

**THE RULES THAT SWALLOWED THE EXCEPTIONS:
THE WTO SPS AGREEMENT AND ITS RELATIONSHIP TO GATT
ARTICLES XX AND XXI**

THE THREAT OF THE EU-GMO DISPUTE

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*Your rank is below his when you seek to establish the exceptions and he
seeks to establish the rule.*

– Friedrich Nietzsche¹

All human rules are more or less idiotic.

– Mark Twain²

I. INTRODUCTION

Is it possible that the rules of the World Trade Organization (WTO) impinge on the ability of the United States—or any of the nearly 150 other WTO member nations—to prevent bioterrorism? Could they render the U.S. ban on the main ingredient in marijuana contrary to international law? Could they do the same to attempts to ban chemicals from drinking water? The answer to these questions is a disturbing “yes.”

A. The Mistake

The answer to these questions, however, is not what it might first appear. It is not the result of a conspiracy of corporate behemoths attempting to suppress the public good for their own avarice, as some WTO foes on the political left might hope. Nor is it the result of nameless, faceless international bureaucrats who aim to enhance their own power while subverting national sovereignty, as WTO foes at the opposite end of the political spectrum might like to believe.

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1. FRIEDRICH NIETZCHE, 2 SAMTLICHE WERKE: KRISTISCHE STUDIENAUSGABE 523 (Giorgio Colli & Mazzino Montinari eds., Berlin, de Gruyter 1980).

2. MARK TWAIN, FOLLOWING THE EQUATOR: A JOURNEY AROUND THE WORLD, ch. 50 (1897).

Rather, it is the result of something far less dramatic or nefarious. It is simply the result of a mistake.

Perhaps even more dumbfounding, this mistake is not a typographical error or some mere error in translation or transcription. The mistake was an oversight, a failure to grasp the sweep and scope of one of the most important breakthroughs of the Uruguay Round of Negotiations, which resulted in the twenty-plus agreements that the WTO in 1995 was put in place to administer. Indeed, it is the kind of oversight that keeps conscientious trade negotiators awake at night, wondering if their good faith efforts to open markets and lift economies might somehow inadvertently result in some great harm that they just cannot foresee.

So, what is the mistake? It is obvious and in plain sight: the negotiators failed to include in the WTO Agreement on Sanitary & Phytosanitary Measures (SPS Agreement)³ the types of fundamental exceptions contained in the General Agreement on Tariffs and Trade (GATT)⁴—in particular, the exceptions contained in GATT Articles XX and XXI. These exceptions permit otherwise non-conforming measures that serve to protect a nation's essential security interests, public morals, system of criminal justice, environment, money supply, and other important policy concerns.

By failing to include the GATT exceptions—or ones like them—the drafters of the SPS Agreement seemed to be saying, rather pointedly, that they did not mean for them to apply to animal or food health laws. After all, the drafters surely knew of the existence of the GATT Article XX and Article XXI exceptions, for they are among the most famous exceptions in international trade. Indeed, these exceptions lie at the heart of some of the most powerful political and policy debates connected to the WTO—i.e., whether the WTO is sufficiently sensitive to labor, environmental, human rights and other issues. Thus, in omitting these exceptions from the SPS Agreement, the SPS drafters failed to grasp how they might be relevant or did not recognize how far the Agreement might reach.

B. New Rules That Swallowed Old Exceptions

This error, though, is not the lone instance in which the architects of the WTO failed to comprehend fully the relationship between one WTO agreement and another. Indeed, the first ten years of the WTO have revealed a number of key areas in which its founders failed to foresee all of the consequences of the

3. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

4. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

agreements they negotiated. Now famous examples include the failure to clarify the sequencing of a challenge to an implementation measure under Article 21.5 of the Dispute Settlement Understanding (DSU)⁵ and the initiation of retaliation under DSU Article 21.6;⁶ the lack of procedures for handling business confidential information; the absence of ethical standards for panelists and Appellate Body members; the omission of rules regarding use of adverse references; and even the omission of clear guidance regarding the burden of proof to apply in dispute-settlement cases. Fortunately, the WTO has found ways to improvise and fill gaps in practice as Doha Round negotiations continue.

As important as the aforementioned issues may be, none has the potentially destabilizing effects of the apparent disconnect between the SPS Agreement and GATT Articles XX and XXI. The aforementioned lapses are largely confined to internal WTO procedures. The disconnect between the SPS Agreement and the GATT exceptions, in contrast, has profound political and policy dimensions. In effect, the SPS Agreement has elevated free trade in food and foodstuffs over a host of other concerns that seem to be equally important if not far more important.

This outcome might stem from the fact that, at its core, the SPS Agreement was intended to be an attempt to clarify and establish more specific rules regarding the application of a single GATT exception—that is, the health and safety exception found in GATT Article XX(b). This exception provides that national laws or policies that violate other parts of the GATT are nonetheless permissible to the extent that they are “necessary to protect human, animal or plant life or health.”⁷ Thus, for example, a WTO Member is allowed to engage in otherwise proscribed discrimination against the agricultural products of another WTO Member if the food or animals in question contain harmful toxins, contaminants, pests, diseases or other health risks (or have not been subjected to the types of health and safety testing and treatments the importing nation requires of its own farmers, ranchers, and agribusinesses).

However, the SPS Agreement does far more than explain an important, but limited, exception to GATT disciplines. Instead, it creates an extensive new set of affirmative obligations that require the use of sound science in formulating food and animal health and safety regulations.

In doing so, the drafters of the SPS Agreement flipped the logic and structure of trade rules in this area. What appears to have been an effort to bring clarity to the scope and application of a given exception to GATT obligations has become the source of a host of new possible violations and, importantly, the

5. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 21.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

6. *Id.* art. 21.6.

7. GATT, *supra* note 4, art. XX(b).

resulting new rules reject the application of other GATT exceptions that previously applied to food or animal health or safety measures. As a result, a measure that is subject to the SPS Agreement cannot be defended on a number of grounds that were available in the past. These defenses covered areas such as national security, environmental protection and other broad policy interests, but also more parochial trade concerns such as guarding against products made by prison labor, enforcing domestic customs laws, or maintaining adequate domestic supplies of important goods.

Thus, in attempting to explain one single GATT exception—GATT Article XX(b)—the drafters of the SPS Agreement nullified the other GATT exceptions, at least as they applied to animal and food safety laws. This Article does not attempt to delve into the historical reasons why they did so.⁸ Rather, this Article attempts to explain how the SPS Agreement intersects with the GATT exceptions and argues that the SPS Agreement does not include and, indeed, rejects those exceptions.

In Section II below, this Article provides an overview of the SPS Agreement and the types of measures it covers. Section III introduces the problem of dual-purpose measures that may fall within the ambit of the GATT exceptions and the SPS Agreement. These measures might be fully consistent with the GATT exceptions yet nonetheless violate the SPS Agreement. Section III shows that this result cannot be correct. Section IV argues that this oversight should be corrected through negotiations and not by dispute-settlement panels or the Appellate Body undergoing jurisprudential contortions in order to create or recognize exceptions not incorporated into the SPS Agreement by its drafters. Section V concludes by noting that the panel in the ongoing *EU-GMO* dispute appears to have done just that, revealing the hazards and shortcomings of such an approach.

8. As noted above, it appears that the SPS drafters did so inadvertently—i.e., the drafters simply did not anticipate that the SPS Agreement might intersect with these other issues. The author interviewed James Grueff, a former attorney with the United States Department of Agriculture, on June 13, 2006. Mr. Grueff was one of the principal U.S. negotiators of the SPS Agreement during the Uruguay Round. He confirmed that the negotiators intended for the SPS Agreement to be a stand-alone agreement and not a mere explication of GATT Article XX(b). He further indicated that the negotiators did not consider incorporating the defenses included in GATT Articles XX and XXI because they did not believe that there was a need to do so and they did not foresee circumstances in which those exceptions might be relevant to SPS issues.

II. AN OVERVIEW OF THE SPS AGREEMENT: A STAND-ALONE AGREEMENT

The preamble of the SPS Agreement states that the SPS Agreement was intended, at least in part, to clarify the operation of GATT Article XX(b).⁹ Yet neither the text of the SPS Agreement nor that of the GATT (as modified during the Uruguay Round) explains what the relationship is between the SPS Agreement and the GATT Article XX and XXI exceptions. An understanding of the language and application of the SPS Agreement reveals that it is a stand-alone agreement, limited within its four corners and untethered from exceptions that may be found in other WTO agreements.

