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Kuik, Onno

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Draft Report on

Technical barriers to trade, sanitary and phytosanitary standards and eco-labelling

Author: Onno Kuik, IVM, Amsterdam

Reviewer: FIELD, London

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Technical barriers to trade, sanitary and phytosanitary measures, and eco-labelling

Preface

The Concerted Action on Trade and Environment (CAT&E) is designed to provide an opportunity for the large and growing community of European researchers working on trade and environment issues to meet regularly, to discuss research hypotheses and methods, to review results, and to develop new lines of co-operative research. CAT&E will launch a dialogue with policy makers at all levels. It aims to create a process that can document the progress of research and generate new research impulses in this area. It seeks to advance the resolution of current conflicts between trade and environment.

The information obtained in the course of the Concerted Action is annually summarised in state of the art reports and bibliographies in a fashion that is useful to both researchers and policy makers. The bibliographies focus on the most recent literature. The reports serve as an input to CAT&E's annual members' meetings and open conferences. To structure the reporting and discussions, the following themes have been identified initially (in random order; the theme of the present paper is underlined):

- ✓ Subsidies
- ✓ Government Procurement
- ✓ Investment
- ✓ TBT, SPS, and Labelling
- ✓ Trade and Development
- ✓ Trade, Environment and Human Rights
- ✓ Trade in Commodities
- ✓ Implementation Procedures
- ✓ Trade in Services
- ✓ Intellectual Property Rights
- ✓ Trade and Multilateral Environmental Agreements
- ✓ Dispute Settlement
- ✓ Transparency and Participation
- ✓ Sustainability Assessment of Trade Agreements
- ✓ European Trade Policy Development
- ✓ Trade and Agriculture
- ✓ Trade, Environment and Labour
- ✓ Trade, Environment, and Public Health
- ✓ Science and Precaution
- ✓ Trade and Environment in the Architecture of International Governance.

Introduction and scope of the paper

Standards and regulations are important instruments of environmental policy. Environmental standards are also increasingly used by non-state actors, for example in eco-labelling schemes. Standards and regulations may protect important values, but they may also, intentionally or incidentally, restrict market access for imported goods or impose discriminatory or unjustifiable costs to such goods. Finding the right balance between disciplining protectionist measures and allowing states to maintain regulatory autonomy is at the heart of the General Agreement on Tariffs and Trade (GATT), namely Articles I, III, XI and XX, the Technical Barriers to Trade Agreement (TBT), and the Sanitary and Phytosanitary Measures Agreement (SPS) (Marceau & Trachtman, 2002). Much of the recent discussion on environmental standards and trade concerns the use of standards for so-called non-product related processes and production methods (PPMs) in eco-labelling schemes (Charnovitz, 2002). More recently, government regulations regarding genetically-modified organisms (GMOs) have received much attention (Runge & Jackson, 2000; Zedalis, 2001). Another emerging area of concern is energy-related products and climate change policies (Kuik, Tol, & Grimeaud, 2003). This paper identifies the relevant areas of research and briefly surveys the methodological approaches that have been taken in examining these issues.

Identification of relevant research hypotheses

The overarching research question regarding the disciplines on standards and regulations in the TBT and SPS agreements and the relevant Articles of GATT is whether they strike the right balance between avoiding protectionist abuse and allowing regulatory autonomy and flexibility in protecting important national and international environmental values.

An important research question concerns the impact of environmental standards and regulations on market access of Southern producers (especially from the least-developed countries) on Northern markets (Verbruggen, Kuik, Bennis et al., 1998). Are standards and regulations restricting access and if so, are these restrictions justified?

A complementary question concerns the design and implementation of national and international environmental policies. How can they be designed and implemented in such a way that they do not unjustifiably discriminate among products from foreign and domestic sources?

Many questions relate to the international governance of product-related environmental standards and eco-labelling schemes (see also the CAT&E paper 'Trade and Environment in the Architecture of International Governance'). Who decides participation in agenda setting and on the standard-setting process? Should this issue be left in the hands of private institutions or is there a need for multilateral intervention (by which organisations)? What approach should be taken in standard setting and how should the interests of developing countries with limited capacities be taken into account? What form of financial and technical assistance would be required to enhance this capacity? (FIELD, 2003).

