Agency for International Trade Information and Cooperation

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Dispute Settlement under the SPS Agreement

1. Since 1995, almost ten per cent of the disputes raised through the WTO's Dispute Settlement Understanding (DSU) involve alleged violations of SPS Agreement provisions. As of December 2008[1], over 388 disputes had reached at least the first stage of the DSU; 35 concerned the SPS Agreement, although in seven cases this was not the main focus. Ten panels have been established to examine eleven complaints. Another 18 cases (some with multiple complainants) did not reach the panel stage; of these, mutually agreed solutions were reported in seven disputes while the remainder are pending at the consultation step – most effectively dormant.

2. How are disputes handled in the SPS area? In essence, conflicts are treated not very differently from those involving other WTO provisions and agreements. The first stage is, therefore, straight-forward bilateral engagement by the two parties outside the WTO. If that does not work, then the issue can be tabled as a "specific trade concern" with the SPS Committee, where other members may decide to take an interest. Sometimes clarification by the country subject to the complaint is sufficient; or some minor change in the objected practice or regulation will resolve the issue. If not, there is scope for the Chair of the SPS Committee to use his or her good offices.

3. At this stage of the process, it is worth noting that other international bodies[2] in the SPS field may provide disputants with a view on critical issues: notably the World Organization for Animal Health (OIE) and the Secretariat of the International Plant Protection Convention (IPPC). However, the most effective, if costly, means of securing an enforceable, binding ruling is to move the dispute into the formal DSU machinery. Here, the procedure is as for any other dispute, with one important exception. Article 11.2 of the SPS Agreement calls on panels to seek expert advice in disputes involving scientific or technical issues. That can mean establishing an "advisory technical experts group" or consulting the relevant international organisations.

4. Over the fourteen years in which the DSU has been ruling on SPS disputes important case law has been established affecting the manner in which governments and their authorities understand the provisions of the Agreement. The few developing countries that have figured as either complainants or respondents in disputes that have not reached the panel stage are as follows:

- India was the respondent in a complaint by the EU over quantitative restrictions on agricultural products (1998).
- India was complainant against EU restrictions on rice imports (1998).
- Mexico was the object of a complaint by the US on measures affecting the import of live pigs (2000).

[1] See *Review of the Operation and Implementation of the SPS Agreement - Background Document*, G/SPS/GEN/887/Rev.1, WTO, 6 February 2009.
[2] See Annex to Trade and Development Brief - SPS Part One.

- Thailand complained against Egypt's GMO-related prohibition on imports of canned tuna with soybean oil (2000).
- Turkey's import requirements for fresh fruit, especially bananas, was the subject of a complaint by Ecuador (2001).
- An EC complaint against India's export and import policies related to SPS provisions (2002).
- Nicaragua complained against Mexico's phytosanitary restrictions on black beans (2003).
- Mexico has recently launched a complaint concerning country-of-origin labelling requirements in the US (2008).

5. The following paragraphs look briefly at the key cases where panels have been established.

I. Cases Involving Food Safety

6. **The "hormones dispute" (WT/DS26 and 48)** – concerned EU prohibitions on meat treated with growth-promoting hormones. The original complaint, in 1996, was made by the US and Canada. The Panel found that the EC ban on imports of meat and meat products from cattle treated with any of six specific hormones for growth promotion purposes was inconsistent with SPS Articles 3.1 (measures not based on international standards), 3.3 (higher levels of protection not based on a scientific justification), 5.1 (not based on appropriate risk assessment) and 5.5 (arbitrary or unjustifiable distinctions in levels of SPS protection that result in disguised restrictions on international trade). The Appellate Body reversed the panel findings on Articles 3.1 and 5.5. Implementation of findings on the remaining provisions has remained in question ever since and continues to be the subject of WTO-authorised retaliation by both the US and Canada.

7. The continued withdrawal of concessions (retaliation) by Canada and the US in this case provoked a formal complaint, in 2004, by the EU in DS/320 and 321. The EU claimed that the retaliatory measures were no longer consistent with DSU provisions. An Appellate Body ruling was issued in October 2008, overturning limited aspects of the panel reports that had found the EU complaint largely unjustified; both were adopted in November 2008.

8. **The "GMOs dispute" (WT/DS/291,292, 293)** – the original complaint from the US, Canada and Argentina challenged both an EU moratorium on the approval of biotech products and national marketing and import bans on such products maintained by EU member states despite their approval for import and marketing at the EU level. The panel found that the EU-wide moratorium and most of the prohibitions in the EU member states contravened Article 8 and Annex B, Para. 1(a) of the SPS Agreement; in other words, the control, inspection and approval procedures on the products concerned had not been completed "without undue delay". It also found against the safeguard measures imposed by EU member states – as being imposed without adequate risk assessments. The panel findings, unusually, were not appealed. However, implementation remains an outstanding problem; the US has sought authorisation to suspend concessions but the request remains in abeyance.