A. The Essential Provisions of the SPS Agreement

The SPS Agreement establishes a framework of rules to guide the development, adoption, and enforcement of national measures to protect human, animal, or plant life or health, which are referred to in the Agreement as “sanitary or phytosanitary measures.” The Agreement defines “sanitary and phytosanitary measures,” as they pertain to food safety, to include “any measure” that is “applied to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins and disease causing organisms in foods, beverages or feedstuffs.”¹⁰ The Agreement contains other definitions of SPS measures as they apply to animal or plant health or safety.¹¹

Article 2 of the SPS Agreement sets forth the basic rights and obligations of WTO Members in relation to food-safety and other health-related laws:

Members have the right to take [SPS] measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.¹²

In exercising this right, Members “shall ensure that any [SPS] measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles, and is not maintained without sufficient scientific evidence. . . .”¹³ Members also must ensure that their measures do not “arbitrarily

9. SPS Agreement, *supra* note 3, pmbl.

10. *Id.* annex A(1)(b).

11. *See id.* annex A(1).

12. *Id.* art. 2(1).

13. *Id.* art. 2(2).

or unjustifiably discriminate” and are not “applied in a manner which would constitute a disguised restriction on international trade.”¹⁴

Article 3 contains the harmonization provisions of the SPS Agreement, and it governs the relationship between the Agreement and relevant international health standards. Article 3.1 provides that, to the extent an international food-safety standard exists and pertains to the relevant subject matter, WTO Members ordinarily should rely on it in fashioning their laws. Article 3, paragraph 1 states:

To harmonize [SPS] measures on as wide a basis as possible, Members are required to base their [SPS] measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular, paragraph 3.¹⁵

As an inducement to gain adherence by WTO Members to international standards and thereby promote their harmonized application,¹⁶ the Agreement states that “[SPS] measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and are presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.”¹⁷ This is the lone, direct connection between the SPS Agreement and the GATT exceptions. National SPS measures that conform to international standards gain a presumption of compliance with the GATT because they are presumed to satisfy GATT Article XX(b). That presumption is, however, a rebuttable one. Moreover, this presumption in no way speaks to the applicability of GATT exceptions other than Article XX(b) as defenses to the SPS Agreement.

While a measure conforming with an established international standard thus enjoys a presumption of validity, the Agreement does not prohibit a Member from adopting for itself a level of protection different than the otherwise prevailing international norm. To the extent that a Member promulgates a measure that results in a higher level of protection than prescribed by a relevant international standard, that Member must justify its measure through scientific analysis and evidence. This requirement is made explicit by Article 3, paragraph 3, which states:

Members may introduce or maintain measures which result in a higher level of [SPS] protection than would be achieved by

14. *Id.* art. 2(3).

15. SPS Agreement, *supra* note 3, art. 3(1).

16. The Agreement identifies a number of underlying purposes in its preamble. Harmonization of SPS measures is among them. *See id.* pmb1.

17. *Id.* art. 3(2).

measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of [SPS] protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5 [which establish procedures for determining whether scientific evidence of a health risk exists].¹⁸

The purpose of this requirement is to ensure that, where a Member adopts a food-safety regulation which provides more protection than the pertinent international standard, the measure in question has a genuine scientific basis and is not in actuality a form of trade protection. To this end, the SPS Agreement bars the imposition of food-safety measures that amount to “discrimination or a disguised restriction” on trade based on “arbitrary or unjustifiable distinctions.”¹⁹ Similarly, the Agreement mandates that Members “ensure that [SPS] measures are not more trade-restrictive than necessary to achieve the appropriate level of protection.”²⁰

Article 5 of the Agreement establishes criteria by which a WTO Member is to assess health risks and determine its appropriate level of SPS protection. Article 5 requires Members to “ensure that their [SPS] measures are based on an assessment . . . of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.”²¹ Thus, the risk assessment techniques of recognized international bodies should form the basis of, or at least influence, the methods used in any scientific analysis undertaken by Members. Article 5 further requires that, in assessing risks:

Members shall take into account available scientific evidence, relevant processes and production methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions and quarantine or other treatment.²²

Article 5 also provides that, in conducting risk assessments:

Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of entry, establishment or spread of a pest or disease,

18. *Id.* art. 3(3).

19. *Id.* art. 5(5).

20. *Id.* art. 5(6).

21. SPS Agreement, *supra* note 3, art. 5(1).

22. *Id.* art 5(2).

the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.²³

The procedures contained in Article 5 apply wherever a WTO Member maintains a level of protection not based on a relevant international standard. That is, where a WTO Member chooses to deviate from an international standard—irrespective of whether its chosen level of protection is higher or lower than that afforded by the international standard—or where there is no international standard at all, the measure in question must have a scientific basis established in accordance with the provisions of Article 5. As a practical matter, the “science” underlying an SPS measure will likely come under scrutiny only if the measure imposes a level of protection higher than the applicable international standard or if there is no such standard. To the extent that a measure provides less protection than an existing standard, it is unlikely to be challenged and it almost certainly could be defended by pointing to the “science” underlying the “higher” international standard.²⁴

Only in those instances where a Member institutes a measure that conforms to an international standard are the requirements of Article 5 inapplicable. This is because, as noted above, a measure that conforms to an international standard is presumed to be consistent with both the SPS Agreement and the GATT 1994.²⁵

The SPS Agreement contains one important exception that allows Members to impose SPS measures without an established scientific justification. Article 5, paragraph 7 provides that:

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt [SPS] measures on the basis of available pertinent information, including that from the relevant international organizations as well as from [SPS]

23. *Id.* art. 5(3).

24. Of course, there may be instances in which an SPS measure could be said to have the same (or even a lower) degree of protection as a relevant international standard, but have different trade effects due to differences in scope or application. The scientific justification for such measures theoretically could be susceptible to challenge, and the measure could run afoul of the SPS Agreement’s requirement that measures not be improper forms of discrimination and not be more trade restrictive than necessary.

25. *See* SPS Agreement, *supra* note 3, art. 3(2) (“[SPS] measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and are presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.”); *id.* art. 2(4) (“[SPS] measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with . . . the GATT 1994”).

measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the [SPS] measure accordingly within a reasonable period of time.²⁶

This provision permits Members, in limited instances, to institute food-safety regulations where information about a subject suggests the existence of health risks, but the relevant science is not developed to the extent that otherwise would be required to substantiate a measure. Such measures are to be “provisional,” and Members imposing them must endeavor to gather needed additional information to verify their necessity.

The SPS Agreement encourages harmonization of global food-safety standards by requiring WTO Members, “within the limits of their resources,” to “play a full part . . . in the relevant international organizations and their subsidiary bodies. . . .”²⁷ In addition, the WTO SPS Measures Committee is required to facilitate the use of international standards, guidelines, or recommendations by all Members and to monitor the process of international harmonization of standards.²⁸

Finally, WTO dispute-settlement procedures may be invoked by aggrieved Members regarding alleged violations of the SPS Agreement.²⁹

B. The Burden of Proof in SPS Disputes Indicates That the SPS Agreement Is Not a Mere Explication of GATT Article XX(b)

The WTO to date has had only a handful of opportunities to interpret the SPS Agreement in dispute-settlement proceedings. These decisions have addressed a variety of issues. Most relevant for present purposes, some of the first SPS decisions rendered examined the applicable burden of proof in SPS disputes.

As the following discussion makes clear, the WTO construed the SPS Agreement to require complaining parties to bear an initial burden of establishing a prima facie case of a violation—i.e., that a covered health or safety measure does not properly conform to an international standard or otherwise rest on a sound scientific basis. If that burden is met, then the responding party would have to come forward with sufficient evidence and arguments to defeat the claim. The WTO rejected the notion that the SPS Agreement was in effect nothing more than an elaboration of GATT Article XX(b) and as such should be treated as an affirmative defense. If that were the case, the responding party would have the initial burden of showing that its challenged measure is scientifically sound, and

26. *Id.* art. 5(7).

27. *Id.* art. 3(4).

28. *Id.* arts. 3(5), 12(2).

29. *Id.* arts. 11(1)-(2).

the complaining party would need to make a rebuttal only where a complaining party makes the requisite threshold showing.

In so ruling, the WTO made clear that the SPS Agreement is a stand-alone agreement rather than an extension of GATT Article XX(b). As such, it is to be construed within its four corners, thereby excluding defenses not directly included or incorporated.

