

Precautionary Principle in the International Trade Regime: A Careful Look at the WTO's SPS Agreement

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Abstract

One of the purposes of the “WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)” is to control health-based barriers. To achieve such goal, the SPS Agreement relies on the scientific justification as a benchmark to distinguish legitimate health-based barriers from illegitimate ones. There are, however, situations where the scientific findings are not adequate. Many commentators believe that the precautionary principle is an appropriate tool enabling the Member states to take appropriate actions in responding to such situations. They refer to Article 5.7 of the SPS Agreement where allows the Member states to adopt sanitary or phytosanitary measures on the basis of available pertinent information, in cases where relevant scientific evidence is insufficient. The issue not being clear in Article 5.7 is the requirements under which the Member states could adopt a trade-restrictive measure on the basis of precautionary principle. This paper tries to address this issue by a contextual analysis of Article 5.7. For this purpose, the essay considers four requirements contained in Article 5.7. This paper concludes in overall, although these requirements create legal ambiguities in some cases, they could be of assistance where the markets are unnecessarily closed.

Field of Research: International Economic Law

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1. Introduction

Nowadays, the sanitary and phytosanitary Measures are one of the challengeable issues in the international trade of food and agricultural products. Although these measures ensure the safety and health in human, animal and plant normally but, sometimes the states use these measures for the protectionism objectives that hurt the free trade. For resolving this problem, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) sets out some disciplines that on the one hand, they pay deference to right of countries to take action to protect domestic safety and health and on the other hand, they require the states that their SPS measures accompanied with the scientific justification. The scientific justification is most important discipline in this Agreement that can prevent the illegitimate health based trade-restrictive measures. Although it may seem with relying on the scientific justification, the WTO dispute settlement bodies may easily resolve the health-based disputes, but there are, however, situations where the scientific findings are not adequate or on the other words, there are scientific uncertainties. Some scholars introduce the precautionary principle as a pertinent tool to react these situations. At first, the precautionary principle was appeared in German environmental law (1974 Federal Emission Protection Act) under name of Vorsorgeprinzip, (Gruszczynski 2010) although some found it in some regulations from 1906(Wiener 2003). There is a huge literature about the definition and goal of this principle in law. Numerous and different definitions of the precautionary principle exist, making it impossible to identify any one uniform description (Epps 2008). In fact, interpretation and implementation of the precautionary principle takes various forms.

This study doesn't seek to introduce all numerous definitions, but two most well-known definitions have been set forth in multilateral Agreements may serve as useful example:

Principle 15 of the Rio Declaration on Environment and Development, 1992:

"In order to protect the environment, the precautionary approach should be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

The above definition shows the principle "gives regulators permission to act without supporting scientific evidence by privileging the avoidance of possible harm"(Button 2004).

Another international instrument points out the precautionary principle is Cartagena Protocol on Biosafety (CPB), 2000. Articles 10(6) and 11(8) provide:

"Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism ... shall not prevent that party from taking a decision, as appropriate, with regard to the import of the living modified organism [...] in order to avoid or minimize such potential adverse effects" It is clear that there is an important difference between above-mentioned definitions. The second doesn't state the conditions of "threats of serious or irreversible damage" and "cost-effective measures" and it appears the second version of this principle is stronger than the Rio Declaration's version (EGGERS 2001).

Now, the application of principle isn't limited to the environmental law and is applied in many fields such as health law, on the national and international levels so that some argues the principle is a general customary rule of international trade, or at least a general principle of law¹, although the Appellate Body declined to take a certain view about the status of this principle in international law:

"The legal debate over whether the precautionary principle constitutes a recognized principle of general or customary international law is still ongoing... we consider that prudence suggests that we not attempt to resolve this complex issue, particularly if it is not necessary to do so...²". Nevertheless, the acceptance of this principle in modern law resulted in its being set forth in Article 5.7 of the WTO's SPS Agreement as a model of precautionary principle. The Article 5.7 provides:

"In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measures accordingly within a reasonable period of time".

