The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)

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Executive Summary

This paper looks at the World Trade Organization's Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) and related decision making processes.

The objective of the Agreement is to assist international trade in food, agricultural commodities and live animals that will be used as food and help overcome barriers to trade. Some of the ways it does this are:

- by harmonisation of national or domestic food safety, plant health and animal health measures through reference to presumptively authoritative international standards((Article 3) in the SPS Agreement.
- a requirement that WTO Member notify the WTO SPS Committee of those domestic SPS measures that are not based on international standards or for which no international standards exist (annex B, paragraph 5).
- a framework (Article 4) for negotiating equivalence agreements, or bilateral recognition by an importing member that the SPS measures of an exporting member have equivalent effect in protecting, human, plant or animal health.

The SPS Committee meets at least three times a year and its tasks include negotiating guidelines to implement or to 'clarify' the SPS Agreement. WTO Member also discuss specific notifications to determine whether they are non-tariff barriers to trade. Potential barriers may be challenged under the terms of the WTO Understanding on the Rules and Procedures Governing the Settlement of Disputes, otherwise known as the Dispute Settlement Understanding (DSU).

Consumer organisations, like civil society organisations (CSOs) in general, have usually focused on (extra-ordinary) SPS-related decision making such as DSU dispute panels that decide whether a domestic SPS measure violates the SPS Agreement. One reason for this interest is that dispute panel and DSU Appellate Body (AB) decisions can require repeal or modification of domestic laws and regulations that are intended to protect consumers.

The interest of consumer organisations may also be prompted where a decision may determine how future SPS-related trade disputes are interpreted. Canada, in its current WTO case against EC – Biotech Products for example, will refer to rulings in Japan-Varietals relating to SPS measures used on horticultural products.[1] The dispute panel may decide to justify a ruling in the EC- Biotech Products case by reference to Japan-Varietals but, unlike a precedent-based legal system, the panel is not required to do so. A report by the Organization for Economic Cooperation and Development (OECD) notes: 'Although the WTO is not based on precedent, the accumulation of a body of jurisprudence relating to the settlement of disputes will determine how they should be interpreted'.[2]

Part of the reason for interest in extra-ordinary decision making is that CSOs have access to the documents of dispute panels and the AB where they do not have direct access to documentation the (ordinary) decision making of the SPS Committee. Nevertheless, most disputes are settled before a decision is rendered by a DSU panel and the AB and international non-government bodies (INGs) and CSOs do not have access to these settlement negotiations which are usually only available to government officials and their food and agribusiness industry advisors.

This paper examines the DSU panel and AB case concerning the dispute between the United States and Canada vs the European Communities (EC – Measures Concerning Meat and Meat Products also known as EC Hormones). The case related to the use of growth hormones in the production of beef. Our purpose is not to review the facts of the case, consumer advocacy for the EC ban or the rulings. The intention is to examine how the DSU can be improved so that the use of expert opinion in the future is more transparent and unbiased than it was in the EC – Hormones case.

The paper argues that, in addition to CSO's focus on extra-ordinary decision making, they should lobby their governments on positions taken in the SPS Committee. This committee's decisions and guidelines can affect the ability of governments to protect consumers at least as much as decisions made by a dispute panel or AB which could result in changes to consumer protection laws.

Monitoring of, and lobbying about, SPS Committee decisions and discussions would, of course, require human and financial resources. It is acknowledged that consumer organisations may wish to devote these resources elsewhere, to national food safety rule making or to national positions for Codex meetings, for example, to name just two SPS-related activities. The following recommendations are put forward for consideration with the understanding that Consumers International's member organisations and other CSOs may have commitments that would preclude undertaking the work entailed in the recommendations.

Recommendation 1

CI member organisations should lobby their governments for changes in the DSU to allow dispute panels and the Appellate Body to review unsolicited CSO 'friend of the court' (*amicus curiae*) *briefs*. Alternatively or additionally, CI member organisations should lobby their governments for a formal mechanism by which CSO briefs concerning a WTO dispute, and to which a government is either a disputant or a third party, are annexed to the government's brief.

Recommendation 2

CI member organisations should lobby their governments to propose DSU provisions to verify the impartiality, independence and the scientific basis of expert testimony.

Recommendation 3

CI member organisations should lobby their

governments to repeal Article 5.5 of the SPS Agreement. The Article requires WTO Member to demonstrate not only that a disputed SPS measure is needed to achieve an Appropriate Level of Protection (ALOP) but that other SPS measures are applied consistently in an indefinite number of 'comparable situations'. This makes it exceedingly difficult to defend an ALOP for consumers, animals or plants. If WTO Member do not repeal Article 5.5, CI member organisations should monitor their governments' SPS regulations to ensure that those governments do not modify, repeal or prevent the application of SPS measures because of the threat of a trade dispute.

Recommendation 4

A change in SPS notification rules proposed by Brazil has the potential to delay implementation of SPS measures to protect consumer health. CI and its member organisations should lobby their governments to delete or amend the Brazilian proposal which is currently under negotiation in the SPS Committee.

Recommendation 5

Given the pressure to implement Article 4 of the SPS Agreement through bilateral equivalency agreements between WTO Member, and given the complexity of negotiating, implementing and enforcing such agreements, CI member organisations should campaign for public disclosure of equivalence agreement documents to help determine whether the agreements will protect consumers from food-borne hazards in imported foods.

