapeau* that have constantly defeated the claims of the nations under Article XX.²⁵ The WTO has however in all cases before it highlighted that the regulation should take into account the conditions of the country on which the Regulation is imposed and also the also meet minimum standards of fairness stated in the *chapeau*. Hence, one can say that though Article XX provides a legally justifiable ground for imposing environmental restrictions, under the existing regime they have to be interpreted narrowly.

The Extraterritorial application of regulation has indeed been the topic for some heated debates. The argument of States sovereignty and its right to use its independent resources has often been cited to strike at the validity

²⁵ GATT Dispute Settlement Panel Report on United States Taxes on Automobiles, 33 I.L.M. 1397-1461, the Panel here ruled that the exception could be used to justify producer characteristics PPM but was non-adopted; in the WTO Dispute Panel Report on the United States-Standards for Reformulated and Conventional Gasoline, Report of the Panel, WT/DS2/R (Jan.29, 1996) US Gasoline case, the exception was accepted but the conditions of the *chapeau* were not met; United States-Import Prohibition of Certain Shrimp and Shrimp Products, Report of the panel, WT/DS58/R (May 15, 1998), where the Appellate Board found the Regulation justifiable under Article XX. Hence in principle the exceptions were accepted.

of the PPM. Since the Trail Smelter Arbitration²⁶ and in light of Article 21 of the Stockholm Conference²⁷, it is amply clear that sovereignty carries with it the responsibility to protect the environment of other states from acts carried out within its jurisdiction. Simply, the use of unilateral measures should not per se invalidate the measure. The use of PPM's to prevent trans-boundary damage, environment of the importing states and protect Global concern should be well accepted.

IV. Developing a Framework for PPMs and TREMS

The need for a detailed and globally acceptable regulatory mechanism for PPM based regulations is already evident and in the coming years this need is going become even more pressing. There are some very basic principles that must be incorporated in any such framework to provide the most efficient and acceptable norms that can also deliver an efficient mechanism to protect the environment and still be as non-protective as possible. The measures proposed herein are not exclusive of each other and must be applied together. The violation of any of these principles would be an indicator of an improper PPM regulation.

Proportionality Principle: The principle of proportionality is one of the most basic tests for determining the validity of any TREM. In terms of PPM's it can be simply stated as follows – the restrictive regulation imposed by means of a PPM should be proportional to the harm that

²⁶ UNRIAA, vol. III (Sales No. 1949.V.2), p. 1965.

²⁷ *Stockholm Declaration of the Human Environment*, UN Doc. A/CONF.48/14 (1973), where Principle 21 states that States have “the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

would have been caused had the PPM not been in enforced. This measure of the strictness of a regulation or the damage caused are not taken in very accurate measures as not only is it near impossible to achieve perfect proportionality but also because the core values of every nation vary from every other and as such the measurement of these two quantities will also vary from nation to nation. The international community is not ready to formulate any strict standards for proportional measurements but at the least we can come up with basic acceptable standards that may be used to get an idea of how proportionate or more importantly disproportionate the balance is.

Purpose and Effect of a Regulation: PPM's are frequently targeted as protectionist measures disguised in the garb of a TREM. The fact that any given regulation may be found to be in violation of GATT does not necessarily mean its true intention was to create a protectionist and restrictive trade practice. Since the redressal mechanisms are more focused towards facilitating sustainable development the test to be kept in mind should be a measure of the effect that the PPM regulation has and not its intended or visible purpose. If it does not provide for any effective protection of the environment then it would most certainly be an unacceptable TREM but on the other hand if it provides for realistic environment protection then the other tests should be used to decide its validity.

Precautionary Principle: The 'Precautionary principle' is another proposed guideline that would provide an extremely helpful in the case where a PPM is proposed with respect to a process or production method which possesses certain scientific uncertainties as to its effects on the

environment.²⁸ This principle helps us analyze the situation in which a product which is harmful to the environment would need strict regulation due to the uncertainty of its scientific parameters. The impact is to be measured in reference with the following two terms:²⁹

- Probability that the environment would be damaged
- Magnitude of harm that would be cause

Thus any harmful impact of a technology should be known prior to its approval for distribution in any market.³⁰ As such if the probable impact is imminent then a PPM may be enacted but one that also follows the proportionality principle. It also covers the fact that despite evident benefits all the harmful aspects of a product must be known and taken into consideration while regulating its place in a market.

