

**SPS AGREEMENT : BALANCING NATIONAL
SOVEREIGNTY AGAINST DISGUISED
PROTECTIONISM**

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INTRODUCTION

Intense debate amongst governments, traders, and scientists can be seen as a symptom of the tension between *national sovereignty* and allegations of *disguised protectionism*. The debates surrounding zero risk import strategies to guard against diseases, such as Bovine Spongiform Encephalitis (BSE or Mad Cow disease) is but one high profile example.¹

In response to such a pluralised and multifaceted debate, this report is motivated to concern itself broadly to provide a short synopsis on the historical dilemma of sovereignty versus international law. This report then engages in more specific analysis of the Sanitary and Phytosanitary Measures Agreement (SPS Agreement), which entered into force with the establishment of the World Trade Organization (WTO) on 1 January 1995. This report concludes by articulating *how* the SPS Agreement strikes a legal balance between the prevention of disguised restrictions on international trade, as per a sovereign's right to protect human, animal, plant life or health.

TREATY LAW DEALING WITH SANITARY AND PHYTOSANITARY MEASURES

Articles I, III, XI, and XX of the General Agreement on Tariffs and Trade (GATT) allows members (nation states) of the WTO, to act on trade in order to protect human, animal or plant life or health, provided they do not discriminate or use this as disguised protectionism.² Aside from GATT, there are also two other co-equal sources of WTO law that are relevant to food safety, animal and plant health safety, and with product standards.³ These are the SPS Agreement,⁴ and to a lesser extent the Technical Barriers to Trade Agreement (TBT).⁵

¹ Andrew P. Thomson, P. Symposium Issue on WTO Dispute Settlement Compliance: Australia-Salcom and Compliance Issues Surrounding the SPS Agreement: Sovereign Acceptance and Measure Adaptation, Summer 2002, 33 *Law & Int'l Bus.* 717, 3.

² Gabrielle Marceau, Joel P. Trachtman, The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade, *Journal of World Trade* 36(5), 811-881, 2002, 811.

³ Gabrielle Marceau, Joel P. Trachtman, as above n 2, 815.

⁴ *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, WTO Agreement, Annex 1A, Legal Instruments-Results of the Uruguay Round, (SPS Agreement) signed at Marrakesh on 15 April 1994.

⁵ *Agreement on Technical Barriers to Trade*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, vol.31, at 138.

The TBT (Technical Barriers to Trade) Agreement covers all technical regulations, voluntary standards and the procedures to ensure that these are met, except when these are sanitary or phytosanitary measures as defined by the SPS Agreement.

THE SPS AGREEMENT IS *LEX SPECIALIS* PER THE GATT

To avoid confusion, I will elaborate as to why this report abandons an analysis of the GATT in lieu of an analysis of the SPS Agreement. After all, the GATT also attempts to balance sovereign rights by preventing disguised restrictions, to eliminate trade barriers among WTO members.

The Panel in *EC—Hormones (US)* WT/DS26/R/USA, (also Appellate Body WT/DS18/AB/R), holds that the SPS Agreement adds to arts III, XI and XX of GATT. There is thus no obligation to prove a violation of arts III or XI in order for the SPS Agreement to be invoked.⁶

The principle enunciated above can be further understood via the notion of *lex specialis derogat legi generali*: (a specific rule of law overrules a general principle). The *lex specialis* principle rests on the theory that where a general rule cannot be read harmoniously with the specific one, the general rule is set aside and the more specific treaty obligation is operable. By this, if a measure violates the SPS Agreement but is legal per GATT, then the violation of the SPS Agreement will *not* be cured by pleading on the measure having GATT legality.⁷ This ability to focus on the SPS Agreement obligations helps to avoid a potential conflict of laws. For these reasons, I will concentrate my analysis on the SPS Agreement.

A GENERAL REFERENCE TO SOVEREIGNTY PER INTERNATIONAL LAW

Traditionally, international law was conceived of as law between sovereigns (nation state) entities. The case of *Lotus* PCIJ 1927, Series A, No. 10, 18 before the Permanent Court of International Justice (PCIJ) is authority for this traditionalist view. The PCIJ held that:

⁶ Gabrielle Marceau, Joel P. Trachtman, as above n 2, 824.

