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The SPS Agreement within the Framework of WTO Law. The Rough Guide to the Agreement’s Applicability

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1. Introduction

The last fifty years witnessed an enormous expansion of international trade. The system created in 1947 by the General Agreement on Tariffs and Trade proved to be very successful in the elimination of trade tariff barriers. International trade liberalization also coincided with the increase of national regulatory activism. This process was particularly visible in the area of risk regulation. Governments, responding to the fears and demands of their domestic constituencies, adopted a wide range of regulatory measures aimed at the protection of the environment and

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human health and safety. In the majority of the cases, these new regulatory initiatives served fully legitimate goals. However, it also appeared that some internal measures might take the place traditionally occupied by tariffs barriers and become an attractive means for protectionism. The clash between international trade and national regulations seemed to be just a matter of time. Trading partners understood this potential danger, but the first efforts proved to be unsuccessful.\(^1\) It was only with the Uruguay Round that a new set of rules disciplining the regulatory activity of WTO Members was introduced. The SPS Agreement\(^2\) and the TBT Agreement\(^3\) are particularly important in this respect, since they are specifically designed to deal with the problem of non-tariff barriers to international trade.

Under WTO law, the WTO Members are expected to observe traditional disciplines of the GATT 1994\(^4\) as well as the new requirements provided by the SPS and TBT Agreements. How are we supposed to navigate between these three agreements? What features of domestic regulations are decisive in qualifying a measure as falling under the SPS or TBT Agreement? Can an SPS-inconsistent measure be saved under the general exception clause of GATT 1994? If a measure is found to be SPS-consistent do we need to conduct additional legal analysis under GATT 1994? This article intends to address these questions. In this context, special attention is given to the recent panel report in EC – Biotech Products case.\(^5\) The reason for such an approach is twofold. First, it was the first panel, which comprehensively analyzed the conditions of applicability of the SPS Agreement. Second, as this article argues, some parts of its analysis are disappointing and not well reasoned. The article attempts to outline those deficiencies.

The article proceeds as follows. The first part briefly describes the structure of the WTO legal system and summarizes the negotiating history of the Uruguay Round preceding the


adoption of the relevant agreements. The second part discusses the conditions of applicability of the SPS Agreement, while the third part concentrates on the relationship between the SPS Agreement and two other legal instruments. The article argues that despite the mutually exclusive relationship between the SPS and TBT Agreement, it is not always easy to establish which of these two should apply. Two types of potentially problematic measures are discussed, namely multi-purpose measures and measures which on their face appear to be non-SPS technical regulations, but in fact are adopted due to SPS concerns. With respect to the second category, the article claims that a WTO panel is authorized to determine a ‘true’ nature of a measure and does not need to rely on the national qualification of a measure. With regard to the SPS Agreement and GATT 1994 relationship, the article attempts to demonstrate that the concept of lex specialis has a rather limited utility. As an alternative, it proposes the cumulative approach to application combined with the rebuttable presumption of GATT 1994 consistency.

2. Structure of WTO system

The WTO legal system is complex and multi-layered. It is composed of different agreements regulating different aspects of international trade. At the top of the system there is the Marrakesh Agreement Establishing the World Trade Organization. The other agreements are gathered in annexes attached to the WTO Agreement. Annex 1A consists of agreements relating to trade in goods. Here the central one is GATT 1994; the other two agreements discussed in this article belong to this group as well. Annex 1A also contains the General Interpretative Note, which provides rules on potential conflicts between GATT 1994 and the provisions of other covered agreements. The General Interpretative Note does not, however, regulate relations between other covered agreements themselves. Annex 1B and 1C include two agreements (General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property respectively). Annexes 2 and 3 contain rules on dispute settlement and

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policy review mechanism. Finally, Annex 4 consists of plurilateral agreements. Except the last category, all other rules are binding on all WTO Members. Plurilateral agreements bind only those Members that have accepted them.

The above-described structure emerged during negotiation of the Uruguay Round. Initially, the agreements were negotiated in 15 different working groups. However, in the course of negotiation the concept of a single legal undertaking materialized. This was understood as requiring future WTO Members to accept all the agreements under discussion as a single package, constituting one international treaty. Thus, WTO Members were obliged to accept all or nothing (with the exception of the plurilateral agreements). Of course, some effort was made to guarantee consistency between agreements. In the course of this process, a special Legal Drafting Group was created with the task of guaranteeing legal co-ordination between different agreements. Its task proved difficult, as the countries were rather reluctant to introduce changes to drafts already adopted within individual negotiating groups. Nor was there any extended discussion on relationships between agreements and their hierarchy. Altogether this resulted in the adoption of norms that sometimes seemed to be overlapping or inconsistent. At the same time collision rules were also underdeveloped, while the complexity of the system added an additional difficulty. It rapidly became apparent that only careful and creative interpretation by the WTO dispute settlement bodies might provide a solution. Therefore, it was (and in respect to some issues it is still) for panels and the Appellate Body to establish appropriate rules.

3. Scope of Application of the SPS Agreement

The scope of the SPS Agreement, at least in theory, is rather narrow, as it only applies to measures intended for the protection, within the territory of an importing WTO Member, of life and health of humans, animals and plants from certain specific SPS risks. Moreover, according to Article 1.1, an SPS measure needs to affect international trade directly or indirectly. Thus, measures with exclusive internal impact, without international dimension, are not covered by the

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9 At the later stage of negotiations 15 working groups were integrated into 7.

Agreement. Since Article 1.1 does not qualify the nature of such impact, it should be assumed that any kind of interference subjects a measure to the SPS Agreement (including de minimis impact). Moreover, according to the panel in EC – Biotech Products, it is not necessary to demonstrate that an SPS measure has any actual effect on trade, since Article 1.1 also covers potential interference (“may”). Coupled with the expression “indirectly,” this provides a broad coverage which is easy to satisfy. It is also noteworthy that the requirement of Article 1.1 is not restricted to the trade between the parties of the dispute. This may be deduced from the broad and unconditional language of the article (i.e. it does not speak about trade between the parties of the dispute). In practical terms, this means that a measure, which only affects the trade between other WTO Members, will also satisfy the requirement of Article 1.1.11

The specific SPS risks consist of: (a) risks for animal or plant life or health arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) risks for human or animal life or health arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) risks for human life or health arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; and (d) other risks related to the entry, establishment or spread of pests.12 According to the footnote attached to the above definition of SPS risks, the term animals include fishes and wild fauna, plants include forest and wild flora, pests include weeds, while contaminants pesticides, veterinary drug residues as well as extraneous matters.13 The above list is exhaustive and if a particular risk does not fit into one of the categories, the SPS Agreement does not apply. As far as the legal form of a measure is concerned, the SPS Agreement broadly provides that the notion of an SPS measure includes all relevant laws, decrees, regulations, requirements and procedures. In addition, Annex A(1) also includes a non exhaustive enumeration of such requirements and procedures, including end product criteria, processes and production methods, testing, inspection, certification and approval procedures,

11 Compare with the finding in Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States, WT/DS27/R/USA, adopted 25 September 1997, modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 943, para. 7.50 (“in our view a Member's potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreement are each sufficient to establish a right to pursue a WTO dispute settlement proceeding”).

12 Annex A(1) of the SPS Agreement.

13 Id., fn. 4.
quarantine treatments, relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport, provisions on relevant statistical methods, sampling procedures and methods of risk assessment, and packaging and labelling requirements directly related to food safety.\(^{14}\) This broad formulation also seems to cover informal procedures which are not codified in the law.\(^{15}\)

The recent ruling in *EC – Biotech Products* indicates that categories of relevant risks are to be interpreted very broadly. First, the panel believed that the protection of the environment, as far as the life and health of animals and plants is concerned, falls within the scope of the SPS Agreement.\(^{16}\) This particularly means that risks to biodiversity are covered by the SPS Agreement since any harm to biodiversity come through the harm to living organisms.\(^{17}\) As will be discussed below, other types of environmental risks (not necessary to animal and plant life and health) can also qualify, on the basis of subparagraph (d), as SPS risks.