1. Background of the *Beef Hormones* Case

In *European Communities – Measures Concerning Meat and Meat Products* (hereinafter referred to as the *EC – Hormones* dispute), the WTO Dispute Settlement Body addressed the SPS Agreement for the first time. Because it established the fundamental guidelines for applying the burden of proof in SPS cases, it deserves our extended attention here.³⁰

The case arose from complaints by the United States and Canada regarding a ban by the European Communities (EC) on meat and meat products from cattle fed one or more of six hormones to promote growth. The ban was total, applying not only to imports, but also to domestic products. The hormones in question are widely used in the United States, Canada, and other countries to promote growth in cattle.

The international body charged with establishing international animal health safety standards—the Codex Alimentarius Commission (“Codex”)—studied five of the six hormones and found them to be safe if properly administered. Despite Codex’s findings, the EC justified its ban on two grounds. First, research indicated that human consumption of hormones could result in cancer or other serious illnesses. This research pertained to hormones in general. It was not focused on the six hormones that were the subject of the EC ban. And second, in view of the serious health consequences this general research on hormones pointed to, the so-called “precautionary principle” mandated application of a total ban on food containing the growth hormones at issue. According to the EC and other supporters of this position, the “precautionary principle” stands for the proposition that, where potential health effects are serious or life threatening and the relevant “science” is inadequate to draw a conclusion, preventive action is warranted until more definitive research is performed.

30. Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC – Hormones* Appellate Body Report].

2. Rejecting the Argument That the Responding Party Has the Burden of Proof

A WTO dispute-settlement panel in two separate, but related, decisions found that the EC ban violated several provisions of the SPS Agreement, principally because the measure was not based on an applicable international standard or a scientific justification, and was improperly discriminatory and a disguised restriction on trade.³¹ The WTO Appellate Body affirmed the panel's decision, though it modified the panel's reasoning in a number of respects.³²

The WTO Appellate Body began its analysis by finding that the panel had erred in placing the burden of proof on the EC. The panel had stated that, as the party imposing the measure, the EC bore the burden of producing evidence to show that its measure was scientifically justified.³³ The panel further maintained that, where a Codex standard exists but a WTO Member chooses to adopt for itself a higher level of SPS protection, that Member should be required to demonstrate that it complied with the provisions of SPS Agreement Article 5 (which govern the assessment of health risks).³⁴

The Appellate Body disagreed, holding that nothing in the SPS Agreement affects the procedures of dispute settlement, which are governed by the WTO Dispute Settlement Understanding. The Appellate Body explained that the EC, in adopting a higher level of protection than the Codex standard, was not

31. Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by the United States*, WT/DS26/R/USA (Aug. 18, 1997); Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by Canada*, WT/DS48/R/CAN (Aug. 18, 1997).

32. See *EC – Hormones* Appellate Body Report, *supra* note 30.

33. More precisely, the Appellate Body found that the panel acknowledged the general allocation of the burden of proof between the contending parties in WTO disputes:

[T]he initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claim.

Id. ¶ 98. The panel, however, “proceeded to make a general, unqualified, interpretative ruling that the SPS Agreement allocates the ‘evidentiary burden’ to the Member imposing an SPS measure.” *Id.* ¶ 99.

34. The panel did not necessarily make this determination with respect to all SPS disputes, but rather those that involved a measure that was not based on relevant international standards. *Id.* ¶ 103.

invoking an exception under the SPS Agreement—which might justify shifting the burden of proof—but was in fact exercising a fundamental, affirmative right.³⁵

Perhaps most important for present purposes, the Appellate Body indicated that the panel incorrectly found a “general-rule exception” relationship in the SPS Agreement that does not exist.³⁶ In effect, the panel improperly analogized the burden of proof under the SPS Agreement to the burden of justifying a measure under Article XX of the GATT. A GATT Article XX defense is indeed an affirmative one. As such, it is invoked only after a complaining party successfully meets its burden of proving a violation of another GATT provision, and its terms are met only if the responding party establishes the requisite elements established by the pertinent text of Article XX.³⁷

In so ruling, the Appellate Body made clear that the provisions of the SPS Agreement are a sword rather than a shield. They require covered measures to be challenged, reviewed, and rejected or sustained according to the terms of the SPS Agreement. The SPS Agreement is not simply an elaboration of GATT XX(b)—i.e., a more detailed set of rules for applying that affirmative defense. If it was, the burden of proof would rest on the responding party, as is the case with regard to Article XX(b).

III. THE PROBLEM OF DUAL-PURPOSE MEASURES

The significance of the omission of the GATT exceptions in the SPS Agreement can most readily be seen in connection with measures that are designed to advance human or animal health or safety as well as another legitimate end. For example, a measure may have both SPS and national security purposes. This type of dual-purpose measure raises the possibility that a law or other governmental action long considered to be permitted by the GATT national security exception may now be inconsistent with the SPS Agreement.

As explained in the preceding section, the SPS Agreement does not incorporate the GATT exceptions directly or indirectly, and the burden of proof applicable in a dispute arising under the SPS Agreement indicates that a violation of that Agreement triggers WTO remedies (e.g., trade sanctions). That a

35. *Id.* ¶ 102. The Appellate Body’s analysis in this regard is consistent with its previous pronouncements on the burden of proof in dispute-settlement proceedings. The Appellate Body had stated in earlier decisions that the initial burden lies with the complaining party to establish a prima facie case and, if made, the burden then shifts to the defending party to refute the allegations. *See, e.g.*, Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (May 23, 1997) at 14.

36. *EC – Hormones* Appellate Body Report, *supra* note 30, ¶ 104.

37. *Id.*

challenged measure might otherwise be defensible under a GATT exception (or any other WTO exception) does not render such a measure safe for SPS purposes.

In this section, we highlight a number of GATT exceptions and analyze how their omission from the SPS Agreement might cause a number of important laws or policies to be inconsistent with WTO rules. This outcome might come as a surprise to many, particularly to the extent that the SPS Agreement would in effect be elevated over national security, moral considerations, and environmental considerations.

In examining these examples, we do not attempt to go through a full, rigorous analysis of the scientific factors that would be required to make a determination of consistency or inconsistency with the SPS Agreement. Rather, the examples serve to highlight measures which, on their face, might be presumed to be permissible because of the GATT exceptions but which, upon closer scrutiny, are vulnerable to challenge because they fall within the scope of the SPS Agreement. The mere possibility that the types of measures discussed below could be inconsistent with the SPS Agreement—with no GATT defense available—seems to be an unintended consequence of the Uruguay Round SPS negotiations and, perhaps, may require correction in the Doha Round. After discussing the examples immediately below, we turn to possible solutions in the section that follows.

A. Four Key GATT Exceptions in Articles XX and XXI

There are a large number of defenses that the drafters of the SPS Agreement could have incorporated, but elected not to. Here, we focus on four that seem especially relevant to health and safety measures and that are especially prominent in international trade jurisprudence:

- GATT Article XX(a) permits otherwise GATT-inconsistent measures “necessary to protect public morals.”³⁸
- GATT Article XX(b) permits measures “necessary to protect human, animal or plant life or health.”³⁹
- GATT Article XX(g) permits measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”⁴⁰
- GATT Article XXI permits measures the imposing country considers “necessary for the protection of essential security

38. GATT, *supra* note 4, art. XX(a).

39. *Id.* art. XX(b).

40. *Id.* art. XX(g).

interests . . . taken in time of war or other emergency in international relations.”⁴¹

These are not the only defenses available in the GATT or other WTO agreements, but they raise a number of issues that could apply to SPS measures, as described below.

B. Falling Through the Cracks: Dual-Purpose Measures

It may not be immediately apparent how issues such as national security or public morals are relevant to human and animal health or safety measures. However, one must recall the broad range of measures to which the SPS Agreement applies. As noted above, the SPS Agreement applies to “any measure” that is “applied to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins and disease causing organisms in foods, beverages or feedstuffs.”⁴² The definition does not limit SPS measures to those laws, regulations, or other governmental actions *primarily* or *directly*, or *exclusively* aimed at food safety. As such, it appears to apply to *all* measures imposed by WTO Members that were crafted to advance food safety for animals or people.⁴³

As the following examples demonstrate, there may well be a great many measures that WTO Members believe are WTO-consistent because they are protected by one of the GATT exceptions but in fact are vulnerable to an SPS challenge. Once these measures are deemed to fall within the definition of an SPS measure, they cannot evade the disciplines of that Agreement through justifications unrelated to health or safety. Like a fly caught in a spider’s web, a dual-purpose measure must work its way through the sticky maze of the SPS Agreement. If it fails to do so, it becomes the spider’s prey and is subject to the remedies the SPS Agreement offers. That escape routes may be close by is irrelevant. Once in the Agreement, the measure must withstand SPS scrutiny or be rejected.