⁷ *EC-Hormones(US)*, Panel Report, WT/DS26/R/USA at para 8.42; *Australia-Salmon*, Panel Report, WT/DS18/R at para 8.39.

International law governs the relations between independent States. The rules binding upon States emanate from their own free will as expressed in conventions or by usages [...] in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

The Lotus principle is not altered by the SPS Agreement, nor altered by the WTO Rules or the Dispute Settlement Body (DSB). The SPS Agreement only applies to the actions or measures of Members, including their laws and regulations.⁸ WTO members are nation states, who use domestic (sovereign) powers to ratify (and/or not withdraw from) the SPS Agreement.

THE SPS AGREEMENT IS *DUBIO MITIUS* TO THE SOVEREIGNTY OF MEMBERS

In *EC-Hormones*, WT/DS26/AB/R & WT/DS48/AB/R, the Appellate Body referred to and applied the interpretative principle of *dubio mitius* where a term is ambiguous, in deference to the sovereignty of states.⁹ The Appellate Report stated:

If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.¹⁰

This deferential treatment to members choice when resolving treaty ambiguity clearly gives rise to a tension between issues of national sovereignty and allegations of disguised restrictions. Although the balance here strongly favours national sovereignty, it is still a uniform rule.

⁸ Gavin Goh, Trudy Witbreuk, 'An Introduction to the WTO Dispute Settlement System', (2001) 30 *Western Australian Law Review* 51, 54.

⁹ Pauwelyn Joost, The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes: EC – Hormones, Australia – Salmon and Japan – Varietals, *Journal of International Economic Law* (1999) 641-664, Oxford Press, 661.

¹⁰ *EC-Hormones*, para 165, at footnote 154.

BALANCING SUBJECTIVE SANITARY & PHYTOSANITARY NEEDS WITH ARBITRARINESS AND COMMERCIALLY MOTIVATED PROTECTIONISM

Sanitary and phytosanitary measures, by their very nature, may result in restrictions on trade. Yet there should be no contention that some trade restrictions may be necessary to ensure food safety and animal and plant health protection. This recognition of sovereign domestic quarantine powers are acknowledged in the Annex A Definitions and in art 2(1) of the SPS Agreement.

To be sure, Annex A(5) of the Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures provides the following definition for the ‘appropriate level of sanitary or phytosanitary protection’. Annex A(5) states:

The level of protection deemed appropriate *by the Member* establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.
(My emphasis is added above and below).

ARTICLE 2(1) further reiterates Member’s sovereignty, Art 2(1) states:

Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.

Annex A(5) and art 2(1) also recognise that environmental concerns resulting from a diverse planet makes it impractical for sanitary and phytosanitary protection measures to be categorically regulated in an international instrument. The SPS Agreement accordingly recognises the sovereign right of WTO members to take unique measures tailored to domestic needs, needs that that are necessary for the protection of human, animal or plant life or health.

SCIENTIFIC EVIDENCE, AN EXTENT NECESSARY, NOT ARBITRARY

Despite the SPS Agreement making no specific reference to balancing tests, a balancing test is never the less imported into the SPS Agreement. A necessary balance is struck to prevent disguised protectionism in art 2(2) by requiring *scientific* evidence, and that any sanitary or phytosanitary measure is applied only to the *extent necessary* to protect human, animal or plant life or health. Article 2(3) goes further by prescribing *arbitrary and unjustifiable discrimination*, where *identical or similar conditions* prevail. Article 5(5) deals with arbitrary discrimination by requiring *internal consistency* in the use of restrictions. I elaborate on the measures below.

ARTICLE 2(3) SPS: SCIENTIFIC JUSTIFICATION

Article 2(3) goes a step further than art XX of GATT. Unlike art XX, art 2(3) requires scientific justification for *any* SPS measure that a Member adopts. This is a condition imposed via art 2(2) which requires that measures be no more restrictive than is *necessary to protect human, animal or plant life or health*. Thus, it is not the SPS Committee, nor the Agreement which dictates SPS measures to Members. Science is the tool used to balance sovereignty per disguised restrictions.

