

The World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures

T. CHILLAUD *

Summary: On 15 April 1994, 125 States signed the 'Final Act embodying the results of the Uruguay Round of multilateral trade negotiations', concluded under the aegis of the General Agreement on Tariffs and Trade (GATT). This Final Act contains an 'Agreement on the Application of Sanitary and Phytosanitary Measures' ('SPS Agreement'), which came into effect on 1 January 1995 with the establishment of the World Trade Organisation (WTO) to replace GATT.

The aim of the SPS Agreement is to minimise the negative effects of health restrictions on international trade. To achieve this aim, the animal health measures established by countries to ensure the protection of human and animal life and health should be based on international standards, guidelines and recommendations, primarily those developed by the Office International des Epizooties (OIE). The OIE Codes therefore play a central role in this process.

The SPS Agreement requires States not to introduce or maintain animal health measures which result in a higher level of protection than that advocated by these international standards, except where a State is able to provide scientific justification of the need for such measures. The SPS Agreement also emphasises the need for transparency in the import health measures which States enforce.

Lastly, the general provisions relating to dispute settlement contained in the Final Act will be applicable to disputes arising in the health sector. If scientific or technical questions are raised, the WTO panel responsible for settling the dispute will be able to consult the OIE.

KEYWORDS: Agreement on the Application of Sanitary and Phytosanitary Measures – International trade – Office International des Epizooties – Regulations – Standards – Trade barriers – World Trade Organisation.

INTRODUCTION

In 1947, in the aftermath of the Second World War, a General Agreement on Tariffs and Trade was developed on the initiative of the Western powers, with the aim of preventing a return to the protectionism of the 1930s (2). This General Agreement took the form of an international treaty which, in subsequent years, was signed by an increasing number of countries.

* Office International des Epizooties, 12 rue de Prony, 75017 Paris, France.

This General Agreement was institutionalised, with the setting up of a permanent secretariat in Geneva (Switzerland), and became the General Agreement on Tariffs and Trade (GATT). The new institution was accorded a double mission: to regulate international trade, thus ensuring its security and stability; and to promote free trade through periodic rounds of multilateral trade negotiations.

The eighth of these rounds, known as the 'Uruguay Round', began in 1986. It took no fewer than seven years of gruelling discussions, punctuated by numerous crises, before the 'Final Act embodying the results of the Uruguay Round of multilateral trade negotiations' was signed by 125 States on 15 April 1994 (1). This Final Act, which covers numerous subjects (e.g. tariff reduction, aeronautics, services and agriculture), led to the establishment of a genuine World Trade Organisation (WTO) on 1 January 1995. Membership of the WTO was made open to any State or separate customs territory possessing full autonomy in the conduct of its foreign trade relations.

For all those involved in sanitary aspects of international trade, 1 January 1995 was an historic date for another reason as well. The 'Agreement on the Application of Sanitary and Phytosanitary Measures' (SPS Agreement) (5), which had been included in the Final Act, came into effect on that date.

BACKGROUND TO THE AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

Immediately after the Second World War, customs duties on commodities had reached an average of 40%. During the various rounds of negotiations under the aegis of the GATT, these duties were progressively reduced to less than 5% by 1993.

Nevertheless, as tariff barriers were dismantled, new obstacles to trade began to be erected. High on the list of such non-tariff barriers to trade are sanitary and phytosanitary regulations applied to imports.

Sanitary and phytosanitary regulations on international trade have always raised difficult problems, due to the highly technical nature of the issues involved, the diversity of situations in different countries, and the fact that assessing a threat to animal or plant life or health, and determining the necessary preventive or remedial measures, are matters which lie within the competence of the relevant national authorities in each country.

Nonetheless, the legitimacy of sanitary and phytosanitary measures is sometimes problematical, for such measures have a direct impact on trade, and can sometimes result in a complete ban.

In the General Agreement, sanitary issues were already mentioned specifically in Article XX (b), as follows:

'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures [...] necessary to protect human, animal or plant life or health.'

