

Sanitary and Phytosanitary Measures

Introduction

- With the advent of the WTO, tariffs have progressively reduced. The prevalence of Plurilateral Trade Agreements (PTAs) have further reduced tariff barriers.
- On the other hand, the use of Non-tariff measures or NTMs have significantly increased over the years.
- Exporters face significant problems due to NTMs. While tariffs can be easily identified and quantified from WTO Schedule of concessions, NTMs are difficult to address.
- SPS measures account for the largest number of NTMs.
- While SPS measures help protect humans, animals and plants against health and safety risks, they are not always defined or implemented in a transparent manner.

SPS measures under the WTO and PTAs

- SPS or Sanitary and Phytosanitary measures are generally any measures taken to address the following issues:
 - Human/animal- food borne risks
 - Human/animal/plant- risks from pests or diseases
 - Prevent or limit “other damage” from pests.
- The **WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)** governs the application of all such measures.
- Many **PTAs also contain SPS related provisions** aiming to balance a country’s sovereign right to protect national health and safety and the objective of facilitating fair market access.
- To understand the nature and operation of SPS measures across PTAs, we must first take a closer look at the SPS Agreement.

The WTO SPS Agreement

- The SPS agreement entered into force with the establishment of the WTO.
- It concerns the application of food safety and animal and plant health regulations.
- Aims to balance the regulatory autonomy to evade health hazards and promote food safety with liberation of trade.
- SPS Agreement allows WTO members to set their own standards. However such standards must:
 - Be based on scientific findings
 - Be applied only to the extent that they are necessary to protect human, animal or plant life or health;
 - Should not unjustifiably discriminate between countries.

Scope of the SPS Agreement

- SPS measures as defined in Annex A of the Agreement, is 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*.

Scope of the SPS Agreement (contd.)

- Sanitary or phytosanitary (SPS) 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.

Objective of the SPS Agreement

No Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade.

Overview of the SPS Agreement

Article	Description
1	General Provisions
2	Basic Rights and Obligations
3	Harmonization
4	Equivalence
5	Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection
6	Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease prevalence
7	Transparency

Overview of the SPS Agreement (Contd.)

Article	Description
8	Control, Inspection and Approval Procedures
9	Technical Assistance
10	Special and Differential Treatment
11	Consultations and Dispute Settlement
12	Administration
13	Implementation
14	Final Provisions
Annex	
A	Definitions
B	Transparency of sanitary and phytosanitary regulations
C	Control, inspection and approval procedures

Art 2 of the SPS Agreement

- Members have right to take SPS measures consistent with Agreement.
- Applied only to extent necessary to protect human, animal, or plant life or health and must be based on scientific principles.
- Can't be maintained without sufficient scientific evidence except Article 5.7 on precaution.
- Measures need to be non-discriminatory and must not be disguised restrictions to trade.

Art 3 : Harmonization

- To harmonize Members shall base their SPS measures on international standards, guidelines or recommendations. Such measures deemed to be necessary and consistent with the SPS agreement.
- A higher level of protection with scientific justification or pursuant to determination of appropriate level of protection (ALOP) based on science-based risk assessment (Article 5) is permitted.
- Encourage the members to participate in the relevant international organisations
 - Food safety: Codex Alimentarius (FAO/WHO)
 - Animal health: International Office of Epizootics (OIE)
 - Plant health: International Plant Protection Convention (IPPC)

Key Message: Harmonization

A member can adopt a SPS measure other than international standards provided such standard is based on scientific evidence or risk assessment (Article 2 & 5).

Art 4 : Equivalence

- Members shall accept the SPS 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:
 - The measures achieve the importing Member's **appropriate level of sanitary or phytosanitary protection.**
 - For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.
- 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.

Art 4 : Equivalence (Contd.)

- It is difficult to prove that the SPS measures of members are equivalent.
- The WTO SPS committee has issued guidelines in this regard (G/SPS/19/Rev.2)
 1. Encourage Codex, OIE and IPPC to develop guidelines for equivalence
 2. SPS Committee to follow recognition agreements, bilateral arrangements
- Importing country should provide its risk assessment or justification for its measure. Respond to requests within 6 months.
- Notify to the SPS Committee when equivalence is recognized.

Art 5 : Risk Assessment and ALOP

Article 5: Assessment of Risk and Determination of the Appropriate Level of Protection (ALOP)

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.

Art 5 : Risk Assessment (Contd.)

• **Factors for Assessment:**

In the assessment of risks, Members shall take into account:

- a) available scientific evidence;
- b) relevant processes and production methods;
- c) relevant inspection, sampling and testing methods;
- d) prevalence of specific diseases or pests; existence of pest- or disease-free areas;
- e) relevant ecological and environmental conditions; and quarantine or other treatment

Art 5 : Risk Assessment (Contd.)