At a more detailed level, research questions concern various elements of the TBT and SPS Agreements, and the relevant Articles of GATT, including (Marceau et al., 2002):

- Non-discrimination: national treatment and most-favoured-nation. These fundamental principles of the WTO prohibit the discrimination of ‘like’ products. The objective of product-related environmental standards and eco-labelling schemes is precisely to discriminate among ‘like’ products on the basis of environmental criteria.
- Necessity, proportionality and balancing tests. When is discrimination on the basis of environmental criteria justified? The exact criteria are developed through jurisprudence and need careful and continuous analysis.
- Appropriate level/scientific basis. Are EU import prohibitions based on hormones in beef and GMOs in food justified on scientific evidence of harmful effects? An important issue concerns the application of the so-called ‘precautionary principle’ (see below).
- Harmonisation; conformity with international standards. The SPS Agreement refers ‘quasi-legislative’ authority to certain international organisations.¹ That is, if Members are in conformity with international standards of these organisations, they shall be “presumed” to be in conformity with WTO obligations (SPS, Art. 3.2). Is this a suitable model for environmental standards (e.g. for those in MEAs)?
- (Mutual) recognition and equivalence. Questions arise as to how mutual recognition and equivalence shall be implemented at the bilateral level. There is also an added question of transparency and access to information.
- Internal consistency. Article 5.5 of the SPS Agreement requires its Members to “avoid arbitrary or unjustifiable distinctions in the levels [of protection against risks] it considers to be appropriate in different situations” (if this would affect international trade). Is it imaginable that, one day, the WTO would require such a test on the internal consistency of *environmental* policy?
- Product/process issues and the territorial-extraterritorial divide. Can trade restrictions be justified based on environmental impacts of the production/processing of a product outside the jurisdiction of the Member involved?

To this list could be added:

- Standards developed and administered by non-state actors. Regarding private eco-labelling schemes, cooperation and coordination among all these bodies is vital to reduce inconsistency and duplication. Further questions then arise, such as: Who decides participation in agenda setting and on the standard-setting process? Should this issue be left in the hands of private institutions or is there a need for multilateral intervention? If the latter, what form should this intervention take and what functions will it have? What would happen to the standards not recognized by the WTO?

¹ Codex Alimentarius Commission, International Office of Epizootics, and the International Plant Protection Convention.

In the WTO, notably the Committee on Trade and Environment (CTE), the discussion seems to focus predominantly on the trade aspects of voluntary eco-labelling schemes (including schemes implemented and administered by non-state actors) (see, for example, WTO, 2000). At the WTO level, the question is what role could/should the TBT committee play, in coordination with the CTE, to promote reducing barriers to trade through the application of the TBT. For instance, should it seek to determine which eco-labelling systems are accepted by the multilateral trading system? Should it define which eco-labelling requirements/criteria are considered to be consistent with the TBT agreement?

Financial assistance is required in order to raise capacity in standard setting, certification and accreditation. Financial and technical assistance is also required to provide adequate and effective participation of developing countries in standard setting, to avoid instances of standards reflecting too heavily the environmental priorities of developed countries. On this issue questions arise such as: How can the participation of developing countries in the process of standard setting be significantly improved? What form should effective technical assistance to developing countries take?

It is vitally important that there is continuous evaluation of the environmental and social benefits of trade-related environmental standards and eco-labelling schemes, including the magnitude of the impacts as well as the distribution of the varying benefits.

Survey of methodological approaches

Methodological approaches in this area include legal analysis, case studies and stakeholder dialogues, economic analysis, political analysis, and environmental analysis, for example in the area of life-cycle analysis.

