Scope and Limitations for National Food Safety and Labeling Regimes in the WTO-Frame

Bettina Rudloff

1 Introduction

This chapter will discuss whether there is scope for a sovereign design of domestic food policies within the WTO-frame. In a first step, the existing scope provided will be described and secondly, the actual use of this scope based on findings of closed disputes will be analysed. This survey on real cases will be split into the period before the SPS-Agreement was adopted in 1994 and into the period afterwards. The main emphasis lies on standards but analogies for labels can be made as they are referring to underlying standards.

All food safety measures can be analysed in the framework of non-tariff barriers (NTBs). According to Gandolfo's definition of NTBs such measures are different from tariffs and cause negative trade effects (Gandolfo 1998). The latter attribute defines the major rationale for WTO rules on NTBs. Food safety measures may become an NTB as far as they are not just domestically implemented but applied to imports as a precondition for market access (Bagwell and Staiger 2002, p. 126). NTBs are addressed by different WTO provisions:

- The General Agreement on Tariffs and Trade (GATT) defines some general rules in Article I, III, IV and XX,
- Certain Agreements specify these GATT rules for selected issues like the Agreement on Technical Barriers to Trade (TBT-Agreement), that is addressing all technical regulations for products, and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS-Agreement) on food safety issues.

2 Time Prior the Adoption of the SPS-Agreement

Prior to the adoption of the TBT-Agreement and the SPS-Agreement in 1994 all emerging food cases were ruled on basis of GATT principles,

namely the most-favoured nation principle (GATT Article I) and the national treatment rule (GATT-Article III).

Both principles command that "like products" must not be treated differently, neither when comparing imports originating in different countries nor when comparing imports with domestic products. Hereby, no barrier neither a tariff nor a NTB on "like" products would be allowed:

- The most-favoured nation principle prohibits discrimination between imports of "like products" originating in different countries. Accordingly, this implies that discrimination of "unlike products" is possible.
- According to national treatment, domestic fees or rules can be applied to "like" imports only as far as they do not lead to worse treatment compared to domestic products. This implies for "unlike products" a potentially different treatment.

As conclusion, import barriers may be justifiable by Articles I and III only as far as unlike products are concerned. The interpretation of likeness of products affected by an accused trade barrier was centric in several disputes.

Table 1. The "like concept" in agricultural and food related disputes (1950 – 1994)

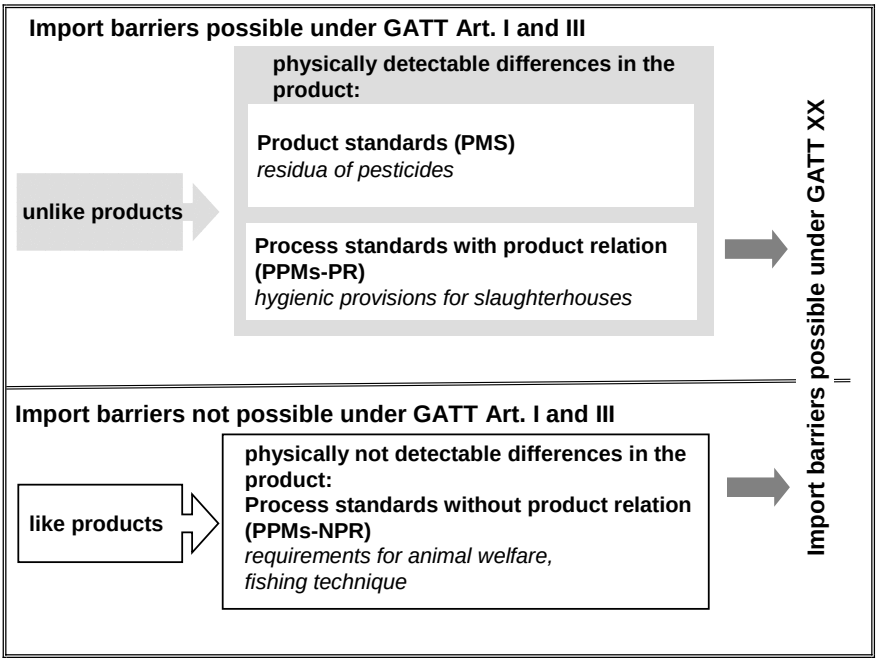
All closed disputes referring to agriculture and food	45	
Cases on interpreting the "like concept"	12	
Findings in favour of "unlike products"	2	• Case on support of domestic feed proteins: different feed proteins accepted as unlike (US against EC, BISD 25S/49) • Case on tariffs on wood types: different wood types accepted as unlike (Canada against Japan, BISD 36S/167)

