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WORLD TRADE ORGANIZATION

3.9 SPS Measures



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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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WHAT YOU WILL LEARN

The *Agreement on the Application of Sanitary and Phytosanitary Measures*, commonly referred to as the *SPS Agreement*, is one of the WTO agreements which resulted from the Uruguay Round of Multilateral Trade Negotiations, held from 1986 to 1993 under the auspices of the GATT. The *SPS Agreement* is contained in Annex 1 A of the 1994 *Marrakesh Agreement Establishing the World Trade Organization* and came into force on 1 January 1995. This Agreement was negotiated in tandem with the *Agreement on Agriculture*, as negotiators wanted to ensure that the hard-won liberalization in the agricultural sector achieved by the *Agreement on Agriculture* would not be undermined by the misuse of health regulations for protectionist purposes. Thus, the *SPS Agreement* creates disciplines applicable to measures for the protection of human and animal life or health (sanitary measures) and of plant life or health (phytosanitary measures) from certain, defined risks. It aims to balance the right of Members to take measures to protect health in their territories from risks contained in traded food and agricultural products, with the goal of trade liberalization in the food and agricultural sector. Generally speaking, the *SPS Agreement* thus aims to reconcile free trade with legitimate concerns for the life and health of humans, animals and plants. The *SPS Agreement* is of particular importance for developing countries, many of whom are primary agricultural exporters and depend on access to foreign markets for their agricultural products for much of their foreign revenue.

This Module provides an overview of the substantive and procedural disciplines contained in the *SPS Agreement*, and sets out the jurisprudence of the panels and Appellate Body of the WTO in respect of this Agreement. It also pays particular attention to the position of developing countries under the *SPS Agreement*.

The first Section of this Module deals with the scope of application of the *SPS Agreement* and describes its relationship to other relevant WTO agreements. This will enable the trainee to identify when the *SPS Agreement* is applicable to a particular factual situation. The second Section lays out the basic principles of the *SPS Agreement*, namely the right of Members to take SPS measures and the basic disciplines surrounding the exercise of this right, as well as the underlying goal of harmonization of SPS measures. The third examines the risk analysis obligations that Members must comply with when imposing SPS measures. This section encompasses both risk assessment obligations and risk management disciplines and devotes some attention to the use of provisional measures in cases of scientific uncertainty. The fourth Section deals with the remaining substantive provisions of the *SPS Agreement*, namely the rules on the recognition of equivalence and adaptation to regional conditions. The fifth is devoted to the institutional and procedural rules contained in the *SPS Agreement*, including those on the role of the SPS Committee and those governing dispute settlement under the *SPS Agreement*, to the extent that these differ from the general dispute settlement rules addressed in Modules

3.1 to 3.4. The sixth Section specifically addresses the special provisions for developing countries in the *SPS Agreement*. This Module concludes with a set of hypothetical case studies, designed to test the reader's knowledge and illustrate the practical application of the theory learnt. Finally, some recommendations are made for further reading.

1. SCOPE OF APPLICATION OF THE SPS AGREEMENT

On completion of this section the reader will be able:

- to identify the circumstances in which the *Agreement on the Application of Sanitary and Phytosanitary Measures*, or the *SPS Agreement*, applies to a factual situation.
- to explain what is meant by a “sanitary or phytosanitary measure” under this Agreement and be able to determine whether the Agreement applies to a particular dispute.
- to understand the relationship between the *SPS Agreement* and other WTO Agreements relevant in this area.

1.1 Substantive Scope of Application

Article 1.1 SPS

Article 1.1 of the *SPS Agreement* defines the scope of application of the Agreement. It provides:

This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.

Thus, as stated by the Panel in *EC - Hormones*, there are two requirements for the *SPS Agreement* to apply, namely that the measure in dispute is an SPS measure and that the measure, directly or indirectly, affects international trade.¹

1.1.1 Definition of an SPS Measure

Article 1.2 and Annex A.1 SPS

Not all measures aimed at public health protection are SPS measures for purposes of the *SPS Agreement*. Article 1.2 points to Annex A of the *SPS Agreement* for the definitions of the terms used in the Agreement. Paragraph 1 of Annex A, defines SPS measures as follows:

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;



¹ Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones)* (“EC – Hormones (US)”), complaint by the United States, WT/DS26/R/USA, DSR 1998:III, 699, para. 8.38; and Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones)* (“EC – Hormones (Canada)”), by Canada, WT/DS48/R/CAN, DSR 1998:II, 235, para. 8.39.

(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. Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

It is clear from the above definition that the question whether a measure falls there under depends on its *purpose or goal*. Broadly speaking, the definition covers measures aimed at protecting humans and animals from food-borne health risks and protecting humans, animals and plants from risks from pests or diseases. Measures addressing other health risks relevant for international trade (such as a ban on asbestos-containing products) and measures not directly aimed at health protection, but rather at consumer information (such as a labelling requirement for biologically grown vegetables), do not fall under this definition. Such measures would thus not be subject to the disciplines of the *SPS Agreement* but be dealt with under other WTO rules.

While this has not yet been subject to dispute settlement, it would appear that the *purpose or goal* of a measure would be determined objectively (for example by examining the formulation of the measure, its structure or design, and its effect), rather than by trying to determine the subjective aim of the Member imposing it. The latter would have the clearly unintended result of enabling a Member to evade the disciplines of the *SPS Agreement* by denying that the purpose of its measure is one of those falling within the Annex A.1 definition.

If the measure at issue is aimed at one of the goals mentioned in points (a) to (d) of the Annex A.1 definition, it is an SPS measure for the purposes of the

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