CHAPTER III

INTERNATIONAL RULES

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1. The origins of GATT, the creation of the WTO, and the general legal framework of international food law

The WTO (World Trade Organization) was established by the "Final Act", which is the most significant part of The Marrakech Treaty of 1994, signed at the end of the Uruguay round of multilateral trade negotiations. According to the Punta del Este Declaration (1986), the first aim of this round was a complete reform of the multilateral trading system, previously based only on the general principles of GATT 1947 (General Agreement on Tariffs and Trade), by replacing the latter with a set of international agreements, regulating each single aspect of the new international trade order (such as countervailing duties, subventions, sanitary and phytosanitary measures, or the new dispute settlement mechanism), or a specific trade sector (e.g. agriculture, services, textiles, intellectual property rights, etc.), with GATT as one of the cornerstones of the legal basis of the new system.

Since its origins in 1947, the GATT text has undergone continuous bargaining among its member states (whose number had meanwhile risen to over a hundred members) and many revisions (usually distinguished by the word "GATT", followed by the year of revision: e.g. "GATT 1964"), in the framework of negotiation "rounds" foreseen by article XXVIII bis (eight rounds since 1947 to Uruguay Round: Borghi, 2004). Prior to 1986, GATT members relied on a "Protocol of provisional application", signed in Geneva on 30th October, 1947.

The early intention of the first GATT contracting parties was to find a temporary – and not strictly binding – legal instrument for trade regulation: in fact it became the main discipline of international trade for almost fifty years, and in practice was more effective than many other formally binding international agreements (on the origins of GATT and its evolution towards WTO see Anzilotti 1969; Cutrera 1961; Demaret 1995; Flory 1968; Jackson 1998; Paemen – Bensch 1995).

To fully understand the new role of the General Agreement in the current multilateral framework, we must refer to the "General interpretative note to Annex 1A", which declares that in case of a conflict between a GATT 1994 rule and a provision of an agreement in Annex 1A to the WTO chart, the provision of the other agreement shall prevail to the extent of the conflict.

Annex 2 to the WTO Agreement must also be mentioned. The "Understanding on rules and procedures governing the settlement of disputes" (briefly Dispute Settlement Understanding, or DSU) is, perhaps, one of the most relevant aspects of the WTO, which improved the former GATT mechanism resulting in much greater effectiveness of the new treaty as a whole, based on:

- the central role of a panel of first instance ("panel of complaints"), whose final report is adopted by the WTO General Council (Dispute Settlement Body) *unless* it decides by consensus not to approve it, thus becoming legally binding;
- the right to appeal the report to an Appellate Body;

- a final decision on the dispute, containing strict indications (recommendations) for the country found in default, and its duty of "prompt compliance"[1];
- the right for the country suffering the breach to apply a predetermined retaliation, should prompt compliance fail (or be "impracticable")[2] (on dispute settlement in WTO see Petersmann 1997; Cameron – Campbell 1998; Jackson 1998; Ligustro 1996; Distefano 2001).

Non-discrimination is still the first and foremost principle at the heart of the whole GATT system and, ensures a basic reciprocity approach.

It is first expressed as a "most favored nation" clause: "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties"; though with some relevant exceptions expressly stated by the Agreement, such as the creation and maintenance of preferential trade areas (often used in favor of developing countries, to grant them special waivers under GATT Article XXV, para. 5), and of free trade areas, or of customs unions (like the EU).

Another expression of the non-discrimination principle is Article III ("national treatment clause"), which prohibits GATT parties to apply internal taxes and charges, laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, to imported or domestic products, so as to afford protection to domestic production.

Furthermore, products which are imported from another contracting party shall not be subject, directly or indirectly, to internal taxes or charges of any kind in excess of those applied, directly or indirectly, to like domestic products; more generally, imported products shall be accorded treatment no less favorable than that accorded to like products of national origin (the jurisprudence of WTO- and GATT panels has been attempting

[1] Implementation: DSU, Art. 21, para. 1.
[2] DSU, Art. 22, para. 4.

to define the concept of "like product"[3]; see also Bronckers – Mc Nelis 1999).

