

Protection for Whom?

The Uses and Abuses of Sanitary and Phytosanitary Standards in the WTO

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Abstract

Sanitary and phytosanitary (SPS) measures create unusual challenges for the World Trade Organization (WTO). On the one hand, all WTO members accept the right of governments to use such measures to protect public health and safety. On the other hand, many members, particularly in the developing world, worry that governments will use SPS measures for purely protectionist ends. The challenge is thus to ensure that SPS measures can be legitimately used without being abused. This memo asks whether political economists can help meet this challenge. I argue that they can, in two ways. First, they can point to institutional reforms that would improve the WTO's dispute settlement system. Second, they can identify which SPS measures reflect concerns about public welfare and which serve purely protectionist ends. I devote most of the memo to the latter point and offer some preliminary ideas about what relevant evidence might look like.

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As tariffs have fallen over the years, the use of less traditional trade barriers has grown. Exporters today confront not only conventional nontariff barriers (NTBs), such as quotas and import licenses, but also a huge range of technical barriers to trade (TBTs) meant to ensure the quality of imports. These include inspection requirements, testing and certification requirements, labeling and packaging requirements, quarantines, and outright prohibitions. A subset of these measures, known as sanitary and phytosanitary (SPS) standards, deals specifically with food, animal and plant safety. SPS measures, like TBTs more generally, create unusual challenges for the global trading system.

On the one hand, all World Trade Organization (WTO) members accept the right of national governments to use such measures to protect public health and safety. This right is enshrined in Article 2.1 of the Agreement on Sanitary and Phytosanitary Standards (SPS Agreement), which states that “Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health.” On the other hand, many WTO members fear that governments will use such measures for purely protectionist ends. The Agreement thus requires governments to employ SPS measures “only to the extent necessary” and only when they can be scientifically justified (Article 2.2), and prohibits governments from using such measures in an arbitrary or discriminatory fashion (Articles 2.3, 5.5). As these provisions make clear, the challenge is to ensure that SPS measures can be legitimately used without being abused.

Those seeking to achieve this balance confront a daunting array of questions. For example, how much risk is needed to justify an SPS measure that restricts trade? Must the risk be proven, or is it sufficient to invoke hypothetical risks? Is it appropriate to focus exclusively—as the current rules do—on the risk-reducing potential of SPS measures, or should these benefits

be balanced against their costs to either domestic consumers or foreign producers? Can public opinion justify SPS measures even when science indicates that the public is wrong?

Although these and other questions are important, they lie beyond the scope of this memo. I address a narrower question: what can political economy contribute to the evaluation of SPS measures? I argue that political economists can encourage the legitimate use and discourage the abuse of such measures in two ways. First, they can point to institutional reforms that would improve the WTO's dispute settlement system. Because this topic has been extensively researched, I merely highlight several findings that might prove useful. Second, political economists can identify which SPS measures reflect concerns about public welfare and which serve purely protectionist ends. I devote most of the memo to the latter point and offer some preliminary ideas about what the relevant empirical evidence might look like.

The Challenge of SPS Measures

The SPS Agreement defines SPS measures as any policies “that protect human, animal or plant life and health within the territory of the Member from risks related to diseases, pests, and disease-carrying or –causing organisms, as well as additives, contaminants, toxins or disease-causing organisms in food, beverages, or feedstuffs” (Roberts 1998: 382). As noted above, there is general agreement that SPS measures should be allowed when genuine risks exist. Anecdotal evidence suggests that this is sometimes the case: consider, for example, recent outbreaks of avian flu in Asia or melamine-contaminated infant formula in China.

Although the SPS Agreement reaffirms governments' right to employ SPS measures for legitimate ends, its primary *raison d'être* is to control the abuse of such measures. The concern

is that governments might invoke health and safety concerns to justify purely protectionist SPS measures. This concern is warranted for several reasons.

First, although research has only just begun, the evidence indicates that SPS measures can be a potent barrier to trade. For example, in Henson and Loader's (2001: 91) survey, a sample of 65 developing-country governments identified SPS measures as the main obstacle to agricultural and food exports, significantly ahead of "other technical requirements," "transport and other direct export costs," tariffs, and quantitative restrictions. These subjective perceptions are echoed in more objective indicators: for example, Otsuki, Wilson and Sewadeh (2001) find that the European Union (EU)'s proposed aflatoxin standard would, relative to existing international standards, reduce African food exports to the EU by 64 percent. The potential impact of such measures is also illustrated by the longstanding US ban on Mexican avocados: when this ban was finally relaxed in the late 1990s, annual US imports of Mexican avocados jumped from less than \$1 million to over \$50 million in just a few years (Zahniser 2006). Hence, whatever their rationale, SPS measures clearly have the potential to impede trade.