Source: Own calculation on basis of the published cases at http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm (Dec 2004).

Out of 45 cases related to agriculture and food about one third was relating to the interpretation of "likeness" of the affected products to reject or justify a NTB at stake (Table 1). Just in two cases, the findings were in

favour of "unlike products" and thereby, the respective import barriers could have been accepted. This acceptance was based on detectable physical attributes like different wood or protein types. Only in these two cases, the challenged barriers were evaluated as being in line with Article I and III, whereas in all other cases, the barrier at stake needed to be abolished according to the dispute findings.

The following Figure 1 shows a systematisation of the underlying attributes determining likeness in the framework of the classification of standards (OECD 1994):



Source: OECD, 1994.

Fig. 1. Process and product standards

All standards with a physical and detectable impact on the final product (product measures (PMs), and process measures that are product-related (PPMs-PR)) may differentiate products into "unlike products" and thereby barriers can be compatible with GATT Articles I and III. Additional criteria ensure that such NTBs are not implemented arbitrarily and that least-trade distorting instruments are chosen. On the contrary, standards without any physical and observable impact (process measures that are not

product-related (PPMs-NPR)) belong to the second category, namely leading to "like products". Therefore, these standards are not allowed to be applied to imports under Article I and III. As Article XX on general exemptions does not differentiate between like or unlike products for both types of standards, barriers could be justifiable in order to protect inter alia human, animal and plant health and life.[1]

A famous case referring to Article I and III are the two parts of the tuna-dolphin case of 1991 and 1994 on the ban of the United States (US) on Mexican tuna and on tuna originating from intermediary trading partners. The import ban was based on the requirement of the US to use a certain domestic fishing technique leading to less harm for the dolphin population. In both cases the panel interpreted the fishing technique as PPM-NPR and consequently, the US and Mexican tuna as "like" product. The US import ban therefore had to be abolished (case DS21/R-359).

An important exception is the product attribute "origin" that belongs clearly into the category of having no physical product impact. Nevertheless, rules of origin have been traditionally addressed by the WTO in the "Agreement on rules of origin" and the "Agreement on trade-related aspects of property rights" (TRIPS). According to these Agreements the differenttiation of products due to their origin is possible and numerous rules to enforce such a differentiation exist.

3 Time after the Adoption of the SPS-Agreement

The SPS-Agreement was adopted in 1994 and is comparable to the TBT-Agreement but consists of rules specifically for food matters and has some stricter provisions. It defines its scope of coverage by defining as SPS measures (Annex 1)

".. 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, or with the

[1] This argument was used by the US in the Turtle-Shrimps Case to justify the US import ban on shrimps of some Caribbean and other countries like Thailand and Malaysia as their fishing technique was deemed to be dangerous to sea turtles. Whereas the panel report had rejected the extraterritorial use of Article XX the Appellate Body in the contrary stressed that for moving species an extraterritorial application is not only allowed but even necessary. However, the ban was condemned due to discriminating effects of this specific measure. See DS58/RW and DS58/AB/R.

materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety."

Hereby, product and process standards are mentioned but it is not explicitly stated whether these refer as well to PPMs without product relation. This is usually denied in several studies (James 2000) and is be empirically shown by the previously described outcome of respective cases (see Table 1).

