U.S. Agricultural Trade Policy: The Issues of SPS and GIs

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Agreement on the Application of Sanitary and Phytosanitary Measures

- The SPS Agreement is the most important agreement covering international trade in food and agricultural products.
- Generally there have been no serious complaints about the fundamental principles and conceptual design of the agreement.

Limitations of the SPS Agreement

- Negotiators were limited by:

-- Time available was completely dictated by the Uruguay Round process;

-- This was the first attempt to develop the key concepts involved.

- Negotiators understood that the SPS concepts would need much elaboration in the future.

Post-Uruguay Round Elaboration

- As envisioned, the language of the SPS Agreement has been elaborated through the case law established by the WTO Dispute Settlement process.
- As one example, in the U.S.-EU Hormones case, the WTO Appellate Body provided important guidance on the relationship between SPS Article 5 and the "precautionary principle."

Application of the SPS Agreement to Issues of Biotechnology

- The SPS Agreement does not specifically mention agricultural biotechnology (GMO's);
- However, the rights and obligations of the SPS Agreement do fully apply to the issues of biotechnology.
- This was confirmed by the WTO dispute settlement case between the European Union and the United States.

Developing Guidelines for Implementation of SPS Measures

- Example of Article 5.5 – achieving consistency in applying the appropriate level of protection.

- WTO SPS Committee later produced "Guidelines to Further the Practical Implementation of Article 5.5."

Challenges for the SPS Agreement: The Politicization of Standards

- Despite the hopes of the SPS negotiators, the international standards-setting process has become somewhat politicized.

- The most prominent example: The approval of the veterinary drug ractopamine at the Codex Alimentarius Commission.

Problems at Codex: The Issue of Zilpaterol

- Zilpaterol is a beta-agonist veterinary drug widely used in U.S. beef production.
- The U.S. wants to begin the process for establishing a Codex standard by having JECFA do a risk assessment.
- The EU is blocking the risk assessment because EU policy does not allow the use of beta-agonists.

Challenge in Practice: Should SPS Decisions Be "Negotiated"?

- Countries should make SPS decisions based on science and the principles of the SPS Agreement.
- SPS decisions should NOT be used as demands or tradeoffs in trade negotiations.
- But often countries use trade negotiations to request attention to specific SPS issues.

Confusion at the Political Level: The SPS Agreement and Sovereignty

- The issue of national sovereignty versus WTO obligations is perhaps raised most often in connection with the SPS Agreement.
- The WTO could never force a country to remove or change an SPS measure.
- However, if a member applies a measure that is not consistent with the SPS Agreement, there may be economic consequences.

Confusion at the Technical Level: SPS and Quality Issues

- The SPS Agreement does NOT cover issues related to the quality of agricultural products.

- Quality issues are generally covered by the WTO Agreement on Technical Barriers to Trade (TBT).

Does the SPS Agreement Cover Environmental Issues?

- WTO case law will help to determine the role of the agreement for environmental issues.

- In the U.S.-EU biotech case, the WTO panel interpreted the SPS definition 1(d) as including damage to the environment.

The SPS Agreement and the Biosafety Protocol

- The SPS Agreement could be viewed as in conflict with the Cartagena Protocol on Biosafety, which has been signed by more than160 countries.

- The Biosafety Protocol explicitly recognizes the precautionary principle and allows countries to limit or prohibit the importation of certain biotech products.

Russia as an SPS Challenge

- Having Russia in the WTO may be one of the major challenges to the integrity of the SPS Agreement.
- The U.S. experience has been that Russia does not appear to be seriously committed to applying the SPS principles.
- There are many examples, including a zero tolerance for ractopamine and salmonella, and the arbitrary delisting of plants.

China as an SPS Challenge

The U.S. believes that China is not acting consistently with the principles of the SPS Agreement.

- U.S. beef prohibited in a manner not consistent with the OIE guidelines on BSE.
- U.S. pork prohibited due to ractopamine despite the Codex standard.
- U.S. apples prohibited for fire blight despite scientific evidence that there is no risk.

