

## **The SPS Agreement – An Update on Emerging Issues, Challenges and the future of the Doha Development Agenda**

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In examining the operation of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement") today, it is useful to recall the origins of this rather brief text. From 1989 to 1994, the new rules were being negotiated for agricultural trade. These rules had the objectives of eliminating the use of import quotas on agricultural products and moving towards tariff-only border restrictions. At the same time, reductions in the use of export subsidies and reductions in production subsidies were being negotiated. The SPS Agreement was negotiated by a handful of far-sighted officials who recognized the necessity of a fourth "pillar" of rules to ensure liberalization of agricultural trade. SPS rules were designed to ensure that as other agricultural trade barriers were reduced, governments did not instead impose unjustified health barriers at the border in order to reduce competition from foreign suppliers.

The basic principles of the SPS Agreement recognize the right of governments to impose trade restrictions when these are necessary to protect human, plant or animal health, but only to the extent necessary for health protection. To achieve this, governments are strongly encouraged to use the standards developed by the Codex Alimentarius Commission, the World Organization for Animal Health or the International Plant Protection Convention. Requirements that are not based on these international standards must be based on a risk assessment. In cases where there is not enough scientific evidence to do a risk assessment, only a temporary measure may be imposed, and more evidence must be sought so that the measure is reviewed within a reasonable time. The SPS Agreement requires governments to accept products that may have been produced or treated in a different way, if they are equally safe. Requirements on imported products must also take into account the pest- or disease-status of the area from which the product comes, and the area to which it is destined. Transparency is a key provision of the SPS Agreement, as advance public notice must be given of proposed new or changed regulations, and comments solicited from trading partners. In addition, the Agreement requires that testing, inspection and approval procedures must not pose unjustified barriers to trade. The need for technical assistance to developing countries is also foreseen in the Agreement.

The far-sightedness of the negotiators has become apparent in the 12 years since the SPS Agreement came into existence. SPS problems are now recognized by many countries – and particularly by developing countries – as perhaps the most critical determinant of trading opportunities. At the same time, some consumer protection groups have recognized the value of an international agreement that requires governments to evaluate potential risks to human, animal and plant health in a structured way, on the basis of scientific evidence, and to be transparent about the risk mitigation measures being considered.

No doubts have been raised about the soundness of the basic principles of the SPS Agreement. However, there have been a number of issues regarding its implementation that have been addressed by the SPS Committee over the years. A few years back, the Committee devoted considerable efforts to developing guidance to help governments recognize when different measures are equivalent. There is often more than one way to skin a cat – or to kill an insect pest or reduce microbial contamination in foods. Although governments naturally reflect in their regulations the production methods used by domestic producers, this should not prevent equally safe products, that

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<sup>1</sup> The views expressed are those of the author only and do not necessarily represent the views of the WTO Secretariat or of its Members.

have been produced according to different methods, from entering your market. The guidelines developed by the SPS Committee – and complemented by those developed specifically for food safety by Codex, for animal health by OIE and for plant protection by IPPC, should help facilitate recognition of equivalence.

The SPS Committee has also devoted considerable attention to the continuing difficulties of many developing countries to make use of the SPS Agreement as a tool to enhance their economic development. The transparency provisions have resulted in over 7,000 notifications since 1995. However, the majority of developing countries are unable to screen the notifications, so they ignore the warning signals being given by trading partners regarding changes in SPS requirements – and they get hit by the train as their products are turned back at the border. Moreover, the notification process refers to new or amended SPS measures. Countries are not required to notify the body of SPS measures they already have in place. Those countries that have found ways to efficiently manage this large volume of information on new SPS measures and those already in place need to assist those who are losing much needed foreign earnings.

Obviously in countries the size of Australia – but in smaller countries as well – the pest and disease situation is not identical from one end of the country to another. Many pests or diseases require certain climates or vectors in order to proliferate. So there is often no scientific justification for banning all meat products from a country where a particular animal disease exists in only one region if products can be safely sourced from regions free of that disease. Or prohibiting all fresh fruit from a country where the pest of concern is limited to a certain area or season, when imports can be permitted from areas without the pest or seasons of the year when the pest is not present. There may be, of course, a need for buffer zones, for surveillance, or controls on internal movement, etc, but safe trade may be possible under these conditions. The implementation of the principle of "regionalization" is currently a hot topic at SPS Committee. Many developing countries think it would be helpful for the WTO to develop some general guidelines for governments, to complement the more specific guidance on plant and animal diseases from the OIE and IPPC.

