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Technical Capacity, Policymaking and Food Standards: An Overview of Indian Experience

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Abstract: The SPS Agreement in the WTO gives legal validity to the CODEX standards. Since the developed countries have been at the forefront of setting the food standards in the CODEX, the developing countries have been increasingly engaged in the CODEX, and also in the WTO, with an objective to increase their exports of the agricultural and food products. But such objective and desire have often been stymied by the lack of institutions which can sustain the intense technical negotiations at the CODEX. If these participations are not qualitatively satisfactory, the very objective of such participations is not fulfilled. But since most of the developing countries are lacking in such high technical capacity, they are unable to influence or qualitatively shape the negotiations in the CODEX. This also impacts their exports of agricultural and food products.

India has been an active member of the WTO. But whether it has been able to influence or respond to the play of events internationally and concomitantly balance it with the domestic imperatives that are embedded in the international legal and technological regimes, institutional capacity constraints and other social issues. This paper examines such issues, and also examines some bilateral trade agreements which demonstrate the mounting pressure on the developing countries to conform to the food standards of the developed countries.

Keywords: SPS Agreement, Food safety standards, Technology, Bilateral Trade Agreements

Introduction

The international debate and discourse on food standards in the last two decades have been punctuated by a number of public health controversies and international trade disputes resulting at times in trade embargoes (Isaac and Kerr, 2003). These debates have also been

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characterized by an increasing involvement of the civil society in questioning both the procedural and the distributive impacts of food standards setting and their implementation. The discourse has, therefore, been highly politicized given the high stakes that are involved in the regime setting and its operation.

Primary reason for the above change has been the international regulation of food standards that has been recognized and given legal validity by the international trade regime of the WTO. The focus of debate has also intensified due to rapid lowering of the tariff barriers as the focus is shifting to the non-tariff barriers to trade like sanitary and phyto-sanitary measures and other technical regulations.[1] This has resulted in polarization - a broad international fault line between the developed and the developing countries, with the former alleging non-adoption of international standards on food safety by the developing countries and the latter countering them with arguments relating to the usage of such standards as disguised restriction to trade in the form of lack of financial and institutional capacity for the developing countries to be involved in regime setting and its national implementation.

If we look closely on the above positions on international food standards governance, we find that there are mainly three sites of contestations; the first is the CODEX itself, wherein the international norms and guidelines are being formulated; the second one is the WTO, wherein CODEX non-conforming national regimes can be legally challenged through the dispute settlement process; and the third one (and also perhaps the most dynamic and most interesting) has been the bilateral trade agreements between the two largest trade blocks (viz. the USA and the EU) and the developing countries.

The first site has been in a legitimacy crisis of sorts partly because of the increasing pressures of negotiating a legal regime through an institution which has a philosophy based on consensual decision-making and that is not structurally constructed to provide for equity in participation. In other words, the institutional process of the CODEX has been exposed to mounting criticism but the process itself was not put into place in the first place to address the increasing claims being made onto it through the WTO mandate that was extended to it. In that sense, there is a case of disjuncture between the institutional objectives and the processes on which CODEX was set up and the extensive demands which were made upon it post-1995 (after the

establishment of the WTO) through the recognition given to it under the legal agreements of the international trade regime of the WTO.

The second site is of the WTO which is organically linked in terms of its operation in extending legal validity to the regime emanating from the CODEX. Though the disciplines are institutionally linked, both the negotiation process (to a limited extent) and the dispute settlement apparatus within the WTO have been extremely dynamic in terms of two things. First, through the negotiations within the WTO, developing countries have made a substantial pitch for revisiting (though to a limited extent) the CODEX policymaking process (Zarrilli and Musselli, 2004). Second, the dispute settlement process has also contributed to this process in terms of clarifying and developing disciplines that have partially responded to the disjuncture that the post-1995 trade regime has forced upon the international food policy regime in general.

In contrast to the above, the third site perhaps is the most dynamic as well as being the one exposed to high drama, given the closed nature of bilateral international relations and lack of public engagement in general. Two largest trade blocks, the US and the EC have engaged in extensive bilateral treaty making driven by the need to co-opt trading partners to adopt standards mirroring their own domestic regime. The bilateral trade agreements between the two trading blocks and their developing country trading partners have come to be increasingly used to export food safety standards regulation. The trading arrangements provide adequate arenas since the basket of measures are large and, therefore, provide flexibility and allow pressure tactics to be deployed to a considerable extent. Further the one-to-one negotiations procedure is also ideal, since structurally it is susceptible to pressure tactics.

All these three sites are also characterized as sites of contestations in their own right, since each display characteristics of individual activity and, therefore, offer a chance for compromise. However, all three sites are also dialectically linked together, since each may support, influence or even provide competition to each other in terms of member countries using each forum to influence policymaking.

