



<p style="text-align: center;">The WTO SPS Agreement & Private Standards</p> <p style="text-align: center;">Hilton E. Zunckel</p> <p style="text-align: center;">Director Trade Law Chambers Cape Town South Africa</p>	<p style="text-align: center;">The ComMark Regional Standards Programme</p> <p style="text-align: center;"> 5 November 2008</p> <p style="text-align: center;"> Trade Law CHAMBERS <small>Cape Town • Geneva • Oxford</small></p> <p style="text-align: center;">www.tradelawchambers.co.za</p>
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Agriculture NTBs

- Mainly health and technical standards.
- No rent – cost raised – price raised.
- Legitimate or protectionist?
- The SPS & TBT Agreements



Which WTO Agreement Applies?

Differing scope of application

- **SPS:** measures aimed at protection of human/animal/plant life/health from food-borne risks and risks from pests and diseases
- **TBT:** technical regulations, standards and conformity assessment procedures
- **GATT:** measures affecting trade in goods (Art. XXb)

Relationship between the Agreements



- **TBT and SPS: mutually exclusive**
- SPS and GATT: presumption of consistency
- TBT and GATT: concurrent application

Agriculture & SPS

Agreement on Agriculture Article 14:

“ Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures. ”

SPS Agreement

Annex A para. 1: Any measure applied to –

- Protect animal or plant from disease.
- Protect human or animal from food.
- Protect human from plant/animal disease.
- Prevent 'other damage' caused by pests.



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SPS Agreement Key Points

- *Non-Discrimination*: Measures must not discriminate between domestic and foreign producers.
- *Use of International Standards*: Measures should be based on accepted international standards when these exist.
- *Full Publication and easy Access*: Publication must be prompt & accessible (enquiry point).
- *Fair Inspection*: Procedures quick and fair with no domestic advantage over imports.



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Based on International Standards

Standardizing Organizations: "three sisters" in SPS Art. 3.4

- Food Safety - Codex Alimentarius Commission (CAC)
- Animal Health - International Office of Epizootics (OIE)
- Plant Health - Secretariat of the International Plant Protection Convention (IPPC)
- Non exhaustive list.



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Egypt's Concern

Equivalence in technologically advanced countries has itself become quite demanding and turned into a barrier to exports from developing countries.

Furthermore, in practice, a number of developed countries are requiring 'sameness' rather than 'equivalence' of measures, which is a source of concern to many developing countries.



(SPS Committee statement By Egypt)



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Least-trade-restrictive Measure

- The principle of least-trade restrictive measure possible (Art. 5.6):
- A measure becomes more trade restrictive than necessary if – There is another measure that:
 - (a) is reasonably available taking into account technical and economic feasibility;
 - (b) achieves the Member's appropriate level of sanitary protection; and
 - (c) is significantly less trade restrictive than the contested measure.



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RISK ASSESSMENT

2 Step approach:

- 1: Identify the adverse effects,
- 2: Evaluate the likely occurrence (possibility).
- Matters not associated with 'physical science' are included.
- No scientific consensus, a body of opinion suffices.
- Presumption that a measure is based on a risk assessment (rebuttable).



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SPS & PRECAUTION

- Articles 5.7 & 3.3 , SPS preamble para 6.
- Customary International Law – EC raises.
- Appellate Body: 'LESS Than Clear'. (?)
- SPS takes precedent over precaution.
- Precaution in art. 5.7 not an excuse for SPS inconsistent measures i.e. Not an exception.
- Art. 5.7 *limited* case of precaution at best.



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EC BEEF HORMONES

- Ban of imports of hormone treated beef.
- US CANADA (Australia, New Zealand, Norway).
- 6 Hormones involved.
- 3 natural & 3 artificial.
- EC "happened" to have large stocks built up!
- Great consumer sensitivity (BSE, GMO?)
- Broccoli.
- Insufficient science.



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Technical Assistance Art 9.1

- Members **agree to facilitate** the provision of technical assistance, especially to developing countries.
- Such assistance may be, inter alia, in the areas of processing technologies, research and infrastructure, the establishment of national regulatory bodies.
- May take the form of advice, credits, donations and grants, including for the purpose of seeking technical expertise, training and equipment.
- AIM – allow, adjust to, comply with SPS measures necessary to achieve the appropriate level of protection in their export markets.



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Technical Assistance Art 9.2

Where substantial investments are required in order for an exporting developing country Member to fulfil the SPS **requirements of an importing Member:**

The latter shall **consider** providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved.



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Small Country – BIG Question



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Can 'Implementation' Save You ?

GLOBALG.A.P.

GLOBALGAP is a private sector body that sets voluntary standards for the certification of agricultural products around the globe. The aim is to establish ONE standard for Good Agricultural Practice (G.A.P.) with different product applications capable of fitting to the whole of global agriculture.

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Implementation Article 13

- Members are fully responsible under this Agreement for the observance of all obligations set forth in the SPS Agreement.
- Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by **other than** central government bodies.
- Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement.
- Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement.
- Members shall ensure that they rely on the services of non-governmental entities for implementing SPS measures only if the entities comply with the SPS Agreement.

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Why does it matter which Agreement applies?

- Different legal rules apply to SPS and TBT measures.



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TBT a possible on Private Standards?

- Article 3.1 of the TBT Agreement.
- Members shall take such **reasonable measures** as may be available to them to ensure compliance by such bodies with the provisions of Article 2.
- Article 2 being - Preparation, Adoption and Application of Technical Regulations by Central Government Bodies.
- Will this suffice?



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SPS & TBT: main provisions

SPS

- scientific justification
- harmonization
- least trade-restrictive
- equivalence
- regional conditions
- transparency
- technical assistance, special and differential treatment

TBT

- legitimate objective
- harmonization
- least trade-restrictive
- equivalence and mutual recognition
- transparency
- technical assistance, special and differential treatment

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Why does it matter which Agreement applies?

- Which regime is more likely to apply?



SPS or TBT?

SPS measures

- protect human or animal health from food-borne risks
- protect human health from animal- or plant-carried diseases
- protect animals and plants from pests or diseases
- examples:
 - microbiological contamination of food
 - pesticide or veterinary drug residues
 - food additives

TBT measures

- human carried disease control - SARS (unless it's food safety)
- nutritional claims
- food packaging and quality
- examples:
 - pharmaceuticals
 - labelling (unless related to food safety)
 - pesticide handling or quality
 - seat belts

An Important Footnote

- "animal" includes wild fauna, fish
- "plant" includes forests, wild flora
- "pests" include weeds
- "contaminants" include pesticides, veterinary drug residues, extraneous matter

What type of measures?

Measures intended to protect:

- the environment, per se
- consumer interests (like metrology & not health)
- animal welfare

are **NOT** covered by the SPS Agreement

Pesticides – Answer these :

- Safe handling instructions
- Performance
- Shelf-life
- Residue limits in food