Second, SPS measures hit poor countries particularly hard. This is partly because SPS measures fall mostly in the food and agriculture sector, on which developing countries are dependent: agriculture accounts for 20 and 9 percent of GDP in low and middle-income countries, respectively, and accounts for over half of employment in most of the developing world (World Bank 2008). The abuse of SPS measures would thus reduce poor countries' gains from trade and worsen North-South trade relations. SPS measures also threaten poor countries more than rich ones because the former are less able to challenge such measures through the WTO's dispute settlement system. I return to this point below.

Finally, there is both anecdotal and statistical evidence that SPS measures have been abused. For example, the US avocado ban survived for decades after the US Department of

Agriculture concluded that Mexican avocados posed no risk of fruit-fly infestation, largely because efforts to relax the ban were strenuously opposed by US avocado growers (Lamb 2006). Likewise, European officials have tended to cite political (in this case, public) pressures rather than scientific evidence to support the EU's ban on hormone-treated beef (Davis 2003, ch.9). More generally, Kono (2006) finds that TBTs are unrelated to proxies for consumer concerns, such as stringent domestic regulations, but are significantly related to traditional interest-group determinants of protection. And while Otsuki, Wilson and Sewadeh's (2001) finding on the impact of the EU's aflatoxin standard does not in itself prove that the measure has protectionist motives, the fact that the standard is expected to save only 0.7 lives per year out of a population of 500 million does raise questions about exactly whom EU officials are trying to protect.

In sum, while health and safety concerns cannot be trivialized, neither can the risk that SPS measures will be used for protectionist ends. The challenge is to devise a system that allows for the legitimate use of such measures while controlling their abuse. In practice, this task falls to the WTO's dispute settlement system. Members have the right to challenge each other's SPS measures if they feel that the latter constitute unwarranted barriers to trade. If members cannot resolve their differences bilaterally, WTO dispute settlement panels and appellate bodies may rule on the measures' legality. While a thorough review of SPS jurisprudence is beyond the scope of this memo, four questions are particularly relevant to the assessment of SPS measures.

First, is the standard consistent with those of international standard-setting bodies such as the Codex Alimentarius, the International Organization of Epizootics, and the International Plant Protection Convention? If so, the measure is presumed to be WTO-compliant. The remaining questions thus pertain to measures that exceed the recommendations of such bodies.

Second, is the measure based on a scientific risk assessment? This is the principal requirement of Article 2.2 of the Agreement, which states that SPS measures should be “based on scientific principles and...not maintained without sufficient scientific evidence.” The EU’s failure to meet this condition was, for example, the WTO panel’s main objection to the EU’s ban on hormone-treated beef (Roberts 1998).¹

Third, is the measure “necessary,” as required by Article 2.2? As Correa (2000) observes, “necessary” has in practice been interpreted to mean “least trade-restrictive.” In other words, the question is whether the desired consumer protection could be achieved through less trade-restrictive measures. Failure to meet this requirement was, for example, the GATT panel’s principal objection to the Thai government’s ban on imported cigarettes (Correa 2000).

Fourth, does the measure discriminate “arbitrarily or unjustifiably,” either across trading partners (Article 2.3) or across sectors (Article 5.5) where similar conditions prevail? If so, this could also disqualify the measure. Cross-partner discrimination was, for example, the WTO panel’s main objection to the US ban on shrimp from countries that did not require turtle-exclusion devices (TEDs). Although the panel upheld the US right to use such measures for environmental ends, it also concluded that the US measure discriminated arbitrarily against some trading partners, for example by giving some partners more time than others to phase in their TED programs. Cross-sector discrimination was a factor in the *Hormones* case: while the EU claimed that the disputed hormones were potentially genotoxic, the WTO panel noted that the EU permitted the use of carbadox, a known genotoxin, in pork production. The panel concluded that the EU was more tolerant of such inputs in the internationally competitive pork sector than

¹ Article 5.7 provides an exception to this rule based on the “precautionary principle”: when scientific evidence is scarce, members may adopt SPS measures provisionally, provided they conduct risk assessments within a “reasonable period of time.” Such measures must, however, have explicitly provisional status.

in the less competitive beef sector, a distinction that is hard to justify on health and safety grounds alone (Roberts 1998).

As the above questions reveal, the evaluation of SPS measures lies largely beyond the expertise of political economists. The first question—on conformance with international standards—is a purely technical one. The second question, on risk assessment, is a matter for scientists. The third question, regarding necessity, is for public-policy analysts. Political economists are thus ill-prepared to answer most of the important questions regarding the legality of SPS measures. Nonetheless, there are two ways in which political economy can make a contribution: first, by proposing reforms to the dispute settlement system; second, by identifying which SPS measures are arbitrarily or unjustifiably discriminatory.

