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The SPS Agreement and Agri-food Trade Disputes: The Final Frontier

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Without modification, the World Trade Organization's Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) will become the battleground for many complex agricultural trade disputes. There are two interrelated reasons for this. The first reason is that the agreement confers on members considerable unilateral power to implement unchallengeable market access barriers to agri-food imports, provided those members have a *legitimate justification* to do so. The second reason is that much ambiguity continues to exist regarding what properly constitutes a *legitimate justification*. Therefore, modifications to the SPS Agreement are required to fully characterize a *legitimate justification,* thus ensuring that SPS-related market access barriers will be wielded in a manner consistent with ensuring public health while preventing unnecessary trade distortion.

Keywords: agricultural trade policy; domestic regulatory policies; sanitary and phytosanitary (SPS) measures; World Trade Organization

Introduction

Negotiating agricultural trade liberalization across domestic subsidies, export subsidies and market access disciplines has proven to be a difficult exercise. Exacerbating this difficultly, the Doha Development Agenda added to the discussions *special and differential treatment for developing countries*. With so many controversial issues being simultaneously discussed, it should come as no surprise that the World Trade Organization's Committee on Agriculture failed – at the Cancun Ministerial in September 2003 – to secure agreement on the negotiating modalities that were to guide the rest of the agricultural negotiations during the Doha Development Round. What is most alarming is that if the agricultural trade negotiations can be so easily stalled over these issues, then as trade tensions associated with complex sanitary and phytosanitary (SPS) measures increase[1] the agricultural trade negotiations in general are at significant risk. This article presents an assessment of why SPS measures are sure to increase agricultural trade tensions and discusses the implications for agricultural trade policy.

There are two interrelated reasons why SPS measures represent a complex challenge for agricultural trade policy. The first reason is associated with the power of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement): a *legitimate* SPS measure confers on a member the unilateral right to ban any type of product from any source, and this right cannot be challenged under international trade law. The second reason is associated with the ambiguity surrounding the wielding of the agreement's power: essentially, there remains uncertainty as to what a *legitimate* SPS measure consists of.[2] The latter reason ensures that various interest groups will seek to capture the definition of what constitutes a *legitimate justification* in order to harness the considerable unilateral power of the SPS Agreement.

The SPS Agreement

Prior to discussing the power of the SPS Agreement and its continuing ambiguity, it is useful to consider both the nature of SPS measures and the background to the international trading system, including how the agreement emerged within this system.

SPS measures include human, animal and plant safety and health regulations that a particular country may put into place as a result of domestic political economy reasons.[3] Trade tensions arise because – given the divergent political economy factors – countries often differ in how and what they regulate, resulting in SPS-related market access barriers. In recognition of this potential source of market access barriers, the

SPS Agreement was developed under the World Trade Organization and came into force in January 1995.

The intended objective of the agreement was to discipline the use of SPS measures in order to simultaneously ensure human, animal and plant safety while preventing such measures from becoming disguised agri-food protectionism. The actual effect of the agreement has been to illustrate just how contentious is the overlap between trade liberalization rules and domestic safety and health regulations. For example, the EU regulations prohibiting the use of growth-promoting hormones in beef production were a market access barrier preventing Canadian and U.S. beef exports to the EU (because under Canadian and U.S. regulations the use of growth-promoting hormones was approved as safe). Canada and the United States both challenged the EU regulations as a violation of the SPS Agreement obligations and the WTO agreed. However, the EU has effectively ignored the ruling and the market access barriers remain. That is, when domestic SPS regulations and international trade rules overlap, it is at the cost of the multilateral trading system. Similarly, in August 2003, at the request of Canada and the United States, a WTO dispute settlement panel was established to rule on the SPS market access barriers that were preventing Canadian and U.S. exports of genetically modified crops from entering the EU (Isaac and Kerr, 2003b). In addition, Canada – which discovered a single case of BSE in May of 2003 – faces SPS market access bans on its beef exports despite the efforts it has taken to identify, isolate and eradicate the risk. Economic diplomacy has not worked, frustration grows and questions about the legitimacy of the continued SPS bans may soon be raised at the WTO.

