

Analysis of the World Trade Organization SPS Agreement

by Faith Thompson Campbell

MEMORANDUM

To: Scientific Colleagues Concerned About USDA Phytosanitary Programs

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Subject: Analysis of the World Trade Organization SPS Agreement

Many of you signed a letter to Vice President Gore in April raising concerns that the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Standards ("SPS Agreement") restricts the U.S. Department of Agriculture's right to implement strong phytosanitary safeguards to minimize introductions of damaging exotic or alien species. As I reported to you at that time, your letter was vitally important in persuading officials with whom we met that amendment of the SPS Agreement may be necessary - and to seek our suggestions on new language.

American Lands is planning to host a workshop later this summer to draft proposals we could give to receptive government officials. I propose that as a first step, we seek agreement on the premises or philosophies that we believe should provide the foundation for an effective phytosanitary regime aimed at keeping out -- "excluding" -- potentially damaging exotic species. We could then incorporate these underlying principles into at least an outline of a revised SPS Agreement.

To move this agenda forward, I present here my initial analysis of whether the SPS allows implementation of an effective phytosanitary exclusion program -- as I would construct one. I hope you will consider these suggestions in light of your own ideas and send to me your proposed additions, deletions, or changes. I will compile the input from all of you, make the appropriate changes in the outline, and send it out again for your review and further comment.

I have taken far too long to reach this point in my deliberations, so I must beg your indulgence and kindness to help us get back on schedule. Can you possibly send me your ideas by 15 July?

There are several lengthy documents that would help you analyze this matter. The text of the SPS Agreement and of three relevant dispute resolutions - European Community / beef hormones; Australia / salmon; and Japan / fruits and nuts - can be viewed on or downloaded from the World Trade Organization's web site: <http://www.wto.org>.

First Draft

Faith Campbell's Suggested Components of an Effective Phytosanitary "Exclusion" Program

An effective phytosanitary "exclusion" program should:

- 1) be transparent -- the public and regulated stakeholders have a clear understanding of what is at stake, the reason provisions have been adopted, and the processes used to reach decisions
- 2) reflect scientific understanding that we cannot know which species will become damaging invasives if introduced -- "if in doubt, keep it out"
- 3) reflect the serious threat to domestic agriculture, horticulture, forestry, and other industries as well as to the natural environment posed by introduction of exotic species.
- 4) reflect practical limits on knowledge and resources, hence the usually irreversible impacts of biological invasions; in other words, it is far easier -- and less expensive -- to prevent an invasion than to combat one.
- 5) reflect the fact that the danger of introductions is increasing as a result of increased international trade
- 6) put the determination that the phytosanitary measures are as effective as necessary to ensure a margin of safety ahead of decisions regarding the level and conditions of trade that can be allowed
- 7) focus on identification and regulation of pathways of introduction, rather than on attempting to predict individual species' potential invasiveness
- 8) institute invasiveness screening of deliberate introductions prior to importation (e.g., plants that may be weedy)
- 9) require the "polluter" to pay -- a user fee imposed on all importers, to cover (some of) the cost of the exclusion program, including monitoring, research, development of control methodologies, and eradication costs, as well as of port inspection; the fee charged should vary in response to the level of risk represented by the imported commodity and/or packaging/ballast
- 10) reflect the value of preventing continuing introductions of additional organisms belonging to species already invasive in the country -- in order to slow the species' spread to new areas and prevent introduction of genetic variants that may prove more virulent

Does the SPS currently allow application of these principles?

- 1) transparency: yes; the SPS mandates transparency -- however, decisions by WTO bodies -- as well as by the U.S. Trade Representative -- are often made in secrecy and with input almost exclusively from trading interests..
- 2) science-based? Ostensibly, yes. But I believe "science" is undercut by both the emphasis on minimizing phytosanitary measures' impact on trade and the failure to consider adequately practical limits on scientists' ability to predict invasiveness, etc.
- 3) reflect seriousness of the threat? I believe not.
- 4) reflect practical limits? Re: information gaps, I think not. Recent decisions by the WTO Appellate Body have required risk assessments to be very specific about the organisms to be regulated and the

threat they pose.

Re: irreversibility of invasions? I think not. The SPS language emphasizes consideration of responses to a potential invasion other than phytosanitary restrictions imposed on imports -- downplaying the difficulty of controlling invasions once they have begun. Furthermore, the text and decisions require countries to evaluate each individual potential introduction without any explicit recognition of cumulative effects of multiple introductions over time.

5) There is no explicit recognition of the increasing danger associated with increasing trade.

6) The SPS Agreement requires that phytosanitary measures minimize restriction on trade while achieving a country's "appropriate level of risk". While every country may set its own "appropriate level of risk" (Article 3.3), this right is limited by the country's other obligations under the SPS Agreement. The Appellate Board has ruled that countries must justify their "appropriate level of risk" through a risk assessment. In another context, the Appellate Body has rejected import bans that had been justified by a country's assertion that there could be some risk. Instead, the risk assessment must evaluate some specific risk.

