The Codex Alimentarius and Environment-related Food Safety – Part Two: Linkages with the Biosafety Protocol, SPS and TBT

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Abstract

The Codex Alimentarius is the global food trade standard which has been adopted by the WTO Agreement on Sanitary and Phytosanitary Measures as the benchmark which determines the level of trade restrictions an importing country may impose on food imports to protect the public health of its citizens without much risk of having these restrictions challenged at the WTO. It is an exceedingly complex and highly procedural organization which is to be expected in a body that administers a set of standards that aim at protecting food safety and at the same time trade interests. This paper represents the continuation of my ISA 2002 presentation: "The Codex Alimentarius and Environment-related Food Safety -- Part One: the Functioning of the Global Standards" which is now posted in a reviewed version on http://www.ecolomics-international.org/2003_ii_2_upt_ca-i_functioning.pdf

After having explored the Codex Alimentarius' general functioning I am focusing in this piece on the Codex's linkages with the CBD's Cartagena Protocol on Biosafety and the two WTO Agreements SPS and TBT. There have been two disputes at the WTO so far involving the Codex Alimentarius, namely the 1998 case *European Commission – Beef Hormones*, and the 2003 case *European Commission – Sardines.* The interesting thing here is that the first one refers to SPS and food safety, the second one on the other hand is based on TBT and refers to the European Union's labeling practices. The EU has lost both cases. The first one, however, cannot be considered as settled because the EU does not accept the imposition of US and Canadian food practices which violate European traditions and values. The EU prefers to pay a fine for the time being, but the case is seen as a harbinger of a much bigger food fight over GM food in which the Codex is involved also.

A reviewed version of this paper will be made available on http://www.ecolomics-international.org/headg_publications_eplr.htm at a later date.

Introduction: An Unusual Regulatory Constellation

This paper deals with the development of a global regulatory framework for genetically modified food and other agricultural products. This framework establishes the conditions under which WTO members may limit access to their market for these goods. Traditionally the two sectors of food-related and of environmental trade restrictions are discussed separately in policy and legal analyses because obviously we are dealing here with two different subject areas, bodies of law, and organizations at the national, regional and global levels. In the first instance we are dealing with a collection of international food standards, the Codex Alimentarius, which have been adopted by the Codex Alimentarius Commission, its governing

body. It is the most important reference point concerning the safety and quality of all food and beverage products whether they are genetically modified or not. In the other instance we have a much more focused legal instrument, the Cartagena Protocol on Biosafety. It represents a hybrid trade and environment agreement dealing exclusively which certain genetically modified goods, namely those which are still living and therefore reproducible, such as seeds or fruits, which are called living modified organisms (LMOs). These include edible as well as other species such as for instance cotton. As can easily be seen from this basic description, there is a very important category of GM goods which are covered by both agreements, namely raw GM food products. It should be noted that we shall limit our discussion to plant varieties because the international regulations of genetically modified animals are, especially at the Codex Alimentarius, not very advanced yet.

In spite of this generally adopted separation between food and environmental regulations it is arguably appropriate to speak of environment-related food safety in the case of raw GM food because these seeds may constitute a threat to the surrounding biodiversity.[1] Crosspollination between GM plants and conventional plants which may threaten to permanently reduce the biodiversity of a certain region is one of the biggest concerns over the introduction of genetically modified agricultural techniques. The prevention of such environmental damages is indeed the very objective of the Biosafety Protocol. At the same time the Codex Alimentarius is responsible for establishing international standards addressing potential health hazards such as allergies due to GM food products.

Given the intertwining food and biodiversity concerns and the very different approach toward their protection it is not surprising that we are dealing here with an exceptionally complex legal and administrative framework. The overlapping and in some cases conflicting jurisdiction of two or more legal instruments is indeed an important and recurring issue in Public International Law. Our regulatory constellation comprises four multilateral agreements which are administered by three separate UN bodies and the World Trade Organization: the Codex Alimentarius is administered jointly by FAO and the WHO,[2] the Cartagena Protocol on Biosafety[3] by the United Nations Environment Programme, and the two WTO Agreements on the Application of Sanitary and Phytosanitary Measures (SPS), and on Technical Barriers to Trade (TBT) are part of the WTO Agreement.[4] The mandates of these four agreements are very different, yet their commonality resides in the fact that they contain international trade provisions which specify the conditions under which a country may restrict or ban the importation of certain genetically modified goods within their jurisdiction. The general background of these provisions consists in the very strict obligation on WTO member countries to provide access to agricultural imports unless they have WTO-approved justifications to restrain or block that access. In other words, the Codex Alimentarius and the Biosafety Protocol are both legal instruments which specify the