Can the SPS Agreement Handle 21st Century Issues?

- The SPS Agreement was written to cover measures used to address the potential risks arising from imported agricultural products.
- It does not have the reach to cover certain issues that some would like to see addressed in trade agreements.
  - -- Animal welfare standards
  - -- Sustainability requirements

How can 21st Century Issues be Addressed?

- Could issues such as animal welfare and sustainability be “legitimate objectives” under the WTO Technical Barriers to Trade Agreement?

- The EU-Korea FTA can provide some insight into how the EU will approach these issues with Japan.

Is the Ractopamine Issue the Greatest Threat to the SPS Agreement?

- Codex has approved residue limits for the veterinary drug ractopamine.
- Therefore the ractopamine limits are “international standards” as defined by the SPS Agreement and the WTO.
- But the EU, Russia, China and others are refusing to accept these standards.

The Ractopamine Dilemma

- The refusal to respect the Codex standards for ractopamine could threaten to undermine the SPS Agreement.

- Furthermore, doubts in the U.S. meat industry could make it more difficult for the U.S. Government to pursue this issue internationally.

SPS Rules in the Trans-Pacific Partnership

- The key concept has been “SPS Plus.”
- “SPS Plus” means essentially that the fundamental principles of the WTO SPS Agreement are to be maintained, but also “strengthened” and “enhanced.”
- The most controversial concept has been the question of “enforceability” of the new SPS rules.

Tobacco Measures in the TPP

- The most contentious SPS-related specific issue in the TPP involves measures to control the trade and use of tobacco.
- The U.S. and Malaysia had proposed a “safe harbor” exemption from challenge for any anti-tobacco measures.
- The U.S. changed its position after pressure from U.S. agriculture.

Japan-U.S. on SPS Issues

- In TPP there will be no major bilateral negotiation between Japan and the U.S. on SPS issues.

- But some SPS issues will be addressed in the Japan-U.S. “parallel process,” as the U.S. has done in other FTA negotiations.

SPS in the Transatlantic Trade and Investment Partnership (TTIP)

- In TTIP, the SPS portion will be the most difficult part of the agriculture negotiation.

- The goal of national leadership to conclude TTIP relatively quickly is not consistent with U.S. agriculture's desire to resolve all major SPS issues with the EU.

U.S.-EU SPS Problems

The most prominent U.S.-EU SPS issues include:

- Hormone use in beef production;
- A wide range of GMO-related issues;
- Ractopamine (for beef and pork);
- Poultry production rinses.

The Precautionary Principle

- The longstanding controversy regarding science and the precautionary principle, led primarily by the U.S. and EU, has been the most important conceptual debate in the evolution of the SPS Agreement.
- However, it seems clear that the precautionary principle per se will not be the subject of negotiations in the TTIP.

Geographical Indications

- The issue of geographical indications (GIs) has been an EU priority in agricultural trade negotiations for many years.

- The essential question: Which GIs should be legally protected?

U.S. and EU: Differing Perspectives on Protecting GIs

- EU: Names used by the original European producers should be protected, both in the EU and in EU export markets.

- U.S.: Common (generic) names that are widely used in commerce should not be protected or limited.

The EU Trade Agenda for GIs

- The EU has used the opportunity of its various trade negotiations to advance its interest in protecting European GIs.
- The most recent examples have been the EU-Korea agreement, and now EU-Canada.
- The U.S. is strongly opposed to the EU position that domestic producers in EU export markets should cease using the common/generic GIs for their products.

A Solution for the GI Issue?

- The U.S. private sector is proposing the approach of differentiating by GI type, with compound names being protected, but not important common/generic names.

- Example (same cheese):

  -- parmigiano reggiano (protected)

  -- parmesan (not protected)

A Global Solution for GIs?

- The TTIP is likely to provoke the most intense negotiation yet on GIs, since the two major protagonists are involved.
- However, if a compromise can be found, it might be the basis for a global approach.
- In any event, Japan should certainly expect to be confronting the GI issue as it enters its negotiations with the EU.

