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Module : Agreement on Sanitary and Phytosanitary measures

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Module XX: SANITARY AND PHYTOSANITARY MEASURES ("SPS")

DESCRIPTION OF MODULE

Items	Description of Module
Subject Name	Law
Paper Name	International Trade Law
Module Name/Title	Agreement on Sanitary And Phytosanitary Measures ("SPS")
Module Id	20
Pre-requisites	• Concept of Sanitary and Phytosanitary measures • Role of precautionary principle • Recent jurisprudential developments
Objectives	To understand the following: • Linkage between sanitary - phytosanitary measures and trade • Why such an agreement evolved • Is there a universal standard on SPS • Salient features of SPS agreement • The Fault lines
Keywords	sanitary, phytosanitary, health, conformity, tariff, non – tariff, harmonization.

E-TEXT

Topics & Sub-Topics covered (Index)

1. **Introduction**
2. **Emergence of SPS**
3. **a. Why SPS ?**
   b. Universal Standard
4. **International organizations providing assistance**
5. **Basic concepts**
6. **Salient Features**
7. **Useful Links**
8. **References**

TEXT

1.1 Introduction:

With the establishment of World Trade Organization ("WTO"), leading to growth in trade and standardization of trade norms, the common methods of trade restriction through border measures (arbitrarily high tariff measures) could not be invoked. Some of the non – tariff barrier measures like customs duty etc. could also not be arbitrarily invoked. Therefore, nations developed other means of trade restriction like developing complex and complication health norms and their own standards of product norms. One such norm was having a complex and sometimes unreasoned set of sanitary and phytosanitary norms. Sanitary concerns "*human and animal life and health issues*" and phytosanitary concerns "*plant life and health issues*". These measures are not necessarily implemented with the intent for trade restrictions but often they have been used as means to restrict trade.

1.2 Objective: To get an overview and functioning of SPS agreement. SPS agreement emerged out of Article XX (b) exception of GATT 1994. The purpose of this chapter is to give an overview of the jurisprudence of SPS Agreement which has evolved into a very complex *legal – scientific* document and one of the areas where WTO countries are deeply divided.

1.3 Keywords: sanitary, phytosanitary, health, conformity, tariff, non – tariff, harmonization.

2.1 Emergence: Why did such an issue creep into the world trading system?

The World Trade Organization effectively reduced tariff and then non-tariff barriers to trade. Market access improved significantly (GATT Art. III: National Treatment Principle; GATT Art. XI: Quantitative Restrictions) and tariffs were reduced progressively (GATT Art. I: Most Favoured Nation Treatment Principle read with Art II: Schedules of Concessions) which made it impossible for countries to use these means for trade restriction. Then what was left for trade protectionism and

arbitrary and unjustifiable discrimination against foreign goods entering into the importing country. It were the exceptions under Article XX of General Agreement on Tariffs and Trade ("GATT") which were ingeniously used or rather misused by countries to restrict trade under the WTO regime. And this difference concerns "*national product standards*".

And as far as human, animal and plant life and health are concerned GATT Art. XX (b) exception was invoked for a disguised restriction on trade by having a different set of product standards for protection.

> GATT Art. XX : Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (*b*) necessary to protect human, animal or plant life or health;

3. animals is of paramount concern of any member country of WTO. Though it becomes insidious if its real purpose is to restrict trade but it masquerades as a measure to protect human, animal and plant life and health.

Therefore, an agreement needed to be reached which brought some level of semblance, uniformity and harmonization in such product standards amongst member countries of WTO. Thus came about the SPS Agreement. It does not provide for specific measures or does not provide an exhaustive list of exact do's and don'ts for different WTO member – countries. What it does provide is a number of general principles, requirements and procedures which shall govern invoking of any protectionist measure under Art XX (b) read with the SPS Agreement.

3.2 Is there a universal standard for SPS?

A universal harmonization has not been reached as far as product standards are concerned and there is a high likelihood that exact and specific product standards might never be reached or cannot be reached in the near future. This does not rule out harmonization where possible. A certain biological or chemical condition or usage might be absolutely benign or relatively benign in a certain geographic and climatic condition but could be lethal in a certain different geographic and climatic condition (Art. 6, SPS Agreement). And this means that there could be a wide variety of variations even within a certain member country of WTO. For example, a certain pest might be absolutely ineffective or relatively less effective in a certain geographic – climatic condition but might be very active and destructive in a certain other geographic – climatic condition. Any product standard which is evoked has to take all this into account by a WTO member country.