[1] This field represents a particularly interesting case study of the overlap between ecology and economics for which I have coined the term 'EcoLomics.' See http://www.ecolomics-international.org/
[2] http://www.codexalimentarius.net
[3] http://www.biodiv.org/biosafety/protocol.asp
[4] The WTO Agreements are available online: http://www.wto.org/english/docs_e/legal_e/legal_e.htm

exceptions within their domain to the WTO's rules against discrimination[5] and protectionism.[6] Both are dealing with GM products but not exactly in the same way. The complexity of this domain arises on one hand from the double threats GMOs may pose to public health and to the biodiversity surrounding a field planted with GM seeds. On the other hand there are worries that countries may try to use trade restrictive measures which are not really motivated by these concerns but rather by protectionist objectives. As is easy to understand, the present analysis is situated in the twilight between policy and law and necessarily of an exploratory nature.

The Codex Alimentarius: Important But Not Very Visible

The Codex Alimentarius is sometimes called the most important unknown multilateral organization. It is a full-fledged UN body with over 160 member states, and a Secretariat that has its a primary venue in Rome within FAO, and a secondary one in Geneva within WHO. In addition to the Codex Alimentarius Commission which meets every two years and its Executive Committee there are approximately twenty Committees and Task Forces in which all member countries may participate and which meet every year. Most of these Committees are dedicated to specific categories of food products such as fats and oils or processed fruits and vegetables. Some so-called horizontal Committees are responsible for functional tasks like negotiating the general principles of the whole Codex framework or of analysis and sampling methods. Unfortunately, developing countries often don't have the means to attend these meetings which take place all over the (industrialized!) world, or else a delegate may be burdened with the representation of more than one country. In spite of this serious shortcoming which the Codex shares with UN conferences in general, the most important work of the Codex Alimentarius is carried out in a considerable number of large international conferences which usually take place annually and last a week.

In view of the importance of the topics of food safety and of fair trade, of their economic and political stakes and ramifications, and of these intensive and rigorously structured negotiation processes organized according to the customary United Nations rules and regulations, one may certainly conclude that the Codex Alimentarius would indeed merit greater attention in the eyes of the public, the media, the NGOs, and also academic researchers. This lack of interest can be explained to some extent by the extraordinary complexity of the various streams of negotiations going on at the same time, and undoubtedly also by the highly procedural and technical nature of many of these discussions and negotiations, especially those regarding the establishment of standards and of their acceptance by the member countries. This complexity can be appreciated from the fact that the Codex Alimentarius Procedures Manual which includes the statutes, rules of procedures, definitions, and the powers and authorities which govern the relationships among the various Codex bodies, as well as the details of these processes contains 170 pages.

[5] GATT Article I, *General Most-Favored-Nation Treatment.*
[6] GATT Article III, *National Treatment.*

The functioning of the Codex Alimentarius and its ambiguous legal relationship with the WTO Agreement has been dissected and analyzed elsewhere (Thomas, 2003).

Non-Trade Concerns in the Wider Trade Policy Context

The creation of the WTO has indeed fundamentally changed the nature of the Codex Alimentarius which previously was often likened to a Gentlemen's club due to its not very politicized and rather technical debates. The SPS Agreement which was introduced as part of the 1994 Marrakesh Agreement declares that in order to harmonize "on as wide a basis as possible" sanitary and phytosanitary measures, these should be based on international standards, guidelines or recommendations where they exist,[7] and that the Codex Alimentarius must be used as the reference point for food safety.[8] In a wider trade policy view point, the SPS Agreement could be called the WTO's reference point for adjudicating whether those trade restrictions which an importing country justifies based on a scientific reasoning are WTO compatible or whether they are to be considered as protectionist trade barriers. These trade measures involving disputed scientific evidence are among the most heatedly debated trade policy issues. Nevertheless, or perhaps precisely because of the contentious nature of WTO disputes involving the sufficiency of scientific evidence, it does not appear that a clarification of the SPS Agreement is one of the trade ministers' priorities. The Ministerial conferences at Doha and at Cancun did not put any emphasis on clarifying the very contentious interface between science and WTO law.

