

## ***SPS Measures and their Application in Regional Economic Communities***

African states increasingly use SPS measures which impact on intra-African and global trade. Recent examples involve South Africa bans on the importation of chickens (later retracted), bans on the importation of Zambian honey, and proposed measures affecting livestock trade in SACU.

The WTO SPS Agreement (which is invoked in most REC SPS regimes; albeit with some qualifications) affirms that member states may adopt measures necessary to protect human, animal or plant life or health, subject to the requirement that such measures are not applied in a manner which would constitute arbitrary or unjustifiable discrimination or result in a disguised restriction on trade. The RECs endeavour to accommodate domestic priorities and capacity constraints. However, there is a danger that essential requirements about substance, due process, transparency and objectivity may, in the process, be weakened.

REC regimes cannot dispense with proper SPS arrangements. The CFTA negotiations offer an opportunity to revisit this important discipline; and ensure that intra-African trade is not hampered by the improper and protectionist use of SPS measures. What considerations should guide this exercise? The WTO SPS Agreement provides the following guidelines:

- SPS measures must be used only to the extent necessary.
- They must be based on scientific principles. (The Codex Alimentarius, the International Office of Epizootics, and the International Plant Protection Convention.)
  - Higher levels of protection require scientific justification.
  - SPS measures must not arbitrarily or unjustifiably discriminate between situations where identical or similar conditions prevail.
  - Disguised restrictions on trade are not permitted.
  - Other requirements emphasize equivalence, risk assessment, and **the appropriate level of protection**.
- Due process and transparency are particularly important. When additional information is necessary for a more objective assessment of risk and review it should be provided within a reasonable period of time.



- When SPS measures are harmonized they must be based on international standards, guidelines or recommendations.
- SPS measures must be adapted to the sanitary or phytosanitary characteristics of the area from which the product originates and to which it is destined.

WTO case law provides clarifications about the practical application of these requirements. In a recent dispute between India and the USA it was ruled that that a state (in this case India) cannot ignore international scientific standards on the appropriate level of protection by simply prohibiting the importation of agricultural produce for SPS reasons.<sup>1</sup> India's main argument was that its measures either “conform to” or were “based on” an international standard<sup>2</sup> and that consequently, compliance with provisions of the SPS Agreement (those requiring that SPS measures must have a scientific foundation) must be *presumed*. The Indian arguments were rejected. Its measures were found to be inconsistent with the SPS Agreement because they were neither “based on” nor “conformed to” the relevant international standard for the particular animal disease. They were, in addition, inconsistent with the SPS Agreement because they did not recognize the concept of disease-free areas and areas of low disease prevalence; and because India had failed to comply with notification and publication requirements in the SPS Agreement.

Where do these developments leave the REC and domestic SPS regimes? They provide indications about national and regional reforms to be considered. When SPS measures are resorted to they have to be transparent, objective and based on scientific standards. SPS measures are essentially exceptions to basic trade rules precluding protectionism and discrimination. As such they have to comply with the underlying logic --- exceptions must be shown to be necessary, may not be arbitrary, and must be justified. Because of the nature of SPS measures (they are, as a rule, imposed unilaterally) due process and transparency requirements are particularly important. These due process principles are not foreign to basic national administrative law concepts.

It is often pointed out that the technical capacity for scientific investigations is not nationally available. The answer to this particular problem lies in a combination of domestic and regional prioritization of needs and reforms, the use of donor funding to comply with specific standards through the establishment of laboratories and abattoirs, as well as the use of technical assessment services provided by international agencies.

There is a new concern about the duplication of African legal regimes for trade. The TFTA and proposed CFTA will provide for new legal disciplines applicable to intra-African trade and will bind the member states of existing RECs which join them. However, the RECs will not disappear. Since they have their own legal arrangements about the full spectrum of trade in goods disciplines, including SPS and TBT, new forms of overlap, duplication, and uncertainty will be created; in particular for the private sector. In order to avoid this, the relationship, hierarchical order, and dispute settlement complications should be addressed as part of the TFTA and CFTA negotiations. There is a substantive issue too; the debate about the REC *acquis* (a negotiating principle for the CFTA) has not yet clarified the extent and level of SPS protection to become available under the CFTA.

---

<sup>1</sup> India — Measures Concerning the Importation of Certain Agricultural Products. Dispute DS 430. <https://www.google.co.za/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=INDIA+%E2%80%93+MEASURES+CONCERNING+THE+IMPORTATION+OF+CERTAIN+AGRICULTURAL+PRODUCTS>. India prohibited the importation of various agricultural products from the USA because of concerns related to Avian Influenza.

<sup>2</sup>OIE Terrestrial Code and, in particular, Chapter 10.4 of the Code, pursuant to Article 3.2 of the SPS Agreement,