If it is correct that scientists lack sufficient understanding of ecological processes to predict which of the myriad organisms in foreign countries could become harmful invasives if introduced here, the logical consequence is that the findings of risk assessments will be severely limited by these uncertainties. The Appellate Body's requirement that risks be defined in specifics puts further strain on the process. Since the Appellate Body has ruled that countries must justify their "level of protection" through preparation of a risk assessment, the flaws in this approach threaten the entire foundation of phytosanitary programs in addition to individual measures developed using this approach.

7) Does the SPS allow a focus on pathways rather than individual organisms? Apparently not. The text and legal decisions all emphasize identifying specific potential threats and evaluating the likelihood that they will occur.

8) Australia and New Zealand are now testing whether pre-screening of species proposed for importation for invasiveness will be acceptable under SPS Agreement rules.

9) Does the SPS allow a "polluter pays" fee system? It is unclear; the text reads as follows:

"any fees imposed for the procedures on imported products are equitable in relation to any fees charged on like domestic products ... and should be no higher than the actual cost of the service." [Annex C, para. 1 (f)]

10) The SPS Agreement establishes criteria that make preventing continuing introductions of established invaders very difficult. Applying exclusion rules and technologies to species already in the country is allowed only when

- the species is not widespread and an "official control program" targets the species; or
- the newly introduced organism differs genetically from its relative in the United States in a way that demonstrates the potential to cause greater damage.

While the definition of "official control program" is not yet set, USDA employees now discussing this issue are pressing for a very narrow definition - perhaps to include only those species for which APHIS is carrying out the control program. A definition this narrow would limit the U.S. to designating only some

dozens of the thousand of introduced pests and weeds as "quarantine pests" for the purpose of border exclusion programs.

Considering the second option, am I right in doubting that scientists have sufficient information about the genetic makeup of alien organisms - and how any genetic differences may express themselves in a new environment - to make the required finding?

Additional Concerns

Risk Assessments

As mentioned above, the SPS text and decisions by the Appellate Body require reliance on risk assessments for establishing a country's "level of protection" and deciding which specific phytosanitary measures to apply in particular situations. The Appellate Body has made two rulings helpful to those who wish to maximize protection: 1) that the analysis does not have to be quantitative, and 2) that the country need not show that the damage will reach a certain threshold level. However, I am quite concerned that the Appellate Body's emphasis on specific information will penalize countries trying to protect themselves from unknown potential invaders.

The only way a country can escape the obligation to define the problem and its solution with great specificity is through adoption of "provisional" measures under the terms of Article 5.7. A country's right to adopt "provisional" measures is often said to be the Agreement's acceptance of the "precautionary principle". However, the text and a decision by the Appellate Body make it clear that "provisional" measures are expected to be short-term and the exception rather than the rule. Furthermore, the country must be seeking the missing information and must review the provisional measure within a reasonable period. These requirements would tie USDA in procedural red tape when it should be focusing on addressing previously unsuspected pests.

Consistency

The SPS Agreement requires that "levels of protection" be consistent in different but comparable situations (Articles 2.3 and 5.5). Comparisons can be made to the level of protection applied to a separate but somehow similar imported good, or to domestic regulation of the same or similar pests. The Appellate Body has ruled that if internal or domestic measures apply significantly less stringent controls in "comparable" situations, a dispute panel can take this discrepancy "into account" as a "factor" in determining whether the challenged international phytosanitary measure is consistent -- and thus complies with the SPS Agreement.

Clearly, to satisfy the demands for consistency, countries must close loopholes in protection resulting from past decisions -- but it is unclear how rapidly. While the Appellate Body has said that the objective of achieving consistency is "a goal to be achieved in the future", it also said that "arbitrary or unjustifiable inconsistencies ... are to be avoided." Can we write language that would allow countries some leeway in phasing in more stringent phytosanitary measures?

As part of my evaluation of the SPS Agreement, I have read a recent paper prepared by Dr. Donna Roberts of the USDA Economic Research Service. In that paper, Dr. Roberts states that introduction of harmful exotic organisms is a "low probability/high consequence" event. Do officials holding this belief tend to conclude that phytosanitary measures can be less restrictive than do those who think the that the

likelihood of an introduction is greater? If so, then it is important to consider this premise carefully. What are your thoughts when you consider the overall volume of incoming shipments, vessels, and travelers?

Dr. Roberts told me that she reached this conclusion because she had been unable to find very many mentions in the literature of organisms being introduced on "commodities" as opposed to in ballast water or as deliberate imports (the case of "weedy" horticultural imports). Apparently she did not consult APHIS' pest interception database. Are there other sources of information that we should bring to researchers' attention?

Finally, should government officials limit themselves to "published" literature when searching for information in this field, e.g., when conducting risk assessments, etc.?

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