Given the above context, this paper examines the three sites of debates. It also highlights developments within the national scene, which are bound to influence international developments and which may also be influenced by the other. In conclusion the paper gives a brief background of the domestic food safety regime and highlights a

particular instance of a sudden shift in policy, which clearly seems to suggest international pressures emanating from bilateral trading partners.

Negotiations on Food Standards within the CODEX Alimentarius Commission

The most important international agency in the arena of food standards is the *Codex Alimentarius* Commission or CAC. The WHO and the FAO, as it is popularly known, set up CAC jointly in 1963. The CAC was set up primarily as a coordinating agency to facilitate the setting of standards on food safety and ensure certain standardization in food trade practices. The membership was and continues to be open to all FAO and WHO members with a large number of international NGOs having observer status.[2] The organization functions through a network of regional, commodity specific and general committees that deliberate on standards. The committees are organized horizontally (general issue areas), vertically (issues that are specific to some commodities) and in regional committees, which are aimed at enabling regional consensus building on region specific standards and issues.[3]

Before the coming into place of the WTO agreements in 1995, the deliberations in CODEX used to be largely consensual and non-posturing in nature. The organization was essentially used as a forum for discussing and debating scientific information, developing regulatory best practices and exchanging and dissemination of information on country practices in the domain of food standards. Direct adoption of the standards produced by the CAC was at best limited amongst countries.[4] The coming into place of the SPS/TBT Agreements has had a crucial impact on the functioning and authority of the CODEX.

Post WTO Codex standards carried within a presumption of legality under the SPS/TBT Agreements. Thus countries adopting CODEX standards were presumed to be in conformity with their WTO obligations.[5] Though this did not demand strict conformity with the CODEX standards, countries could only justify their non-adoption by adhering to strictly defined criteria. The high costs of litigation in the WTO also meant that adherence to the CODEX standards was a more cost effective alternative and avoid getting embroiled in disputes within the WTO. Thus, the CODEX standards not only received legal validity via its inclusion in the text of the SPS/TBT Agreements but also the organizational and functional costs of participating in the WTO meant

that there was/is a real (albeit negative) incentive in the adoption of these standards (Appleton, 2000). Another important aspect of the legal effect of the CODEX is the definition of international standards includes standards, guidelines and recommendations.[6] In this context one could safely draw the conclusion that the SPS extends legal validity to all recommendations of the CODEX without any differentiation.

Post WTO has also witnessed the growing importance of the CODEX standards. However, it has also been subjected to a slew of criticisms focusing on systems of participation for members, processes of deliberation, etc.[7] Various committees operating under the CODEX are hosted by the individual governments. The host country member has a significant leeway in agenda setting within the committee. Further, the increasing use of the voting system to adopt standards within the CAC (in lieu of a consensual process) has also contributed to the legitimacy crisis facing the CODEX. Moreover, developing countries also complain that standards in developed countries are in some instances more stringent than the CODEX standards (Brack, Falkner and Goll, 2003), and, therefore, there is always a pressure within the CODEX to continuously upgrade standards to more stringent level. One of the reasons for this is the slow pace of standards development within the CODEX and the faster pace of standards development in developed countries.[8] This has led to a viscous circle having a spiraling effect on stringency of the standards given the developed countries wariness to downgrade standards within their domestic jurisdictions.

The CODEX in the post 1995 phase, after it was referred to as an acceptable standard benchmarking agency by the WTO, has, therefore, witnessed widening and deepening of the negotiations taking place within it. In terms of subject matter the number of food standards deliberated within the CODEX has increased exponentially over the last decade. Also the nature of factors and criteria underlying a scientific standard has also proven to be a point of contention in the CODEX. The Procedural Manual of the Codex Commission differentiates between risk assessment and risk management with reference to food standards.[9] It defines risk assessment as purely a scientific process and the latter as a policy process that includes consultation with a range of interested parties and weighing of alternatives. This kind of a divisive frame of reference is organically linked with that of the acceptance of the role of "other legitimate factors" within the decision-making framework of the CODEX – meaning within the domain of risk management. The

manual provides for several caveats in the operation of "other legitimate factors", viz. putting an additional burden on managers to "indicate how these factors affect the selection of risk management options and the development of standards, guidelines and related text". It further stipulates that the consideration of these factors "should not affect the scientific basis of risk analysis", thereby clearly extending primary importance to scientific outputs from the risk assessment, over that of "other legitimate factors". Moreover, it considerably limits the scope of "other legitimate factors" by specifying that only those factors that have a world-wide/regional basis should be incorporated (thus negating territorially limited factors that may have an impact nationally). Singularly the manual exhibits some awareness of the challenges faced by developing countries in undertaking risk assessment and states that "*particular constraints of the production or processing methods, transport, storage especially in developing countries may be considered*"[10] (emphasis added). In this case, therefore, the manual makes an exception and uses non-obligatory language and in effect substantially waters down the legal effect of the aforementioned section.

