

UNCTAD

Environmental requirements and market access

Non-discrimination

- **Under the GATT, regulations were dealt with in the context of Articles I, III (non-discrimination) and Dispute Settlement**
- **Regulations have also been treated through recourse to Article XX (general exceptions)**
 - **XX(b): protection of human, animal or plant life or health**
 - **XX(g): conservation of exhaustible natural resources**

Beyond non-discrimination

- **What may be considered by some as product differentiation on quality of safety grounds, may be considered by others as a form of trade barrier**
- **Non-discrimination had become an insufficient test**
- **Some countries wanted to make this Article XX more difficult to invoke by limiting exceptions to health protection standards pegged to internationally agreed norms**
- **Need to develop a more sophisticated set of rules to distinguish “legitimate” from “illegitimate” restrictions on trade**

GATT Working Group

- **1980s: GATT Working Group to examine NTBs**
- **Product requirements were found to be among the most significant barriers**
- **The examination of NTBs brought health and environmental policies under much greater scrutiny by GATT, and subsequently the WTO**

General exceptions

- **Technically speaking, an application of an exception generally comes in the form of a product standard**
- **Standards as multilateral “scientific consensus”**
- **There is no reference in GATT Articles I, III and XX to science**
- **Issues of science have repeatedly come up in disputes where these Articles were invoked**

Science and risk assessment

- **Harmonization of standards is difficult to achieve**
- **Several countries (EC) argued for leeway for countries to exceed international standards if they sought higher levels of protection**
- **Eventually, countries turned their attention to *science and risk assessment***

TBT and SPS

- **1980s: the Tokyo Round Agreement on TBT**
 - explicitly introduced the concept of “science” into the law of international trade
- **In UR this instrument was refined and broken down into two separate agreements: TBT and SPS**
- **These Agreements developed sophisticated mechanisms to guard against unjustified restrictions on trade**
- **Rules on “science” and “risk assessment” were formulated**

SPS regime

- **SPS takes WTO members to a restrictive interpretation of the GATT general exceptions by elaborating the applicability of the GATT Article XX(b)**
- **This interpretation is rather “closed” in its tendency to privilege scientific rationality**
- **SPS disciplines are greater than those in GATT Article III:1,4 and XX(b)**
- **Not only must there be no discrimination between supplying countries, but there must be no discrimination between the importing territory and that of others**
- **This adds a national treatment note to the *chapeau* of Article XX**

Scope for science

- **Four areas where scientific arguments really play out**
 - GATT Article XX (general exceptions)
 - TBT (necessity test)
 - SPS (risk assessment)
 - Dispute Settlement (right to seek information)
- **There is a trend towards using science – again – in the context of provisions for non-discrimination, e.g. in cases that deal with *toxicity***

Science as the legal test

- **Increasingly, the Appellate Body leans towards the view that the environment and health do not always have to be treated as exceptions**
 - standards of the International Agency for Research on Cancer and the ILO occupational health and safety standards were very much part of the proceedings in the Asbestos case.
- **This trend – science “migrating back” to the provisions for non-discrimination – is significant**
- **Science has effectively become the legal test in the WTO with respect to trade measures that have to do with the environment, food safety and health**

First (main) threshold

- **Standards as international scientific norms**
- **Article 3.1 of the SPS Agreement**
 - “3 sisters”
 - **Codex Alimentarius Commission for food safety**
 - 1963, FAO and WHO
 - **International Office for Epizootics (OEI) for animal safety**
 - 1952, FAO, revised in 1979 and again in 1997
 - **International Plant Protection Convention (IPPC) for plant safety**
 - 1924
- **Article 2.4 of the TBT Agreement**

Second threshold

- **Risk assessment**
 - SPS Article 5
 - TBT Article 2.2 (for product requirements that claim to be based on science)
- **Neither the SPS nor TBT Agreements set out the threshold very clearly**
- **SPS speaks of the need to ground SPS measures in “scientific principles” and “sufficient science”**
- **The terms are nowhere defined in the Agreement**
- **Presumably, Panels and the Appellate Body can interpret them on a case-by-case basis**
- ***Substantial equivalence* is the current standard for risk assessment**

Third threshold

- **SPS makes an allowance for the "insufficiency" of scientific information**
- ***Precautionary approach or principle SPS Article 5.7***

Standards

- **Compliance with international standards as a central requirement**
- **Without turning the WTO into a standard setting institution**
- **Using international standards that other more specialized institutions created**
- **Few had anticipated the challenges that the deference to international standards would entail, both for the WTO and for international standardizing bodies**

New role

- **Standard setting organizations were not prepared for the role that it was assigned by WTO accords**
- **Having been benchmarked in WTO accords, standards became increasingly measured against their market-opening potential and their costs and benefits for trade**