Overview of the SPS Agreement

Negotiations towards the SPS Agreement began in the late 1980s when the General Agreement on Trade and Tariffs (GATT) Standards Code was judged to be inadequate to prevent the use of domestic SPS measures as unjustified barriers to trade.[3] The GATT principle of 'national treatment' had been applied to ensure that SPS requirements for imported foods were not more stringent than those for domestic foods but the lack of science-based and risk assessment criteria for resolution of SPS disputes, particularly in EC – Hormones, motivated the negotiation of the SPS Agreement.[4]

The Agreement goes beyond the GATT requirements in several ways. First, it requires that an SPS measure 'is based on scientific principles and is not maintained without sufficient scientific evidence' (Article 2.2). The question of what is 'sufficient' is answered to some extent by the requirement that a WTO member's SPS measures 'shall be' based on international SPS standards (Article 3.1) such as those of the Codex Alimentarius Commission (Article 3.4) that have a scientific basis.

If WTO Members wish to achieve a higher level of SPS protection than that afforded by the international standards and guidelines, such measures 'shall not be inconsistent with any other provision of this Agreement' (Article 3.3). To achieve this consistency, and to protect domestic SPS measures from a challenge under the DSU, the WTO member must fulfill a number of requirements.

Perhaps the most difficult of these are contained in Article 5. This article requires that SPS measures be justified by an assessment of risks to human, plant and/or animal health in traded foods and live animals, 'taking into account risk assessment techniques developed by the relevant international organizations' (Article 5.1). If a risk assessment were the only requirement of the article, then WTO Member could satisfy this by showing the risk assessment on which an SPS measure was based or by referring to an international standard. In practice, and in order to show that a domestic SPS measure conforms with the Agreement, negotiators set the evidentiary bar far higher.

Article 5 asserts that the risk assessment and the determination of an ALOP is a function of the 'objective of minimizing negative trade effects' (Article 3.4). Far from asserting the textbook

independence of risk assessment from risk management, the SPS agreement states that '[I]n assessing the risk to animal, plant life or health and determining the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors' a series of cost-effectiveness criteria when managing the risks. The negotiators, in effect, take on the role of risk managers instructing risk assessors not to determine risks just on the basis of a review of scientific literature but also to take into account the economic costs of applying SPS measures.

Quite discreetly, the negotiators say nothing about applying cost-effectiveness analysis to the risks to human health mentioned in Article 5.1. The only other mention of human health is: 'the exceptional character of human health risks to which people voluntarily expose themselves' (Article 5.5). It is not clear whether the negotiators believe that a consumer's choice of one food over another, e.g. soy burgers instead of beef burgers, is an 'exceptional' risk and beyond the cost-effectiveness framework applied to plant and animal health. This mention of human health is in the context of instructing the SPS Committee to negotiate guidelines to implement Article 5.5. The article requires that risk management demonstrate consistency in the application of SPS measures to achieve appropriate levels of protection 'in different situations' and to avoid 'arbitrary or unjustified distinctions' in ALOPS. Later in the paper we will review Article 5.5 and the Guidelines to implement it.

This overview cannot summarise all of the disciplines the SPS Agreement brings to bear on the application of SPS measures. We cannot conclude it, however, without mentioning Article 5.7 because this acknowledges what the rest of the SPS agreement does not; namely that an adequate science-based justification for an SPS measure cannot always be given. Sometimes, to protect animal and human health, risk managers have to apply SPS measures, up to and including import bans, on the basis of very little scientific information e.g. with regard to avian influenza. Article 5.7 concerns the use of provisional SPS measures 'in cases where relevant scientific evidence [needed for a risk assessment] is insufficient'. The article requires that WTO Member seek 'the additional assessment for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time'.

In our view Article 5.7 does not deserve the notoriety it received as a result of its invocation in the Japan – Varietals case and by its association with the precautionary principle in the EC – Hormones case.[5] Here the negotiators frankly acknowledged the limit to all the other articles whose objective is to facilitate trade whenever possible and to 'minimise negative effects to trade' whenever the application of an SPS measure can be justified by the high evidentiary bar set by the SPS Agreement.

The SPS Agreement: Possible Kinds of Consumer Advocacy Activities

The following analysis results in fewer recommendations than those in a previous Decision making paper on the Codex Alimentarius Commission (Codex)[6], and far fewer recommendations than CI makes in the course of its oral and written interventions in Codex. Part of the reason for this modest and pragmatic purport is that currently non-governmental and consumer organisations lack access to intervention in formal WTO decision making.

Despite this lack of direct access there are at least four kinds of advocacy that could help to protect consumers:

1. lobbying governments for procedural modifications to the WTO agreement on dispute resolution to allow non-governmental organisations to submit *amicus curiae briefs* in dispute cases, and to develop guidelines to make expert testimony in disputes more impartial and transparent

2. lobbying governments and campaigning publicly when governments are disputants or third parties to a dispute concerning the substantive content of complaints or defenses, in matters governed by the SPS Agreement

3. lobbying governments about their positions on Decisions before the WTO SPS Committee intended to 'clarify' or implement the SPS Agreement

4. lobbying governments and campaigning about abusive invocations of the SPS Agreement aimed at changing or pre-empting national legislation and regulation that protects consumers.