1. The U.S. Ban on THC

One dual-purpose measure that may find itself betwixt and between the GATT exceptions and the SPS Agreement is the U.S. ban on the active ingredient

41. *Id.* art. XXI.

42. SPS Agreement, *supra* note 3, annex A(1)(b).

43. The Agreement also provides that it “applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade.” *Id.* art. 1(1).

in marijuana, tetrahydrocannabinol (THC). At first blush, this type of ban would seem to be altogether irrelevant to SPS disciplines but, as we shall see, its reach is quite broad—initially covering *all* ingestible items containing *any* amount of THC, no matter how small. It applies to food items and it was put in effect, at least in part, to promote human health. If subject to the disciplines of the SPS Agreement, it could be deemed a WTO violation—one that could not be remedied by the GATT exceptions.

a. Background on the Ban

On October 9, 2001, the U.S. Drug Enforcement Administration (DEA) published an “interpretive rule” under the U.S. Controlled Substances Act declaring that “all products that contain any amount of THC are Schedule I controlled substances.”⁴⁴ Schedule I controlled substances are treated as *per se* illegal drugs or narcotics, such as cocaine or heroin. The “interpretive rule” became effective upon publication. Publication of this rule was not preceded by a notice and comment period.

On the same day, DEA also issued an “interim rule” exempting from the ban THC-containing products that are not used, or intended to be used, for human consumption.⁴⁵ This “interim rule” provided for an initial 120-day grace period, during which businesses were to dispose of all inventories of ingestible THC-containing products. Along with the “interim rule,” DEA also published notice of a “proposed rule,” which would amend DEA’s drug-control regulations to include the THC ban.⁴⁶

b. Why the Ban Might Be an SPS Measure

THC is not just an ingredient in marijuana. It also is an ingredient in other substances, which are used in foods and foodstuffs.

For example, THC can be found in hemp, a crop that has multiple uses. Hemp oil, hemp seed, and hemp fiber are used in foods, beverages, clothing, body care products, paper and wood products, and medicine. Hemp is a commonly used term for a group of varieties of the plant species *cannabis sativa L.* that are

44. Interpretation of Listing of “Tetrahydrocannabinols” in Schedule I, 66 Fed. Reg. 51530, 51533 (Oct. 9, 2001).

45. Exemption from Control of Certain Industrial Products and Materials Derived from the Cannabis Plant, 66 Fed. Reg. 51539 (Oct. 9, 2001).

46. Clarification of Listing of “Tetrahydrocannabinols” in Schedule I, 66 Fed. Reg. 51535 (Oct. 9, 2001). On February 8, 2002, DEA extended the grace period until March 18, 2002.

cultivated for industrial purposes. Industrial hemp, which can be grown as a fiber or seed crop, contains non-psychoactive trace amounts of naturally occurring THC. Industrial hemp typically contains less than 0.3% of naturally occurring THC. In comparison, marijuana, which is a different variety of the same plant species, typically contains between 3% and 15% of THC. Nonetheless, the THC ban applied equally to hemp products as it does to marijuana.

The THC ban appears to be a measure subject to the SPS Agreement, since it applies to hemp food products. While the ban is ostensibly a part of U.S. drug laws, its reach is not limited to drugs (which are not covered by the SPS Agreement) but extends to food items. Indeed, the DEA rules specifically target ingestible hemp products that contain trace amounts of THC. THC-containing hemp products that are not used for human consumption are explicitly exempted. In SPS and WTO parlance, there seems to be little doubt that the architecture, design, and operation of the THC ban demonstrates that it is intended, at least in part, “to protect human or animal life or health . . . from risks arising from additives, contaminants [or] toxins . . . in foods, beverages or feedstuffs.”⁴⁷

c. Why the Ban Might Be Inconsistent with the SPS Agreement

The WTO Appellate Body has held that a WTO Member may adopt and maintain an SPS measure only where there is an “ascertainable risk” of a health concern to be combated.⁴⁸ While there may be an argument over the health effects of marijuana, which has relatively high amounts of THC, it is at least questionable whether there is an “ascertainable risk” to human life or health caused by miniscule amounts of THC in foods containing hemp seed or oil. Under WTO practice, it is not enough for a study to show that marijuana may cause health risks; rather, the study would need to show that trace amounts of THC in foods containing hemp oil or seed pose a risk to human life or health.⁴⁹

Even if an “ascertainable risk” to public health could be shown, the total ban of hemp food products is arguably disproportional to the risk it is designed to address. The WTO Appellate Body has interpreted provisions of the SPS Agreement to require that the results of the risk assessment “sufficiently warrant” or “reasonably support” the SPS measure in question, and that “there be a rational relationship between the measure and the risk assessment.”⁵⁰ The rules published by the DEA do not distinguish among products or amounts of THC. A blanket

47. SPS Agreement, *supra* note 3, annex A(1)(b).

48. *EC – Hormones* Appellate Body Report, *supra* note 30, ¶ 186.

49. *Id.* ¶ 200 (requiring scientific studies that examine the precise risk at issue).

50. *Id.* ¶ 193; *see also* Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, ¶ 76, WT/DS76/AB/R (Feb. 22, 1999).

ban would seem justifiable only where a risk to health can be shown to result from the ingestion of *any* amount of THC, no matter the circumstances.⁵¹

In addition, the SPS Agreement mandates transparency in the adoption of SPS measures. WTO Members must notify other Members of changes in their SPS measures and, except in urgent circumstances, must provide for a reasonable period for comment between first publication of the measure at issue and its entry into force. It does not appear that the United States complied with the notification requirement with respect to the DEA “interpretive rule,” providing no advance notice or opportunity for comment. Indeed, the “interpretive rule” became effective upon publication.

d. The GATT-SPS Conflict

Assuming the foregoing analysis is correct and the U.S. THC ban is inconsistent with the SPS Agreement, this result would surely come as a surprise to the U.S. government. Even if the analysis is incorrect, and the United States could easily present a scientific basis for a complete ban on THC, many U.S. officials might believe they should not have to submit the analysis to review under the SPS Agreement at all. To the extent that U.S. officials have given any thought to the WTO-consistency of the THC ban, they likely would have assumed that the WTO agreements simply did not apply or that the ban was sheltered by the safe harbor provided by GATT Article XX(a).

As noted above, GATT Article XX(a) allows WTO Members to maintain measures that otherwise violate the GATT because these measures are “necessary to protect public morals.” This provision has rarely been invoked or interpreted, but public morality is a commonly used justification for drug laws. Whether drug laws in general promote public order or morality is not the question at issue here. While it might seem to some observers far-fetched for the United States to claim that a food product containing non-psychoactive, trace elements of THC threatens the social order, for our purpose we will assume that it does. We will assume that there is a perfect fit between the drug laws writ broadly, or the U.S. THC ban more specifically, and GATT Article XX(a).

Even so, Article XX(a) offers no defense to a violation of the SPS Agreement. As explained above, it was not incorporated into the SPS Agreement, nor was an analogue of it drafted into that Agreement’s text. Accordingly, the U.S. THC ban could present a circumstance in which the SPS Agreement might strike down a measure that is otherwise defensible under the GATT.

51. In comparison, the Canadian THC regulatory scheme demonstrates that less restrictive alternatives to a total ban may be available. The production of industrial hemp in Canada is subject to strict licensing requirements, under which leaves and flowering heads of hemp plants cannot contain more than 0.3% THC.

That application of one agreement might lead to a different conclusion about a given measure than another agreement should come as no surprise. After all, agreements are written to advance or retard certain ends. However, in the case of the U.S. THC ban, the fact that the SPS Agreement and the GATT appear to be working at cross-purposes is troubling because the conflict was unintended. There is no basis to believe that SPS negotiators meant for the SPS Agreement to trump the GATT. Rather, they simply did not envision such a conflict.