3.1 The Provisions for National Flexibility

As key areas of the SPS-Agreement, the following issues will be discussed: (1) the accepted level of safety to be applied on imports by NTBs, and (2) the specific NTB to be implemented. For both areas the existing provisions and the given scope for national flexibility are described.

(1) Regarding the accepted safety level, the SPS-Agreement grants the general right to each member to implement such safety measures that are appropriate for achieving a chosen safety level in its territory (Article 2).

- To avoid trade distortion, harmonization is targeted as a key objective (Article 3). It is recommended to base national measures on international standards, guidelines and recommendations as far as they exist (Article 3.1). Such international standards are deemed to be necessary to protect human, animal or plant health (Article 3.2) repeating the general objectives of GATT Article XX. The resulting safety level can be interpreted as accepted by the WTO and therefore is not challengeable. The concrete *international standards* and guidelines are determined by a given catalogue of relevant institutions that are developing standards (Annex A 2-3): for food safety the Codex Alimentarius is the responsible institution jointly founded by FAO and WHO in 1964.[2] Codex standards cover for example maximum residua levels for antibiotics in pork or hormones in beef. This list of standards makes the SPS-Agreement different from the TBT-Agreement, where only the criteria for accepted standard-setting organisations are defined but no explicit list of organizations is given. Therefore, the SPS-Agreement can be interpreted as being stricter and in some disputes the defendant tries

[2] For standards related to other issues other Organisations are defined as responsible: for animal health the International Office of Epizootics for plant health the Secretariat of the International Plant Protection Convention (SPS-Agreement Annex A 2-3).

to base the respective barrier on the TBT-Agreement whereas the complaining party is using the SPS-Agreement.

Potential for national sovereign policy interms of deviating from these standards are related to the submission of a risk assessment to justify standards that are stricter than the Codex standards (Art. 3.3). The provisional implementation of stricter standards is possible even if scientific evidence to justify them is insufficient (Art. 5.7); however a risk assessment must be submitted at a later stage. This option is discussed intensively in the context of the precautionary principle. Most often Article 5.7 is not characterised as precautionary principle due to its terminal limitation and the need for scientific risk assessment at a later date (Gutpa 2000; Scott and Vos 2001). The specific requirements on risk assessments cover the criteria to be considered for a correct assessment, such as taking into account all relevant sampling methods (Art. 5). Only traditional risk dimensions like probability and damage amount are accepted as arguments, either quantitatively by figures or qualitatively by description (Annex A 4). The evaluation whether the submitted risk assessment is sufficient is the dominant argument in SPS disputes. The time period for filing the assessment subsequently is defined as "reasonable" and open to negotiations in the dispute procedure.

(2) Related to the choice of a specific NTB, a core rule of the WTO is to consider a minimal trade effect:

- Least-trade distortion is expressed in the SPS-Agreement as requirement to minimize trade effects (Articles 5.4, 5.6). As no measures are predetermined as being least-trade distorting, some general GATT principles have to be consulted to obtain information on what degree of trade restriction could be accepted. According to GATT Article XI no quantitative import restrictions are allowed and thus, import bans can be seen as the most problematic NTBs. An instrument often recommended as being very market-oriented, not trade distorting and an effective way to differentiate between product qualities is a label. Only few explicit provisions on labels can be found in the agreements. The TBT-Agreement is covering general packaging and label requirements, and the SPS-Agreement is addressing such issues when related to food (Annex A 1). In principle the same limitations as for standards are valid for labels. Therefore, no mandatory label for process standards without physical product impact is accepted as NTB whereas voluntary label are WTO conform (Josling et al. 2003). Related to accepted standards having a physical effect even mandatory labelling would be WTO compatible. For such label, harmonization is targeted. International standards for label that have been developed by Codex Alimentarius are

recommended to aim at harmonization (e.g. STAN Serial of Codex, see Codex 2003). Hereby free trade is ensured and additionally the risk of abuse and the information overload for the consumer resulting from an intransparent variability of labels are reduced.[3]