One horizontal issue that has proved to be contentious within the CODEX is the definition and scope of the "precautionary principle". The lack of agreement between members has resulted in a compromise leading to the adoption of the following position in 2001: "When there is evidence that a risk to human health exists but scientific data are insufficient or incomplete, the Commission should not proceed to elaborate a standard but should consider elaborating a related text, such as a code of practice, provided that such a text would be supported by available scientific evidence". This is indeed problematic especially given that the WTO does not differentiate between standards, codes or guidelines. Thus, the legal validity of a "code of practice" emanating from CODEX would be akin to the standards or guidelines proscribed by it under WTO law.[11]

Another important area of discussion has been the definition of "other legitimate factors" in the context of the decision-making within CODEX. Discussions on this issue have been divisive and there is yet to be an agreement on what constitutes "other legitimate factors". However, the statement of principles provides for certain critical caveats that will have an import on the discussions and could very well limit its scope. First it reiterates the separation between the risk assessment and the risk management processes in order to secure the sanctity of the former

and ensure that it only has a scientific basis. It also states that CODEX will consider only those factors which have a regional or a worldwide reach and not those that are territorially limited within a nation state. Thus, the geographical reach or scope of the factor is an important prerequisite for its consideration within the CODEX. Further, the Statement also takes into account the particular circumstance of the developing countries in evaluating the feasibility of the risk management preferences that are adopted within the CODEX, thereby providing for a consideration of extraneous factors – "other legitimate factors" in negotiating and mandating standards. It also stipulates that in the case of forwarding of economic interests and trade issues which are considered to be germane to standards setting within the CODEX, quantifiable data should be made available to support them.

The above discussion highlights some of the tensions, which are prevalent within the various committee negotiations in the CODEX. There have been concerted efforts on the part of developed countries to push for an exclusively "science based" risk management techniques. However, this assumption has been questioned by social scientists and management theorists who have denied the claims of neutrality of science (Walker, 2003) and have reiterated the non-scientific aspects of determination of standards of risk. Criticisms of the CODEX have also been targeted at the inequalities of participation embedded within the functioning of the various committees and task forces.[12] The report of the evaluation of CODEX has also commented on the growing frustrations of the LDCs and the developing country in fully participating in the deliberations of the CODEX.[13]

Legal commentators like Livermore have sought to characterize such tensions as a "legitimacy dilemma" faced by the CODEX resulting from the expanded organisational mandate backed by the international institutional mechanism of the WTO. [14] He has highlighted the change in the nature and political culture of the negotiations within the CODEX, given the high stakes. From an external perspective this also means that the CODEX negotiations have attracted considerable criticism from the international civil society. Livermore also points out that the WTO agreements provides for a balancing of interests given the separation and the institutional differentiation of powers. He calls this "institutional differentiation" and understates its importance in functioning as a balancing of interest mechanism, and then goes on to argue that the judicial review function of the WTO tribunals (Panels

and the Appellate Body) enables it to undertake a procedural review of standards setting activities within the CODEX. In defense of this contention he marshals jurisprudence from the *EC-Sardines* case[15], wherein the AB had undertaken a review of the internal decision-making processes of the CODEX. He has also demonstrated that the developments of administrative law principles like due process and transparency requirements have come to characterize Appellate Body deliberations.[16] In this context main thesis is that the Appellate Body is empowered to review CODEX decisions on the basis of transparency and other procedural bars that would to an extent address the claims of a crisis of legitimacy brewing within the CODEX.

Bilateral Agreements and Its Influence on Food Safety Standards

> *"Our SPS standards are not open to negotiation, and they apply in full to all trade: preferential as well as non-preferential."*
>
> — European Agricultural Commissioner Mariann Fischer Boel (Sixth Meeting of the International Centre for Advanced Mediterranean Agronomic Studies, CIHEAM)

This comment perhaps best illustrates both the inflexibility and also the resolve of the EU (mirrors that of the USA) to influence trading partners to grant the same level of protection and also to adapt (and in most cases transpose) their domestic food safety framework to match the EU/USA regimes (Paarlberg, R, 2002). In this section we would study two such examples of bilateral trade agreements - EU-Chile Association Agreement and the United States-Panama Agreement that have a well-detailed chapter on SPS standards. [17] From these chapters it is apparent that they have been negotiated keeping in mind the EU/USA standards. These two agreements are both similar and dissimilar in certain aspects. They are similar because, they represent the intense drive of these two trading nations/community to push for harmonization of SPS standards. However, they are starkly different in their choice of methodology. The EU-Chile Association agreement focuses largely on laying down structural linkages between the regulatory systems of the two countries – enabling close cooperation both the formation and operation of SPS measures and mechanisms. The US-Panama agreement, on the other hand, is more direct in its approach, where the US uses its

historical linkages with its neighbouring countries like Panama to push through an extensive equivalence project that effectively narrows down the room for maneuver (respond to their own domestic priorities and conditions) to partner countries like Panama.

