

<http://ageconsearch.umn.edu/handle/151447>

<http://ageconsearch.umn.edu/bitstream/151447/2/smythfalck14-1.pdf>

Volume 14 Number 1 2013/p. 18-38 esteyjournal.com

The Estey Centre Journal of International Law and Trade Policy

Editorial Office: 410 22nd St. E., Suite 820, Saskatoon, SK, Canada, S7K 5T6. _____

Phone (306) 244-4800; Fax (306) 244-7839; email: kerr.w@esteycentre.com 18

Socio-economic Considerations and International Trade Agreements

Stuart J. Smyth

*Research Scientist, Department of Bioresource Policy, Business and Economics,
University of Saskatchewan*

Jose Falck-Zepeda

*Senior Research Fellow, International Food Policy Research Institute, Washington,
D.C.*

Abstract

The provision for the inclusion of socio-economic considerations in domestic regulatory frameworks pertaining to living modified organisms has been established by Article 26 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. Many countries are considering, or have considered, inclusion of socioeconomic aspects in their domestic legislation, raising international concern that socioeconomic risk assessments will become a mandatory part of approval processes and further complicate the approval, and international trade, of new genetically modified crops. Barriers to international trade, unfortunately, enjoy a long and robust history. **The objective of this article is to review the various international agreements that have a governance capacity pertaining to international trade and assess how these agreements might interpret the domestic implementation of socio-economic risk assessments.** The result of this will be a clearer understanding of what cost and benefit tradeoffs will be required by countries that have included, or are planning to include, socio-economic considerations as part of their domestic regulatory framework.

...2. Article 26 of the CPB

... Box 1: Article 26 of the Cartagena Protocol on Biosafety

SOCIO-ECONOMIC CONSIDERATIONS

1. The Parties, in reaching a decision on import under this Protocol or under its domestic measures implementing the Protocol, may take into account, consistent with their international obligations, socio-economic considerations arising from the impact of living modified organisms on the conservation and sustainable use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities.

2. The Parties are encouraged to cooperate on research and information exchange on any socio-economic impacts of living modified organisms, especially on indigenous and local communities.

Source: Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000.

... There have been some attempts to define potential SECs that may be included in biosafety decision-making (Fransen et al., 2005). Table 1 lists the SECs identified in a CBD Secretariat expert meeting report, providing examples that parties to the CPB may take into consideration during their decision-making processes. The list in table 1 is quite similar to the Fransen, et al. compilation.

A strict interpretation of Article 26 would include only the last two items from table 1, as they may reflect an impact on biodiversity. This reading implies that other impacts in this list may not be considered in socio-economic assessments prior to a science-based biosafety assessment unless they have an impact on biodiversity or unless such an assessment is specifically included in domestic measures. Several countries have already included SECs as part of their domestic measures. Inclusion of SECs has been done through policies, laws and other regulatory instruments under domestic biosafety frameworks. See Falck-Zepeda and Zambrano (2011) for a thorough discussion of the issues associated with such inclusions.

Table 1 List of Potential Socio-economic Considerations

Source: adapted from UNEP, 2010.

- Impacts on market access and trade at national and international levels
- Macroeconomic impacts, including those on sustainable development
- Microeconomic impacts at the individual, household or community level
- Compliance with biosafety measures, including institutional costs
- Coexistence of LMOs
- Health-related impacts, including those resulting from changes in the use of pesticides and herbicides
- Gender impacts
- Labour and employment
- Impacts on consumer choice or consumption patterns
- Food security
- Land tenure
- Rural-urban migration
- Farmers' rights
- Cultural, spiritual and ethical aspects
- Economic impacts of changes in pest prevalence due to changes in farm management practices
- Economic impacts of changes in application rates and effectiveness of pesticides and herbicides
- In indigenous and local communities, impacts on livelihoods, knowledge and biodiversity
- Impact on the conservation and sustainable use of biodiversity

(pp. 20-21)

... 3. Relationship between CPB and the WTO

... The question of which agreement would prevail raises an exceptionally complicated international legal matter, which ideally would require a completely separate research article, but the discussion can be summarized as follows. Article 30.4(b) of the Vienna Convention states that when the parties to a later treaty do not include those to an earlier treaty, then the treaty that both parties have in common will govern. Isaac, Phillipson and Kerr (2002, 79) observe that, given the two vastly different treaty foci of the WTO and the CPB, it “cannot be said to be in the same subject area (although their spheres of operation will clearly overlap).” Given that the CPB has no dispute settlement mechanism of its own, Article 34 indicates that disputes between CPB parties will be addressed through Article 27 of the CBD. Article 27 of the CBD deals with the settlement of disputes and suggests that first, parties will seek to resolve the dispute through negotiation; if negotiation fails, they should engage third-party mediation. If this still does not resolve the issue, then the dispute is to be submitted to the International Court of Justice. Regarding a dispute between a country that is a party to the CPB and country that is not, Isaac, Phillipson and Kerr (2002, 80) observe that “Politically, WTO agreements (and the obligations therein) are generally taken more seriously by states than other obligations incurred under other instruments.” Indeed, Hobbs, Hobbs and Kerr, (2005) noted that the CPB could resolve disputes between a party and a non-party if the non-party voluntarily agreed to be bound by the dispute settlement process of the CPB. Obviously, this is not a concrete assessment of the situation, but rather is indicative of government responses over time, which will have varying degrees of impact for this debate.