Dispute settlement

- **DS should not put into question the validity of an international standard**
- **Rather, it should limit itself to ensuring that international standards are being followed**
- **Codex had no dispute settlement clause**
- **IPPC had provisions for a technical dispute settlement, but they had never been used**
- **IOE was in the process of developing dispute settlement procedures**
- **No choice by develop DSU provisions in the SPS and TBT (today supplement the DSU)**

Codex

- Approval of MRLs for growth promoting hormones in cattle
- A long-standing dispute between the US and the EC over an EC import ban on hormone treated beef
- Consensus in Codex could not be reached on these standards
- At the request of the US, a secret vote was held, and the standard was approved by 33 votes against 29 (with 7 abstentions)
- Standards were adopted in **June 1995**
- This was the first time in the history of Codex that a vote on an international standard was held
- Since the beef hormones standards, two other Codex standards have been adopted through a vote
 - hormone treated milk
 - natural mineral water

SPS - Codex

- **1987:** Codex begins to consider growth-promoting hormones (coincides with the first Hormones dispute under GATT)
- **1987 to 1995:** the SPS Agreement is being negotiated, Codex begins to reflect on the role of science and its norms
- **1995:** Codex adopts its standards for these hormones and its Statements of Principle on the role of science in Codex, the SPS Agreement enters into force
- **1997,** the second set of Hormones disputes is brought to the WTO by Canada and the US; Codex puts the role of "Other Legitimate Factors" in its decision-making under review
- Parallel timelines cannot have been a mere coincidence.
- Countries have clearly been using one forum to influence the other.

IPPC

- **Prior to SPS, the IPPC had only engaged in an *ad hoc* standard setting process**
- **1997 an amended version of the treaty was developed to better prepare it for its role under WTO**
- **The 1997 amendment enshrines some of the principles of the SPS Agreement, such as *risk assessment*, and the need to recognize the existence of pest and disease-free areas**
- **IPPC ended up basing itself on the WTO, and not the other way around as had been the intention of WTO negotiators**

IEO/OIE

- **IEO/OIE's work has become increasingly controversial – and politicized - due to mad-cow and other animal diseases and their trade implications**

Science and commercial diplomacy

- **The role of international standardizing bodies today is to a large extent determined by WTO**
- **The work of these organizations will become difficult to undertake, as the market opening and closing potential of their standards is increasingly weighed**
- **While continuing to be “multilateral”, these institutions may increasingly have to vote on the adoption of their standards**

How objective is science?

- **Regulatory design and implementation is much more than a technical exercise**
- **Notwithstanding the movement to transform rulemaking into a scientific discipline, real world regulatory determinations remain political**

Scientific consensus

- ***Scientific consensus* is geographically distributed and flows from centres of influence**
- **These centres of scientific authority correspond, not accidentally, to the major players in the world trading system**
- **Countries commanding resources for the establishment of *scientific consensus* are in a position to exert important influence on national regulations around the world**
- **It is not clear to what extent nations removed from the scientific centres of authority can obtain the science they need to support desired regulatory outcomes**
 - ACWL

Economic aspect

- **Concealed in the narrower debates about the environment and human health are wider concerns about market dislocations, product displacement and concomitant socio-economic changes**
- **Generally, product displacement and similar adjustments are considered to be part of the evolution of markets**
- **However, the pace and scale at which they occur may threaten the export prospects for developing WTO Members**

Questions

- **What are the main trends in international standards setting activity?**
- **What are the possible shifts in competitive advantage and potential market gains and losses?**
- **Which countries – or companies – may become new – or major – players?**
- **Is there risk of major frictions between the old and new players? In which sectors?**
- **How big are the risks of product displacement? Is there a danger of worsening terms of trade in particular sectors, i.e. commodities?**
- **How prospective standards, environmental, health, etc., may affect trade flows and market access?**
- **What is the scope for the harmonization of regulatory regimes?**

Technical assistance

- **TA in the form of advice and training is important for achieving the appropriate level of quality and SPS protection in their export markets**
- **However, it does not address these bigger problems**
- **Need for TA that would permit the developing country Members to maintain and expand its market access opportunities for the product involved**
- **However, this type of assistance, also agreed to by WTO Members as per Article 9:2 of the SPS Agreement, is rare**
- ***Aid for trade* concept**
 - rule making is done with little regard to development
 - not a one-off intervention
 - improving access to liberalized markets

Challenge

- **Over 650,000 standards worldwide**
- **More frequent, stringent and complex**
- **A growing number are environment-related**
- **Both product and process standards**
- **Proliferation of private standards**
 - *de facto* mandatory
- **Changing standards**