Second, the panel decided that the term “animal and plant” includes the micro- and macro-flora and fauna, irrespectively of whether its components are target or non-target organisms.\(^{18}\)

Third, the equally broad interpretation was applied to the expression “arising from”. The panel, referring to the dictionary definition, interpreted this expression as meaning “to occur as a result of”. This finding, coupled with the observation of unqualified character of term,\(^{19}\) led the panel to conclude that the scope of notion “risks arising from” is sufficiently broad to include risks, which may only potentially arise in the future.\(^{20}\) In consequence, according to the panel, the SPS Agreement is not limited to the measures which address risks of immediate and direct

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\(^{14}\) Annex A(1) of the SPS Agreement.

\(^{15}\) But compare, Panel Report, US – Continued Suspension of Obligations in the EC Hormones Dispute, adopted 31 March 2008, WT/DS320/R, para. 7.429 (failing to recognize that informal procedures can be also qualified as SPS measures).

\(^{16}\) Panel Report, EC – Biotech Products, *supra* note 5, para. 7.207 (observing that protection of environment consists in part in protecting life and health of plants and animals, including wild flora and fauna).

\(^{17}\) *Id.*, at para. 7.372 (finding that damage to biodiversity implies damage to living organisms).

\(^{18}\) *Id.*, at para 7.219 (noting that “non-target fauna and flora ... means plants and animals (including insects) which are not themselves the organisms farmers seek to control or eliminate through the cultivation of GM crops, but which are affected by the cultivation of the GM crop, including through consumption of components of the GM plants”).

\(^{19}\) *Id.*, at para. 7.226 (noting that the expression “risks arising from” is not qualified by words directly or immediately).

\(^{20}\) *Id.*, at para. 7.225.
character (e.g. spread of pests), and equally covers those measures, which are concerned with risks that are indirect and more remote in time. In practical terms, this means that the required causality between the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms and risk to animal and plant life and health is less demanding (e.g. potential gene transfer to other plants leading to expansion of this species and reduction of biological diversity). At the same time, however, the panel did not explain what level of causality is required in order to satisfy the condition of “risks arising from”.

Fourth, in defining the notion of a “pest” the panel again referred to the dictionary meaning of this term. Thus, according to the panel, a pest under the SPS Agreement is to be understood as “an animal or plant which is destructive, or causes harm to the health of other animals, plants or humans, or other harm, or a troublesome or annoying animal or plant.” An interesting aspect of this interpretation is the fact that it is broader than the general definition provided by the International Plant Protection Convention (IPPC), one of the standard-setting organizations, which is explicitly referred to by the SPS Agreement. This approach seems, however, to be justified since the language of the Agreement indicates a broader meaning of the term. Moreover, the IPPC itself has recently recognized genetically modified (GM) plants as pests (although it is still defined through reference to damage to plants and plant products). On this

21 For an interesting discussion on the approach of the panel to the concept of biodiversity, see, Christiane R. Conrad, PPMs, the EC-Biotech Dispute and Applicability of the SPS Agreement: Are the Panel’s Findings Built on Shaky Ground? The Hebrew University of Jerusalem, Research Paper No. 8-06, at 18.

22 Panel Report, EC – Biotech Products, supra note 5, para. 7.240 (observing that the footnote to the definitions provided in Annex A stipulates that pests also include weeds, while the reference in various subparagraphs of Annex A(1) relates pests to different risks: to human, animal and plant life and health as well as to other damages).

23 The IPPC defines a pest as “[a]ny species, strain or biotype of plant, animal or pathogenic agent injurious to plants or plant products” (International Plant Protection Convention, Article II.1). Note that this wording excludes harm to animal and human life and health as well as other damages caused by a pest.

24 The other two organizations are the Codex Alimentarius (Codex) and the World Organization for Animal Health (OIE). The IPPC is responsible for development of standards in the area of plant protection, the Codex is responsible for food safety while the OIE deals with animal life and health. In the SPS practice, those three organizations are frequently referred to as “sister organizations”.

25 According to the SPS Agreement, pests may cause harm to human health (e.g. allergic reactions), animal life and health (e.g. by outcompeting those plants which are vital for fauna in particular region), as well as other damage (e.g. economic).

basis, the panel concluded that cultivated plants (*i.e.* GM plants) growing where they are not wanted and causing harm qualifies as pests (to be more precise as weeds).  

Fifth, the panel noted that even without deciding whether a GM plant, which cross-breeds with other plants, could be viewed as a pest, it is sufficient to establish that cross-breed plants could be classified as pests. In the words of the panel “there is nothing in the text of Annex A(1) to suggest that the product subject to an SPS measure – in this case, a GM plant to be released into the environment – need itself be the pest which gives rise to the risks from which the measure seeks to protect.” Again the panel referred to rational relationship between introduction of a GM plant and phytosanitary risk. One can here also note a certain logical trick here. The panel seems to construe the notion of pest not in absolute terms (whether a GM plant is a pest or not) but with the reference to potential risks, which may arise in a particular situation. Thus, GM plants growing where they are undesired would be pests, while GM plants as vector of genetic materials may not be considered as such.

Sixth, when addressing risks arising from the establishment or spread of diseases, disease-carrying organisms or disease-causing organisms, the panel found again that it is not necessary to take the position whether a GM plants could be classified as falling into one of these categories. Instead, the panel was satisfied with the fact that there is a rational relationship between the release of a GM plant containing the antibiotic resistance marker genes and the establishment or spread of pathogen, which may develop resistance to the antibiotic. Note that this approach closely corresponds with the interpretation adopted by the panel with respect to notion of “pest”.

Seventh, the panel noted that GM crops grown for the explicit purpose of providing food to human and animals could be classified as food or feedstuff respectively. This rather uncontroversial statement was accompanied by the finding that GM plants grown for other purposes (*e.g.* as a material for biofuels) may also qualify as food, since these plants could be

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28 *Id.*, at 7.255.

29 *Id.*, at 7.258.

30 *Id.*

31 *Id.*, at paras. 7.282 - 84 (noting that “we are satisfied that even if the GM plant or the ARMG were not viewed as a ‘disease causing organisms’ in and of themselves, the pathogen which develops resistance to the antibiotic in question could be regarded as a ‘disease-causing organism’ for the purposes of Annex A(1)”).

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eaten by non-target animals (e.g. rabbits or birds). After establishing that a GM plant is to be regarded as food (or feedstuff), the panel also found that added gene constitutes an additive, since proteins produced through unintended expression of modified genes in agricultural crops may be considered as “contaminant”, while poisonous substances, which may be produced during the metabolism or growth of a GM crop could qualify as a “toxin”.

Eighth, the panel found that the language used in the expression “other damage within the territory of the Member from the entry, establishment or spread of pests” also required a broad interpretation. According to the panel, it includes in particular damage to property (e.g. water intake systems), economic damage (e.g. damage in terms of sales lost by farmers due to the presence of unwanted GM plants on the agriculture fields) as well as damage to the environment other than damage to the life or health of animals or plants (adverse effects of GM plants to non-living components of the environment, including damage to geochemical processes).

Ninth, and finally, the panel qualified labelling requirement as SPS measure, however, only to the extent that it addresses health concerns. On the other hand, the same requirement applied to prevent the misleading of consumers fell outside the scope of Annex A(1) of the SPS Agreement.

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32 Id., at para. 7.292; this finding is again disputable, as it seems that the term “feedstuff” can be applied to domesticated animals only (compare also with the dictionary definition cited by the panel, which provides that feedstuff is food for cattle, horses, etc., and more specifically as dried food, as hay, straw, etc., for stall-feeding).

33 Id., at para. 7.297-301. The panel made two arguments. First, it referred to the definition of the Codex, which defines an additive as intentional addition in the manufacturing process. According to the panel, this language also covers development and production of seeds of the GM plants. Second, the panel observed that the Codex definition is not exhaust the meaning of the term “additives” while the ordinary meaning of this term indicates that an added gene can be define as an additive.

34 Id., at para. 7.313.

35 Id., at para. 7.323.

36 Id., at para. 7.370 (noting that the category of “other damage” is not qualified by any other expression).

37 Id., (basing its observation on the dictionary meaning of damage, which defines it as “physical harm impairing the value, usefulness, or normal function of something” and on the context of Annex A(1)(d), particularly Article 5.3 which recognize the economic damage as one of the relevant elements in risk assessment).

38 Id., at para. 7.372.

39 Id., at para. 7.389 (finding that there is a rational relationship between the purpose of the legislation - to protect human life and health - and labelling requirement).