Perspectives on the WTO Sanitary and Phytosanitary Agreement And Current SPS Negotiations

Discussion Paper by Jim Grueff,
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The negotiations to develop the WTO Agreement on the Application of Sanitary and Phytosanitary Measures were completed almost exactly 20 years ago. The agreement was written essentially by a small group of negotiators working with an extremely capable chairperson from the GATT Secretariat. At the time the negotiators believed that their work would be important, but for several reasons the SPS Agreement has turned out to be even more important than anticipated.

The Importance of the WTO SPS Agreement

With almost 19 years of the implementation of the SPS Agreement to evaluate, it can be said that the agreement has, at least implicitly, been judged to be conceptually sound. There have been relatively few complaints regarding the fundamental principles of the agreement, such as science-based decision making, the use of risk assessments, and the legal incentives for the harmonization of standards.

Moreover, the changing composition of agricultural trade has increased the relevance of the SPS Agreement. Products such as meats and consumer-ready foods have continued to take a higher value of world trade as compared with bulk commodities like grains and soybeans. These high-value products are much more likely to be the subject of health-related disputes, and therefore now by far most of the government-to-government agricultural trade issues are in the SPS area. By contrast, the multilateral commitments regarding the "traditional" barriers of tariffs and tariff-rate quotas have in effect been frozen in place since 2000, when the developed countries completed the implementation of their Uruguay Round obligations for these measures. Disputes in this area are much less frequent than SPS problems.

Furthermore, the SPS Agreement covers the issues of biotechnology. Ironically, however, during the original SPS negotiations the plant breeding technology known as genetic engineering, genetic modification, or biotechnology (GMOs) was not widely known or understood, including among the trade officials of developed countries. This explains the complete absence of any mention of the issues of biotechnology in the SPS text. As the products of biotechnology, especially GMO corn and soybean varieties, begun to be successfully commercialized, there was a debate as to whether GMO-related issues were covered under the SPS Agreement.

One argument against the application of the SPS Agreement to the issues of biotechnology was that measures to block imports of GMOs were not intended to protect against "pests, diseases, additives or contaminants" or other such threats to health that are included in the agreement's definition of an SPS measure. On the other hand, proponents of anti-GMO measures maintained that they were necessary for reasons of protecting the

health of consumers and the environment, which would seem to bring them under the SPS Agreement. WTO dispute settlement brought a decisive end to this debate by ruling in the U.S-EU case on biotech regulation that the SPS Agreement does cover the trade-related issues of genetic engineering.

Finally, the SPS Agreement was designed to be dynamic in the sense that it recognizes that "sound science" is constantly changing and evolving and never static. In other words, it was important that no specific numerical standards from the mid-1990s were included, but rather international standards were defined as the current standards and guidelines of the three standard-setting organizations that are named in the text of the agreement (the Codex Alimentarius Commission, the World Organization for Animal Health, and the International Plant Protection Convention). This has allowed the SPS Agreement to remain relevant even as the pace of scientific progress continues to accelerate.

Constraints in Developing the Agreement

Although the SPS talks were in effect a "stand-alone" negotiation, the SPS Negotiating Committee was completely subordinate to the overall process of the Uruguay Round negotiations. This was especially relevant with regards to the constraints of time available to develop the agreement. The overall negotiating process dictated the time available and the deadlines to be met.

Another constraint was the "newness" of the conceptual framework that was being established. Although certain ideas were relatively straightforward, such as transparency and notification requirements, other fundamental principles were much more difficult to express. Some of the most challenging and complicated concepts included, for example, achieving consistency in the application of the appropriate level of SPS protection, and defining the legal obligation to harmonize with international standards.

In view of these circumstances, the negotiators understood that there were real limits to the extent to which many of the key concepts could be developed. Therefore it was anticipated that in the future many of the SPS concepts would be clarified and further defined through the use of the WTO dispute settlement process. This in fact has happened. As one example, in reviewing the panel findings in the U.S.-EU hormones case, the WTO Appellate Body provided important guidance regarding the relationship between SPS Article 5 and the precautionary principle. (For instance, the Appellate Body said that the precautionary principle cannot supersede the explicit risk assessment requirements in SPS Article 5.1.)

