Dispute Resolution in SPS Cases

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Chapter 11

Dispute Resolution in SPS Cases

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The Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) aims to find the right equilibrium between safeguarding each Member’s interest in protecting its domestic market from products that threaten the life or health of humans, animals or plants and ensuring that these threats are not abusively invoked by individual Members in order to distort international trade patterns.

This chapter proposes that the DSB should apply a more deferential standard of review when evaluating: (1) the level of risk a state is prepared to tolerate; (2) scientific data; and (3) the relationship between the measure at issue and the ‘risk assessment’ that is required by the SPS Agreement. In fact, it is advocated that the WTO Body should refuse to review these types of assessments altogether. It is asserted that the DSB should not evaluate state priorities and is inadequately qualified to make complicated scientific evaluations. Moreover, the author contends that errors in this field are more costly than in others, in both political and financial terms. Nevertheless, it is asserted that there should still be vigorous review of state conduct in certain other respects, for instance, to determine whether state measures are arbitrary or discriminatory.
Introduction

The Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) recognises the right of WTO Member states to protect their markets from products that threaten human, animal, or plant life or health.¹ That right, however, must be balanced against the market access rights provided for by the WTO Agreements. Thus, the SPS Agreement is an attempt to strike a balance that preserves domestic autonomy over decisions in the public health area on the one hand, and guards against pretextual use of the agreement's health and safety provisions on the other hand.

This chapter argues that the standard of review applied in SPS cases should be highly deferential to domestic decisions with respect to the evaluation of science, the level of risk a state is prepared to tolerate, and the relationship between the measure at issue and the risk assessment required by the SPS Agreement. Specifically, WTO panels and the Appellate Body (AB) should decline to review these decisions. This deference, however, should extend only to the above-mentioned state decisions. There should be vigorous review of state conduct with respect to the transparency and procedural requirements of the SPS Agreement, as well as a prohibition on arbitrary or unjustifiable discrimination,² disguised restrictions on trade,³ and measures that are more trade restrictive than necessary.⁴

This proposal is supported by a cost-benefit analysis of judicial review in the SPS context. The key element of this analysis is the observation that panels and the AB are particularly ill suited to evaluate scientific evidence and questions of risk tolerance that arise in SPS cases. This is so for at least two reasons. First, the domestic concerns and priorities of Member states are likely to diverge more in the SPS context than in other trade contexts, making it more difficult for judges to identify the legitimate interests of states. Second, SPS cases typically involve an evaluation of the scientific data on which the state relied in enacting its measure. For structural and personnel-related reasons, panels and the AB are unqualified to judge the merit of that scientific evidence.

These two problems imply that the WTO's judicial organs will err more frequently in SPS cases than in other areas. The costs of review are further increased by the fact that when mistakes are made they are typically more costly in the SPS arena than in other trade areas. The issue here is that if a state enacts an SPS-justified trade measure in good faith, and the AB erroneously concludes that the measure is a violation, the state is quite likely to accept the suspension of concessions that follows non-compliance rather than change its policies. The result is that subjecting SPS measures to scrutiny at the WTO results in the adoption of two trade measures (the original SPS-justified measure and the retaliatory measure) rather than just one (the SPS-justified measure). The SPS cases to date highlight this compliance

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3 Ibid.
4 SPS Agreement Article 5(6).
problem. In the *Hormones* case,\(^5\) for example, the AB ruled that the European regulation banning the importation of meat and meat products from cattle treated with artificially produced hormones was inconsistent with the SPS Agreement. Rather than admit the beef in question, the EC attempted to change its procedures to comply with the ruling. When this effort failed, the EC elected to live with the resulting suspension of concessions rather than remove the ban. Non-compliance such as this not only hinders the mission of the WTO to promote free trade, it threatens the credibility and legitimacy of the institution.

In November of 2006 the Dispute Settlement Body adopted the report of the panel in the *GMO* case.\(^6\) In that case the United States, Canada, and Argentina filed a complaint against the EC challenging various regulations put in place by the EC and its member states relating to the importation of biotech products. Like the *Hormones* case, the problem here was one of balancing European concerns and priorities regarding the health effects of consuming genetically-modified foods against the values of the liberalized trading system. This case provoked considerable controversy, and not without reason. How can a tribunal decide whether a state should be permitted to control the consumption of a product that it alleges to be harmful to public health? How can a trade body evaluate the complex scientific evidence that has been submitted by the parties? This chapter argues that these tasks should be left with national governments.

Note that this proposal addresses only the manner in which panels and the AB review SPS cases and does not call for a change to the substantive legal rules of the SPS Agreement. This is an important point, since changes to the substantive rules are quite unlikely. The consensus-based approach taken in rule-making carries with it a powerful status-quo bias, and there is no reason to think that Member states are eager or willing to revisit the content of the SPS Agreement. This being so, all that is suggested here is that, in order to reduce the frequency and cost of judicial mistakes, the AB should revisit its jurisprudence on the standard of review applied in SPS cases.

The remainder of this chapter proceeds as follows. The next part describes the legal obligations imposed by the SPS Agreement. Then the existing jurisprudence with respect to the standard of review applied in SPS cases is presented. The arguments behind the main policy claim of the chapter are then presented; that is, panels and the AB should not review the decisions of Members with respect to science, risk tolerance, or the relationship between the risk assessment and the measure at issue. The final part of the chapter responds to the possible concern that states will adopt protectionist measures justified by the SPS Agreement.

