

WHAT DOES THE SPS AGREEMENT COVER?

Sixteen pages of text may not seem an earth-shattering document, but the carefully crafted prose of the SPS agreement packs a lot of punch. It repays careful reading in full, but these are its main concepts and principles:

Basic rights and obligations:

National sovereignty
Necessity
Non-discrimination
Most favoured nation (MFN)
National treatment
No disguised trade restrictions
Consistency with GATT 1994
Summary

Other provisions:

Assessment of risk
Choice of SPS measure
Harmonization
Uncertainty
Regional conditions
Alternative measures
Explaining/reviewing SPS measures
Checking and inspection procedures
Responsibilities for implementation
International organisations
SPS committee
Disputes
Transparency

BASIC RIGHTS AND OBLIGATIONS

The fundamental principles of the SPS agreement are set out as ‘basic rights and obligations’, contained in article 2 of the agreement:

- national sovereignty;
- necessity, and scientific basis;
- non-discrimination: between countries, and between imported and domestically-produced goods;
- consistency with the SPS agreement is consistency with GATT 1994.

National Sovereignty

Members have the right to protect the life and health of their human, animal and plant populations, provided the measures taken are consistent with the SPS agreement.

2.1 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.

Key to the entire agreement. The most fundamental challenge is to reach a balance between the sovereign rights of individual countries to set their own SPS measures, and to achieve the aim of the Uruguay Round agreements in facilitating trade.

Necessity

How do we know if an SPS measure is necessary? Under the SPS agreement, necessity is defined by reference to science.

- measures only applied to extent necessary
- and must be based on scientific principles
- and maintained only while justified by science.

So, WTO members have the right to take sanitary and phytosanitary measures that are necessary to protect health.

2.2 Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

What does “not maintained without sufficient scientific evidence” mean? The SPS agreement itself gives no further guidance. But the meaning of this phrase in article 2.2 was a key point in the Japan varietal testing dispute. The panel said that for an SPS measure to not fail this obligation, there must be an “objective relationship” or a “rational relationship” between the SPS measure on the one hand, and, on the other hand, the scientific evidence presented by the WTO member imposing the measure.

The basic obligation of article 2.2 is elaborated in more detail in article 5, especially article 5.1.

Non-discrimination

The WTO agreements have a strong principle of non-discrimination.

Under the SPS agreement there are three warnings against discrimination contained in the ‘basic rights and obligations’;

- not making a distinction between goods from different countries, unless this is provided for in the agreement;
- not discriminating against imported goods, in favour of locally-produced goods;
- not to use SPS measures as a disguised restriction on international trade.

This concept is also elaborated elsewhere in the agreement, such as in article 5.

Most favoured nation

Importing countries must treat imports from two different countries the same, unless there are valid health reasons for treating them differently. So if a country is importing the same commodity from country A and country B, and country A and country B do not have significantly different pest or disease statuses, the importing country must apply the same conditions to the commodity from the two countries.

2.3 Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, ...

National treatment and avoiding disguised restrictions on international trade

The same principle applies to discrimination between imports and domestic production. If a country is importing a commodity from country A which is also produced domestically, and country A and the importing country do not have significantly different pest or disease statuses, the importing country cannot apply more strict conditions to the imported commodity than it does to domestic production.

To do so would be a disguised restriction on international trade.

That means, that an importing country cannot impose SPS measures on imported commodities that are not imposed, by law, on that commodity produced domestically. If farmers in the importing country are 'encouraged' or 'advised' to carry out some treatment against a pest or disease, the importing country cannot 'require' that treatment on the same commodity imported from another country.

2.3 including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

Consistency with GATT 1994

The agreement clearly states that if a country's SPS measures meet the requirements of the SPS agreement, they fulfil that country's obligations under the 'umbrella' WTO agreement: GATT 1994.

2.4 Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

Summary

The fundamental principles of the SPS agreement are set out as 'basic rights and obligations', contained in article 2 of the agreement:

- National sovereignty is preserved. WTO members have the right to protect their human, animal or plant health. But only if the way they achieve this protection is consistent with the SPS agreement.
- SPS measures must be necessary, based on scientific principles, and not maintained without scientific evidence.
- WTO members must not use SPS measures to discriminate: between countries, and between imported and domestically-produced goods.
- SPS measures that are consistent with the SPS agreement are consistent with GATT 1994.

