7

Improving the Agreement on Sanitary and Phytosanitary Standards

Steve Charnovitz[1]

One of the most significant achievements of the Uruguay Round was securing the Agreement on the Application of Sanitary and Phytosanitary Measures (known as SPS). This Agreement imposes controls on the use of national laws and regulations to protect humans, animals, or plants from pests, disease, and harmful food additives. During its first five years, SPS has had some favourable impact. In some arenas, however, SPS is criticized for violating national autonomy. The Seattle Ministerial Conference in December 1999 will provide an opportunity for governments to take stock of SPS implementation and to consider whether the Agreement needs to be renegotiated. At a time when food safety concerns are paramount,[2] everyone interested in the linkages between trade, health, and biotechnology has a stake in the ongoing debate about SPS. This chapter seeks to inform the consideration of SPS in Seattle.

Although the SPS Agreement can serve to improve public health, the main motivation for this treaty was to prevent the use of unnecessary health measures that impede foreign exporters. SPS has proven to be controversial because it puts the World Trade Organization (WTO) in a position of telling a government regulator to remove measures that the regulator claims are needed for health reasons. The idea behind SPS is that food safety and related disputes should be settled by science-based rules. But although scientists may be able to answer some scientific

questions, they cannot bridge differences in values that often underlie health-related conflicts between countries.[3]

As of mid-1999, three judgments pertaining to the SPS Agreement have been handed down by WTO panels and the Appellate Body. In all three cases, the defendant government employing the health measure lost. Two of the disputes involved "sanitary" measures focusing on food safety or fishery disease. One dispute involved "phytosanitary" measures focusing on agricultural disease. The cases were also split between old-style disputes that might have occurred 50 years ago and a modern dispute involving biotechnology.

The first case was *EC–Measures Concerning Meat and Meat Products (Hormones).*[4] The United States and Canada complained against a European Commission ban (begun in 1989) on the importation of meat produced with growth hormones. The Commission had banned the use of six growth hormones in Europe to promote food safety and sought to keep out foreign meat produced with such hormones. The rationale for the ban was that the hormones might be carcinogenic. The WTO Appellate Body ruled against the European Union in January 1998 and an arbitrator gave the Commission 15 months to bring its law into conformity with SPS rules. As of mid-1999, the Commission had not yet removed the ban and the United States and Canada are threatening trade retaliation.[5]

The second case was *Australia–Measures Affecting the Importation of Salmon.*[6] In this dispute Canada complained against an Australian ban (begun in 1975) on the importation of uncooked salmon. Australia had enacted this ban to prevent the introduction of exotic pathogens not present in Australia. (This was a fishery health measure, not a food safety measure.) The Appellate Body ruled against Australia in October 1998 and an arbitrator gave Australia eight months to bring its regulation into conformity with SPS rules. As of mid-1999, Australia has not yet removed the ban and Canada is threatening trade retaliation.

The third case was *Japan–Measures Affecting Agricultural Products.*[7] Here the United States complained about a Japanese phytosanitary measure (begun in 1950) that banned imports of apples, cherries, nectarines, and walnuts potentially infested with coddling moth. In 1987, Japan had provided for lifting this ban subject to certain quarantine and fumigation requirements, which called for each variety of fruit to be

individually tested. It was this separate testing requirement that provoked the WTO dispute. The Appellate Body ruled against Japan in February 1999. Thereafter, Japan agreed to bring its regulation into conformity with SPS rules by the end of 1999.

The victory by plaintiffs in these three disputes will surely lead to more such cases in the future.[8] Already in the WTO pipeline are cases regarding a French ban on asbestos and a US subnational import ban on Canadian cattle and grain. Disputes may also be looming on issues such as the overuse of antibiotics in animals and the use of genetically modified organisms (GMOs).[9] Even when the substance being regulated is unquestionably harmful (e.g. dioxin), disputes can occur over whether or not the regulatory response is broader or longer lasting than necessary.

This chapter contains five sections. The first section provides a brief discussion of the historical context for international negotiations on sanitary standards. The second section explains the SPS rules and the interpretations given by the WTO Appellate Body. The third section appraises SPS dispute settlement. The fourth section appraises the WTO role on food safety. The fifth section discusses a few key issues that may be considered in Seattle.

1. The historical context of SPS

Concerns about the trade effects of unjustified sanitary measures go back many years. This problem was extensively examined in the League of Nations with a view to using science to determine the validity of trade bans. But no multilateral discipline was created until 1947, with the General Agreement on Tariffs and Trade (GATT). Although GATT rules were intended to prohibit trade measures for sanitary purposes that were not "necessary" for health or that were really disguised trade barriers, these rules were hardly ever tested. Instead, a GATT Standards Code was written in 1979 and, when that proved inadequate, a new effort to draft a separate SPS Agreement was begun in the late 1980s.

Although SPS builds on GATT in many ways, perhaps the most important addition is the discipline on domestic measures. Under GATT, a domestic health standard impeding an import was held only to the principle of "national treatment." So long as the import was treated

no less favourably than the domestic product, it did not matter how flimsy the justification was for the domestic standard. As will be explained below, SPS subjects domestic standards to supervision whenever they directly or indirectly affect trade. Because SPS has more stringent disciplines than GATT, the health exception in GATT Article XX(b) is not available to a government as a defence in an SPS lawsuit.

It should be noted that the SPS Agreement pertains only to health standards applied to imports. Thus, it would not be an SPS violation for a country to impose an unscientific ban on the use of hormones in food production so long as it did not apply that standard to imports. Yet this retained sovereignty right is unlikely to prevent trade conflict. It would be rare indeed for a government to impose a health standard on domestic products and yet allow in imports that do not meet that standard.