2. The Agreement on agriculture

A brief analysis of international rules pertaining to trade in food must begin with a very quick look at the WTO Agreement on agriculture, the first special discipline ever of multilateral trade in agricultural and fisheries products, listed in its Annex 1. Thus – with regard to food, and to feed (which EU law considers as a part of the food sector) – this agreement's coverage extends, for example, to meat and products thereof, crustaceans, mollusks, eggs, honey, edible vegetables and fruits (including dried fruits), coffee, tea and other spices, cereals and products of the milling industry, fats and oils, beverages and spirits, etc. (the peremptory index of Annex 1 includes chapters 1 to 24 of the customs Harmonized System [4], plus some other products listed in the Annex itself); so that the Agreement on agriculture can properly be deemed as an act on international trade in food and feed.

Its three "pillars", market access, domestic support and export subsidies, are also the main pillars of worldwide agricultural policies.

Market access is the first issue that broadly involves any decisions by member states and that could affect their imports in any way and by any means (Anania – De Filippis 1996; Smith 2009; Wto 2001). First, in the WTO context it implies "tariffication" (Article 4, para. 4), by converting any non-tariff measure into ordinary customs duties (except as otherwise provided for in Article 5 and in Annex 5), according to parameters established under "Modalities" (a separate operational text). Hence, any quantitative import restrictions, or variable import levies, minimum import prices, discretionary import licensing, etc., have been given a value in terms of their

[3] See, e.g., *EEC - animal feed proteins*; *Japanese liquor taxes II*, at 6.22; *Korea liquor taxes*, at 114.

[4] International Convention on the Harmonized Commodity Description and Coding System.

protectionist effect ("tariff equivalent"), then have been replaced by an equivalent customs duty, and finally reduced to the extent provided by the agreement itself (by 36% on average, and by at least 15%, during the implementation period 1995-2000, compared to a previous base period. Furthermore, foreign agricultural products had to be guaranteed minimum access opportunities by means of zero-tariff quotas of imports, calculated on the basis of domestic consumption of the products concerned, and progressively increased in equal annual instalments.

Different rules apply to developing countries (e.g. an extended implementation period of 10 years) and to least developed countries (no commitment: s.c. "Special and Differential Treatment", Article 15). Other relevant exceptions are the "Special treatment with respect to paragraph 2 of Article 4" (products matching the requirements of Annex 5, Section A, are exempted from tariffication; or primary agricultural products being predominant staple in the traditional diet of a developing country, provided they match the conditions set out in Annex 5, Section B); and the "special safeguard clause", allowing all members to apply additional (protective) duties on imports, when these exceed a trigger level (compared with the existing market access opportunity), or when the price falls below a trigger price (Article 5, paras. No 1, 4 and 5).

The second pillar is domestic support, a brand new subject of international trade rules (which formerly only dealt with customs law), which has been included in the new legal framework because of its influence on the international market, affecting the balance of supply and demand, potentially inducing lowered prices, production surplus, etc., and frustrating the effects of tariff reductions. The Agreement on agriculture (Article 6, para. 1) contains a general reduction commitment – with some peremptory exceptions such as the "*de minimis*" clause (Article 6, para. 4), or such as the waivers provided for in Annex 2 – and, to this aim, it divides support measures into three categories: the "amber box", encompasses all the measures coupled with production and/or with price (a definition indirectly deduced from Article 6, para. 5, and from Annex 2, which – on the contrary – exempts from the reduction commitments the decoupled support measures: s.c. "green

box"). Between the amber and the green, the "blue box" was first conceived as partly decoupled support measures, which were to be allowed only during a transition period to expire in 2000, but then were extended further by the Doha Ministerial Conference in 2001. Modalities (pt. 8) prescribed an average 20% reduction of all the amber box measures within year 2000 (13,5% for developing countries, and no reduction for least developed countries: Articles 6.2, and 15), by calculating an AMS (aggregate measurement of support, replaced by an EMS (equivalent measurement of support), where AMS cannot be determined product by product or – when such calculation is impossible – based on non-product specific support provided in favour of farmers in general.