Specific provisions of the agreement need to be discussed with those fundamental provisions in mind.

NEXT: assessment of risk

OTHER PROVISIONS

Assessment of risk

WTO members are obliged to ensure that their sanitary measures are based on an assessment of risk; in New Zealand we call the whole process "risk analysis".

Risk analysis is a fast-evolving science. It helps regulators assemble data in a thorough and consistent way, so their decisions can be made on a sound technical basis. Anyone affected by a decision is entitled to see the assumptions and decisions made in developing sanitary measures.

SPS measures must be based on an assessment of risk, 'as appropriate to the circumstances'.

5.1 Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

The WTO appellate body in the EC hormones case said that for an SPS measure to be "based on" a risk assessment, there had to be a "rational relationship" between the SPS measure and the risk assessment.

Other points from article 5.1:

There is no obligation for the WTO member imposing the measure to carry out the risk assessment; they are able to use or adapt a risk assessment done by another WTO member or an international organisation.

The SPS agreement points us to the risk analysis techniques developed by relevant international organisations. These organisations techniques are:

- for specified aspects of food safety, the Codex Alimentarius Commission.
- for animal health and animal diseases that affect humans (zoonoses), the OIE or the world organisation for animal health.
- for plant health, the standards developed under the auspices of the International Plant Protection Convention (IPPC).

What is a risk assessment?

There are two definitions of 'risk assessment' in the SPS agreement:

Risk assessment for food-borne risks

Annex A, paragraph 4, second phrase

Risk assessment - the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

The dispute panel in the EC hormones case said that a food safety risk assessment for humans must:

- identify the adverse effects on human health (if any) arising from the presence of the additives, contaminants, toxins or disease-causing organisms in the commodity of concern (in this case, beef from the US and Canada), and
- if any such adverse effect exists, evaluate the potential or probability of occurrence of these effects.

What should be taken into account in food-safety risk assessments?

When carrying out a risk assessment, a WTO member is obliged to take into account a range of factors (article 5.2):

- available scientific evidence;
- relevant processes and production methods (e.g., for animal or plant products);
- relevant inspection, sampling and testing methods (in both the importing and exporting countries);
- prevalence of specific diseases or pests (in both the importing and exporting countries);
- existence of pest- or disease-free areas (in both the importing and exporting countries);
- relevant ecological and environmental conditions (in both the importing and exporting countries); and
- quarantine or other treatment (in both the importing and exporting countries).

The appellate body in EC hormones stated that this is not a closed list: other factors related to the risks could be considered.

Risk assessment for pest or disease risks

The second type of risk assessment defined in Annex A, paragraph 4 of the SPS agreement is:

Risk assessment - The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences;

The dispute panel in the case of Australia salmon outlined what this means. A risk assessment dealing with pests or diseases must:

- Identify the organisms (pests or diseases) whose entry, establishment or spread the WTO member wishes to prevent.
- Identify for those organisms the associated potential biological, economic and environmental consequences of entry, establishment or spread.
- Evaluate the likelihood of the entry, establishment and spread of those organisms, and the associated potential biological, economic and environmental consequences.
- Evaluate how the sanitary or phytosanitary measures that might be applied would affect the likelihood of the entry, establishment or spread of those organisms.

What should be taken into account in pest or disease risk assessments?

When carrying out a risk assessment for pest or disease risks, a WTO member is obliged to take into account the same range of factors as for a food safety risk assessment (article 5.2):

- available scientific evidence;
- relevant processes and production methods (e.g., for animal or plant products);
- relevant inspection, sampling and testing methods (in both the importing and exporting countries);
- prevalence of specific diseases or pests (in both the importing and exporting countries);
- existence of pest- or disease-free areas (in both the importing and exporting countries);
- relevant ecological and environmental conditions (in both the importing and exporting countries); and
- quarantine or other treatment (in both the importing and exporting countries).

Remember this is not a closed list: other factors related to the risks could be also considered.

Economic factors to be taken into account

When assessing risks and deciding on the SPS measures needed to reduce that risk to an acceptable level, importing countries must take several economic factors into account (article 5.3):

- the potential loss of production or sales following entry, establishment or spread of a pest or disease;
- the costs of control or eradication in the importing country;
- the relative cost effectiveness of alternative ways of limiting risks.