Although a review of trade history shows a long-time concern about unjustified non-tariff barriers, that is not the only historical development relevant to appreciating SPS. Another is the way that trade concerns contributed to raising food safety and sanitary standards. As Percy Bidwell explains, "The first [US] federal legislation regarding meat inspection was directed, not toward protecting American consumers . . . but toward improving the healthfulness of American products destined for foreign markets."[10] This initiative in the early 1890s arose in response to import bans against American imports throughout Europe. Since inspectors were to be hired to examine meat exports, they were also ordered to examine domestic meat trade. Another interesting interplay between health and trade occurred in the 1929 Convention for the Protection of Plants. On health, the Convention committed governments to prevent and control plant disease. On trade, the Convention provided that disputes about phytosanitary measures could be brought to the International Institute of Agriculture, which would appoint a committee of experts to investigate and issue a report.[11]

These historical episodes are suggestive of how SPS might become a broader agreement aimed not only at promoting trade but also at promoting food safety and public health. It is not that these concerns are absent from SPS. After all, its Preamble notes the desire "to improve the human health, animal health and phytosanitary situation in all Members." But the food safety goal has not been developed. Greater cooperation by governments to improve food safety and sanitation, especially in

developing countries, could prevent trade conflicts and ultimately lead to greater economic growth and trade.

2. SPS rules and case-law

The SPS rules apply only to sanitary and phytosanitary measures as defined in the Agreement.[12] In broad terms, SPS pertains to laws or regulations to protect against exposure to pests (i.e. insects), to micro-organisms, and to additives, contaminants, and toxins in food for humans and feedstuffs for animals. For example, protection against insecticide in fruit is covered by SPS because that is a contaminant. But protection against bio-engineering in fruit might not be covered by SPS because genetic modification is not a risk listed in the above categories. The applicability of SPS to GMOs is a complex issue that will no doubt be determined by a future WTO panel.[13]

The SPS Agreement interrelates with other WTO agreements.[14] If a measure is governed by SPS, then it is excluded from coverage under the WTO Agreement on Technical Barriers to Trade (TBT). All measures governed by SPS will also be governed by GATT, but the SPS rules are much stricter. It remains unclear how the WTO will deal with a measure that has dual purposes—for example, to protect both food safety and biodiversity.[15]

Before discussing SPS rules, it will be helpful to provide a brief background on WTO dispute settlement. If a WTO member government believes that another WTO member government is utilizing a health measure in violation of SPS rules, it can lodge a complaint to the WTO. A panel will be appointed to hear testimony from the plaintiff and defendant governments and then render a decision. After the panel hands down its decision, it may be appealed to the WTO Appellate Body (as were the first three SPS cases). The Appellate Body then delivers a final decision within 60 days. If the defendant government loses the case, it is asked by the WTO Council to bring its SPS measure into conformity with whatever SPS rule it was found to violate. If the government does not do so within a specified period of time, the WTO Council may authorize the complaining country to impose trade retaliation on the scofflaw government. In all three SPS cases, the panels availed

themselves of the provision in SPS enabling them to consult experts. Instead of setting up the advisory technical experts group provided for in SPS Article 11.2, the panels brought in several experts in their individual capacities.

The SPS rules apply only between WTO member governments. Thus, a populous country such as China, which has not been permitted to join the WTO, has no rights or obligations under SPS. For example, the US government now bars certain wood crates from China that might harbour a destructive beetle. But China cannot ask the WTO to evaluate the scientific evidence for this ban.

Before explaining SPS rules, this chapter should discuss the burden of proof and the standard of review. As in most WTO disputes, the initial burden lies with the government lodging the complaint, which must establish a clear (i.e. *prima facie*) case of inconsistency with SPS rules. Once that occurs, the defendant government utilizing the health measure has the burden to bring forward evidence and arguments to refute the allegation that it is violating a WTO rule.

The standard of review dictates whether the panel should be deferential to the regulatory authorities of the country imposing the health measure. In *Hormones,* the Appellate Body rejected the arguments of the European Union (EU) for deference and instead stated that the role of the panel is to make an "objective assessment of the facts," relying on the evidence as presented by governments and outside experts.[16] Some analysts continue to argue that WTO panels should show deference to governments.[17] It should be noted that SPS rules seem to apply identically to national laws both where regulators require applicants to show that a product is safe and where regulators have the burden to show that a product is unsafe.

The complex SPS rules can be abridged into seven disciplines and one exemption.

The science requirement

The first SPS discipline is the science requirement. SPS Article 2.2 states that governments "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."[18] In *Agricultural Products,* the Appellate Body interpreted this provision to require "a rational or objective relationship between the SPS measure and the scientific evidence."[19] The panel and the Appellate Body concluded that Article 2.2 was being violated because Japan could not show that the quarantine and fumigation used for one variety of fruit or nut would be inadequate for other varieties.

Although it is often averred that the SPS Agreement requires governments to use "sound science," it should be noted that this term does not appear anywhere in the SPS Agreement. This point is significant because it is unclear to what extent panels may discount scientific findings presented by a government. So far, no panel has been faced with such a decision. But a dispute will surely arise where a government presents a scientific study for an SPS measure that is then challenged by other scientists as being a poorly conducted study. It seems likely that future WTO panels will seek to weigh such competing positions in the manner that many national courts do.