4.1 International organizations providing assistance

Annex A of SPS agreement concerning "*international standards, guidelines, and recommendations*" provides a list of international organizations which could be referred for setting up product standards for a relevant subject. The organizations are: Codex Alimentarius Commission, under the aegis of Food and Agricultural Organization ("FAO") of UN for food safety measures; International Office of Epizootics for animal health; and Secretariat of the International Plant Protection Convention for plant health. Other additional and relevant international organizations could be added to help develop international harmonization by the SPS committee established under Art. 12.1 of the SPS agreement.

5.1 BASIC CONCEPTS
Sanitary and Phytosanitary measure

Under Annex A,
SPS measures would include:

> *Sanitary or phytosanitary measure* — Any measure applied:
>
> (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
>
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease causing organisms in foods, beverages or feedstuffs;
>
> (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
>
> (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

ii. Art. 2.1 recognizes the rights of governments, including state and local governments, to take SPS measures;

iii. SPS measures can be applied *only to the extent necessary* for protection of human, animal and plant life and health and *must* be based on scientific principles (Art. 2.2; exceptions under Art. 5.7);

iv. The term scientific is not defined in the agreement but would generally signify a measure which is having or appearing to have an exact, objective, factual, systematic or methodological basis;

v. Scientific certainty is rare and SPS agreement gives room to differing scientific views by different governments;

CASE: JAPAN – MEASURES AFFECTING AGRICULTURAL PRODUCTS

The present dispute came in appeal to the Appellate body from the decision of the Panel and there is a beautiful discussion of Article 2.2 and 5.1 and their relationship in the report of the Appellate body.

Brief Facts:

Japan had put in place a few quarantine measures for Codling moth (Cydia pomonella) which is a pest which invades apples, cherries, nectarines and other fruit crops.[1] Under the said quarantine measures any imported plant or plant product upon

[1] Japan – Measures Affecting Agricultural Products, WT/DS76/AB/R, para 2.1

entering the Japanese territory have to be inspected by plant quarantine officers at one of the 101 major ports (or airports) of entry for any quarantine pest (in this case, Codling moth). In certain cases, a growing-site inspection by the foreign authorities was also to be carried out.[2] Japan also require *each variety to be tested separately* (hereinafter varietal testing method) for Codling Moth, which was the main issue for the dispute.

Claims of the Parties:

It was alleged by the US inter alia that the "Varietal testing Method" used by Japan to screen certain varieties of products being imported from the U.S. was *inter alia* violative of

Articles 2.2, as the Japanese varietal testing requirement was maintained without "sufficient scientific evidence" as mandated in Article 2.2.

Articles 5.1 and 5.2, because the Japanese varietal testing requirement was not based on an "assessment of risk" as mandated by Article 5.1 and 5.2.

On the other hand, it was claimed by Japan that **Article 5.7** has to be looked into before any measure be called violative of SPS Agreement because of its non-conformity with Article 2.2.

Some of the key findings of The Panel's Report

(a) After weighing the evidence put forward by both the countries, the Panel concluded that though there might be varietal differences in plants, but they do not produce any difference in the test results done for quarantine risk assessment. So, the differences do not have any casual relationship with the result sought to be achieved. Hence, they concluded that Japan's varietal testing requirement is maintained without sufficient scientific evidence in violation of Article 2.2.[3]

(b) Again with respect to Article 5.6, the Panel broke up Article 5.6 to define a measure "more trade-restrictive than required" if there is another phytosanitary measure which:

- "reasonably available taking into account technical and economic feasibility";
- "achieves [Japan's] appropriate level of ... phytosanitary protection"; and
- is "significantly less restrictive to trade" than the varietal testing requirement.

And as there was another method available as was ascertained by various expert depositions, hence, Japan was also held to violate Article 5.6.[4]

(c) With respect to Article 5.7, the Panel distinctly noted the requirements to invoke the said Article:

- "where relevant scientific information is insufficient", and
- "the measure is adopted on the basis of available pertinent information".