- National scope to choose instruments is covered by the criterion of feasibility of NTBs and the principle of equivalence. The strict rule of using always the least trade-distorting measures is supplemented by additional criteria: the evaluation of implemented NTBs considers the technical and economic feasibility compared to alternative NTBs (Art. 5.6). The principle of equivalence can be understood as an alternative to the detailed harmonization of national food safety approaches. Equivalence means the acceptance of different instruments that achieve identical safety levels. This principle is recommended by allocating the burden of proof to the exporting country (Article 4) which has to convince its trading partner that the own safety instrument ensure the safety level of the importing country. The concrete implementation is realised by conformity assessments, i.e. the technical procedure to declare equivalence. Such procedures cover means to verify and document conformity, e.g. the intensity of inspections or the definition of critical levels of contamination (Josling et al. 2003). This granted possibility to maintain the national instrument is factually very rarely implemented. One reason is that the importing partner has to accept the equivalent performance. Very few bilateral agreements exist which are defining either minimum food standards and thereby are comparable to WTO rules or have to negotiate laboriously technical details (Rudloff and Simons 2004).[4] Finally, labelling offers some flexibility: a way out of harmonizing product labels can be the use of voluntary or private labels. These are not restricted or even not addressed by WTO. Therefore, private labels could be supported by accompanied public control procedures to increase effectiveness. There should be no public subsidies paid (e.g. for certification) because that could make private and voluntary

[3] A precedence became the „Sardine Case“ between Peru and the EU. The EU restrictted the marketing to just one certain sardine specie under the term “sardines”. Thereby sardines from Peru were excluded from market access. As the existing marketing standard of the Codex Committee referred to is applicable to a set of different species (Stan serie on packing and marketing requirements: Stan 94-1981, rev. 1-1995 and Stan 1-1985, rev. 3-1999) the EU’s prohibition was condemned.

[4] An extraordinary example for a comprehensive Equivalent Agreement is Annex IV of the “EU-Chile Association Agreement” where detailed procedural elements such as inspection methods are ruled (EU-CHILE ASSOCIATION AGREEMENT 2002).

label challengeable either under the Agreement on Subsidies and Countervailing Measures or the Agreement on Agriculture (Rudloff 2003). For quality aspects instead of safety issues, such as cholesterol in food, more flexibility exists. Some general guidelines of the Codex Alimentarius exist without having the binding character of standards for the labelling of safety aspects. As no reference is made under the SPS-Agreement for food quality, harmonisation is not commanded for respective labels. This leads to flexibility on the one hand but to huge intransparency for the consumer on the other hand (Caswell 1997).

3.2 Survey on Disputes

General Overview on Food-related Cases

After the formal foundation of the WTO in 1994 and the adopted reform of the dispute procedure, 328 cases were opened formally by requesting consultations. According to the reform 1995 the procedures have been strengthened leading to more actually concluded disputes. The following Table 2 indicates the factual relevance of conflicts between WTO members due to SPS issues compared to other conflict areas. The Table covers opened cases referring to different WTO-Agreements since 1995. Opened disputes are covering all formally announced disputes starting with the status of request on consultation:

Table 2. Empirical relevance of WTO disputes on NTBs (January 1995 – March 2005)

All cases	328
Reference to Agreement on Agriculture	55
Reference to Sanitary and Phytosanitary Agreement	30
Reference to Agreement on Technical Barriers to Trade	32

Source: Own calculation on basis of the published cases at http://www.wto.org/ english /tratop_e/dispu_e/dispu_subjects_index_e.htm (March 2005).

Out of the 328 cases 55 are referring to the Agreement on Agriculture and altogether 62 are referring to NTBs either under the SPS or the TBT-Agreement showing the increasing relevance of conflicts on NTBs.