Risk assessment requirement

SPS Article 5.1 requires governments to ensure that their sanitary and phytosanitary measures are "based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health." This requirement has proven to be of central importance in enforcing the SPS Agreement. It was litigated in all three WTO disputes and thus there is a small body of case-law on it. In all three disputes, the defendant government was found to be in violation of Article 5.1.

What is a risk assessment? The SPS Agreement explains that a risk assessment can be either (1) the evaluation of the likelihood of entry, establishment, or spread of a pest or disease, or (2) 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 (SPS Annex A, para. 4). In interpreting this provision, the Appellate Body seems to be saying that, although an adequate assessment must evaluate the probability of risk, it does not

have to make a monolithic finding.[20] Thus, a risk assessment that presented both a "mainstream" and a "divergent" scientific view could be an adequate assessment.[21] Moreover, there is no requirement that a risk assessment be expressed as a quantitative conclusion.[22]

According to the Appellate Body, a risk assessment must find evidence of an "ascertainable" risk.[23] This seems to mean that a tangible risk must be found. The Appellate Body has stated that it will not be sufficient for governments to impose regulations simply on the basis of the "theoretical" risk that underlies all scientific uncertainty.[24] For example, in *Salmon,* the Appellate Body agreed with the panel that the analysis conducted by the Australian government was not a proper risk assessment because it lent too much weight to "unknown and uncertain elements."[25] On the other hand, there is no minimally sufficient magnitude of risk that regulators must find.[26] Adding this up, the Appellate Body appears to be saying that a risk assessment can still be acceptable even if it points to an extremely small risk.

Although there is no requirement that the defendant government actually do the risk assessment itself, there must be a risk assessment in order to comply with SPS Article 5.1. A government can use a risk assessment conducted by another government or by anyone. But an adequate assessment must be in place. This requirement was first implemented in the *Hormones* dispute. There was considerable evidence on the record that the use of hormones as a growth promoter was safe. Yet most of this evidence assumed that the hormones would be used in accordance with "good veterinary practice."[27] Thus, if hormones were overused or misused in fattening animals, the available evidence did not demonstrate the safety of eating such meat.

Even while admitting that hormone abuse could constitute a health risk, the Appellate Body faulted the European Commission for not conducting a risk assessment of this prospect. Therefore, the Appellate Body found a violation of Article 5.1.[28] Although many commentators suggest that SPS prohibits import bans only of products that have been proven safe, this episode shows that SPS disciplines can disallow health regulations aimed at genuinely unsafe practices.

Once the existence of an adequate risk assessment is shown, the panel must then consider whether the health measure in dispute is "based on" this assessment. The Appellate Body reads "based on" as a substantive

requirement. In the first SPS case (*Hormones*), the panel sought to impose a procedural requirement that the defendant government actually rely upon the risk assessment. The panel undertook an administrative law analysis of the EU's decision-making process. This approach also had the effect of excluding new scientific evidence that arose during the course of WTO review. In an important ruling, the Appellate Body rejected this attempt to incorporate minimum procedural obligations into SPS.[29]

The Appellate Body has been a bit unclear on how this "based on" test operates. Within the same decision, it said that the risk assessment must "sufficiently warrant," "sufficiently support," "reasonably warrant," "reasonably support," or "rationally support" using the health measure, and that there must be an "objective relationship" or a "rational relationship" between the risk and the measure.[30] This test was first implemented in the *Hormones* case, where the panel and the Appellate Body found that the thin EU risk assessment did not rationally support banning the importation of meat produced with growth hormones. The Appellate Body admitted that one expert consulted by the panel had testified that one out of every million women would get breast cancer from eating meat produced with growth hormones.[31] But the Appellate Body discounted this testimony from Dr. George Lucier of the US National Institute of Environmental Health Sciences, noting that Lucier's opinion was not based on studies that he had conducted and that his views were "divergent" from the other views received by the panel. It is unclear whether the Appellate Body dismissed Dr. Lucier's opinion as speculative, or adjudged a one-in-a-million risk to be unimportant.

Whenever a government violates SPS Article 5.1, there will perforce also be a violation of the science requirement in SPS Article 2.2. Although this conclusion is not at all obvious, the *Salmon* panel made this contention, which was upheld by the Appellate Body.[32] The issue is sure to arise in the future.

The SPS Agreement does not direct panels to apply benefit–cost analysis.[33] Thus, so long as a governmental measure is based on an adequate risk assessment, restricting the use of a chemical whose benefit exceeds its harm should not constitute a violation of SPS. Still, there will be continuing pressure by litigant governments to impose an economic test on defendant governments via Article 2.2. Even in its first SPS decision, the Appellate Body noted that promoting

international trade and protecting human health were "sometimes competing" interests.[34]

The requirement for national regulatory consistency

Article 5.5 states that, "[w]ith the objective of achieving consistency" in levels of protection against health risks, a government "shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade." This is the most controversial SPS rule and the one most intrusive into national decision-making processes because it focuses on the "levels" of health protection.[35] Although the SPS Agreement calls on the WTO Committee on Sanitary and Phytosanitary Measures to develop guidelines for the practical implementation of this provision, neither of the first two SPS panels was willing to await those guidelines before enforcing Article 5.5.

The Appellate Body has pointed out that there are three elements to an Article 5.5 violation. First, the defendant government must be seeking different levels of health protection in "comparable" situations. In *Salmon,* the Appellate Body explained that situations are "comparable" when there is a common risk of entry or spread of one disease of concern.[36] For example, health regulations on salmon may be compared to regulations on herring for bait because both salmon and herring can impose the same health risk. The second element is that the differences in the government's intended level of protection must be "arbitrary or unjustifiable." This can be found if the risks are similar but the level of protection is different. The third element is that the health measure embodying these differences results in discrimination or a disguised restriction on international trade. In the cases so far, the first two elements have been easily shown, while the third element has received the greatest attention by the panels and the Appellate Body.

