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Role of sanitary and phytosanitary measures within the context of Free Trade Agreements

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The international norms for the trade of animal products were implemented as part of the Marrakech Agreement that established the World Trade Organization (WTO) in 1995. This act culminated the negotiations maintained during the so called “Uruguay Round” (1986-1994) within the framework of the General Agreement on Tariffs and Trade (GATT) that included international trade norms for general merchandise but not for agricultural commodities.

There are several Annexes within the basic text of the WTO. Among them is the Agreement on the Application of Sanitary and Phytosanitary Measures (1), better known as the “SPS Agreement”, with the fundamental purpose of protection of human and animal life and health (sanitary measures) as well as plant life and health (phytosanitary measures) in international trade activities, thus recognizing the importance of the agricultural sector in the wellbeing and economic development of humankind.

The SPS agreement encourages WTO members to base their measures on international standards, guidelines and recommendations where they exist. This process is known as Harmonization. To achieve global harmonization, and due to the technical complexity of the issues of human, animal and plant health, the WTO appointed three international agencies and institutions responsible

for the promulgation of the regulations required for implementing of the SPS Agreement. These organizations are known as the “Three Sisters” and include:

- The Codex Alimentarius Commission (Codex) under the aegis of FAO and WHO, responsible for regulations to protect the health of consumers and ensuring fair practices in food trade.
- The Secretariat of the International Plant Protection Convention (IPPC), a multilateral treaty for international cooperation in the field of plant protection under the aegis of FAO, as the organization responsible for the international standards for plant health measures.
- The World Organization for Animal Health (OIE), the oldest independent international animal health agency in the world, responsible for, among other activities, the enactment of norms related to animal health.

Before discussing the role of the SPS agreement in the context of the Free Trade Agreement (FTA), it is important to clarify that, in spite of its name, a FTA between two or more countries is not an agreement under which goods and products are marketed worldwide completely “free” from

international regulations. On the contrary, and in specific relation to the issue of SPS agreement, the FTAs strengthen the concept of national sovereignty in the protection of human, animal and plant health in relation to international trade transactions.

Actually, the official name of the FTA between Colombia and the United States is “Trade Promotion Agreement between the United States and Colombia” (2), and as such, is a treaty to boost bilateral trade between our two countries, including issues dealing with political, economic, institutional, industrial, environmental, and intellectual property, among others. The FTA between Colombia and the United States refers to the use of the WTO SPS Agreement relating to trade promotion activities between the two countries in agricultural areas.

The application of the SPS agreement is one of the most complicated activities in relation to the norms within the WTO framework. It is much easier to reach an agreement on the norms on technical characteristics of manufactured products than to reach international agreements on sanitary or phytosanitary risk in agriculture where nature with all its biological diversity does not follow “manufacturing” patterns that may follow very precise ISO specifications.

The SPS agreement defines a SPS measure as any measure applied:

- a. to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- b. to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- c. to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
- d. to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

For the purposes of these definitions, the term “animal” includes fish and wildlife, the term “plant” includes forests and wild flora; “pests” include weeds, and the term “contaminants” includes pesticide residues and veterinary drug residues and extraneous matter.

SPS measures can take many forms. Among others, include:

- require that animals and their products come from disease-free areas;
- inspecting products to detect microbiological contaminants;
- impose a specific fumigation treatment of products, and
- establish maximum permissible levels of pesticide residues in food.

Two of the fundamental principles of the WTO rules in reference to the SPS Agreement are: (a) the recognition of the sovereign right of Members to provide the level of protection of health that they consider appropriate; and (b) to ensure that SPS measures do not constitute unnecessary restrictions, arbitrary or unjustifiable from a scientific standpoint and that a measure is not a disguised restriction on international trade. This means that countries can set their own standards on matters of animal health and plant and food safety whenever “such regulation is based on scientific principles, which apply only to the extent necessary to protect the health and does not establish an arbitrary or unjustifiable discrimination between countries with identical or similar conditions” (WTO - SPS Agreement).

While the SPS Agreement encourages countries to use harmonization with the norms established by the WTO international agencies (OIE, Codex, IPPC), countries may adopt “sanitary and phytosanitary measures to achieve higher levels of health protection - or measures to address health

concerns for which there are no international standards - provided they are justified from the scientific point of view.” This adopted level is known as “Appropriate Level of Protection (ALOP)”.

For example, on certain animal health issues, the United States (as well as many other countries) has established requirements for the importation of animals or animal products at higher levels than the international standards promulgated by the OIE, justified through quantitative risk assessments based on available sound science. This is justifiable given the high level of animal health in the U.S. where many animal diseases have been eradicated after animal health campaigns that have lasted decades at a very high financial cost.

The right to establish SPS measures to achieve a desired ALOP also requires basic obligations to assure that such measures: “(a) are applied only to the extent necessary to protect life or health; (b) are based on scientific principles and not maintained without sufficient scientific evidence (except emergency or provisional measures); and (c) do not unjustifiably discriminate between national and foreign, or among foreign sources of supply.”

This sovereign ability to establish international trading conditions higher than the standards of international consensus must be taken very seriously to avoid common abuse committed in many countries in trying to use sanitary barriers without necessary scientific justification. The SPS agreement encourages health protection, but not unscientific protectionism. In this regard, it is common to ask what to do for example in the presence of an emerging animal disease for which there is no good scientific information at the time of recognition. In these cases it is permissible for the country to establish immediate precautionary emergency measures (for example in the form of suspension of imports) with the understanding that these precautionary measures are temporary and will be re-evaluated in a reasonable time, as scientific information about it becomes available. These precautions should be distinguished from the European concept of the Precautionary Principle that contemplates the effect of scientific uncertainty of

any action on the environment even in the absence of scientific consensus that the action or policy is harmful.