The original General Agreement on Tariffs and Trade (GATT 1948) was built on the principle of non-discrimination (PND), a function of the following three concepts:

1. the national treatment provision (article I), which states that foreign products must be treated like domestic products;
2. the most-favoured nation principle (article III), which states there should be no discrimination between products originating from different countries; and
3. the distinction between processes and production methods (PPMs) and products, whereby all ‘like products’ were to be treated the same regardless of the PPM used in their production.

These principles essentially mean that ‘like’ products must be subject to the same regulations in a particular regulatory jurisdiction regardless of their origin or the PPM used. The focus on like products was to prevent the often significant differences in levels of technological development between trading partners from being used as barriers to market entry. For example, the like-products concept implies that a cotton

shirt produced in an organic agricultural system is like a cotton shirt produced in an intensive agricultural system; market access rules are not permitted to distinguish between the two types of cotton shirts.

The GATT 1948 was, however, unclear on the issue of inconsistencies between trade rules and domestic food safety measures. Signatory countries held significant discretion to establish their own food safety and food quality regulations according to a number of the GATT articles. For instance, article XI specifically permitted regulations setting out national "standards or regulations for the classification, grading or marketing of commodities in international trade." Article XX(b) permitted the adoption or enforcement of measures necessary to protect human, animal or plant life or health. In an attempt to be consistent with the PND, the discretionary measures invoked under articles XI and XX(b) were not to be applied in such a manner as to cause arbitrary or unjustifiable discrimination between countries or disguised restrictions on trade. However, this specification did not provide any discipline on the type of measure that could be implemented.

The SPS Agreement: A Powerful Treaty

The SPS Agreement emerged from the convergence of many different interests, all frustrated with the discretionary and arbitrary food safety measures applied under the GATT 1948. These interests ranged from food exporting countries and multinational food processing and distributing companies that shared a common concern about market access barriers facing food trade to consumer organizations that wanted to ensure that, as food products were increasingly traded, some minimum standards of safety would prevail (Isaac, 2002). Therefore, the objective of the agreement was to specifically outline permissible types of trade-restricting measures that WTO members may enact in order to protect human, animal and plant safety and health from the import of unsafe agricultural products.[4]

The inalienable right of members to protect human, animal or plant safety and health is enshrined in the agreement:[5]

> No member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health arising from
>
> • the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
>
> • additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs; and
>
> • diseases carried by animals, plants or products thereof (*SPS Agreement,* annex A).

Accordingly, if a *legitimate justification* exists[6] members may restrict or prevent imports through the use of mandatory sanitary and phytosanitary measures. In fact, there are three important provisions of the SPS Agreement – differing from traditional trade principles – that support the unilateral establishment of SPS measures by members.

First, under the SPS Agreement, members may discriminate against imports because of the presence of risks in the exporting country (*SPS Agreement,* article 2:3). The agreement recognizes that different regions with different geographical conditions and agronomic practices face different incidences of pests and disease. As a result, it may not be possible or necessary to establish uniform SPS measures to apply to all exporters according to the PND. Instead, trade measures may need to specifically target those imports that may contaminate the domestic food supply, while other imported agricultural products may not face the same measures. Hence, members are not required to grant either national treatment or most-favoured nation status to agricultural exporters whose products may contaminate the domestic food supply.

Second, according to the agreement, members may also establish domestic SPS measures higher than the accepted international standard if there is *legitimate justification* to do so (*SPS Agreement,* article 3:3). Generally, international trade agreements commit members to adopt international standards if available; however, the SPS Agreement permits members to establish even higher standards. That is, the SPS Agreement creates a regulatory floor but not a regulatory ceiling.

Third, under the SPS Agreement, members may establish provisional SPS measures based on precaution, in the event that there is insufficient scientific evidence to conduct an appropriate risk assessment. The agreement states the following:

> In cases where the relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable amount of time (*SPS Agreement,* article 5:7).