(a) EU-Chile Association Agreement

At the time of its signing the EU-Chile Association Agreement was one of the most far reaching agreements as it clearly went beyond the traditional areas associated within trade agreements. As the name suggests – the association agreement – is designed to be comprehensive and cover a wide range of social, economic and technical cooperation. The inclusion of trade as one of the issues covered within the agreement influenced the coverage of trade issues within the agreement itself. Analysis of the agreement reveals that the provisions were a far-reaching extension in providing for close regulatory cooperation between the authorities of the two countries so as to preempt any conflict of interest in terms of their sanitary and phytosanitary standards. Thus, addressing trade issues through an association agreement provided an avenue to push for closer regulatory cooperation on trade issues.

The section on equivalence is comprehensive and is integrated into Annex IV of the Agreement. The provisions provide for strong cooperation between the Chilean and the EU authorities in standards, technical regulations and conformity assessment. Further, the agreement also identifies international and European standards as benchmarks to which Chilean standards should be based on (Christoforou, 2004). This also illustrates drive for the integration of the EU standards into the agreement along with international standards, which are recognized under the WTO Agreements. The agreement also puts into place stringent conformity assessment structures and procedures as conformity assessments are popular tools within association agreements in stimulating greater oversight and monitoring and evaluation of regulatory measures within the domestic jurisdiction of trading partners.

The development of animal welfare standards in particular received special attention within the Association agreement. Articles 2, 3 and Appendix 1c deal with the stunting and slaughter of animals. The preamble of Annex IV of the agreement specifically mentions the development of an international animal welfare standard as one of the aims of the Association agreement. This in itself is not incongruous with the current policy of the OIE (World Organization for Animal

Health), which has sought to focus actively on the development of animal welfare standards. However, what requires attention is that of placing such an aim within the standard aims of the agreement itself. In this context the agreement itself becomes a vehicle for harmonization and also a site for active negotiation on the development of "international standards". Further, the terms and broader contours of such future negotiations would be circumscribed by the provisions of the agreement. The agreement thus binds the parties to future negotiations on international standards that go much beyond the dictates of multilateral negotiations within the WTO.

Lastly the agreement is also characterized by the strong periodical institutionalized forms of information exchange and refers to regulatory convergence and compatibility between the domestic regimes of the trading partners. This direct reference to convergence and compatibility is not surprising given the aims of the association agreement. Further, the institutionalized nature of information exchange and mechanism for cooperation anticipates domestic regulatory changes and equips the partners to provide for advanced notice of such changes and more onerously the need to take into account the views of the trading partner in envisaging and developing domestic regulatory regimes in related areas. This in a manner legitimizes and leverages the role of trading partners from that of external influencing domestic regulatory policy to that of demanding attention and consideration of their viewpoints in decisions governing the domestic policy regimes. This conceptually radicalizes their involvement and influence to influence and shape policy making nationally.

(b) The United States-Panama Trade Promotion Agreement

The US-Panama TPA was signed in June 2007, after three years of protracted negotiations between the two sides. Soon thereafter the Panama government got a swift approval of their legislature with an overwhelming majority voting in favour of the agreement. But the US Congress has refused to give it their stamp of approval till now, though reports of late suggest that there are some positive movements within the US domestically on this.[18]

Although the agreement is yet to receive congressional approval, the scope and value of this agreement to both these trading partners are not in doubt. Given both the geopolitical and the direct trading interests relating to the Panama Canal Authority, the US is admittedly

keen on cementing its strategic ties with this Central American republic. Similarly, for Panama hopes of gaining unilateral trade privileges from the US would help it to compete with the Caribbean nations that have been enjoying liberalized tariff regime for both the US and EU markets under the GSP scheme of trade preferences. It will also enable it to leverage its role as a US trading partner in a region characterized by traditional US opponents. This would then seem to relate to a win-win situation for both the countries; however, the devil in this case lies in the details. An analysis of the text of both the free trade agreement and the single focus agreement on SPS measures would prove the degree of one sidedness, which both these texts exude. Herein we would focus on certain aspects of the free trade agreement and discuss the rationale for establishing a separate agreement on SPS measures.[19]

Amongst one of the innovations, which have been made in this FTA, is the introduction of the special category called "Special Regimes".[20] This is listed under Chapter 3 "national treatment and market access to goods" section, and refers to waiver of custom duties. This section (Article 3.4) creates a legal bar against the revision of the customs waivers adopted under this agreement if it is conditioned on the fulfillment of a performance requirement. The caveat attached to this is that it could be an "explicit or implicit" conditionality, essentially debars any course of action. Under this articles Panama retains the right to maintain existing measures, which are inconsistent, under two conditions. First, that they should be consistent with Article 27.4 of the SCM Agreement. Second, that Panama "may not" maintain such measures after December 31, 2009. It is quite obvious that given such a deadline, Panama will be under immense pressure to withdraw the current regime of customs waiver that are external to this agreement.