### The legal obligation

The SPS Agreement gives Member states ‘the right to take sanitary and phytosanitary measures necessary for the protection of human, animal, or plant life or health, provided that such measures are not inconsistent with the provisions of this

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Agreement. In other words, though the SPS Agreement is not framed as an exception to the WTO obligations taken on by Members, this is effectively its role. For a measure to take advantage of the SPS provisions, it must satisfy a series of conditions.

The simplest of these conditions provides that measures in conformity with international standards are ‘deemed to be necessary to protect human, animal, or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994’. The wisdom of this safe harbour provision depends on the way in which international standards are set by the institutions assigned to this task through Annex A of the Agreement. From the perspective of the dispute-resolution organs of the WTO, there is no need to evaluate scientific evidence or the risk preferences of a Member state in such cases. A panel or the AB need only determine that the measure at issue does, indeed, conform to the relevant international standard. The cases that interest us, then, are the ones not resolved by the provision on international standards. These are the cases in which a Member state has introduced a measure that provides higher protection than that which is recommended by international standards.

To be permitted under the SPS Agreement, such a measure must be ‘applied only to the extent necessary to protect human, animal or plant life or health’, be ‘based on scientific principles and not maintained without sufficient scientific evidence’, not ‘arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail’, and not ‘constitute a disguised restriction on international trade’.

Article 5 explains how states should go about satisfying the scientific requirements of the SPS Agreement. In particular, it requires that the measure be based on a ‘risk assessment’. The term risk assessment is defined in the Annex to the Agreement as ‘[t]he evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member ... and of the associated potential biological and economic consequences ... or the evaluation of the potential for adverse effects on human or animal health’. This definition was

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7 SPS Agreement Article 2(1).
8 This is made clear by Article 2(4), which specifies that compliance with the requirements of the SPS Agreement generates a presumption of compliance with Article XX(b) of the GATT, the ‘general exceptions’ article.
9 SPS Agreement Article 2(2).
10 Ibid.
11 Ibid. An exception to this requirement is provided in Article 5(7) of the SPS Agreement, which allows for provisional measures in the event that relevant scientific information is insufficient. Ibid at 5(7).
12 Ibid, Article 2(3).
13 Ibid.
14 Ibid, Article 5(1). Article 3(3) of the SPS Agreement states that a higher level of protection can be justified ‘if there is a scientific justification or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of ... Article 5’. Despite the use of the word ‘or’, which seems to offer two different ways to satisfy the requirements of Article 3 (a scientific justification or a risk assessment), the appellate body established in Hormones that compliance with the requirements of Article 5(1) is required for any measure that results in a higher level of sanitary protection. See Hormones, above note 5, at 174-76.
clarified in the *Australia – Salmon* case, which states that a risk assessment must (1) identify the disease whose entry, establishment or spread is being addressed as well as the biological and economic consequences of such entry, establishment or spread; (2) evaluate the likelihood of entry, establishment or spread of the disease; and (3) evaluate the likelihood of entry establishment or spread of the disease under the SPS measures which might be applied.\(^{16}\)

Although the SPS Agreement requires a risk assessment, it does not provide any guidance about what sort or what magnitude of risk is sufficient to justify a measure. The requirements that are provided are largely procedural: in conducting a risk assessment, Members must take into account available scientific evidence,\(^{17}\) potential loss of production,\(^{18}\) the damage from establishment of the pest or disease,\(^{19}\) and so on.\(^{20}\) The substantive requirements of the Agreement do not directly address scientific questions or the level of acceptable risk. Rather, they provide a norm of non-discrimination\(^{21}\) and demand that the measures used be the least trade-restrictive available to achieve the desired level of protection.\(^{22}\)

The SPS Agreement does not explicitly demand some minimum level of risk, but it is difficult to imagine why a risk assessment would be required if a measure could be justified without at least some risk. The AB has apparently adopted this view, stating in the *Hormones* case that ‘theoretical uncertainty’ is insufficient to satisfy the requirements of the risk assessment.\(^{23}\) This result was justified by the panel in the same case on the ground that ‘zero risk cannot be achieved in practice; not even under the EC ban itself since the European Communities cannot guarantee that there is a zero probability that illegal use of the hormones at issue will occur’.\(^{24}\)

But if the AB requires some risk that is greater than theoretical uncertainty, what is the relevant threshold? How can we distinguish true uncertainty from theoretical uncertainty? The AB in *Hormones* dodged this question, stating that there is no minimum magnitude of risk required.\(^{25}\) The lesson from the *Hormones* case, then, is that the risk assessment must reveal at least some evidence of risk, but that there is no minimum required level.

The other significant source of guidance provided by the SPS Agreement concerns the relationship between the science used in the risk assessment and the relevant measure. As already mentioned, Article 2.2 requires that the measure be ‘based on scientific principles and ... not maintained without sufficient scientific evidence’.\(^{26}\) The agreement itself does not provide any additional guidance on this point, but the AB has ruled that there must be ‘a rational relationship between the measure


\(^{17}\) SPS Agreement Article 5(2).

\(^{18}\) *Ibid*, Article 5(3).

\(^{19}\) *Ibid*.


\(^{21}\) *Ibid*, Article 5(5).

\(^{22}\) *Ibid*, Article 5(6).

\(^{23}\) *Hormones*, above note 5, 186.


\(^{25}\) *Hormones*, above note 5, at 186.

\(^{26}\) SPS Agreement Article 2(2).
and the risk assessment’. Though the rational relationship requirement is in practice a fairly permissive standard, it is not without impact.