40 Id., at para. 7.412.
As a result of this broad interpretation, the *EC- Biotech Products* panel concluded that almost all types of risks addressed in the EC legislation could be qualified under different subparagraphs of Annex A(1). In consequence, the EC measures fell into the ambit of the SPS Agreement. It is worth to note that the approach of the panel suggests that basically any domestic regulatory scheme for approval and control of GMOs will be classified in the future as SPS measure.⁴¹ However, what really alarmed some scholars, were the potential implications of the ruling for the environmental legal system in general (both on the international and national level). Note that according to the panel, measures intended for the protection of environment on the level of animal or plant life and health (or other environmental damage if it results from entry, establishment or spread of pests) are classified as SPS measures. Recall also the panel’s conclusion that regulated product (*i.e.* a GM plant) does not need to be a pest as such and it is sufficient that there is a rational relationship between a product and risk agent (*i.e.* cross-breed plant).⁴² The same approach was taken with respect to disease, disease-causing and disease-carrying organisms. The panel did not decide whether a GM plant falls into one of these categories, since it was satisfied with the existence of a rational relationship between GM plants and risk agents (pathogen, which might develop resistance to the antibiotic). These conclusions led some scholars to argue that the standard of rational relationship may subordinate in the future the majority of environmental regulations to the disciplines of the SPS Agreement.⁴³ Indeed, since it is not necessary for a regulated product to be a risk agent (*e.g.* pest or a disease) and the existence of rational relationship is sufficient, theoretically every national environmental regulation, which can be reduced to human, animal or plant life and health, and which involves at some level pest or disease, would be qualified as SPS measure. The problem with such an expansive interpretation is the fact that environmental protection is “quite a different field form the [SPS] Agreement’s traditional subject matter.”⁴⁴ The precautionary principle is frequently

⁴¹ Jacqueline Peel, *A GMO by any Other Name…Might be an SPS Risk!: Implications of Expanding the Scope of the WTO Sanitary and Phytosanitary Measures Agreement*, 17(5) European J. Int’l Law, 1009, 1024 (2007) (noting also that classifying such complex and multi-faceted risk regulatory scheme as a scheme providing only protection against pests and food safety risks is decontextual and oversimplified approach).


⁴³ Conrad, *supra* note 21, at 13 (giving the example of a measure, which bans importation of nuclear waste; following the logic of the panel if one is able to establish a link between the nuclear waste and a disease, one may conclude that such a measure is SPS one).

⁴⁴ Peel, *supra* note 41, at 1026.
relied upon, while the assessment of risks is not limited to scientific considerations but also includes other elements such as broad environmental effects and socio-economic consequences.\footnote{Id., at 1027.} Applying the strict scientific disciplines of the SPS Agreement may undermine these regulatory policies or even discourage new initiatives in the field of environmental protection, both nationally and internationally.\footnote{Id., at 1028.}

The critics also add that the SPS Agreement was never meant to be applied expansively. The drafting history of the SPS Agreement points in the opposite conclusion: the negotiators saw the adoption of the SPS Agreement as a response to the liberalization of international trade in agriculture (as well as a remedy to the long standing beef hormone dispute between the US and the EC). This suggests that the applicability of the SPS Agreement was intended to apply to traditional SPS risks such as food safety and risks posed by pests or diseases imported with agricultural products.\footnote{Id., at 1016.} This also implies that the environmental risks in general were considered to fall outside of the scope of the SPS Agreement. The narrow interpretation, as far as protection of environment is concerned, is additionally supported by the language of the TBT Agreement. Article 2.2 of the TBT Agreement explicitly refers to the protection of the environment as one legitimate objective for the adoption of technical regulations. On the other hand, the SPS Agreement does not contain any comparable wording. Thus, as noted by the EC in \textit{EC – Biotech Products}, “when the drafter of an international agreement uses a term in one instrument but not in another, the drafter intended to exclude that term from the latter instrument.”\footnote{Panel Report, EC – Biotech Products, \textit{supra} note 5, para. 7.198 (the panel was not persuaded by this argument and instead relied on the unconditional language of the Annex A(1)(d)).} There are also pragmatic arguments against the broad coverage of the SPS Agreement. As it was mentioned above, the environmental treaties generally adopt a less stringent approach than the SPS Agreement (\textit{e.g.} by generally allowing precautionary actions). This “may in turn reflect states’ acknowledgement of the different nature of available scientific knowledge regarding most environmental problem”\footnote{Peel, \textit{supra} note 41, at 1017.} as compared with the traditional SPS risks. Since the TBT Agreement provides more permissible disciplines, presumably it would be easier to reconcile the obligations
of environmental treaties with this agreement.\textsuperscript{50} By adopting broad interpretation with respect to the applicability of the SPS Agreement, the panel ruling thus undermines the international environmental legal regime by subordinating its disciplines to the obligations of the SPS Agreement.

The above criticism is not without merit. It may be questioned whether the unconditional inclusion of environmental risks (subject to the requirement that they indirectly or directly affect life and health of animals and pests and result from the entry, establishment or spread of pests, diseases, disease carrying- or causing-organisms) into the ambit of the SPS Agreement is a proper approach. Similarly, it seems legitimate to worry about reductionist interpretation of the concept of biodiversity. As noted by Conrad biodiversity is an autonomous value, which exceeds the value of its components (including the protection of animal and plant life and health).\textsuperscript{51} In consequence, it may be argued that the panel actually failed to grasp the real purpose of the examined measures. On the other hand, it is important to realize that the language of the SPS Agreement is not without ambiguity. It includes an explicit reference to protection of wild flora and fauna, elements which are traditionally considered as falling into the category of environmental protection.\textsuperscript{52} Obviously some environmental measures are SPS measures since animals and plants are part of the environment. Moreover, there are some indications in the drafting history, which suggest that the issue of the inclusion of environmental issues was not totally alien to the negotiators. As observed by the panel in EC – Biotech Products, one of the initial drafts of the SPS Agreement included language explicitly excluding environmental measures. This clause was, however, not included in the final version of the SPS Agreement, which may suggest that the SPS Agreement was never meant to be limited to traditional SPS risks.\textsuperscript{53} There are also pragmatic reasons, which speak against the general exclusion of environmental risks from the scope of the SPS Agreement. Too narrow interpretation would

\textsuperscript{50} Conrad, \textit{supra} note 21, at 25-27 (explaining how the disciplines of the TBT Agreement and GATT 1994 could have been applied to the facts of EC – Biotech Products).

\textsuperscript{51} \textit{Id.}, at 18.

\textsuperscript{52} \textit{Compare}, Panel Report, EC – Biotech Products, \textit{supra} note 5, para. 7.204.

\textsuperscript{53} \textit{See id.}, at para. 7.211 (the relevant clause provides “[r]equirements concerning quality, composition, grading, [consumer preferences, [...], the environment or ethical and moral considerations] are \textit{not} included in the definition of sanitary or phytosanitary measures”).
allow WTO Members to escape the scrutiny of the Agreement simply by labelling its measure as aiming at the protection of the environment.

Another part of the criticism, which demands a separate analysis, is the introduction of the rational relationship test. As it was discussed above, the panel frequently referred to this concept when it justified the applicability of the SPS Agreement (e.g. it was not necessary for a GM plant to be a pest since there was a rational relationship between such plant and establishment and spread of pest). Theoretically, critics are right in saying that such an approach potentially expands the scope of the SPS Agreement to many environmental areas, which have little in common with SPS risks. However, it is also worthwhile in this context that although the panel did not introduce any specific threshold of required causality, it mitigated its findings by asking for the existence of a rational relationship. Arguably this language implies the certain limits. One should also not be surprised by the reluctance of the panel to formulate any general standard here. Although such an approach would contribute to the predictability of the SPS system (and from this point can be criticized), it is a normal practice of WTO dispute settlement bodies to decide on particular cases rather than to establish blueprint criteria. Moreover, note that GM plants are agricultural products, which may pose risks for human, animal and plant life and health. In this sense, they are very similar to traditional SPS risks. Finally, the recent general WTO case law also suggests that catastrophic visions of the SPS Agreement overshadowing the whole field of environmental protection are misconceived. In Brazil – Retreaded Tyres, Brazil introduced the ban on importation of retreaded tyres, claiming that those tyres, having shorter lifespan, contribute to the faster accumulation of wastes. This, in turn, increases the population of mosquitoes, which frequently act as vector for malaria and pose direct risk to human health. If one follows the extreme interpretation of the ruling in EC – Biotech Products, it is not difficult to find such a requirement to be an SPS measure. There is a casual relationship between the importation of retreaded tyres and the amplification of risk for human health (the increase of the mosquito population being the mediating element). At the same time, mosquitoes can be easily qualified as disease carrying animals within the meaning provided by Annex A(1)(c) of the SPS Agreement. Note, however, that none of the parties in Brazil – Retreaded Tyres ever argued that such a measure could be considered as an SPS measure. Moreover, the panel itself never

mentioned that a measure introduced by Brazil could be regarded as an SPS measure. This clearly shows the limitations of the rational relationship introduced by the panel in EC - Biotech Products.