That is, members are permitted to establish trade barriers based on the precautionary principle. These barriers can remain in place until sufficient scientific evidence has been compiled to assess the risk.

Therefore, a member country with a *legitimate justification* for an SPS-related measure wields considerable international trade power: the unilateral right under the WTO to impose trade barriers that cannot be challenged by other members.

The SPS Agreement: Ambiguity

While the power of the SPS Agreement makes it attractive to a wide range of interest groups (and virtually ensures that it will be invoked to impose a host of market access barriers), it is the ambiguity surrounding how the SPS Agreement is appropriately interpreted and applied that creates significant trade controversies. Hence, it is crucial at this point to define what is meant by a *legitimate justification* for an SPS-related market access barrier and the problems that remain with this justification.

Legitimate justifications for SPS-related market access barriers are those that are scientifically sound. According to the agreement, unilateral SPS measures must be "based on scientific principles" and cannot be maintained "without sufficient scientific evidence" unless they are temporary, precautionary measures (*SPS Agreement,* article 2:2). The science-based measures adopted must be proportional to the risk that is being targeted.

It is important to note that the WTO does not determine the sufficiency of scientific evidence. Instead, it defers to one of three international scientific organizations. For food safety, the relevant international institution is the Codex Alimentarius Commission (CAC), for animal safety, the International Office of Epizootics (OIE) and for plant safety, the International Plant Protection Convention (IPPC) (*SPS Agreement,* article 5:1). Sufficient scientific evidence would be evidence that conforms to the standards or standard-setting procedures of these three organizations. The agreement states the following:

> In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions and quarantine and other treatment (*SPS Agreement,* article 5:2).

Hence, the SPS Agreement requires members to provide scientific justification for the adoption of measures where the scientific justification is crucial in supporting the legitimacy of the domestic measure in the event of a trade challenge.

> When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure (*SPS Agreement,* article 5:8).

Consider a trade dispute over the use of a food safety measure. The WTO Dispute Settlement Panel seeks the scientific advice of the Codex Alimentarius Commission. Without an acceptable scientific justification, it is unlikely that a trade dispute decision by a WTO dispute settlement panel or an appellate body will support the unilateral SPS measure. In this sense, even if members do not adopt international standards, it is important that for domestic food safety measures to be legitimate they must remain congruent with the international risk analysis approach of the CAC in the event of a trade dispute.[7]

At first glance, it may appear that the provisions in the SPS Agreement are well specified, leaving little room for controversy; however, there are several important sources of ambiguity. For example, while the PND limits the focus of trade rules to 'like products' it is obvious that some SPS-related risks may, in fact, be associated not with the end-use characteristics of a product but rather with the processes and production methods (PPMs) employed. Indeed, this is at the heart of the WTO trade disputes over beef hormones and genetically modified crops (Isaac and Kerr, 2003a). In both cases the European Union has banned products from North America based on PPM technologies that Canada and the United States argue have no impact on the end-use characteristics of the final product. The agreement is relatively silent with respect to the legitimacy of PPM-based SPS market access barriers, and greater clarification is required.

According to the agreement's article 5:7, members may adopt temporary, precautionary bans to prevent the introduction of risks when sufficient scientific evidence is absent. The problem here does not lie with this provision; indeed, it is a necessary provision that empowers all members to act to protect human, animal and plant safety and health in the event of a perceived crisis. The problem lies, rather, with how to *remove* the provision once it is triggered. The SPS Agreement is silent on the steps that need to be taken by a member country that has lost international market access because trading partners have invoked this provision. For an example, consider the current case of Canada. With the discovery of a single case of BSE, Canada immediately lost access to 34 markets that – quite legitimately – established temporary, precautionary bans. Since that time, Canada believes that it has identified, isolated and eradicated the risk that any BSE-infected animals will enter the food supply. Further, animal health experts (with the OIE) have vetted the Canadian response. Yet many important markets remain closed or are only partially open.[8] The ambiguity here arises because of an absence of a harmonized blueprint for the opening of markets after temporary, precautionary bans have been invoked. Greater

clarification is required in the SPS Agreement on how long is 'temporary' and on the quantity and type of scientific evidence that is deemed sufficient.