The standard of review

The legal rules described in the last section represent only one aspect of the legal review that panels and the AB are charged with carrying out. A decision by the judicial organs of the WTO can only be made after the standard of review has been established.

The WTO Agreements are, for the most part, less than clear with respect to the standard of review that should be applied by panels or the AB. This is certainly true of the SPS Agreement, which offers no guidance on the question. The starting point for an analysis of the appropriate standard of review is Article 11 of the Dispute Settlement Understanding (DSU): ‘A panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.’ The DSU leaves unanswered the question of what constitutes ‘an objective assessment’. In this sense, the AB is left with considerable leeway to determine the appropriate standard of review.

The proper interpretation of Article 11 of the DSU has been addressed in several WTO cases, but considerable ambiguity remains about the proper standard of review to be applied in a particular case. One of the best descriptions of the approach to be taken by a panel when reviewing a domestic measure is found in the United States – Lamb case, in which the AB states that in order to evaluate a Member’s explanation for a measure the panel must:

‘... critically examine[] that explanation in depth, and in light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities of the

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27 Hormones, at 193. The same language is used in the Japan – Agricultural Products case. WTO Appellate Body Report, Japan – Measures Affecting Agricultural Products, WT/DSS6/AB/R at 79 (22 February 1999) (hereinafter Japan – Measures Affecting Agricultural Products). ([T]here is a “scientific justification” for an SPS measure, within the meaning of Article 3.3, if there is a rational relationship between the SPS measure at issue and the available scientific information.’).

28 See Australia – Salmon, above note 16, at 199 (stating that neither a panel nor the AB should ‘substitute its own reasoning about the implied level of protection .... The determination of the appropriate level of protection ... is a prerogative of the Member concerned’).

29 See the discussion under ‘The standard of review’ below.

30 One of the few areas in which there is an explicit instruction with respect to the standard of review is in the anti-dumping context. The standard of review here is clearly quite deferential: ‘If the establishment of the facts [by domestic authorities] was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.’ Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 15 April 1994, WTO Agreement, Annex 1A, Legal Instruments-Results of the Uruguay Round vol 27 (1994), Article 17.7(i).


data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is inadequate, if some alternative explanation of the facts is plausible, and if the competent authorities’ explanation does not seem adequate in the light of that alternative explanation. Though this description remains somewhat vague, it is clear that the AB is calling for a significant review of the domestic explanation at issue. The standard falls short of a de novo review, but domestic decisions are given only limited deference.

When considering SPS cases, the AB has adopted a somewhat less stringent level of review. It has made it clear that panels and the AB are not to substitute their own interpretation of scientific evidence, or their own risk analysis, when considering such cases. That said, there is a limit to the level of deference exercised in these cases. Panels are still to ‘consider the evidence … and make factual findings on the basis of that evidence’. There is, of course, some tension between a standard that calls for objective findings based on the evidence and one that instructs panels to refrain from conducting their own risk analysis. In the Japan – Apples case, the AB appears to have come down on the side of a higher, rather than lower, standard of review, stating that: ‘Japan’s submission that the Panel was obliged to favour Japan’s approach to risk and scientific evidence … conflicts with the Appellate Body’s articulation of the standard of “objective assessment of the facts”’. The AB recalled that, in the EC – Hormones case, it had ‘addressed the question of the standard of review that a panel should apply in the assessment of scientific evidence submitted in proceedings under the SPS Agreement’. ‘[A]s regards fact-finding by panels and the appreciation of scientific evidence, total deference to the findings of the national authorities would not ensure an objective assessment as required by Article 11 of the DSU.’ Therefore, the panel was entitled to independently take into account the views of experts to determine whether the United States had made a prima facie case. On appeal, the AB held that it was ‘well-established’ that a panel, as the trier of facts, enjoys ‘a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence’.

34 ‘[R]esponsible and representative government may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources. By itself, this does not necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment’ (Hormones, above note 5, at 194).
36 Hormones, above note 5, at 133.
38 Ibid.
39 Ibid, citing Hormones, above note 5, at 117.
40 Ibid, at 166.
The final issue related to the review of a measure by a panel or the AB concerns the question of whether the measure at issue has a ‘rational relationship’ to the risk assessment.\(^{42}\) In \textit{Japan – Apples}, Japan’s failure to demonstrate the existence of a rational relationship between the challenged measures and the scientific evidence led to the panel’s conclusion that the measure was maintained without sufficient scientific evidence.\(^{43}\)

Taken together all of this leaves us with the following. When reviewing an SPS case, a panel (or the AB) will demand that the measure be based on a risk analysis. Member states will have some – and likely considerable – discretion with respect to the level of risk they are prepared to accept and with respect to the science they are prepared to consider. As the AB held in \textit{EC – Hormones}, the ‘available scientific evidence’ referred to in Article 5.2 ‘includes both generally held or majority scientific views as well as minority, or dissenting, scientific opinion’.\(^{44}\) Nevertheless, the panel is entitled to review the attitude of the Member toward risk and its risk assessment to discern whether the conclusions reached can be reconciled with an objective assessment of the facts. The panel is then to determine whether there is a rational relationship between the risk assessment and the measure.

\textbf{The need for deference in SPS cases}

The above discussion of the key doctrinal issues relevant to dispute resolution in SPS cases demonstrates that, although there remains some ambiguity about the level of review applied, it lies somewhere between the general standard of review called for in the \textit{US – Lamb} case and complete deference.