Since the adoption of the SPS-Agreement in 1994, thirty formal cases on food safety have been opened till today (Table 3):

Table 3. Overview on SPS disputes (January 1995 – March 2005)

Basis for cases opened since 1995	Numbers
All SPS cases	30
Still active panels	5
Pending consultations	13
Mutually agreed solutions	5
Decided cases	5 (+ Asbestos)[5]
Cases with adopted reports (panel and appellate body)	5 (+ Asbestos)
Implementation of findings	3 (+ Asbestos)
Sanctions	2

Source: Own calculation on basis of the published cases at http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm (October 2004).

Nearly half of the decided cases were solved before they entered into all dispute stages. Therefore, a majority of the cases is not ending up in a judgement of the responsible WTO bodies. Formally announced bilateral compromises are mutually agreed solutions which account just for five cases. Additionally, other cases have been suspended without any formal final decision that may be caused by an informal consensus between the parties. This relevance of bilateral solutions demonstrates the self-enforcing power of the dispute settlement procedure to motivate solutions without awaiting formal findings.

Involvement of Developing Countries in Disputes

The provisions of special and differentiated treatment is an overall rule for all WTO agreements aiming at considering the specific situation of developing countries as integrated part of all WTO rules. Regarding the SPS-Agreement, this principle grants longer phasing-in periods for

[5] The Asbestos Case is only formally referring to the SPS-Agreement but not addressing any food-related matter. Therefore this case will not be covered by the following analysis.

implementing new standards, the possibility for overall exceptions from duties and recommends assistance to join relevant organisations such as the Codex Alimentarius Commission (Art. 10). As developing countries often are underrepresented at such meetings due to lack of financial and human resources the Trust Fund offers support to visit the regular Codex meetings. Hereby, representatives of developing countries may actually contribute to the definition of standards that afterwards will become the harmonized ones under SPS.

Table 4. Involvement of developing countries in food disputes (March 2005) [1]

Involvement of developing countries in SPS-disputes	Least developed countries [2]	Low income countries[3]	
		Low income	Lower Middle income
… as defendant	0	India India	Egypt Turkey Turkey
… as complainant	0	India Nicaragua	Philippines Philippines Thailand Ecuador

Source: Own calculation on basis of the published cases at http://www.wto.org /english/tratop_e/dispu_e/dispu_subjects_index_e.htm (March 2005).
Notes:
1) At WTO the affiliation to developing countries is based on self-declaration and has not been considered in the Table.
2) Least developed countries are classified according to the UN's Index 2003. According to this classification no least developed country was involved in disputes.
3) The income classification is based on the World Bank's Atlas approach (for 2004: low income = $765, lower middle income = $766 - $3,035).

More and more developing countries are involved in food disputes as both defending and complaining party what is indicated Table 4. In all opened thirty SPS cases low income and lower middle income countries account for eleven. So far no least developed country (LDC) has been involved in any food disputes but one case of non-food disputes exists. Half of the disputes take place between developing countries.

As all these cases are still at the very beginning of the overall dispute procedure, no formal reports have been published clarifying the underlying details. Thereby, the following analysis will focus only on cases among developed countries as these are the only concluded cases.

Findings of Disputes Related to National Flexibility

The following five cases were closed and serve as basis for the analysis on granted scope for national sovereignty. Only the two Hormone Cases are directly linked to food safety aiming at human health. The others are targeting at plant health (Fruit Case and Apple Case) or animal health (Salmon Case) and therefore harmonization is based on other international standards than those of Codex Alimentarius.

(1) The *Salmon Case*: Canada accused Australia for having implemented an import ban on salmon that is not fulfilling Australian heating treatment requirements (WT/DS18).
(2–3) The two *Hormone Cases* in which both the US and Canada complained about the European import ban on meat produced with growth hormones (WT/DS26 and WT/DS48).
(4) The *Fruit Case***:** the US complained against Japan applying domestic quarantine requirements on imports of certain fruit products and nuts in order to avoid the spread of codling moths (WT/DS76).[6]
(5) The *Apple Case* in which the US complained about the Japanese application of certain quarantine requirements on imports to avoid the spread of fire blight (WT/DS245).[7]

For the majority of these cases, the findings were made in favour of the complainant what is a general trend for all WTO disputes. Just two cases ended with the final institutional stage, i.e. retaliation: because the loosing parties failed in the implementation of the findings in terms of abolishing the measure at stake, penalty tariffs were applied by the complaining party.[8] This situation has appeared in both *Hormone Cases* that have not

[6] This insect is not dangerous for human health but destroys the harvest. The infection is depending on climate conditions leading to a differentiation of import requirements depending on the season.