In *Salmon,* the Appellate Body offers five arguments for concluding that the Australian health measure constituted discrimination or a disguised restriction on trade. It will be useful to examine the Appellate Body's analytical approach because the five arguments do not prove much. The first two arguments are mere bootstrapping: the Appellate

Body points to the lack of a risk assessment and to the different levels of health protection being sought (both discussed above). The third argument is that there was a "substantial" difference in the level of health protection being sought. The fourth argument is that an Australian government draft report in 1995, which would have been tolerant of salmon imports, was revised in the final report of 1996. The fifth argument is that Australia lacks strict internal controls on salmon equivalent to those it imposes at the border against foreign diseases. According to the Appellate Body, whereas no single one of these arguments might be conclusive, together they add up to a trade law violation.

This judicial approach is confounding in its analytical weakness and in its potential for mischief. Accusing a government of trade discrimination or a disguised restriction is a serious charge that should not be hurled lightly. As the Australian representative explained to the Appellate Body, it cannot possibly be a violation of the WTO for a government to change a recommendation between a draft and a final report. Similarly, it cannot possibly be a violation of the WTO for a government to lack internal controls on commerce equivalent to border controls. Yet, according to the Appellate Body, such innocent acts can aggregate into a WTO violation. It is unclear why the Appellate Body did not realize that an island nation might need stricter health controls at the perimeter than internally. According to the Australian government, there are at least 20 diseases of salmon not currently found in Australia.

A government convicted of violating Article 5.5 has two choices if it wants to comply. It can upwardly harmonize its chosen level of health protection or it can downwardly harmonize. Thus, although it would not be correct to say that Article 5.5 promotes downward harmonization, there is that potential, and therefore the implementation of dispute reports should be closely monitored. The WTO will certainly not gain in the public's esteem if it is blamed for lowering public health goals.

The requirement of least trade restrictiveness

Article 5.6 states that governments shall ensure that their sanitary and phytosanitary measures "are not more trade-restrictive than required to achieve their appropriate level" of protection. To prove a violation, there

must be an alternative measure, reasonably available, that is significantly less restrictive to trade. So far, the WTO has found no Article 5.6 violations. In two cases, the panels held that Article 5.6 was being violated, but both decisions were reversed on appeal. Nevertheless, these Appellate Body rulings contain some important interpretations of Article 5.6, which will be noted briefly. One is that governments are obligated to determine and reveal their chosen level of protection to WTO panels so that SPS rules can be applied. Another is that, in analysing an alternative measure, panels will consider whether it matches the intended level of protection, not the level of protection actually achieved by the SPS measure that is the target of the WTO lawsuit. Another is that the complaining country must show that the alternative measure exists. In other words, a panel may not posit the alternative based on the advice of experts.

The requirement to use international standards

Article 3.1 states that governments "shall base" their SPS measures on international standards, where they exist, except as otherwise provided. As this provision links with others in a very confusing skein of obligations and exceptions, this chapter will seek only to give a summary of this part of the SPS Agreement. International standards are the standards drafted by organizations such as the Codex Alimentarius Commission for food safety, the International Office of Epizootics for animal health, and the International Plant Protection Convention for plant health. When such standards do not exist, then Article 3.1 has no effect.

When international standards do exist, a government has three choices. It can use a higher standard in order to pursue a higher level of health protection. It can use a lower standard. Or it can conform its SPS measure to the international standard. By so conforming, a government would gain a presumption in the WTO that its measure complies with SPS rules. This presumption would be rebuttable, however, and so it is unclear how much of a "safe harbour" using international standards will be. Some analysts have suggested that governments would have a greater incentive to use international standards if they were truly a "safe harbour" from being challenged as SPS violations.

If a government chooses to pursue a level of health protection higher than the international standard, then it must meet all the SPS requirements, including the four disciplines discussed above. The existence of the international standard does not put a government in a worse position for not having followed it. Thus, a government does not have to justify the deviation from international standards. This point was litigated in the *Hormones* case, where the panel, surprisingly, had sought to shift the burden of proof to a government choosing not to use an international standard. The Appellate Body quickly reversed this ruling.[37]

If a government chooses to pursue a level of health protection lower than the international standard, then it too must meet all other SPS requirements. It would not have to justify the deviation from international standards, even for its exports. The government need only assert that the lower standard results from its chosen level of protection. There are unlikely to be WTO complaints about standards being too low.

The recognition of equivalence

Article 4.1 requires an importing country (or a government refusing to import) to accept an SPS measure by an exporting country as equivalent to its own, if the exporting government can objectively demonstrate that its health measure achieves the level of protection chosen by the importing government. This provides a valuable opportunity for exporting countries that often face impenetrable regulatory systems in importing countries.[38]

The transparency requirement

SPS Annex B requires governments imposing a regulation to notify the WTO and to allow time for affected governments to make comments and for the regulators to take such comments into account. In addition, governments are required (except in urgent circumstances) to allow a reasonable interval between the publication of a regulation and its enforcement date.

In focusing on these seven core SPS disciplines, this chapter does not cover numerous other SPS rules. There is too much to explain in one

short chapter. But there is one other SPS provision—regarding provisional measures—that needs to be discussed. Article 5.7 provides that, "in cases where relevant scientific evidence is insufficient," a government may "provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information." In such circumstances, the government is required to obtain additional information necessary for a more objective assessment of risk and to review the SPS measure within a reasonable period of time. This provision is a qualified exemption from Articles 2.2 and 5.1.

