

Note

Taking Advantage of the WTO Committee on Sanitary and Phytosanitary Measures

By Philip Poppelreuter

Summary

At the WTO, regular work under the Committee on Sanitary and Phytosanitary Measures (SPS) enables members to ensure their exporters are not unfairly affected by measures adopted by trading partners. Yet, due to the low profile kept by many small developing countries, few discussions have focused on measures of their interest. After analysing their participation so far, this paper will explore the benefits and avenues for engaging more effectively in the SPS Committee.



Introduction

Tariffs and traditional non-tariff measures (NTMs) have experienced a sharp decline in the recent decades, following multiple negotiation rounds on tariff reduction under the GATT and the WTO. Simultaneously, new forms of NTMs have gained importance, including Sanitary and Phytosanitary Measures (SPS), which governments apply to ensure that: (i) their domestic market is supplied with food products and beverages which are safe to consume; and (ii) the outbreak of plant and animal diseases is prevented.

SPS measures comprise all relevant laws, decrees, regulations and procedures that are related to human, animal and plant health, focussing on additives in foodstuff or beverages, prohibiting products from a disease- or pest-area and setting up tolerance limits for the level of pesticides among others.¹ As such, they are protectionist in nature and can easily turn into considerable trade barriers when being misused to protect domestic production.

Across the literature, the consequences of technical regulations for trade in agricultural products are assessed differently. While some stress the benign effect of food safety regulations on trade², the majority of authors finds that strict regulations on food safety, as well as animal and plant health introduced by developed countries

have a negative overall impact on global trade flows³ and especially hurt small developing countries who lack the necessary financial, technical and administrative resources to comply with the required standards.⁴

Within the framework of the WTO, the agreement on SPS measures aims to strike a balance between legitimate regulatory policy objectives and free trade.

The SPS Agreement

The SPS Agreement, which is binding to all WTO Members, is based on some of the core elements of other WTO Agreements, including the principle of non-discrimination, promoting predictability to markets, as well as technical assistance and Special and Differential Treatment (S&D) for developing countries. It covers those SPS measures that may affect international trade⁵ and aim at protecting: (i) Human or animal health from food-borne risks; (ii) Human health from animal- or plant-carried diseases; (iii) Animals and plants from pests or diseases; (iv) The territory of a country from damage caused by pests.

The Agreement's main purpose is twofold: on the one hand, the sovereignty of Members to set their own standards when aiming at protecting the health of domestic humans, animals and plants shall be maintained; on the other hand, it

¹ Kang and Ramizo, Impact of SPS Measures and TBT on International Trade, p. 4. / WTO, Sanitary and

Phytosanitary Measures, pp. 9 and 17.

² Ferro et al., The Effect of Product Standards on Agricultural Exports, p. 69.

³ Kang and Ramizo, Impact of SPS Measures and TBT on International Trade, p. 23.

⁴ Melo et al., Do Sanitary, Phytosanitary and Qualityrelated Standards Affect International Trade?, p. 351. / Disdier et al., The Impact of Regulations on Agricultural

Trade, p. 1.; Ferro et al., The Effect of Product Standards on Agricultural Exports, pp. 73 and 78.; Otsuki et al., Saving Two in a Billion.; Jaffee, Food Safety and Agricultural Health Standards and Developing Country Exports.; Xiong and Beghin, Disentangling Demand-Enhancing and Trade-Costs Effects of Maximum Residue Regulations.

⁵ Marceau and Trachtman, A Map of the WTO Law of Domestic Regulation of Goods, p. 417.



shall be ensured that the granted regulatory policy space does not create unnecessary and artificial obstacles to the trade of agricultural and allied products.

To this end, the SPS Agreement establishes rights and obligations for the implementation and maintenance of SPS measures, including:

Transparency

Under the SPS Agreement, Members are obliged to notify the SPS measures they intend to implement to the WTO Secretariat in order to give other Members sufficient time to provide written comments on the measure and suggest amendments to it. Moreover, importing Members are required to set up both an Enquiry Point and a SPS national notification authority in order to respond to clarification requests from other Members and drive the implementation process of the notification obligations.⁶

Harmonisation

Based on the assessment that SPS measures which are based on international standards do not have a trade distortive impact, the SPS Agreement strongly encourages Members to use international standards, guidelines and recommendations when implementing national SPS measures. Unlike the TBT Agreement, the SPS Agreement specifies three international standard-setting bodies7 whose standards are deemed appropriate in the areas of human, animal and plant health. These are the Codex Alimentarius Commission (Codex), the World Organisation for Animal Health (OIE) and the

International Plant Protection Convention (IPPC).⁸

Risk Assessment

Article 5 of the SPS Agreement requires Members to undertake risk assessments when maintaining or before implementing individual SPS measures which are above the international standards. When undertaking risk assessments, Members are required to apply techniques developed above-mentioned by the international standard-setting bodies, and rely on objective scientific data.9 If there is no scientific evidence that justifies standards above the international standards, these stricter standards are perceived to violate the SPS Agreement.