The question that this example raises is whether limiting the ability of governments to impose health and safety measures that are not based on sound science, or that are disproportionate, is necessarily more important than allowing them to impose such measures to protect public morality or otherwise maintain anti-illicit drug laws. The answer is far from clear. On the one hand, a strong argument could be made that the United States does not need an overreaching ban on even microscopic amounts of THC, which likely pose no health or safety risks to humans. Instead, the United States should craft its ban more narrowly, tailoring it to the real human health risks THC might pose.

On the other hand, the United States might well take the position that it needs a blanket ban to pursue its “war” on drugs. The United States could take the position that a “war” is not fought through subtleties and technicalities. It needs bright lines and clear rules. Otherwise, the moral underpinnings of its position might slide down a slippery slope: Does one marijuana cigarette really cause physical harm to a user? Does one line of cocaine? For U.S. officials fighting the drug “war,” THC and marijuana are gateways to grave problems—health-related and otherwise. They want the gate closed tight.⁵²

From the U.S. vantage point, the fact that the THC ban could be an SPS measure at all may be startling. After all, the ban is hardly the ordinary stuff of the SPS Agreement. It is not akin to regulations regarding how pigs are slaughtered, beef is cooked, or infected plants are quarantined. Yet, there is an obvious health purpose underlying U.S. drug laws. At the same time, health issues are but one aspect of those laws; indeed, for some, health is but a secondary or incidental aspect.

To the proponents of the THC ban, its main purpose is a moral one. Drugs like marijuana ruin lives. They make users dependent, torpid, and unfocused. They lead to abusive behavior, theft, and violence. They tear apart the fabric of society.

All of the foregoing justifications for the ban may be correct, but from a strictly legal perspective, they are irrelevant. They are public morals arguments that have no place in an SPS analysis. Simply put, the SPS Agreement does not have a public morals defense available.

52. In the alternative, the THC ban might be considered a national security measure. In Part III.B.2 which follows, we discuss why a national security defense is unavailable in the context of an alleged SPS Agreement violation.

e. Postscript: The U.S. Courts Narrowed the Ban

Another argument that proponents of the ban might make to exclude the ban from coverage under the SPS Agreement is that the ban has nothing to do with international trade. It is not a customs measure, but instead a criminal law measure. They might point to SPS Article 1(1), which provides that the Agreement “applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade.”⁵³ From this, they might argue that the ban falls outside the scope of the SPS Agreement since it does not affect international trade.

This notion is belied by a U.S. court challenge against the ban brought by a group of companies that manufacture, distribute, or sell comestible items containing oil or sterilized seeds from hemp.⁵⁴ Many of the companies involved were engaged in cross-border trade, especially with Canada.

DEA countered by arguing that it could regulate the sale or possession of items even if the items contain only non-psychoactive trace amounts of THC. DEA asserted that natural, as well as synthetic, THC is included in Schedule I of the Controlled Substances Act (CSA). On September 17, 2003, the Ninth Circuit Court of Appeals upheld the ban in the main, but found that DEA exceeded its authority by extending the ban to products containing naturally occurring THC. As the court explained,

The DEA’s Final Rules purport to regulate foodstuffs containing “natural and synthetic THC.” And so they can: in keeping with the definitions of drugs controlled under Schedule I of the CSA, the Final Rules can regulate foodstuffs containing natural THC if it is contained within marijuana, and can regulate synthetic THC of any kind. But they cannot regulate *naturally-occurring* THC *not* contained within or derived from marijuana—i.e., non-psychoactive hemp products—because non-psychoactive hemp is not included in Schedule I. The DEA has no authority to regulate drugs that are not scheduled, and it has not followed procedures required to schedule a substance.⁵⁵

The court’s ruling knocked out perhaps the strongest argument supporting a possible SPS challenge to the THC ban—that is, application of the ban to food items or other ingestible products naturally containing THC at levels that are non-psychoactive. Such items would appear to be powerful examples of

53. SPS Agreement, *supra* note 3, art. 1(1).

54. Hemp Indus. Ass’n v. DEA, 357 F.3d 1012 (9th Cir. 2004).

55. *Id.* at 1018.

instances in which the United States might have considerable difficulty showing a risk to human life or health.

However, the court's decision did not eliminate the possibility of an SPS challenge. The court's ruling did not reach the question of whether DEA must show some type of health risk based on the amount of synthetic THC found in ingestible products. Absent such a minimum, the ban could still be challenged as excessive and not justified by a proper risk assessment. Whether naturally occurring or synthetic, trace elements or other small amounts of THC arguably do not pose a health risk. It is beyond the scope of this Article to wrestle with this type of scientific question. Suffice it to say that the THC ban illustrates a circumstance in which an anti-illicit drug law, which seemingly has nothing to do with the SPS Agreement, could fall within the reach of that Agreement and have no defense under the public morals rationale of GATT Article XX(a).

2. The U.S. Bioterrorism Act

The U.S. Bioterrorism Act of 2002⁵⁶ addresses prevention and responses to bioterrorism and other public health emergencies. Like the U.S. ban on THC, the Bioterrorism Act at first blush does not seem to be an SPS measure, or even a measure related to international trade. In fact, a review of the hearings on the Bioterrorism Act of 2002, the related congressional debates, and relevant House and Senate reports reveals no references to the WTO or the SPS Agreement. Its authors surely thought they were enacting national security legislation, not an SPS measure.

However, the Act requires several U.S. agencies to prepare medical facilities for prevention and response to bioterrorism and health emergencies, to exercise greater control over imported articles, and to prepare for attacks on sources of drinking water. As explained below, it may well be covered by the SPS Agreement, it might not be fully consistent with that Agreement, and, if so, it cannot be defended on national security grounds.

a. Summary of the Bioterrorism Act

Title I of the Act falls under the heading "National Preparedness for Bioterrorism and Other Public Health Emergencies." In subtitle A, the Act directs the Secretary of Health and Human Services (HHS) to carry out health-related activities in preparation and response to bioterrorism and public health

56. Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594 (2002), available at <http://www.fda.gov/oc/bioterrorism/bioact.html> [hereinafter Bioterrorism Act].

emergencies. It requires the Secretary to ensure an effective medical response to such emergencies, develop emergency communication mechanisms, and better educate the public about potential emergencies.

Title II of the Act, headed “Enhancing Controls on Dangerous Biological Agents and Toxins,” directs the Secretary of HHS to establish and update a list of biological agents that have the potential to pose a severe threat to public health and safety. It also directs the Secretary to regulate use, possession, and transfer of listed agents and toxins. It authorizes exemptions for certain uses of listed agents and toxins (such as use for research). It mandates that the Secretary of Agriculture establish and maintain a list of biological agents and toxins that have the potential to pose a severe threat to animal or plant health and products. It establishes criteria for inclusion of agents and toxins on the list, and it regulates use, possession, and transfer of listed agents and toxins. Finally, Title II directs the Secretary of HHS and the Secretary of Agriculture to coordinate activities regarding overlapping agents and toxins, and it revises criminal penalties for transfer and possession of listed agents and toxins.

Of particular relevance here, in Subtitle A of Title III, the Act instructs the Secretary of Agriculture to inspect imported food at ports of entry more frequently and effectively. It sets forth procedures for FDA officers to temporarily detain a food product if credible information indicates that it poses a threat to the health of humans or animals. It requires importers to give the Secretary prior notice of importation of any covered food products. It establishes procedures to prevent reentry of rejected food items into the United States. It encourages participation of states, territories, and Indian tribes in inspection of imported food.

b. Why the Bioterrorism Act Might Be an SPS Measure

As the above description of the Act makes plain, it has all of the essential features of an SPS measure.

First, the Act was clearly enacted “to protect human or animal life or health within the territory of the Member.”⁵⁷ The Act is replete with references to the need to protect human health in the United States, and it delegates authority repeatedly to the Secretaries of HHS and Agriculture, whose jobs and agencies are dedicated to health issues.

Second, the Act clearly was designed to guard against “risks arising from additives, contaminants, toxins, and disease causing organisms in foods, beverages or feedstuffs.”⁵⁸ Bioterrorism could involve risks that fall outside this

57. SPS Agreement, *supra* note 3, annex A(1)(b).

58. *Id.*

definition, but certainly a great many bioterror risks described in the Act involve just such concerns.

Third, the Act expressly “affects international trade.”