Another source of ambiguity arises from the fact that the SPS Agreement sets a regulatory floor but not a ceiling. According to the agreement, members are committed to both the international harmonization of SPS measures (subject to the three international scientific organizations) and the mutual recognition of measures employed by other members. With respect to mutual recognition, a member is committed, in principle, to granting equivalence to the SPS measures adopted by an exporting country "if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection" (*SPS Agreement,* article 4:1). To facilitate the process, the importing member must be allowed to conduct a conformance assessment including inspection, testing, monitoring and evaluation of the measures in place in the exporting member country. The problem here is that – provided that the national treatment provision is met – the agreement is silent on the limits that exist for countries to have their regulations substantially above those of other member countries. Indeed, this issue is related to the discussion above, because many of the markets that continue to ban Canadian beef products – such as Japan – have domestic traceability and slaughtering regulations different from Canada's. Therefore, while there is a minimum level of sanitary and phytosanitary measures that must be met, is there a maximum defining the point that importing member countries cannot legitimately expect potential exporting members to achieve?

Another source of ambiguity is associated with the role of socio-economic considerations in risk assessment. The SPS Agreement permits members to establish SPS measures based on scientific risk as well as on broader assessments of risk such as relevant economic factors, including

- the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of the disease or pest;
- the costs of control or eradication in the territory of the importing Member; and
- the relative cost-effectiveness of alternative approaches to limiting risks (*SPS Agreement*, article 5:3).

Trade agreements traditionally avoid such socio-economic assessments because of the subjectivity complications associated with them. Indeed, it has been argued that the WTO attempts to depoliticize trade and make it a function of comparative advantage by insulating trade agreements from socio-economic assessments (World Trade Organization, 1995). However, the SPS Agreement recognizes that imported risks to human, animal and plant safety and health are likely to have socio-economic impacts

that can be perhaps quite significant. The inclusion of this article raises significant ambiguity about how socio-economic assessments may be worked into the *legitimate justifications* based on sufficient scientific evidence. None of the international scientific organizations deferred to by the WTO provide much scope for socio-economic assessments, so it is unclear how and when they may be included in a legitimate fashion.

This assessment of the SPS Agreement reveals that while the agreement grants members considerable power to take unilateral and unchallengeable trade actions against other members if they have a *legitimate justification* to do so, there is significant ambiguity associated with what constitutes a *legitimate justification* and, hence, when and how this power might be appropriately wielded. Yet, as will be discussed in the next section, modifying the agreement to deal with such issues presents a complex challenge for agricultural trade liberalization efforts.

Systemic Agricultural Trade Issues

While it has been argued above that the SPS Agreement is likely to play a preeminent role in agricultural trade disputes and, hence, greater clarification of the outstanding areas of ambiguity is required, achieving this clarification is difficult for two reasons.