The state of play on the implementation of the SPS Agreement by the SPS Committee is provided here to give a context and basis for our recommendations. This analysis, though far from comprehensive, is focused on aspects of two implementation issues:

- non-binding guidelines concerning how governments should determine an ALOP when applying SPS measures so as not to discriminate against imported foods

- Decisions on equivalency of SPS measures, including special and differential treatment for developing countries in SPS matters.

As implementation of the SPS Agreement occurs through the SPS Committee and dispute panel rulings, we outline controversies in DSU provisions and dispute panel procedures. Our analysis focuses on the use of expert testimony and *amicus curiae briefs* and how these procedures affected the outcome of the EU/US/Canada dispute on hormone treated beef.

Since the SPS Agreement is designed to facilitate trade it might be assumed that it offers no opportunities to protect consumers, notwithstanding the intent to protect human health stated in its non-binding preamble. According to one survey of WTO dispute rulings, 'the complainants win in 88 percent of the cases that reach a final conclusion in a [dispute settlement] panel or before the Appellate Body' based on 1995-2002 data.[7] This general tendency for complainants to win changes in the defendant's laws or gain some form of compensation, as in the application of a certain amount of tariffs, should not lead us to assume that 88 percent of WTO challenges to domestic SPS measures will result in the repeal or modification of those measures as 'disguised barriers to trade'.

As is noted below, relatively few WTO complaints are filed with reference to the SPS Agreement and very few result in dispute panel and AB rulings that can be analysed to determine whether they undermine consumer protections. There is ample opportunity, however, for governments unilaterally to weaken or not apply SPS measures to protect consumers because of a credible threat that domestic measures will be challenged under the SPS Agreement as trade barriers. In addition to dispute panel rulings consumer organisations should give more attention to whether negotiated and unpublished settlements about SPS disputes result in weakening measures intended to protect human, plant and animal health. Similarly, more attention needs to be paid to government positions taken in the ordinary decision making of the SPS Committee that 'clarifies' how to use and interpret the SPS Agreement.

Recommendations are proposed for the four kinds of advocacy activities outlined above on the basis of current state of play on dispute resolution, SPS Committee guidelines for determining how governments establish 'appropriate levels of protection' and bilateral equivalence of SPS measures to facilitate trade.

Decision-making in the SPS Committee and the Dispute Settlement Framework for Trade-Related SPS disputes

In 1997, Franz Fischler, European Union Commissioner of Agriculture, called for the renegotiation of the SPS Agreement. Its binding obligations were, he said, paralysing the adoption of international food safety, food quality and animal health standards set by international organisations referenced in the Agreement.[8] Following a 1998 WTO AB ruling, that overturned some elements of a dispute panel ruling concerning the using of growth hormones in the production of beef, the United States also considered re-opening SPS Agreement negotiations.[9] Since then a not very cordial *entente* has thwarted renegotiation of the SPS Agreement and there is no 'built-in' agenda for further negotiation.

Formal legal interpretation of the SPS Agreement is based on relatively few trade-related SPS disputes currently before panels of the Dispute Settlement Body (DBS) empanelled under the DSU, which is an Annex of the Agreement that founded the WTO.

Interpretation of the SPS Agreement is not limited to dispute panel and AB rulings, however, it also takes place in Decisions, Recommendations and Guidelines negotiated by the SPS Committee to 'clarify and improve' the implementation of specific articles, e.g. Article 4 concerning the bilateral determination of equivalence in Member' SPS measures.[10] All WTO Member may send representatives to the Committee which meets three times a year and informally as necessary.[11]

The high cost of litigating disputes, the slow pace at which post-ruling sanctions are applied, and the very great difficulty in getting WTO rule violators to change offending legislation or regulations, are some of the factors that disincline most WTO Member from pursuing recourse through the DSU.[12] Most trade-related SPS disputes are resolved through bilateral negotiations, albeit invoking the SPS Agreement, and in rare cases even involve Heads of State pleading the case of particular industries.[13]

A recent quantitative study of DSB proceedings suggests that the number of disputes filed about domestic regulations, such as the application of SPS measures, peaked in 1998 and is on the decline.[14] Complaints or 'counter-notifications' to the SPS Committee of measures that a member believes may violate the SPS Agreement are fairly frequent. According to one study of SPS Committee minutes, between 1995 and 2002, 241 such complaints were filed.[15] Relatively few of these complaints result in dispute filings, however, and even fewer result in DSU rulings that can be examined as case studies. From 1996 to 2003, only three disputes citing the SPS Agreement were reviewed by the AB.[16] Cross-referencing in the WTO 'Index of disputes issues' makes calculation of dispute themes somewhat imprecise but we estimate that, as of 5 October 2004, of about 90 agriculture and fish product-related dispute issues, 14 concerned SPS matters at least in part.[17]

The usefulness of analysing case studies of trade disputes resolved by panels in order to determine the overall impact of the SPS Agreement on the protection of consumer health, is therefore somewhat limited. Pre-dispute bilateral resolution of the application of SPS measures, without public disclosure of relevant documentation, seems to be the rule. The exceptions are rulings that can be studied by the public to learn how trade dispute panels judge whether the application of national SPS measures conforms to the SPS Agreement.