What is disappointing about the panel report in EC – Biotech Products is not so much the ultimate results but rather the reasoning as such. For example, when discussing the meaning of the terms “animal or plant”, the panel observed that these notions also encompassed soil and aquatic microorganisms. The panel finding was based on the observation that the SPS Agreement specifies that animals and plants include wild fauna and flora. The interpretation of the panel was that the scope of the phrase “animal or plant” was comprehensive in coverage and included microorganisms.\(^{55}\) This teleological interpretation differs however from the interpretation, which was employed with respect to term “pest”. In the second case, the panel heavily relied on (textual interpretation and referred to dictionary definition of the term.\(^{56}\) Applying the same method to the interpretation of “animal” and “fauna” would arguably lead to different outcome than was reached by the panel. According to the dictionary, “an animal” means “a multicellular organism ... differing from plants in certain typical characteristic such as its capacity for locomotion”, while “fauna” is defined as “animals, especially the animals of a specific region.” On the other hand, a dictionary definition of a microorganism provides that it is “an organism of microscopic or submicroscopic size, especially bacterium or protozoan.”\(^{57}\) Note that these definitions exclude microorganism from the scope of the term “animal”, since bacteria are unicellular organisms. The point which I am trying to make here is not that risks for microorganism should be included or not in the SPS Agreement. My concern is rather with the consistency of the panel’s approach in interpreting the terms provided by the SPS Agreement. The report of the panel, as it stand now, gives the impression that the panel had decided beforehand to apply the SPS Agreement and was subsequently looking for a sufficient rationale. What are the criteria of applying one method of interpretation in one case and another one in the other case? The panel report remains silent on these issues.

\(^{55}\) *Id.*, at para. 7.219.  
\(^{56}\) *Id.*, at paras. 7.238 and 7.241.  
Another problem with the panel’s analysis is its over-reliance on the dictionary meaning of the terms. This sometimes leads to comical results. Recall the finding of the panel that crops grown for other purposes than for human or animal consumption (e.g. cotton) can be considered as “food” since they are potentially consumed by wild animals. Similarly, GM seeds used for sowing purposes are also food because these seeds may be spilled next to the field and be subsequently eaten by birds. As an effect of such equilibristic interpretation, the panel came up with the definition of “food” which is completely unrelated to its understanding in the SPS field, where food is always defined through reference to human consumption. Note also that even within the SPS Agreement, the panel approach seems to be incorrect. The Agreement distinguishes, between food and feedstuff. If the first one is understood so broadly as to encompass food for animals, then the term “feedstuff” is deprived of any meaning. The similar problems arise with the panel’s interpretation of the term “additive”. Instead of relying on the Codex definition, it again referred to the dictionary meaning of the term. However, additive (as far as food is concerned) has its specific understanding in the SPS field, which cannot be really captured on the basis of dictionary definition. Again this is not to say that inserted genes cannot be considered as additives. The Codex definition is sufficiently broad to cover this category. The important thing, however, is to realize that the SPS Agreement does not operate in a legal vacuum and the meaning of its terms cannot be established simply by reference to the dictionary. Instead, the panel when confronted with the technical terms should rather rely on the work of international standard setting bodies specializing in a particular field. Although definitions of sister organizations do not exhaust the meaning of the terms used by the SPS Agreement (e.g. the notion of pest is interpreted more broadly under the SPS Agreement as compared to the IPPC), nevertheless where there is no clear difference, they should serve as reference point for the panel. Note also that such an approach might have actually simplified some parts of the panel’s analysis. For example, the IPPC defines a GM plant as a pest if it is associated with “[a]dverse effects of gene flow or gene transfer including, for example ... transfer of pesticide or pest resistance genes to compatible species.”\(^{58}\) Although a GM plant is acting more as a potential vector or pathway for the introduction of a genetic construct of phytosanitary concern rather than

\(^{58}\) IPSM No. 11, Pest risk analysis for quarantine pests, including analysis of environmental risks and living modified organisms, supra note 26, at 25.
as a pest in and of itself, the IPPC nevertheless considers that it may be considered as a pest. In consequence, simple reference to the definition of the IPPC would have saved the panel from introduction of the concept of rational relationship (at least with respect to pests), since a GM plant as such would be considered to be a pest.

4. The Relationship between SPS Agreement, TBT Agreement, and GATT 1994

4.1. SPS and TBT Agreement

Both, the SPS and TBT Agreements apply to trade in goods and deal with non-tariff barriers to international trade. They are intended to create disciplines for the establishment and maintenance of internal measures adopted in the form of regulations that may have an impact on trade flow. The TBT Agreement applies to measures such as technical regulations, product standards and conformity assessment procedures in general. The first type of measures is understood as a document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. Technical regulation may also include or deal with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. The standard is defined as a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. Finally, conformity assessment procedure is defined as any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled. The TBT measure may be adopted to fulfill a range of objectives from national security requirements through prevention of deceptive practices to protection of human health or safety, animal or plant life or health, or the

59 Id., at 26.
60 Annex 1(1) of the TBT Agreement.
61 Annex 1(2) of the TBT Agreement.
62 Annex 1(3) of the TBT Agreement.
environment. In contrast to the SPS Agreement, that list is not exhaustive. On the other hand, as it was already mentioned, the SPS Agreement applies only to specific technical measures intended to protect the life and health of humans, animals and plants from certain SPS risks enumerated in the Agreement.

The relationship between the SPS and TBT Agreements seems to be clear. Article 1.5 of the TBT Agreement provides explicitly that its provisions do not apply to SPS measures as defined in the SPS Agreement. In the same manner, Article 1.4 of the SPS Agreement also provides for an exclusive relationship. Note in this context that the distinction between two agreements is not “based on the nature of products that are subject to measures applied, … [i]nstead, the SPS Agreement defines SPS measures that are subjects thereof on the ground of objectives of and risks addressed by measures.” In other words, what is decisive in determining whether the particular measure falls within the scope of the one or the other agreement is the purpose of a measure and the type of risk which it seeks to address. If a purpose of a measure is to protect human, animal and plant health or life from specific risks enumerated in the Annex A, it will be qualified as an SPS measure only. Consequently, it is held that the SPS and the TBT Agreements are mutually exclusive.

However, this clear-cut distinction between the SPS and TBT Agreements is not always easy to operate. Although there are numerous cases where it should be rather easy to establish which agreement is applicable, there are also measures of more ambiguous character. Two types are particularly troublesome. The first group consists of measures that appear on the face of it to be technical regulations covered by the TBT Agreement but which in reality were adopted due to

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63 Article 2.2 of the TBT Agreement.
64 Article 1.5 of the TBT Agreement (providing that “[t]he provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures”).
65 Article 1.4 of the SPS Agreement provides that “[n]othing in this Agreement shall affect the rights of member under the Agreement on Technical Barriers to Trade with respect to measure not within the scope of this Agreement.”
SPS concerns. The second problematic group encompasses measures of a mixed-purpose character, reflecting both SPS and TBT considerations (i.e., measures which address certain safety aspects of imported food as well as consumer information, protection of environment in general or ethical standards). At this point, it is important to note that the classification of a measure under one of the agreements may have far-reaching consequences. As disciplines provided by each of the agreements differ, it may be tempting for an individual WTO Member to draft its regulation in such a way which, in effect, may lead to forum shopping between those two agreements. The SPS Agreement provides rather rigid requirements of scientific risk assessment, while the TBT Agreement is more liberal, permitting consideration of different factors in the process of adoption of a measure. Consequently, in specific circumstances the concept of risk assessment, as embodied in the SPS Agreement, may be a “more demanding criterion to meet before the … panel” than would be the necessity requirement provided by the TBT Agreement.

