GLOBAL HEALTH GOVERNANCE IN THE WTO: ASSESSING THE APPELLATE BODY'S INTERPRETATION OF THE SPS AGREEMENT AND IMPLICATIONS FOR SPS MEASURES IN RTAs

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Health protection has loomed large as a value worthy of deference by the WTO that has prompted the claim that it has now assumed the status of an interpretive principle in the interpretation of trade agreements. By this is meant that protection for health as an interpretive principle is given substantial weight to allow WTO Members significant discretion in the application of measures for health governance. However, the Appellate Body's interpretation of the Agreement on Sanitary and Phyto-Sanitary Measures (SPSA) and Article XX (b) of GATT 1994 as regards *necessary* sanitary and phyto-sanitary measures provides little support for this position. The different criteria to be met under the necessity tests under both provisions, and under GATT Article XXIV with respect to free trade agreements demonstrates the challenge that will accompany the design and application of SPS measures to pass muster under GATT and under RTA provisions that must be consistent with GATT.

MEASURES TO BE NECESSARY IN RELATION TO THE OBJECTS PURSUED

Once a WTO Member has chosen its level of protection for the application of SPS measures such measures are required to be no more than necessary for the attainment of that object. Thus Article 2.2 of the SPSA states:

Members shall ensure that any sanitary or phytosanitary 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, except as provided for in paragraph 7 of Article 5

This provision does not indicate what is meant by necessary, but Article 5.6 of the SPSA sheds some light on the meaning to be accorded to the term. Both Article 5.6 of the SPSA and Article XX of GATT 1994 bear a close relationship in terms of the requirement of a balancing between the health measure and its likely effect on trade. Second, both provisions stipulate similar conditions for the balancing of the competing norms of health governance and trade liberalization implicated, although Article XX's interpretation by the AB (in particular Article XX(b)) provides a more nuanced approach to the balancing of these competing norms.

Article 5.6 of the SPSA requires that a Member's SPS measure be no more trade restrictive than necessary in order to achieve its appropriate level of protection. In *Australia-Salmon,* the AB set out three conditions to be met for there to be a breach of this provision. These are (1) there is an SPS measure that is reasonably available taking into account technical and economic feasibility (2) achieves the Member's appropriate level of sanitary or phytosanitary protection and (3) is significantly less restrictive to trade than the SPS measure contested. The Appellate Body (AB) indicated that these

conditions are cumulative so that if any one of these conditions is not met, the measure in dispute would not be in breach of Article 5.6.[1]

By contrast, Article XX of GATT 1994 provides that:

> 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:
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> **. . .**(b) necessary to protect human, animal or plant life or health;
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> **. . .**(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; **. . .**

A comparison of both provisions requires the meeting of a necessity test for the health measure implemented. Article 5.6 requires that there is no alternative measure in place that is significantly less trade restrictive than the contested measure, and Article XX of GATT requires that the measure be necessary in the sense that there is no less trade restrictive measure in place.

The AB's interpretation of Article XX (b) has benefited from some measure of refinement that has not been extended to its interpretation of Article 5.6 of the SPSA. It has held in *Korea –Beef* that necessary does not necessarily mean indispensable, thereby allowing for a measure that is not the *only* measure that could have addressed the risk posed. Where the measure is not indispensable the AB balances a number of factors to achieve the appropriate balance between the competing norms of health governance and trade liberalization. These are (1) the contribution made by the compliance measure to the enforcement of the law or regulation at issue (2) the importance of the common interests or values protected by that law or regulation, and (3) the accompanying impact of the law or regulation on imports or exports.[2]

Despite the similar requirement for necessity under Article 5.6 of SPSA and Article XX (b) of GATT 1994, there is some notable difference in the application of the standard under both agreements. Conceivably, Article 5.6 includes measures that are not indispensable by virtue of the fact that a measure may be justified if it is not significantly more trade restrictive than a reasonably available alternative. Consequently, if the alternative measure is merely less trade restrictive the challenged measure may still meet the requirements of Article 5.6, but without the balancing requirement for the necessity standard under Article XX (b) of GATT 1994.

The disconnect in the jurisprudence on the necessity standard under both agreements may be justified on the basis that the SPSA is a more specific agreement to address measures

to protect health and that the SPSA is designed to provide a less onerous route for the justification of health measures in the form of an SPS measure. The difference in the requirements for justification of measures under Article XX (b) and Article 5.6 of the SPSA seems to support this argument. The Chapeau to Article XX of GATT 1994 requires, as the AB clarified in *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, that a Member imposing a measure pursuant to Article XX discharges its duty to negotiate a bilateral or multilateral outcome to resolve the dispute prior to an embargo against another Member's exports. Although the decision relates to the interpretation of Article XX (g) and not Article XX (b) of GATT 1994, it has general application for the interpretation of other Article XX exceptions to GATT for as the AB further clarified 'any appraisal of justifiable or unjustifiable discrimination' requires an examination of whether the Member imposing the measure in the form of an embargo has engaged Members who may be affected in concluding a bilateral or multilateral solution.