(pp. 22-23)

...World Trade Organization Agreements

The inclusion of SECs in decision-making may constitute a significant barrier to trade and thus be subject to WTO obligations. The importance of this is stressed in Article 26.1 of the CPB, which states that the implementation of SECs must be done with respect to a country’s international obligations. Zarrilli (2005) indicates that four issues related to the CPB could overlap with WTO agreements: 1) the scope for legitimate government action short of conclusive scientific evidence; 2) risk assessment and risk management; 3) the socio-economic factors that may be taken into account in the decision-making process; and 4) documentation obligations. Potentially, there are a number of WTO agreements that could apply in the case of including SECs in decision-making, such as the Sanitary and Phytosanitary Measures (SPS) Agreement, the Technical Barriers to Trade (TBT) Agreement, Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the General Agreement on Tariffs and Trade (GATT).

Sanitary and Phytosanitary Measures Agreement

In the SPS Agreement, a SPS measure is one taken to protect an entity from a recognized risk. Table 2 includes protected entities and the causal agents the measures protect against. In Annex A.1, the SPS Agreement defines SPS measures as all sanitary and phytosanitary measures that may affect international trade. SPS measures include all

... laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants . . . ; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety.

(pp. 25-26)

...The Precautionary Principle

The precautionary principle has been widely debated in many policy forums as well as in the literature (Szajkowska, 2010). The precautionary principle was adopted by the Rio Conference in 1992, but its origins can be traced back to German environmental legislation from the 1970s. Sandin (1999) and others have pointed out that there is very little consensus about the exact meaning of the precautionary principle. In most formulations those actions that may pose significant risk should be avoided even when there is no full scientific evidence that the risk may actually be realized in practice. In short, the precautionary principle is a notion which supports taking protective action before there is complete scientific proof of a risk; that is, protective action should not be delayed simply because full scientific information is lacking. The precautionary principle has been incorporated into several international environmental agreements, and some authors have suggested that it is now recognized as a general principle of international environmental law (Falkner and Gupta, 2009).

In the fields of food safety and the protection of plant and animal health, the need for taking precautionary actions in the face of scientific uncertainty has long been widely accepted. For example, there may be instances when a sudden outbreak of animal disease is suspected of being linked to imports, and trade restrictions must be immediately imposed while further information is gathered about the source of the outbreak and its extent.

The discipline of risk assessment, one of the basic obligations of the SPS Agreement, was developed to guide action in the face of incomplete knowledge about risks to health. The discipline focuses on probabilities of hazards occurring and the probable consequences, as it is impossible to scientifically prove ‘100% safety’ of a food or product.

The CPB preamble embraces precaution as one of its operating principles. In fact, paragraph 6 of the preamble encourages harmonization of national SPS measures with international standards without requiring members to change their sovereignly determined appropriate levels of health protection. Article 3.3 of the SPS Agreement allows members to adopt SPS measures that may be more stringent than relevant international standards when so desired. Other articles in the SPS Agreement allow measures that can be considered under the precautionary principle operating mode. For example, Article 5.7 of the SPS Agreement allows members to take temporary measures if there is no sufficient evidence of safety. As indicated in the text, members must seek additional pertinent information to render a safety assessment within a reasonable amount of time. These additional requirements within the SPS Agreement, in addition to the more general requirements for the application of SPS measures, limit the implementation of the precautionary principle under the WTO agreements, thus providing a measure of discipline for regulatory design.

(pp. 28-29)

...There has not been a WTO ruling specifically discussing the potential inclusion of SECs in decision-making. Based on the discussion on the requirements for SPS or TBT measures, we speculate that inclusion of SECs would need to strictly follow a narrow interpretation of Article 26.1 of the CPB based on a well-defined assessment that follows a broadly accepted socio-economic protocol or procedures identified as ‘best practices’ by relevant experts in the field, since an internationally accepted protocol does not exist. Any attempt to include considerations broader than the narrow scope of the strict

interpretation of Article 26.1 would have to be included under domestic measures, which in turn would have to be compliant with WTO agreements.

(p. 29)

...WTO Case against the European Communities

The 2006 ruling in the case *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* addresses the complex and contentious international trade situation for GMOs between the United States, Canada and Argentina (later joined by other interested parties) on the one hand and the EU on the other hand. The ruling provides some preliminary ideas on the potential relationship between the WTO and the CPB with regard to the inclusion of SECs in decisionmaking.

(pp. 29-30)

...In the panel ruling, only science-based risk assessments are relevant for purposes of determining whether a WTO member has satisfied SPS Article 5.1 and Annex (A)(4). This may have an impact on those SEC procedures that may be included under the auspices of the CPB.

The panel report sets a legal precedent that WTO members have to account for in their future decision-making with regard to protective measures. **In the future, any inclusion of SECs in decision-making will require identification and assessment of risk considerations associated with the SEC in order to be compliant with SPS measures. This may be a significant hurdle**, as there is very little experience associated with some of the broader SECs, such as those listed in table 1. The ruling also implies that the conditions under which SECs are included in decision-making would need to comply with the procedural requirements for SPS measures, including nondiscrimination and minimal impact as trade barriers.

Although the DSP report sets a precedent by finding fault with the ban on approved GMO crop events and with other measures taken by the EU

(Kogan, 2007; Cho, 2006), bans set in place by individual EU country members remain in place. The EU seems to be re-affirming the right of individual member countries to ban any EU approved GMO event, in some cases based on SECs. **These bans may run counter to the WTO SPS Agreement rules** and thus may need a formal ruling by the Dispute Settlement Body mechanism to determine the appropriateness of such inclusion in decision-making.

(pp. 31-32)

...References

...Kogan, L. K. 2007. World Trade Organization Biotech Decision Clarifies Central Role of Science in Evaluating Health and Environmental Risks for Regulation Purposes. *Global Trade and Customs Journal* 2(3): 147-155