Scientific Evidence: While the precautionary principle deals with the situation where it is not possible to immediately gauge the degrading effect of a product which is the subject of a PPM regulation, as far as those products are concerned for which we do have the requisite data and do not pose any immediate threat to the environment. As a general precaution it must be made mandatory for every PPM based regulation to have a sufficient scientific backing and the form of regulation must be such as to negate the effect proved by the scientific evidence.

²⁸ Kindall M.P.A., '*UNCED and the Evolution of Principles of International Environmental Law*', 25 John Marshall Law Review 19, 23-25 (1991).

²⁹ Weiss, McCaffrey, Magraw, Szasz, Luitz, *International Environmental Law and Policy*, Aspen Law & Business, page 157-159 (1998) New York. Also *see* the 1990 Bergen Declaration for a similar principle, 1992 Rio Declaration principle 15. 1996 Protocol to the London Convention of 1972.

³⁰ 'Like Products, health and environmental exception: the interpretation of PPM's in recent WTO trade dispute cases', *Estey Centre Journal of International Law and Trade Policy*, Vol 5 , No2, p 123-146, 2004.

Similar Treatment as Domestic Producer: This principle originates in GATT itself. It simply provides that when there is any PPM that regulates the imported product in the Importing Nation then the domestic producers of a like product must necessarily comply with the same standards so as to harmonize the standards and maintain fair competition. Any violation of this rule would be proof of an unfair and restrictive trade practice.

Regulatory Standards and Trade Prohibitions: Technically speaking a PPM may provide for regulation by taxation, standards that a product or process must adhere to or whether it classifies a certain product or a product made from a certain process as a banned commodity of trade. A PPM standard would require compliance with respect to the techniques, technologies, processes, methods or inputs by which a product or service is produced, in order to change the impact of production in pursuit of a specific, legitimate, public policy objective.³¹ Thus the regulatory framework would provide for International Standards and may at the same time provide for different standards for different categories of nations depending upon their economic and technological advancement, or depending on the nature of a resource particular to any one or group of nations. It would also set minimum standards that all nations must adhere to. Nations may also discuss the possibility of providing incentives to countries that adhere to levels of environmental standards above those expected of them.

³¹ P005 ISEAL Code of Good Practice for Setting Social and Environmental Standards, Public Draft 2, July 2003, ISEAL Alliance, Canada, 3.3 Page 3

These international standards must necessarily take into consideration the present and future levels of market demands, supply, environmental statistics, national economic profile, scientific technological standards available in the affected nations and existing regulatory requirements. Thus the standards could vary deeply from nation to nation and an effective solution can be reached by the division of nations into groups based on common characteristics. For the purpose of creating these globally acceptable standards an international organization would be created, which doesn't not create new standards, but simply asses the mass bulk of standards of all national non-governmental and international agencies and then identifies the common strains within them.

While providing for the regulation of a product based on its production method it would also be necessary to provide for measures to ban products that are harmful to the importing nation's environment due to the use of any dangerous or harmful process that makes the product itself an environmental liability. Mechanisms would need to be created for the enforcement of bans not only by individual countries but also the global community to protect resources nearing depletion or reaching a state from which it would be extremely cost-ineffective or improbable to renew a renewable resource.

Eco-Labeling: Labeling is an alternative solution identified by the WTO as well as many other jurists and academicians. It works on the simple principle that consumers are conscious members of society and would refrain from buying a commodity that was is not eco-friendly. We can see the rise of this consumer consciousness in a variety of forms from the

increasing sales in 'blood-free' diamonds to the ban on use of polythene as a packaging material in cities around the world. The consumers of a developed nation are more discerning than the consumers of a developing or under-developed nation. Most PPM's are imposed by developed nations themselves and as such providing for eco-labeling could easily be a justifiable trade practice that is non-restrictive. Labeling also solves the dilemma of a consumer in a developed nation who would prefer to buy a cheaper product which is not eco-friendly for a variety of reasons including his inability to pay a higher price that eco-friendly products would obviously require.