Although the negotiators established the permanent SPS Committee, they did not necessarily envision that this committee would be helpful in interpreting some of the most difficult SPS provisions. However, the committee has done this, such as negotiating the "Guidelines to Further the Practical Implementation of Article 5.5."

Challenges for the SPS Agreement

Although the SPS Agreement has performed well so far, WTO members who want to use the agreement in good faith and for its intended purposes are facing many challenges today. One of these challenges is the politicization of the designated standards-setting organizations, especially at the Codex Alimentarius Commission. The clearest example of this was the eventually successful effort of the U.S. Government to establish a Maximum Residue Level for the beta-agonist ractopamine. Far from the original idea of Codex as a forum where decisions are made by unanimous consent and purely on the basis of scientific evidence, the U.S.-led initiative to approve ractopamine became an effort of lobbying for votes and it took many years. Finally in 2012 the ractopamine MRL was approved by a vote of 69-67.

Another example from the Codex involves the beta-agonist zilpaterol, which is widely used in the U.S. as a feed additive for cattle to promote leaner beef production. With the eventual goal of establishing an MRL for zilpaterol, the U.S. has requested that the Joint Expert Committee on Food Additives (JECFA) of Codex perform a risk assessment. The EU, however, has opposed this request, stating that EU policy does not allow the use of beta-agonists in meat production, and therefore starting the process (with the risk assessment) for a zilpaterol MRL would be of no value. From the U.S. perspective, this issue represents the core of its disagreement with the EU, i.e., the EU is rejecting zilpaterol on the basis of its risk management approach without seeing the results of a scientific risk assessment.

Another challenge for the SPS Agreement is one that is almost never discussed publicly. It is the matter of maintaining the integrity of SPS decision making and not allowing it to become a tradeoff in negotiating bilateral trade deals. In other words, SPS measures should be based on science and the principles of the SPS Agreement, and not used as bargaining chips to achieve other objectives that countries may have.

It appeared that such a tradeoff may have occurred recently between the U.S. and Taiwan, as inferred from public reporting. The U.S. had been pressuring Taiwan, without success, to remove its ban on ractopamine use in beef, which was blocking U.S. exports to that market. It seemed that the U.S. then linked the resumption of a broad trade dialogue with Taiwan to the ractopamine issue. Thereafter Taiwan approved ractopamine for beef imports and the U.S. agreed to resume the bilateral trade talks. This was especially curious because Taiwan continued its prohibition on the use of ractopamine in pork production.

This is not to say that any holding of SPS discussions simultaneously with a market access negotiation is not appropriate behavior from an SPS perspective. For example, a country with an export interest may ask its negotiating partner to prioritize scarce SPS resources for an import risk assessment of a particular product. This is the concept of "moving to the front of the line." As long as the exporting country is not making a positive outcome from the SPS decision making process a condition for a tradeoff, this would seem to be a legitimate tactic within a negotiation. On the other hand, in reality it is likely that only a positive outcome would be acceptable to the requesting country. This

discussion might have some relevance for the SPS portion of the "parallel process" negotiations that Japan and the U.S. will conduct simultaneously with the TPP talks.

Unfortunately another challenge for the SPS Agreement appears to be the recent entrance of Russia into the WTO. There is considerable evidence that key officials in the Russian Government do not have a serious regard for the fundamental principles of the SPS Agreement. Russian SPS measures provide numerous examples, including zero tolerances for salmonella and listeria, near-zero tolerances for tetracycline antibiotics (inconsistent with Codex standards), non-scientific certification for imported dairy products, and the apparently arbitrary de-listing of foreign meat plants as suppliers of the Russian market. There is reason to believe that some important SPS-based import decisions by the Russians in recent years have had the primary objective of supporting the development of the Russian food sector rather than protecting the health of Russian consumers and agriculture.