Until recently, an importing country would apply measures at its frontier, and would determine – according to its own criteria – the risk it was prepared to accept and the appropriateness of measures taken by supplier countries to meet its requirements, whereas supplier countries had no means for contesting such decisions.

To strengthen the rules governing the use of Article XX (b), sanitary and phytosanitary issues were included in negotiations during the Uruguay Round, and a Working Group on Sanitary and Phytosanitary Regulations and Barriers met in Geneva between September 1988 and December 1990 to negotiate multilateral measures in this field.

The SPS Agreement is the result of these negotiations. It defines the conditions under which countries will now be able to impose sanitary measures in matters relating to imports of animals and animal or plant products.

CONTENTS OF THE AGREEMENT

To present the contents of the SPS Agreement as simply as possible within the context of this volume devoted to aquatic animal disease prevention and international trade, the present paper will be limited to animal health aspects, although it should be borne in mind that WTO members are subject to similar measures in the fields of food hygiene and plant protection.

From this limited viewpoint, the fundamental aim of the SPS Agreement is to preserve the sovereign right of governments to establish a level of animal health protection which they consider appropriate, while ensuring that this right is not used for protectionist purposes.

The SPS Agreement stipulates conditions to be respected by WTO Member Countries, defines concepts essential for the implementation of the Agreement, provides for the setting up of a system to ensure compliance, and describes the claims procedures that are available, in the event of a dispute between two countries which falls within the scope of the Agreement.

Each of these aspects will now be considered, generally in the order in which they are presented in the Agreement itself.

Field of application

The sanitary measures within the field of application of the SPS Agreement include all those which may affect international trade directly or indirectly, insofar as they are aimed at protecting animals against diseases or pathogens, and protecting human life and health against diseases transmitted by animals (i.e. zoonoses).

The SPS Agreement states that the term ‘animal’ includes fish and wild animals. A definition such as ‘all living organisms classified within the animal kingdom’ would have been preferable, as this would have removed any doubt regarding the inclusion of molluscs and crustaceans.

It should also be noted that the SPS Agreement does not apply to international movements unrelated to trade, such as the international transportation of competition horses, or the crossing of national borders by pet animals with their owners.

Rights and obligations conferred by the Agreement

Governments may introduce animal health measures only in the interests of protecting human or animal life or health. These measures must be based on scientific principles; in practice, this means the application of risk assessment methods.

Such measures should be maintained only if they are supported by sufficient scientific evidence, except in the special cases referred to in the section on risk assessment.

Lastly, governments may not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail, including between their own territory and other countries.

In this last obligation, the reference to internal regulations may perhaps prove to be the most important. In practice, the principle of similarity can give rise to interminable discussions since conditions in any two countries will never be identical, even if those countries are neighbours. Details of the rules which a country imposes upon itself, however, are easy to obtain. Many health regulations which apply to imports have no equivalent in the national regulatory system of the importing country.

Harmonisation

The SPS Agreement encourages governments to adopt harmonised sanitary measures regarding animal health and zoonoses, based on the standards, guidelines and recommendations issued by the Office International des Epizooties (OIE).

To encourage this harmonisation, the Agreement states that animal health measures which conform to the recommendations of the OIE will be presumed to be consistent with the SPS Agreement.

The role of the OIE is thus reinforced, as it is now clearly established that the OIE recommendations shall provide the basis for all national animal health regulations.

Nonetheless, a country is still free to introduce animal health measures resulting in a higher level of sanitary protection than would be achieved by strict application of the relevant OIE recommendations, on condition that it can provide scientific justification.

Except where a country finds itself in a situation so unusual that it is not covered by any existing international standard, this clause can have only beneficial effects. The arguments put forward by countries invoking the clause will inevitably fuel discussions within those OIE Commissions whose task it is to establish international standards, and will thus promote the updating of OIE recommendations, should the arguments prove to be scientifically valid.

This clause will probably also encourage countries to participate even more actively in the work of the OIE, as each nation would want to see its own standards recognised at the international level, rather than finding itself obliged to justify them under threat of a dispute settlement procedure.