The Doha ministerial meeting was undoubtedly the most important one in the WTO's history which is still short but already rich in trade-related developments. Most notably, the WTO has managed to impose itself as *the* multilateral trade tribunal respected by the international community which rules authoritatively on economic disputes, including those between the world's two biggest economic blocks, the US and the EU. Nevertheless, even though its rulings are accepted by both economic superpowers, in the case of the *EC -- Beef Hormones*[9] dispute this does not mean that the US as the winning side managed to impose its views regarding the safety of non-therapeutic hormone treatment for cattle on the Europeans. Rather, the latter simply agreed - at least for the time being (for how long??) - to pay a fine of over US$ 100 Million per year as a compensation for the economic damage resulting from this WTO-illegal trade barrier. A strong feeling of resentment against the United States and against the WTO remains in Europe as a result of this ruling which is not perceived by the public at large as being a science-based transatlantic trade quarrel but rather as the imposition of an American value system which clashes with the perception of food culture in Europe:

[7] SPS Article 3.1.
[8] SPS Annex A 3.(a).
[9] WORLD TRADE ORGANIZATION WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, Appellate Body, *EC - MEASURES CONCERNING MEAT AND MEAT PRODUCTS (HORMONES)* http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#bkmk63

> *Beef Hormones* is a minor example of the consequences of different food and regulatory cultures and their impact on trade. The significant disagreements about the genetic modification of food – the revolutionary, new food production technology – is of immensely greater significance to food supplies and world trade. Religious notions about what it is safe to eat could lead to an equally bitter trade dispute (Echols, 2001:148-150).

Many of the wider issues pertaining to multilateral negotiations and their specific pertinence for WTO agreements are often termed by the trade community "non-trade concerns." They include issues like trade-related environment measures, consumers' information, the multifunctionality of agriculture, access and benefit sharing regarding plant genetic resources, or *suis generis* regulations of traditional intellectual property rights on plants (Cottier, 2001). It is interesting to note that the drafters of the Doha Declaration have attempted to limit non-trade concerns to the negotiations on agriculture:

> Doha Declaration Paragraph 13: (…) We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture.[10]

It is of course true that trade in agricultural products, arguably indeed more than any other sector, affects areas which are essentially not included in the purview of the WTO, such as improving food security or landscape protection (particularly important for an alpine country like Switzerland). Trade in agricultural products is linked also to issues where the WTO's role is presently not very clear, for instance the consumers' right to know whether food is genetically modified. In spite of the fact that agriculture's position at the center stage of non-trade concerns is undoubtedly justified - and in spite of Doha's Paragraph 13 - it should be mentioned that there is no consensus among the members regarding the question whether environmental issues ought to be included in the negotiations at all at the Committee on Agriculture.[11] More generally speaking, the regulatory interfaces between FAO/WHO/Codex, UNEP/CBD/Cartagena Protocol, and the WTO raises the issue of the UN-WTO interface, or to put it differently, the question of coherence between regulatory frameworks with different orientations, finalities, and – most importantly - responsible ministries with very unequal power distributions:

> One also needs to realize that the WTO does not really constitute a "mosaic"-like system whose elements make up a coherent and comprehensive ensemble. Rather, the WTO appears as a "puzzle" in which the environmental and trade pieces need to be better joined together. The role of the Appellate Body in this merging process is fundamental. The difficulty lies in the orientation of the WTO's dispute settlement policies: Which is the weight to be given to the environment in a system that is mandated to rule on *a priori* commercial disputes, and that is situated within an organization which is

[10] DOHA WTO MINISTERIAL 2001 *Op. cit.*

[11] See for instance : Agriculture and Services Talks Technically on Schedule, but Substantive Differences Remain Unchanged, *Bridges*, January 2002, p. 9.

specialized in the domain of commerce [author's translation] (Boisson de Chazournes et Mbengue, 2002:189)?