Prospects for Consumer Organisation Intervention in Influencing the Interpretation of the SPS Agreement

International standard setting organisations, such as Codex, are constitutionally arranged to enable intervention by accredited INGOs, such as CI[18]. The opportunities for INGO intervention in formal WTO activities are virtually non-existent, however, except and insofar as dispute panels allow *amicus curiae briefs* from NGOs and individuals in specific trade disputes (NGOs and individuals are invited to participate in informal, non-decision making activities such as WTO sponsored seminars or briefings). The AB ruled, in October 1998, in Canada Asbestos that dispute panels had the discretion to consider unsolicited *amicus curiae briefs* from NGOs and individuals. The ruling set off a fire storm of Member protest, which led to accusations that the AB was usurping Member rights.[19]

After more than two years of Member comments the AB recently revised its working procedures. They do not address the issue of *amicus curiae briefs*, although the AB expects 'to have an opportunity to consider some of the matters raised by Member in the context of future revision exercises'.[20] Any recommendation concerning *amicus curiae briefs* will have to take account of this controversy in the light of the current DSU negotiations, which are not part of the Single Undertaking framework of the Doha Round of negotiations.[21]

As, 'the provisions of the DSU hardly amount to a comprehensive code of civil procedure or evidence'[22], there is no explicit provision granted or denied that dispute panels must consider any other briefs than those of the disputants and third party Member. Article 13 of the DSU provides that: 'Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate'. At question is whether the word 'seek' encompasses non-obligatory consideration of an unsolicited *amicus brief* by a panel or the AB.

Professor Robert Howse argues that because the purpose of the DSU is not just to settle disputes to the satisfaction of the disputants and third parties, but also to clarify the law (Article 3.2), the discretion to accept *amicus briefs* is related to the AB's broader institutional role in clarifying the law'[SP1].[23] While the AB may decide not to refer an *amicus* in a specific ruling, particularly given the 60-90 day time line [SP2]for an AB to review an appeal, both it and the dispute panels should retain the discretion to accept briefs that may help to decide a case or to clarify the law on which a decision is based.

Despite the protests of what Howse calls the trade 'club' of developed countries against the filing of NGO *amicus briefs*, 'the powerful interests of developed countries, such as corporate interests, have means of getting their point of view know in dispute settlement circles that don't depend on *amicus* submissions. . . All of the howls of the trade 'club' about *amicus* practice when NGOs are involved should be interpreted in light of their utter silence about the due process issues raised by the long-standing practice of lawyers, lobbyists, etc. talking to delegates or even legal officials of the Secretariat. . . This is no time for NGOs to back off from *amicus* submissions. In the short term, the AB may not 'consider' any of these submissions. But it will be forced in each instance to reaffirm its discretion to accept or reject the submissions. With each reaffirmation, the Members of the WTO are reminded that, despite all the pressure, the AB has not backed off from its basic legal position, and that NGOs are not prepared to back off as well.'[24]

In light of the current dispute over *amicus briefs*, CI should consider how best to communicate the views of its member organisations to governments regarding procedural and substantive issues in SPS and other disputes heard by WTO panels. At least three not mutually exclusive options should be considered, in the following order of temporal priority:

Recommendation 1

- A first option is that CI seek funding to prepare *amicus curiae briefs* consonant with CI World Congress Resolutions and campaign objectives, e.g. regarding genetically modified organisms in EC – Biotech Products, and request CI member organisations to use such *amicus curiae briefs* to influence the positions taken by their governments in disputes.

- A second option is that CI member organisations lobby their governments for changes in the DSU to allow dispute panels and the AB to review unsolicited NGO *amicus curiae briefs*. Such briefs could be reviewed following DSB panel and/or AB review of disputant and third party briefs, if the panel or AB declares that *amicus curiae briefs* are warranted to provide relevant evidence or

opinion not provided by disputants or third parties.

- A third option is that CI member organisations lobby their governments for the creation of a formal mechanism by which NGO briefs concerning a dispute to which a government is either a disputant or a third party could be annexed to the government's brief.

The SPS Agreement and the Dispute Settlement Agreement: Facilitating Trade

The SPS Agreement is designed to facilitate trade not to act as a public health agreement, such as The World Health Organization Framework Convention on Tobacco Control. It has among its non-binding objectives the desire to, 'improve the human health, animal health and phytosanitary situation in all Members' (Preamble). The binding provisions of the agreement require Member to justify the 'necessity' of the application of SPS measures to achieve public health objectives.

The justification for such measures is assumed to conform with the SPS Agreement if a WTO member references, in its notification, an agreed standard established by one of three standards-setting bodies referenced in the agreement. These are: the Codex Alimentarius Commission, the International Animal Health Organizations (Office Internationale des Epizooties or OIE) and the International Plant Protection Convention (Articles 2.2, 3.2). Members may seek to apply measures that offer a higher level of human, animal or plant health protection, than that offered by international standards 'if there is a scientific justification' (Article 3.3) and, in line with the conditions of Article 5, the higher level of protection does not result in discrimination against imported foods.

However, the public health objectives should not be 'more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility' (Article 5.6). As indicated in our discussion below of Article 5.5, the SPS Committee had difficulty in developing voluntary guidelines to advise governments on how to implement their sovereign discretion to select the appropriate level of protection. The guidelines advise that governments may define a quantitative amount of risk to impose on consumers or give a qualitative description of how much consumers are to be protected.