Economic Factors in risk Assessment animal or plant life or health

The potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

- Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.
- Avoid arbitrary or unjustifiable distinctions when determining levels or protection appropriate in different situations if distinctions result in discrimination or a disguised restriction on international trade.
- Members 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.

Art 5 : Risk Assessment (Contd.)

Precaution

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt 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.

May request explanation of SPS measure imposed by another country (if not based on international standard)

Art 6: Adaptation to Regional Conditions

- Measures are to be adapted to regional conditions, including pest- or disease-free areas and areas of low pest or disease prevalence
- Determination is to be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.
- Exporting country is obligated to provide evidence to support claims that regions are pest/disease free and to grant reasonable access

Art 7 and 8 of the SPS Agreement

Article 7: Transparency

Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

Article 8: Control, Inspection and Approval Procedures

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

Art 11: Consultations and Dispute Settlement

- The provisions of the Dispute Settlement Understanding shall apply.
- A panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.
- Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.

SPS Agreement: Developing members' concerns

- Adoption of protectionist trade measures **disguised as precautionary measures** that negatively impact the exports of developing countries.
- From an exporting perspective, the **economic costs** of applying the precautionary principle are a genuine concern developing countries.
- **Risk assessment can be costly** and developing countries may encounter a **lack of capacity** to adopt and implement precautionary measures.
- **Problems regarding provisional measures:** Ambiguous how long a measure may be maintained while keeping its character as 'provisional' – this creates the possibility that insufficiently justified measures **could be maintained for long periods of time.**

Regulating SPS measures under PTAs

- The language of SPS-related provisions in PTAs are based on the WTO SPS agreement.
- In general, they reaffirm members' rights and obligations under the WTO SPS Agreement.
- PTAs may either
 - have a general reference to the WTO SPS agreement (or)
 - have dedicated chapter/paragraphs on SPS measures.
- Most current PTAs follow the second approach.

SPS related provisions in PTAs

- Dedicated SPS provisions under PTAs mostly pertain to:
 - i. Information exchange
 - ii. Cooperation on SPS issues such as inspection, quarantine, capacity building etc.
 - iii. Rules on use of International Standards and Harmonization
 - iv. Establishment of PTA Specific SPS Committees
 - v. Risk Assessment and Equivalence
 - vi. Mutual Recognitions of Standards
- Thus, PTAs often encourage signatories to coordinate SPS measures through a variety of approaches that include basic SPS principles and mutual recognition.

SPS related Provisions in PTAs (Contd.)

- While SPS provisions under the PTAs are based on the WTO SPS agreement, they may not cover all aspects of the multilateral rules.
- SPS provisions under PTAs may give rise to obligations that either:
 - Are **Equivalent to those under the SPS Agreement** (or)
 - **Go beyond the SPS Agreement (SPS-Plus obligations)**: Containing detailed rules on regulatory cooperation or harmonized regulatory process (eg. CPTPP) (or)
 - **Dilute obligations under the SPS Agreement (SPS-minus obligations)**: For Eg. Containing rules less stringent than the Agreement (eg: different definitions of risk assessment) (eg. TFTA, most FTAs by the EU)

Features of EU's FTAs

- Primarily focus on procedural rules.
- Aims to facilitate the application of WTO SPS provisions by
 - Fostering a common understanding of the WTO rules (and)
 - Harmonization of standards
- Focus on technical assistance in SPS issues.
- They rarely have WTO+ commitments.
- Provide an additional forum to settle disputes. (either by WTO dispute settlement or through specific FTA procedures)

SPS Provisions in PTAs: Summarizing

- Only a small number of PTAs contain specific rules on international standards.
 - Such rules are mostly characterized by best endeavor clauses
 - Provisions may call for harmonization to International standards
 - Some PTAs also allow the creation of regional standards
- PTAs generally contain binding provisions on information exchange to promote transparency.
- Most PTAs also contain the general exceptions under GATT Article XX (b) and (g) as part of the SPS chapters.
- Most PTAs use language similar to the WTO SPS agreement for provisions on Risk Assessment.

Concluding Remarks

- Newly concluded PTAs always contain dedicated SPS provisions. Number of SPS Provisions in PTAs are rising in number and complexity.
- New trend: To set up specific SPS Committees under PTAs. Also, establish SPS mechanisms to foster cooperation and mutual recognition.
- Notably, PTAs involving high income economies contain more stringent SPS provisions. For eg. CPTPP.
- Given the cost and human capacity needed to develop, implement, and face SPS barriers, it is important to negotiate North-South PTAs that contain clauses on capacity building and technical assistance.
- Both at multilateral and regional levels, SPS should serve a regulatory objective, and not a covert protectionist purpose.