The TBT, the SPS, and the Evolution of the Codex Alimentarius

In view of the approximately 40 year old history of the Codex Alimentarius, the mandate given to it by the WTO to act as the global reference point in matters concerning food quality is obviously a recent development, in fact it represents an often overlooked but very important result of the Uruguay Round negotiations. This mandate has as mentioned profoundly changed the Codex's importance and even its very nature. In view of the Codex's new and far more politicized nature, one may argue that the Codex is presently still in a phase which can be described as an adjustment to its new role in international trade. As a matter of fact, a lengthy and elaborate evaluation process[12] which has been concluded with the discussion of its Report[13] by the Codex Commission in July 2003 represents an important achievement. One may well consider that the new phase in the history of the Codex Alimentarius will have begun for real once the implementation process of these recommendations has been concluded. The Codex being the highly procedural and slow-moving kind of organization that it is, it is clear that this implementation will take a considerable length of time even though undoubtedly only some part of these recommendations will be realized.

In addition to these legal and institutional transformations, another new development has directed the limelight onto the Codex, namely the international commercialization of GM commodities and seeds, and the related entry into force of the Biosafety Protocol. In theory there is a clear division of work between on one hand the Codex in charge of health-related food standards, and on the other hand the Biosafety Protocol in charge of potential threats to biodiversity which could result from living modified organisms. In reality, however, this separation is made complicated by the fact that human health concerns are included in the Protocol, but they constitute what may be considered a gray area. If the members of the Protocol should be serious about using this instrument in order to restrict or ban LMO imports then a clarification of its role with regards to health concerns would presumably be necessary and might require some new and very difficult negotiations.

The combined effect of the controversies surrounding GM food and of the linkages between the Codex Standards and the WTO agreements have resulted in considerable tension in the relevant Committees of the highly decentralized Codex structure which are conducting those negotiations, especially with regards to food labeling:

[12] This is the first time that the Codex Alimentarius Commission has conducted an evaluation of its functioning.

[13] Report of the EVALUATION OF THE CODEX ALIMENTARIUS AND OTHER FAO AND WHO FOOD STANDARDS WORK
http://www.fao.org/docrep/meeting/005/y7871e/y7871e00.htm#E10E3

> Polarization has increased as governments incorporate labelling provisions in their national legislation. There are accusations of inflexibility, criticism of the chair and general frustration at the lack of progress… As the working group became larger, there was less efficiency and less progress… The issue of "other factors" complicated the picture further and Principles for Risk Communication had not yet been elaborated. Due to political aspects of risk management and communication, and the current impasse, CCFL [Codex Commission on Food Labelling] may not be able to resolve this dispute.[14]

The issue of the labelling of GMO products is indeed presently one of the most contentious trade issues (Appleton, 2000). To appreciate the complexities and difficulties faced by the Codex Alimentarius Commission, it is necessary to place these tensions into the wider context of the Codex's double mandate (Thomas, 2003) which consists in a reconciliation of the two fundamentally different if not contradictory objectives "to protect the health of consumers and ensure fair practices in the food trade."[15] It is unavoidable that the twin objectives of the protection of public health on one hand and of the liberalization of international trade will inevitably clash at some point over the threshold of safety measures which are allowed under the SPS agreement (Romi, 2001:207). Interestingly, the two WTO disputes *EC - Hormones*[16] and *EC - Sardines*[17] both fall within a different one of these two mandates of the Codex. And they have been adjudicated on separate WTO agreements, namely on the SPS agreement for the former, which stipulates the Codex Alimentarius explicitly as its point of reference,[18] and on the TBT agreement for the latter, which indirectly calls for compatibility with the Codex Alimentarius standards through its mandatory referral to international standards.[19]

TBT, SPS, and the Position of the European Commission

The *Hormones* and the *Sardines* WTO disputes are of historical interest because they are the first ones which involve the Codex Alimentarius, and it is an intriguing coincidence that they clearly demonstrate the above-mentioned double role of the Codex in the application of the SPS and the TBT agreements. The political dimension of the framework in which both the WTO and the Codex Alimentarius operate is underlined very generally by the fact that the EC has been the accused party in both disputes. The analysis of the two Appellate Body reports sheds some light about the procedures which the WTO's Dispute Settlement Body uses in order to arrive at a