A key problem is under which requirements; the Article 5.7 will be triggered? Although the text of this Article lays down four requirements which must be met in order to adopt and maintain a precautionary SPS measure, but there are some ambiguities about this requirements. So this essay seeks to explain these requirements for eliminating some ambiguities and problems.

To achieve this goal, after this introduction, literature review and methodology, the essay includes three parts and a conclusion. The

findings start off with part 4.1 that contains the overview of disciplines of the SPS Agreement. Part 4.2 briefly outlines this Article's position in the SPS Agreement and implies the burden of proof in relation of the Article 5.7. Part 4.3 analyses the requirements of the Article 5.7 including (I) Insufficiency of scientific evidence, (II) Based on available pertinent information, (III) seeking to obtain the additional information and (IV) Reviewing within a reasonable period of time. In the final, the essay states briefly the findings of previous parts in the conclusion.

2. Literature Review

The essay refers to Gruszczynski (2010) who performs a critical analysis of the SPS Agreement. In chapter 5 of his book, he addresses the idea of precaution and Article 5.7 in the situations where science is not able to provide any conclusive answer, but he doesn't recognize the Article 5.7 as a model of precautionary principle. He analyses the requirements of Article 5.7 and in overall suggests that the assessment of requirements has to be performed on a case-by-case basis.

In her book, *The Power to Protect: Trade, Health and Uncertainty in the WTO*, Button (2004) investigate European Commission's Communication on the Precautionary Principle and then explore its implications in WTO. Without any reviewing the four requirements of the Article 5.7 and only on the basis of the EU's experiments, he argues the introducing the precautionary principle into the WTO would remove the linchpin of the SPS Agreement: the scientific justification.

Besides her book's central argument about the conflict between health and trade, Epps (2008) states many scholars' views about the necessity of attention to the precaution in risk analysis. However she has some concerns about this principle. She believes the principle will cause conflict because of its potential to disguise trade barriers in the name of health protection.

3. Methodology

The essay relies on the analysis of the text of the SPS Agreement and corresponding case law. The more focus is on the sentences of the Agreement, because the recourse to the text of relevant provisions is an interpreter's first task. The provisions always find the reflection in the relevant jurisprudence. So the essay should consider the reports of WTO's panels and Appellate Body. This approach identifies the inconsistencies in the interpretation of the Agreement between the interpreters and the WTO's settlement bodies. Such methodology provides clear guidance to the readers as to look at the Article 5.7 of the SPS Agreement.

4. Findings

4.1 The overview of disciplines of the SPS Agreement

Before studying about the application of precautionary principle in the SPS Agreement, It would better to outline briefly the disciplines of this Agreement:

The right of a WTO Member to obtain and maintain necessary SPS measures for the protection of human, animal and environment life or health is one of most important subjects in this Agreement that has emphasized in Article 2. At the same time, this Article's subparagraphs impose some obligations on the Members: The prohibition of the application of the SPS measures over what is necessary to protect human, animal and environment life or health, the necessity of measure-taking on the basis of scientific principle(Article 2.2) and non-discriminatory obligation (Article2.3). Also this Article states the SPS measures have to be applied in a manner which does not constitute a disguised restriction on international trade.

One of the goals of this Agreement is the encouragement of harmonization in adopting and maintaining the SPS measures in world trade system. The Article 3 takes positive step toward the harmonization. Article 3 encourages the Members to base their measures on international standards, guidelines and recommendations (Article 3.1), while the Article establishes a presumption of consistency with the SPS Agreement as a prize for the measures that conform to such standards (Article 3.2). The harmonization disciplines are not absolute and the Members may decide to adopt and maintain measures that are not based on international standards provided that the Members can provide scientific justification for such measures (Article 3.3).