The Free Trade Solution: At the conclusion we would like to tackle a set of hypothetical situations that may arise and would help us better analyze the dilemma surrounding TREMS in general. Free trade is the principle that provides the staunchest resistance to PPM's. Thus it would also appear to be at odds with environmental protection. Most environmental lawyer and academician are usually faced with the option of either siding with giving preference to Free-Trade policies or strict TREMS. As must have been observed by many before us, it is our humble opinion that achievement of our desired environmental standards is best achieved by utilizing the forces of Free-Trade itself. It would be safe to say that there exists not a single developing or under-developed country that would sufficiently sacrifice its economics for environmental protection of its own volition. The proposed solution is to make sure the third world countries can still carry on the trade so as to reach the required economic status where they can use the new clean/environment friendly and technologies/production methods and still compete in the international markets. This requires a well thought out and balanced system of proper

pricing of the goods, internalizing as much as possible without affecting the competitiveness of goods and bringing into equilibrium the Cost of Environment Factor with the Economic incentives. These requirements will surely involve steps beyond mere regulatory mechanisms or at least more complex trade mechanisms than seem to be possible at the current time. It is clear that modern human nations cannot survive without both Trade and the Environment. The relevant characteristic here is the basic human tendency to choose trade over the environment when the costs are similar and the probability of this becomes higher as we move from developed to developing and under-developed nations.

Now, let us take the following variables for our hypothesis - E = Environmental factor/cost and e = Economic factor/growth:

Scenario 1 When $E > e$

Then in the absence of other considerations a PPM would be desirable:

Scenario 2 When $e > E$

In this case a PPM would be undesirable:

Scenario 3 When $E = e$ or $E \sim e$

Whether a PPM is to be enforced or not depends on opportunity cost and comparative costs test proposed herein. Realistically speaking a country is unlikely to choose an environment friendly method if it adversely affects its trade situation assuming the costs are similar, specially for renewable resources i.e. a drastic destruction of an environmental resource compared to a recession . Working on this assumption a country is more likely to head in favor of a non-eco-friendly process method if the final economic

costs are similar to the environmental costs. As such the country has to figure out its own comparative advantage in giving preference to the environment or the economy. The probability of a country choosing trade over the environment is likely to increase even more if the country in question is a developing or under-developed country and are somewhat reduced if it is a developed country. Only after a nation reaches a certain levels of development can it successfully compete in an international market with eco-friendly production methods.

Now, assuming the argument shifts the other way, i.e. a country is forced into protecting its environment as a PPM bans its exports. In such a situation the country looks for either alternative markets, and maybe in cheaper markets. If it looks for the new markets in countries of an equal standard as the one that imposed the PPM then the objective of the PPM is lost or at the least diluted. If it goes for cheaper markets then the chances of its attempting to make its cost of production cheaper and sales price of goods lowers is very high and as such the environmental damage will necessarily increase. As such the environment can be damaged even more.

The third possible scenario is that all markets for the good are destroyed in which case the developing countries economy takes a jolt equal to or more than the environmental cost. Thus, if developed nations truly desire to save the environment, need to provide the cleaner/eco- friendly technology at affordable price to the developing countries and by provide incentives for their use instead of dirty technology or non-eco-friendly methods like eco-labeling by which a clean technology product is certain to amass greater profits in first world markets at the least.

V. Conclusion

The creation of an International Regulatory Framework on TREMS particularly PPMs is a possibility albeit one which requires a great deal of commitment and planning from all the interested parties.

In this Article, we highlighted the important players in the TREMs as well as the existing jurisprudence on the same. Only by thoroughly understanding and appreciating the reasons behind the opposition of the third world countries to various TREMs can we come to a situation where we may actually be able to reconcile these differences and achieve the utopian goal of sustainable development. One of the key factors that would affect all our measures would of course be the speed of technological development and the changing economic dynamics of the global communities various players. As we move towards facilitating a framework we need to create an institution to implement the framework. One such body, in our humble opinion, is the World Trade Organization. With its proven and tested dispute resolution mechanism and its vast membership, not to mention the fact that its procedure ensures universal acceptance and it minimizes political manipulations by the developed countries as well.

We have a limited time frame in which to react to the present situation and handle the problem as the rate of environmental degradation needs to be controlled quickly. With the burgeoning population and resultant increased dependency on limited resources the economic parities will force

the nations around the world to further exploit their resources. The time from which we might never be able to come back is fast approaching.