The Agreement also contains a specific chapter on Sanitary and Phyto-sanitary Measures. The chapter only affirms the application of the SPS Agreement of the WTO and sets up a consulting and facilitating mechanism in the form of a Committee on Sanitary and Phyto-sanitary measures. Further, the scope of the chapter is wide and, therefore, refers "all" SPS measures that may directly or indirectly affect trade. Amongst the Committee's various functions, it also provides for a forum for prior consensus building on issues and positions in international SPS bodies like the Codex, WTO SPS committee, International Plant Protection Convention amongst others. This is another related trend that is being reflected in such FTAs. Such institutions in reality create a

practical imperative to undertake consultations with ones' trading partner on decisions, which should be taken on the basis of national trade priorities. This also highlights the essentially territorial[21] nature of the side effects of such agreements between two unequal trading partners. The agreement puts into place a self-progressing mechanism, which would catalyze closer trade relations between the partners on an ever expanding range of issues – which may not even have featured in the text of the agreement. This is illustrated by the US-Panama FTA in which, although the substantive provisions are limited, the setting up of the Committee and the role and scope determination of the committee has set up a process with a self momentum. On a more pragmatic note, the setting up of a Committee and the lack of any substantive obligations reflects the lack of agreement between Panama and the US at that point of time. It also, therefore, highlighted the need to negotiate a separate agreement on the outstanding SPS issues in the future. The signing of the US-Panama SPS Agreement is a fulfillment of that need.

The latent trigger to the signing of this single focus agreement on SPS measures between the US and Panama has its genesis in the Panama's requirement conducting individual audits by national authorities of the US manufacturing processes, facilities and export shipments that export agricultural products to Panama. The US was keen to ensure that such far-reaching administrative requirements would be done away with and replace them by a wide ranging equivalence measures. The importance of these measures also underlines the need for a separate agreement rather than including such issues within the larger radius of the proposed US-Panama free trade agreement.

The Agreement primarily focuses on three sectors, viz. meat (including but not limited to beef and pork), poultry and its products and processed food (including dairy products). The essential thrust of the Agreement is to recognize and validate the certification provided to the US exports in these sectors by the domestic regulatory authorities without the necessity to undergo the quality controls by the authorities in Panama. The reason behind this is that all these three commodities form the most protected products and almost 40 per cent of the imports from the US. The US in many bilateral forums had contended that process of certification of individual US manufacturing/processing firms by the Panama authorities have been a procedurally cumbersome and an expensive process.[22] Panama has thus in pursuance to the Agreement

agreed that it would not require "any additional certification statements to the standard applicable US export certificate, except as provided in this Agreement."[23]

Another important aspect is its focus on laying down procedural time lines. Article 7 of the Agreement specifies that in case of obtaining product registration statement from the Panama Food Safety Authority, the time line have been fixed at "one working day of receiving basic product information about a product". This is indeed unprecedented in terms of the reach of bilateral agreements. Providing for fixed time lines in case of regulatory approvals and specifying automatic issuance product registration certification. These further illustrate the intrusive nature of the Agreement and its impact and influence and fashioning domestic regulatory approvals. Moreover, the Agreement states that, also in cases of animal diseases, viz. avian influence and Newcastle disease, Panama will accept the internal regulatory certificates of the USDA (United States Department of Agriculture) FSIS Export Certificate, as valid. Although this is in conformity with the OIE (World Organization for Animal Health) guidelines, there are very few instances where countries have accepted such measures of equivalence.

In the specific case of importation and sale of beef and beef products, Panama is obligated to "continue to recognize, the US beef grading system, and US beef cuts nomenclature, without review or further action." This is indeed unprecedented, that a bilateral agreement would aim to constrain further action or even review of present domestic measures. This goes much beyond what is meant by equivalence. Since the idea and commitment towards equivalence is an act of recognition of the measures of a trading partner as in conformity (and therefore having the same legal effect as) with domestic regulatory measures. In this case, however, not only is there a legal obligation on Panama to recognize current standards of the US, but of more concern is that censure on future domestic policy changes. Puritans would argue that an international agreement being a legal contract, it is possible to withdraw and rescind from it. However, realistically this is not an option open to Panama, given the historical linkages (both trade and politics) between the two countries.

The above discussion quite clearly elucidates the extensive nature of commitments that Panama has undertaken in the context of SPS measures (with reference to specific goods) with the United States. This is not surprising given the earlier regulatory regime wherein Panama

maintained that specific regulatory procedures have been seen to be an expensive exercise and also very time intensive. Nevertheless what is indeed surprising is the nature and scope of this Agreement in terms of mandating detailed and rather sweeping "prior information" and notification commitments preceding any review or change in the regulatory regime by Panama.[24] This will of course facilitate bilateral policymaking in this area; nevertheless the provisions of this Agreement are quite clearly SPS plus in nature and this potentially could constrain the domestic regulatory flexibility of Panama.