This chapter argues that the standard of review in SPS cases should grant still more deference to domestic decisions. I am not the first to put forward this argument, of course.\(^{45}\) Most prior writing, however, has focused on the impact of the SPS Agreement and the AB’s application of it on domestic sovereignty. The basic claim is that risk regulation decisions should be made by domestic authorities because any other outcome represents too great a compromise of sovereignty. The problem with this argument is that it applies to virtually any international agreement – including other WTO Agreements. Sovereignty is, after all, an elastic concept that changes over time. Without a better justification or explanation of why risk regulation in particular is central to sovereignty, there is no reason to think that it must remain at the domestic level.

Thus, rather than lean on difficult-to-define notions of sovereignty, this chapter evaluates the likely costs and benefits of having risk regulation decisions reviewed by the AB. The conclusion that substantive decisions should be left to Member states reflects a view that AB review does more harm than good.

\(^{42}\) See \textit{Hormones}, above note 5, at 193.

\(^{43}\) \textit{Japan – Apples}, above note 96, at 8.191, 8.197.

\(^{44}\) \textit{Hormones}, above note 5, at 27.

\(^{45}\) See eg J Martin Wagner, ‘The WTO’s Interpretation of the SPS Agreement has Undermined the Right of Governments to Establish Appropriate Levels of Protection Against Risk’, \textit{31 I Poly InT Bus} 855 (2000).
The case for substantive review of SPS decisions

Assessing the merits of panel or AB review of domestic decisions requires an evaluation of both the costs and the benefits of that review. This chapter argues that the costs of review outweigh the benefits in the SPS context. This section addresses the benefits side of that evaluation and finds that the benefits of substantive review in the SPS context are very much like the benefits in other trade contexts.

WTO Member states are best assumed to act in their own interest (or at least in the interest of their policy-makers) and without regard for other states. By subjecting the health and safety policies of Members to review, the WTO can reduce the incentive to cheat on WTO obligations. The WTO Agreements constrain the protectionist impulses of states in many ways, and, absent review of domestic risk regulation decisions, states might be tempted to use the SPS Agreement as a pretext when adopting protectionist measures. If panels and the AB are able to review SPS measures effectively, they can deter impermissible measures, or at least ensure that such measures are removed sooner than would otherwise be the case.

Similar benefits are present, of course, in almost every WTO context. Every obligation, from the MFN requirement, to safeguards rules, to TRIPs, is enforced more effectively because the judicial organs of the WTO stand ready to adjudicate a dispute. The magnitude of this benefit in a particular case turns largely on the trade measure that is affected. That is, what matters is the increase in tariff or non-tariff barriers, rather than the reason for the policy change. The reason that a particular measure is ruled to be a nullification or impairment has no bearing on the impact of that ruling. If a trade barrier is removed, there is some benefit in the form of liberalised trade. To measure the size of that benefit one would need to know about the market in question – the elasticity of demand, the size of the market, and so on. The point here is that when a panel or the AB correctly concludes that an SPS measure must be removed, there is no reason to think that the gain from this decision is any larger or smaller than is the case when other trade measures are condemned.

A second benefit that emerges from AB review is clarification of the relevant rules. Just as domestic courts clarify rules in the course of their decisions, so do WTO judges. Despite the formal absence of stare decisis at the WTO, prior cases offer important signposts/guidance for states, panels, and the AB. In the SPS context, however, this benefit is likely to be quite small. To see why this is so, consider the key requirements imposed by the SPS agreement. The agreement requires that SPS measures be based on a risk assessment and that there be a rational relationship between the measure and the risk assessment. Though precedent can shed some light on what those terms mean, drawing inferences from past cases will generally be more difficult in SPS cases than in other contexts. In a safeguards case, for example, one can look to older cases to determine what it means to say that imports are ‘increasing’. In SPS cases, however, there are fewer common

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46 Keep in mind that this chapter only proposes a reduced standard of review, not a change to the rules themselves. Whether or not a decision is reviewed, then, does not technically affect whether it is consistent with WTO obligations.

47 See Argentina – Footwear, above note 32, at 129-31.
elements from one case to the other. In resolving the *Hormones* case, for example, the AB provided some guidance on the rational relationship requirement. It is, however, difficult to anticipate how that requirement will be applied in future cases because the facts of SPS cases vary so broadly. The *Hormones* case provides only modest guidance with respect to how the rational relationship test would apply in the *Japan – Apples* context. The differences in science and risk between the two cases are such that the value of each case as a precedent is quite small.

The review of SPS cases, then, acts as both a deterrent to illegal measures and a contribution to clearer rules. The first of these benefits has about the same impact in SPS cases as in other areas while the second is smaller than in other areas. The key point for the proposal advanced in this chapter is that the benefits of substantive review by panels or the AB are no larger, and are probably smaller, than, the benefits of review in other areas.

*The case against substantive review of SPS decisions*

The case for greater deference in SPS disputes turns on their unique characteristics. Many WTO disputes address concerns that fundamentally concern trade rather than other social issues. Thus, for example, the famous *Japan – Alcohol* case addressed the national treatment obligation – a core trade concern that does not directly address non-trade issues. The notion that Japan is required to provide national treatment to imports, and that the AB is an appropriate forum to determine which foreign and domestic products are sufficiently alike as to require equal treatment, is unremarkable. After all, the point of the GATT is to liberalise markets, and the norm of non-discrimination is fundamental to the way in which it attempts to do so. In that case, then, the stakes of the dispute were familiar trade issues over which states are relatively willing to cede authority to the dispute settlement process.