Equivalence

As a complement to the provision on harmonisation, the SPS Agreement strives for mutual recognition of other Members' SPS measures. Even if they are distinct from their own SPS measures, importing Members are encouraged to regard them as equivalent as long as the respective exporting Member can show that its SPS measures ensure a similar level of consumer protection.

Regionalisation

Under Article 6 of the SPS Agreement, Members are required to adapt their SPS measures to the SPS characteristics that prevail in the areas from which the product originated and to which the product is destined. In particular, Members shall

⁶ IBAR, Enhancing Participation of African Countries in the WTO SPS Committee, p. 46.

⁷ Both, countries and leading scientists in the field of food safety are actively participating in and reviewing the organisations' work.

 $^{^{\}rm 8}$ Mavroidis and Wolfe, Private Standards and the WTO, p. 7.

⁹ Arnell, Sanitary & Phytosanitary Issues in the WTO, p. 3. / Marceau and Trachtman, A Map of the WTO Law of Domestic Regulation of Goods, p. 382.



recognise the concept of pest- or disease-free areas, implying that exporting Members who claim that their territory is free of diseases must provide importing Members with sufficient opportunity for inspection and testing.

The SPS Committee

The SPS Agreement established the SPS Committee, which has two broad areas of activity: firstly, it serves as a forum for WTO Members to exchange information, as well as to discuss and negotiate the implementation of SPS measures in order to avoid that these measures create arbitrary and unjustified obstacles to international trade flows. Secondly, the SPS Committee aims at facilitating the implementation of the SPS Agreement, in particular by promoting the use of international standards and monitoring the process of international harmonisation.

Under these broad areas of activity, the SPS Committee fulfils several other functions, including: (i) the facilitation of ad-hoc consultations among the WTO Members on specific SPS issues; (ii) coordination and integration between international and national systems for approving, inter alia, the use of food additives in foodstuffs; (iii) provision of technical assistance and time-limited exemptions from obligations under the SPS Agreement for developing countries; and (iv) development of guidelines to further the practical implementation of non-discrimination provisions.

It is important to mention, that the SPS

Committee does not have the mandate to: (i) settle SPS-related conflicts between Members, (ii) amend the SPS Agreement; and (iii) develop any SPS-related international standard. However, the SPS Committee is required to review the implementation process of the Agreement every four years and may submit proposals to the Council for Trade in Goods with regard to appropriate amendments to the SPS Agreement.

Functioning of the SPS Committee

The SPS Committee is open for all WTO Members and observers, including governments, intergovernmental institutions and regional organisations, and holds three formal meetings a year.¹⁰ It is important to mention that during the formal meetings, the SPS Committee makes decisions by consensus. However, the guidelines and recommendations agreed upon there are not considered binding to WTO Members.¹¹

Under the agenda items of a formal SPS Committee meeting, both Members and observers are invited to provide the Committee with an update on their work and their points of view on the different SPS-related subjects on the table. In particular, Members are encouraged to inform the Committee about their latest efforts to comply with the SPS Agreement's provisions on equivalence, S&D, technical assistance and pest- and disease-free areas.

Moreover, the SPS Committee enables Members to ask for clarification or raise Specific Trade

¹⁰ In addition, the SPS Committee organises informal meetings upon request of the Members to discuss specific SPS-related issues more freely.

¹¹ IBAR, Enhancing Participation of African Countries in the WTO SPS Committee, p. 27.



Concerns (STCs) about a particular SPS measure notified by an importing country which may violate the SPS Agreement provisions. The defendant of the SPS measure is then given time to react to the raised STC, consult with the concerned Members, and amend its intended SPS measure if deemed necessary.

Once the concerned exporting Member(s) has assessed and exchanged views with the defending Member(s), the demander(s) can decide whether they want to let the matter rest or whether they want to challenge the defendant(s) further. Within the SPS Committee, STCs are considered to be resolved when at least two-third of the conflicting Members report to the Committee that the issue has been solved.¹²

However, if it turns out that the differences of opinion between the Members involved in the discussion are insurmountable, the concerned delegations may decide to bring the issue to the formal WTO dispute settlement body.