The first country to invoke Article 5.7 was Japan in the *Agricultural Products* case. The panel rejected this claim and was upheld by the Appellate Body. The Appellate Body stated that Japan had not obtained information on the key point of whether or not different varieties experience dissimilar quarantine effects. It is interesting to note that the panel suggested that it was up to the United States (the plaintiff) to establish that Japan had not complied with Article 5.7.[39]

A discussion of Article 5.7 provides a good window for introducing the Precautionary Principle, which is central to this provision and perhaps also relevant to SPS as a whole. The precautionary principle is a key tenet of modern environmental policy. As articulated in the Rio Declaration on Environment and Development (Principle 15), it states that, "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." In the *Hormones* dispute, the EU defended its failure to follow Article 5.1 by calling attention to the precautionary principle, which it characterized as a rule of customary international law. The panel responded that, even if it were part of customary international law, the precautionary principle would not override Article 5.1, particularly since the precautionary principle had been incorporated into Article 5.7.[40] The Appellate Body agreed with this conclusion and offered some additional observations about the precautionary principle. First, it found that it was not clear that the precautionary principle had crystallized into a general principle of customary international law. Secondly, it found that, outside of environmental law, the status of the precautionary principle awaits more authoritative formulation. Thirdly, it stated that the precautionary principle had not been written into the SPS Agreement as a ground for

justifying a measure that otherwise violates SPS. Fourthly, it found that the precautionary principle "finds reflection" in SPS Article 5.7, but that this provision does not exhaust the relevance of the precautionary principle for SPS.[41] Fifthly, the Appellate Body counsels panels considering whether or not "sufficient scientific evidence" exists to bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks are irreversible. The Appellate Body counterbalances this point, however, by stating that the precautionary principle does not by itself relieve a panel from applying principles of treaty interpretation. What all these dicta add up to must await clarification in a future case.

3. Appraisal of SPS dispute settlement

SPS dispute settlement is providing good results for producers in exporting countries. Three long-time complaints have been brought to the WTO and been adjudicated in favour of the exporter. Additional exports have not yet ensued, but could within a year or two. Of course, the impact of SPS is seen not only in the cases that go to panels, but also in actions taken by importing countries to avoid panels.[42] Even in disputes where the losing defendant fails to change its import ban (e.g. hormones), there is still benefit in having the WTO issue a ruling.

Consumers are also gaining from SPS. When unjustified import bans are removed, consumers secure greater access to meat, salmon, fruit, etc. that they are now being denied. This will presumptively result in lower prices and/or more choices. It may be true, as some consumer groups allege, that SPS rules can hurt consumers and citizens by reducing their sense of self-government. Yet, although SPS can be anti-democratic in this way, it can be pro-democratic in vindicating the volitions of uninformed consumers who can be politically overpowered by special interests seeking an unjustified SPS measure. SPS could also be pro-democratic in mandating risk assessments that will give citizens greater opportunity to participate in reasoned decision-making.[43]

In mandating science-based analysis, the WTO will promote global economic welfare. So it is unfortunate that this respect for science does not permeate other areas of WTO law. Aside from the SPS Agreement

and the review of environmental measures under GATT Article XX, the scientific basis for government regulations is not being scrutinized elsewhere in the WTO system. For example, is there a scientific justification for the WTO to condemn "dumping" in a broad definition that includes the practice of selling a product at less than its cost of production when that prevents price increases in the country of importation? Is there a scientific basis for the WTO to require governments to issue patents for at least 20 years?

Champions of SPS say that no health interests have been sacrificed because the overruled import bans were unjustified. But, until new imports enter, no one can know for sure. Suppose that Australia complies with the WTO ruling, allows in Canadian salmon, and then suffers a huge loss from foreign salmon disease. Who would bear the cost of the WTO panel being wrong about the danger of alien pathogens? Not the panel surely. Not the Canadian exporter. Not the WTO. No, it would be Australia that would suffer that cost. In pointing this out, this chapter is not suggesting that three WTO judges sitting in Geneva are less competent to weigh the risk of salmon disease than Tasmanian salmon fishers. Rather, the point here is that resolving the legal dispute is not equivalent to resolving the health dispute.

The health dispute gets resolved by a real world experiment that has financial liability for Australia but none for the WTO. One wonders whether the WTO dispute system might be rounded out by providing some financial insurance for Australia. If Australia were violating SPS Article 2.2, then insurers presumably would recognize the insignificant sanitary threat from imports and would agree to insure the Australian salmon industry. It would be an interesting market test of WTO dispute settlement to see how costly such disease insurance would be.

The process used by SPS panels is reasonable except for one flaw—its secretive, closed nature. It seems contradictory for governments to make sanitary decisions with open, transparent procedures and then have them reviewed at the WTO behind closed doors. Although this problem is common to all WTO dispute settlement, it is perhaps most acute in the area of health and environment. Not only are panel sessions closed, but panels so far have been unwilling to entertain *amicus curiae* briefs submitted by non-governmental organizations (NGOs). For example, when an NGO submitted an *amicus* brief to the *Hormones* panel, it was rejected

by the WTO Secretariat. This may change as a result of the Appellate Body's decision in the *Turtle* case that panels may consider unsolicited NGO briefs.[44] A willingness to consider *amicus* briefs is one of many procedural changes needed before the public will accept the WTO as a food safety tribunal.