Exporting perspective

- **Minimal scanning capabilities**
- **Absence of early-warning systems**

Importing perspective

- **Regulatory agencies do not consider themselves trade agencies**
- **Loath to provide notifications, particularly at an early stage**

A two-track approach

- **Standard setting**
 - pre-standard harmonization
 - taking into account possible consequences for DCs
 - stakeholder consultations
 - *ex ante* impact assessments
- **Standard implementation: offering financial and technical assistance to DCs**

EU context

- **EC Treaty article 178 on Policy Coherence for Development (PCD)**
 - **Netherlands: PCD-test for all new EC proposals**

Ex ante consultations

- **Internet makes consultations accessible**
- **E.g. EU chemicals regulation (REACH):**
 - **over 6,400 contributions**
- **However:**
 - **99 DCs affected by REACH, 11 participated**
 - **48 LDCs affected by REACH, 1 participated**
- **Why?**

Ex post consultations

- **Explaining new directives to stakeholders, e.g.**
 - EU Directive on waste electrical and electronic equipment (WEEE)
 - EU Directive on restriction of hazardous substances in electrical and electronic equipment (ROHS)
- **Inviting stakeholders to participate in consultation fora for implementation, e.g.**
 - EU Directive on eco-design requirements for Energy-using products (EuP)

Impact assessments, case 1

- **EU Chemicals regulation (REACH):**
- **First draft: authorization required for ores and ore concentrates with hazardous impurities**
- **Impact assessment:**
 - loss of income to S-S Africa: €2.13 bn in 10 years
 - little risk to environment and public health
- **Present draft: ores and ore concentrates completely exempted**

Impact assessments, case 2

- **EU regulation on ochratoxin A in roasted coffee beans:**
- **First draft: maximum level 3 ppb**
- **Impact assessment:**
 - 3 ppb = 5% rejected, 5 ppb = 1% rejected.
 - costs: \$160 mn/year to DCs (especially Africa)
 - no real difference in risk to health
 - questions by DCs in SPS Committee
- **Final EU regulation: 5 ppb**

Advice to developing countries

- **Participate in stakeholder consultations**
- **If necessary, ask for TA to participative in these consultations**
- **Ask developed countries about impact assessments**
- **If necessary, carry out impact assessments yourself**

TA and capacity building: recent trends

- **More transparency: S&D and TA in Addendum to SPS notifications**
- **Linking transition periods to capacity building: EU Official Feed and Food Controls, Article 50**
- **In-house experts provide TA: TA by European Chemicals Agency under REACH**

TA and capacity building: recent trends

- **TA in formulating proposals: project preparation grants by STDF (WTO-World Bank, UNCTAD participates)**
- **Coordinating TA on the basis of registers: WTO/OECD Trade Capacity Building Data Base**
- **One stop sources of information for exporters: e.g. CBI AccessGuide.**

Ask for assistance!

- **SPS: react to notifications, ask for S&D**
- **EU OFFC: ask for a longer transition period and TA**
- **EU REACH: ask the European Commission and Agency for TA**
- **STDF: promote and use the facility**
- **CBI AccessGuide: inform your exporters**

Pre-standard harmonization

- **Pre-standard harmonization, i.e. coordination between regulatory systems, common data collection processes, testing protocols, scientific methodologies, and risk assessment procedures**
- **Makes sense for both regulators and regulated entities, offers one of the most promising avenues for responding to market access pressures associated with changes in standards.**

New approach to TA

- **Linking capacity building processes to regulatory ones to ensure that the importing perspective can be heard**
- **Shift from demand-driven to donor-driven model**

Consultative Task Force

- **Country- and sector-specific exchange of experience**
- **Focus on voluntary ERs of the private sector and NGOs and thus provides a formal exchange mechanism between these stakeholders and governments**
- **Facilitating access to information on new ERs**
- **Allows a regular exchange of information among agencies and initiatives that provide TC/CB in fields relevant to CTF discussions**
- **Provides input into WTO debate (CTE, TBT, SPS)**

TER 2006

- **Conceptual issues on how to protect environmental (not trade) interests at the interface of ERs and market access**
- **Sectoral experience: electrical goods and electronics (China, Philippines and Thailand)**
- **Organic agriculture as an export and sustainable development opportunity**
- **Large number of commentaries from a wide spectrum of stakeholders**
- **Overview of TA/CB activities on TED in 2004-2005**

On-line sources

- **Website of UNCTAD's Consultative Task Force**
 - www.unctad.org/trade_env/test1/projects/taskforce.htm
- **Website for UNCTAD Trade and Environment Review 2006**
 - www.unctad.org/trade_env/test1/publications