Support measures under programs qualified as exempt from reduction (green box) are excluded from AMS or EMS calculation, thus exempted from any action under GATT (Article 13, (a): first of all, from any additional and/or countervailing duties), provided that they match any of the requirements listed in Annex 2; in other words, only if they have no, or at most minimal, trade-distorting effects, or effects on production, or the effect of providing price support to producers. Furthermore, they must comply with the policy-specific criteria and conditions set out in the Annex itself, such as to involve expenditures, or revenue foregone under programs providing services or benefits to agriculture or the rural community; or concerning research in connection with environmental programs; or concerning pest and disease control; or accumulating and holding stocks of products which form an integral part of a food security program identified in national legislation; or giving payments as part of a clearly-defined government environmental or conservation program and being dependent on the fulfilment of specific conditions under the government program; etc.

Finally, the third "pillar" is the reduction of supported exports by an average 36% of their value (compared to the average global value of supported exports in 1986-1990), and by an average 21% of volume. Even in this regard special treatment is granted to developing countries, and no commitment at all is imposed on least developed countries.

Of course, non-supported exports fall outside the scope of the Agreement, and are still not subject to reduction commitments. The same applies to exports for the purpose of food aid to developing, or least developed, countries: they are allowed, provided they respect Article 10 of the agreement, which states that export subsidies shall not be applied in a manner which results in (or which threatens to lead to) circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.

3. The Agreement on Sanitary and Phytosanitary Measures (SPS agreement)

It is not easy to convert some of the measures currently defined as "non-tariff" into custom duties, since they were established and maintained by WTO members for sanitary (including veterinary) and/or phytosanitary reasons. That is why member states usually deny that those measures can also (or, in the worst case, only) have a protectionist real intent, and try not to "tarifficate" them (also because tariffication would imply recognizing that the alleged sanitary reasons are false, and that protectionism is their real – although disguised – justification). The use of SPS measures (and, broadly speaking, of non-tariff measures) to obtain the same protectionist effect as obtained by a customs duty could frustrate the liberalizing power of the entire WTO system.

The former discipline on SPS measures, based only on Article XX GATT, revealed its major shortcomings and insufficiencies in the agricultural and food sector, giving rise to large number of disputes for decades, since that sector had always given itself to forms of disguised protection, and to circumvention of tariff reduction commitments: a sort of mutual and natural complementarity of tariff and non-tariff measures has often been found, confirmed by the large coincidence of subject between the Agreement on agriculture and the SPS Agreement. The first has a peremptory field of application (namely, it applies only to trade in products listed in its Annex 1), whereas the SPS Agreement can be applied to very general

categories of food products (such as foods, beverages or feeds). An SPS measure is defined as any measure aimed at protecting animal or plant life or health from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; or applied to protecting human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; or intended to protect human life or health from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or aimed at preventing or limiting other possible damage deriving from the entry, establishment or spread of pests.

All laws, decrees, regulations, requirements and procedures (including end product criteria), processes and production methods, testing, inspection, certification and approval procedures, quarantine treatments, provisions on relevant statistical methods, sampling procedures and methods of risk assessment, and packaging and labelling requirements directly related to food safety, can be qualified as SPS measures. In reading this definition, it becomes quite clear how SPS measures can hamper international trade.

In this perspective, the SPS agreement seems to be, first of all, a particular expression of the non-discrimination principle: hence, the application of an unjustified SPS measure (or of a measure justified by a false sanitary reason) would be, *inter alia*, a breach of the national treatment clause, despite the differences between SPS Agreement and Article III GATT.

The main principle of the SPS agreement is that any measure must be based on sound science, and must be necessary: both Articles XX GATT and 2.1 SPS refer to the idea of "necessity", meaning – in the Panels' opinion – that no less restrictive, but equally effective, SPS measure is available, or practicable, given that Article 5.6 SPS requires Members to ensure "that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility". According to Article 2.2 SPS, member states are requested to implement health measures "only to the extent necessary to protect human, animal or plant life or

health": science, therefore, is not used only to identify whether the measures adopted by a member can really address a certain risk or not, but also to verify whether an SPS measure has been adopted in the correct way (i.e. scientifically justified) or not, to check its proportionality, etc.