4.1.1. Purpose of a Measure

As mentioned above, measures that appear to be technical regulations covered by the TBT Agreement but which are adopted due to SPS concerns pose particularly difficult questions as to the applicability of the proper agreement. Should a panel establish a purpose of a measure on the basis of the declaration of the defending party? Or, rather, should it carry out its own assessment of a measure? If a panel is obliged to make its own assessment, how deeply should it scrutinize a particular SPS regulation?

Theoretically, there are at least four different approaches to this problem. First, the panel may be fully deferential and base its findings on the defending party’s statement in the proceeding, irrespectively from the real nature of a contested measure. A more moderate approach requires a panel to look at the purpose explicitly stated in a measure rather than at the

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69 Ahn, supra note 66, at 17.

70 Norbert Wilson, Clarifying the Alphabet Soup of the TBT and the SPS in the WTO, 8 Drake J. Agric. L. 703, 723 (Fall 2003); Scott also notes that a measure may breach the SPS Agreement and be TBT-consistent, see Joanne Scott, European Regulation of GMOs: Thinking about ‘Judicial Review’ in the WTO, Jean Monnet Working Paper No. 2004/04, at 8.
defending party’s declaration in a proceeding. Only if there is no clear indication of a measure’s objective, a panel should seek this by looking at its structure and substance. Another approach is to look at the architecture and the text of a particular measure alone so as to ascertain its purpose. In such case, a panel’s analysis is not limited to the purpose(s) expressly stated in a measure (i.e. in the preamble). This factor is given consideration, but it constitutes only part of the examination. A panel also evaluates other elements of the measure, such as substantive requirements, prescribed procedures and possible exceptions etc. Finally, a panel may seek out the subjective intent of the domestic regulator, which was the reason for the adoption of a measure.

The early case law did not give any decisive answer. The Appellate Body’s reasoning in Australia - Salmon might have suggested a preference for the second method. Although the issue related to establishment of the appropriate level of protection (ALOP) under Article 5 of the SPS Agreement, it nonetheless could have been considered to provide some guidance here (ALOP was also conceptualized as an objective). 71 The Appellate Body expressly stated that the establishment of an ALOP “is a prerogative of the Member concerned and not of a panel or of the Appellate Body”72 and added that “in cases where a Member does not determine its appropriate level of protection, or does so with insufficient precision, the appropriate level of protection may be established by panels on the basis of the level of protection reflected in the SPS measure actually applied.”73 Consequently, a panel’s analysis should have been limited, in principle, to the purpose expressly stated by a defendant and extended to the substance of the measure only if no purpose was given or if it was formulated imprecisely. The problem with this interpretation is the fact that the finding of the Appellate Body was made in a particular context. The definition of an ALOP, as provided in the Annex A to the SPS Agreement, expressly refers to the discretion of the WTO Members (“level of protection deemed appropriate by the Member”74). On the other hand, there is no parallel language with respect to objective of a measure.

72 Id. para. 199.
73 Id. para. 207.
74 Annex A(5) of the SPS Agreement.
It was only the recent ruling of the panel in *EC – Biotech Products* which directly addressed this issue. Although the panel, in its examination of the purpose, frequently referred to objectives expressly provided in the measures, it also clearly stated that “nothing in the *SPS Agreement* ... bar a panel from considering purposes which were not articulated by the member States.”\(^75\) In the other passage of the report, the panel went even further and proclaimed that it did not “need to accept at face value assertions of purposes which are implausible in the light of all relevant circumstances.”\(^76\) At the same time, the panel set the relevant standard for examination of the purpose. According to the panel, a purpose of a measure needs to be ascertained on the basis of objective considerations (*e.g.* text and structural features of relevant measure). The purpose that is explicitly pronounced in a measure will be relevant only if there is an objective relationship between such purpose and these considerations. This interpretation also necessitated the rejection the fourth approach, which asks for examination of subjective intent of the legislator or regulator adopting a measure. In this regard, the panel observed that for the SPS Agreement, the purpose of maintaining a measure is more relevant than its adoption.\(^77\) It also appears that the panel distinguishes between probative value of the purpose articulated in the measure as opposed to the purpose, which is merely asserted in the proceeding. As far as the first case is concerned, there seems to be a rebuttable presumption, which requires the panel to accept such purpose as a genuine one, once it establishes the existence of objective relationship.\(^78\) Thus, it is for a complainant to come up with sufficient evidence to the contrary. In the second case, it is the responsibility of a defendant, since a mere assertion is not sufficient and needs to be substantiated with some additional evidence.\(^79\)

The analysis in *EC – Biotech Products* closely corresponds to the third approach, which requires a panel to ascertain the “real” nature of the measure on the basis of “objective factors


\(^{76}\) *Id.*, at fn 1691.

\(^{77}\) *Id.*, at para. 7.2558 (noting that Annex A(1) does not refer to measures adopted for one of the enumerated purposes, but, more broadly, to measures applied for one of the enumerated purposes).

\(^{78}\) *Id.* (noting “in the absence of sufficient indications of a different or additional purpose, we may and should presume that the labelling requirement is intended to serve the purpose articulated in the Directive”).

\(^{79}\) *Id.*, at para. 7.2573 (finding that “the European Communities asserts that Austria's safeguard measure on T25 maize is also applied in view of concerns about labelling. This concern was not articulated by Austria in the documents discussed by us above. Furthermore, the European Communities has neither substantiated nor explained its assertion. In the light of this, we are not persuaded that Austria is applying its safeguard measure also to address the additional concern identified by the European Communities”).
embedded in regulatory design or text." The approach of the panel seems to be plausible. There are at least two reasons, which support interpretation proposed by the panel. First, it should be noted that regulatory purpose is part of a measure. This purpose may be provided either directly (e.g. in the preamble) or indirectly, in the structure of a measure. The purpose shapes and determines the meaning and the substance of the measure. Thus, inquiry into the purpose of the measure may be seen as an inquiry into the meaning of a measure as such. That leads us directly to the problem of standard of review applicable in the examination of the domestic law. In *US – Section 301 Trade Act*, the panel regarded a question of domestic law as a question of fact. Specifically, it said that its mandate is to “establish the meaning of Sections 301-310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations.” Consequently, the panel is not bound by the interpretation of the domestic law as provided by respective national governments. The elements that can be taken in account when ascertaining the meaning of the domestic law are the “text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars.” Clearly, a panel is authorized to go far beyond the text of a domestic act. In the context of the SPS/TBT Agreement, it means that a panel, in its examination of the domestic law, is not limited to the text of a measure. Thus, even if a measure expressly states its purpose, a panel may continue its analysis in order to establish a real nature of a measure. At the same time, a certain degree of deference needs to be granted to WTO Members. In *US – Section 301-310*, the panel stated that “any Member can reasonably expect that considerable deference be given to its views on the meaning of its own law.” That deference cannot, however, preclude a panel from the examination of the substance of a measure.

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80 Scott, supra note 70, at 7.
81 For more detailed discussion, see Matthias Oesch, *Standard of Review in WTO Dispute Resolution*, 6(3) J. Int’l Econ. L. 635 (2003).
84 Panel Report, US – Section 301 Trade Act, supra note 82, para. 7.19.
4.1.2. Multiple-Purpose Measures

The second category of measures also creates its own specific problems. The issue that arises here is whether to apply both agreements simultaneously or sequentially, or rather to look for the primary purpose of the measure and neglect the ancillary one. Once again, in theory there are at least three possible approaches. The first provides for the exclusive priority of the SPS Agreement. It is submitted that a particular measure can be covered by only one of the two agreements, and the SPS Agreement is “given a priority as opposed to the TBT Agreement with respect to jurisdictional determination.” It may be argued that the above conclusion is supported by the fact that the SPS Agreement as lex specialis has a priority over the more general regime of TBT Agreement, and secondly by the text of Article 1.5 of the TBT Agreement, which provides for the exclusive applicability of the SPS Agreement. The first approach has however serious drawbacks. Here, providing a clear blueprint criterion might seem attractive but over simplification can be dangerous. The automatic classification approach is unable to capture the specificity of truly multi-faceted measures. Moreover, if the SPS consideration in the measure is only a minor one, a panel classification will unduly interfere with WTO Member’s freedom to regulate, and will diminish the value of genuine and legitimate national objectives. It seems doubtful that this was the intention of the WTO Members when signing the SPS Agreement. Indeed some scholars are alarmed at the idea of a pure textual interpretation of the relationship between the SPS and TBT Agreement. Finally, as discussed below the concept of lex specialis has rather a limited utility under WTO law.