What does the above analysis portend for the ongoing India-EU FTA negotiations? There are primarily two issues to which attention could be drawn in this regard. First is that of the SPS standards themselves. As is evident from the analysis of the above two FTAs, India should expect pressure from the EU to agree to extensive harmonization of its legal instruments and institutional infrastructure governing SPS. This would be in terms of accepting the protocols established by EU certification authorities and in the Indian scenario adopting those or similar protocols with the promise of guaranteeing faster and more effective access to the EU markets. As has been witnessed in the US-Panama SPS Agreement, this could either be limited to a few products to begin with but thereafter there will be pressure to extend it to the entire product line being negotiated under the FTA. Second also at the level of regulatory approvals, there may be pressure to streamline the process in terms of specifying strict time lines for gaining such approvals. More importantly, however, it is the review and consultation that are mandated before any change of policy on the regulatory fronts that is of concern. As seen from the earlier discussion, it could be expected that similar responsibilities be specified in the agreement that would make incumbent on India to consult with the EU before undertaking any exercise of review and revision of the current regulatory standard specifically with reference to the SPS measures. This cannot and should not be acceptable to India on grounds that it would be undermine the policy flexibility that is required to design and implement a regime that addresses its domestic priorities.

Institutionally there could be demands made similar to those under the US-Panama FTA. This refers to the setting up of a joint committee to facilitate consultation on SPS measures. Although such an institution can be helpful, however it should be noted that the mandate of such a consultative mechanism needed to be clarified. In the case of an open

mandate on engagement there may be pressure to subsequently enlarge the mandate given the new circumstances. Thus, if India does enter into such a mechanism with the EU it would need to be very clear on the purpose, duration and draw a clear mandate for such a mechanism.

The Home Front

In this section we study the domestic institutional and regulatory landscape on food safety in India. This is an important and crucial part of this issue area. Given the fast moving pace of international developments on this issue, it is imperative that our domestic regime is both well entrenched but also flexible enough to address the international demands made on it. In this specific case, a country's negotiating prowess on a specific subject/issue area is largely contingent on the development of its domestic regime and its independent and effective functioning. It is also important at the level of providing crucial national experiential data in equipping negotiators with a knowledge base and multiplicity of choices in designing institutions and regulatory instruments that best reflect the domestic priorities and also fulfill our international obligations as a country. In this regard the following analysis reflects on the institutional aspects of the regulatory bodies dealing with food safety in the country. It also highlights few of the problems of regulatory uncertainty that may be created due to lack of clear mandate of functioning bodies.

The primary aim in highlighting such domestic fissures is to illustrate the highly contested nature of domestic policy making itself on this issue. This further complicates policymaking domestically and could potentially have a negative impact in terms of coordination between the different lead agencies in the international negotiations spanning the CBD (Chazournes. and Thomas *et al*. 2000), WTO and the CODEX committees. Following, therefore, is an overview of the regulatory landscape in India and some of the fissures therein.

In India, the Ministry of Health and Family Welfare (MoHFW) is the oversight authority for food safety. For nearly five decades the Prevention of Food Adulteration Act (PFA), which was enacted in 1954, has been the sole legislation on food safety in India. The primary objective of this legislation was to ensure consumer safety through preventing fraud and deception in food manufacturing and marketing. Since the food safety is a subject that is part of the concurrent list, the enforcement of the Act is the primary responsibility of the State/Union

Territory governments. The role of the MoHFW is advisorial in nature other than few of the statutory functions that it undertakes. The MoHFW is also the designated National Codex Contact Point in India. The National Codex Committee was constituted as an overview agency under which there are twenty-four shadow Committees in concomitance with those in the CODEX that essentially follows the international developments in the committees and helps in preparation of India's submissions.

In August 2006, the entire food safety law in India was overhauled through the enactment of the Food Safety and Standards Act. One of the main features of the enactment is the setting up of the Food Safety and Standards Authority. This provides for a one point regulatory oversight over the entire food chain. This illustrates a shift away, in many ways, from the earlier regulatory ethos of focusing on enforcement mechanisms on the end of the food chain sold in the market to a more preventive approach to risk assessment and reduction of such risk. The primary aim is to deploy regulation at points where it is most effective like in the HACCP classification systems.