Another emerging issue is the failure of countries to make adequate use of the internationally developed standards. Remember that the SPS Agreement obliges governments to base their national requirements on the Codex, OIE and IPPC standards, unless they can justify scientifically that these standards are not adequate to ensure health protection. Logically, therefore, each and every time a government considers the need for a food safety, plant or animal health regulation – including also in emergency situations – it should start by examining the existing international standards and determining whether these would sufficiently address the health risks. Unfortunately, all too many governments are putting too many resources into doing their own risk assessments from scratch and reinventing wheels – sometimes with some very odd shapes. All the while their own national experts have already done the necessary work while developing Codex, OIE and IPPC standards. This tendency to ignore the international standards often results in over-reactions to disease outbreaks, unnecessary trade frictions, and an unfortunate misallocation of scarce resources.

Another problem, which is linked to this, are the "undue" or unjustifiably long delays in opening markets. These delays occur, for instance, in the completion of risk assessments, or in taking decisions on recognizing equivalence or disease-free areas. Australia has been criticized in this regard – by both developed and developing country trading partners. A major function of the SPS Committee meetings is to provide a forum for countries to raise – and try to resolve – specific trade problems arising from SPS measures. The table below shows the specific trade concerns that have been raised since 1995 regarding measures imposed by Australia. In addition, there is a pending legal dispute case by the Philippines against Australian SPS measures. A legal complaint by the European Union has only recently been resolved. The underlying criticism of many trading partners is that the Australian process is a seemingly never-ending process of draft risk assessments, followed by consultations with stakeholders, leading to revised draft risk assessments, further consultations, further revised assessments, etc. In a number of cases, these processes have gone on for 8 to 10 years

or longer. When the SPS Committee last met at the end of February 2007, trading partners were pleased to learn of Australia's plans to revise its risk analysis procedure and to set some specific deadlines for completion of risk assessments, but frankly many governments were sceptical as to whether this will actually resolve the problem.

**Table 1. Complaints about Measures Maintained by Australia**

Measure at issue	Country raising concern	Years raised
<i>Salmon for human consumption</i>	<i>Canada / US</i>	<i>1996- 1997</i>
<i>TSE-related measures</i>	<i>Switzerland</i>	<i>1996 - 1999</i>
<i>Raw milk cheeses</i>	<i>EU, Switzerland</i>	<i>1998 - 2000</i>
<i>Sauces containing benzoic acid</i>	<i>Philippine, supported by Malaysia</i>	<i>1998 - 2001</i>
Chicken meat - Infectious Bursal Disease Virus	Thailand, supported by EU	1998 - 2001
Fresh tropical fruit	Philippines on behalf of ASEAN, supported by Brazil, EU, India, Korea, Malaysia, Thailand, US	2000
Fumigation with methyl bromide	European Union	2000
Durian	Thailand, supported by EU, India, Malaysia, ASEAN	2000 - 2003
Restrictions affecting BSE-free countries [also by Argentina, Canada, Korea, NZ and US]	Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Poland, Romania, Slovak Republic, Slovenia	2001
<i>California table grapes</i>	<i>US, supported by ASEAN, EU</i>	<i>2001 - 2002</i>
<b>Prawn and prawn products</b>	<b>Thailand on behalf of ASEAN</b>	<b>2001 - 2007</b>
Pigmeat	European Union, supported by Canada, US	2002 - 2005
Netherlands truss tomatoes	European Union, supported by Philippines, Indonesia, Thailand	2003
<i>Table grapes</i>	<i>Chile [EU, NZ]</i>	<i>2004 - 2006</i>
<b>Apples</b>	<b>New Zealand, supported by Chile, EU, US</b>	<b>2005 - 2007</b>

NOTE: Text in *italics* indicates issues where a resolution has been reported to the SPS Committee; text in **bold** indicates issues where discussions have occurred in 2006 or 2007.