There is no obligation, however, to document the ALOP even when notifying an SPS measure to the SPS Committee (Annex B). The documentation of an ALOP may have to be produced if and when another WTO Member counter-notifies the SPS Committee that an SPS measure is trade restrictive. The consumer protection value of notification is further reduced because Member are not required to include

in their notifications 'confidential information . . . which would prejudice the legitimate commercial interests of particular enterprises' (Annex B). 'Taking into account' that an SPS measure is economically and technically feasible and the least trade restrictive measure for a member to achieve whatever ALOP it may set, dilutes the consumer protection value of the SPS measure.

Complicating the already attenuated relation of the SPS Agreement to the protection of human, animal and plant health is the fact that nothing in the DSU requires trade disputants to adduce peer reviewed scientific literature as evidence to resolve trade disputes. As noted above, Article 13 of the DSU states: 'Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate'. The Article continues: 'Confidential information which is provided shall not be revealed without formal authorisation from the individual, body or authorities of the Member providing the information', even if the information in question concerns a product or a substance that might harm public, animal or plant health. Annex 4 on 'Expert Review Groups' has no provisions to prevent conflicts of interest resulting from an expert having financial or corporate interests in the matter under dispute. However, parties to a dispute may object to experts chosen by the panel.[25]

The DSU is currently being renegotiated under the mandate of paragraph 30 of the Doha Ministerial Declaration. Article 13 is not being targeted for renegotiation, however, and clarification of the treatment of *amicus curiae brief* to the panels, a matter of great interest to non-governmental organisations, is too controversial to allow the Chairman of the Trade Negotiations Committee to propose a revision.[26] Weak rules of self-disclosure for panelists' qualifications, negotiated in 1996, allowed a board member of the Nestlé Corporation to be selected to rule on US sanctions on Cuba where Nestlé had a factory.[27]

The use of expert advice in Dispute Settlement: the Beef Hormone Dispute

Among the many controversies in the EU/US/Canada dispute over the use of growth hormones in beef production (EC – Hormones) was the dispute panel's use of expert advisers. As an *amicus curiae brief* submitted to the Appellate Body's review of the panel ruling noted in 1997, 'The United States and the EC agreed that the manner in which the Panel used scientific experts would affect the integrity of the dispute settlement process and public confidence in the outcome of the dispute'.[28] The brief noted that the public could not be confident of the integrity of the process, since, among other issues:

- the panel did not make public the written submissions of experts to the panel
- the panel's report on expert responses to panel-drafted questions referenced no scientific literature as grounds for the expert's views
- the panel did not ensure that the experts were impartial and independent by publishing conflict of interest information about each expert
- one of the experts selected from lists provided by Codex: 'Dr. Jock McLean was actually a member of the Codex group that produced the 1988 report relied on by the United States. In addition to choosing its experts from a list provided by Codex, the Panel submitted questions to the Codex Commission Secretariat and involved a sixth expert, who represented the Codex secretariat, in its expert deliberations'.[29]

In effect, Codex affiliated experts were allowed to review the scientific validity of their own work and present that as independent and impartial evidence. The panel did not seek independent corroboration of their views in peer-reviewed literature. Furthermore, the NGOs submitting the brief discovered – since the panel report did not include the resumés of the experts – that two of the six experts were employed by the disputant governments at the time of the dispute.[30]

These flaws have impaired the credibility of WTO rulings based on putatively impartial and independent expert evidence. While many proposals have been made to address the weaknesses of the DSU, as far as we can determine the proposals do not address the provision of expert advice. At a non-governmental forum at the WTO in May 2004, the ambassadors of Brazil and India recognised that the DSU needed to be reformed but suggested that such reforms could only take place after the conclusion of Doha Round negotiations, i.e. in 2008 at the earliest.[31] Government officials may believe that disputes are so seldom that DSU reform should be secondary to the renegotiation of other agreements. Our view is that since dispute panel and AB rulings are used to justify changing national SPS measures, or to

threaten the measures of other countries in the name of upholding the SPS Agreement,[32] the public needs to have documented assurance that the evidence upon which such rulings are based is impartial, independent and reflects the best peer-reviewed science, and not just the opinion of an expert.

The DSU Rules of Conduct, negotiated in December 1996, include 'Self-Disclosure Requirements for Covered Persons' intended to address the apparent lack of impartiality and independence of experts that undermined the credibility of the dispute over growth hormones in beef. These self-disclosure requirements need to be strengthened by guidelines to independently verify the impartiality, independence and the scientific basis of expert testimony. WTO Members apparently do not wish to strengthen the implementation of Article 13 and Appendix 4 of the DSU regarding expert advice, at least not before the conclusion of Doha Round negotiations. Nevertheless, dispute panels and the AB will have to rule on important cases prior to 2008, not the least of which is the current US case and possible future cases against EU rules on genetically modified organisms.

Recommendation 2

CI member organisations should lobby their governments to propose non-binding guidelines to implement Article 13 and Appendix 4 of the DSU. These guidelines could include measures to ensure that panelists only put questions to experts that the experts are qualified to answer, and that speculative responses to panelists' questions or conflicting statements by experts are part of the public record of the panel decision.

Non-binding guidelines cannot oblige panels to be more rigorous in reducing possible conflicts of interest among experts or more rigorous and transparent in the use of expert opinion. It is, however, probably more feasible to get Members to negotiate such guidelines than to negotiate binding changes to the DSU.