Economic factors that can not be taken into account

An importing country can not take into account:

- the effect on the local industry of the importation of the product;
- the net national benefit of the importation.

This is because SPS measures must be:

- to manage the risks to human, animal or plant health;
- as least trade-restrictive as possible

Review of the two types of risk assessment

Assessments of food-borne risks must evaluate the potential for adverse effects on human or animal health.

Assessments of disease or pest risks must evaluate the likelihood of entry, establishment or spread of an organism, and the associated potential biological and economic consequences.

Benefits of risk assessment

Using risk assessment is an obligation, but it has benefits too. A risk assessment allows a WTO member to:

- justify and defend its decisions;
- prioritize resources in developing SPS measures, to the areas where risk is greatest;
- view risk objectively and realistically;
- identify research and information needs;
- evaluate the decisions of other WTO members;
- identify technical points of difference between two WTO members.

PREVIOUS: basic rights and obligations

NEXT: choice of an SPS measure

OTHER PROVISIONS

Choice of an SPS measure

Given a choice, members must choose the sanitary measure which is least restrictive on trade.

5.6 ... when establishing or maintaining sanitary or phytosanitary measures ... Members shall ensure that such measures are not more trade-restrictive than required ... taking into account technical and economic feasibility

And risks related to trade from different WTO members must be managed consistently. WTO members must avoid unjustifiable distinctions between levels of sanitary or phytosanitary protection applied to different situations, for example with imports from different countries with similar health status (article 5.5).

Article 5.5 is a difficult provision to understand. However, the SPS committee approved guidelines to “further the practical implementation of this provision”.

PREVIOUS: assessment of risk

NEXT: harmonisation

OTHER PROVISIONS

Harmonisation

'Harmonisation' refers to WTO members using the same SPS measures, by aligning their measures with international standards.

This is mandated in article 3.

3.1 To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

The "relevant international organisations" are:

- for specified aspects of food safety, the Codex Alimentarius Commission.
- for animal health and animal diseases that affect humans (zoonoses), the OIE or the world organisation for animal health.
- for plant health, the standards developed under the auspices of the International Plant Protection Convention (IPPC).

Exceptions to harmonisation

But a WTO member can deviate from an international standard, in certain circumstances.

3.3 Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

What does this mean? There are two situations when a WTO member can introduce an SPS measure that will give a higher level of protection would be given by an international standard:

- either if there is scientific justification, or
- because a risk assessment shows a higher standard is necessary to meet the member's appropriate level of protection.

The appellate body in the case of EC hormones stated that in both cases the requirements of article 5 must be met.

PREVIOUS: choice of an SPS measure
NEXT: acting in the face of uncertainty

OTHER PROVISIONS

Acting in the face of uncertainty

Remember the basic right of article 2.2:

2.2 Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

What is the exception provided for in article 5.7?

5.7 In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

The panel in the case of Japan varietal testing examined this requirement. They found it had four cumulative elements.

A WTO member is allowed to provisionally adopt an SPS measure if:

- the measure is imposed in respect of a situation where “relevant scientific evidence is insufficient”; and
- the measure is adopted “on the basis of available pertinent information” (so there still has to be real evidence of risk).

If a WTO member does this, there are two obligations:

- it must “seek to obtain the additional information necessary for a more objective assessment of the risk (it must look for the information necessary), and;
- “review the sanitary or phytosanitary measure within a reasonable period of time”.

What constitutes a “reasonable period of time”? The panel in this case did not decide that, but said it would be determined on a case-by-case basis.

PREVIOUS: harmonisation

NEXT: adaptation to regional conditions

OTHER PROVISIONS

Adaptation to regional conditions

Because of differences in climate, pest or disease status or food safety conditions, it is not always appropriate to impose the same SPS measures on products coming from different countries. So SPS measures may vary, depending on the country of origin of the animal, plant or food product concerned. In fact SPS measures **must** take into account the health status of the origin of the product.

But it is not the 'country' of origin, but the health characteristics of the 'area' of origin, that is important. Sanitary or phytosanitary measures must take account of demonstrable regional variations in health status in the 'area' from which the product has come. An 'area' can be a country, part of a country or parts of several countries. An 'infested country' doesn't mean there is the same health situation in every part of it.

6.1 Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - from which the product originated ...

What does this mean in practice?

