Notes of Speech by Martin Khor (South Centre) at meeting in Oslo on development of Norway's Biosafety Regulations, Sept. 2012

Introduction

Norway has one of the best policies and laws and regulations on biosafety in the world. Developing countries have benefitted greatly from the Norwegian model. The research centre GeNok has collaborated with Third World Network to build capacity for scientists, policy makers and civil society in developing countries on the science of gene technology and the required accompanying biosafety. Both the biosafety regulations and the capacity building collaboration are valuable contributions that Norway is making.

This paper reviews the issues in the interface between biosafety concerns and the relevant rules of the WTO. It is hoped that this will be useful in the consideration of application and further development of the legislation or regulations.

Issue of whether products containing GMOs can be considered a different product from products that do not contain GMOs

This is an important issue as it will influence whether a country can restrict or ban the import of a product that contains GMOs.

Article III (on national treatment) prohibits WTO members from taking measures that directly or indirectly discriminate between like products on the basis of their country of origin.

There is currently no WTO jurisprudence that says that GMOs are "like", in the sense of GATT Art. III:4, to their non-GMO counterparts. The Panel in the EC Biotech case did not rule on this issue at all.

According to established GATT practice, the four general criteria which provide a framework for analysing the "likeness" of particular products are: (i) similarity of physical properties; (ii) similarity of end-uses; (iii) consumers' tastes and habits; and (iv) tariff classification.

The Appellate Body in the Japan Alcoholic Beverages case said that "there can be no one precise and absolute definition of what is 'like'. The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply." That is, "likeness" essentially depends on the circumstances.

The key issue with respect to "likeness" in relation to WTO law is simply whether the imported GMO products and domestic non-GMO products (i.e. conventional products) are 'like products'. In the EC Biotech case, the USA, Canada and Argentina sued on the basis that there is no difference between GM products and their non-GM conventional counterparts. The EC, as the respondent, took the approach that the only 'like' product to a given imported GM product is the same GM product cultivated or processed domestically. However, the EC Biotech Panel did not rule on which approach should be used under WTO law.

In the case of GMOs and GM commodities and their conventional substitutes, two of the traditional criteria (i.e. end-use and tariff classification) would point to "likeness", and two (i.e. consumers' perceptions and properties of the products) would point to "non-likeness".

However, it could be argued that GMOs are not "like" their non-GMO counterparts on the basis of:

(1) The fact that an international normative regime has been developed to govern GMOs – e.g. the Cartagena Biosafety Protocol in relation to the transboundary movement of GMOs as well as the various guidelines issued by the Codex Alimentarius Commission with respect to GMO food products; and

(2) The scientific uncertainty relating to the risks (to human, animal, or plant life and health, and to the environment) posed by GMOs which is not present with respect to their non-GMO counterparts.

Of course, it would be clear that domestically produced GMS and imported GMOs would be considered as like products – e.g. domestic and imported BT corn or GMO soya would be considered as like products. The question of likeness only arises, for example, if BT corn is to be treated the same or differently as regular corn, for example, in import policy.

Hence, to the extent that Norway treats imported and domestic GMOs in the same way, it would be able to pass the national treatment test under GATT Art. III (which incorporates the like product test). For example, if Norway imposes a ban on the production and sale of a specific product containing GMO, then it could justify a ban on the import of that product.

Furthermore, to the extent that Norway is able to provide scientific justification for the level of risk that they are seeking to enforce through their GMO regulations with respect to conditions that are applicable only to Norway, it would also be able to justify these regulations under the SPS Agreement. Therefore there is a crucial importance in scientific work and findings, including findings on risk assessment, on risks or dangers to health and the environment.

Also, the factor of consumer perception, behaviour, preference and taste is important, as one of the four factors the WTO panels are likely

to consider. To the extent that consumers and the public in Norway perceive there is a difference between products containing GMOs and that do not contain GMOs, this will help determine if the products are "like" products or otherwise.

Conclusion: It is important (1) to prepare the ground to demonstrate that products containing GMOs are different from those that do not;

(2) to have high-quality scientific findings and evidence on risks of GMOs and specific products to human health and the environment, and other relevant aspects, and to continuously update these scientific findings. Thus a priority to scientific research on the risks and implications of GMOs and GMO products is important.

(3) to demonstrate the perception and behaviour of consumers, that they differentiate between products containing and not containing GMOs.