The subparagraphs of Article 5 run parallel with Article 2.2. Article 5 requires the Members to base their SPS measures on a scientific assessment of risk (Article 5.1) and states the factors must take into account in such risk assessment(Article 5.2), nevertheless if scientific evidence is not enough to perform a risk assessment, the Members may act on the basis of provisional measures. In such sense, the Members are obliged to seek additional information for performing an objective risk assessment (Article 5.7). Other disciplines of Article 5 give attention to risk management's arguments. The Members should take into account the objective of minimizing negative trade effects in determining the appropriate level of protection (Article 5.4). The Members must avoid arbitrary or unjustifiable distinction in the levels of protection (Article 5.5) and they need to ensure that their SPS measures are not more trade-restrictive than is necessary and they are obliged to take into account the technical and economic feasibility of alternative options in order to achieve this level(Article 5.6).

4.2 The position of Article 5.7 in the SPS Agreement

Before going into the conditions of Article 5.7 to apply a model of precautionary principle, it is necessary to analyze the position of this Article in the framework of the SPS Agreement.

The SPS Agreement sets forth some obligations on the Members of WTO. They are: Harmonization (Article 3), Science Test (Articles 2.2, 5.1 and 5.7), Regulatory consistency (Article 2.3), Necessity Test (Article 5.6) and Transparency (Article 7). The obligation of "Science Test" is the central discipline in this Agreement. According to Article 2.2, obligation of science test mandates the Members to base their SPS Measure on the scientific evidence, nevertheless the members can deviate this discipline by relying on the Article 5.7.

The relationship between two Articles is a key issue in ascertain the position of Article 5.7. For explaining this relationship we must answer this question: Does Article 5.7 is an independent right of the Member or an exception? The important consequence of declaring a provision as an independent right is that the burden of proof does not shift and the interpretation of it is not narrow while declaring a provision as an exception result in bearing the burden of proof by the defendant and its interpretation is narrow and restrict.

Some scholar regards Article 5.7 as an exception to be invoked by the defendant (Pauwelyn 1999) The others points out the similarity between article 5.7 and Article 3.3 of the SPS Agreement which has been interpreted as an autonomous right (EGGERS 2001). This problem was discussed comprehensively in the Biotech Dispute³. The panel in that dispute discussed whether Article 5.7 is to be regarded as an exception of Article 2.2 or an independent right of the Members. The answer to this problem is important both for ascertaining the position of the Article 5.7 and the allocation of the burden of proof between the parties of a dispute. The Panel based its analysis on the benchmarks that was developed by the Appellate Body in EC-Tariff Preferences. The Appellate Body suggested a particular provision may be characterized as an independent right rather than exception if it meets three conditions: (a) one provision permits what would otherwise be consistent with an obligation of another provision; (b) there is a reference between these two provisions; and (c) one of the provisions suggests that its obligation is not applicable to a measure⁴.

The panel found that article 5.7 "in certain circumstances permits behavior ...that would otherwise be inconsistent with...the obligation of Article 2.2"⁵. Two other conditions were also met, as the panel was able to identify the existence of reference and the exclusion of applicability. In supporting this finding, the panel referred to other cases where the same relationship was

identified. Articles 3.1 and 3.3 of the SPS Agreement are examples and the panel observed that the language used in Article 3.1 and 2.2 was substantially the same. Since Article 3.3 was characterized in the case law as the right of WTO members, the consistent interpretation of the SPS Agreement required the same conclusion with respect to Article 5.7.⁶ This led the panel to conclude similarly Article 2.2, in the Article 5.7 the initial burden of proof was borne by complainants⁷.

4.3 The analysis of Article 5.7's requirements

A measure may be adopted and maintained under Article 5.7 only to the extent the four requirements which are stipulated in the provision.