SPS cases, on the other hand, tend to deal with issues that go to the heart of notions of state sovereignty and autonomy. In particular, SPS decisions typically involve, and often turn on, the willingness of a state to accept risks in health and safety matters, its attitude toward and evaluation of scientific evidence, and the relationship between science and the trade measure at issue. These are not matters that have traditionally been considered fair game for international organisations. They implicate policy conclusions that have always been considered the exclusive province of domestic leaders. So when the AB rules, for example, that Europe must admit hormone-treated beef, it is hardly surprising that Europeans object.

The way in which Europe objected to the *Hormones* decision demonstrates that at least one objection to AB review of SPS decisions lacks merit. Faced with a final and binding decision from the WTO, the EC did not elect to change its policies and admit the beef in question. Rather, it attempted to change its procedures to comply with the ruling. To date, this effort has failed and sanctions against the EC have resulted. The EC’s response illustrates the obvious, but sometimes overlooked, point that the WTO lacks the ability to force a state to open its markets. This means that one nightmarish vision of WTO review – in which a state is forced to admit a product despite a good faith belief that the product is harmful – is unlikely.

to come about. It is precisely because the admission of products perceived to be dangerous is so costly for a state and its citizens that government officials will choose the alternative; they will tolerate sanctions through the DSU system. This decision to accept sanctions rather than open one's markets is understandable because the economic sanctions that can be imposed are limited to the 'level of nullification and impairment' caused by the illegal measure. That is, complainant states can only withdraw concessions up to the point where they are equal in value to the costs suffered as a result of the measure. For virtually any measure adopted out of good faith health and safety concerns, these modest sanctions will be insufficient to open the defendant's market.  

So the argument against review of SPS measures cannot rely on the notion that trade tribunals will be the de facto policy-makers for health and safety issues. Whatever is done at the WTO, domestic leaders are in a position to refuse entry of products they or their citizens consider dangerous.

The stronger argument for deference from panels and the AB must consider the costs imposed by efforts to review domestic SPS decisions. The key to the argument is not that the WTO will force borders open, but rather that SPS cases will be wrongly decided more often than most other trade disputes, and that when mistakes are made, they will be more costly than is the case in most other contexts.

The Appellate Body, domestic priorities, and science

Whenever a panel or the AB (or any other court) makes a ruling, there is a risk that it will make a mistake. By this I mean that it may misunderstand the underlying facts or it may fail fully to appreciate the implications of its decision. Though this problem exists in every WTO dispute, there are at least two reasons why it is especially acute in the SPS context. First, the concerns and priorities of states are likely to differ more in this context than in most other trade contexts, making it more difficult for judges to identify those concerns and priorities. Second, a typical SPS case involves the evaluation of scientific data, a task for which panels and the AB are particularly poorly suited.

Evaluating state priorities

The underlying goal of the SPS Agreement is to give domestic governments the ability to put in place regulations necessary to protect human, animal and plant health and safety, while at the same time discouraging restrictive trade measures for which health concerns are merely a pretext. The determination of whether a measure is necessary to protect health and safety is itself a difficult one that requires judgments to be made about the scientific evidence of health risks and the degree to which a population will tolerate those risks.

49 See Thefanis Christoforou, 'Settlement of Science-Based Trade Disputes in the WTO: A Critical review of the Developing Case Law in the Face of Scientific Uncertainty', 8 NYU Envt'L LJ 622, 644 (2000) ('A wrongful finding could have potentially disastrous effects on the lives of millions of people').

Consider first the willingness of a population to accept health risks in exchange for some economic or other benefit. The obvious examples, as is so often the case in SPS discussions, are hormone treated beef or genetically modified foods. These products can be produced at lower cost than beef that has not been treated with hormones or non-GMO foods, but there is concern in some circles that consumption of these products may have harmful health consequences. Policy decisions, therefore, must weigh the benefits of allowing the sale of these products against the potential health costs.

It is clear that different states will reach different conclusions on these policy questions. If, for example, one state decides to ban the sale of products treated with beef hormones while another state chooses to allow those sales, this difference may simply reflect different attitudes toward risk. There are at least two reasons to accept such policy differences among states. First, when state preferences with respect to risk or other factors diverge, it also makes sense for policies to diverge. There is no sensible reason to prevent a state from accepting a higher level of risk in exchange for economic gains if that policy reflects their preferences. Similarly, there is no reason why a state that prefers a more conservative approach should be required to take on additional risk.

Second, a state’s situation influences its priorities and its payoffs. A poor state will be more concerned about getting inexpensive food to its population and less concerned about long-term health effects than will a rich state. A rich state, on the other hand, may be able to afford the luxury of protecting itself against these potential health risks. In this example, the states are likely to adopt different policies. Demanding harmonisation of these policies would impose needless costs on one or both countries.

The SPS agreement itself is drafted in a way that suggests legitimate health and safety decisions should be left with Member states. The agreement and the related jurisprudence are best interpreted as an effort to distinguish measures reflecting sincere health and safety concerns from pretextual claims, rather than as an attempt to override local preferences with respect to risk and science.

The key rules governing SPS measures require that they be applied only to the extent necessary; that they be based on scientific principles and not maintained without sufficient scientific evidence; that they do not arbitrarily or unjustifiably discriminate between measures; that they are not a disguised restriction on trade, and that they should not be more trade-restrictive than required. Notice that none of these requirements suggests that states are required to accept some minimum level of risk, or that their ability to protect themselves from health risks is somehow constrained. Rather, the rules are aimed at restricting the harmful impact of SPS measures and guarding against pretextual measures by ensuring that there is at least some science to support the measure.

