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## The Sanitary and Phytosanitary Agreement: Interpretation & Challenges

By Bill Bryant

Before the Uruguay Round, under the terms of the General Agreement on Tariffs and Trade (GATT), countries could impose whatever standards on imports they considered necessary to protect human, animal, or plant health. Without internationally accepted parameters, standards such as those regulating agricultural imports for quarantine, chemical residue, contaminant, or biotechnology concerns could be and were abused to unfairly restrict trade. Consequently, U.S. agricultural exporters insisted that new international disciplines on sanitary and phytosanitary (SPS) standards be included in the Uruguay Round of multilateral trade negotiations (which was negotiated under the General Agreement on Tariffs and Trade and eventually established the World Trade Organization, or WTO).

The Uruguay Round's Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) obligated WTO

Members to base import standards on a scientific assessment and for those standards to be no more trade restrictive than necessary to achieve an acceptable level of protection.

Once signed, the SPS Agreement was tested in disputes that individually and cumulatively further defined Member obligations generally, and more specifically, provided a roadmap for how Members should set standards in order for them to be consistent with the SPS Agreement.

This article reviews the basic obligations provided for in the SPS Agreement, provides a high-level overview of three WTO dispute settlement panel decisions that clarified Members'

obligations, and identifies challenges obstructing the full implementation of the SPS Agreement.

### *Provisions of the Sanitary and Phytosanitary Agreement*

The SPS Agreement was negotiated during the Uruguay Round of the General Agreement on

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*The WTO SPS Agreement reaffirms that “no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members.”*

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Tariffs and Trade and entered into force with the establishment of the WTO at the beginning of 1995. It includes 14 Articles and numerous annexes.

*Basic Rights and Obligations:* Article 2 of the SPS Agreement requires technical standards be based upon sufficient scientific evidence and that there be a rational and objective relationship between the standard and the science. Standards must emerge from science. Science may not be cherry-picked after the fact to justify a standard.

*Harmonization:* Article 3 calls for WTO members to harmonize SPS standards and requirements by basing national standards on international ones, such as those set by the International Plant Protection Convention (IPPC), the International Office of Epizootics (OIE), and the Codex Alimentarius Commission (Codex). WTO members can maintain standards that are stricter than international standards if they have scientific justification for doing so (Article 2) and if the measure results from a risk assessment and if the level of protection provided by the stricter standard is consistently applied (Article 5).

*Equivalency:* Under Article 4, when an exporting Member produces a product that meets the importing Member's required level of protection, but does so under different regulations or required procedures, the importing Member is encouraged to recognize the exporting Member's procedures as equivalent and accept the product.

*Risk Assessment:* Article 5 requires that standards emerge from an evidence-based scientific assessment of the human, plant, or animal health risk presented by the importation of a product. What the importing Member considers an acceptable level of risk must be consistently applied across comparable situations.

*Recognition of Differing Regional Conditions:* Article 6 acknowledges that countries have different growing regions and certain pests and diseases may not be found in all of them. Article 6 obligates Members to recognize and permit the importation from disease-free and pest-free areas within a country. Unnecessarily broad exclusions of exports from an entire country (once a common means of blocking the importation of agricultural products) when merely prohibiting exports from a more confined area would suffice contravenes the Agreement.

*Transparency:* Article 7 and Annex B of the SPS Agreement require that all SPS regulations be easily identifiable. It requires WTO Members to freely provide information on their phytosanitary measures and to have a central enquiry point at which questions on SPS regulations will be answered. Members must publish pending regulations at an "early stage," thus permitting Members to become familiar with changes and revisions and to comment on them.

### ***Beef Hormones, Salmon and Apples***

In the years following the adoption of the SPS Agreement, three disputes, made by Members using the dispute settlement system of the WTO, clarified Members' obligations under the Agreement.

*Beef Hormones.* One of these first cases was a challenge to the European Union (EU) ban on artificial beef hormones. While the United States requested a WTO panel review the dispute in 1996, the dispute itself originated in the early 1980s when the EU adopted restrictions on beef hormones, banned the use of synthetic or artificial beef hormones, and banned the importation of meat that had been treated with such hormones. In the mid-1980s, the United States challenged the European standard in a technical trade barrier dispute before the General Agreement on Tariffs and Trade (the predecessor to the WTO and prior to the establishment of the

SPS Agreement). By the time the SPS Agreement was in force and the WTO convened a panel to review the consistency of the European beef hormone ban with the EU's SPS obligations, the dispute had become politicized.