4.3.1 Insufficiency of scientific evidence

The first requirement to Article 5.7 of the SPS Agreement is that a precautionary measure is taken in cases which relevant scientific evidence is insufficient. As there is no scientific definition of terms such as sufficient, there are the debates about the concept of "efficient scientific evident". The case law does not establish any rules about how to assess the insufficiency of scientific evidence and prefers a case-by-case approach⁸. The Appellate Body in Japan-Varietals found the sufficient scientific evidence indicates that there must be the existence of a sufficient or adequate relationship between the SPS measure and scientific science.⁹ The rationale relevance should be determined on the basis of distinctive features of any case. This result was stated in further details in Japan-Apples case. The panel held insufficiently of relevant scientific evidence should be a condition that there was no, or that there was only very limited scientific evidence upon which the risk issue could be managed¹⁰. Appellate Body confirmed that insufficiency should not exclude case where the available evidence is more than minimal in quality, but also not led to reliable or conclusive. Appellate Body also stated that the notions of relevance and insufficiency in the Article 5.7 imply a relationship between the scientific evidence and something else. Appellate Body continued relevant scientific evidence will be insufficient if the body of available scientific evidence does not allow the performance of an adequate assessment of risks, as required under Article 5.1 and as defined in Annex A to the SPS Agreement.¹¹ But Appellate Body rejected a separation between risk assessment and risk management and held:"It is essential to bear in mind that the risk that is to be evaluated in a risk assessment... is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die¹².

This approach is parallel to some scholar's opinions the states in the scope of science, some information can be sufficient for one scientist to assess a risk and insufficient for another, because some factors such as

subjective judgments of the Scientifics, values of a particular community and the nature of risk assessment have important role in finding sufficiency or insufficiency. This approach reflected in the report of one expert advising the Biotech panel: "when additional scientific knowledge is needed to evaluate new GM crops, each nation's regulators and scientific advisory committees are placed in the difficult position of choosing between expediency and greater certainty. It is not always clear where the distinction lies between what regulators need to know vs. what is merely nice to know"¹³.

Considering the effect of non-scientific factors in a risk assessment justifies the judicial bodies' case-by-case approach in ascertaining the insufficiency.

4.3.2 Based on available pertinent information

After adopting first requirement "Insufficiency of scientific evidence", at this point, the further requirement of "based on available pertinent information" comes into play.

It must note that the "pertinent information" differentiates "scientific evidence". The first requires a lower threshold of conclusiveness than scientific evidence. Nevertheless, it is not possible to establish any decisive benchmark and the assessment of pertinent information has to be performed on a case-by-case. Pertinent information provides for a lower threshold than that required from scientific evidence include that has not been confirmed in other studies or is not fully consistent with theory (Gruszczynski 2010).

Some scholars emphasizes the term "on the basis of". They believe "on the basis of" is not equal "based on" in the Article 5.1. "On the basis of" suggests a slightly loser relationship between the measure and the pertinent information than "based on" in Article 5.1. "Pertinent" means "applicable" or "relevant" and the evidence is pertinent "when it is directed to the issue or matters in dispute, and legitimately tends to prove the allegations of the party offering it"(Black's Law Dictionary 1999).

This statement proves the allegation that on the basis of "based on available pertinent information's requirement, the information must sufficiently warrant the precautionary actions, considering the circumstances of the case. Availability means the information has to be available to the competent authority of the Member taking a measure. The competent authority can use such information and forward or disclose them to other entities such as WTO's judicial bodies. (Wolfrum, Stoll & Fohr 2007)

4.3.3 Seeking to obtain the additional information

Article 5.7 requires the Members to obtain the additional information necessary for a more objective assessment of risk. The Appellate Body stated a Member "must make best efforts to remedy the insufficiencies in the relevant scientific evidence with additional scientific research or by gathering information from relevant international organizations or other sources"¹⁴.

In another dispute, the Appellate Body held: The Article 5.7 doesn't specify "explicit prerequisites regarding the additional information to be collected or a specific collection procedure. Furthermore, Article 5.7 does not specify what actual results must be achieved; the obligation is to seek to obtain additional information"¹⁵.

The phrase 'necessary for a more objective assessment of risk' is important in understanding of this requirement of Article 5.7. It conceptualizes the examination of pertinent information as a form of risk assessment, but such risk assessment cannot be required to satisfy the requirements of Annex A(4) and Article 5.1 of the SPS Agreement. In this context, there is not any predetermined and fixed benchmark to evaluate the efforts of Members to collect additional information and perform a risk assessment. Some suggests a reliance on a flexible standard of reasonableness, applicable on a case-by-case basis. Such approach would require the Members to make the efforts in the search for additional scientific information, while taking into account limitations of domestic research capacities and national priorities in addressing SPS risks. It seems such approach is possible and desirable especially for developing countries.