The second approach concentrates on the primary-ancillary relationship. Consequently, after identifying the primary purpose of a measure, a WTO panel should disregard its other objectives. The second approach is similar to the first one in the sense that it secures the mutual

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85 Ahn, supra note 66, at 7; this was also one of the arguments of Argentina in EC – Biotech Products (see, Panel Report, EC – Biotech Products, supra note 5, para. 7.161).

86 Compare, Panel Report, EC – Biotech Products, supra note 5, para. 7.156.

87 Scott, supra note 70, at 8 (stating that “[i]t is a danger against which the AB must guard. It must guard against the imperialism, which might be thought to inhere in the SPS Agreement by virtue of this wording”).

exclusivity of the agreements, however, unlike the first approach, it does not provide for automatic precedence of the SPS Agreement. The second approach also requires rather artificial simplification of the rationales underlying a measure, and anticipates the possibility of the identification of a principal purpose. This is not always the case; a measure may equally serve two different objectives.

The third approach, in contrast, provides that a single measure motivated by both SPS and TBT concerns can be perceived as “partly an SPS measure and partly a TBT measure, and subject to both agreements.” The examination of different parts of the measure under different agreements, depends on the objective underlying a particular part. In such a case, a panel’s examination should be twofold. In the first stage of the analysis, the measure is to be divided into “sub-measures”, second, each of these sub-measures is to be classified under the appropriate agreement. As it is discussed below, such sub-measures may be identical or alternatively be composed of different parts of the primal measure. Similarly to other approaches, this one also has its own drawbacks. First, in some cases it could be impossible to extract sub-measures, meaning that a primal measure could be simply non-divisible. Second, division of a measure and analyzing its parts as separate measures under different agreements may fail to grasp the overall importance of values underlying an initial measure. In practical terms, this may, for example, affect the assessment of measure’s legality in the context of Article 5.6 of the SPS Agreement.

Again it was only the panel in EC – Biotech Products, which addressed the above problem. The panel referred to the hypothetical situation where a WTO Member decides to consolidate two identical requirements (measures), one of them being SPS while the second non-SPS, into one law. According to the panel, this purely technical endeavour cannot remove such consolidated act

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89 Marceau & Trachtman, supra note 10, at 865.

90 The this approach was argued by the EC in EC - Biotech Products, where the EC observed that a single measure pursuing different objectives should be considered for purpose of the WTO law as constituting two separate measures (Panel Report, EC – Biotech Products, supra note 5, para. 7.151).

91 Id., at para. 7.165 (recognizing this limitation of the third approach).

92 Compare, JOANNE SCOTT, THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES. A COMMENTARY 20 (2007) (expressing her concerns with possibility of justifying a measures under Article 5.6 as the least trade restrictive alternative if a benchmark for restrictiveness is composed only of SPS benefits).

93 A SPS measure pursue one the objectives enumerated in Annex A(1), while a non-SPS measure the objective which is not covered by the enumeration.
from the scope of other WTO agreements (i.e. SPS Agreement).\textsuperscript{94} Developing this argument, the panel also added that requiring WTO Members to enact two separate acts containing identical provisions, each of them being adopted due to different concerns (purposes), would go against the rational legislative practice.\textsuperscript{95} Thus, according to the panel, to the extent that the requirement is applied for one of the purposes enumerated in the SPS Agreement, it falls under this Agreement. On the other hand, to the extent the same requirement “is applied for a purpose which is not covered by Annex A(1), it may be viewed as a separate measure which falls to be assessed under a WTO agreement other than the SPS Agreement.”\textsuperscript{96} At the same time, the panel also believed that its interpretation is compatible with the language of Article 1.5 of the TBT Agreement. Referring to the same hypothetical situation, the panel noted that Article 1.5 would only necessitate to exclude from the scope of the TBT Agreement these requirements (measures) which had been qualified as SPS.\textsuperscript{97} Consequently, Article 1.5 does not affect the applicability of TBT provisions to the second identical measure which pursue non-SPS objectives. At the same time, the panel observed that its analysis was based on the assumption that single requirement (measure) could be split up into two separate requirements (measures) “which would be identical to the requirement at issue, and which would have an autonomous raison d’être, i.e., a different purpose which would provide an independent basis for imposing the requirement.”\textsuperscript{98} This conclusion of the panel remained, however, somehow theoretical. As it was mentioned in Section 3, the panel found that almost all the objectives, which were purportedly pursued by the EC legislation on GMOs were SPS objectives.\textsuperscript{99} In consequence, there was no need to decide on the compatibility of a measure that could be extracted from one single act in order to assess it under other WTO agreements (i.e. the TBT Agreement).

The panel’s approach seems to be plausible. It respects the autonomy of WTO Members to regulate for whatever purpose they want. At the same time, the panel did not answer the very important question as how to proceed with those measures which are indivisible. No perfect

\textsuperscript{94} Panel Report, EC – Biotech Products, \textit{supra} note 5, para. 7.166.

\textsuperscript{95} \textit{Id.}, at paras. 7.168-70.

\textsuperscript{96} \textit{Id.}, at para. 7.165.

\textsuperscript{97} \textit{Id.}, at para. 7.167.

\textsuperscript{98} \textit{Id.}, at para. 7.165.

\textsuperscript{99} Except from the objective to ensure that novel foods do not mislead the consumers (\textit{Id.}, at para. 7.412).
answer is possible here. It seems, however, that in such case the primarily-ancillary approach should be applied. Thus, a panel would need to establish which purpose underlying a particular measure is the most important. Note in this context, that the strong predominance of one objective justifies the application of only one agreement, as the interference with WTO Member freedom to regulate would be minimal in such case. Finally, in all those cases where it is not possible to divide a measure into sub-measures or to identify the principal objective, it seems that the priority of the SPS Agreement should be presumed. This approach although mechanical, provides an exit in all those cases where two first methods failed, guaranteeing at the same time mutual exclusivity of the agreements as required by Article 1.5 of the TBT Agreement.

4.2. SPS and TBT Agreements and GATT 1994

The relationship between the SPS and TBT Agreement and GATT 1994 is even more complicated than that between the SPS and TBT Agreements. The SPS Agreement clearly provides a more sophisticated and developed regime for technical SPS measures than the one available under the GATT 1994. On the one hand, it elaborates upon existing GATT 1994 rules, but on the other hand it also adds obligations and rights not found in the basic agreement on trade in goods (i.e. requirement of scientific justification, reliance on international standards). Further complicating the issue, Article 2.4 of the SPS Agreement presumes conformity with GATT 1994 for all measures found to be consistent with the SPS Agreement. The nature of this presumption is discussed in more detail below.

The most intuitive approach to explain the relationship between two agreements seems to be a reference to the principle of *lex specialis*. As noted by Koskenniemi, the principle of *lex specialis* can be understood in two different ways. Thus, a particular rule may be considered an

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100 The preamble to the SPS Agreement provides as follows: “[d]esiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).”


102 Art. 2.4 provides that “[s]anitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX (b).”
application of the general rule in a given circumstance, to give instructions on what a general rule requires in the case at hand.\textsuperscript{103} Secondly, a specific provision may be perceived as an exception to the general rule. In this case, the particular rule derogates from the general rule.\textsuperscript{104} In both cases the point of the \textit{lex specialis} rule is to indicate which rule should be applied. Note that, according to the preamble, the SPS Agreement is intended as elaboration of rules for the application of the provisions of GATT 1994 which relate to the use of SPS measures (in particular the provisions of Article XX(b)). This would suggest that, in terms of Koskenniemi’s distinction, the SPS Agreement gives instructions on what a general rule of Article XX(b) requires. Seen from a different perspective, the \textit{lex specialis} principle may be conceptualized as providing a conflict rule (“in the event of conflict, the more special norm prevails over the more general norm”\textsuperscript{105}). Thus, principle of \textit{lex specialis} applies to the situations where two provisions (here agreements) are in conflict, meaning that provisions (agreements) regulate a particular subject matter in different ways. Technically speaking, \textit{lex specialis} may operate as a rule, which overrules or sets aside a general rule, or as a rule which removes the matter it controls from the scope of the general rule.\textsuperscript{106} Finally, that strong version of the \textit{lex specialis} principle may be contrasted with its softer version, where the \textit{lex specialis} principle is understood as providing only the sequence of examination of different agreements.\textsuperscript{107} Accordingly, the more specific rules are to be examined before the general provisions. Under the soft version both provisions (agreements) are applicable and the consistency of a measure with the requirement of more specific provision (agreement) does not immunize a measure from the violation of requirements provided by more general rule.

