

facts critical to these choices will have to be developed and empirically evaluated²⁹.

VI. Conclusion

Cognitive neuroscience attempts to understand how the brain enables the mind to function, as well as answering questions such as “What enables humans to make choices that lead to long-term gains?”, and “Do we have a rational mind?” Decision making skills depend on the processes of action selection, choosing between one of several possible responses, reinforcement learning, and modifying the probability of selecting a choice on the basis of experienced consequences. Behavioral and cognitive neuroscience identify the neural systems involved in adaptive behavior, namely the ability to flexibly modify the relative reinforcement values of alternative choices.

What about the role of law in this context? Many scholars have maintained that neuroscience at its current stage of development cannot modify the law.

Methods for comparing individual and population responses to stimuli are lacking, and there are fundamental differences between a clinical setting and the lab. There is, however, no denying that brain imaging is a powerful tool for cognitive neuroscience, whether used for medical or legal purposes. This raises the question whether the law should consider the emergence of these new technologies as a new challenge for regulators. It probably should. Discussion about the right regulatory environment raises a variety of well-known generic issues within the interface of law and science, but new policy implications might emerge with regard to neuroscience. Promoting lively international collaboration between legal scholars and neuroscientists is therefore crucial.

29 The general tripartite risk communication scheme, here adapted on drugs issues, has been delineated by Baruch Fischhoff, “Risk perception and communication”, in R. Detels, R. Beaglehole, M.A. Lansang, and M. Gulliford (eds), *Oxford Textbook of Public Health*, Fifth Edition (Oxford: Oxford University Press), Reprinted in N.K. Chater (ed.), *Judgment and Decision Making* (London: Sage, 2009), pp. 940–952.

Trade, Investment and Risk

This section highlights the interface between international trade and investment law and municipal and international risk regulation. It is meant to cover cases and other legal developments in WTO law (SPS, TBT and TRIPS Agreements and the general exceptions in both GATT 1994 and GATS), bilateral investment treaty arbitration and other free trade agreements such as NAFTA. Pertinent developments in international standardization bodies recognized by the SPS and TBT Agreement are also covered. Risk regulation refers broadly to regulation of health, environmental, financial or security risks.

Of recurrent interest in this area are questions of whether precautionary policies can be justified, the extent to which policy can and should influence risk regulation and the standard of review with which international judicial and quasi-judicial bodies assess scientific evidence.

United States: Certain Measures Affecting Imports of Poultry from China – Just Another SPS Case?

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The SPS Agreement may apply to budgetary measures if they are motivated by SPS concerns. Equivalence-based measures are subject to regular disciplines of the SPS Agreement, including but not limited to Article 4. This means that WTO Members when engaging in the recognition process need to observe other SPS provisions such as requirement of scientific risk assessment (Articles 5.1–5.3) or quasi-consistency obligation of Article 5.5. An SPS measure which has been found inconsistent with cer-

tain provisions of the SPS Agreement (e.g. Articles 2 and 5), cannot be later justified under the general exception of Article XX(b) of the GATT 1994 (author’s headnote).

I. Introduction

The *US – Poultry*¹ case was the first sanitary/phytosanitary (SPS) dispute decided by the WTO panel

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1 Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted on 29 September 2010.

that involved China. Although China over the last years has become one of the most important actors in international trade of food and agriculture products, until now it did not participate in any formal dispute settlement proceeding under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Instead, it attempted to resolve existing trade concerns (regarding both its export and import) through bilateral negotiations. To this end, China has been very active in the Committee on Sanitary and Phytosanitary Measures (SPS Committee) where it has frequently raised specific trade concerns or supported other WTO Members.²

Overall the panel report confirms the existing SPS case law. However, it also includes three interesting developments relating to the following issues: (i) the scope of the SPS Agreement; (ii) relevance of its different disciplines for assessment of equivalence regimes; and (iii) the relationship between the SPS Agreement and Article XX(b) of GATT 1994. All these issues will be addressed below in some details.

II. Facts

The dispute arose in the context of a budgetary measure taken by the US, which effectively prohibited import of poultry from China. The US law establishes an equivalence-based regime for importation of poultry products. This means that the import may proceed only if a country willing to export proves that its inspection system, guaranteeing safety of final products, is equivalent to that of the US.³ The body responsible for verification of an applicant country's inspection system is the Food Safety and Inspection Service (FSIS), an agency of the United States Department of Agriculture. This is done through analysis of relevant laws and regulations of an applicant country and on-site audit of operability of a system. The tasks of the FSIS extend to inspections of certified establishments in the exporting country and continuous

port-of-entry checks of poultry products shipped to the US.⁴ The FSIS is also responsible for the annual review in order to guarantee that the initial recognition is still based on an effective inspection system.