Accordingly, the Act appears to fall squarely within the definition of an SPS measure.

c. Why the Ban Might Be Inconsistent with the SPS Agreement

Having established that the Bioterrorism Act falls within the parameters of the SPS Agreement, its provisions thus must withstand scrutiny under the Agreement. This means that each toxin banned by the Act must pose an “ascertainable risk” to human health. Each ban must conform to an international standard, if one exists. If a particular ban does not conform to an international standard—either because no such standard exists or because the United States chose to deviate from the standard—the United States must be able to support its action by pointing to a properly conducted risk assessment that studies the item in question and the type of harm to be prevented. If the United States cannot justify each ban in this way, a violation of the SPS Agreement may be established.

Moreover, to the extent that the Bioterrorism Act contains import-specific provisions, these provisions could run afoul of the nondiscrimination rules of the SPS Agreement (as well as in other WTO agreements, for example, GATT Article III:4). If imported products are subjected to more onerous, costly, or time-consuming inspections or other burdens, or if imported products are denied access to the U.S. market, such less favorable treatment could trigger additional SPS violations.⁵⁹

In order to defend against allegations of improper discrimination against imports, the United States would have to show that domestic-like products face the same level of scrutiny for the same types of risks, but that the procedures involved are dissimilar only to reflect real differences between foreign and domestic items. In other words, if domestic-like products carry the same risks, they must be subject to the same type of burdens. It may make sense to take into account unique differences in foreign countries or customs procedures, but any such differences must be scientifically justified and in no way constitute a hidden form of trade protectionism.

59. The SPS Agreement provides that Members must ensure that their measures do not “arbitrarily or unjustifiably discriminate” and are not “applied in a manner which would constitute a disguised restriction on international trade.” *Id.* art. 2(3).

d. The GATT-SPS Conflict

Whether each and every aspect of the Bioterrorism Act would pass muster under the SPS Agreement is not relevant here. Rather, what matters is the perhaps surprising reality that the Act is subject to SPS scrutiny at all.

As much as the Act is a measure designed to protect human health from toxins in food and beverages, it is equally, if not more so, a measure to protect the national security of the United States. To the extent they thought about WTO rules at all during its drafting and enactment, the authors of the Bioterrorism Act might have considered it exempt from international trade disciplines.

GATT Article XXI(b) provides:

Nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(i) relating to fissionable materials or the materials from which they are derived

...
(iii) taken in time of war or other emergency in international relations.⁶⁰

The United States could argue that the September 11, 2001 attacks constituted an “other emergency” justifying the Bioterrorism Act. Furthermore, the United States has taken the position in the past that “the General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests. Contracting parties had no power to question that judgment.”⁶¹ Thus, in the U.S. view, it alone has the power to decide whether a particular U.S. action is a national security measure, and any such measure is immune from international examination.

The U.S. position on this matter is not free from doubt. Other WTO Members have maintained that GATT Article XXI is subject to review and that the party invoking it must be prepared to show that its challenged measure falls within the terms of that provision.⁶²

Whether the United States ultimately would prevail if it were to raise a national security defense, though, is beside the point. The SPS Agreement contains no such defense; it is simply unavailable.

60. GATT, *supra* note 4, art. XXI(b).

61. ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, vol. I, art. XXI Security Exceptions, 601.

62. *Id.*

3. U.S. State Bans on MTBE

The previous two examples have shown how measures that ostensibly serve to advance public morals or national security may be deemed to be measures subject to the SPS Agreement and perhaps even in violation of that Agreement. A third area in which this may be true is with respect to environmental measures. To show why this is so, we turn to the bans imposed by a number of U.S. states against methyl tertiary butyl ether (MTBE), a gasoline additive that reduces pollution from the fuel combustion process.

a. Background on the Bans

Oil refiners began to put MTBE into gasoline as a result of the Clean Air Act Amendments of 1990, which required the year-round use of reformulated gasoline (RFG) in cities with the worst smog problems, beginning in 1995. One of the requirements of RFG specified by the 1990 amendments was a 2% oxygen requirement, which is met by blending “oxygenates,” such as MTBE and ethanol, into the gasoline. MTBE has been the oxygenate used most commonly in RFG outside of the Midwest. Ethanol has been favored in the Midwest.

In the 1990s, MTBE was detected in water supplies scattered throughout the country but predominantly in areas using RFG. MTBE from RFG was apparently making its way through leaking pipelines and underground storage tanks into ground water. The discovery of MTBE in ground water and concerns for water quality touched off a debate about the use of MTBE in gasoline.

In 1999, citing ground water contamination, California ordered MTBE to be phased out of all gasoline sold in that state by 2004.⁶³ Connecticut, New York, North Carolina, and several other states followed suit either with bans or restrictions on the use of MTBE.

These bans involve two conflicting environmental issues. Environmentalists seeking to protect ground water have promoted the bans. However, the product at issue, MTBE, has been one of the most important methods of preventing air pollution. The main alternative for MTBE, ethanol, is considered to be less cost-effective and harder to transport.

At the same time, the MTBE bans have been justified as a measure to protect public health. According to the U.S. Department of Health and Human Services:

Breathing small amounts of MTBE for short periods may cause nose and throat irritation. Some people exposed to MTBE while

63. Governor Gray Davis, Exec. Order D-5-99, Mar. 25, 1999, available at <http://www.calgasoline.com/EOD05-99.PDF> (last visited Jan. 14, 2007).

pumping gasoline, driving their cars, or working in gas stations have reported having headaches, nausea, dizziness, and mental confusion. However, the actual levels of exposure in these cases are unknown. In addition, these symptoms may have been caused by exposure to other chemicals.

There are no data on the effects in people of drinking MTBE. Studies with rats and mice suggest that drinking MTBE may cause gastrointestinal irritation, liver and kidney damage, and nervous system effects.

There is no evidence that MTBE causes cancer in humans. One study with rats found that breathing high levels of MTBE for long periods may cause kidney cancer. Another study with mice found that breathing high levels of MTBE for long periods may cause liver cancer.

The U.S. Department of Health and Human Services (DHHS), the International Agency for Research on Cancer (IARC), and the EPA have not classified MTBE as to its carcinogenicity.⁶⁴

The health effects of exposure to MTBE thus appear to be somewhat murky. While future research may pinpoint a direct nexus between MTBE and human health risks, for the moment the more tangible problem with MTBE is to the environment when it leaks into soil. Ground water clearly can be contaminated, resulting in it having a bad taste or odor.

b. Applicability of the SPS Agreement

Like the THC ban and the Bioterrorism Act, the state bans on MTBE serve dual ends. In this case, the bans serve to protect the environment, but they also are predicated on protecting public health. At least in part, each is a “measure . . . to protect human . . . health” from “risks arising from additives, contaminants, toxins in . . . beverages”—or in this case, a single beverage, water.⁶⁵ The bans apply to imported MTBE as well as domestic MTBE, thus satisfying the SPS Agreement requirement that a covered measure “affect international trade.”

64. Agency for Toxic Substances and Disease Registry, <http://www.atsdr.cdc.gov/tfacts91.html>. The website points out that “MTBE is also used to dissolve gallstones. Patients treated in this way have MTBE delivered directly to their gall bladders through special tubes that are surgically inserted.” *Id.*

65. *Id.*

Once so defined, the bans fall within the scope of the SPS Agreement and must satisfy its scientific requirements. No relevant international standard calls for a ban on MTBE. Accordingly, the United States would have to identify a risk assessment showing an “ascertainable risk” to human health caused by MTBE. The U.S. Department of Health and Human Services has noted that the health risks related to MTBE are uncertain. The most concrete harms appear to be various irritations, which many chemicals might cause. If no scientific study showing a discernible health risk from MTBE can be found, then the bans would appear to be on weak SPS footing.

Even assuming some form of health risk could be scientifically established, the question of proportionality then arises. Article 5(6) of the SPS Agreement states that WTO Members must “ensure that [SPS] measures are not more trade-restrictive than necessary to achieve the appropriate level of protection.”⁶⁶ It is, at the least, unclear whether a total ban on the use of MTBE in gasoline is more trade restrictive than necessary when less restrictive methods may exist. In particular, the problem with MTBE arises from leaks in underground gasoline storage tanks. If steps could be taken to prevent such leaks, or to catch any spills before ground water is contaminated, then arguably Article 5(6) has not been met.

c. The GATT-SPS Conflict

Yet again, it is not necessary for present purposes to determine whether the measure we are using as an example—in this instance, state MTBE bans—would in fact run afoul of the SPS Agreement. The point here is to note that they could. As was the case with the THC ban and the Bioterrorism Act, the state MTBE bans are a type of measure that might not readily be seen as being within the SPS framework yet, once subsumed therein, lose the benefit of the main defenses that would apply under the GATT.