4.4.4 Reviewing within a reasonable period of time

Article 5.7 implies that an SPS measure which falls within its scope is subject to review that should take place within a reasonable period of time. The case law held that assessment of what constitutes a reasonable period of time requires a case-by-case basis that affords a large degree of discretion to the dispute settlement¹⁶. Appellate Body in Japan-Agricultural Products held:"In our view, what constitutes a reasonable period of time has to be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review and the characteristics of the provisional SPS measure"¹⁷.

The acceptance of a case-by-case basis suggest that the term 'a reasonable period of time' is not related to specific time limits so slow progress of scientific research in a particular field resulting from objective problems may justify a longer period of time (Gruszczynski 2010). In Japan-Agricultural Products, Japan and the EC argued that provisional

doesn't defer to a limited period of time nor would it oblige a party to declare its measure to be temporary¹⁸. Although the United States criticized this approach and stated "a measure may only be taken for a limited amount of time, which equals the reasonable period of time referred to in sentence two of Article 5.7 of the SPS Agreement¹⁹". Some scholars also affirm the recent approach (Charnovitz 2000; Quick & Bluthner 1999).

Although there are the debates about the meaning of 'a reasonable period of time' but considering case-by-case test developed by the Appellate Body appears to be room for longer bans responding to concerns about long-term risks.

Another issue about this requirement is the time of calculation of a reasonable period of time. It seems about the measures taken before 1995, the reasonable period of time only starts to run after the entry into force of the SPS Agreement, but about another measures (taken after the entry into force of the SPS Agreement) the time is the moment when a provisional measures is adopted. The panel in US-Continued Suspension implicitly accepted this approach.

5. Conclusion

It appears that there are many debates about the SPS Agreement, in particular as to the nature and requirements of Article 5.7. No doubt, the requirements of this Article introduce a model of precautionary principle. Nevertheless, there are the ambiguities in the application of Article 5.7. Some of these difficulties related to the four requirements contained in Article 5.7. The Article doesn't consider any detail about "insufficiency", "a reasonable period of time" or "available pertinent information". The settlement bodies in their reports in some disputes, especially Japan-Agricultural products explain about these requirements that can be seen as Article 5.7's supplementary texts. In overall, the settlement bodies adopt a case-by-case approach that permits the flexible and very broadly interpretations about the terms and requirements of Article 5.7.

¹ EC- Hormones, WT/DS26/AB/R, WT/DS48/AB/R AB Report adopted 13 February 1998 para 121

² EC-Hormones, WT/DS26/AB/R, WT/DS48/AB/R AB Report adopted 13 February 1998 Para 125

³ Panel Report, EC-Biotech Products, para 7.2998.

⁴ Appellate Body Report, EC-Tariff Preferences, para 88

⁵ Panel Report, EC-Biotech Products, para 7.2968

⁶ Panel Report, EC-Biotech Products, para 7.2967

⁷ Panel Report, EC-Biotech Products, para 7.3000

⁸ Panel Report, EC-Biotech Products, para 7.3238

⁹ Appellate Body Report, Japan-Varietals, para 73

¹⁰ Panel Report, Japan-Apple, para 8.291

¹¹ Appellate Body Report, Japan-Apple, paras 179, 183

¹² Panel Reports, EC-Hormones, para 105 (US) and para.8.108(CAN)

¹³ Panel Report, EC-Biotech Products, Annex H, 'Replies by the Scientific Experts Advising the Panel to Questions Posed by the Panel', para 14

¹⁴ Appellate Body Report, US-Continued Suspension, para 679.

¹⁵ Appellate Body Report, Japan-Agricultural Products, para 92.

¹⁶ Appellate Body Report, Japan-Agricultural Products, para 93.

¹⁷ Ibid

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