The case largely focused on obligations presented by SPS Agreement Articles 3 and 5. The EU was banning the importation of beef that had been treated with specific hormones, despite international standards existing for most of them. Hence, the extent to which Members must base national standards on established international standards (Article 3) was considered. The WTO panel decided that a Member, in order to secure an appropriate level of protection, may choose not to base its national standard on an international standard, but that if it does so, the national standard must be based on a risk assessment consistent with Article 5. The focus then shifted to whether the EU's ban of certain hormones resulted from such a risk assessment.

The case helped shape minimal requirements for a risk assessment. Risk assessments must identify the hazard or risk, must characterize or quantify that risk and must assess the likely exposure of that risk. The import measure must be derived from that scientific assessment. In this case, the EU failed to conduct an evidence-based assessment that identified a specific health risk. The EU's attempt to gather scientific evidence in support of its standard after it had been implemented was rejected by the WTO panel, especially since the evidence presented was not new and had been taken into account when the international standard was established.

The EU argued that the risk presented by artificial hormones, even if minute and not appreciable, still constituted a risk and that any risk was unacceptable. This argument was also rejected by the panel because if the risk is not identifiable, it cannot be assessed as is required under Article 5.

The case also confirmed the understanding among Members that the threshold of acceptable risk should be applied across comparable situations, but, if different levels of risk were set in comparable situations, those differences not be arbitrary and unjustified and not create trade restrictions. The WTO panel found that the EU accepted different levels of risk in comparable situations, that the differences were not scientifically justifiable, and that the restrictions did have an adverse effect on trade. The ban was found inconsistent with the EU's obligations under Article 5 of the SPS Agreement.

The EU chose not to comply and appealed the panel decision, so in 1999 the United States retaliated against certain imports of EU products. Negotiations, disputes, retaliation, and threats of retaliation continued for years. In 2008, a WTO Appellate Body issued a mixed ruling, in effect confirming the right of the United States to retaliate against the EU, but simultaneously leaving open the possibility that the EU's standard was not entirely inconsistent with the SPS Agreement. While certain language in the panel report clarified Members' obligations, the appellate decision provided the EU with the ambiguity it needed to maintain a standard that some consider to be inconsistent with Article 5.

It might be that WTO Members want to provide Article 5 flexibility in matters related to human health, but that is not what the Members negotiated. The US-EU Beef Hormone case, eventually somewhat settled under a bilateral understanding, clarified certain obligations, but also left open the possibility that Members might have flexibility that this some believe is not in the negotiated agreement. That ambiguity remains.

*Salmon.* Certain Member obligations were better clarified in another early WTO SPS Agreement case brought against Australia for its quarantine ban on imports of fresh, chilled salmon to prevent entry of imported diseases into fish stock

in Australia. Canada brought the complaint in 1995. A panel was formed in 1997. A report was issued in 1998 and disagreements over compliance lingered into 1999.

In this case, the WTO agreed with Canada and found that it was not enough for an Australian risk assessment to identify the possibility of a risk, but that a Member maintaining an import restriction must scientifically establish the likelihood and probability of importing a product causing the entry, establishment, and spread of the disease, pest, or health concern the standard was intended to keep out. The WTO panel's decision required that a risk assessment identify the pathway between the product's importation and the probable adverse effect.

This case also clarified when a Member is obligated to consider an alternative measure for achieving their level of protection. Based on this decision's three-prong approach, an importing Member should consider an alternative measure when the exporting Member (1) presents an alternative that is reasonably available, (2) achieves the importing Member's appropriate level of protection, and (3) is significantly less trade restrictive.

*Apples.* Both the hormones and the salmon cases served as the foundation for a subsequent dispute settlement decision against Japan's restrictions on apple imports. Japan was prohibiting the importation of U.S. apples because of the fireblight virus, a disease affecting apples that exists in the United States but not Japan. Japan's import ban was maintained even though the United States provided data showing that mature, symptomless apples (in other words, healthy looking apples) could not be carriers or vectors of the disease. Therefore, while the disease exists in the United States, mature, symptomless apples did not present a threat of fireblight entering, establishing, and spreading in Japan. Japan was unable to demonstrate a probable pathway

between importing mature, symptomless U.S. apples and the establishment of fireblight in Japan.

The WTO agreed with the United States that Japan was maintaining a restriction that was inconsistent with scientific evidence and was more trade restrictive than necessary. The panel not only ruled that Japan's import restriction contravened Article 5 (since its measure was not based on a risk assessment), but the panel also relied on the three-prong approach in the Australia salmon case to decide that Japan should accept the alternative measure proposed by the United States.