Equivalence

The principle of equivalence is the subject of a separate article in the SPS Agreement. The effect of this principle is to restrain the principle of harmonisation, and may be summarised as follows: a country must accept the measures implemented

by another country – even if they differ from those enforced on its own territory – as long as they achieve the appropriate level of protection.

In the veterinary field, it is hoped that the principle of equivalence in animal health measures will be widely recognised. In numerous cases, countries applying different control methods have achieved the same favourable result. Likewise, the epidemiological surveillance methods which countries use to demonstrate freedom from an animal disease may vary widely, yet they may well offer similar health guarantees.

Only time will tell whether countries make practical use of the clauses relating to equivalence.

Risk assessment

As stated above, countries must establish animal health measures on the basis of risk assessment, taking into account the techniques developed by the OIE in this field. For animal health problems raised by import applications, countries must set appropriate levels of protection.

The negotiators of the SPS Agreement, fearing perhaps that some vital factors might be overlooked in the development of these techniques, did not hesitate to draw up a list of such factors, taking little care over the order of presentation. The Agreement thus lists the following factors, in no particular order: scientific evidence, inspection methods, disease prevalence, ecological conditions, etc. The SPS Agreement even goes so far as to raise the matter of potential economic losses (from reduced production and sales) which may result from the introduction of a pathogen into a country previously free from a given disease.

The concept of pest- or disease-free areas – and areas of low pest or disease prevalence – may be included under the heading of risk assessment, although pests are covered in a different section of the SPS Agreement.

In response to a request from GATT, the OIE began work on the assessment of health risks in 1990.

This work led to the development of recommendations on import risk analysis, which have been incorporated in the *International Animal Health Code* (3) since their adoption by the OIE International Committee (general assembly of the representatives of Member Countries) in May 1993 and May 1994. Along with general considerations, including the aims of risk analysis, these guidelines state that the following elements may be involved in import risk analysis:

- risk assessment (followed in some cases by risk management and risk communication)
- evaluation of Veterinary Services
- zoning and regionalisation of countries
- epidemiological surveillance and monitoring of animal diseases.

Each of these elements is covered, in detail, in specific chapters of the *Code*. The first three elements were also included in the *International Aquatic Animal Health Code* (4), adopted by the OIE International Committee in May 1995, after having been adapted to suit aquaculture.

Although many areas have yet to be defined, the OIE has clearly succeeded in establishing – within a relatively short period – a general framework for import risk analysis in terms of animal health. At no time, however, during discussions among OIE experts or within the International Committee, has the idea of measuring potential losses, as suggested by the SPS Agreement, seemed likely to be adopted.

Regarding the SPS Agreement, it should be emphasised that a derogation clause has been provided so that a country may avoid having to apply risk assessment methods. Cases may arise when scientific knowledge about a particular health problem, particularly a new health problem, proves to be inadequate. In such cases, the SPS Agreement makes provision for countries to adopt temporary animal health measures based on the available, relevant information – particularly that issued by the OIE – while taking into account measures applied by other countries faced with the same problem.

Transparency

The SPS Agreement makes provisions to ensure greater transparency in the animal health measures that countries apply to imports. To this end, the following procedures have been adopted:

- The WTO must be notified of any new regulation which differs from the relevant recommendation of the OIE. However, as a result of this measure – which is also applicable to food hygiene and plant protection – the administrative workload for the WTO could soon become extremely heavy as each notification received by the organisation in one of its three official languages is translated into the other two and then circulated to all its members. For this reason, discussions on this subject, which are under way in Geneva, lean towards a system in which the information supplied by countries would be as concise as possible.

- Each country must specify an office (to be notified to the WTO), which will respond to requests for information from other countries on any matters covered by the SPS Agreement.

In this manner, it is hoped that sufficient notice will be given of any new regulation issued by a country. This will give other countries an opportunity to air any comments they may have, before the definitive adoption of the regulation, or to adapt their products and production methods to the new requirements once the regulation is enforced.

The intention behind this measure is commendable, but only time will show whether such mechanisms truly work.