II. Cases involving animal safety

9. ***The Salmon dispute (WT/DS/18 and 21) –*** complaints by the US and Canada, in 1995, focused on an Australian import ban, imposed through quarantine requirements, affecting trade in salmon. Only the Canadian case went to a panel which found the measures inconsistent with SPS Articles 5.1 (not based on appropriate risk assessment), 5.5 (arbitrary or unjustifiable distinctions in levels of SPS protection that result in disguised restrictions on international trade) and 5.6 (measures should not be more trade restrictive than necessary). The Appellate Body modified the panel ruling on Article 5.1 and largely reversed that on Article 5.6. Subsequently, Australian compliance with the rulings was tested in an "Article 21.5" panel, largely on the basis of an Import Risk Analysis published by Australian authorities in 1999. This panel, whose report was adopted in 2000, found that limited aspects of the new Australian regulations remained inconsistent with the SPS, mainly because of an absence of appropriate risk assessment and the availability of other less trade-restrictive measures.

III. Cases Involving Plant Protection

10. ***Variety testing in Japan (WT/DS/76)*** – in 1997 the US complained that the Japanese plant protection law prohibited imports – pending quarantine and testing – of each variety separately of a given agricultural product (largely fruits capable of carrying the coddling moth). A panel found that Japan was acting inconsistently with Articles 2.2 (measures not based on scientific principles) and 5.6 (measures should not be more trade restrictive than necessary) as well as Annex B (transparency) of the SPS Agreement. The ruling was upheld by the Appellate Body and Japan abolished the varietal testing requirement in 1999.

11. ***Fire blight in Japan (WT/DS/245)*** – in 2002 the US called for consultations on quarantine restrictions on apples imported into Japan, supposedly to protect against the introduction of fire blight. The complaint included the Japanese requirements to inspect orchards three times a year and the disqualification of any orchard where fire blight was discovered within a 500 metre radius. In its 2003 report, the panel found the measures contrary to Article 2.2 (measures not based on scientific principles) and not justified under Article 5.7 (provisional adoption of measures where scientific evidence is insufficient). It also ruled that Japan's 1999 Pest Risk Assessment did not meet the requirements of Article 5.1 (take account of risk assessment techniques developed by international organisations). These findings were confirmed on appeal and again by an "Article 21.5" panel in 2005. That same year the two parties announced a mutually agreed solution to the dispute.

12. ***Tropical fruit measures in Australia (WT/DS/270)*** – in one of the rare disputes pursued by developing countries, Philippines complained, in 2002, of Australian import measures affecting trade in fruit and vegetables, including bananas. The Philippines claimed that regulations and practices under the 1998 Quarantine Proclamation were inconsistent with a large number of SPS provisions as well as the Import Licensing Agreement and GATT Articles XI and XIII. A panel was established in 2003 but has not been composed.

13. ***Apples in Australia (WT/DS/367) –*** in August 2007, New Zealand called for consultations on measures affecting its exports of apples to Australia. These were imposed under the Quarantine Act of 1908 and, according to the Australian authorities *"as specified in the final import risk analysis report for apples from New Zealand, November 2006".* New Zealand considers these measures contrary to many

provisions of the SPS Agreement. A panel was composed in March 2008 and has yet to report.

IV. Conclusion

14. In summary, the SPS Agreement has provided WTO members a guarantee that their environmental and human health protection measures are based on scientific evidence, risk assessments and international standards. SPS disputes have been brought to the WTO's Dispute Settlement mechanism to resolve conflicts of interpretation between measures taken for protectionist purposes and those based on scientific analysis. The SPS disputes have involved issues relating to food safety, animal health and plant protection. However, the conclusions of some panels and of the Appellate Body have led some members to regard WTO dispute resolution as constraining their freedom to respond to consumer concerns, particularly in the cases of food safety. Some of the issues under contention are, for example, that the precautionary principle does not override SPS obligations or that measures that are not based on international standards are not justified. Thus, some WTO members, as well as NGOs, have called for amendments to the SPS Agreement and insisted on initiating discussions on giving greater scope for members to ensure the preservation of consumer confidence and/or domestic public health standards. As the debate on the safety of GMOs persists and advances in bio-technology continue, undoubtedly SPS issues will continue to spark lively debates inside the WTO as well as in other forums and, in all likelihood, disputes related to SPS will increase in the future.

Acronyms

DSU Dispute Settlement Understanding
GATT General Agreement on Tariffs and Trade
GMOs genetically modified organisms
IOE International Office of Epizootics
IPPC International Plant Protection Convention
SPS Sanitary and Phytosanitary Measures
WTO World Trade Organization

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