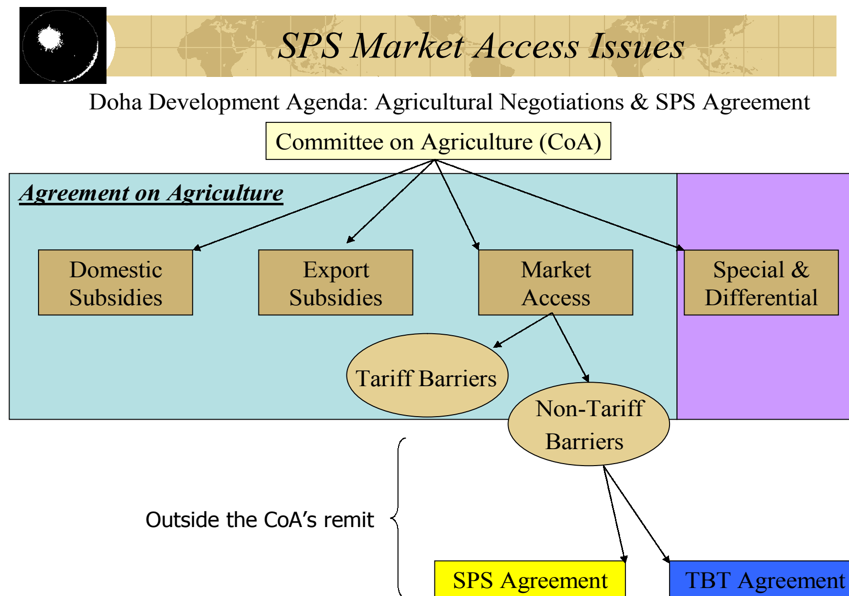

Figure 1 Agricultural negotiations and the SPS Agreement

First, achieving clarification of the SPS Agreement's ambiguous rules vis-à-vis agricultural market access is difficult because, as figure 1 depicts, the SPS Agreement

plays an exogenous role with respect to the Agreement on Agriculture. Indeed, the agreement was omitted from the Ministerial Declaration of the Doha Development Agenda and it was not part of the mandate of the Committee on Agriculture. As a result, the focus of the agricultural negotiations has been on the traditional domains and no attention has been paid to the SPS Agreement. It is important to note that "opening up" the SPS Agreement is not without risks. Indeed, the EU's bad experience with the SPS Agreement and the beef hormones issue (likely to be repeated again with the genetically modified crops issue) has led the EU to propose changing the agreement to make it more like EU-style regulations (and less like U.S.-style regulations). Nevertheless, despite the tough negotiations that would follow, the SPS Agreement does require modification.

The second systemic agricultural trade issue that makes the modification of the SPS Agreement difficult is the *special and differential treatment for developing countries* offered in the Doha Development Agenda. This inclusion fundamentally changed the dynamic of agricultural negotiations. The Cairns Group was essentially marooned as the developing-country members – led by Brazil – formed the G22 negotiating bloc in order to stand apart from the developed Cairns Group members and claim an entitlement to special and differential treatment in agriculture. This is problematic for the SPS Agreement because on the issue of safety and health there should be no special and differential treatment; ensuring safety and health should be the goal of all agricultural producers regardless of their level of development. Yet domestic interests in developing countries looking for protectionist justifications may be attracted by the power of the SPS Agreement and its ambiguous rules. The result may be an increased use of special and differential SPS-related market access barriers, which are effective in barring food trade yet may have little effect upon actual safety and health.

Implications for Agricultural Trade

Given the significant unilateral power it confers and the ambiguity associated with how this unilateral power is appropriately wielded, it can be expected that the most complex and challenging tensions related to agricultural trade will be under the auspices of the SPS Agreement. The agricultural trade policy issue is that the agricultural trade liberalization efforts – stalled by the traditional issues of domestic subsidies, export subsidies and market access disciplines – appear unable to take on the complex challenge of SPS trade disputes unless modifications are made.

To ensure that the unilateral power of the SPS Agreement is wielded in a manner consistent with maximizing public health while preventing unnecessary trade

distortions, the agreement requires full characterization of what constitutes a *legitimate justification* for SPS-related market access barriers. This may involve a coordinated effort both to ensure that any modifications to the agreement are focused solely on the issues of safety and health and to avoid focusing on issues beyond this. It could include, in addition, a coordinated effort to ensure excellence in the establishment of scientific standards and scientific standard-setting procedures at the various international scientific organizations.[9] The goal of such efforts would be to establish universal regulatory floors based on scientifically sufficient parameters of safety and health while avoiding SPS-related measures on any non-safety issues, including on the basis of special and differential treatment. That is, greater effort must be spent on finding the floor of minimum essential requirements that all countries can agree to, after which all other measures are subject to trade disciplines. In addition, the appropriate use of temporary, precautionary bans must be characterized, including the development of a framework for regaining markets that have been closed due to precautionary SPS measures.