### *Current Challenges*

One might conclude that, following the successful negotiation of the SPS Agreement and the clarification that was provided in subsequent dispute settlement cases, SPS measures are no longer used to restrict trade. Unfortunately, that is not the case. Challenges remain.

*Length of Time.* First, is the amount of time it takes to resolve a matter. Currently, if one Member believes another is maintaining a standard that is inconsistent with the WTO SPS obligations, efforts are made to resolve the matter through bilateral negotiations or discussions. Given scheduling and resource limitations, it is possible only one or two such meetings might be scheduled in a year, relying upon exchange of information between meetings. It is easy for such a process to be drawn out for two years or more without any progress, or with just enough to enable both sides to believe some progress on some of the technical issues is being secured.

If the Member challenging the other's standard decided, after a few years of talks but little movement, to abandon the bilateral negotiation process and move the dispute into the WTO dispute settlement process, it is likely the

Member defending its standard would suspend all ongoing bilateral talks on the matter until the WTO case were resolved. The time it takes to secure a favorable opinion in the WTO and then to secure compliance with that decision must weigh on exporters wanting market access. The length of the beef hormone case can be measured in decades; the Australia salmon case took more than five years to be resolved. In some cases, so much has already been invested in the bilateral efforts, that abandoning them and starting an entirely new multilateral process involves the risk of extending the process even longer.

*Resources.* The amount of time and resources it takes government negotiators and trade policy officials to prepare and prosecute a WTO case and then to bilaterally negotiate compliance also presents a disincentive for, or presents limitations on, Members' ability to bring cases. That is even truer in cases that involve the export of a product that is very important to a specific group of producer/exporters, but that in overall national terms doesn't represent a significant amount of trade.

An alternative would be to consider the resolution of SPS cases more akin to a small claims court. A Member challenging another's standard would not start the process bilaterally, but in formal WTO consultations, that in effect would be gathering evidence and securing the understanding needed to decide whether a legitimate grievance exist. If 90-120 days of consultations and exchange of scientific information failed to resolve the matter, the case would proceed to a streamlined dispute resolution. Briefs presenting a scientific argument against a standard would be filed, the

Member maintaining the measure would have a fixed deadline for presenting the risk assessment that justified the standard, and a decision would be reached by three panelists from neutral countries who may call upon experts in the field for scientific guidance. In all, for this process to be useful to exporters, from start to finish, it should take no more than a year. However, that would require a commitment of resources from the WTO Members that has not been made.

*Ambiguity.* A second challenge to the effectiveness of the SPS Agreement is the ambiguity injected by the U.S.-EU Beef Hormone appellate body ruling. If Members are given the flexibility, out of an abundance of caution, to maintain an import restriction in the absence of scientific evidence and in contradiction to international standards or are enabled to restrict imports in the absence of a product-specific risk, global trade will slide toward the pre-WTO days when countries could establish import restrictions based on whim. This is not a hypothetical challenge.

The EU has announced its intention to ban the use of certain common agricultural pesticides in Europe and to prohibit the importation of food products that have a residue of those pesticides, despite international standards being set for many of those chemicals and despite no characterized or quantified specific risk. Implementing this standard could restrict trade and it is unclear what health benefits or protections would be secured. The EU is arguing that even minute and not appreciable risk is still a hazard, and therefore unacceptable. Maintaining a measure in the absence of a quantified or qualitatively characterized risk was arbitrated in the hormone

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*The WTO SPS Agreement was crafted in 1994 with members, "Desiring the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade."*

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case, but the appellate body ruling injected ambiguity that still needs clarified.

### **Conclusions**

The intent of the SPS Agreement is to ensure standards are not construed to be non-tariff trade barriers. Basing standards on scientific evidence, identifying a risk and a pathway between the importation of a product and that risk, evenly applying an acceptable level of risk across all comparable standards, harmonizing standards when practical and recognizing that different

standards and procedures can secure equivalent results – all of these principles ensure standards are not more trade restrictive than necessary and aren't used as trade barriers.

The SPS Agreement was negotiated out of need, because standards were being abused for protectionist reasons. That need remains. Enhancing implementation of the Agreement will involve Members considering issues such as resources and Member obligations.

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*Notes from the Author: Some of the language in this article, particularly in the section "Provisions of the Sanitary and Phytosanitary Agreement," first appeared in the San Joaquin Agricultural Law Review Vol. 6 1996 Number 1, ELIMINATING PHYTOSANITARY TRADE BARRIERS: THE EFFECTS OF THE URUGUAY ROUND AGREEMENTS ON CALIFORNIA AGRICULTURAL EXPORTS, David S. Johanson and William L. Bryant.*