Dispute settlement

The general provisions in force at the WTO concerning consultation and dispute settlement are applicable to animal health measures (6).

First, countries are invited to find a mutually satisfactory solution to their dispute, through bilateral discussions known as consultations. If consultations are unsuccessful, the injured party may ask the WTO to set up a panel to deal with the issue.

If scientific or technical issues are raised within the dispute settlement procedure, the panel is entitled to seek advice from experts who are chosen in consultation with the parties to the dispute. When it deems such action appropriate, the panel may

establish an advisory group of technical experts, or consult the OIE (either at the request of one or both parties to the dispute, or on its own initiative). Lastly, the panel issues recommendations which may be rejected only by a consensus among WTO members. While provision has been made for an appeals procedure, this concerns only points of law.

These provisions do not preclude the dispute settlement mechanisms of the OIE as laid down in the *International Animal Health Code*. With regard to the role of the OIE in a WTO dispute settlement procedure, two possibilities can be envisaged. The OIE could put forward the names of internationally recognised scientific experts to examine a specific veterinary problem, or the Office could elaborate on the contents of its recommendations pertaining to the issue under dispute. In either case, the OIE would not be able to deliver a judgement on a health standard as such, applied by a country. No such provisions have as yet been determined by the International Committee.

Administration of the Agreement

A Committee on Sanitary and Phytosanitary Measures has been established in Geneva, in accord with the SPS Agreement, to hold consultations on all matters concerning the application of the Agreement. The Committee will reach its decisions by consensus.

To avoid any unnecessary duplication of work performed by the OIE in its sphere of competence, the Committee invited the OIE to be represented at its deliberations, with observer status, from its very first meeting. This decision marks the extremely rapid implementation of the measure in the SPS Agreement which provides for close relations to be established between the WTO and those international scientific organisations whose authority is recognised in the Agreement.

Special measures for developing countries

The least developed countries and other developing countries have been granted periods of five years and two years, respectively, to comply with the obligations contained in the Agreement, particularly those concerning the justification of animal health measures on imports and notification.

In addition, the SPS Agreement devotes two paragraphs to the provision of technical assistance to developing countries, although the only possibilities mentioned are assistance on a bilateral basis or through the appropriate international organisations.

In the view of the WTO Secretariat, the WTO is not mandated, at present, to seek or provide technical assistance for developing countries. Such initiatives must be undertaken by organisations like the OIE, to revise their own plans regarding programmes for developing countries, with a view to helping these countries to comply with the conditions of the SPS Agreement.

The OIE has already received a special contribution from France, which enabled the Office, in association with the WTO, to organise an international seminar in May 1995 for the Delegates of Member Countries on risk analysis, animal health and trade.

CONCLUSION

One of the fundamental principles of the General Agreement on Tariffs and Trade, which has retained its full force with the adoption of the Final Act and the establishment of the WTO, holds that all non-tariff barriers to international trade should be prohibited.

Indeed, a system of tariffs has never been of any assistance in resolving health problems. The negotiators of the Uruguay Round thus had to define a specific set of rules aimed at limiting sanitary barriers to trade, either through prevention (transparency, promoting harmonisation) or remedial means (dispute settlement). It is still too early to tell whether these rules will allow some of the existing barriers to trade to be removed.

Upon reflection, it becomes clear that the SPS Agreement will impose strict constraints on WTO members. The Veterinary Services of Member Countries, as well as the relevant national authorities in the field of aquatic animal diseases (in cases where the Veterinary Services are not responsible for the control of such diseases), will need to familiarise themselves with risk assessment methods, in order to be able to provide scientific justification for any import health restriction which differs substantially from the recommendations of the OIE.

Furthermore, these administrations will have to be capable of rapidly evaluating the appropriateness of new health regulations developed by other countries. They will have to react promptly when informed of such changes, either to negotiate through the WTO, should they wish to have the texts amended, or to make the necessary changes at the national level if their exports are likely to be fundamentally affected.

These scientific and technical aspects will need to be joined with the capacity for legal analysis of the health requirements formulated both in their own countries and in other countries, in regard to the SPS Agreement.