SPS Measures and WTO Dispute Settlement

A WTO member hurt by SPS measures in partner countries need not passively accept this state of affairs. The aggrieved member may challenge these measures under the WTO's Dispute Settlement Understanding (DSU). Since the DSU is the main forum within which SPS measures can be challenged, it is important that it be equally accessible to all. In this regard, extant research provides some cause for concern.

A number of studies show that, *ceteris paribus*, poor countries are less likely than rich ones to participate in WTO disputes (Bown 2005; Busch and Reinhardt 2003). This may be because they lack legal resources and expertise or because, due to their small markets, they have little ability to enforce panel rulings via trade sanctions and rationally refrain from filing claims they cannot enforce. Whatever the reason, poor countries' underuse of the DSU is troubling. Since poor countries are especially likely to be victims of SPS measures, they have a greater

need for a DSU that protects their interests. Poor-country governments recognize this point: in Henson and Loader's (2001) survey, such governments identified "Insufficient ability to participate effectively in dispute settlement procedures" as the second-biggest obstacle to participation in the SPS Agreement. Controlling abuses of SPS measures thus requires a DSU that is more responsive to poor countries' needs. How can this be achieved?

Some causes of poor-country underrepresentation defy institutional or policy fixes. For example, there is no quick solution to the problem of limited legal and technical resources. Nonetheless, some political-economy research does suggest ways to improve the ability of poor countries to pursue their interests through the DSU. For example, Davis and Bermeo (forthcoming) find that legal assistance from the Advisory Centre on WTO Law makes developing countries more likely to initiate disputes. Bagwell, Mavroidis and Staiger (2004) address the enforcement problem, demonstrating formally that a system of tradable remedies—in which WTO members auction their rights to retaliate—could lead to greater compensation for poor countries with limited retaliatory power. Although research along these lines is in its infancy, these preliminary results suggest that institutional reforms could improve poor-country representation under the DSU. Identifying such potential reforms is one way in which political economists could contribute to the evaluation of SPS measures.

SPS Measures as Hidden Protectionism

Article 2.2 of the Agreement states that SPS measures "shall not be applied in a manner which would constitute a disguised restriction on international trade." In other words, SPS measures cannot be protectionism in disguise. Although this dictum sounds reasonable, it begs the question of how one determines whether an SPS measure is meant to protect interest groups

or the public. Risk assessments do not answer this question, since even flimsy evidence of risk might motivate a risk-averse, yet public-spirited, government to adopt an SPS measure. To prove that a measure is protectionist in intent, further evidence is needed.

What would this evidence look like? Extant trade policy research provides little guidance here. Historically, scholars have not thought much about the motives behind trade barriers. Because traditional barriers such as tariffs and quotas reduce aggregate welfare, scholars have generally assumed that such barriers reflect protectionist pressures. Although this assumption is reasonable when it comes to traditional protection, it is less so in the case of SPS measures, which may help as well as hurt consumers. There is thus a pressing need to think about how to assess the motives behind SPS measures and other technical barriers to trade.

One possible approach would be to compare the benefits and costs of such measures. If the benefits of an SPS measure exceed its costs, it is at least plausible that it serves a public-spirited end. If, conversely, the costs far outweigh the benefits, it seems more likely that the measure is protectionist in intent. This is the approach taken by Otsuki, Wilson, and Sewadeh (2001), who find that the EU's proposed aflatoxin standard would dramatically reduce imports from poor countries while having essentially no impact on the health of EU consumers.

Although this approach is interesting and useful, particularly for public-policy analysis, it offers at best suggestive evidence about the motives behind SPS measures. One problem is that the costs and benefits are not, at least in this example, in the same metric, which raises the problem of putting a monetary value on lives. This problem might be overcome by estimating the health consequences of higher import prices, but even then the results might not tell us much about politicians' motives. The main problem is that such cost-benefit calculations are often absent from public policy: for example, when the terrorist attacks of September 11, 2001 led to

increased airport security, few people asked whether the resulting airport delays could lead to more deaths by diverting some travelers into more hazardous ground transport. Since many policies—even well-meaning ones—seem to be adopted without much cost-benefit analysis, its absence in the case of an SPS measure probably tells us little about why that measure exists.

Another approach, taken by Kono (2006), is to examine the correlates of TBTs. Kono asks whether TBTs are correlated with (1) proxies for consumer pressures, such as domestic health and environmental regulations, and (2) the determinants of more traditional NTBs such as quotas and import licenses. He finds that TBTs are uncorrelated with other health and safety regulations but highly correlated with the determinants of conventional NTBs. This suggests that TBTs generally reflect protectionist pressures.