An example would be the importation of cattle to New Zealand from Australia. The disease bluetongue is present in Australia but not in New Zealand. But bluetongue requires certain insect vectors for transmission, which are present in the warmer areas of Australia.

It would not be appropriate for New Zealand to have the same conditions for cattle from all of Australia. So instead New Zealand has two different sets of import conditions for cattle from Australia: one for animals that have lived below latitude 26° south for all their lives, and one for animals that have lived north of latitude 26° south (and thus exposed to the risk of carrying bluetongue) for some of their lives.

So New Zealand has adapted its sanitary measures to the "sanitary characteristics of the area" (part of Australia, not the whole country) from which the product originates.

Conditions for the area of import

But it is not only the area of origin that is important. Article 6.1 goes on to say

6.1 Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - ... to which the product is destined. [emphasis added]

An example would be exporting honey from New Zealand to Australia. The disease chalkbrood is endemic throughout New Zealand, and in the eastern states of Australia. But it is apparently absent from Western Australia. So Australia sets different conditions for the import of honey from New Zealand to Western Australia, than it does to other states.

Australia has adapted its sanitary measures to the "sanitary characteristics of the area (part of Australia, not the whole country) ... to which the product is destined".

What factors should be considered?

What evidence does an importing country need before it can adapt its measures to regional conditions within its borders? What evidence does an exporting country need before it can ask the importing country to adapt its measures to regional conditions within the exporting country?

The SPS agreement sets out in article 6.1 some things that can be considered; this is not a complete list:

- the level of prevalence of specific diseases or pests;
- the existence of eradication or control programmes, and;
- appropriate criteria or guidelines which may be developed by the relevant international organizations.

The SPS agreement specifically calls attention to pest-free or disease-free areas, or areas where pests or diseases have low prevalence. In article 6.2, the agreement says that such areas shall be determined on a range of factors; again, this is not a complete list:

- geography;
- ecosystems;
- epidemiological surveillance, and;
- the effectiveness of sanitary or phytosanitary controls.

And if an exporting country wants an importing country to recognise its claim for pest- or disease-free areas, according to article 6.3 it has to:

- provide the necessary objective evidence to demonstrate to the importing member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence;
- give reasonable access to the importing member for inspection, testing and other relevant procedures.

Recognition of regional conditions is determined bilaterally, after all these issues are discussed and any necessary evidence is provided. (Sometimes this concept is called 'regionalisation'.)

PREVIOUS: acting in the face of uncertainty

NEXT: choosing alternative measures

OTHER PROVISIONS

Choosing alternative measures

An importing country's desire to protect itself from particular risks can be achieved in various ways.

Least trade restrictive

From the range of measures that are available to reduce risk to the level the importing country wants — assuming they are technically and economically feasible — the importing country should select those that restrict trade as little as possible (article 5.6).

Equivalence

The principle of equivalence has the potential to save New Zealand millions of dollars per year, in making it more cost-effective for exporters to produce safe food to the satisfaction of importing countries.

If an exporting country can come up with alternative measures that suit it better, provided they deliver the same level of health protection, they should be accepted as equivalent (article 4.1). (This concept is called equivalence).

4.1 Members **shall** accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, 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.

The agreement recognises that equivalence will be worked out bilaterally, or on a regional basis. It puts an obligation on members to discuss this.

4.2 Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

Accepting equivalent measures ensures that protection is maintained, but that consumers have access to the greatest quantity and variety of safe foodstuffs, that producers have access to safe inputs, and that healthy economic competition is permitted.

PREVIOUS: adaptation to regional conditions

NEXT: explaining and reviewing SPS measures

OTHER PROVISIONS

Explaining and reviewing SPS measures

What happens if an exporting country is not satisfied with an SPS measure imposed by an importing country? The first step is to ask for an explanation of why the measure has been imposed.

5.8 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.

An explanation of the reasons for a measure should demonstrate how it is justified by the provisions of the SPS agreement, including that the SPS measure is:

- applied only to the extent necessary to protect against defined risks;
- based on scientific principles and evidence;
- based on a risk assessment;
- not used to discriminate against imported goods in favour of domestically-produced ones;
- not used to discriminate against between other countries;
- and generally applied consistently with the SPS agreement.

In order to give such an explanation, the importing country may have to review the SPS measure, and change it if necessary.