Nevertheless despite the enactment of this legislation several delays in notifying the legislation have meant that there is a grey area of regulatory oversight that has been created largely by default. Though the food regimes is to be under the authority of the Food Standards and Safety Authority, the Ministry of Environment and Forests (MoEF) has continued to be in charge of the environmental health impacts of food safety regime specifically with reference to the genetically modified foods regime. This follows through from the parameters set up within the Environmental Protection Act 1986, through the notification setting up of the entire regulatory apparatus of approval of GM crops. Thus since the most important international instrument on GM crops have been developed within the larger framework of the CBD (Convention on Biological Diversity), i.e. the Cartagena Protocol on Biodiversity (Katz, D,2001).

The Cartagena Protocol is essentially an international environmental regime that provides for a system of institutional and regulatory standards that delimits the functioning of the regime. The regime was developed in response to the environmental risks emanating from the international export and import of LMOs (Living Modified Organisms – the name used to refer to the GMOs under the CPB). Thus, the location of the food safety regime within the ministry of

environment was partly a reflection of the international institutional arrangements, but also addressed the unique threats that emanate from the development of GM crops within agriculture.

A second aspect, before discussing the implications of such an institutional location, two preliminary points needs to be made. First it is important to keep in mind that though in this section, regime location is construed as crucial facet of regime architecture, it does not in any way deny the numerous influences both domestic and international in determining regime development and functionalities. Second, one of the inherent assumptions of this facet of examination is that there are certain forms and processes of regime architecture which the location of the Ministry of Environment privileges over others and that has certain implications of the nature and operation of the food safety regime itself and most importantly for its development.[25] The GM regime exemplifies the importance of this contextual dynamics of regime location. The Indian environmental regime governing GM crops has a long history. India was one of the early subscribers to a specialized GM environmental governance regime. The notification on GM regulation was brought into place as early as in 1989. Interestingly this was before any known commercial plans to invest in GM research were unveiled in India. Such a precautionary posturing could perhaps be attributed to the domestic judicial drive that was witnessed during the late eighties through the nineties on environmental issues and the executive response to it. This period also saw the overhauling of the environmental regime in form of the enactment of the Environmental Protection Act, 1986.

However, thereafter especially through the late nineties, the techno-optimism that characterized the investment and development of biotechnology saw a clear posturing of the government to go slow on regulations. This was also evidenced by the clear lack of regulatory control in terms of institutional capacities that were pre-requisites for the legislative oversight. Another proof of the government stand was also the sudden change of government policy by proceeding with an executive order (notification) in mid-August last year.[26] The notification essentially used an exception clause enabling the MoEF to provide for the non-application of the notification if it so warranted. The notification does not provide for specific conditions under which the ministry can take such a position and therefore provides for wide discretionary powers to the MoEF. This *per se* is not legally problematic

but in case of abuse of such discretion in clear violation of the legislative intent underlying the enactment of the GM notification, this may be legally challenged. The August notification of the MoEF essentially provides for a blanket exemption of GM regulatory oversight on the imported GM food. This is surprising given that there has been no overall policy change in the government on such issues. Further, there has been a significant rise in the import of GM food especially through the rise of retailed vegetable shopping chains. Also this kind of a stand is very much opposite to the government of India's international stand on eco-labelling of GM food at the CODEX. Since then there has been a case filed against this order in the Supreme Court, and the Ministry has put the notification in abeyance for a period of six months pending further direction from the Food Safety and Standards Authority under the Ministry of Health and Family Welfare.[27]

The above is just one of the various illustrations that characterize the conflictual and highly contesting nature of the food safety administration in the country. Thus, it would be naïve to imagine that even having a consolidated authority would iron out all the problems, specifically because in the context of the environmental health aspects of GM food would require the expertise of the MoEF. In that sense it is critical that any such step would have to be supported by a clear plan of inter-ministerial action and support structure that would enable effective oversight of food safety in India. Such inter-ministerial deliberation and action is also critical in providing for a formative strategy in dealing with international negotiations at different forums on food safety. Thus, other than the MoEF, the MoHFW, it is the Ministry of Commerce which would have to be involved in the coordination of such responses, given that it is in overall charge of the international trade negotiations both at the bilateral level and at the multilateral institutional level of the WTO.

Concluding Remarks

Discussion in the above sections highlights the contested nature of the sites of international decision-making on food safety. This contestation is not necessarily a negative issue, since it also illustrates the diverse nature of the actors that are involved and, therefore, have to be accommodated within the different forums (Anderson and Nielsen, 2004). However, what is quite apparent are the increasing demands

that emanate from such forums on the developing countries to participate and influence standard setting related decision-making therein. What is of concern is the privileging of bilateral forums over multilateral ones in the drive for harmonization on food safety regimes. Given the inherently unequal nature of these forums, it creates tendencies for inordinate influence of the larger trading partner (Barton, 1996). This is quite apparent from two instances of such bilateral agreement analyzed in this paper.