The 'justifiable or unjustifiable discrimination' standard is contained in the *Chapeau* that the AB has clarified to require interpretation for GATT consistency of any exception measure taken under Article XX even if they initially meet the necessity or other test under that provision.[3] Similarly, Article 2.3 of the SPSA contains the same standard to guard against arbitrary and unjustifiable discrimination, although it is unclear whether this means that, like the duty to negotiate in Article XX (b) jurisprudence, the requirements of Article 4.2 of the SPSA (regarding the duty to consult with a view to concluding mutual recognition agreements or MRAs) must be met to satisfy the standard in Article 2.3 of the SPSA.

The duty referred to in the interpretation of Article XX (b) is a duty to negotiate and not necessarily to conclude a bilateral or multilateral agreement. Further, this duty arises in the context of discrimination in the design or application of the measure between countries where the same conditions prevail.

It is interesting to note, however, that an SPS measure may pass muster under the necessity test of the SPSA and fail that test under Article XX of GATT 1994. That is, in the one case there is no balancing of factors for the measure to be justified if it is not indispensable while in the other a balancing is required for the justification of the measure as necessary where the measure is not indispensable.

There is no apparent justification in principle for the difference in the AB's approach on the necessity standard under both provisions. It may be argued that there is no need to harmonize the jurisprudence on both provisions (with respect to the necessity standard) because both provisions focus on different issues, one (Article XX of GATT 1994) addressing general exceptions under GATT and the other (Article 5.6 of SPSA) addressing specific measures under a specific agreement.

This position is less than convincing because the AB has opined that the WTO Agreement must be read and interpreted as a whole. Indeed, claimants often plead a breach of several agreements in a dispute. It would not be unusual therefore for a Member to claim that an SPS measure is in breach of the SPSA and of another provision

of GATT 1994 that would require the respondent Member to plead Article XX (b) as a defence. In this regard, the AB has stated that no one agreement takes precedence over the other. This means that where Article XX is claimed as a defence to an SPS measure the SPS measure would ultimately have to be justified under the more stringent of the two separate criteria for justification of such measures.

RELATIONSHIP BETWEEN SPSA and SPS MEAURES UNDER RTAs

Article XXIV of GATT 1994 governs the formation of RTAs. SPS measures are usually an important component of the rules within an RTA, but their inclusion present several interpretive issues. An SPS measure implemented within an RTA may be the result of a mutual recognition agreement as between the members of the RTA, or there could also be mutual recognition agreements between the RTA members collectively and some countries external to the RTA. GATT inconsistent SPS measures have to meet a necessity test under Article XXIV to be justified. This requires that the measure be put in place on the formation of the customs union (CU) or free trade area (FTA) and the measure is necessary for the formation of the CU or FTA, that is the CU or FTA could not have been formed but for the SPS measure. It is unclear whether the SPS provision in an RTA if stated to require consistency with GATT obligations would therefore mean that the FTA never intended a GATT inconsistent SPS measure to be a necessary condition for the formation of the CU or FTA. That means that the discriminatory application of an SPS measure, whether *de facto* or *de jure*, would not meet the necessity test under Article XXIV of GATT 1994.

The necessity test under Article XXIV, like that under Article XX (b) of GATT 1994 and Article 2.2 and 5.6 of the SPSA are designed to balance trade liberalization against legitimate domestic regulatory policy goals of health protection. However, the criteria to be met for each when compared to the other are substantially different thereby resulting in uncertainty in the appropriate design of domestic policy instruments to demarcate the margin of appreciation for domestic regulatory autonomy.

Under Article XXIV, the balancing between the two objectives of liberalization and health protection requires that the SPS measure, if regarded as 'other regulations of commerce' pursuant to Article XXIV: 5, be no not higher or more restrictive 'than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free trade area…'[4] Internal MRAs that, on the whole, raise the level of, or require more stringent criteria than, what existed before the formation of the RTA may conflict with this requirement. By contrast, MRAs, that on the whole provide qualitatively lower SPS measures to accommodate integration efforts within the RTA, meet the requirements of Article XXIV: 5, but possibly run afoul of the MFN requirement under Article XXIV: 5 with respect to MRAs between the RTA and Members external to the RTA, if there is no consistency in the qualitative level of the SPS measure extended to Members external to the RTA. In other words, qualitatively lower SPS measures would also have to be extended to non-RTA Members, even though the RTA Members may be handicapped in terms of their entry into markets with higher SPS standards.

Negotiation of MRAs with provisions requiring qualitatively higher SPS measures than exists within the RTA, to ensure that the RTA Members are not any more disadvantaged in market access to non-RTA Member markets than those non-RTA Members would be with respect to the market of the RTA, would also run counter to the national treatment obligation in Article XXIV:5. It could then be argued that the application of a qualitatively higher SPS measure for imports into the RTA than for intra-RTA trade is not necessary under Article 2.2 of the SPSA because of the existence of a less trade restrictive alternative. Here, a violation of the national treatment obligation under Article XXIV: 5's necessity test merges with the necessity requirement under Article 2.2 of the SPSA.