Another process problem is that, once a panel rules against a defendant government, there are no procedures for that government to introduce new scientific evidence. An inadequate risk assessment or a risk assessment that does not demonstrate risk are both deficiencies that are potentially curable. But a government that believes that re-doing the risk assessment achieves compliance may find it difficult to present this new evidence to the Appellate Body or the WTO Dispute Settlement Body.[45]

So far, no SPS litigation has involved a developing country.[46] In part, this may be due to the provision in SPS Article 14 giving the least developed countries until the year 2000 to comply.[47] A bit harder to explain is the lack of developing country plaintiffs. Surely there are numerous questionable SPS barriers that impede exports to industrial countries? One answer is that it is very difficult to lodge an SPS case against a rich country. Because SPS dispute settlement is so complicated, countries with large governmental legal staffs that are repeat litigants will have the advantage in SPS adjudication. (The new Advisory Centre on WTO law could redress this imbalance.)

In noting this situation, this chapter is not suggesting that developing countries begin filing SPS lawsuits. The economic harm from unjustified SPS measures is surely small compared with the economic harm from unabashedly protectionist barriers such as tariffs, quotas, and subsidies. Thus, looking at the position of developing countries, they can gain more from demanding better compliance with the WTO Agreement on Textiles and Clothing than from better compliance with SPS.

4. Appraisal of WTO activities on food safety

The biggest barrier to greater trade in food is not unjustified government regulation. Rather, it is unsafe food. The government in the exporting country should take greater responsibility for assuring the

salubrious condition of its food exports. With its legal sovereignty over the process of food production, the exporting government is the lowest-cost avoider.

So far, the WTO has conceived its role narrowly as facilitating world food trade (which is about 9 per cent of total world merchandise trade). In this frame, food safety is the responsibility of the importing country. But the WTO could broaden its role by better coordination with other international organizations. For example, the Codex Alimentarius Commission has promulgated a Code of Ethics for International Trade in Food. Among its principles is that "[n]o food should be in international trade" that has in it any substance "which renders it poisonous, harmful or otherwise injurious to health."[48]

The WTO needs to address the popular misperception that it may undermine consumer health. To do so, the WTO should reposition itself to promote the safety of food in international trade. The legal bases for doing so already exist. SPS Article 3.1 directs governments to base their SPS measures on international standards. SPS Article 3.5 directs the WTO's SPS Committee to coordinate efforts on harmonization with relevant international organizations. SPS Article 10.4 calls on governments to facilitate the active participation of developing countries in relevant international organizations (among the relevant organizations are the World Health Organization and the Food and Agriculture Organization[49]). SPS Article 9 memorializes a commitment by governments to consider providing technical assistance to developing countries to enable producers to meet the health standards in export markets. SPS Article 12.2 directs the SPS Committee to sponsor technical consultations with the objective of increasing coordination in the use of food additives or establishing tolerances for contaminants in foods, beverages, and feedstuffs.

The SPS Committee is the proper institution for expanding the WTO role. In its March 1999 report, the Committee stressed the need for enhanced technical assistance to developing countries, particularly with regard to human resource development, national capacity-building, and the transfer of technology and information.[50] But the Committee itself has accomplished very little along these lines. In Seattle, the Committee could be invigorated by giving it a broader mandate and authorizing more coordination with external agencies. Although several inter-

governmental organizations have sought closer cooperation with the Committee—for example, the Latin American Economic System—the Committee has been very slow to approve applications for observer status.[51] Equally disturbing is the Committee's unwillingness to approve observer status for NGOs. At least two NGOs have already sought such status: the International Meat Secretariat and the International Seed Federation. Many food and biosafety NGOs would apply if they thought that the WTO would cooperate with them.

Higher food safety standards could strengthen the WTO through win–win solutions. Although such standards are needed throughout the world, it is in developing countries that the regulatory regimes are weakest.[52] By working with those countries to implement international food safety standards, the WTO could reduce potential barriers to food exports by those countries.

5. Further issues for Seattle

Although everything in this chapter is an issue for Seattle, this final section discusses three controversial issues in the current worldwide debate about SPS. They are: SPS Article 5.5 on regulatory consistency, product labelling, and the precautionary principle.

Regulatory consistency

Article 5.5 is more likely to hurt the trading system than to help it. The idea behind scrutinizing regulatory consistency might have been a good one. But both panels enforcing Article 5.5 used flimsy grounds to find violations. Whereas the first decision (*Hormones*) was overturned by the Appellate Body, the second (*Salmon*) was not. Yet, even if the panels had acted on good evidence, one wonders whether the game is worth the candle. In conducting an intrusive examination into national regulatory consistency, an SPS panel is bound to provoke public concern about the loss in regulatory autonomy. And to what end? Is inconsistency in sanitary policy so bad that the WTO must come down hard on it? If the WTO is to become a policy consistency policeman, surely there are many self-contradictory trade policies that

deserve greater attention than whether Australia tolerates more risk in herring than it does for salmon.

Actually, there is an easy way out of this problem. As noted above, Article 5.5 directs the Committee to develop guidelines to further the practical implementation of Article 5.5. Since the SPS Committee has not yet been able to develop such guidelines, the Seattle Ministerial Conference should consider calling a moratorium on any further Article 5.5 lawsuits.

Product labelling

It is unclear how SPS regulates product labelling. In its definition of SPS measures, the Agreement includes "packaging and labelling requirements directly related to food safety." The implication is that other labelling requirements are unregulated by SPS. For example, labelling for animal safety or for general consumer information would seem to be regulated, if at all, by other WTO agreements such as TBT and GATT. But no panel has yet clarified this point.