In contrast to Australia's lead position in pushing for further liberalization in the agriculture trade negotiations, WTO members increasingly complain that Australia is using unjustified SPS measures to protect its own market. This perception is unfortunate. Australia was one of the great champions of the SPS Agreement, a driving force in the negotiation of this tool to help ensure greater access for Australian farm products in export markets.. Rather than taking the lead in addressing new SPS issues and using the SPS Committee as a way to explore forward-thinking solutions to common problems, Australia is frequently seen as being overly defensive in justifying its existing restrictions. There is no doubt that Australia has a unique ecosystem, a very particular biodiversity that rightfully needs to be protected. But other countries argue that Australia is not the only WTO member with unique ecosystems and with plant/animal health conditions that need protection from the incursion of some diseases. There appears to be, however, a difference in the approach and attitude of Australia, compared to some other WTO members with special ecosystems.

Australia, like all countries active in international trade, needs to ensure that the internationally agreed rules of trade are being respected. In the past, Australia has also made use of the SPS Committee to raise concerns regarding the SPS measures of other countries, and to seek to resolve these concerns. Table 2 presents all of the specific trade issues which Australia has raised in the Committee, and Table 3 shows those issues which have been raised by other countries, but which Australia also supported.

**Table 2. Specific Trade Concerns raised by Australia**

Measure at issue	Country maintaining the measure	Years raised
<i>Shelf-life requirements</i>	<i>Korea</i>	<i>1995 - 1997</i>
BSE-related restrictions on cosmetics	European Union	1997
Restrictions on fresh fruits and vegetables	Indonesia	1997
Live animals and animal products	European Union	2003
Animal health conditions and certification requirements for live fish	European Union	2003
Uses of living modified organisms	Japan	2003
Transboundary movement of living modified organisms	Korea	2003

NOTE: Text in *italics* indicates issues where a resolution has been reported to the SPS Committee.

**Table 3. Specific Trade Concerns raised by another Country and Supported by Australia**

Measure at issue	Country maintaining the measure	Years raised
Restrictions on imports of gelatine	European Union	1997 – 2001
Plant protection law	Japan	1998 - 2001
Ban on livestock	Turkey	1998 -2003
<i>Welfare requirements for animal products and eggs</i>	<i>Switzerland</i>	<i>1998 - 2004</i>
Antibiotics in foods	European Union	1999
GMO traceability	European Union	2001 - 2003
GMO regulations	European Union	2001 - 2004
Pest risk assessments on plants	Brazil	2002
Ban on hormones in animal production	Indonesia	2002
<i>Certification of meat and dairy products</i>	<i>Philippines</i>	<i>2002 - 2003</i>
Restrictions on animal by-products	European Union	2003 - 2004
Failure to notify SPS measures	India	2004 - 2005
<b>Lack of recognition of pest-free areas</b>	<b>Indonesia</b>	<b>2006</b>

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One additional emerging issue that should be mentioned is the growing concern of developing countries with the proliferation of private or commercial standards that set SPS requirements – such as EurepGAP, Tesco's Best, etc. While it is unclear to what extent governments can be held responsible for these private standards, it is clear that for many products these private standards actually set the

conditions for market access. And in many cases, the private standards go well beyond assuring compliance with governmental regulations on pesticide residues, contaminants and the like. It is also clear that while private standards may provide some market benefits for those exporters who can easily meet these requirements, many of the world's smaller, poorer producers may be able to meet the official government safety requirements but they cannot afford the costs of certification according to the private standards. Here it matters little if the small producer is in a developing or developed economy. It is also because developing countries feel excluded from the process of creating these private standards that they have brought this issue before the SPS Committee. It is not clear what the outcome may be on this issue, but there is certainly a lot of interest in further discussions.

With regard to the Doha Development Agenda, the news is correct that renewed efforts are underway to bring these trade negotiations to a conclusion sooner rather than later. This is the third round of multilateral trade negotiations that I have participated in, and while the kinds of delays facing the Doha round are unfortunate, they are not unique. What is unique, however, is the unprecedented active involvement of so many developing countries in the negotiations, and the formation of so many negotiating coalitions. Negotiating coalitions were virtually unknown until the last round, when Australia took the lead in creating the very effective Cairns Group of countries sharing agricultural exporting interests. Although the Cairns Group is still active, we now have the G-4, G-10, G-20, G-33, G-90, RAMs and others. In some cases, it is difficult to clearly understand what are the common interests within some of these coalitions, and indeed some countries are members of several different coalitions that at times have conflicting positions! So while the participation of so many countries is a very welcome development, there is no doubt that it makes reaching consensus on difficult issues -- such as agricultural trade liberalization -- even more difficult.