China requested the equivalence determination already in 2004. After lengthy examination, the FSIS eventually added China to the list of eligible countries with regard to processed poultry products not slaughtered in China. However, it did not formally recognize the equivalence of the Chinese inspection system for slaughtered poultry. It neither approved the list of certified establishments that could export poultry products to the US.

In the meantime, the US Congress passed the Omnibus Appropriations Act, which contained the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2009 (AAA).⁵ Section 727 of the latter stipulated that "None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China." The adoption of the provision was motivated by a series of scandals related to the operation of China's system of food safety enforcement.⁶ In particular, the US indicated numerous cases of adulterants added to pet food ingredients by Chinese producers, which led to thousands of deaths of US domestic animals (2007) and adulterants added to milk by Chinese processors, which resulted in several deaths among US consumers (2008). As a consequence of these legislative developments, the FSIS was neither able to complete the recognition process nor to undertake the annual review. This effectively cut off the access of Chinese establishments to the US poultry market.

On 17 April 2009 China requested a consultation with the US pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Since the parties did not reach any agreement, in June 2009 China asked for the establishment of a panel. In its request, it identified a number of provisions in the covered WTO agreements that were supposedly infringed by the US. In particular, it claimed the violation of GATT 1994 (Articles I:1 and XI:1), the Agreement on Agriculture (Article 4.2) and the SPS Agreement (Articles 2.2, 2.3, 5.1–5.2, 5.6 and 8). A number of WTO Members, including Brazil, the EU and Chinese Taipei reserved their rights to participate in the panel proceedings as third parties. The panel eventually made findings only under the GATT 1994 and the

² For interesting general analysis of strategies used by China in the settlement of international trade disputes, see Marcia Don Harpaz, *Sense and Sensibilities of China and WTO Dispute Settlement*, The Hebrew University of Jerusalem, Research Paper No. 02-10.

³ Panel Report, *US – Poultry*, para. 2.6.

⁴ *Ibidem*, paras. 2.15–16.

⁵ The AAA of 2009 was later replaced by the AAA of 2010, which contained a similar obligation as its predecessor. China, however, decided to pursue its claim only with respect to the Section 727.

⁶ Panel Report, *US – Poultry*, para. 4.38.

SPS Agreement, while declining to rule on China's claim under the Agreement on Agriculture (this was justified through reference to the principle of the judicial economy).

III. Judgment

The panel first found that it was entitled to rule on a measure, which had already expired (however, only after the establishment of the panel).⁷ The panel noted that the measure at issue could be easily re-imposed and thus simple dismissal of the complaint could deprive China of any meaningful review of US's actions.⁸ The panel, in line with the previous case law (e.g. *EC – Hormones, Australia – Salmon*), decided to address first the claims under the SPS Agreement (of course subject to the applicability of the agreement) and move to the GATT 1994 only afterwards. This was justified by reference to *lex specialis* rule, albeit in its weak form as the rule that determines the sequence of examination and not as a conflict of law maxim.

The panel then analysed whether Section 727 could be regarded as an SPS measure. In this context, it held that it had to consider the purpose of a measure (whether it is directed against one of the risks enumerated in Annex A(1) of the SPS Agreement) and its legal form (whether it can be qualified as law, decree, regulation, requirement or procedure). The purpose of the measure was determined on the basis of the Joint Explanatory Statement that accompanied Section 727 and the relevant statements on the Congressional Record.⁹ It was clear from these materials that measure aimed at “protecting human and animal life and health from the risk posed by the prospect of the importation of contaminated poultry products from China.”¹⁰ Consequently, Section 727 could be regarded as falling into Annex A(1)(b) as a measure intended to protect human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs. It also could be qualified as law (i.e. Section 727 was a provision of the AAA of 2009). The fact that it was also a budgetary measure (i.e. a measure that dealt with monetary appropriations concerning one of the US agencies) did not change this assessment.

Once the panel established the applicability of the SPS Agreement, it turned to the examination of the measure under the specific obligations. First, it held

that domestic equivalence regimes could be assessed not only under Article 4 of the SPS Agreement – the rule that was specifically designed to regulate the recognition process¹¹ – but also under other relevant provisions, including Articles 2 and 5. The panel added that Section 727 was not merely a procedural rule of the equivalence system but a substantive obligation that effectively operated as a traditional ban on the importation of poultry products (i.e. without establishing equivalence, Chinese poultry products were banned from entering the US market).¹²

Second, the panel found that the US did not have the necessary risk assessment (Article 5.1–5.2) that would support its measure. The studies cited by the US were of general nature (e.g. some of them were merely newspaper articles discussing existing hazards such as avian influenza, poultry smuggling, and presence of melamine in chicken feed) and they did not address specific risks resulting from the importation of poultry products from China.¹³ This finding also implied that the measure was neither based on scientific principles nor maintained with sufficient scientific evidence as required by Article 2.2.¹⁴

Third, when analyzing the US measure under Article 5.5, the panel relied on the test that was elaborated extensively in the previous SPS case law. Under this test, three elements had to be demonstrated in order to establish the violation of the provision: (i) existence of different levels of protection (ALOP) in different but comparable situations, (ii) arbitrary or unjustifiable character of such differences, and (iii)

7 As was mentioned above, Section 727 expired on 30 September 2009 and was replaced by Section 743, which was, however, not covered by China's complaint. Note that Section 743 also expired in the course of the panel proceeding.