ARTICLE 5(5) SPS : ARBITRARY & UNJUSTIFIABLE RESTRICTIONS

Article 5(5) imposes an *internal consistency requirement* upon protectionist measures taken by a Member. Article 5(5) of the SPS Agreement states:

With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade...

Lawyers and scholars of WTO jurisprudence have coined art 5(5) as an *internal consistency* requirement.¹¹ The Appellate Body Report on *Australia – Salmon*, WT/DS18/AB/R illustrates the reasoning behind such an alias.

In *Australia - Salmon*, Australia was found to be in breach of art 5(5), for the unexplained distinctions in levels of protection measures imposed by Australia. Both the Panel and the Appellate Body stressed that *Australia was free to determine its own level of SPS protection*; however, they found that Australia was inconsistent in the application of the same high levels of protection in other comparable situations.¹² As the case in point, in *Australia-Salmon*, Australia had applied high levels of SPS protection to salmon, yet did not apply the same high standards to bait and ornamental fish imports. It was found that bait and ornamental fish imports placed Australian domestic industries at a greater SPS risk than may potentially arise from salmon imports. Both the Panel and Appellate Body held that the inconsistency showed a disguised restriction on trade.

The test in art 5(5) can thereby be summarised as (1) A Member must first determine its appropriate level of protection; then (2), it must ensure that its appropriate level of protection is consistently applied to the extent required by art 5(5). The first element, holds that national sovereignty remains relatively unimpeded by art 5(5), as the level of protection that a member feels is appropriate, is a prerogative of the Member concerned. The second element, merely requires that countries are faithful to the SPS measures that they themselves have imposed.

¹¹ Gabrielle Marceau, Joel P. Trachtman, as above n 2, 844.

¹² David G. Victor, 'The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment after Five Years' (2000) 32 *New York University Journal of International Law and Policy* 865, 13.

INTERNATIONAL STANDARDS v THE SOVEREIGN RIGHT TO LEGISLATE

Theoretically a dilemma arises where international standards are less rigorous than the preferred national standards. Yet the administrative incentive to use international standards does not trump national standards. National standards will not violate the SPS Agreement simply because they differ from international norms. In fact, the SPS Agreement explicitly permits members to impose more rigorous requirements than the international standards. Members which do not base their national requirements on international standards may however be required to justify their higher standard if this difference results in a trade dispute.

In *Australia – Salmon*, the Appellate Body stressed that an explicit statement by a Member about its level of protection cannot be questioned by a Panel or Appellate Body, they said:

The determination of the appropriate level of protection, a notion defined in paragraph 5 of Annex A, as the level of protection deemed appropriate by the Member establishing a sanitary ... measure, is a prerogative of the Member concerned and not of a panel or of the Appellate Body.¹³

In the *Australia – Salmon* dispute, the Appellate Body dealt with the question of how an implicit level of protection can be inferred from an SPS measure. The Panel had found:

[t]he level of protection implied or reflected in a sanitary measure or regime imposed by a WTO Member can be presumed [sic] to be at least as high as the level of protection considered to be appropriate by that Member.¹⁴

¹³ *Australia – Measures Affecting Importation of Salmon*, (Appellate Body Report of 20 October 1998), WT/DS18/AB/R at para 199, <<http://www.worldtradelaw.net/search/searchreports.htm>>, at 10 April 2004.

¹⁴ *Australia – Measures Affecting Importation of Salmon*, (Panel Body Report of 12 June 1998), WT/DS18/R, at 174, para 8.107, <[www.worldtradelaw.net/reports/wtopanelsfull/australia-salmon\(panel\)\(full\).pdf](http://www.worldtradelaw.net/reports/wtopanelsfull/australia-salmon(panel)(full).pdf)>, at 10 April 2004.

