The Role of Experts in the WTO's Agreement on Sanitary and Phytosanitary Measures to Promote Reasonable Regulation of Commerce

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Background to the problem

- Health and safety regulations can become obstacles to placing products on the market of another country because
  - Placing on the market is prohibited or requires adaptation of the product or circumstances linked to its production
  - Special requirements apply to the selling of the product, its use or its disposal
- But purchasing decisions also depend on buyers having confidence in the safety of the product

Background to the problem

- As markets are imperfect and a finite good (regulatory protection) creating winners and losers is to be distributed, gvt. have the key role in regulating
  - To bring market closer to optimum by pooling knowledge, standardising and coercing
  - Providing a framework in which gains and losses can be assigned legitimately, that is, supported by public reason
- The result is complex CBA with multiple types of risks and benefits

Challenge for WTO law

- Distinguish between necessary and justified market supporting regulation and unnecessary, unjustified or discriminatory regulation while safeguarding the prerogative of gvt. to undertake complex CBA

Standard legal test

1. Whether or not ***a*** relevant risk warranting intervention is present
2. Whether the mitigation strategy is capable of addressing it
3. If so, whether there is no alternative measure that would both be as effective (or more) and less restrictive of trade
4. No specific *sui generis* test for complex CBA

The problem

- GATT 1994 is default agreement on regulation
- It contains a closed list of risks recognised as acceptable grounds for regulation
- The legal question is whether the regulation is necessary to address *that particular risk*
  - In other words, standard of necessity is a certain relationship between that *particular risk* and the regulation
  - The main legal hurdle has been 3. while 1.-2. are easy to pass

The problem

- On top of the GATT, the SPS Agreement applies to a specific set of risks
- The main legal hurdle in the Agreement has been 1.-2. because it imposes detailed requirements for adducing scientific evidence to pass tests 1.-2.
  - In past cases, most regulations have not passed these tests so 3. has played no role
- This evidence should be a risk assessment unless the state of scientific evidence is insufficient to perform one because of
  - No or limited data
  - Contradictory evidence fundamentally calls into doubt preceding risk assessment

A closer look at legal test 1

- The regulation has to be based on a risk assessment
- Risk assessment is defined as
  - evaluation of the **potential** for adverse effects on **human** or **animal health** from additives, contaminants, toxins or disease-causing organisms in **food, beverages or feedstuffs**
  - evaluation of the **likelihood** of entry, establishment or spread of a **pest or disease** according to the **mitigation measures** which might be applied, and of the associated potential **biological and economic consequences**

Critique

- 'Based on' has been interpreted to require an actual dose-dependent assessment and causality between exposure and hazard
- A different quantum & standard of proof is required
  - For food & feestuff, potential (=possibility) but not dependent on mitigation measures to be applied
  - For pests & diseases likelihood (= higher degree of likelihood) as a function of mitigation measures
  - For pests & diseases, some of what is relevant to complex CBA is considered for test 1 but not for food & feedstuff

Critique

- Why this difference in quantum?
- The complete multi-risk and multi-benefit aspect of a risk has some role to play in decision on whether or not the amount and quality of evidence is enough to regulate
  - Because regulation ultimately responds to a normative question of what ought we to do and not a factual question of whether the risk is well-established enough

Solution or false promise?

- *Continued Suspension:* desired level of protection allows regulator to frame the risk assessment and questions asked of experts but whether or not evidence is sufficient is the domain of expert judgment, not the policy-makers
- Evidence for complex CBA nevertheless still excluded for food & feedstuff because it does not fall under definition of risk assessment
  - Against which is to be judged whether or not evidence is sufficient for a risk assessment

Conclusion

- Risks relevant for more complex CBA are subject to GATT but not the aspects of the policy dealing with food & feedstuff risks
- This does not take account of the fact that the decision whether or not all the evidence considered is enough to regulate is an integrated one
- GATT emphasis is more on test 3, less on 1-2
- The SPS Agreement would still be violated unless GATT could function as an exception to an SPS violation but this is doubtful
- The SPS Agreement relies too little on broad types of expert evidence