It should be clarified here that the establishment of an ALOP in order to correct a negative impact on prices as a result of the importation of agricultural products during the implementation of a FTA is not justifiable within the rules of the WTO, unless such import has an impact on the life or health of humans, animals or plants.

The SPS Agreement recognizes that there may be more of one way to achieve the ALOP of a given country. This is known as the Equivalence Principle and represents a bilateral or multilateral agreement leading to the acceptance of equivalent SPS measures of an exporting member (even if the measures are different from the importers) if the exporter objectively demonstrates that its measures achieve the importer’s appropriate level of protection.

Given that the distribution of diseases and / or pests often depends on geographical and / or ecological factors and boundaries, the SPS Agreement recognizes the concept of “free zones” of pests or diseases. This is what is known as the concept of Regionalization. These “zones” can be part of a country, or all or parts of several neighboring countries. In cases of Regionalization, importing countries should not deny access to products from these areas even when the disease or pest exists elsewhere in the exporting country. In these cases it is the responsibility of the exporting country to demonstrate the integrity of established SPS barriers that keep these areas as free of the disease or pest.

One of the key objectives of the SPS Agreement is to increase the Transparency of sanitary and phytosanitary measures. Because of this, governments are required to report to other countries any SPS measure that may affect international trade. In the specific case of the FTA between Colombia and the United States, one of the treaty’s provisions is the establishment of a Standing Committee on Sanitary and Phytosanitary Matters (2) within the first 30 days

of the implementation of the treaty, with a view “to promote consultation and cooperation between the Parties on sanitary and phytosanitary measures and address matters affecting trade between the Parties” (Colombia –US FTA). In animal health issues, this transparency also includes the obligation for WTO member countries to have immediate notification (within 24 hours) of new animal health events to the OIE with real-time dissemination to the rest of the world through the web pages of their World Animal Health Information System (WAHID) database.

Another basic Annex of the WTO is the Agreement on Technical Barriers to Trade, known as the “TBT Agreement” (3), established to ensure that the product requirements and the procedures used in the evaluation of compliance do not create unnecessary obstacles to trade. As with the SPS Agreement, “all Members are entitled to make mandatory requirements for products in order to achieve legitimate objectives. These legitimate objectives include protecting people’s health or safety, the protection of life or health of animals or plants, the protection of the environment, the interests of national security, and the prevention of misleading practices”.

There is an important relationship between the SPS and TBT agreements regarding international trade in agricultural products. The concepts of transparency and harmonization are also applicable in the formulation of technical requirements and procedures for assessing compliance (procedures called conformity assessment). Besides this, the TBT Agreement requires the principle of non-discrimination. This means that a country cannot impose technical specifications to imported products that are not applied to like products of national origin or which have not been implemented to similar products from other countries of origin. Another important principle of the TBT Agreement is the need to develop procedures for assessing conformity to the minimum level that achieves the desired effect in proportion to the objectives they seek to achieve. For example a country cannot require that the package information of an imported product should have more information than what is required for a national product and that information

should not be required beyond what is needed for consumer information.

Possible examples of TBT measures that relate to the health of people, include, among others, restrictions on prescription pharmaceuticals or labeling of cigarettes. Most of the measures related to the control of human disease are governed by the TBT Agreement, except in the case of diseases carried by plants or animals (such as rabies and other zoonotic diseases). In the case of food, labeling requirements concerning nutritional value, quality and packaging regulations are not considered sanitary or phytosanitary requirements and hence subject to the provisions of the TBT Agreement. However, the labeling requirements that relate to food safety are considered SPS measures.

The following examples illustrate the difference between SPS and TBT measures (3):

SPS measures typically deal with:

- additives in food or drink
- contaminants in food or drink
- toxic substances in food or drink
- residues of veterinary drugs or pesticides in food or drink
- certification: food safety, animal or plant health
- processing methods with implications for food safety
- labeling requirements directly related to food safety
- plant/animal quarantine
- declaring areas free from pests or disease
- preventing disease or pests spreading to or in a country
- other sanitary requirements for imports (e.g. imported pallets used to transport animals)

TBT measures typically deal with:

- labeling of composition or quality of food, drink and drugs

- quality requirements for fresh food
- volume, shape and appearance of packaging
- packaging and labeling for dangerous chemicals and toxic substances, pesticides and fertilizer
- regulations for electrical appliances
- regulations for cordless phones, radio equipment etc.
- textiles and garments labeling
- testing vehicles and accessories
- regulations for ships and ship equipment
- safety regulations for toys
- etc.

Taking into account the experience that many countries have encountered in the implementation of FTAs, one might think that the benefits resulting from the implementation of the Trade Promotion Agreement between the United States and Colombia will be beneficial for most business sectors in both countries. This does not mean that some sectors and

industries will not suffer negative effects as a result of global competition given homologous production conditions, either because of product quality or cost of production and marketing. However, a thorough understanding of the standards of the Agreement on the Application of Sanitary and Phytosanitary Measures will facilitate the appreciation of the opportunities that the FTA provides the agricultural sector and avoid the problems of misunderstanding and protectionist tendencies which tend to appear (on both sides) in the process of implementing these bilateral trade agreements.

References

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