Furthermore, the SPS agreement presumes that a national measure is legal whenever it is "harmonized", namely, when it is in full compliance with the standards developed by major international organizations: according to Annex A, Section 3, as of food safety, WTO members must base their action on the standards, recommendations and guidelines of the Joint FAO/WHO Codex Alimentarius commission; as of animal health, on the standards of the IOE (International Office of Epizootics); and as of plants' health, on the rules issued by the Secretariat of the IPPC (International Plant Protection Convention).

Harmonization is endorsed by the equivalence mechanism (Article 4 SPS), under which an SPS measure shall be applied, even if it is not harmonized: the importing country must accept the measures adopted by the exporting State as sufficient, if the exporting country proves that those measures provide a level of health protection which can be considered as equivalent to the protection level deemed as "appropriate" by the importing Member. Thus, should an importing country apply protective measures on the imported products, ignoring the exporter's attempts to prove the "equivalence" (in the above sense) of its measures – provided that the importer's measures are not harmonized – such barriers must be examined to ensure that they do not constitute a disguised restriction on trade, and this justification test requires an assessment in terms of "necessity".

According to a "Decision" of the WTO SPS Committee, on request of the exporting Member, the importing Member should explain the objective and rationale of the SPS measure and clearly identify the risks that the relevant measure is intended to address. The importing Member should indicate the appropriate level of protection which its SPS measure is designed to achieve (and the explanation should be accompanied by a copy of the risk assessment which the SPS measure is based on, or by a technical justification based on a relevant international standard, guideline or recommendation), whereas the exporting Member

shall provide appropriate science-based and technical information, to support its "objective demonstration" that its measure achieves the appropriate level of protection identified by the importing Member (including references to relevant international standards, or to relevant risk assessments undertaken by the importing member or by another member country, and on request, grant the importing member reasonable access to inspection, testing and other relevant procedures for the recognition of equivalence). The result will be a validity assessment of the measures applied by the importing state. In addition – according to SPS agreement – the protection levels cannot be evaluated by comparing the involved national safety systems as such, but rather by referring to individual products, and to the specific SPS measures applied to them by the exporter and by the importer, on a case-by-case basis.

Moreover, the members' right to determine their own level of health protection must be constantly balanced with the limits imposed on them by Article 5 SPS; in paragraph 4. Member States are required to take into account the objective of minimizing negative trade effects, when determining their own appropriate level of SPS protection and paragraph 5 lists three significant elements that reveal a possible SPS non-compliance: i.e. a) when the importing country adopts different "appropriate levels" of health or life protection; b) when those different levels are "arbitrary and unjustifiable", and finally c) when such measures result in a "discrimination or a disguised restriction on international trade". A non-discrimination principle is used here as a means of testing the legitimacy of an SPS measure.

4. The precautionary principle in the SPS agreement

The precautionary principle is still an "unsolved legal problem", due to its uncertain *status* and boundaries in general international law: "The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by

members as a principle of general or customary international law appears less than clear"[5] (Sands 1995; Cameron 1994; Cameron - Abouchar 1996). Other authors argue that the precautionary principle has not yet achieved the status of a principle of international law, or at least, consider such status doubtful, also due to the fact that the principle is still subject to a great variety of interpretations (Birnie - Boyle 1992; Gündling 1990; DeMestral et. al 1993). Its boundaries are somewhat uncertain, and often depend on the regulatory context of each precautionary rule, and on the purposes of that regulatory framework.

In general, "precaution" is a legislative technique of "enhanced protection", seeking to preserve a value even before a possible injury occurs (when it is not certain that it will occur). Since the common description of the precautionary principle usually makes reference to a lack of sufficient scientific data to prove the real existence of a risk (in other terms, the concrete likelihood of a future damage), that enhanced protection consists of defending the endangered value even if the prospect is very uncertain, and even if no damage may result in the end. It therefore implies a hypothetic comparison between action and inaction, from the point of view of the likely consequences (positive and/or negative), in terms of costs to individuals and to the civil community, both short and long term.

