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WORKING PAPER

Drafting of an Appropriate Framework of Rules for Sanitary and Phytosanitary Regulations

The Punta del Este Ministerial Declaration called for "minimizing the adverse effects that sanitary and phytosanitary regulations can have on trade in agriculture, taking into account the relevant international agreements".

The only current GATT rule applying to such regulations is Article XX(b), allowing contracting parties by way of a general exception to adopt measures "necessary to protect human, animal or plant life and health". This is subject only to two conditions : the measures must not constitute either a means of arbitrary or unjustifiable discrimination between countries where the same conditions exist, or a disguised restriction on international trade. With those reservations, therefore, Article XX enshrines each contracting party's sovereign right to select appropriate health measures and decide what level of animal and plant health protection it wants to provide.

In practice, national regulations do vary widely, reflecting either objective differences in the plant or animal health situation or differing policies in this field which can constitute barriers to trade, up to and including complete import bans. Thus in order to achieve the broad agricultural objectives set out in the Punta del Este Declaration, there is a need to find the means to minimize the adverse effects of these regulations, without jeopardizing the health status of contracting parties. It should be possible to do this by means of action along the following lines.

1. A strengthening of international harmonization

It is impossible to do without international harmonization, which has already done a great deal to facilitate trade. It results from the work of several international organisations : the FAO/WHO Codex Alimentarius, the IOE International Animal Health Code, the International Plant Protection Convention, as well as the UN Economic Commission for Europe, the OECD et al. Their work normally takes the form of detailed expert-level discussions leading to texts which would usually take the form of recommendations - i.e. participating countries are not obliged to comply with the provisions laid down by these bodies, but may accept them and apply them to varying degrees.

GATT could give contracting parties a greater incentive to participate in the framing of these and apply them in full by ruling that national regulations complying with such international provisions would be deemed to conform to Article XX(b). Thus, while the principle of voluntary compliance with international rules would be maintained, countries would be encouraged to bring their own legislation into line to benefit from a full legal guarantee of the legitimacy of its requirements. But international harmonization, scattered as it is among a variety of bodies and requiring years of painstaking work, cannot by itself resolve all the problems arising from differences in national legislation and must be backed up where necessary by a specific international negotiating procedure under the auspices of GATT.

2. Ad hoc negotiations within the framework of GATT.

Where trade barriers resulting from disparities in national health protection rules have a serious adverse effect (import bans in particular), negotiations on the matter could be held in GATT, if possible in collaboration with the competent international body.

The aim of these negotations in the first instance would be to smooth out disparities and incompatibilities simply to the extent necessary to facilitate trade. This means finding a way to make differing national provisions compatible, rather than duplicating the process of international harmonization, which as we have seen aims actually to regulate a given health issue. For instance, it might be possible to seek and agree upon alternative guarantees, acceptable in terms of health safeguards, to replace the import ban. This would contribute to a better balance of the benefits resulting from the GATT system.

In this frame, it would be appropriate to pay a particular attention to the situation of the developing countries, who are worst affected by health bans on various markets because of the different health problems they face; they should, therefore, be entitled to benefit from forms of cooperation to be defined in order to be able to cope with problems linked with this kind of regulation.

Health barriers to be dealt with by this negotiating process can be identified on the basis of a list to be drawn up during the negotiations on agriculture .

3. Improving rules and disciplines for national regulations

In order to limit the adverse effects on trade of differences in national legislation which have not been dealt with by either of the two harmonization procedures described above, national laws should be subject to disciplines drawn up in GATT. Such rules could cover e.g. :

- transparency of national regulations :

any new or existing regulations including substantial changes in rules for imports should be submitted for appropriate procedure, to be defined, for making the information available to interested parties, who should in particular be informed of the practical implications and the possibilities of adaptations; notification procedures and possible counter-notifications should be foreseen as well as consultation procedures;

- effect on trade :

national regulations should systematically take the form least restrictive to trade, whilst ensuring an equal level of health protection; in particular, risk should be assessed on a regional basis so that wherever possible, import bans no longer apply to the whole territory of an exporting country but only to specific areas defined in terms of health status and given guarantees;

- adapting protective measure to risk :

in depth, consideration should be given to the possibility and appropriateness of limiting protective measures to the minimum strictly necessary to guard against actual risk occuring in modern conditions of production and trade rather than the theoretical risks of transmission;

-non-discrimination :

this is a basic principle of the General Agreement itself; however, it actually allows for a certain degree of discretion under Article XX, which merely states that measures must not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions exist.

It would be necessary to work out more precisely how the conditional non-discrimination rule should be applied in practice, bearing in mind, in particular, that national treatment will not always be either possible or even helpful to trade where different health conditions or systems of protection exist in different countries;

- consultation machinery :

we need a bilateral procedure to allow a contracting party confronted by health regulations limiting its exports to another contracting party to get together with the importing country in order to seek alternative safeguards or corrective measures to facilitate trade while maintaining the requested level of health protection; in particular, we should consider the possibility of technical assistance to improve the health status in developing countries and thus help their exports.

4. Drafting of an appropriate framework of rules for process and production methods (ppm)

Rules about process and production methods play a particular role in the agricultural sector. By contrast with the industrial sector, where standardized production has generally permitted use of norms drafted in terms of characteristics of the finished products, in the agricultural sector it is very frequently the practice to regulate the conditions of production which enable to presuppose the health status of the product, which is nevertheless a living organism liable to individual contamination, meets certain health standards.

A number of contracting parties have asked for the disciplines governing norms expressed in terms of the characteristics of the finished product to be extended to ppm. Such a simple extension of disciplines concerned for norms would lead to an alignment of ppm to norms. However this alignment does not correspond the technical characteristics of the two regulatory procedures. In fact while a contracting party applying import regulations has the imported product to hand and can carry out the necessary checks, it is in a position to assess and verify the conditions of production taking place in another country only with the cooperation of the country concerned.
It is therefore necessary to draft an appropriate framework of rules suited to the special case of agri-food process and production methods.