However one other problem (linked to the likeness of products) is that there is no agreement among WTO members of whether and how processes and production methods (PPMs) are treated under Article 3. "Like products" are usually considered in terms of similarity of their physical qualities. Thus if a product is physically the same from another, it cannot be considered different (and thus have a different treatment eg a ban or an extra import duty) on the basis of the way it has been produced (i.e. process and production method). For example, that in producing that product, more pollution or emissions were generated compared to another product, or that lower wages were paid to the worker in making the product. It is generally difficult to get the PPMs factor accepted in the WTO, either with members or with the panel, as compared to the factor of the physical properties of the products.

A problem therefore arises when, as can be seen in the draft GMO sustainability criteria, that it has **sustainability criteria** that relates to how the GMO product is produced or the impacts of such GMO production in the foreign GMO producing country, and then that criteria is used to bar the importation of GMO products into Norway from that particular country. Such a situation could give rise to a violation of GATT Art. I (MFN) and Art. III (national treatment), and it would be quite difficult to justify such a violation under GATT Art. XX(b) or (g).

Another Issue: If Norway fails the test of National Treatment and Like Products of Article 3 in GATT, can it rely on other WTO rules to justify trade measures (eg import ban) on GMO related products?

Reply: Yes, Article XX of GATT and the SPS rules.

1. **GATT Art XX**

Such measures could conceivably be sought to be justified as an exception to WTO rules under GATT Art. XX(b) and XX(g) – i.e. that they would be necessary for the protection of human, animal or plant life or health (GATT Art. XX(b)), or that they are related to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (GATT Art. XX(g)).

The chapeau of this article also says that such measures must not imply "arbitrary and unjustified discrimination between countries where the same conditions prevail or a disguised restriction on international trade."

A biosafety measure can be taken under Article XX provided it meets certain criteria.

- It must not be arbitrary or unjustified discrimination or a disguised restriction on trade. Thus the scientific rationale of the biosafety measure has to be shown
- For article XX (b), the **necessity** of the measure to protect human, animal or plant life has to be shown.
- For article XX (g), the necessity standard is not asked for. However the biosafety measure has to be shown to be "related to conservation of exhaustible natural resources". For example, the case is to be made that biodiversity is such an exhaustible natural resource, that would be threatened by the product.

SPS (sanitary and phyto-sanitary) Agreement

A WTO member intending to apply trade measures (laws, regulations, requirements, procedures, decrees) to protect human, animal and plant life has to comply with the SPS agreement.

WTO members can set their own standards as long as the measures are applied to the extent necessary to protect human, animal and plant life; are based on scientific principles with sufficient scientific evidence, are not a disguised trade restriction, do not arbitrarily or unjustifiably discriminate between members, and are not more trade restrictive than required to achieve an appropriate level of protection.

WTO members are encouraged to use international standards, guidelines or recommendations - i.e. those standards set by Codex Alimentarius Commission (on food safety), World Organization on Animal Health (for animal health and zoonoses) and the International Plant Protection Convention (for plant health). However they may use measures that result in higher levels of protection if there is scientific justification (if they have conducted an examination and evaluation of available scientific information and have decided the international standards are not sufficient to achieve their appropriate level of protection).

Alternatively there needs to have been a risk assessment conducted according to the SPS provisions for the measure to be regarded as achievcing the appropriate level of protection from the risk concerned.

A general import ban on GMOs and GM products will likely not be allowed under the SPS agreement unless it can be shown that GMOs are inherently dangerous. Individual bans may be justified by scientific evidence and risk assessment. In general a WTOmember would have to demonstrate that any import bans have a rational basis, supports a legitimate policy objective, are no more trade restrictive than necessary to achieve that objective, and not not applied in an arbitrary and discriminatory manner.

Temporary bans ate allowed if they are provisional measures allowed under Article 5.7 of SPS, which has elements of a precautionary principle. A provisional measure can be taken subject to specific conditions: where relevant scientific information is insufficient; it is adopted on basis of available pertinent information; the Member will seek to obtain additional information needed for a more objective risk assessment; the member must be reviewed in a reasonable time. All four requirements have to be met

Another Important Issue:

Would sustainable development requirements in the producing country for imported GMOs be compatible with WTO rules?

Would an import ban on GMOs produced outside Norway, imposed on the ground that the production and process methods for such GMOs did not promote, or adversely affected, the sustainable development of the producing country, be considered as compatible with WTO rules?

Answer:

Assuming that the “likeness” test under GATT Article I and III has not been overcome, such that the imported GMO has to be considered as “like” to the competing non-GMO product, the defense available under WTO law for such measures would be under the SPS Agreement and GATT Art. XX.