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51 States will also differ in their evaluation of relevant science. This issue is discussed in the next section.
52 SPS Agreement, Article 2(2).
53 Ibid, Articles 2(2), 5(1), 5(2).
54 Ibid, Articles 2(3), 5(5).
55 Ibid.
56 Ibid, Article 5(6).
It must be admitted that even if domestic governments act without protectionist motives, it is at least conceivable that some review by a higher body (such as the AB) might improve outcomes. This is one reason why, for example, a country might make health and safety decisions at the national level rather than at the state or provincial level. For AB review to improve on the policies of domestic governments under these assumptions, however, requires that the AB have a better sense of domestic preferences and priorities than do local policy-makers. This is clearly not the case. The AB is a tribunal and, as such, it is limited in its ability to collect information and faces severe time constraints, both of which prevent it from evaluating the preferences of Member states and their citizens. A tribunal also has the disadvantage that it cannot control the cases it sees. This means that the AB can neither identify optimal policies nor implement them in any sort of comprehensive way.

Even if these problems were not present, there is an additional concern about the ability of AB judges to stay abreast of events in every Member state. AB judges are not elected, they are not fully accountable for their actions and face no meaningful oversight.\(^{57}\) Just as the judges are not answerable to anyone, there are no checks on their decisions. Though the Dispute Settlement Body can, in principle, refuse to adopt a decision, the reverse consensus rule ensures that every decision is adopted. Finally, the AB has no tools to learn about the preferences of states and their residents. Judges cannot be expected to know about the attitudes and concerns of citizens in each of the Member states, and there is no way for them to get that information once a dispute finds its way to the WTO. Perhaps more important than any of these arguments is the widespread agreement that domestic regulatory choices are best made by domestic governments.

It is true, of course, that panels and the AB might err when dealing with any dispute, including those outside of the SPS context. They may err in their assessment of the facts, the law, or the motives of governments. There are, however, two important differences between SPS disputes and most other trade disputes. First, in SPS cases, the preferences of individual states matter more than in most other trade disputes. Second, those preferences are more likely to diverge across states and to be difficult for panels or the AB to accurately identify.

It is clear in both the SPS Agreement and the associated case law that states are entitled to determine the level of risk that they will accept when importing a product. As discussed above, this also makes good policy sense because different states will have different attitudes and those differences should be respected. In many SPS disputes, differences in policies can plausibly be explained by differences in preferences. It is clear, for example, that there is much less public concern about hormone-treated beef in the United States than is the case in Europe. Similarly, Europe is more concerned about genetically modified foods. To judge Europe’s compliance in either the Hormones case or the GMO case requires an assessment of its attitude toward risk. Different assessments of risk are amplified by different attitudes toward science. At least in these cases, Europe has taken a more cautious stance toward new products and new technologies in food production than has

\(^{57}\) They can be removed, but only under exceptional circumstances. See DSU Article 17 ("The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once").
the United States. More generally, any inquiry into the sufficiency of scientific evidence and the reaction of a state to that evidence requires an evaluation of the state’s willingness to bear risk.

In other trade disputes, there is no analogous set of state preferences that are relevant to the inquiry. Or, perhaps more accurately, those state preferences are reasonably uniform across states and have been incorporated into the existing WTO Agreements. So, for example, in a national treatment case such as Japan – Alcohol,\(^{58}\) there is no serious disagreement that internal taxes must be applied in a non-discriminatory fashion, and there is no great difference from one state to the other with respect to their attitudes toward the like product issues that was crucial to the resolution of that case. There were differences in the litigation, of course, but these reflected strategic decisions rather than underlying preferences. It is not accurate to say, for example, that Japan has a general preference for a liberal interpretation of the like product requirement or that the complainants in the case (Canada, the EC, and the United States) prefer a narrow definition. Even in areas such as anti-dumping or safeguards, the merit of a claim relies on economic analysis that is not closely tied to local preferences.

If all states have common preferences with respect to dumping, for example, the panel or AB’s task is relatively straightforward. Hypothetically, the panel or AB could carry out even a de novo review, and, as long as the result lies somewhere between the positions established by the parties, there is no real concern about accuracy. No matter what, the ruling will be closer than the stated position of either state to the true preferences of at least one state, and possibly both. This is true because if both states, despite the position alleged, actually have the same preferences, they would reach the same policy conclusions but for the fact that each state is biased. A ruling that falls between the positions proposed by the states must be closer to the policy they would have chosen absent that bias.

So, if we define a correct ruling as one reached by an unbiased authority with full information about state preferences, the panel or AB is more likely to reach that correct ruling when state preferences are reasonably consistent across states. In that situation, the benefit of judicial review will outweigh the possible costs. Conversely, in SPS cases, where states are likely to have divergent preferences, a judge has a much more difficult task.

One might be tempted to downplay the importance of state preferences by relying on the fact that the SPS Agreement requires that the risk assessment take into account the relevant scientific assessment. As discussed in the next section, however, this still leaves plenty of room for state preferences to come into play.

The problem of evaluating science

The difficulty faced by a panel or the AB when it attempts to determine the preferences of states is compounded by the difficulties the judicial organs of the WTO have in evaluating science and scientific evidence. This is especially true under existing jurisprudence because a panel or the AB must determine if a ‘rational relationship’ exists between a measure and the risk assessment. This determination

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58 See above, note 48.
requires that judgments be made about the validity of scientific evidence, which raises at least two problems for panel and AB judges.