The WTO Committee on Sanitary and Phytosanitary Measures: Guidelines on the Implementation of Article 5.5

As noted above, with the exception of relatively few dispute rulings about SPS measures, the implementation of the SPS Agreement is the competence of the WTO SPS Committee. In this section and the following one, we illustrate some of the Committee's work on two issues of interest to consumers and about which consumer organisations may wish to advise their governments and/or educate consumers. The issues are:

- a government's right to set 'appropriate levels of protection' for its citizens
- bilateral agreements to determine whether exporting countries' SPS measures are equivalent in effect to the SPS measures of the importing country.

Article 5.5 calls for Member to co-operate in the committee to negotiate what became the non-binding 'Guidelines to Further the Practical Implementation of Article 5.5'.[33] The guidelines help Member to avoid 'arbitrary or unjustifiable distinctions' in the ALOP when applying SPS measures. The statement of the ALOP may be qualitative or quantitative (e.g. a permitted level of food contamination) and should serve to guide consistent implementation over time'[SP3] (paragraph A.1). Governments may not set a more stringent ALOP for imported food than for domestic food without being accused of creating a disguised restriction on international trade. The guidelines are to undergo periodic revision during the life of the Agreement (paragraph 2).

When negotiating the guidelines, the US sought to reflect the 1997 dispute panel ruling in its favor with regard to the EU ban on imported meat and meat domestically produced with growth hormones. The EU sought to have reflected, the 1998 AB ruling that overturned much of the dispute panel's ruling, including the charge that the EU ban was applied discriminately.[34] The compromise guidelines have a degree of complexity that favours only those Members with massive SPS bureaucracies capable of setting norms for protecting human, plant and animal health without being accused of disguised trade protectionism.

Consider the following advice: 'To avoid arbitrary or unjustifiable difference in the level of protection a

Member considers to be appropriate in different situations, a Member should compare any proposed decision on the level of protection in a particular situation with the level it has previously considered or is considering to be appropriate in situations which contain sufficient common elements so as to render them comparable with regard to human life or health, to animal life or health, or to plant life or health' (paragraph A.4). This guideline offers ample scope for litigation over what are 'situations' in which there are 'sufficient common elements' so as to enable procedural comparisons between differing SPS measures. To judge by this advice, any SPS measure proposed by any member to protect human, animal or plant health should be compared with every existing SPS measure, or measure under consideration, to determine whether the level of protection provided by it can be justified in the event of a trade dispute challenge.

According to this guideline, a member must justify the level of protection it decides to provide by ensuring consistency with the ALOP of every other of the member's SPS measures that a trade dispute complainant might consider to be a comparable measure. This means that SPS measures informed by science-based risk assessment, and applied indiscriminately and consistently to domestic and imported foods alike, can be challenged as trade restrictive if a member cannot show that the risk management decision is consistent with the decision process of measures regarded as comparable by a complainant. To heed this guideline would be to interfere in the right, affirmed in the guidelines, 'of a Member to determine its appropriate level of sanitary and phytosanitary protection against risks to human life or health, or to animal or plant life and health'.

The US sought to make these guidelines binding but was prevented from doing so by the EC and other Members.[35] Nevertheless even the voluntary guidelines might be invoked by one member to threaten an SPS-related trade dispute. The result could be that application of a proposed SPS measure is rejected. not because it lacks a scientific basis and a risk assessment, but because a member cannot meet the procedural requirement of comparing the ALOP with measures to achieve other ALOPs in so-called comparable situations.

The difficulty of implementing Article 5.5 through this guideline leads us back to examining the viability of Article 5.5 itself. Steve Charnovitz has written that 'the SPS Agreement – which was largely initiated by the US government – favors those countries that have a surfeit of administrative procedures'.[36] He argues partly on the basis of an examination of a dispute between Canada and Australia concerning salmon, and partly on the basis of the difficulty of demonstrating procedural comparisons, that 'Article 5.5 is too extreme and should be repealed'.[37] We agree.

Recommendation 3

CI member organisations should lobby their governments to repeal Article 5.5 of the SPS Agreement. The article makes it exceedingly difficult to defend an ALOP for consumers, animals or plants, by requiring a member to demonstrate not only that the disputed SPS measure is needed to achieve an ALOP but that other SPS measures are applied consistently in an indefinite number of 'comparable situations'. If WTO Member do not repeal Article 5.5, CI member organisations should monitor their governments' SPS regulations to ensure that their governments do not modify, repeal or prevent the application of SPS measures because of the threat of a trade dispute.

Special and Differential Treatment and Determination of Equivalence in SPS Measures

At the WTO Ministerial Conference in Doha, Qatar, the WTO, the World Bank, the World Health Organization (WHO), the United Nations Food and Agriculture Organization (FAO) and the International Animal Health Organization (OIE in its French acronym) stated their intention to support developing country participation in international standard-setting organisations, and to provide technical assistance 'in the establishment and implementation of appropriate food safety and animal and plant health measures'.[38]

Towards fulfilling that intention and implementing Articles 9 and 10 of the SPS Agreement, the organisations established a Standards and Trade Development Facility, coordinated by the WTO and financed by the World Bank with an initial contribution of $300,000 and with a project 2003 fiscal year budget of about US $2 million contingent on partner contributions.[39] In 2004, an FAO/WHO Trust Fund to support developing country participation in Codex began operations with less than a million dollars of a 12-year notional budget of US $35-40 million.[40] The post-Doha SPS Committee 'discussions went beyond the need for participation in standard-setting to the capacity to implement these standards. The need to involve the private sector had been identified, as well as enforcement of the capacity of developing countries to ensure the safety of the products which they imported'.[41]

Special and Differential Treatment (S&D) provisions in the SPS Agreement appear in the preamble, Article 5.6, Article 9, Article 10 and Annex B concerning transparency of SPS measures. The following review concerns only notification measures to increase transparency.