In this context one would need to underline a couple of caveats. First, food safety regulation within the trade regime would take centerpiece given the increasing use of non-tariff barriers by countries while regulating trade. Second, this would automatically raise the profile of bodies like CODEX in terms of authorizing regulations that lay down the basis of food safety regulations that are recognized as "legitimate" within the framework of the WTO (Bentley, 2001). Third, this creates institutional pressures within the CODEX to respond to the demands of the variety of actors that are interested in participating in the deliberations. These issues of legitimacy would have to be addressed both within the CODEX and/or through the other forums like the dispute settlement or through the various committees of the WTO wherein procedural requirements could be debated and adopted in order to guide decision-making within the CODEX. It is also important to focus on bilateral developments and resist pressures from larger trading partners in adopting standards that clearly go beyond those mandates under the SPS Agreement. Herein it is important to reiterate that multilateral forums like the CODEX or the WTO remain ideal institutionally to provide for negotiations on this issue, given the nature and scope of the food safety regulation.

At the national level, the setting up of the Food Safety and Standards Authority is a critical institutional innovation in the context of the food safety regime. Given the institutional convergence that is required between the MoEF, MoHFW and the Ministry of Commerce, having a one point institutional mechanism is required. Further, food safety within the context of international negotiations is shared across international negotiating platforms like that of the CBD, WTO and the CODEX. Thus, it is important that there is sustained and regular interactions that are institutionalized through the oversight of the Food Safety and Standards Authority.

Endnotes

1 "It is widely recognized that SPS measures can act to impede trade in agricultural and food products." Impact of SPS Measures on Developing Country Export of Agricultural and Food products, World Bank, 1999.

2 There are currently 167 members and 149 NGOs have observer status.

3 See Joint FAO/WHO Food Standards Programme, General Principles of Codex Alimentarius, in Codex Alimentarius Commission Procedural Manual 30 (14th ed. 2004).

4 See Michael Livermore, Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation and the Codex Alimentarius, 81, N.Y.U. Law Review, 774 (2006).

5 Under the SPS Agreement, members "shall base their SPS measures on international standards"; Article 3.1. Under the TBT Agreement, members "shall use them or the relevant parts of them, as a basis for their technical regulations"; Article 2.4.

6 Annex A to the SPS Agreement, Section 3(a), defines international standards relating to food safety.

7 Embassy of India, International Harmonization of SPS Standards, Paper submitted by India in the WTO Committee on SPS Measures; http://www.indianembassy.org/policy/WTO/wto_india/harmonise_sps.htm , paper last accessed on 12th December 07. Also Lori M. Wallach, Accountable Governance in the Era of Globalization: The WTO, NAFTA and International Harmonization of Standards, 50 U. KAN. L. REV, 826 (2002).

8 W. Bruce Triaill. et al, Report of the Evaluation of the Codex Alimentarius and other FAO and WHO Food Standards Work, FAO and WHO, November 2002.

9 Procedural Manual of the Codex Alimentarius Commission. 16th Edition. FAO, Rome.

10 The Codex Decision making Process and the Extent to Which Other Factors are taken into Account: This includes both the statement of the Criteria in the first statement in 1995 and thereafter in second statement of the principle in 2001.

11 See also, Cassese S, Shripms, Turtiles and Procedure: Global Standards for National Administrations 15 (InternationalmLaw and Justice, Global Administrative Law Series, Working Paper No. 2004/4, 2004).

12 Livermore Michael, Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius, NYU Law Review, May 2006.

13 Supra Note 11.

14 Supra.

15 Appellate Body Report, European Communities – Trade Description of Sardines, WT/DS231/AB/R, (September 2002).

16 See also, Cassese S, Shripms, Turtiles and Procedure: Global Standards for National Administrations 15(InternationalmLaw and Justice, Global Administrative Law Series, Working Paper No. 2004/4, 2004).

17 United States – Panama Agreement Regarding Certain Sanitary and Phytosanitary Measures and Technical Standards Affecting Trade in Agricultural Products. December 20, 2006.

18 See http://www.bilaterals.org/article.php3?id_article=13099 accessed 12/9/08

19 United States-Panama Agreement Regarding Certain Sanitary and Phytosanitary Measures and Technical Standards Affecting Trade in Agricultural Products. December 22, 2006

20 See Section C of Chapter Three, "National Treatment and Market Access for Goods", US-Panama Trade Promotion Agreement

21 In this context the use of the word "territorial" is implied to mean the unclear nature of territorial boundary and the essential national urge to extend them through annexation of territory.

[22] United States Trade Representative. 2007 National Trade Estimate Report on Foreign Trade Barriers. Washington, D.C. March 2007. p. 452.
[23] Supra Note 15
[24] Supra 11.
[25] See more generally for similar assumptions; Post Diahanna; Standards and Regulatory Capitalism:The Diffusion of Food Safety Standards in Developing Countries, The Annals of the American Academy of Political and Social Science; 598; 168, 2005.
[26] MioEF Notification number S O 1519E.
[27] Notification S.O. 411E 25 February 2008.

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