First, the scientific interpretation called for in these cases often involves subjective judgments about the value of specific evidence and the relevance of particular studies. Scientists themselves may disagree on the meaning of evidence; the quality and relevance of individual pieces of evidence may be disputed, or the evidence that exists may not be perfectly on point—making it necessary to draw conclusions from incomplete data. This being so, states acting in good faith may reach (very) different conclusions about scientific evidence. More importantly, the way in which the panel or the AB should interpret the evidence is uncertain. Even if the goal were to interpret the evidence through the eyes of the defendant, it would be difficult, and perhaps impossible, to know whether the defendant’s scientific concerns are made in good faith or if they are pretextual.

Second, panels and the AB are poorly equipped to evaluate scientific evidence. The judges involved are not chosen on the basis of scientific expertise and may not be qualified to evaluate the scientific evidence that is placed in front of them. The problem is aggravated by the fact that there are few resources with which judges can conduct their own inquiry into the science. They must, therefore, rely on the materials submitted by the parties. Since each side presents only that science which will help their case, there is no guarantee that the panel or AB will be able to reach a sound decision. Though scientific experts can be appointed, these experts cannot resolve the issue; it remains the judges that must make the final legal determination. The problem is aggravated further by the fact that decisions must be made under time constraints and by a court that lacks the institutional infrastructure to undertake its own inquiry into the science. Put in simple terms, panels and the AB lack the expertise, resources, staffing, budgets, and time to evaluate scientific evidence in SPS cases competently and thoroughly.

One might conclude that the burden of evaluating scientific evidence is less acute because states are permitted to use minority scientific views in their risk assessment. This conclusion, however, would be mistaken. Scientific evidence is required to meet a minimum threshold level of scientific legitimacy or, as the AB stated in the Hormones case, must come from “qualified and respected sources”. The question thus becomes whether the science used meets this minimum standard, and this in turn requires that judges evaluate the scientific claims.

In Japan – Apples, for example, the panel examined the evidence produced by the parties, considered the opinions of the experts, and concluded, as a matter of fact, that it is not likely that apple fruit would serve as a pathway for the entry, establishment, or spread of fire blight in Japan. The panel employed, and the AB upheld, its own methodology to assess whether Japan’s measure was maintained ‘without sufficient scientific evidence’. The AB emphasised that ‘the approach followed by the Panel in this case – disassembling the sequence of events to identify the risk and comparing it with the measure – does not exhaust the range of methodologies available to determine whether a measure is maintained ‘without

59 See eg Hormones, above note 5, at 198.
60 Ibid at 194.
sufficient scientific evidence' within the meaning of Article 2.2', and that '[a]pproaches different from that followed by the Panel in this case could also prove appropriate to evaluate whether a measure is maintained without sufficient scientific evidence'.

All of this makes it clear that when SPS cases are compared to other trade cases, panels and the AB are more likely to make mistakes in the former than in the latter. This is true whether a 'correct' decision is taken to be one that conforms with the honest preferences of the defendant state (which is likely to be different from its strategic position in the proceedings), or one that accords with a dominant scientific view.

**Mistakes will be more costly in SPS cases**

The problem with review of SPS decisions is not limited to the frequency of mistakes, however. It is also likely that, when mistakes are made, they will be larger – meaning more costly – than errors in other areas. The increased costs will take the form of higher costs on the violating state, greater strains on the trading system, and larger losses felt by the complaining state.

As already mentioned, there is little risk that panel or AB review of SPS decisions will force states to open markets to what they believe to be dangerous products. If a defendant loses a case in that situation, it is much more likely that the state will simply refuse to comply and accept any resulting sanctions. This is so because the limited sanctions provided for by the DSU are simply too small to persuade a government to open its markets to dangerous products. In addition, domestic governments will resist compliance for fear that they will be seen by their citizens as more concerned with pleasing the WTO than with protecting domestic interests.

The reluctance to comply with SPS rulings is explained in significant part by the fact that health and safety issues have traditionally been perceived as within the jurisdiction of domestic governments. In contrast to most trade disputes, SPS disputes go to the heart of domestic sovereignty. When the WTO attempts to inject itself into these areas, it should not surprise us that the reaction is hostile. This perception, then, contributes to the reluctance of states to comply with SPS decisions that address the substance of health and safety policies.

When states refuse to comply with a panel or AB ruling, a various costs are generated. The first of these is that the winning complainant is authorised to suspend concessions. Though these sanctions are intended to secure compliance, if they are inadequate to do so, the sanctions can simply persist indefinitely, as we have seen in the *Hormones* case. This retaliatory sanction is, of course, simply a trade barrier, which is costly for both the sanctioned and the sanctioning state. Now, instead of having one trade measure in place (the original SPS-justified measure), panel or AB review of SPS cases has led to the adoption of two trade measures. The welfare of both states would be improved if the original SPS-justified measure were simply permitted, and no sanction were adopted in reaction. In other words, review by the panel or the AB has reduced the welfare of all concerned.

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62 *Japan – Apples*, above note 37, at 164.