8 Panel Report, *US – Poultry*, para. 7.55.

9 *Ibidem*, para. 7.109.

10 *Ibidem*, para. 7.115.

11 Article 4 of the SPS Agreement stipulates: “4.1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures. 4.2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.”

12 Panel Report, *US – Poultry*, para. 7.154

13 *Ibidem*, para. 7.202.

14 *Ibidem*, para. 7.203.

presence of discrimination or disguised restriction on international trade resulting from that distinction. The panel compared ALOPs applied to poultry products from China with poultry products from other WTO Members (comparable situations). It found that difference was arbitrary or unjustifiable (e.g. because Section 727 was not based on scientific principles and evidence) and resulted in discrimination. Interestingly, the panel noted that the comparison under Article 5.5 could include not only different WTO Members but also different products coming from the same Member if those products express some common element (e.g. same pathogen).¹⁵ Finally, the panel added that the violation of Article 5.5 implied an infringement of Article 2.3 of the SPS Agreement.

Fourth, the panel found that the US violated Article 8¹⁶ by failing to observe requirements provided by Annex C(1) of the SPS Agreement. In particular, the panel held that the US did not complete a procedure for assessing compliance with its SPS measure (Section 727) without undue delay.¹⁷ On the other hand, the panel did not make findings under Article 5.6 because it considered the formulation of China's claim as going beyond its mandate.¹⁸

Fifth, the panel held that Section 727 violated both Articles I:1 and XI:1 of the GATT 1994. It also found

that such violation could not be justified under Article XX(b) of the GATT 1994¹⁹ because the measure was previously found to infringe the SPS Agreement.²⁰ According to the panel, any defense under Article XX(b) becomes in such cases unavailable. Although that finding was made in the context of the GATT violation, one may argue that it also applies to situations when a WTO Member makes a claim only under the SPS Agreement while the defendant raises a defense under Article XX(b).

IV. Comments

As already noted, in principle the panel report merely confirms the previous case law. However, it also includes three new interesting developments. First, as already noted, the panel held that Section 727 could be regarded as SPS measure. This was not obvious as the provision dealt with "monetary appropriations concerning the activities of an Executive Branch agency of the United States Government, instead of directly regulating sanitary and phytosanitary issues."²¹ The panel, however, found this aspect of a measure to be of secondary importance and instead concentrated on the underlying purpose and its legal form. In doing so, it deviated from the approach taken in the *EC – Biotech Products* dispute where the nature of a measure was considered as one of the constitutive (and independent) elements for establishing applicability of the SPS Agreement.²² This is probably a correct reading of Annex A(1). From the textual point of view, "requirements and procedure" seem to be just an example of an SPS measure and not an independent category that sets a threshold with respect to the required nature. This conclusion is strengthened by a pragmatic reason. SPS measures can take different forms that are not really limited to "laws, decrees, regulations" or be of a nature which is not reducible to SPS "requirements or procedures" (as it was a case in *US – Poultry*). They may amount to nothing more than particular practice or just affect the operation of direct SPS requirements. Leaving such "measures" outside the scope of the agreement will arguably undermine the effectiveness of the whole system. Interestingly, on the more general level the approach in *US – Poultry* appears to be similar to the philosophy that guided the *Biotech* panel. The specific conditions for applicability of the SPS Agreement are to be read broadly, expanding the reach of its disciplines.

¹⁵ *Ibidem*, para. 7.223.

¹⁶ Article 8 provides: "Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement."

¹⁷ Panel Report, *US – Poultry*, para. 7.392.

¹⁸ *Ibidem*, paras. 7.333–7.337 (particularly noting: "in the present case an analysis under Article 5.6 would be inappropriate for this Panel to engage in as it would be entirely speculative and be exceeding our role under Article 11 of the DSU to make an objective assessment of the matter").

¹⁹ Article XX(b) provides: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: [...] (b) necessary to protect human, animal or plant life or health."

²⁰ Panel Report, *US – Poultry*, para. 7.482.

²¹ *Ibidem*, para. 7.119. Note that this was not clear to China either. Initially, the SPS violation was argued about only as an alternative to the main claim under the GATT 1994 (*cf.*, para. 7.3).