The SPS Committee has sought to implement S&D by considering revisions to notification procedures 'to re-notify [SPS] measures when the scope of a measure was changed in such a way that trade from developing countries could be adversely affected'.[42] The committee is still discussing a 2001 proposal from Brazil which states that if 'the introduction of SPS measures may have significant effect on trade opportunities for products of interest to developing countries, Members shall notify the WTO and inform concerned Members prior to the application of such measures.[43] This proposal would change the notification requirement in Annex B that states:' The Secretariat shall promptly circulate copies of the notification to all Members and interested international organizations and draw the attention of developing country Members to any notifications relating to products of particular interest to them' (paragraph 8). Under the Brazilian proposal, SPS measures would no longer be notified promptly *after* their application in domestic food regulation. Instead SPS measures would have to be notified before their application to determine whether such measures would adversely affect trade opportunities for developing countries.

The proposal is controversial because of the difficulty of determining, prior to application, which Members' trade opportunities might be adversely affected by an SPS measure, the extent to which they might be affected and whether a delay would interfere with the importing member's rights to set appropriate levels of protection for its consumers under Article 5.5. A further difficulty arises in the possibility that human, plant or animal health might be adversely affected during the time that a proposed measure is not applied and while the impact of the measure on trade opportunities of concerned Member is assessed. It is not clear whether pre-application notification of an SPS measure would provide an importing country with legal justification not to apply the measure pending its trade impact review.

There are currently no sanctions for failing to promptly notify the WTO. The US, for example, took about three years to notify its 2001 Aggregate Measures of Support to the Committee on Agriculture. On the other hand, pre-application notifications could encourage exporting countries to counter-notify that a proposed measure would constitute a 'disguised barrier to trade' and lead to withdrawal of the measure or to a trade dispute if the measure was not withdrawn.

Consumers International has been a strong proponent of technical assistance to developing countries to assist them to participate in Codex standard-setting activities and to support the adoption, implementation and enforcement of standards to protect consumer health.[44] CI recognises that to date S&D technical assistance to developing countries has been very modest and that far more could and should be done to implement S&D in food safety matters, particularly in providing needed SPS infrastructure to protect consumer health and facilitate trade. However, the change in SPS

notification rules proposed by Brazil, though ostensibly an S&D provision, has the potential to delay implementation of SPS measures that might protect consumer health.

Recommendation 4

Consumers International and its member organisations should lobby their governments to delete or amend the Brazilian proposal in the context of other proposed changes to SPS notification currently under negotiation in the SPS Committee.

Implementation of Article 4 on the Recognition of the Equivalence of SPS Measures

Article 4 of the SPS Agreement concerning the bilateral recognition by an importing member that the SPS measures of an exporting member have equivalent effect in protecting human, plant or animal health, applies to all WTO Members. Developing countries have been particularly interested in furthering the SPS Committee's implementation of Article 4, as they recognise that equivalence is very helpful in facilitating trade. The SPS Committee developed a format for Members to notify the bilateral Determination of the Recognition of Equivalence of SPS Measures, but as of November 2002: 'no Member has submitted a notification regarding agreements recognizing equivalence'.[45]

In 2003, Codex and OIE adopted guidelines for equivalence agreements on SPS measures. In the same year, the Interim Commission on Phytosanitary Measures, began to develop guidelines for phytosanitary measures.[46] Nonetheless, as of the July 2004 meeting of the SPS Committee, no bilateral equivalence agreements had been notified. This is due to a number of factors, not the least of which are the aforementioned difficulties in implementing Article 5.5 on 'arbitrary and unjustifiable' differences in SPS measures without usurping the Members' right to apply measures to achieve a documented appropriate level of protection.

According to a July 2004 Decision of the SPS Committee, 'the importing Member should indicate the appropriate level of protection which its sanitary or phytosanitary measure is designed to achieve. The explanation should be accompanied by a copy of the risk assessment on which the sanitary or phytosanitary measure is based or a technical justification based on a relevant international standard, guideline or recommendation'.[47] This means that when an exporting member requests recognition of equivalence for 'a specific measure, or measures related to a certain product or category of products or on a system-wide basis'[48] the importing member will have to justify each of its measures for which equivalence is requested, 'normally within a six-month period'.[49] The exporting member will have to do the same[50] and 'provide reasonable access, upon request, to the exporting Member for inspection, testing and other relevant procedures for the recognition of equivalence'[51] although no time frame is provided for such visits.

As noted above, Codex adopted guidelines in 2003 to aid its Members in the determination of equivalence.[52] Recognising that the guidelines were of a general nature, Codex authorised the start of a work programme of appendices to the guidelines that would provide specificity concerning documentation requirements, technical inspection visit requirements and technical assistance requirements, among other issues, for determination of equivalence.[53] The authorisation of such appendices indicates that the implementation of equivalence agreements is a good deal more complicated than is detailed in general guidelines or in an SPS Committee Decision.