In addition, the party is also under an obligation to

[2] Plant Protection Law, enacted on 4 May 1950, Plant Protection Law Enforcement, enacted 30 June1950

[3] Japan – Measures Affecting Agricultural Products, Report of the Panel, WT/DS76/R, para 8.42

[4] Ibid, paras 8.72, 8.104

- "seek to obtain the additional information necessary for a more objective assessment of risk" and
- "review the … phytosanitary measure accordingly within a reasonable period of time".

In the present case, Japan was unable to furnish any evidence which proved that it has met the obligations enumerated hereinabove. So, they held that Japan had violated Article 5.7 as well.[5]

vi. Art. 2.3 actually reinforces National Treatment ("NT") and Most Favoured Nation ("MFN") Treatment Principle and wants to weed out obstacles to trade. Restrictions have to be a rarity and based on sound scientific rationale rather than as a rule.

CASE: AUSTRALIA – MEASURES AFFECTING IMPORTATION OF SALMON

This dispute which was later settled between the Parties by Arbitration concerned inter alia violation of Article 2.3 to the effect that Australia imposed stringent restrictions on dead, imported finfish purportedly to prevent the spread of disease while imposing no restrictions whatsoever on the domestic movement of dead finfish.

The Panel Findings

The Panel, while discussing the possible effects of Article 5.5 and 2.3 reiterated the Appellate Body in EC - Hormones[6] and concluded that Article 2.3 prohibits two things: (a) Phytosanitary measure that arbitrarily or unjustifiably "discriminate between Members where identical or similar conditions prevail" and (b) Application of phytosanitary measures that would constitute a "disguised restriction on international trade" and an important element of Article 5.5 is that it "requires that the measure in dispute results in discrimination or a disguised restriction on trade." Hence, if this element of Article 5.5 is not fulfilled, automatically, Article 2.3 will also be violated.[7]

In the present case, the Panel reached the conclusion that Australia was acting in violation of Article 5.5 by violating all the three elements of the Article and hence, by extension, was violating Article 2.3.

Appellate body Findings

The Appellate body on the other hand did not accept the above mentioned logic of the Panel Report and concluded that it would first of all be necessary to determine the risk to Australia's salmonid population resulting from diseases which are endemic to some parts of Australia but exotic to others. But because there were no factual findings by the Panel or undisputed facts between the parties on the matter, it was impossible to

[5] Ibid, paras 8.54, 8.58
[6] European Communities — Measures Concerning Meat and Meat Products (Hormones), DS26.
[7] Australia - Measures Affecting Importation of Salmon- Report of The Panel, WT/DS18/R, Para 8.109

determine if the quarantine mechanisms constitute an arbitrary or unjustifiable discrimination within the meaning of Article 2.3.[8]

Compliance Panel Findings

The Appellate body points out clearly the "identical or similar conditions" that is to be compared here, viz. the risk to salmonids and other fish population from imported fresh chilled or frozen salmon from Canada with the risk to salmonids and other fish arising from endemic diseases.

On finer analysis, the Appellate body came to the finding that Canada was seeking "equivalency" of measures without assessing the risks. The domestic fish population that has been alleged to be unregulated were actually not disease causing at all or at least they do not cause the diseases caused by dead imported finfish from Canada. So, the Appellate body held that Canada has the burden of proof to establish a prima facie presumption that different measures arbitrarily or unjustifiably discriminate between Australia and Canada in respect of the measures taken to comply. And that Article 2.3 first sentence does not impose a requirement of equivalence in measures.[9]

vii. SPS agreement does not entail acceptance of "*downward harmonization*" (harmonization is standardization of SPS measures which is acceptable by all member nations of WTO) under international standards, guidelines or recommendations by any government (Art. 3.3); Individual countries can and do have their own standards;

viii. If a national measure is in conformity with international standard, measure or guideline it is deemed to be necessary and it is considered to be consistent with GATT 1994 (Art. 3.2);

ix. Under Art. 4.1, if the exporting country has the same level of protection as the importing country, then they reach an *equivalence*, but such equivalence does not violate against the importing country's right of inspection, testing and other relevant procedures to establish equivalency;

x. Art. 5.1 requires each government to ensure that its SPS measures are based on risk assessment; annex A provides a general definition of "*risk assessment*";

xi. When a member country conducts risk assessment, it has to take a number of factors into consideration (under Arts. 5.2 and 5.3) like available scientific evidence, relevant processes and production methods, relevant inspection, sampling and testing methods, and relevant ecological and environmental conditions.