One might have thought that, as measures to protect the environment, the state bans would be immune from SPS challenge or, at the least, eligible for a defense on that basis. Indeed, GATT Article XX(g) permits measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”⁶⁷ Superficially at least, the state bans certainly appear to be related to the conservation of an “exhaustible natural resource”—namely, ground water. Perhaps the technical requirements of an Article XX(g) defense could not be met. It might be that ground water is not ultimately found to be “exhaustible,” though

66. SPS Agreement, *supra* note 3, art. 5(6).

67. GATT, *supra* note 4, art. XX(g).

that is difficult to imagine. Or, it might be that some other condition of Article XX(g) could not be shown in this instance.

But, the question here is whether the competing environmental issues at play in the MTBE bans ought to at least be weighed in an SPS dispute. The SPS Agreement says no. It suggests that the only relevant question is whether the bans meet the requisite science requirements. If not, then the measure fails, and remedies (e.g., trade sanctions) may be available.

4. The Limited Role of Precaution

One argument that might be raised in connection with each of the above three examples is that the United States should not have to find an existing, concrete health risk to justify these types of measures. The United States should be able to take preemptive action before any health risks arise.

The problem with this line of reasoning is that, as noted above, the SPS Agreement imposes procedural requirements that must be met for such preemptive action to be taken. Article 5, paragraph 7 of the Agreement provides that “a Member may provisionally adopt [SPS] measures on the basis of available pertinent information” but the Member in question must “seek to obtain the additional information necessary for a more objective assessment of risk and review the [SPS] measure accordingly within a reasonable period of time.”⁶⁸ Given that all three examples involve indefinite measures that have been on the books for years, and that there does not appear to be any effort undertaken by the governments involved to gather the requisite science needed for a risk assessment to be performed, it seems quite unlikely that the United States could overcome Article 5(7).

IV. CORRECTING THE MISTAKE: THE NEED FOR ADDITIONAL DEFENSES

In the preceding sections of this Article, we have seen how the SPS Agreement has in effect elevated the need to prevent abuses in the area of sanitary or phytosanitary measures above essentially all other policy considerations. As demonstrated above, the Agreement does not allow for defenses based on national security, public morals, criminal justice requirements, or environmental protection. In fact, it does not have any section dedicated to exceptions, as do other WTO agreements.

It is difficult to see how this result can be correct. WTO Members should recognize this oversight in the SPS Agreement and determine which

68. SPS Agreement, *supra* note 3, art. 5(7).

exceptions should apply. In Section IV.A, which immediately follows, various approaches for correcting the situation are laid out. In Section IV.B and the following sections, the dangers of attempting to deal with the issue through individual dispute-settlement cases are discussed.

A. The Need for a Negotiated Solution

WTO Members may be understandably reluctant to “re-open” the text of any agreement. Once you pull on the thread of an agreement, you might rend the entire fabric, or so the logic goes.

However, as the above examples make plain, the failure to include certain basic exceptions in the SPS Agreement could lead to absurd results. Using the starkest example, it is difficult to see how the need to curb SPS abuses should trump genuine national security claims.

If no negotiated solution is employed to deal with these issues, sooner or later a panel or the WTO Appellate Body will be called upon to engage in legal gymnastics in order to avoid an unsustainable outcome. The old legal adage that “bad facts make bad law” would certainly seem to be apt here. Who knows what facts might lead a panel to try to subvert the text of the SPS Agreement and render their own version of justice rather than apply the text as written? As Justice Robert Jackson wrote in dissent in *Korematsu v. United States* about the dangerous precedent set by the majority decision in that case to uphold internment of Japanese-American citizens, the case is “like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”⁶⁹

So, too, is the failure of SPS negotiators to incorporate appropriate defenses. This failure is a loaded gun waiting to go off in future cases. It simply does not make sense for an *ad hoc* panel, or even the standing Appellate Body, to attempt to divine which policy considerations are so great as to merit exclusion from the SPS Agreement and which are not. It is just these types of policy decisions that belong to the appointed negotiators of the roughly 150 nations comprising the WTO.

Past practice reveals that future negotiations on SPS exceptions could proceed in one of two ways: incorporate preexisting GATT exceptions into the SPS Agreement, or negotiate new ones specific and appropriate to SPS issues.

69. 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (*superceded by statute*, Civil Liberties Act of 1988, Pub. L. No. 100-383, § 2(a), 102 Stat. 903).

1. Incorporate the GATT Exceptions

The simplest route would be to incorporate the GATT exceptions into the SPS Agreement. This is precisely what the negotiators of the Agreement on Trade-Related Investment Measures (TRIMs Agreement)⁷⁰ did. Article 3 of the TRIMs Agreement states that “[a]ll exceptions under the GATT 1994 shall apply, as appropriate, to the provisions of this agreement.”⁷¹ In the SPS context, it might make sense to exclude GATT Article XX(b), which is the precursor to the SPS Agreement and whose relationship with the SPS Agreement is already dealt with in that later Agreement.

This approach is not only straight-forward and easy to implement, but it also might take care of objections that it would require a “re-opening” of the SPS Agreement. WTO negotiators could treat the process as a kind of technical correction, plugging a hole negotiators did not intend to leave open.

2. Negotiate New Exceptions

One need not be a perfectionist to take the position that we ought not be satisfied by mere incorporation of old exceptions.

After all, the GATT exceptions were crafted in 1947 and have not been updated since. Furthermore, the GATT exceptions are hardly an exhaustive list of all important competing policy considerations. For example, they do not include measures relating to slave labor, child labor, human rights, terrorism, drug trafficking, and other trade-related issues that have taken on prominence in the six decades since the GATT went into effect. Surely the world’s SPS experts are able to determine what policy issues are most likely to intersect with the SPS Agreement and decide which ones deserve exemption.

Such an approach was taken in connection with the General Agreement on Trade in Services (GATS).⁷² The exceptions contained in Article XIV of that Agreement are similar to, but not the same as, those contained in the GATT. Likewise, at Article XIV *bis*, the GATS contains a national security exception that is similar, but distinct, from that of the GATT.

70. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMs Agreement].

71. *Id.* art. 3.

72. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS Agreement].

The two tracks listed above highlight a number of issues that might be appropriate for WTO negotiators to ponder. At minimum, they should consider a national security exception. Exceptions for public morals and the environment might also make sense, though policy experts with the ability to both understand the full ramifications of such changes and draw the nuanced lines needed to implement them, better than this author, should ultimately make those decisions. The same is true for the panoply of other areas with which the SPS Agreement might intersect.

B. The Danger of Leaving the Mistake to Be Resolved in Individual Disputes: The Lesson of the GMO Decision

Absent a negotiated solution, WTO dispute-settlement panels and the Appellate Body are left with difficult choices to make in the case of dual-purpose measures: Either they strike down a measure that could be justified on other grounds—grounds that arguably outweigh any SPS infirmities underlying the measure—or they will be forced to play games with the definition of what constitutes an SPS measure and attempt to shield some covered measures from the Agreement’s reach.

The first instance in which the WTO appears to have faced this dilemma occurred in *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*.⁷³ In this dispute, three WTO Members that produce and export genetically modified seed products (GMOs)—the United States, Canada, and Argentina (hereinafter collectively referred to as the “complaining parties”)—challenged two directives of the EC and an EC regulation establishing a pre-marketing approval process for GMOs within the territory of EC Member States. The directives, Directive 90/220 and Directive 2001/18 (which repealed Directive 90/220 on October 17, 2002), provided a multi-step process involving Member State and EC officials for approval of GMOs before they could be imported or marketed in the EC. EC Regulation 258/97 provides approval procedures relating to “novel foods and novel food ingredients.”⁷⁴

From October 1998 until the establishment of the panel in August 2003, the EC did not approve any biotech product applications. The complaining parties pointed to statements by several EC officials declaring a “moratorium” on the approval of applications until the EC had updated its labeling and traceability regulations. The complaining parties alleged that this moratorium, both in general

73. Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) [hereinafter *EC – Biotech Panel Report*]

74. *Id.* ¶¶ 7.103-7.146.

and as applied to specific product approval applications, constituted an SPS measure that failed to observe the following requirements under the SPS Agreement.

