

Sanitary and Phyto-sanitary Measures (SPS)

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Outline

- Why SPS?
- The Key Question in SPS
- The SPS Legal Discipline
- The Coverage of SPS
- SPS in Today's Mess

Why SPS?

Now that Farm Tariffs are on the Way Out

Link to Farm Trade

- XI.2 GATT: left farm trade outside the GATT disciplines
 - Agreement on Agriculture meant to bring farm trade under GATT
 - Main target was the EU CAP (common agricultural policy)
- SPS originally negotiated in the Agriculture Group
 - SPS was insurance policy that tariff protectionism would not be substituted by **regulatory protectionism**
 - The proxies chosen (and especially **science**) are the insurance policy vs. tendencies to protect domestic producers
 - SPS has strong (but not exclusive) focus on farm trade (foodstuff)

The Key Question in SPS

Untangling De Facto Discrimination

The Key Question in SPS

- How avoid regulatory protectionism
 - In the name of safeguarding a social preference, protect domestic producers from foreign competition
- This is not an easy question to answer
 - Repeatedly courts have failed to develop an intellectually satisfactory test
 - De jure discrimination is like per se in antitrust (a rule)
 - De facto is like rule of reason (a standard not a rule)
- The SPS test on paper
 - The most advanced test put together to detect protectionism

Why is So Difficult?

- An anti-protection legal test cannot be limited to effects
 - Any genuine public health measure will disadvantage some
- There is thus a need to inquire into regulatory intent
 - But inquiry occurs in an asymmetry of information context
 - Incentive of regulator to be non-cooperative (Prisoner's Dilemma)
 - Judge must devise a test to detect intent
 - SPS agreement provides judges with useful proxies

The SPS Legal Discipline

The Most Elaborate Ant-Protectionism Test

How Stop Regulatory Protectionism?

- SPS measures must be
 - in accordance with/based on **international standards**
 - If no appropriate standards, exist, then they must be
 - Based on **scientific risk assessment**
 - Or, if no science exists be adopted on precautionary grounds, and
 - Be **consistent**, and **necessary**, and
 - Applied on **non-discriminatory** basis
 - No distinction between technical regulations and standards: market **access** is **conditional upon** conformity with SPS measures

The Coverage of SPS

Narrower then What it Seems

SPS are Measures Aiming to Protect

- Animal/plant life or health from entry of pests and diseases
 - emerald ash borer, ash trees
- Other damage from entry of pests
 - damage on agricultural land, GMOs
- Human/animal life or health from additives and contaminants
 - hormone-treated beef
- Human life or health from diseases carried by animals/plants
 - avian flu

SPS in Today's Mess

Where Adjudicate?

Not so Dramatic

- Appellate Body is abeyance, so we empanel?
 - Some insurance policy: MPIA; facilitator; ad hoc agreements
 - Number of disputes falls (25.5/year avg. until 1999; 5 since then)
- But majority of SPS disputes do not go to panels
 - STCs (specific trade concerns)
 - 616 STCs (until end 2020); 52 formal disputes
 - Overwhelming majority are settled before SPS Committee
- There is a problem of course
 - But in the realm of SPS it is mitigated because of STCs