The OIE will also be subject to constraints, as OIE Member Countries will require international standards of increasing precision and quality. This is the logical consequence of the more direct and formal involvement of the OIE in the sphere of trade.

To satisfy this demand, the OIE intends to strengthen its collaboration with the WTO in matters relating to animal health in international trade. Such collaboration already existed with the GATT – in application of the strategic policy decisions made by the International Committee of the OIE – and it should continue to provide the best possible service to its Member Countries.

*
* *

EL ACUERDO SOBRE LA APLICACIÓN DE LAS MEDIDAS SANITARIAS Y FITOSANITARIAS DE LA ORGANIZACIÓN MUNDIAL DEL COMERCIO. – T. Chillaud.

Resumen: El 15 de abril de 1994, 125 Estados firmaron el «Acta final de adopción de los resultados de las negociaciones comerciales multilaterales del Uruguay Round», concluida bajo los auspicios del GATT (General Agreement

on Tariffs and Trade: *Acuerdo General sobre Aranceles y Comercio*). Dicha acta contiene un «Acuerdo sobre la aplicación de medidas sanitarias y fitosanitarias» (Acuerdo SPS), que entró en vigor el 1º de enero de 1995 con la creación de la Organización Mundial del Comercio (OMC) en substitución del GATT.

El objetivo del Acuerdo SPS es el de reducir al mínimo los efectos negativos de las barreras sanitarias sobre el comercio internacional. A tal efecto, las medidas zoosanitarias adoptadas por cada país deben responder a las normas, directivas y recomendaciones internacionales, y básicamente a la reglamentación elaborada bajo los auspicios de la Oficina Internacional de Epizootias (OIE). Ello otorga un papel central a los Códigos de dicho organismo.

El Acuerdo SPS obliga a los Estados a no mantener ni introducir medidas zoosanitarias que impliquen un nivel de protección más elevado que el que establecen las normas internacionales. En caso contrario, el acuerdo sienta la obligación de justificar científicamente la necesidad de tales medidas. Por otra parte, el Acuerdo insiste en la necesaria transparencia de las barreras sanitarias a la importación establecidas por los Estados.

Cabe señalar, por último, que las disposiciones generales contenidas en el Acta final referentes a la resolución de litigios serán aplicables a todo desacuerdo que se produzca en materia sanitaria. Si se plantean cuestiones de orden científico o técnico, el grupo especial de la OMC encargado de resolver el litigio podrá consultar a la OIE.

PALABRAS CLAVE: Acuerdo sobre la aplicación de medidas sanitarias y fitosanitarias – Barreras sanitarias al comercio internacional – Comercio internacional – Normas – Oficina Internacional de Epizootias – Organización Mundial del Comercio – Reglamentación.

*
* *

REFERENCES

1. GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) (1994). – Final Act embodying the results of the Uruguay Round of multilateral trade negotiations. *In* The results of the Uruguay Round of multilateral trade negotiations: the legal texts. GATT, Geneva, 1-3.
2. GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) (1994). – General agreements on tariffs and trade (1947). *In* The results of the Uruguay Round of multilateral trade negotiations: the legal texts. GATT, Geneva, 485-558.
3. OFFICE INTERNATIONAL DES EPIZOOTIES (OIE) (1995). – Import risk analysis. *In* International Animal Health Code: mammals, birds and bees. 1993, 1994 and 1995 updates. OIE, Paris, 27-28/15.
4. OFFICE INTERNATIONAL DES EPIZOOTIES (OIE) (1995). – Import risk analysis. *In* International Aquatic Animal Health Code. OIE, Paris, 27-40.
5. WORLD TRADE ORGANISATION (WTO) (1994). – Agreement on the Application of Sanitary and Phytosanitary Measures. *In* The results of the Uruguay Round of multilateral trade negotiations: the legal texts. GATT, Geneva, 69-84.
6. WORLD TRADE ORGANISATION (WTO) (1995). – The WTO dispute settlement procedures: a collection of the legal texts. WTO, Geneva, 95 pp.