PREVIOUS: choosing alternative measures

NEXT: checking and inspection procedures

OTHER PROVISIONS

Checking and inspection procedures

When imported goods arrive in a country, there are usually some procedures for checking that they comply with the SPS measures the importing country has negotiated with the relevant exporting country. It is important that these procedures are not more than is necessary, and are not used to discriminate against imports in favour of local goods.

Annex C sets out disciplines on procedures used by the importing country to check compliance with its SPS measures.

Procedures to check that imports comply with SPS measures should be:

- limited to what is necessary;
- the same as for domestic products;
- done without undue delay;
- open and transparent (especially with respect to the time taken).

PREVIOUS: explaining and reviewing SPS measures

NEXT: responsibilities for implementation

OTHER PROVISIONS

Responsibilities for implementation

The members of the WTO are states or separate customs territories with full autonomy in their external trade. Members are fully responsible for fulfilling all obligations in the SPS agreement (article 13).

What about provincial or other subnational governments? Central governments are responsible to “formulate and implement positive measures” to see that provincial administrations observe the agreement (article 13). Central governments should also take reasonable measures to ensure compliance by non-governmental organisations (article 13).

PREVIOUS: checking and inspection procedures

NEXT: participation in international organisations

OTHER PROVISIONS

Participation in international organisations

WTO members should play a full part in relevant international organisations, within the limits of their resources (article 3.4).

The relevant international organisations are those recognised as competent to develop international standards:

- the Codex Alimentarius Commission for relevant food safety standards;
- the OIE or world organisation for animal health for standards concerning animal health and animal diseases that affect humans;
- organisations working under the International Plant Protection Convention for phytosanitary standards.

Participation has its benefits. By taking part in the organisations, countries have the opportunity to influence the way standards are set, and help ensure that international standards take account of the conditions in their territory. They also have an excellent opportunity to learn about SPS standards and systems.

PREVIOUS: responsibilities for implementation

NEXT: the SPS committee

OTHER PROVISIONS

The SPS committee

A committee was set up under the SPS agreement: the Committee on sanitary and phytosanitary measures, or the SPS committee.

It is made up of representatives of all WTO members and there are also some observer countries and organisations.

It has a mandate to “provide a regular forum for consultations”, and to do anything “necessary to implement the provisions of this agreement and the furtherance of its objectives”.

Activities

It works proactively:

- It has certain specific projects mandated, but otherwise holds consultations on issues that members think it worth discussing to help implement the SPS agreement.
- It also holds training sessions on specific issues, especially for developing countries and new WTO members (e.g. transparency - November 1999, and risk analysis - June 2000).

It also works on specific issues:

- Members spend much of the time raising specific trade concerns they have with other members.

Preliminary role in dispute settlement

Discussion of a trade concern can go on for a year or two in the committee. This is the first step in resolving trade disputes.

If this doesn't fix the problem, the committee can play another role. The chairman can mediate *ad hoc* consultations (this is usually on bilateral issues).

PREVIOUS: participation in international organisations

NEXT: WTO dispute settlement procedure

OTHER PROVISIONS

WTO DISPUTE SETTLEMENT PROCEDURE

The WTO's formal dispute settlement provisions, as set out in the 'Dispute Settlement Understanding' apply to consultations and disputes between WTO members under the SPS agreement (article 11.1).

WTO members are committed not to taking unilateral action, but to seek recourse to problems in the multilateral dispute settlement system.

The aim of the WTO dispute settlement system is "to secure a positive solution to a dispute". So the first stage is consultations to try and find a mutually agreeable solution.

If this does not work, a panel of qualified people can be established. The terms of reference and procedures for the panel are set out in the WTO dispute settlement procedures. The panel can find that the SPS measure under dispute are inconsistent with the SPS agreement, and recommend the WTO member bring the measure into conformity with the agreement.

Panel decisions can be appealed against on points of law. The appeals are heard by a standing Appellate Body established by the WTO. The decision of the Appellate Body is binding.

The dispute settlement understanding emphasises that "prompt compliance with (dispute settlement) recommendations or rulings ... is essential to ensure effective resolution of disputes to the benefit of all members".

There are procedures for retaliation or compensation if the member complained about does not comply with a dispute settlement ruling. But these should be seen as last resorts.

PREVIOUS: the SPS committee