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[14] *Report of the Evaluation, op. cit.*, Box 1: Labelling of Foods Derived from Biotechnology (GM Labelling)
[15] *Understanding the Codex Alimentarius.* 1999. FAO and WHO, Rome, 34 p. (19). http://www.fao.org/docrep/w9114e/w9114e00.htm
[16] *EC – Hormones, op. cit.*
[17] EUROPEAN COMMUNITIES - TRADE DESCRIPTION OF SARDINES, Report of the Appellate Body WORLD TRADE ORGANIZATION, WT/DS231/AB/R, 26 September 2002 http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm
[18] SPS, Annex A, Definitions, Para 3. International standards, guidelines and recommendations.
[19] TBT, Articles 1.1 and 2.5.

ruling in the face of scientific uncertainty and of accusations concerning discrimination in the food trade.[20]

These two cases have shown to what extent this multilateral food standard is challenged by uncertainties of a political, legal and scientific nature. The *Hormones* case in particular raises numerous essentially political, ethical and societal questions regarding the assessment, communication and management of risk which the SPS agreement is not equipped to handle according to widely respected trade expert and WTO Panel member Professor Cottier (2001:42):

> A better framework to deal with such concerns and to differentiate them from economic protectionism needs to be developed. In future work, it will be necessary to provide adequate room and an appropriate methodology for assessing such arguments and concerns in dispute settlement. This is important not only for dealing with traditional issues of quarantine regulations, but more significantly in adjudicating matters relating to genetically modified organisms in the new age of biotechnology.

In the same vein, the question is raised by a former WTO divisional director "…do the existing WTO provisions provide sufficient flexibility to address issues of an economic, social, cultural and environmental nature (Sampson, 2001:25)?" The integration of precautionary considerations is particularly complex and presents the trade regime with a formidable task.[21] As far as the TBT Agreement is concerned, the Appellate Body Report of the of *Sardines* case[22] (Appleton and Heiskanen, 2003) is generally regarded as an in depth analysis of the institutional role and legitimacy of the Codex Alimentarius system of standards in international law.

We shall end by observing that the EC has assumed -- at its expense -- a rather political position in both disputes: In *Hormones* the EC was faced with the "sound science" based position of the US, and in *Sardines* with what I would call the "sound law" position of Peru. The Appellate Body ruled in both cases against the EC. The *Sardines* case represents a relatively minor stake *per se,* especially for the EC, except that it strongly backs up the Codex's claim for legitimacy especially with regards to TBT. On a different level, it may encourage developing countries to stand up for the rights they have acquired under the WTO agreements. It is in fact quite remarkable that Peru managed to prevail in a dispute which one may consider as a crossover between zoological nomenclature and marketing practices. *Hormones* on the other hand is sometimes called a harbinger of things to come, i.e. EC-US disputes over GM products, which potentially may portend serious negative repercussions for the WTO as an institution:

> Public discontent could become an even greater challenge to the multilateral system, if new food technologies are imposed for the economic reasons underlying the SPS Agreement. Post-Seattle, post-World Bank, post-UNCTAD

[20] On the important issue of the *process* which brings the required scientific expertise to the attention of the panel and appellate body members, see Theofanis Christoforou. 2003.
[21] See for instance : Precaution – from Rio to Johannesburg, Proceedings of a Geneva Environment Network Roundtable, 16.5.2002, 45 p. http://www.environmenthouse.ch/Roundtables/pp%20report/pp%20report%20e.pdf
[22] *EC - Sardines, op. cit.*

> and post-Social Summit, the WTO must be mindful of this new scrutiny and skepticism if it desires to maintain and garner public support for an essentially economic approach to things cultural and personal. Is a balance that favors food as commerce still acceptable to the general public? The answer might be no (Echols, 2001:8).

To conclude this brief discussion of the linkages between the Codex Standards and other multilateral agreements, it is easy to see that the *Hormones* as well as the *Sardines* cases have important ramifications of both a legal and a political nature. Both undoubtedly make an important contribution to the development of public international law on one hand through the WTO, and on the other hand via the Codex Alimentarius through the UN system.

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