China has also proven to be a challenge regarding non-compliance with the SPS Agreement. Examples include Chinese bans on beef imports using questionable BSE-related measures, prohibitions on apple imports that ignore the existing science of plant health, and zero tolerances for salmonella and listeria. For those who understand that SPS compliance is important for the global food trading system, it is discouraging to see such behavior from the rising economic superpower.

Limitations of the SPS Scope of Coverage

Over the two decades of its existence the SPS Agreement has not changed, but the desire for the agreement itself or SPS-like agreements to cover other issue areas has been apparent. One of these is trade-related environmental issues. Although, for example, the WTO panel in the U.S.-EU biotech case ruled that the SPS Agreement can apply to the protection of the environment, it certainly is not primarily an environmental agreement. Moreover, the relationship between the SPS Agreement and the Biosafety Protocol is not well-defined, and in the event of a trade dispute it would not be at all clear which agreement would have precedence over the other.

In another issue area, many would like to see trade rules used as a means to achieve important animal welfare objectives. Although this is a legitimate goal, it would be difficult to conceive of a meaningful role for the SPS Agreement in achieving it. Similarly, it would be hard to imagine a role for the SPS Agreement in promoting the sustainability of agricultural production.

Such a discussion leads to some broader thoughts. One is that unfortunately the WTO is not an organization whose members are capable of developing or adapting trade rules to address constantly evolving problems and objectives. (And it may be unrealistic to think that any multilateral organization could do this.) Another thought is that any attempts to address issues such as animal welfare should seek to build new and separate agreements, rather than to revise the SPS Agreement. Any revisions taking the SPS Agreement away from its core discipline of science-based decision making for health-related import measures would risk completely undermining the effectiveness of the agreement.

Negotiating SPS in the FTAs – U.S.-EU at the Center

After many years of relative inactivity as the Doha Round failed and the U.S. showed no interest in pursuing new Free Trade Agreements (FTAs), especially during the first term of the Obama administration, the global trade agenda has intensified considerably. This includes most notably the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP) and the Japan-EU FTA. Successfully negotiating the SPS portions of these agreements will be essential for the completion of each of them. However, it is important to understand that the character of each of these SPS negotiations will be or is (in the case of TPP) quite distinct from the others.

Of the negotiations mentioned above, the U.S-EU efforts to reach agreement on SPS issues under the TTIP will unquestionably be the most challenging. The U.S. and the EU have a long and very difficult history of SPS-related disputes. This has occurred despite the fact that they both of course committed to the identical SPS principles and obligations in accepting the Uruguay Round results...

However, diverging approaches to regulation and even cultural differences between the EU and U.S. have led to conflicting interpretations and application of the SPS Agreement. To understand the monumental challenge that the SPS area will present in the TTIP negotiations, it is essential to have some grasp of the differing perspectives of the two sides in their approach to managing the risks within their own agriculture and food systems.

The most important factor underlying many of the U.S.-EU bilateral problems is the divergence of views regarding the "precautionary principle" approach to risk management. There is not a universally accepted definition of the precautionary principle, but the EU has provided this official version: "The precautionary principle states that where the possibility of a harmful effect exists, but where scientific uncertainty regarding the risk persists, provisional, non-scientific risk management strategies may be adopted by the European Community."

The EU has made the precautionary principle the cornerstone of its approach to risk management in the SPS area. On the other hand, in the U.S. the precautionary principle is often viewed as inconsistent with the basic tenets of the WTO SPS Agreement and as the pretext for scientifically unjustified barriers to trade.

For many years the U.S. and the EU have been the chief protagonists in what may be described as a global battle of diverging approaches to SPS issues, especially pertaining to risk management. The "pure science versus precautionary principle" debate has extended from confrontations at Codex to GMO policy in the developing countries of Africa. The result is a certain constant tension in the U.S.-EU relationship.

