



Trade Basics

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The Sanitary and Phytosanitary and Technical Barriers to Trade Agreements: An Overview

By Daniella Taveau

The General Agreement on Tariffs and Trade (GATT) sought to reduce tariffs and barriers to international trade by creating common rules for trade and a negotiating forum for Member countries. The GATT existed as the primary accord on trade among nations from 1948 through the mid-1990s and successfully reduced tariffs on goods traded between nations. However, despite the benefits of the GATT on tariffs, the Agreement and the subsequent six “rounds” of negotiations did nothing to prevent the proliferation of non-tariff barriers (NTBs) that served as a guise for restricting trade, particularly for agricultural goods. NTBs are measures other than tariffs that frequently serve as barriers to trade, such as burdensome and unnecessary certificate requirements, sanitary and phytosanitary regulations, and arbitrary and capricious rules that result in disparate treatment between imported and domestic goods.

By the 1980s, it became apparent that a serious overhaul was in order. In 1986, countries convened in Uruguay to begin negotiating a new agreement that would be the successor to the GATT. This meeting, famously referred to as the Uruguay Round, resulted in the creation of the World Trade Organization (WTO).

The final negotiated trade agreement is generally divided into three key parts: GATT (covering goods), the General Agreement on Trade in Service (GATS), and Trade Related Aspects of Intellectual Property Rights (TRIPs). It also considerably expanded the application of the overall agreement, creating, for example, specific agreements on Agriculture, Anti-Dumping, Rules of Origin, Safeguards, Subsidies and Countervailing Measures, and Textile and Clothing, as well as the critical Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and Agreement on Technical Barriers to Trade (TBT Agreement).

The SPS and TBT Agreements took unprecedented steps to strengthen Member countries’ rights and obligations and to ensure that they could not implement NTBs that were an unnecessary or disguised barrier to trade.

Putting the WTO into Practice

WTO Committees, including the SPS Committee and the TBT Committee, meet three times per year and are comprised of Members and Observers (generally international standards-setting organizations). The meetings follow a prescriptive format, which include a discussion of

specific trade concerns, monitoring and implementation of the Agreements, and a formal review of the Agreement that happens every three years. In addition to the formal Committee meetings, informal meetings are held either directly before or after the formal meetings to discuss specific areas of interest for current or future work.

In the United States, the WTO delegation is led by the United States Trade Representative (USTR), with participation by the U.S. Department of Agriculture, the U.S. Department of State, and the U.S. Department of Commerce, as well as the U.S. Food and Drug Administration, the U.S. Environmental Protection Agency, and other agencies as appropriate. Smaller developing countries will often send Geneva-based officials who cover multiple WTO committees and do not necessarily have specific expertise in SPS or TBT issues.

Understanding the SPS Agreement

The SPS Agreement defines SPS measures as:

All relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

It is important to see the definition in its entirety to understand the breadth and scope of agricultural measures covered by the SPS Agreement.

The SPS Agreement itself is a living agreement and subject to revision by Members and binding

interpretation through the dispute settlement process. This provides an important forum for Members to voice their concerns with other Member's SPS measures and to build coalitions with other like-minded countries.

Examples of SPS Measures:

- Maximum residue limits (MRLs) for pesticides or other contaminants (i.e., heavy metals, microbiological hazards)
- Restrictions on use of products in production (i.e., hormones, antibiotics, growth promoters)
- Inspection and quarantine rules (i.e., fumigation or meat inspection)
- Regulatory oversight of genetic engineering and biotechnology
- Food safety standards

Key Member Obligations under the SPS Agreement:

- Members shall adopt standards developed by the Codex Alimentarius Commission (Codex), World Animal Health Organization (OIE), and International Plant Protection Convention (IPPC); however, Members may develop their own standards if they are based on science and they are consistent with other obligations under the SPS Agreement.
- Members should seek to harmonize their standards where possible.
- Members should recognize the equivalency of other Member's food safety systems.
- Measures shall be based on an assessment of the risk (where risk is defined by Codex as hazard times exposure).
- Measures should be adopted and maintained only to the extent necessary to address legitimate health and safety concerns.
- Measures should be developed transparently, allowing for notice and comment and consideration of those comments.