The pressure for importing countries to conclude equivalence agreements has, however, led to criticisms that the procedure and substance of the agreements violated some domestic regulations even where there were extensive SPS bureaucracies and infrastructure as in the US.[54] Despite these criticisms the US Food Safety Inspection Service is proposing to eliminate the requirement that SPS officials of Members exporting meat or poultry to the US, review the practices of the in-plant inspectors of export establishments on a monthly basis.[55] Elimination of the requirement would, arguably, not only violate US law but could also weaken meat and poultry inspection for consumers in the exporting member's country.

Recommendation 5

Given the pressure from the SPS Committee to implement Article 4 of the SPS Agreement through bilateral equivalency agreements and given the complexity of negotiating, implementing and enforcing such agreements, CI member organisations should campaign for public disclosure of equivalence agreement documents to determine whether the agreements will protect consumer health from food-borne diseases resulting from the consumption of imported foods. CI should also continue to participate in the Codex work programme on equivalence agreements to elaborate appendices to the recently adopted guidelines that will help to ensure the protection of consumer health.

Conclusion

From the viewpoint of agricultural economists, trade disruptions due to SPS factors 'are relatively small, considering the magnitude of global food and agricultural trade ($436 billion in 2001), the thousands of food categories and products traded, the roughly 200 counties participating in food trade and the range of food safety challenges'.[56] Even the FAO announcement in March 2004, that in 2004 the $33 billion meat and poultry trade would lose $10 billion in sales due to import bans resulting from animal health and meat contamination issues, would not disturb the macro-economic view that SPS measures are working well to facilitate trade. Even the cost to public health and work hours lost to food-borne diseases, albeit more difficult to calculate, might not disturb this happy view of macro-economic welfare.

Consumer organisations, on the other hand, have sufficient grounds to be concerned that decision making processes, the substance of decisions in dispute settlement and the implementation of the SPS Agreement are among factors making it more difficult for governments to justify to other WTO Members the SPS measures that protect consumers. Although consumer organisations, like other NGOs, have no legal standing in WTO activities, we believe that the foregoing analysis shows the need for consumer organisations to intervene with their governments to prevent the weakening of SPS measures that protect consumers. It will then be up to governments, closely monitored by consumer organisations, to take positions in the WTO that will defend their right and ability to protect consumer health.

It is hoped that the recommendations outlined here will be considered as starting points from which consumer organisations may lobby and publicly campaign to change the implementation of the SPS Agreement in ways that will allow governments to protect consumer health.

Footnotes

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List of Abbreviations

AB	Appellate Body
ACWL	Advisory Centre on WTO Law
ACOS	Advisory Committee on safety - IEC
AFNOR	French National Standards Institute
ALOP	Appropriate Level of Protection
ANEC	the European Consumer Voice in Standardisation
ANSI	American National Standards Institute
API	American Petroleum Institute
ASME	American Society of Mechanical Engineers
ASTM	American Society for the Testing of Materials
BINGO	Business-interest Non-governmental Organisation
BSI	British Standards Institution
CCEXEC	Codex Executive Committee
CCGP	Codex Committee on General Principles
CCRVDF	Codex Committee on Residues of Veterinary Drugs in Foods
CEN	European Committee for Standardization
CENELEC	European Committee for Electro-Technical Standardisation
CI	Consumers International
Codex	Codex Alimentarius Commission
COPANT	Pan American Standards Commission
COPOLCO	Consumer Policy Committee of ISO
CS	Central Secretariat
CSC/STRAT	ISO Council standing committee on strategies
CSOs	Civil Society Organisations
DEVCO	Developing Countries Policy Committee of ISO
DIN	German National Standards Institute
DSU	Dispute Settlement Understanding
EC	European Community
ECOSOC	Economic and Social Council
EPA	Economic Partnership Agreement
ExCo	Executive Committee of the IEC
FAO	Food and Agriculture Organization
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariffs
IBRD	International Bank of Reconstruction and Development
IEC	International Electrotechnical Commission
IEEE	Institute of Electrical and Electronics Engineers
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
IMF	International Monetary Fund
INGO	International non-Government organisation
INNI	International NGO Network on ISO
ISO	International Organisation for Standardization
ITU	International Telecommunications Union
JECFA	WHO/FAO Joint Expert Committee on Food Additives and Contaminants
JEMRA	WHO/FAO Joint Expert Meetings on Microbiological Risk Assessment
JMPR	WHO/FAO Joint Meeting on Pesticide Residues
LDC	Least Developed Countries
NGO	Non-government Organisation
NWIP	New Work Item Proposal
OECD	Organisation for Economic Cooperation and Development
OIE	World Organisation for Animal Health
O-Member	Observer Member
P-Member	Participating Member
PINGO	Public-interest Non Governmental Organisation
PTAs	Preferential Trading Agreements
SC	Sub-committee
SCC	Standards Council of Canada
SDO	standards development organisation
SME	small and medium enterprises
SPS Agreement	Trade Related Application of Sanitary and Phytosanitary Measures
TC	Technical Committee
TBT	Agreement on Technical Barriers to Trade
TMB	ISO Technical Management Board
TRIPS	Trade Related Intellectual Property Rights Agreement
UNCTAD	United Nations Conference on Trade and Development
UNECE	UN Economic Commission for Europe
USTR	(Office of) United States Trade Representatives
WB	World Bank
WG	Working Group
WHO	World Health Organization
WTO	World Trade Organization