Regarding the precautionary principle, two important trade disputes between the EU and U.S. can likely best be understood through the lens of this approach to risk management. One of these is the beef hormones conflict, which is probably so far the most important SPS issue to go all the way through the WTO dispute settlement process. Essentially this dispute centers around the U.S. practice of applying growth promoters in the feeding of

beef cattle to accelerate growth and improve feeding efficiency. The U.S. believes that there has never been any internationally accepted evidence that this practice poses a demonstrable risk to the health of consumers. On the other hand, the EU can argue that the application of growth promoters is not necessary for the production of beef, and therefore that if it even very marginally increases the health risk (through higher hormone levels), then it should be prohibited.

The beef hormones case was one of the first SPS issues to reach WTO dispute settlement. Eventually the WTO found that the EU had not performed an adequate risk assessment and therefore ruled in favor of the U.S. In one of the relatively few recent successes in addressing EU-U.S. agricultural trade disputes, the U.S. has dropped its WTO-authorized retaliation in the beef hormones case in exchange for access to the EU market for beef not produced with hormones. However, it is important to understand that in the U.S. view, this is not a final resolution of the issue because the EU has not changed its decades-long policy of prohibiting the use of beef hormone growth promoters.

Another issue of major and more urgent importance is the EU prohibition on the use of the beta-agonist feed additive ractopamine, which is used in the U.S. and other major meat-exporting countries to improve leanness in beef and pork production. This issue has recently become especially difficult because, as mentioned above, in 2012 ractopamine was approved as safe (within the indicated maximum residue levels) by the Codex, which gives it an international standard as defined by the WTO.

Here again an understanding of the precautionary principle can help one comprehend the differences. The EU refused to accept the Codex approval of ractopamine, citing "persistent scientific uncertainty" and making reference to its broader opposition to the use of veterinary drugs as growth promoters. As in the case of beef hormones, a very practical obstacle has been that the EU had a prohibition on ractopamine in effect long before it was approved by the Codex.

Beyond the more general policy differences, the U.S. and the EU have an approximately 50-year history of specific SPS-related trade disputes. The current list of bilateral problems goes far beyond the beef hormones and ractopamine issues described above, including antimicrobial rinses used in poultry production, an array of biotech-related regulatory disputes, and U.S. anti-BSE measures that prevent imports of EU beef, among other issues. Making this even more problematic is that three of these issues (beef hormones, biotech measures, and poultry rinses) are currently still at some stage of the WTO dispute settlement process.

Negotiating SPS – the Outlook for Japan

Fortunately for Japan, it does not have such a difficult history of major SPS disputes with either the U.S. or the EU. In addition, the SPS work to be done in relation to the TPP should be very manageable from the Japanese perspective. The SPS chapter in the TPP text is based on the "SPS Plus" concept, which appears (based on unofficial reports) to include maintaining the core principles of the WTO SPS Agreement. The "Plus"

apparently means “strengthening” and “enhancing” the functioning of certain SPS features, such as transparency and notification.

However, what is apparently not included is any means for enforcement of the new “Plus” provisions, much to the disappointment of the U.S. agricultural private sector, among others. The enforcement concept was rejected by the governmental interagency process in Washington, specifically by the regulatory agencies. One might surmise that, if the TPP application of the “SPS Plus” concept is as described above, the Japanese Government is probably finding it to be acceptable. Japan does also have the SPS “parallel process” with the U.S., which addresses only minor issues such as food additive risk assessment and fungicide standards, but that should not be particularly burdensome.

As far as Japan and the EU, that SPS negotiation should also be quite manageable for the Japanese. As noted above, these two do not have a history of major SPS disagreements. Furthermore, although the EU is actually a major agricultural exporter (and importer), it traditionally negotiates like an importer. And EU negotiators in Brussels apparently do not face intense private sector advocacy and pressure to address export-focused SPS issues, as is seen in the U.S.

Therefore, in stark contrast to the extremely difficult SPS negotiation anticipated for the TTIP, Japan’s way forward on SPS in the TPP and in the Japan-EU FTA should be manageable and may proceed without major obstacles.

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