For food safety labels, there is a difference of opinion as to what the SPS requires. The US government's position seems to be that "[r]equiring labeling when there is no health or safety risk discriminates against products produced through biotechnology and suggests a health risk when there is none."[53] Other governments have a more tolerant attitude toward requirements for factual labels and consider a GMO labelling requirement to be WTO legal.

In general, product labels are a market-friendly measure. Providing consumers with additional information empowers them to make decisions according to their own self-interest. Although a labelling requirement is coercive when the manufacturer would prefer not to disclose the information, there is far less coercion from labelling than from banning a product. Recently, the Codex Alimentarius Commission has been trying to reach agreement on a GMO labelling standard.[54] One roadblock is the uncertainty about what WTO rules require.

It may be true that gratifying consumer inquisitiveness with unnecessary information can be counterproductive because consumers will make poor choices with that information. But, even so, it is hard to see how the WTO can take a stand against any food-labelling requirement when it

allows governments to require labels disclosing the country of origin. Such national origin labels can lead to consumer discrimination against imports.

The precautionary principle

As noted above, the Appellate Body held that the precautionary principle finds reflection in SPS Article 5.7, which states that, where scientific evidence is insufficient, governments may provisionally adopt sanitary measures based on pertinent information. This article provides leeway to an interventionist-minded government worried about risk. At this early stage of SPS adjudication, there is no reason to conclude that the existing language in Article 5.7 is inadequate. Thus, proposals either to tighten this article by requiring more science or to loosen it by deleting the word "provisionally" are premature.

More problematic are proposals explicitly to incorporate the precautionary principle into Article 5.7. As articulated in the Rio Convention, the precautionary principle contemplates a consideration of cost-effectiveness in justifying precautionary measures. Indeed, the European Commission acknowledges that "[m]easures based on the Precautionary Principle must include a cost/benefit assessment."[55] But one of the distinctive features of SPS is that it does not mandate the use of cost–benefit analysis.[56] One wonders if the consumer groups demanding SPS recognition of the precautionary principle have reflected on the fact that, because bio-engineered foods provide clear benefits, a proposal to bar their entry might fail a cost-effectiveness test. The excessive attention to an SPS precautionary principle is lamentable because it distracts attention from actions needed to address real food safety threats that have already been demonstrated through science.

In view of the conflicting policy currents, there is doubt about whether or not the SPS Agreement will be "reopened" in Seattle. Although many governments are unhappy with particular aspects of SPS, there may be insufficient consensus on any specific change. Moreover, there are generalized fears that a rewrite of SPS might make things "worse." So the governments could well agree in Seattle to make no decisions about SPS and to consider only minor changes to SPS in the forthcoming round.

6. Conclusion

In adjudicating SPS complaints, the WTO may gain a reputation as a naysayer to food safety regulation. Every time it declares an SPS measure to be WTO illegal, there will be consumers who lament a perceived loss in health security. Already there are many NGOs around the world that oppose the WTO because they believe that it privileges trade over a healthy environment.

Inattention to SPS in Seattle would be a missed opportunity. The benefits of science-based standards need to be better explained to the public. The SPS Committee should conduct its work more openly and with greater participation by interested stakeholders. The WTO should expand the cooperative aspects of SPS so that people can buy foreign food and eat it safely.

Notes

1. The views expressed are those of the author only.
2. For example, on 3 July 1999, US President Bill Clinton gave an address to the nation announcing new actions to keep out unsafe foreign food. The President noted that "some importers are sidestepping our laws and getting contaminated food across our borders and onto our kitchen tables."
3. See David A. Wirth, "The Role of Science in the Uruguay Round and NAFTA Trade Disciplines," *Cornell International Law Journal* 27, 1994, 817, 835–836, 845.
4. *EC–Measures Concerning Meat and Meat Products (Hormones),* Report of the Panel, WT/DS26 and WT/DS48; modified by Report of the Appellate Body, AB-1997-4, 16 January 1998 (hereinafter Appellate Body *Hormones* Decision).
5. "EU Panel Finds Beef Hormones Harmful; U.S. Sees Ploy to Avoid WTO Deadline," *World Food Regulation Review* 9(1), June 1999, 3.
6. *Australia–Measures Affecting the Importation of Salmon,* Report of the Panel, WT/DS18; modified by Report of the Appellate Body, AB-1998-5, 20 October 1998 (hereinafter Appellate Body *Salmon* Decision).
7. *Japan–Measures Affecting Agricultural Products,* Report of the Panel, WT/DS76; modified by Report of the Appellate Body, AB-1998-8, 22 February 1999 (hereinafter Appellate Body *Agricultural Products* Decision).
8. See Terence P. Stewart and David S. Johanson, "The SPS Agreement of the World Trade Organization and the International Trade of Dairy Products," *Food and Drug Journal* 54, 1999, 55, 68–70.
9. "U.S. Considers Filing WTO Complaint over EU Barriers to GMO Trade, USTR Says," *BNA Daily Report for Executives,* 25 June 1999, p. A-2.
10. Percy W. Bidwell, *The Invisible Tariff,* New York: Council on Foreign Relations, 1939, pp. 169–170.
11. Convention for the Protection of Plants, 16 April 1929, 126 L.N.T.S. 305, Arts. 4, 16.

12. Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), in the Agreement Establishing the World Trade Organization, signed Marrakesh, 15 April 1994, Annex A.1.
13. Analysts suggesting that SPS regulates genetically modified organisms point to the SPS Annex A.1 definition, which states that SPS measures include processes and production methods. But it seems likely that this is meant to describe the range of SPS measures "relevant" to the covered risks, not to add additional risks.
14. The WTO Secretariat has devised a good flowchart showing how trade issues are split between SPS and TBT, and how some issues are unregulated by either. See World Trade Organization, *Sanitary and Phytosanitary Measures (WTO Agreement Series 4),* Geneva: WTO, 1998, pp. 15–16.
15. Joost Pauwelyn, "The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes," *Journal of International Economic Law* 2, 1999 (forthcoming).
16. Appellate Body *Hormones* Decision, paras. 113–118.
17. For example, see Vern R. Walker, "Keeping the WTO from Becoming the World Trans-science Organization: Scientific Uncertainty, Science Policy, and Fact-finding in the Growth Hormones Dispute," *Cornell International Law Journal* 31, 1998, 251, 283, and 286.
18. SPS Agreement, op. cit., Annex C, para. 1(a) strengthens this discipline by requiring that SPS approval and inspection measures be "completed without undue delay." This provision has not yet been applied by a WTO panel.
19. Appellate Body *Agricultural Products* Decision, para. 84.
20. Appellate Body *Hormones* Decision, para. 187; Appellate Body *Salmon* Decision, para. 124.
21. Appellate Body *Hormones* Decision, para. 194.
22. Appellate Body *Salmon* Decision, para. 124.
23. Appellate Body *Hormones* Decision, para. 187; Appellate Body *Salmon* Decision, para. 125.
24. Appellate Body *Hormones* Decision, para. 186.
25. Appellate Body *Salmon* Decision, para. 129.
26. Appellate Body *Hormones* Decision, para. 186; Appellate Body *Salmon* Decision, para. 124.
27. Appellate Body *Hormones* Decision, para. 206.
28. Ibid., paras. 206–208.
29. For a good discussion of the issues, written by the chairman of the *Hormones* panel, see Thomas Cottier, "SPS Risk Assessment and Risk Management in WTO Dispute Settlement: Experience and Lessons," 1999, unpublished draft.
30. Appellate Body *Hormones* Decision, paras. 186, 189, 193, 197, 253(L).
31. Ibid., para. 198 (and notes therein).
32. Appellate Body *Salmon* Decision, para. 138.
33. Alan O. Sykes, "Regulatory Protectionism and the Law of International Trade," *University of Chicago Law Review* 66, 1999, 1, 31–33.
34. Appellate Body *Hormones* Decision, para. 177.
35. Steve Charnovitz, "The World Trade Organization, Meat Hormones, and Food Safety," *International Trade Reporter* 14, 15 October 1997, 1781–1787.
36. Appellate Body *Salmon* Decision, para. 152.

37. Some commentators have criticized the Appellate Body for making it so easy for governments to use a more stringent regulation than an international standard. For example, see Ryan David Thomas, "Where's the Beef? Mad Cows and the Blight of the SPS Agreement," *Vanderbilt Journal of Transnational Law* 32, March 1999, 487, 507–516.
38. "27 Nations Seek Equivalence Status to Open U.S. Doors to Meat, Poultry," *World Food Regulation Review* 8(12), May 1999, 13.
39. *Japan–Measures Affecting Agricultural Products,* Report of the Panel, op. cit., para. 8.58.
40. *EC–Measures Concerning Meat and Meat Products (Hormones),* Report of the Panel, op cit., para. 8.157.
41. Appellate Body *Hormones* Decision, para. 124.
42. For example, see "Fearing Trade Disputes, EU Suspends Deadline on Salmonellosis Programs," *World Food Regulation Review* 8, May 1999, 5.
43. Robert Howse, "Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization," 1999, unpublished draft.
44. *United States–Import Prohibition of Certain Shrimp and Shrimp Products,* Report of the Appellate Body, AB-1998-4, 12 October 1998, para. 110.
45. The WTO Dispute Settlement Understanding, Articles 21.5, 21.6, 22.2, and 22.8, contains the available rules, but there are no specific procedures for a declaratory judgment that a new risk assessment puts a government into compliance with SPS.
46. Two cases were lodged against Korea, but were settled early in the panel process. The cases involved shelf-life requirements and bottled water.
47. India has asked that this deadline be extended. Note that SPS Article 10 calls for Special and Differential Treatment to developing countries.
48. Code of Ethics for International Trade in Food, CAC/RCP 20-1979, Rev. 1 (1985), Art. 4.2(a).
49. SPS Agreement, op. cit., p. 27.
50. World Trade Organization, *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures, Report of the Committee on Sanitary and Phytosanitary Measures,* G/SPS/12, 11 March 1999, para. 9.
51. World Trade Organization, *Report (1998) on the Activities of the Committee on Sanitary and Phytosanitary Measures,* G/L/274, 16 November 1998, para. 2.
52. Linda R. Horton, "Food from Developing Countries: Steps to Improve Compliance," *Food and Drug Law Journal* 53, 1998, 139–171.
53. US Trade Representative, *National Trade Estimate Report on Foreign Trade Barriers,* Washington, DC: Office of the US Trade Representative, 1999, pp. 225–226.
54. "Codex Alimentarius: Setting Food Safety Standards for Global Trade," *Bridges* 3(4), May 1999, 1.
55. European Commission, "Guidelines on the Application of the Precautionary Principle," 17 October 1998, p. 9. It is interesting to note that, in the context of food safety, the government of Sweden has presented a formulation of the precautionary principle that does not include cost–benefit analysis, but does call for a "proportionate" response. Codex Alimentarius Commission, *Report of the 14th Session of the Codex Committee on General Principles,* ALINORM 99/33A, April 1999, para. 28.
56. See Wayne Jones, "Weigh up the Costs and Benefits," *OECD Observer,* No. 216, March 1999, 30.