Related to this standoff between violators and complainants are the costs borne by the WTO as an institution. The most obvious of these is that the presence of persistent violations (especially when combined with retaliatory sanctions) undermines the credibility of the institution. The organisation also loses support when citizens feel that it is intruding into domestic policy decisions and imposing WTO priorities on Member states. The credibility of the WTO is also harmed in the complaining state, which observes a legal victory before a panel or the AB, but does not get the benefits of that victory. The WTO's inability to secure compliance in disputes important to the complaining state makes it seem less relevant and less legitimate, which in turn reduces that state's interest in its own compliance.

**A better standard of review**

If the likelihood of a mistake by panels and the AB is greater in SPS cases than in other trade disputes, and if the cost of those mistakes is larger in SPS cases, it follows that the WTO's judicial organs should be more cautious when addressing SPS cases. The specific proposal advanced in this chapter is to leave the substantive decisions with respect to scientific judgments, a state's willingness to tolerate risk, and the relationship between the risk and the adopted measure in the hands of domestic authorities. The WTO should refrain from reviewing these decisions and limit itself to evaluating the other SPS requirements – that the measure be transparent,\(^\text{64}\) that there be no arbitrary or unjustifiable discrimination,\(^\text{65}\) that the measure not be a disguised restrictions on trade,\(^\text{66}\) and that it be the least trade-restrictive alternative.\(^\text{67}\) This latter set of obligations involves health and safety concerns in the same way as do matters of risk, risk tolerance, and science.

Importantly, this proposal does not require changes to the SPS Agreement itself. It only requires an adjustment to the jurisprudence found in SPS cases. States will continue to have an obligation to conduct a risk assessment, for example, and to take into account relevant scientific evidence. These obligations, however, will not be subject to review by the judicial organs of the WTO. This is an important point because, as discussed above, changing the text of WTO agreement is extraordinarily difficult.\(^\text{68}\)

Changing the jurisprudence of the AB, however, is much simpler. It requires only a decision by the judges on that body. Nor is there any reason to be concerned that this proposal requires AB judges to be more 'activist' than is currently the case. The standard of review is not specified in the SPS agreement, so one must fall back on the DSU rules, as discussed above.\(^\text{69}\) It could be argued that this structure compels the same standard of review across all cases and issues that do not have their own specified standard of review,\(^\text{70}\) but that is not the current position of the

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\(^{64}\) SPS Agreement, Article 7; Annex B.

\(^{65}\) Ibid, Articles 2(3), 5(5).

\(^{66}\) Ibid, Articles 2(9), 5(5).

\(^{67}\) Ibid, Article 5(6).

\(^{68}\) See above, Section I.

\(^{69}\) See above, Section III.

\(^{70}\) Article 17.6 of the Anti-dumping Agreement, for example, specifies a standard of review for anti-dumping cases.
AB. As already discussed, the standard of review (the rational-relationship test) used in SPS cases is already different from that used in other trade disputes.\textsuperscript{71}

**What will discipline states?**

Deference to state decisions generates one important cost that must be addressed. If state decisions regarding science and risk are not reviewed, what is to stop WTO Members from using the SPS agreement as a pretext for whatever protectionist measures they may wish to adopt?

This is a reasonable question, but there are several reasons why such concerns are not fatal to this proposal. First and most important is recognition that the WTO Agreements generate compliance not only because of the threat of a withdrawal of concessions (which has only happened a handful of times over the ten-year history of the WTO), but also because of the political consequences associated with violations. The SPS Agreement already requires a high degree of transparency with respect to SPS regulations,\textsuperscript{72} and panels and the AB should scrutinise compliance with those obligations carefully. Under the current proposal, states adopting SPS measures should still be required to explain the risk-assessment procedures used, provide information about the science and how it was evaluated, and explain its chosen level of protection.

Such transparency allows other states and domestic constituents to understand the measures being adopted and to observe the risk assessment upon which the measure is based. This will reveal pretextual measures to other states and allow them to respond politically. It will also ensure that domestic constituents can observe the behaviour of their own government. This improves domestic decisions and reduces the chance that the SPS Agreement will be used for ulterior motives pretextually because it will be more difficult for concentrated interest groups to capture the process.\textsuperscript{73}

These safeguards are not, of course, foolproof. A sufficiently motivated state could still use the SPS Agreement to justify a trade measure, even one that has nothing to do with health and safety. But concern that the SPS Agreement would become a sort of get-out-of-jail-free card for protectionist actions is misplaced. Proof of this claim can be found in the experience, to date, with the national security exception. The exception effectively provides states with a way to avoid any obligation at any time, yet it has never been adjudicated by a panel or the AB because it simply is not used very often, certainly not as a routine way to avoid losing a case. Since a state can invoke the national security exception at any time and (most likely) without review at the WTO, every losing defendant in the history

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\textsuperscript{71} See above, Section III.

\textsuperscript{72} The agreement requires that regulations be published promptly, Annex B.1, that producers be given time to adjust before a measure comes into effect, Annex B.2, that ‘enquiry’ points be established to answer questions relating to the measure, Annex B.2, that other states be given an opportunity to discuss a proposed measure, Annex B.5.d, that the risk assessment be transparent, and that the state answer all reasonable questions regarding the procedures used in the assessment, including the factors taken into consideration and the ‘determination of the appropriate level of sanitary or phytosanitary protection’ (Annex B.3.c).

of the WTO could, in principle have sought refuge behind that exception. That they did not demonstrates the constraining power that politics play. Obviously, disingenuous use of the national security exception is not a strategy that states have used. The same would be true of the SPS Agreement if panels and the AB refrained from reviewing decisions about science, risk and the relationship between those and the trade measure adopted.