[8] Australia – Measures Affecting Importation Of Salmon- Report of the Appellate Body, WT/DS18/AB/R, Para 255

[9] Australia – Measures Affecting Importation Of Salmon- Recourse To Article 21.5 By Canada -Report Of The Panel, WT/DS18/RW, Para 4.348

CASE: JAPAN – MEASURES AFFECTING THE IMPORTATION OF APPLES, WT/DS245/AB/R

On 1 March 2002, the United States requested consultations with Japan regarding restrictions allegedly imposed by Japan on imports of apples from the United States.

Brief Introduction:

The present dispute, which was again settled between the parties, arose out of quarantine restrictions imposed by Japan on imported apples for protection against introduction of fire blight. The quarantine restriction consisted of prohibition of import of apples from orchards which where fire blight would be detected during three tests conducted in a year and also if they were detected within a 500 meter buffer zone surrounding such orchard.

Article 2.2: On the question of burden of proof, Japan seemed to be harping on the proposition that U.S. could not prove anything in apples other than mature asymptomatic apples and hence, have not made a prima facie case against Japan. The Appellate Body held that it is sufficient establishment of prima facie case if the "normal" imported product has been proved to be subjected to arbitrary and trade restrictive phytosanitary norms.[10]

Further, the Appellate body also noted that it is not essential for the Panel to judge the sufficiency of scientific evidence from the point of view of the importing country and they can easily rely on the opinion of experts in the field.[11]

Hence, the Panel's findings, in that Japan's phytosanitary measure at issue is maintained "without sufficient scientific evidence"[12] within the meaning of Article 2.2 of the SPS Agreement is upheld.

Article 5.1: Specificity of risk Assessment: The Panel found the risk assessment not "sufficiently specific" because it did "... not purport to relate exclusively to the introduction of the disease through apple fruit, but rather more generally, apparently, through any susceptible host/vector."[13] In this case, the Appellate Body reached the finding that because the spread of the disease varies significantly depending on the host and vectors, so, the "risk assessment" undertaken for apples only, which were only one possible vector for fire blight, were not "sufficiently specific". So, the evaluation of the risks do not qualify as risk assessment under the SPS Agreement for the evaluation of the "likelihood of entry, establishment or spread of fire blight in Japan through apple fruit."[14]

xii. Articles 5.4 and 5.5 provide minimal disciplines for establishing levels of protection; Art. 5.5 further provides that an SPS committee established under SPS agreement should develop guidelines to further the practical implementation of that provision;

xiii. Under Art. 5.6, member countries shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility

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[10] Japan – Measures Affecting The Importation Of Apples, WT/DS245/AB/R Para 153
[11] *Ibid*, Para 160
[12] Panel Report, Para 8.199 and 9.1(a)
[13] *Ibid.*, Para 8.27
[14] Supra Note 12, Para 216

(measures achieving the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade);

xiv. The complaining member would have to show three pre-conditions to prove that the concerned country enacting SPS measures is more trade restrictive than required (under the explanatory footnote to Art. 5.6): (a)A specific alterative measure was reasonably available; (b) achieves the level of protection the concerned country determines is appropriate; (c) the alternate measure is significantly less restrictive to trade;

xv. Under Art. 5.8, the importing country is obligated to provide on request an explanation of the reasons for its SPS measure;

xvi. Transparency requirements (Art. 7 and Annex B): concerned parties get to know what requirements apply and how to adapt production and other activities to the said requirement; Annex B requires all governments to publish SPS measures promptly, those SPS measures which are not based on international standard should be provided to other members on an advance notice and an opportunity to comment on the proposal except where some "*urgent problems of health protection is involved*"; time should be allowed for producers in exporting countries to harmonize their products and methods of production to the proposed SPS measure unless it is urgent;

xvii. Article 8 and Annex C provides specific disciplines on control, inspection and approval procedures.