Clarifying what constitutes a *legitimate justification* for an SPS-related market access barrier will simultaneously ensure that such barriers are not simply used as disguised protectionism. Bringing the SPS Agreement fully into the negotiating agenda of the Committee on Agriculture would begin to deal explicitly with the relevant market access issues. Yet, as discussed above, when opening up the agreement, it is crucial that human, animal and plant safety and health dominate the agenda and not non-safety issues. The goal here would be to prevent the discretionary use of temporary and permanent market access barriers with no clear outline of how to regain market access by clarifying the principles underlying the risk analysis framework used in determining appropriate SPS measures. To aid this process, better methods could be developed to quantify non-tariff market access barriers in order to facilitate their reduction through negotiation. Another area of coordinated effort could target the precautionary principle outlined in the agreement's article 5:7.

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Endnotes

1. The World Trade Organization's Committee on Sanitary and Phytosanitary Measures tracks specific trade concerns (STCs) that are brought to the committee's attention by any member country concerned about the SPS-related market access rules established by another member. Since January 1995, 154 STCs have been raised, 26 percent related to food safety concerns, 30 percent to plant health concerns, 40 percent to animal health and zoonoses and 4 percent to other issues such as certification requirements or translation (World Trade Organization, 2003).
2. Some examples include the types of processes and production methods (PPMs) that can be focused on and those that cannot; the appropriate use of temporary, precautionary import bans and their subsequent removal; and the role that international scientific organizations play in setting the international safety and health standards (or, in the absence of actual standards, the appropriate procedures for setting domestic safety and health standards).
3. Differing domestic political economy reasons can be the result of several factors (Isaac, 2002). First, there may be cultural differences in risk perceptions, as evidenced by the avoidance of pasteurization of cheese in France and the widespread use of pasteurization of cheese in North America. Second, influencing risk perceptions are experiences with food safety in various jurisdictions (Spriggs and Isaac, 2001). For example, the BSE crisis in British beef, the dioxin contamination in Belgium and the E. coli contamination in Scotland have each had a lasting effect upon consumers' risk perceptions. Third, jurisdictions differ in their regulatory traditions and the emphasis they place upon actual and/or perceived risks when making regulatory decisions.

4. Unsafe imports can jeopardize human safety and health either directly, in the case of unsafe imported foodstuffs, or indirectly, by infecting domestic food inputs including livestock and agricultural plants that are part of the domestic food chain. There is a crucial distinction to note: the SPS Agreement targets measures taken to protect the domestic food supply, not measures taken to target overall domestic biodiversity. In this sense, the SPS Agreement relates to food safety measures only, not environmental protection measures, although in practice this distinction is blurred.
5. *Agreement on the Application of Sanitary and Phytosanitary Measures, Uruguay Round of Multilateral Trade Negotiations Legal Texts* (the "SPS Agreement"), preamble, pp. 69-84.
6. The meaning of a *legitimate justification* will be discussed below.
7. For a comprehensive assessment of the Risk Analysis Framework and the many debates associated with its appropriate use see Isaac (2002).
8. In September 2003, the USDA announced that Canadian producers could export boneless meat from animals younger than 30 months to the United States; however, trade in live cattle or boned meat cuts was not reinstated.
9. While the focus of this paper is on the SPS Agreement, it is important to note that the scientific organizations themselves – the Codex Alimentarius Commission, the International Office of Epizootics and the International Plant Protection Convention – are not above criticism. For instance, further research may be done on the organizations themselves in terms of whether or not they are actually capable of establishing scientific standards or standards-setting procedures that are timely and not unduly influenced by political considerations. Therefore, while modifications to the SPS Agreement highlighted in this paper may be thought of as necessary conditions for a better functioning trading system they may not be sufficient conditions, as subsequent modifications to the scientific organizations themselves may be required.

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