[7] Fire blight is a plant disease not harmful for human health but hindering the mildewed products from being marketed.

[8] Using this option of penalties can be found very rarely when looking at all disputes. This can be explained by the reputation effect, i.e. losing international reputation due to not following the rules. Another reason is the fact that such trade reducing penalty tariffs are of disadvantage to both parties because even for the winning party welfare losses appear due to reduced imports (Hudec

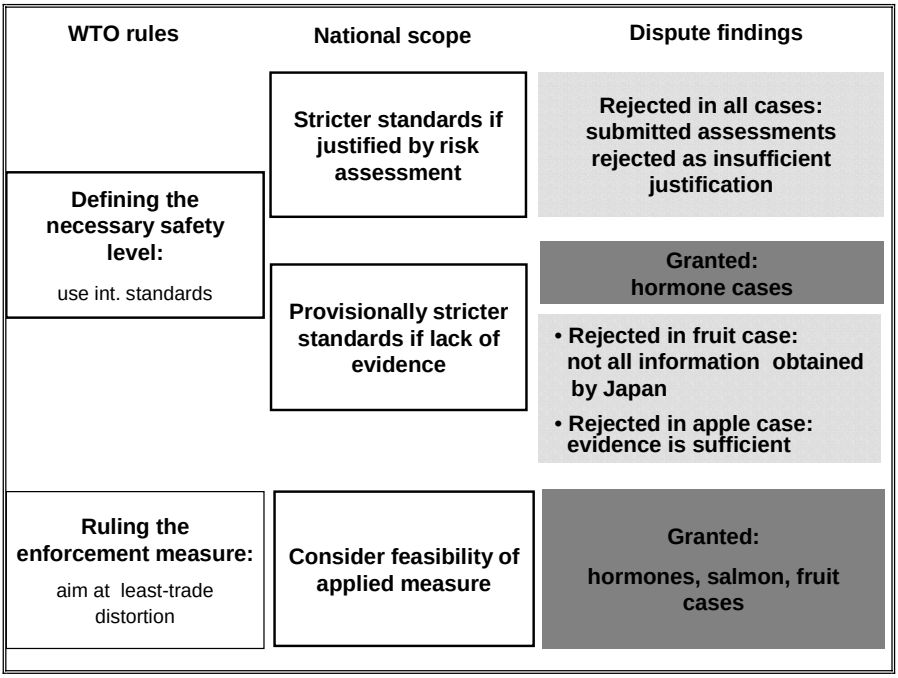
been solved in terms of abolishing the condemned import ban and have remained in the status of keeping the ban while imposing penalty tariffs till today. Another case that led to the request of penalty tariffs is the Apple Case. A decision on granting penalties has been suspended until further notice. As the *Hormone Cases* were the first ones closed they are often used as precedence and are referred to in the other cases.

The following Figure 2 summarizes the relevant issues for national scope and indicates the findings of existing cases made in favour of national sovereignty.

(1) Related to the safety level, the core argument in all cases was the scientific justification for the chosen safety level (Article 3 and 5). In most cases the scientific assessment was rejected as inappropriate. Just in the two *Hormone Cases* the insufficient scientific evidence was accepted to justify the provisional establishment of the import ban according to Article 5.7. The granted period was 15 months. On the contrary, such option was rejected in the *Apple Case* as the scientific evidence was evaluated as being sufficient. In the *Fruit Case* the second condition for implementing Article 5.7. was evaluated as insufficient, namely that Japan failed in searching for all information available.