Benefits for Developing Countries

The WTO SPS Information Management System (SPS IMS) provides a clear picture of the status of STCs and Members involved therein. The STC mechanism is an important tool for small developing countries, who have limited financial and technical resources to identify trade-distortive SPS measures. For instance, they can work with more experienced Members when raising STCs to benefit from their experience and save resources. They can also join Members who already raised an STC about an SPS measure that may affect them. Moreover, they can, if part of a Regional Economic Community (REC), raise the profile of their concern by making an intervention in cooperation with their REC partners in one of the SPS Committee sessions.

In addition to the benefits arising from the SPS Committee work on transparency, actively participating in the SPS Committee provides other benefits to developing countries: (i) firstly, one agenda item of the formal SPS Committee sessions grants them the opportunity to make direct requests to other Members for technical support, tailored towards their needs on the ground; (ii) secondly, developing Members can inform other Members that the OIE declared their territories to be free of diseases, and hence demand any disease-related ban on their exports to be lifted.¹³ Given that many developing Members are situated in disease-prone areas, the latter is crucial to prevent their exclusion from global trade due to unsubstantiated suspicions of other Members.

It is important to note that most of the STCs raised at the SPS Committee are not taken further to the formal dispute settlement.¹⁴ This implies that the SPS Committee offers all Members an effective mechanism to express their interests and concerns, simultaneously circumventing the costly and prolonged process at the WTO Dispute Settlement.

Last but not least, actively participating in the SPS Committee ensures that small developing

 ¹² Horn et al., In the Shadow of DSU, pp. 24-25.
 ¹³ IBAR, Enhancing Participation of African Countries in the WTO SPS Committee, p. 40.

 $^{^{\}rm 14}$ Horn et al., In the Shadow of DSU, p. 30.

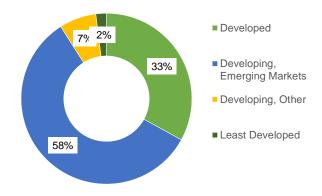


countries receive information about new SPS measures at an early stage, which provides them with sufficient time to consult with their export industry and governmental bodies in order to assess whether the new SPS measures poses a threat to their exports.¹⁵

SPS Committee: Recent Participation of Developing Countries

Since 2010, a total number of 201 SPS-related STCs has been raised between at least two Members, either by one Member against another Member; or a group consisting of up to four Members against a single Member or a group of Members, respectively.¹⁶ Figure 1 illustrates the distribution of STCs raised by Members according to their development level, as categorised by UNCTAD. It suggests that emerging markets (58 per cent) and developed countries (33 per cent) raised the majority of STCs since 2007, way ahead of other developing countries and LDCs, who together only make for nine per cent of all SPS-related STCs raised since 2007.

Figure 1: SPS STCs by Country Category since 2007



Source: Author's calculations, based on WTO SPS Information Management System

While small developing countries hardly raise any STC, they are most of the time not subject to STCs either. Table 1 shows that 52 of the 66 STCs raised by a developed country since 2007 were directed against an emerging market, mainly China, the Russian Federation and India, while other developing countries were only subject to four STCs by developed countries. Likewise, almost half (57) of the 116 STCs raised by emerging markets were directed to developed Members, while 48 STCs targeted other emerging markets targeted SPS measures of smaller developing or Least Developed Members.

 ¹⁵ According to a decision by the ministers from WTO Members, after the notification of a new SPS measure at least six months must elapse until the measure may be implemented, except from emergency cases.
 ¹⁶ In case that a STC was raised by Members A, B and C against Member D, this was denoted for as 3 STCs,

namely Member A vs. Member D, Member B vs. Member D and Member C vs. Member D. This approach of counting was chosen to get a clear picture of the distribution of raised STCs across the different country categories.



MEMBERS SUBJECT TO STCS

Table 1: Participation in SPS STCs by Country Category since 2007.