Although this approach seems more promising, it also tells us less about politicians' motives than we would like. Because proxies for consumer pressures are hard to obtain at the sectoral level, this part of Kono's (2006) analysis is conducted at the national level. Hence, while this analysis tells us something about governments' general propensities to employ various types of regulations, it tells us nothing about the rationale for a TBT in any given sector. The sectoral results are more compelling, as they tell us that TBTs are found in the same kinds of sectors as more traditional NTBs: import-competing sectors, sectors with high employment, and so on. Nonetheless, evidence that TBTs reflect interest-group pressures does not prove that such measures are not also meant to protect the public. To demonstrate the latter, we need to show more directly that TBTs are not related to the safety risks posed by imports in each sector.

The language of the SPS Agreement suggests one way in which this might be done. As noted above, Article 5.5 of the Agreement prohibits measures that discriminate “arbitrarily and unjustifiably” across sectors where similar conditions prevail. This provision proved important

in the *Hormones* case: the WTO panel noted that the EU allowed potential genotoxins in the internationally competitive pork industry but not in the less competitive beef industry. Since the ban on hormone-treated beef did not follow any consistently applied public-health logic but was consistent with a protectionist logic, the panel inferred that the measure was a disguised barrier to trade. The same reasoning, applied more broadly, could tell us which SPS measures are protectionist in intent. If a government's SPS measures do not reflect any consistently held regulatory stance but are correlated with variables that typically predict trade protection, this suggests that such measures are protectionism in disguise.

The first step in such an analysis would be to identify "questionable" SPS measures, i.e. ones that might serve protectionist as well as public ends. One might do this by examining complaints filed under the WTO's DSU, since disputed measures clearly have the potential to impede trade. This approach suffers from selection problems, however: trading partners may not initiate disputes either because they lack legal, financial, and technical resources or because they doubt their ability to enforce panel rulings. A tally of questionable measures based on dispute initiations will thus understate the degree to which SPS measures restrict trade.

A better approach would be to examine expressions of concern about SPS measures by affected WTO members. Under the SPS Agreement, members are required to notify the WTO of prospective SPS measures so that other members have the opportunity to express their concerns. Both these notifications and expressions of concern are publicly available through the WTO's SPS Information Management System (IMS).² Although selection problems might arise here as well, they should be minimal because expressing a concern via the IMS is essentially costless. Such expressions of concern should thus provide a fairly accurate picture of which SPS measures are likely to impede trade.

² <http://spsims.wto.org/>.

The next step, following the logic of Article 5.5, would be to identify domestic sectors that are similar to those with contested SPS measures. By “similar” I mean that the argument for the SPS measure, if consistently applied, would require similar measures in these other sectors. In the *Hormones* case, for example, the pork industry was considered similar to the beef industry because there is no reason to believe that a toxin used in pork production would be any more or less harmful than one used in beef production. To take another example, in June 2008 the Chinese government objected to US SPS restrictions on Chinese exports of apples. Although the Chinese had submitted all the technical documentation requested by the US, the US risk assessment still had not been completed ten years after its initiation. The Chinese requested that the US complete its risk assessment as quickly as possible. In this case, one might ask whether Chinese exports of other fruit—pears, apricots, oranges, grapefruit, and so on—have encountered similar delays. If they have, then the explanation may simply be that it takes a long time to evaluate the risks associated with Chinese produce. However, if risk assessments for these other sectors have been completed quickly, then it is reasonable to ask why apples have taken so long.

If SPS measures have not been applied consistently to similar sectors, then we need to ask whether protectionist pressures explain this anomaly. Suppose, for example, that the apple sector’s delay is unique. We can then ask how the apple sector differs from comparable sectors when it comes to political-economy variables such as comparative advantage, employment, lobbying contributions, firm concentration, and so on. If these variables explain the variation in risk-assessment delays across otherwise comparable sectors, this suggests that long delays are protectionist in intent.

The key to this research strategy is identifying sectors that are similar from a public-health standpoint. Doing so successfully would hold constant the public-health rationale for SPS

measures. If such measures nonetheless vary within this group of sectors, and if they are correlated with political-economy variables, we can infer that they reflect protectionist pressures. Identifying the relevant group of sectors may be a difficult task, requiring significant research on the characteristics of these sectors. Nonetheless, this task is probably essential if we are to identify which SPS measures are protectionist and which are not.

Conclusion

SPS measures serve both legitimate and illegitimate ends. Ensuring that they are used to protect public health and safety but not for protectionist ends is a difficult but urgent task for the WTO. To a large extent, this task lies in the hands of scientists, lawyers and policy analysts rather than those of political economists. Nonetheless, this memo has highlighted two ways in which political economists can help: by identifying potential reforms to the WTO's dispute settlement system and by identifying the motives behind SPS measures. These are also difficult tasks, but I hope that this memo will stimulate discussion on how best to tackle them.

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