(2) Regarding the implemented instrument, in half of all cases the NTB at stake was accepted as the only feasible one compared to alternatives. Even the most trade distorting import ban in the two *Hormone Cases* and in the *Salmon Case* was accepted as the only technically feasible one compared to alternative measures such as process controls. Nevertheless, the ban was finally condemned in all cases but due to the missing risk assessment and not because of the trade distorting effect as such. In the *Fruit Case,* the panel accepted the testing methods required for imports as being the only feasible measures. But the subsequent appellate body rejected the argument as being formally not relevant for the findings. The principle of equivalence was not addressed in any of the cases.

1996). In the Hormone Cases both the US and Canada as complainants against the EU had difficulties in choosing the products on which they wanted to impose those penalty tariffs (Rudloff 2003).



Source: Own composition.

Fig.2. Granted scope for a national food policy design

4 Conclusions

The analysis of existing WTO provisions has identified limited scope for national sovereignty. The existing scope can be different related to single aspects:

1. For the enforcement of domestic safety levels at the border, little scope exists. If international standards have been developed the only way out of harmonisation is the submission of a risk assessment, which is the most often used argument in disputes to reject a NTB at stake. The most important flexibility for the safety level is offered by allowing provisional measures if scientific evidence is insufficient. This flexibility is timely restricted as the risk assessment has to be submitted at a later date.
2. The largest scope for national action exists in the area of choosing a specific NTB. Feasibility can justify instruments that are not accepted as least trade distorting. In half of all cases the measure at stake was accepted due to this reason. Equivalence is suggested as facilitating

instruments but hardly used by countries due to necessary enormous bilateral bargaining efforts.

The analysis of the concluded cases has shown that even the existing windows for national flexibility is limited by strict criteria leading to its very rare use. The dominance of scientifically based food policies is stressed in all presented cases. Thereby the WTO dispute bodies are becoming involved in evaluating scientific soundness instead of pure trade impacts.[9]

These results must be relativised in several ways: first, the WTO findings reflect only conflicts on internationally existing standards. But for many issues so far no standards have been developed and the standard setting process of the Codex Commission is lengthy. For conflicting positions on such issues the existing findings may only be relevant as far as similar risks are addressed for which analogies could be drawn. Like for Melengestrolacetat as one of the six hormones at stake in the Hormone Cases for which the Codex Commission had not developed a standard but the dispute bodies derived some conclusions (Rudloff 2003). Second, voluntary and private standards that are not covered by SPS rules are gaining increasing relevance, which is also true in the case of labels. For these standards flexible bilateral solutions are negotiable and not addressed by the WTO. And finally, all described findings are only related to the question of implementing stricter standards than existing international ones. Thereby the dispute results imply that existing international standards function as maximum standards as stricter standards never were accepted. Deviating from this requirement can only be followed by the very final mean to accept sanctions. This is in fact an institutionalised option in the WTO framework but the most rigid one. The *Hormone Cases* are the only ones where the status of the remaining import ban and the reacting sanction tariffs have been held up now for six years.[10] Hereby, the *Hormone Cases* symbolise the principal restriction of the global ruling frame when large differences on national policy objectives exist. But deviating from existing standards in the other direction, i.e. establishing weaker standards than international ones, has never been part of any dispute so far. Whether there is actual scope for undermining these standards is a question to be covered by empirical analysis of bilateral arrangements.

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[9] The Appellate Body in the *"Hormone Case"* emphasised that the evaluation of the scientific quality could not be WTO's tasks (WT/DS/48, par.187).

[10] The sum of about 120 million $ is imposed as penalty tariffs on European products imported to US and Canada per year (Rudloff 2003).

A final issue relativising the relevance of the described findings is the fact that only the minority of conflicts actually is reaching the stage of a formal dispute. Therefore, another empirical question would be the analysis of arrangements taking place prior ever starting a dispute (see Henson in this proceeding).

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