		MEMBERS RAISING STCs			
		DEVELOPED	DEVELOPING, EMERGING MARKETS*	DEVELOPING, OTHER	LEAST DEVELOPING (LDC)
		STCs: 10	STCs: 57	STCs: 6	STCs: 2
DEVELOPING, DEVELOPED	ЕГОРЕИ	<i>Top Demanders:</i> United States of America, European Union, Israel	Top Demanders: China, India, Argentina, Brazil, Ecuador Top Defendants:	<i>Top Demanders</i> : Paraguay, Costa Rica, Viet Nam, Nicaragua	<i>Top Demander:</i> Senegal <i>Top Defendants:</i> European Union, United
	UE V	<i>Top Defendants:</i> European Union, United States of America, Australia, Japan	European Union, United States of America, Japan, Australia	<i>Top Defendants:</i> United States of America, Japan, European Union	States of Amerika
	Ś	STCs: 52	STCs: 48	STCs: 7	STCs: 1
	MARKET	<i>Top Demanders:</i> European Union, United States of America, Canada, Japan	<i>Top Demanders:</i> Brazil, India, Mexico, Ukraine, China, Ecuador	<i>Top Demanders:</i> Pakistan, Morocco, Namibia, Nicaragua	<i>Demander</i> . Senegal: <i>Defendant</i> . India
	EMERGING	<i>Top Defendants:</i> China, Russian Federation, India, Republic of Korea, Turkey	<i>Top Defendants:</i> China, Russian Federation, Indonesia, Brazil, Mexico	<i>Top Defendants:</i> Mexico, South Africa, India, China	
DEVELOPING,		STCs: 4	STCs: 10	STCs: 2	STCs: 1
	THER	Top Demanders: United States of America, European Union	<i>Top Demanders:</i> Mexico, Chile	<i>Top Demanders:</i> Panama, Guatemala	<i>Demander:</i> Senegal
	0	<i>Top Defendants:</i> El Salvador, Viet Nam	<i>Top Defendants:</i> Viet Nam, Costa Rica, Albania, Gabon	<i>Top Defendant:</i> Costa Rica	<i>Defendant.</i> Viet Nam
LDCs	Ś	STCs: -	STCs: 1	STCs: -	STCs: -
	ΰ Γ		Demander: Brazil		
			Defendant: Senegal		
	SUMMARY	STCs raised: 66 <i>Top Demanders</i> : European Union, United States of America, Canada, Japan	STCs raised: 116 <i>Top Demanders:</i> China, Brazil, India, Argentina	STCs raised: 15 <i>Top Demanders:</i> Costa Rica, Paraguay, Panama	STCs raised: 4 <i>Top Demander:</i> Senegal

* UNCTAD definition

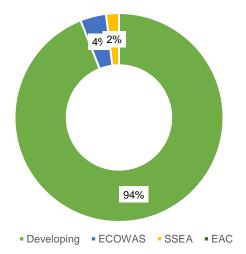
Source: Author's Calculations, based on Sanitary and Phytosanitary Information System

Figure 2 illustrates the contribution of three selected regions to the overall number of STCs raised by developing countries since 2007. While it appears that EAC Member States have not raised any STC individually, ECOWAS Members represented 4 per cent of STCs raised. Small developing and LDC Members from South and Southeast Asia (SSEA)¹⁷, i.e. excluding emerging markets from this region, accounted for 2 per cent of STCs raised by developing countries. Overall, the figure suggests that small developing countries from these regions have been relatively passive in the SPS Committee's STC mechanism.

¹⁷ Afghanistan, Bangladesh, Brunei, Cambodia, Lao PDR, Macao SAR, Maldives, Myanmar, Nepal, Pakistan, Sri Lanka, Vietnam.



Figure 2: Developing Countries SPS STCs since 2007 -Contribution of Selected Regions



Source: Author's Calculations, based on Sanitary and Phytosanitary Information Management System

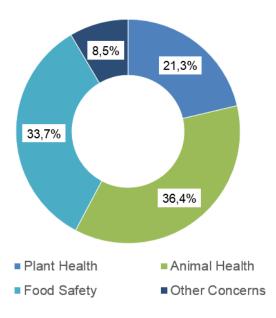
Summarising the quantitative analysis of the SPS-related STCs raised since 2007, it can be observed that while emerging markets are the most frequent user of the STC mechanism, small developing countries and LDCs hardly participate in this aspect of SPS Committee work. On the other hand, with only 18 STCs raised against them, SPS measures notified by small developing countries and LDCs do not seem to attract significant attention from other Members.

Examples of recent STCs raised by developing countries

All STC categories, which comprise animal health, plant health and food safety, are of paramount importance to small developing countries, given that the agricultural sector contributes significantly to their export earnings. However, depending on the geographical, climate and soil conditions, as well as financial and technical factors, the commercial interest of small developing countries with regard to specific agricultural products varies from case to case.

Figure 3 presents the frequency of each SPSrelated STC category of concerns raised in the SPS Committee since 2007. While most of the STCs raised were directed against SPS measures on animal health (36.4 per cent) and food safety (33.7 per cent), SPS measures concerning plant health denoted for 21.3 per cent of all raised STCs. This bespeaks of the fact that the SPS Committee has been a platform for discussing SPS-related issues that are important for small developing countries. However, with small developing countries being extremely passive, it is likely that some of the SPS-related concerns which are of particular interest to them were not raised.