That is perhaps the most delicate aspect of the relationship between law and science: while, on the one hand, uncertainty is intrinsic to scientific knowledge, on the other hand it is the most relevant part of the precaution premises; and precaution is, in turn, expected to give legislators and policy makers a concrete rule of conduct, as a basis for governing and managing a probably non-existing risk. Since the main function of the precautionary principle is to indicate the threshold above which uncertainty legally becomes equal to certainty (and thus, an action can be expected from governors), and given the basic approach of the SPS agreement (requiring any SPS measure to be strictly "necessary", in the above explained sense), it is quite clear that the main difficulty for lawmakers and for all people

[5] *EC - Hormones*, at 123; *EC - Biotech*, at 7.87.

interpreting laws lies in determining how far that threshold must be lowered. Numerous studies have tried to analyze this particular aspect in depth, by examining the juridical notion of "risk", of "relevant risk" (e.g., by excluding the relevance of the s.c. "theoretical risk"), etc.

Article 5.7 SPS – where a precautionary principle is expressed – makes the precaution a basis for some members' rights and faculties, as if the SPS measures had been scientifically demonstrated as necessary. No obligation derives to member states from uncertainty, just as no obligation derives from necessity: an action is merely justified, i.e. legal; and that is all. The only peculiarity of uncertainty is that it legitimates nothing but temporary, provisional measures, accompanied by a duty-to-research (to try to find scientific evidence), and by an obligation to remove them after a reasonable period, if the risk has not been confirmed by new scientific data, or by a significant review of the previously available data (so that, in this case, the "equivalence" principle in Article 4 will oblige the importing member to accept the exporter's food safety standards).

The governments of Member States have been left quite a lot of discretion, so that WTO panels have already played a fundamental role, even in creating rules of conduct and of interpretation, in some reports such as the above cited *EC - Hormones* and EC - *Biotech* cases, but also in *EC - Asbestos* case, and in other cases). In any case, it is a "softer" idea of precaution than in other international acts (than in Cartagena Protocol on Biosafety, for example, or in the Rio Declaration). It is a compromise between the need to protect health and the need for liberalization of international trade. Overcoming the "reasonable period" of a measure's life would automatically make precaution a breach of the SPS agreement.

5. The Agreement on Technical Barriers to Trade (TBT)

Dealing with international food law, we must also briefly look at some technical rules that are not closely related to SPS measures: particularly the TBT Agreement, another

fundamental part of the Marrakech Treaty applicable to trade in food, both in primary and in processed products.

The relevance of technical rules for food safety (but also for food quality) is a matter of common experience. The TBT Agreement stems from the awareness that technical requirements for products (e.g. mandatory dimensions, allowed materials and substances, types of packaging, labelling and its contents, etc.) differ greatly among WTO countries, and that those differences may obstacle trade. Moreover these requirements, – as some health measures – may sometimes be introduced with no real justification simply to hinder trade. So, the aim of the TBT Agreement is to limit the use of specious requirements.

First, the agreement recognizes members' right to adopt technical standards as they deem appropriate to ensure their own safety level, and therefore does not prohibit them, by almost repeating the non-discrimination clauses of GATT: "Members shall ensure that in respect of technical regulations, products imported (...) shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country" (Article 2.1 TBT). So, members are required to guarantee that their technical regulations (including those related to quality) are not designed or applied to create disguised barriers to trade, and that they are necessary to pursue legitimate goals (including, *inter alia*, national security, human, animal, and plant health or life protection, environmental protection, prevention of deceptive practices). The logical consequence is that no technical barrier can be upheld when the reasons for their adoption no longer exist, or when the same circumstances (or objectives) can be addressed (or pursued) by less restrictive technical rules.

To this aim, the TBT Agreement sets up a "harmonization" rule that is quite similar to Article 3 SPS, where members have to comply with standards of major international organizations, such as ISO or – with regard to food – Codex alimentarius, or even with TBT's Annex 3 ("Code of Good Practice for the Preparation, Adoption and Application of Standards"). Besides, the agreement requires members to recognize each others standards-conformity assessment procedures, so as to allow