Legal analysis has an important task in interpreting the provisions of the GATT, TBT and SPS Agreements, its drafting history (WTO, 1995) and in studying and interpreting case law that is generated through rulings on legal disputes (e.g. Chang, 1997). Important legal questions include, *inter alia*, the definition of 'like' products (Von Moltke, 2000), the product/process distinction (Howse & Regan, 2000) and questions regarding the coverage of the WTO rules to non-state initiatives (Tietje, 1995). For specific international legal aspects of eco-labelling, see Appleton (1997). At the moment, a research consortium coordinated by the University of Barcelona is, *inter alia*, studying the legal aspects of 'sustainability' labelling.²

The case study and stakeholder dialogue approach is particularly common in this area of research. OECD (1997) and UNCTAD (2002) carried out extensive research programmes on the trade effects of eco-labelling and other environment-related technical barriers to trade, employing a case study methodology. Based on case study research, OECD (Vitalis, 2002) argues that many private eco-labelling schemes are trade distort-

² "Sustainability labelling and certification: towards an integrated legal, economic, ecological and social approach" EU-project EVG1-CT-2000-00031. "Sustainability" labelling refers to a labelling scheme that would integrate environmental, social and economic (or equity) concerns.

ing, discriminatory, and environmentally disappointing. The paper argues for more public participation of private eco-labelling schemes to encourage transparency and non-discrimination.

The stakeholder dialogue approach is rapidly gaining ground as a recognised research methodology.

Theoretical economic research in the area of eco-labelling and trade is often based on information economics, notably the economics of asymmetric information (Akerlof, 1970). For a general analysis of the market effects of voluntary labelling, see Mattoo and Singh (1994). Beaulieu and Gaisford (2002) apply this theoretical framework to the analysis of alternative trade regimes for goods whose non product-related PPMs may or may not conform to domestic, multilateral or international standards.³ In general, there is no unambiguous welfare ranking between unrestricted trade and interventions such as a full embargo on imports, a partial embargo on non-certified imports and a labelling scheme, but a labelling scheme is typically superior (at least as good) as a partial or full embargo. An import policy advise of Beaulieu and Gaisford (2002) is to let the (compulsory) notification of standards to the WTO be accompanied by a Cost-Benefit Analysis to justify the standard and to reduce the risk of protectionist' capture.

The extent of empirical economic research in this area is somewhat disappointing. Examples of such empirical research include Harris et al. (2002; a, 2001), Henson and Loader (2001) and, somewhat older, Verbruggen et al. (1998). Among other things, the extreme paucity of reliable data in this field seems to hamper empirical research. Hence, any data-gathering exercise would be beneficial.

The process of standard setting itself may be studied from several perspectives, including the political perspective. As the TBT and SPS Agreements make frequent references to international standards, the political economy of standard setting in international bodies becomes of major interest (Clapp, 1998). Strongly related to this is the issue of Multilateral Environmental Agreements (MEAs) and their impact on international standard setting (see CAT&E paper on MEAs). Of increasing importance are environmental standards that are developed and administered by non-state actors.

Environmental standards and regulations are based on environmental and/or health research. Life-cycle analysis plays an important role in standard setting in eco-labelling schemes. What is the state-of-the-art of life-cycle analysis? Is it 'sound science' or not (yet)? And when is science sound enough? Strongly related to this is the issue of the precautionary principle (see CAT&E paper on the Trade, Science and Precaution). Of particular importance in the context of trade and environment is the question to which extent life-cycle-based labelling programmes use a "one-size-fits-all" approach to assessing environmental impacts, instead of assessing impacts in the context of the specific circumstances and priorities prevailing in other countries (Vitalis, 2002).

³ The information asymmetry occurs if the PPMs have no relation to detectable attributes of the good itself. Producers know under which circumstances the good is produced, but consumers cannot deduce this information from inspection of the good, before or after its purchase.

Conclusions

Standards and regulations are indispensable instruments of environmental policy. They may, however, hamper free trade. The objective of the relevant provisions of the GATT, the TBT and SPS Agreements is to find the right balance between disciplining protectionist measures and allowing states to maintain regulatory autonomy and flexibility in their design of environmental policy. The main research question is whether the WTO rules presently ensure the right balance. Specific legal questions relate to the non product-related PPM issue and a host of other technical issues, for example relating to the role of science in standard setting. The process of (international) standard setting itself and the actual effects of environmental standards and regulations on market access and international trade are interesting subjects of study. Of particular interest are ecolabelling schemes operated and administered by non-state actors. Are they really often "trade distorting, discriminatory and environmentally disappointing" (Vitalis, 2002) and do they need more public scrutiny, or should they simply be viewed as market solutions to environmental problems and be left to the private sector? How should the WTO deal with them?

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