Although considerable progress has already been made, it has been slow in coming and very difficult to get. But we should remember that it was impossible to launch the round in Seattle in 1999 yet Members succeeded only two years later in Doha with the objectives of substantial improvements in market access, phasing out of export subsidies and substantial reductions in trade-distorting domestic support. Since then, further progress has been made with a great deal of detail added in the Framework of August 2004 and the Hong Kong Ministerial Conference of December 2005. In many areas the outline of an agreement on agriculture is emerging or, in some cases, has been clear for some time. For example, in Hong Kong Ministers agreed that all forms of export subsidies will be eliminated by end-2013. In addition, there will be real and substantial reductions in trade-distorting domestic support. Also, not only will there be the elimination of export subsidies and reductions in domestic support, the rules on both pillars will be greatly improved as all forms of export subsidies are to be eliminated and all forms of trade-distorting domestic support will have to be reduced and subjected to much stricter disciplines.

Unfortunately, on market access, the situation is much less clear. We do have the objective of substantial improvements in market access and agreement on a tiered formula with four bands for tariff reductions – the higher the tariff the greater the reduction. But there is much less clarity on the details and the flexibilities. So we do not know at this moment how Sensitive Products will be treated although we do know that they will have less-than-formula tariff reductions and they will be subject to tariff quota increases. For developing countries, there are also Special Products and a Special Safeguard Mechanism and we do not know what will be the product coverage or the treatment for either mechanism. Current proposals are widely supported by many Members but strongly opposed by others as they could result in high total import duties into some developing countries for some products. This is not to criticize these proposals, just to point out their implications.

But the situation is rapidly evolving, as renewed efforts are being made on all of these issues. The Chairman of the Agriculture negotiating group, Ambassador Crawford Falconer of New Zealand, released a frank communication on 30 April in which he detailed where there appears to be growing consensus and where he sees the need for further flexibility in the positions of various countries on specific issues. It is, as he put it, a "hard-nosed view of what ... is within the realm of the possible"

He also made it clear that this was a first instalment, with his views on other issues to be covered in subsequent papers. .

The SPS Agreement is not currently on the negotiating table, hence the conclusion of the Doha round is not expected to result in any change to the SPS Agreement. But there are proposals from a number of developing countries to find ways to ensure that governments do indeed take into consideration the capacities and needs of developing countries when they set new SPS requirements, and in the provision of technical assistance. It is important to note that the developing countries are not asking their trading partners to allow trade in unsafe products, but rather to conscientiously apply the SPS Agreement so that measures are taken only when necessary for health protection, and to assist developing countries to be able to meet these justified requirements.

An important initiative in this regard was the creation of the Standards and Trade Development Facility (STDF), by the World Bank jointly with the WTO, FAO, WHO and OIE. The WTO administers this modest (US\$ 5 million) fund, which seeks to improve coordination in SPS capacity building among donors and develop best practices for capacity-building in this area. The fund finances projects to help developing countries make use of the Codex, OIE and IPPC standards – such as projects in APEC countries on food safety capacity evaluation, in the South Pacific on plant health capacity evaluation and on risk assessment in the Asian region. The STDF also provides funds to help turn good ideas into fundable project proposals. Australia contributed to the STDF in 2005, but unfortunately has not since renewed its contribution.

In the 12 years of its existence, the SPS Agreement has proven to be as necessary as Australia and others actively involved in its development had expected. Recent studies confirm that the greatest barriers to agricultural exports are not tariffs, but non-tariff barriers, among which sanitary and phytosanitary requirements are of major importance in particular for developing countries. SPS measures continue to create market access problems also for developed country exporters, as is clear from the issues brought before the SPS Committee. Although the SPS Agreement is not perfect, the major difficulties do not lie with its basic principles but with its application, hence the consensus not to re-open the text for general renegotiation.

Given Australia's critical role in developing the SPS Agreement, as well as Australia's continued leadership in seeking further agricultural trade liberalization, many developing countries and others are looking to Australia to play a proactive, positive role in ensuring the conscientious application of the SPS Agreement. As a major agricultural exporter, a producer of highly competitive, high quality products, Australia has every interest to ensure that all countries fully respect the rules of the SPS Agreement.