Commentators see two possible routes for application of a \textit{lex specialis} rule in the WTO context. Marceau and Trachtman\textsuperscript{108} perceive \textit{lex specialis} as a part of customary rules of general

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{104} Id., at para. 103.
  \item \textsuperscript{105} \textsc{Joost Pauwelyn}, \textsc{Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law 385 (2003).}
  \item \textsuperscript{106} Marceau & Trachtman, \textit{supra} note 10, at 869.
  \item \textsuperscript{107} \textsc{Pauwelyn}, \textit{supra} note 105, at 411.
  \item \textsuperscript{108} Marceau & Trachtman, \textit{supra} note 10, at 869-70, however, the authors also note that strict application of the \textit{lex specialis} rule is questionable due to the wording of article 2.4 of the SPS Agreement and admit that the \textit{lex specialis} rule was only applied to ascertain the sequence for different agreements’ examination.
\end{itemize}
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international law, which directly apply to WTO agreements through Article 3(2) of DSU.\(^\text{109}\) Other scholars refute that (or at least question whether) the *lex specialis* rule has the status of customary international law. They point out that the principle *lex specialis derogate legi generali* was not included in the Vienna Convention on the Law of Treaties. Instead they proposed application of *lex specialis* “in the light of the principle of effective treaty interpretation,”\(^\text{110}\) arguing that the *lex specialis* rule may be seen as an element of such interpretation. Their approach therefore assumes a two-stage process - diligent delimitation of the scope of *lex specialis* rules and subsequent application of general rules “to the extent that there is no overlap”\(^\text{111}\) or as interpretative signposts for the specific rules. Indeed, the Appellate Body has recognized the principle of effective treaty interpretation as “one of the corollaries of the ‘general rule of interpretation’ in the Vienna Convention.”\(^\text{112}\) Nevertheless, it should be noted that the *lex specialis* rule applied as tool of effective treaty interpretation has not as such been recognized in the WTO case law.

The concept of *lex specialis* seems also to be reflected in the text of the General Interpretative Note to Annex 1A of WTO Agreement.\(^\text{113}\) It is useful to cite this in full. It provides that: “in the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization, … the provision of the other agreement shall prevail to the extent of the conflict.” Consequently, the General Interpretative Note gives explicitly a precedence to the more specific SPS Agreement in case of a conflict with the provisions of more general GATT 1994. If the conflicts are to be conceived very broadly, the SPS Agreement will take automatic

\(^{109}\) Article 3(2) of the SPS Agreement specifically provides that “[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law [emphasis added].”


\(^{111}\) Id., at 323.


\(^{113}\) Pauwelyn notes, however, that General Interpretative Note reflects *lex specialis* rule only to the limited extent, as it gives the preference to other agreements over the GATT 1994 irrespectively whether they are actually more specific, see Pauwelyn, supra note 105, at 398.
precedence in all disputes relating to SPS measures. Of course, in all the situations where there is no conflict between two agreements, the application of both agreements will be cumulative.

Against this background, it is interesting to look at the case law, which may be relevant in this context. The strict version of *lex specialis* rule was argued by Indonesia in *Indonesia – Autos*. Indonesia claimed that the Agreement on Subsidies and Countervailing Measures as *lex specialis* ruled out the application of certain provisions of GATT 1994.\(^{114}\) The panel first noted that “the *lex specialis derogat legi generali* principle ... does not apply if the two treaties ‘deal with the same subject from different point of view or [is] applicable in different circumstances, or one provision is more far-reaching than but not inconsistent with, those of the other’.\(^{115}\) On that basis the panel went on and observed that “obligations contained in the WTO Agreement are generally cumulative, can be complied with simultaneously and that different aspects and sometimes the same aspects of a legislative act can be subject to various provisions of the WTO.”\(^{116}\) In consequence, the argument of Indonesia was rejected. The subsequent case law took somehow less restrictive direction. The Appellate Body, in the context of Article 1.2 of the DSU,\(^ {117}\) observed that it did not exclude the possibility of conflict between two provisions contained in different WTO agreements.\(^ {118}\) However, at the same time, the Appellate Body construed the conflict in very narrow terms as both provision need to be mutually exclusive (“adherence to one provision will lead to a violation of the other provision”\(^ {119}\)). In other case, the Appellate Body adopted a presumption against conflicts between different WTO rules, noting that “it is now well established that the WTO Agreement is a ‘Single Undertaking’ and therefore all WTO obligations are generally cumulative and Members must comply with all of them


\(^{116}\) *Id.* at para. 14.56.

\(^{117}\) Article 1.2 of the DSU provides in the relevant part that “[t]o the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail.”

\(^{118}\) Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767, para. 66 (noting that “only in the specific circumstance where a provision of the DSU and a special or additional provision of another covered agreement are mutually inconsistent that the special or additional provision may be read to prevail over the provision of the DSU”).

\(^{119}\) *Id.*, at para. 65.
simultaneously.” On the other hand, the principle of *lex specialis* in its soft version was accepted in the case law (albeit in the context of other agreements). The Appellate Body in *EC - Bananas III* observed that “although Article X:3 (a) of the GATT 1994 and Article 1.3 of the Licensing Agreement both apply, the Panel, in our view, should have applied the Licensing Agreement first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures (emphasis added).” It is also worthwhile noting that in *EC – Asbestos*, the dispute was decided under the GATT 1994, even though the TBT Agreement was also applicable. Obviously, the TBT Agreement provided more specific requirements as compared to the GATT 1994.

How then should we deal with the SPS/GATT 1994 relationship? The interpretation adopted by the case law would speak against the application, in the context of the SPS Agreement and GATT 1994, of the *lex specialis* principle in its hard form. As noted in the literature both agreements do not contain rules which violate each other; rather, they are supplementary. In consequence, WTO Members are obliged to observe both disciplines - that provided by GATT 1994 as well as by the SPS Agreement. This cumulative approach is also subject to Article 2.4 of the SPS Agreement. As mentioned above, that provision establishes the presumption of GATT 1994 consistency for measures which comply with the SPS Agreement. The concept of cumulative application seems to require construing the presumption as a rebuttable one (if both agreements are applicable cumulatively there is no need to disturb this application with irrebuttable presumption). Such character of the presumption can be additionally supported by the language of Article 2.4, since the expression “shall be presumed” indicates a weaker relationship than wordings such as “shall be considered” or “shall be deemed.” That would also correspond

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123 Marceau & Trachtman *supra* note 10, at 869 (noting “it is difficult to imagine circumstances where one requires what other forbids”).
with the interpretation adopted by the Appellate Body with respect to Article 3.2, which was recognized as providing for rebuttable presumption.\footnote{Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 170 (note that both articles contain the similar wording, Article 2.4 speaks use the expression “shall be presumed to be in accordance” while Article 3.2 “shall be deemed ... and presumed”).}