Figure 3: SPS STCs by Subject since 2007



Source: Author's Calculations, based on Sanitary and Phytosanitary Information Management System

In their few STCs, member states of ECOWAS focussed on SPS measures dealing with the rapid alert system regarding mango imports of the



European Union (Senegal 2008), restrictions on tomatoes intended by the United States of America (Senegal 2012), the new restrictions on imports of hibiscus flowers by Mexico (Nigeria 2015), the suspension of groundnut seed imports notified by Viet Nam (Senegal 2017) and the new fumigation requirements for cashew nuts envisaged by India (Senegal 2017).

With regard to SSEA countries, recent STCs were raised by Pakistan against the Mexican import restrictions on rice (2008); Viet Nam, in cooperation with China, against the U.S. measures on catfish (2009); and the Philippines against Indonesia's food safety measures affecting horticultural products and animal products (2016).

It is important to mention that while ECOWAS, EAC and SSEA countries have not been raising further STCs on other agricultural or allied products - which are of particular interest to them - , other Members have done so. During the last session of the SPS Committee in July 2017, for instance, China raised an STC about the intended U.S. seafood import monitoring program, which has a potential trade-distortive impact on fish exports from Africa and Asia. Another STC which might affect agricultural exports of small developing countries, too, was raised by the European Union in 2016 and focused on the amended standards for food additives, intended to be introduced by India.

Nevertheless, small developing countries cannot only rely on other members to raise STCs on SPS measures of interest to them.

Taking better advantage of the SPS Committee

Challenges to effective participation

The passive role of small developing countries in SPS Committee work can be partly explained by the specific challenges they face in their participation.

Firstly, small developing countries often lack financial, technical and human resources which make it difficult for their governments and delegates to coordinate the efforts of all relevant stakeholders engaged in SPS-related fields, as well as to thoroughly assess SPS measures affecting them. Without adequate information exchange between their delegates to the SPS Commission and the local export industry, small developing countries will struggle to identify priority areas of action in the SPS Committee.

Secondly, public awareness is low in small developing countries about the opportunities offered by the SPS Committee and its STC mechanism. This might make it difficult for governments to justify resource investment in improving collaboration among relevant SPS stakeholders.

Opportunities

The most pragmatic approach for small developing countries to make better use of the SPS Committee is to establish permanent collaboration with each other to give their concerns and interests a louder voice. While lack of resources and knowledge tends to prevent them from taking action individually, coordinating with developing members with



similar trade profiles may create synergies and pool resources to participate more effectively in the SPS Committee.

In this regard, small developing countries may consider raising more STCs as a REC, to raise the profile of their concerns. Since most African countries are members of at least one REC, there is ample opportunity for them to discuss SPS measures on the table amongst themselves, develop both the necessary institutional infrastructure and common positions to participate in the SPS Committee, as well as jointly raise STCs where appropriate. To facilitate cooperation, Member states of a REC could choose a board of delegates to the SPS Committee, which attends the SPS Committee sessions on behalf of them and constantly reports back on recent developments within the SPS Committee.18

In addition, given the fact that other RECs may have similar interests on specific products, REC members should be ready to forge alliances with other RECs depending on the SPS issue at stake. This requires undertaking efforts to set up and maintain a dense network with other Members. Moreover, small developing countries should seek advice and support from other Members who have been active participants in the SPS Committee.

Along these lines, studying how past STCs have been dealt with could provide insightful lessons, for current and future STCs raised by small developing countries.

Beside the collaboration with other Members, small developing countries should develop

¹⁸ IBAR, Enhancing Participation of African Countries in the WTO SPS Committee, p. 72-74. different compliance strategies to take better advantage of the WTO SPS Committee. In this context, the private actors engaged in the export industry are a crucial source of information for the Members' SPS Committee delegates, as they have a sound knowledge on the SPS-related standards they are technically and financially capable to meet, the obstacles they face when exporting to foreign markets, and the potential impact of new SPS measures envisaged by importing countries.

Last but not least, given the crucial role of international standard-setting bodies in SPS matters at the WTO, small developing countries should actively contribute to the work of Codex, OIE and IPPC to tailor standards towards their domestic needs.

Conclusion

The quantitative analysis of all SPS-related STCs raised in front of the SPS Committee since 2007 indicates that small developing countries only denote for a vanishingly small share of those STCs which were raised in that period, simultaneously hardly being subject to STCs raised. To become more active in the SPS Committee, small developing countries should study old STC cases to learn from earlier STCs, set up a national SPS Committee to encourage cooperation among the relevant domestic stakeholders, in particular from the private export sector, and collaborate with other likeminded countries in order to both give their concerns a voice in the SPS Committee and save valuable resources.

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