The panel held that the EC did in fact institute a moratorium on deciding GMO applications from October 1998 until August 2003. The panel found especially persuasive a June 1999 declaration of the five EC Member States—Denmark, Italy, France, Greece, and Luxembourg—that stated an intent by those countries not to concede to the approval of any further GMO applications until the EC updated its regulations pertaining to labeling and traceability of GMOs. The panel held that the EC, while not necessarily in favor of the “Group of Five” countries’ declaration, did in fact fail to take steps necessary to move applications through the approval process, perhaps due to an awareness of the lack of political support for such approvals.⁷⁵

Of particular relevance here, the EC argued its approval procedures were SPS measures only in part. More precisely, the EC argued that one of the express purposes of Directives 90/220 and 2001/18 was protection of the environment, which the EC argued was distinct from protection of human, animal and plant life as defined by the SPS.⁷⁶

The panel ultimately ruled against the EC, finding that its moratorium on GMO approvals was inconsistent with the SPS Agreement. In particular, the panel held that:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. The European Communities failed to rebut this presumption. Therefore, to the extent the European Communities has acted inconsistently with its obligations under the *SPS Agreement* in respect of the relevant member State safeguard measures, it must be presumed to have nullified or impaired benefits accruing to Argentina under that Agreement. In the light of these conclusions, the Panel recommends that the Dispute Settlement Body request the European Communities to bring the relevant member State safeguard measures into conformity with its obligations under the SPS Agreement.⁷⁷

75. *Id.* ¶ 7.1273.

76. *Id.* ¶ 7.198. The EC also argued that GMO seeds intended to be planted in the ground were not “foods, beverages or feedstuffs” under Annex A(1)(b), and that GMOs were not “diseases” or “pests” as defined by Annex A(1).

77. *Id.* ¶¶ 8.63-.64, quoting DSU, *supra* note 5, art. 3(8).

In short, the panel held that the EC moratorium on GMO approvals—constituted in part by Directives 90/220 and 2001/18—violated the SPS Agreement, and the EC must bring its measures into conformity with the Agreement.

Had the panel stopped there, its analysis would be unremarkable. However, in reaching its conclusion, the panel engaged in a labyrinth of logic that is difficult to comprehend. The panel began its convoluted journey by noting that the EC had argued that its measures served not just health-safety purposes but also environmental protection purposes. According to the EC, even if its measures were inconsistent with the SPS Agreement, the panel did not have authority to strike down the measure in light of its legitimate, other purpose:

[W]here a Member's regulation pursues an SPS objective and also a non-SPS objective, and that regulation is found by a panel to fall within the scope of the SPS Agreement and to be inconsistent with it . . . the most that the panel could properly find is that the regulation includes an SPS measure and that the SPS measure in the regulation is inconsistent with the SPS Agreement. The panel's recommendation could only be that the Member take the measures necessary to bring the SPS measure in the regulation into conformity with the SPS Agreement. The European Communities submits that the panel could not make any recommendation in relation to the regulation as a whole, unless it also considered and made findings in relation to the measures in the regulation that fall outside the scope of the SPS Agreement. Consequently, when it would come to implementation, the Member concerned would be under an obligation to bring the SPS measure into conformity with the SPS Agreement, by removing the SPS objective and the elements of the measure that derive therefrom, but the Member in question would not be under an obligation to remove the regulation.⁷⁸

In effect, the EC was arguing that the existence of a proper, alternative purpose to an SPS measure allowed the measure to remain in effect, even if the measure is found to violate the SPS Agreement. The EC's argument would place a large hole in the middle of the SPS Agreement. It would allow WTO Members to claim that non-conforming SPS measures serve more than one purpose and thus they should be allowed to leave them in place despite adverse WTO rulings.

The panel should have flatly rejected the EC's position, but it regrettably did not. Rather than simply stating that, to the extent a measure falls within two agreements, it must conform to the disciplines of both, the panel turned to a

78. *Id.* ¶ 7.153.

hypothetical example that was rather difficult to follow. The panel asked its readers to assume that a WTO Member had enacted not one law that was covered by the SPS Agreement and another WTO agreement, but instead two identical laws—one pursuing an SPS objective and another pursuing a different objective covered by a separate WTO agreement. Doing so, according to the panel, would allow the responding nation to have each law scrutinized separately and thereby avoid the need to enact a new or separate law that is sustainable under a different WTO agreement.⁷⁹ The panel suggested that the two identical measures could be treated separately under the WTO agreements, and only the SPS-aimed measure would be struck down under the SPS Agreement. The other measure would be seen as a non-SPS measure and therefore outside the reach of the Agreement. The panel then went on to say that a single measure with more than one purpose—i.e., a dual- or multi-purpose measure—should be treated the same as two identical measures, with each component being evaluated separately under different WTO agreements.⁸⁰ In the panel’s view, only the SPS aspect of the measure would be rejected but the other, non-SPS aspect could remain in force.

The flaw in the panel’s reasoning is the notion that, if a WTO Member were to enact two identical measures serving different purposes, only one would be subsumed by the SPS Agreement. What the panel failed to recognize is that the purported non-SPS measure would still fall within the scope of the SPS Agreement. That the drafters of the law had subjectively intended for the non-SPS measure to serve an environmental or other purpose should be immaterial. What should matter is whether the measure objectively falls with the SPS Agreement’s definition of an SPS measure—i.e., whether it is a measure “applied to protect human or animal life or health . . . from risks arising from additives, contaminants, toxins and disease causing organisms in foods, beverages or feedstuffs.” As long as a measure is “applied” to guard against the specified hazards and, in doing so, protects human or animal life or health, the SPS Agreement is triggered. The subjective intent of lawmakers should not matter. Attempting to divine such subjective intent is not only an almost impossible undertaking, it also would allow SPS violations to remain on the law books with impunity.

In the end, the panel leaves readers half-pregnant. It concludes its report by ruling that Directives 90/220 and 2001/18 are SPS measures and recommends that the EC reform its GMO regime to come into conformity with the SPS Agreement. The panel, though, does not address the implementation question it raised with its hypothetical discussion. The panel seems to contemplate allowing the EC to renew its condemned directives strictly as environmental measures, disavowing any health-safety purpose. If this is the panel’s intended outcome, it would allow WTO Members to make a mockery of the SPS Agreement by merely

79. *EC – Biotech* Panel Report, *supra* note 73, ¶¶ 7.162-65.

80. *Id.* ¶ 7.165.

recasting SPS-inconsistent measures in the guise of laws serving environmental or other non-SPS purposes.

Indeed, if this is what the panel intended, it could undermine the WTO dispute-settlement system. It would allow measures that are blatantly in violation of one WTO agreement to stand merely because they are consistent with another WTO agreement. That has never been considered appropriate. In fact, the Appellate Body rejected such a notion in an early decision. In the *Bananas* dispute, the Appellate Body determined that some measures may be covered by both the GATT and the GATS because they affect trade in goods and in services.⁸¹ The Appellate Body went on to say that measures covered by both agreements must be fully consistent with both agreements. That a measure might be consistent with one would not suffice to rectify defects under the other.⁸²

The panel in the GMO case should have said the same thing. It should have made plain that the environmental aspects of the EC's moratorium were no defense to an SPS violation. The GMO decision has yet to be appealed or implemented; thus, it is too early to see what effect, if any, the panel's strange hypothetical analysis will be given. Hopefully, if the decision is appealed, the Appellate Body will reject this portion of the panel's decision. And, in implementing the decision, the EC should not be allowed to engage in cute tactics and try to keep the rejected provisions in place or reenact them as non-SPS measures.

Had the drafters of the SPS Agreement wanted to establish an environmental defense they could have said so, but they did not. The real question now is whether they should have. That question belongs to current WTO negotiators.

V. CONCLUSION

WTO negotiators should take note of the disconnect between the SPS Agreement and the GATT exceptions. They should either incorporate them into the SPS Agreement, as WTO negotiators did with respect to the TRIMs Agreement during the Uruguay Round, or draft a new set of exceptions.

The WTO should not leave the burden of grappling with the profound effects of the absence of such exceptions to the dispute-settlement system. Doing so will lead to questionable decisions and poor results, as the GMO case suggests.

Until that occurs, the new rules of the SPS Agreement will continue to swallow the old GATT exceptions. The SPS Agreement will continue to have no clear exceptions that recognize important, competing policy objectives. For the

81. Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 221-22, WT/DS27/AB/R (Sept. 9, 1997).

82. *Id.*

reasons described above, the status quo does not make sense and should be addressed through negotiations.