The Appellate Body however rejected the Panel's statement, particularly because Australia had explicitly stated that its level of protection was different from the one reflected in its measure. The Appellate Body then went on to emphasize that the appropriate level of protection and the SPS measure itself were distinct and that the establishment of the appropriate level of protection logically precedes the establishment or decision on maintenance of an SPS measure. They stated:

The 'appropriate level of protection' established by a Member and the 'SPS measure' have to be clearly distinguished. They are not one and the same thing. The first is an objective, the second is an instrument chosen to attain or implement that objective. It can be deduced from the provisions of the SPS Agreement that the determination by a Member of the 'appropriate level of protection' logically precedes the establishment or decision on maintenance of an 'SPS measure'.¹⁵

IT IS 'IMPLICIT' THAT A MEMBER DETERMINE A LEVEL OF PROTECTION

In *Australia – Salmon*, the question arose whether a WTO Member is obliged to determine, positively, its appropriate level of protection. While the Panel held that no such obligation existed, the Appellate Body determined that such an obligation exists under the SPS Agreement, albeit only implicitly. However, it also held that where a Member fails to determine its appropriate level of protection, this level of protection can be established by a panel on the basis of existing relevant SPS measures:

We recognize that the SPS Agreement does not contain an explicit provision which obliges WTO Members to determine the appropriate level of protection. Such an obligation is, however, implicit in several provisions of the SPS Agreement, in particular, in paragraph 3 of Annex B, arts 4.1, 5.4 and 5.6 of the SPS Agreement ...¹⁶

The SPS Agreement contains an implicit obligation to determine the appropriate level of protection. This does not mean, however, that an importing Member is free to determine its

¹⁵ *Australia – Measures Affecting Importation of Salmon*, as above n 13, para 200.

¹⁶ *Ibid* para 205.

level of protection with such vagueness or equivocation that the application of the relevant provisions of the SPS Agreement, such as art 5.6, becomes impossible. It would obviously be wrong to interpret the SPS Agreement in a way that would render obligations futile, by allowing Members to effectively evade their obligations.

CONCLUSION

The SPS Agreement explicitly recognises the right of governments to take measures to protect human, animal and plant health. The only caveat placed on the sovereign right to tailor restrictive measures is that such measures must be based on *science*, and are applied only to the *extent necessary* for the protection of health etc, and *do not unjustifiably discriminate* among Members.

The SPS Agreement also encourages Members to harmonise their protectionist measures with the international standards, guidelines and recommendations developed by other WTO members. International standards organisations include, for food safety, the joint FAO/WHO Codex Alimentarius Commission; for animal health, the Office International des Epizooties; and for plant health, the FAO International Plant Protection Convention.¹⁷ In these areas, WTO members participate in developing international standards, and participation in the scientific determination of the effects on human health of pesticides, contaminants or additives in food; or the effects of pests and diseases on animal and plant health. For, it can well be said that promoting harmonisation is in itself, a method to avoid allegations of disguised restrictions on trade.

Annex C(3) of the SPS Agreement states that '*nothing in this Agreement shall prevent Members from carrying out reasonable inspection within their own territories*'. Thus, the SPS Agreement strikes a balance with sovereignty per disguised restrictions by allowing a review of behaviour indicative of disguised trade restrictions. Sovereign power is not trumped for a lack of scientific justification or arbitrariness in measures, for ultimately, a Member can withdraw from the WTO.

¹⁷ World Trade Organization, *Sanitary and Phytosanitary Measures: Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, May 1998, <http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm> at 15 April 2004.

TERMS AND ABBREVIATIONS

Codex - The FAO/WHO Joint Codex Alimentarius Commission

Dubio Mitius - Given multiple possible interpretations, the meaning which is less onerous to the party assuming an obligation is preferred.

FAO - The Food and Agriculture Organization of the United Nations.

GATT - The General Agreement on Tariffs and Trade, established in 1947. The abbreviation is used both with reference to the legal text and to the institution

GATT 1994 - The General Agreement on Tariffs and Trade, as revised in 1994, which is part of the WTO Agreements. GATT 1994 includes the original General Agreement, which is known as GATT 1947.

IPPC - The Secretariat of the International Plant Protection Convention, based in the FAO.

OIE - The Office International des Epizooties, (aka) the World Animal Health Organization.

SPS - Sanitary and phytosanitary measures, as defined by the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

TBT - Technical barriers to trade, as covered by the WTO Agreement on Technical Barriers to Trade. References to the previous GATT agreement by the same name are indicated as the "1979" TBT Agreement.

WHO - The World Health Organization of the United Nations.

WTO - The World Trade Organization, became the successor to GATT on 1 January 1995.

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