Again, a number of scholars seem to share this view.\footnote{Marceau & Trachtman, supra note 10, at 871.} In practical terms, the above means that a measure, which is assessed under the SPS Agreement may be examined under GATT 1994. The logic of cumulative approach also requires that such examination should be available both for measures which have been found to be compatible with the SPS Agreements as well as those which violate the provisions of the Agreement.\footnote{But see, Laurent A. Ruessmann, \textit{Putting the Precautionary Principle in its Place: Parameters for the Proper Application of a Precautionary Approach and the Implications for Developing Countries in Light of the Doha WTO Ministerial}, 17 Am. U. Int’l L. Rev. 905, 914 (2002), Ruessmann argues that the General Interpretative Note 1A gives the precedence to the SPS Agreement with respect to Article XX(b), however, as it was discussed above, conflicts under WTO law are to be understood very narrowly, “adherence to one provision” (here Article XX(b)) needs to “lead to a violation of the other provision” (here the SPS Agreement).} Of course in the second case, a defendant will not gain anything by referring to subparagraph (b) of Article XX,\footnote{If a measure is found incompatible with the SPS Agreement it cannot be saved under Article XX(b). This is true with respect to these provisions of the SPS Agreement, which repeats the disciplines established under Article XX (e.g. scientific basis for a measure) but also with respect to those provisions which go beyond its requirements (e.g. Article 5.6, which requires consistency in risk management decisions). As far as the second conclusion is concerned, note that the opposite interpretation would nullify those ‘GATT plus’ requirements of the SPS Agreement.} nevertheless this should be decided on the substantive level and not on the level of the agreements’ applicability. Moreover, it seems logical to switch, with respect to measures which are found to be compatible with the SPS Agreement, a traditional burden of proof under Article XX.\footnote{According to the WTO case law, the burden of proof under Article XX of GATT 1994 is normally borne by the defendant; see also, Marceau & Trachtman, supra note 10, at 871.} Since the presumption of Article 2.4 of the SPS Agreement speaks not only about the substantive rights of WTO Members (with corresponding obligations of other Members) contained in Articles I, III and XI of GATT 1994, but also explicitly refers the general exception of Article XX, the complainant should also be obliged to make a \textit{prima facie} case for violation of Article XX of GATT 1994. This would allow the defendant to benefit from the presumption in full. In this context, it should be also noted that any defence (as well as attack) under Article XX is limited to subparagraph (b). This results from the fact that a measure in order to fall into the ambit of the SPS Agreement needs to
be adopted for protection of human, animal, plant life and health from certain specified risks. If a measure is adopted because of other concerns (i.e. protection of public morals as provided by Article XX(a)) it will not be qualified as SPS measure in the first place. In consequence, a WTO Member cannot rely on other subparagraphs of Article XX, since the nature of SPS measure precludes the possibility of pursuing by such a measure any other objective.

The above approach seems to be an attractive and coherent interpretation of the relationship between the SPS Agreement and GATT 1994. Unfortunately, it also poses some difficulties. First, it seems that some findings of the case law are incompatible with the above picture. The EC - Hormones panel interpreted Article 2.4 of the SPS Agreement as having an “inverse effect”129 (meaning that if a measure violates the SPS Agreement, legally it is not possible for a defendant to justify it under Article XX(b) of GATT 1994).130 Second, and what I consider to be more important, it is not clear whether there is no conflict between the disciplines of the SPS Agreement and Article XX(b). For example, the case law decided under Article XX(b) provides for a proportionality test as the examination of necessity was construed as weighting and balancing process.131 The elements which are relevant include: (i) the relative importance of the values furthered by the challenged measure, (ii) the contribution of this measure to the realization of the ends pursued by it, (iii) the restrictive impact of the measure on international commerce.132 Obviously, the more important the values that are at stake, the higher contribution of the measure to attaining objectives, and the lesser impact on international trade, make it easier to find the necessity. In the context of SPS measures, the above test may require proportionality between the restrictiveness of a measure and the relevant risk (small risks would require to adopt less strict measures). Note that although this corresponds with the approach of the panel in Japan – Apples, it may also violate the right of WTO Members to establish a level of protection which

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they deems appropriate, right that was construed in other cases in absolute terms. The possible way out from this conflict (if any, as Japan – Apples adopted similar approach) is either to construe the presumption as irrebuttable one, or to apply strict lex specialis rule or to interpret the proportionality test in such a manner as to guarantee that the right to establish ALOP is not infringed. The latter possibility seems to be particularly attractive as it allows for the harmonization of the cumulative approach interpretation with the absolute character of the right to establish ALOP. This can be done in two different ways. First, the proportionality test may be construed as requiring only that a measure is not disproportionate to achieve specific ALOP and not as a proportionality between identified risk (low, moderate, high) and the measure chosen to reduce such risk (weak proportionality). Second, it may be argued that the protection of human, animal and plant life or health are so important values that they always outweigh the restrictive impact of the measure.

The application of the lex specialis rule in its softer form is less controversial in the context of the SPS Agreement. The case law always commences the examination of a measure from the analysis under the SPS Agreement. As noted by the panel in EC – Hormones “[i]f we were to examine GATT first, we would in any event need to revert to the SPS Agreement: if a violation of GATT were found, we would need to consider whether Article XX(b) could be invoked and would necessarily need to examine the SPS Agreement, if, on the other hand, no GATT violation were found, we would still need to examine the consistency with the SPS Agreement.” This reasoning clearly reflects the essence of the weak version of the lex specialis rule. However, even here the determination of the sequence of examination does not necessarily require reference to lex specialis. The panel approach was more based on logic and judicial economy rather than the explicit lex specialis principle.

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134 Compare, Panel Report, Brazil – Retreaded Tyres, supra note 54, para. 7.112.


136 Id. (noting “[f]or these reasons, and in order to conduct our consideration of this dispute in the most efficient manner, we shall first examine the claims raised under the SPS Agreement”).
5. Conclusions

WTO law does not precisely delimit the scope of the application of the SPS Agreement. A closer analysis of the relevant provisions reveals areas of possible overlaps and concurrent application with the TBT Agreement and GATT 1994. In the field of technical regulations and standards, multi-purpose measures are particularly troublesome, as well as measures which appear to be purely technical regulations covered by the TBT Agreement but in fact are adopted due to SPS considerations. Insofar as the SPS Agreement and GATT 1994 are concerned, the main issue is the character of the relationship which exists between these two agreements. The example of the EC – Biotech Products case shows that these problems are not purely academic. At the same time, given the fact that the SPS Agreement provides more stringent disciplines as compared to other WTO instruments, one may expect that the problem of the SPS Agreement’s applicability will be also subject to disagreement between the parties in future disputes.

This article recognizes that the case law has conceptualized the conditions of applicability of the SPS Agreement in very broad terms. In consequence, the SPS Agreement covers indirect and environmental risks (with respect to animal and plant life and health as well as other environmental risks resulting from the entry, the establishment and spread of pests). Moreover, according to the case law, it is not necessary for a regulated product to be a pest or disease (disease-carrying or -causing organism) itself. It is enough that there is a rational relationship between a product in question and risk agent. While accepting parts of criticism which was provoked by broad interpretations of the applicability, e.g. the different nature of the regulatory approach in environmental area as compared to traditional SPS risks, this article also finds that some of the concerns seem to be premature. First, it recognizes that the textual basis in the SPS Agreement required the panel to include in the scope of the agreement some of environmental risks. Second, allowing WTO Members to escape the scrutiny of the SPS Agreement simply by labelling a measure as environmental is hardly an advisable approach. Third, as far as the rational relationship test is concerned, the article submits that the language used by the panel clearly indicates that this concept has its limitations. The general WTO case law (i.e. Brazil –Retreated Tyres) seems to confirm that observation. At the same time, the article highlights number of other deficiencies in the panel’s analysis in EC – Biotech Products. This includes lack of consistency in the use of interpretative tools as well as overreliance on dictionary meaning of terms. In this
context, the article submits that the SPS Agreement does not operate in a legal vacuum and its terms need to be interpreted consistently with documents of relevant standard–setting bodies.

With regard to the relationship between the SPS and TBT Agreement, the article identifies four possible approaches to the assessment of the measure’s objective (relying on the statement of the party in a dispute, referring to the purpose explicitly stated in a measure, ascertaining the applicability of the SPS Agreement on the basis of objective criteria such as text and architecture of a measure, or searching for subjective intent of a party), and then analyzes the relevant case law. The approach of the panel in *EC – Biotech Products*, which allows for determination of a “true” nature of a measure, is recognized as a positive development. The second part of the analysis (multi-purpose measures) follows the same pattern. The possible approaches (exclusive priority of the SPS Agreement, primary-ancillary relationship, division of the measure into sub-measures) are juxtaposed with the existing case law. While appraising the approach of the panel in *EC – Biotech Products* (examination of different parts of the measure under different agreements), the article also notes the potential limitations and proposes some solutions. Thus, in all those cases where different objectives cannot be ascribed to different parts of the measure, the primarily-ancillary approach seems to be a proper solution. Strong predominance of one objective justifies application of only one agreement, as the interference with WTO Member freedom to regulate is minimal in such case. If this is not possible, the panel respecting the language of Article 1.5 of the TBT Agreement should accept the priority of the SPS Agreement. Regarding the SPS/GATT 1994 relationship, this article argues that a concept of *lex specialis* with respect to SPS Agreements has limited utility. The possible application of that principle seems to be limited to the question of sequence of examination and not so much applicability. Instead, the article proposes an alternative approach based on the principle of cumulative applications of the different WTO agreements, combined with the rebuttable presumption of GATT 1994 consistency.