- Measures should not arbitrarily or unjustifiably discriminate between Members.

Understanding the TBT Agreement

In general, the TBT Agreement covers Members' technical regulations, standards, and conformity assessment procedures. Technical regulations, as defined by the TBT Agreement, include:

Product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

These “standards” that are covered by the TBT Agreement don't necessarily have to be mandatory standards, but could be guidance.¹

Examples of TBT Measures:

- Nutritional claims
- Food labels
- Food quality standards and packaging standards
- Registration of chemicals or pesticides

Key Member Obligations under the TBT Agreement:

- Regulations and standards should not create an unnecessary barrier to trade.
- Measures should not arbitrarily or unjustifiably discriminate between Members.
- Encourages the development of international standards.
- Members should use relevant international standards when fit for purpose.
- Requires that technical regulations and equivalency procedures should be developed transparently, allowing for notice and comment and consideration of those comments.

A Real-World Example: Korean Shelf-Life Labels:

In February 1994, South Korea reclassified imports of U.S. frozen, heat-treated meat products, reducing the allowable shelf-life of the products from 90 days down to only 30 days. In effect, the South Korean shelf-life requirements set such short time frames that many meat imports could not be marketed in that country. The requirements essentially eliminated imports of U.S. sausages, since the 30-day shelf-life was about equal to the time it took for these products to clear port inspections. Korea claimed its action was necessary to protect public health.

In May 1995, the United States filed a WTO complaint against South Korea, stating that the country's shelf-life requirements was based on unscientific principles and inconsistent with WTO rules, specifically claiming the labeling requirements violated both Article 2 of the TBT Agreement and Article 2 of the SPS Agreement. The two countries eventually reached a mutually acceptable agreement resolving the dispute, as South Korea agreed to change its import regime to allow manufacturers of various products to determine their shelf-life.

As one can see, the SPS and TBT Agreements are very similar in nature. One glaring difference between the two agreements is that while the SPS Agreement clearly defines an international standard as a standard developed by the three sisters (Codex, OIE, or IPPC), the TBT Agreement does not. Instead, the TBT Agreement allows any standard to be considered an international standard as long as it is developed in accordance with the Code of Good Practice, found in Annex 3 of the TBT Agreement. As a result, many would argue that it is more difficult to prove that a Member's TBT measure is in violation of the Agreement.

Relationship Between the WTO & U.S. Law

The United States Congress approved the GATT on December 1, 1994, under “fast track”

authority, making the agreement part of U.S. law. Members of the WTO, including the United States, are not only required to abide by the provisions set forth by the WTO Agreements, but they are also required to make every reasonable effort to bring the “Members” within its territory (such as states and provinces) into compliance with the Agreements. Specifically, Article 13 of the SPS Agreement states:

Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement.

The TBT Agreement also contains provisions for Members regarding bodies at the sub-central level and within their territories. Article 4.1 of the TBT Agreement states:

Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement.

They shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice.

In recent years, there has been considerable discussion within the WTO as to how these articles should be interpreted. In fact, many regional bodies and non-governmental entities employ measures that are inconsistent with the provisions of the SPS Agreement. For example, in the United States, individual states such as California, who adopt hazard-based measures that don’t consider risk from exposure in evaluating substances, do so inconsistently with the WTO SPS and TBT Agreements. Further and because these agreements are codified into U.S. law, hazard-based systems such as the portions of California’s Safe Drinking Water and Toxic Enforcement Act of 1986, also known as Proposition 65, are in violation of the WTO Agreements and ostensibly U.S. law.

Conclusion

Both the SPS and TBT Agreements attempt to provide rules and clarity around non-tariff trade barriers among WTO member countries. Though similar in their make-up, these two agreements have important distinctions.

About the Author: Daniella Taveau is a former International Policy Analyst with the U.S. Food and Drug Administration and Trade Negotiator with the U.S. Environmental Protection Agency, where she represented the U.S. government in the WTO SPS and TBT Committees in Geneva and in U.S. free trade agreements.

¹ The TBT Agreement defines standards to include a “document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.”