Similarly, concluding MRAs with Members external to the RTA that provide for qualitatively different levels of SPS measures among these Members would also be potentially inconsistent with the MFN requirement and would pose a challenge to meeting the necessity test under Article XXIV: 5 (because the RTA does not require these to be in existence), and possibly that under Article 2.2 and 5.6 of the SPSA (because of the availability of a less trade restrictive alternative).

IMPLICATIONS FOR SPS PROVISIONS IN EUROPEAN PARTNERSHIP AGREEMENT

The SPS provisions in EPA mirror those in the WTO and the jurisprudence developed in the WTO is therefore relevant for how SPS measures are to be applied. Critical concerns for CARIFORUM in the application of SPS measures against their exports to the European Union will be the conclusion of MRAs and the utilization of S&D provisions in the SPSA. But the conclusion of MRAs will require technical assistance to meet SPS standards as a precondition for acceptance of SPS measures in CARIFORUM as equivalent to standards in the EU.

Given the requirement for MRAs to be extended on an MFN basis to avoid a challenge to the EPA as not WTO consistent (because its non-observance would not meet the necessity test under Article XXIV of GATT 1994), it is unlikely that MRAs will be concluded without equivalence in standards that is consistent with the EU's appropriate level of protection. This is so because conclusion of MRAs without equivalence in standards with the EU means that the application of EU SPS measures to non-CARIFORUM parties would invite a challenge for breach of SPSA on the basis that a less restrictive trade alternative is available to meet the EU's appropriate level of protection. As discussed above, this would possibly arise where the SPS measure is not indispensable and some balancing of factors is required for justification of the measure, assuming the jurisprudence on Article XX (b) of GATT 1994 may be invoked for the determination of this issue.

The application of S&D provisions pursuant to the SPSA (which is incorporated in the EPA) would also not be shielded from the necessity test stipulated under the SPSA despite drafting language that suggests the contrary. For example, S&D provision Article 10 of the SPSA that provides as follows:

1. In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.

2. Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.

3. With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.

4. Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.

Article 10.2 of the SPSA suggests that CARIFORUM may benefit from the phased introduction of new SPS measures. There is no obligation however to accord this treatment bearing in mind the use of the word 'should' that indicates a best efforts approach similar to the AB's interpretation of Article 3 of the SPSA as to whether there is an obligation to base SPS measures on international standards.[5]

In any event, if an obligation were to be deduced from this provision this would not trump a Member's right to set its SPS measure to be consistent with its appropriate level of protection. In this respect any substantial difference in SPS measures to be applicable to WTO Members would have to be justified under the necessity test. A phased introduction of new SPS measures to accord with the S&D provision in the SPSA suggests that a less restrictive trade alternative is available, and, arguably, would have to be extended on an MFN basis to other WTO Members. In other words, Article 10 of the SPSA is not in any sense a true S&D provision because it privileges appropriate level of protection above differential treatment. That being so, the EU would be under no less obligation to other WTO Members than it would be for CARIFORUM with respect to obligations under the SPSA. In this respect, the existence of the S&D provision in SPSA does not foreclose meeting the necessity tests under SPSA and Article XXIV.

Concluding remarks

Health governance is of central concern in the interplay between trade liberalization and appropriate standards for trade in goods. The SPSA is designed to play an important role in achieving a balance between these competing norms. However, the AB's interpretation of this agreement raises unresolved questions about when and under what circumstances liberalization will trump standards. SPS measures must be necessary under SPSA, GATT Article XX (b), and Article XXIV with respect to RTAs where the SPS measure is

inconsistent with GATT. That the necessity test under these provisions is not identical has implications not only for the appropriate design of domestic policy instruments to demarcate the margin of appreciation for domestic regulatory autonomy, but for SPS measures under RTAs and the EPA in particular. With respect to the latter, the requirement to satisfy the necessity test in the case of GATT inconsistent measures means that Article 10 of the SPSA, as regards special and differential treatment for developing countries, will have to pass muster under that test if SPS measures are to be introduced that either (a) does not satisfy the appropriate level of protection of the WTO Member imposing the measure, and this treatment is not extended on an MFN basis or (b) provides for differential treatment in favour of developing countries that is not extended on an MFN basis (the claim being here that a less trade restrictive alternative is available to be applied with respect to other WTO Members).

This may very well mean that if SPS measures are used as non-tariff barriers and not as legitimate trade policy instruments for health governance it may very well be unlikely that the S&D provision will be given effect for the benefit of CARIFORUM.

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[1] *Australia-Measures Affecting the Importation of Salmon*, WT/DS18/AB/R, para. 194.

[2] *Korea-Measures Affecting Imports of Fresh ,Chilled and Frozen Beef*, WT/DS161/AB/R, para. 161.

[3] *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 147.

[4] Article XXIV: 5 of GATT 1994.

[5] *EC- Measures Concerning Meat and Meat Products(Hormones)*,WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998. Here, the AB clarified that the goal to harmonize SPS measures in Article 3 of the SPSA coupled with the obligation to base SPS measures on international standards is aspirational in character, despite the use of the word 'shall' in referring to WTO Members' obligation to base SPS measures on international standards.