GATT Art XX

Such measures could conceivably be sought to be justified as an exception to WTO rules under GATT Art. XX(b) and XX(g) – i.e. that they would either be necessary for the protection of human, animal or plant life or health (GATT Art. XX(b)), or that they are related to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (GATT Art. XX(g)).

It depends, to a great depend, on how the particular regulations are worded. In the case of the Norwegian GMO sustainability criteria, they could fall under Art. XX(b) or (g).

The measure would be easier to defend it if applies only to assessing sustainability impacts on Norway per se.

However, the design of the sustainability criteria goes into assessing the sustainability impacts and looking into policy decisions of foreign countries producing GMOs. This could make the measure be considered as a measure with extraterritorial application that could have, when applied, coercive effects on other countries’ policy decisions. This is an issue that has been addressed already in the case of US Shrimp-Turtle.

In US Shrimp-Turtle, the Appellate Body had ruled that if a measure is applied in such a way that it would have intended and actual coercive effects on the specific policy decisions made by foreign governments, such a measure would be considered as “unjustifiably” discriminatory, and hence would violate the conditions of the chapeau of Art. XX. The US shrimp import ban had been intended to force

foreign governments to require their shrimp fishers to adopt and use turtle excluder devices (TEDs).

In relation to this, the Appellate Body had said that the US should have entered into good faith negotiations with those foreign governments to arrive at a mutually agreeable solution rather than imposing the ban, although the US was not required to actually conclude such negotiations. Additionally, the Appellate Body had also ruled that if the measure is applied in a rigid or inflexible way or if there is no transparency or procedural fairness in how it is applied, that would constitute "arbitrary" discrimination which would also make it fail the conditions in the chapeau of GATT Art. XX.

In the Art. 21.5 compliance case following US Shrimp-Turtle filed by Malaysia, the Appellate Body ruled that the revised guidelines applied by the US following the original US Shrimp decision was justified under GATT Art. XX(g) and that it no longer constituted a means of arbitrary discrimination because of: (i) the serious, good faith efforts made by the US to negotiate an international agreement, and (ii) the new measure allowed sufficient flexibility by requiring only that foreign governments' measures be simply "comparable in effectiveness" to the revised US measure rather than the "essentially the same" standard of the previous measure. The obligation to negotiate is only to enter into good faith, best effort, negotiations for an international agreement rather than to actually conclude such an agreement because all that is required to avoid arbitrary or unjustifiable discrimination under GATT Art. XX chapeau is to provide foreign exporting countries similar opportunities to negotiate an international agreement with the importing government.

Hence, one of the conditions for Norway to be able to justify its GMO sustainability criteria as a justifiable exception under GATT Art. XX(b) or (g) is for it to first of all enter into good faith negotiations with those GMO-producing countries to have an international agreement on the impacts of GMO production on sustainability and sustainable development. But Norway is not obliged to conclude such negotiations if agreement really cannot be reached. Second, Norway

should also make sure that the design and application of its sustainability criteria for GMOs should be flexible enough so as to allow foreign governments some flexibility in designing their policy measures that would allow them to have comparable effectiveness as the Norwegian measure, rather than require them to make policy decisions that be essentially the same, either in design or in effect, as the Norwegian measure.

SPS Agreement

Another way of ensuring WTO compatibility is to make sure that the Norwegian sustainability criteria complies with the SPS Agreement's provisions.

One way that this can be done is to have the measure conform to or completely embody international standards, guidelines or recommendations - i.e. those standards set by Codex Alimentarius Commission (on food safety), World Organization on Animal Health (for animal health and zoonoses) and the International Plant Protection Convention (for plant health). If there are no GMO sustainability standards or guidelines coming from these bodies that could be used by Norway, or if Norway wants to impose a higher level of sanitary or phytosanitary protection that those that would be achieved by Codex Alimnetarius guidelines, then it will have to provide a scientific justification for its measure.

The problem though is that the SPS Agreement relates only to measures applied by an importing member on the basis of factors that apply IN the importing country. That is, the SPS Agreement does not in effect allow for extraterritorial factors to be considered - whether this would be with respect to the risk assessment grounds or the appropriate level of sanitary or phytosanitary protection sought. Furthermore, the SPS Agreement (Art. 2.3 and 5.5) also prohibit arbitrary or unjustifiable discrimination - i.e. essentially the same test as that applied in US Shrimp-Turtle with respect to the chapeau of GATT Art. XX.