²² *Cf.* Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006, para. 7.149. The *Biotech* panel read Annex A(1) second part as providing two separate requirements: one relating to a form of a measure ("laws, decrees, regulations") and the other to a nature of a measure ("requirements and procedures").

Second, the panel found that SPS equivalence regimes (or their constitutive elements) are subject to regular disciplines of the SPS Agreement, including but not limited to Article 4. This was justified through reference to the Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures that was adopted by the SPS Committee (see below).²³ The panel also made an argument on textual grounds (“there is nothing in the text of Article 4 that suggests that it should be applied in a vacuum, isolated from other relevant provisions of the SPS Agreement”²⁴). Although one may have some doubts as to the strength of the panel’s analysis (Article 4 neither contains a reference to other provisions of the SPS Agreement), the conclusion reached by the panel should be welcomed. It strengthens the equivalence obligations of the SPS Agreement, which are formulated in relatively general language that leaves the recognizing Member with (an overly?) wide margin of discretion. Under the panel’s standard, a WTO Member that engages in the recognition process needs to observe other obligations of the SPS Agreement. For example, it cannot require from an exporting Member to meet specific SPS conditions that are not scientifically justifiable. Similarly, it cannot capriciously halt the recognition process and needs to guarantee consistency in the treatment of comparable risks (subject to justification in case of any divergences).

As noted above, the panel also referred to the Decision on the Implementation of Article 4 in its analysis. Regrettably, it is not clear how, according to the panel, this decision could become relevant when interpreting Article 4. Although the panel admitted that the decision was not binding, it also explained that it “expand[ed] on the Members’ own understanding of how Article 4 relat[ed] to the rest of the SPS Agreement and how it [was] to be implemented.”²⁵ This language is difficult to reconcile with the prescription of Article 31 of the Vienna Convention on the Law of Treaties (VCLT),²⁶ which provides interpretative rules for WTO dispute settlement bodies. Is it a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision (Article 31.3(a))? Or rather a subsequent practice in the application of the treaty which establishes the agreement between the parties regarding its interpretation (Article 31.3(b))? By failing to identify the relevant provision, the panel seems to miss the opportunity to clarify that point. What is even more problematic is the fact that the

panel is obliged to rules and procedures governing the settlement of disputes on the basis of Article 3.2 of the WTO Understanding to clarify the provisions of covered agreements in accordance with customary rules of interpretation of public international law. Consequently, if a panel finds that a particular decision is relevant in the process of interpretation, it should clearly indicate a basis for such a conclusion.

The third interesting issue relates to the relationship between Article XX(b) of the GATT 1994 and disciplines of the SPS Agreement. The finding of the panel removes some uncertainty as to the nature of the connection between these two sets of obligations. One has to recall that the panel had to decide whether it was possible to justify (with respect to GATT 1994 violation) the US measure under Article XX(b) as necessary to protect human and animal life and health when such a measure was already found inconsistent with certain provisions of the SPS Agreement.

The panel correctly observed that WTO rules are cumulative and Members need to comply with all of them simultaneously. Consequently, the fact that the SPS Agreement is applicable to a specific measure does not exclude the applicability of GATT 1994 rules. At the same time, the panel rightly recognized that SPS disciplines build upon Article XX(b) – for example, the preamble of the SPS Agreement contains explicit reference to this article (“Desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)”). The word “to elaborate” indicates that the Agreement explains in detail how to apply disciplines of Article XX(b) with respect to SPS measures.²⁷ In addition, Article 2.4 establishes a presumption of consistency with Article XX(b) for those measures which comply with the SPS Agreement, while a number of other provisions mirror the language used in the general exception of the GATT 1994 (e.g. Articles 2.3 and 5.5 that speak about arbi-

23 Committee on Sanitary and Phytosanitary Measures, Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures, document G/SPS/19/rev. 2, dated 23 July 2004.

24 *Ibidem*, para. 7.138.

25 Panel Report, *US – Poultry*, para. 7.136.

26 *Vienna Convention on the Law of Treaties*, adopted on 22 May 1969, 1155 *U.N.T.S.* 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1969).

27 Panel Report, *US – Poultry*, para. 7.471.

trary and unjustifiable discrimination and disguised restriction). On that basis, the panel concluded that the SPS Agreement thus explains in detail the provisions of Article XX(b) in respect of SPS measures (or provides a relevant context when interpreting the latter). Consequently, the panel held that “an SPS measure which has been found inconsistent with Articles 2 and 5 of the SPS Agreement, cannot be justified under Article XX(b) of the GATT 1994.”²⁸

The panel conclusion is definitely correct. What is slightly disappointing is the reasoning as such. The panel relied in its analysis predominantly on various textual arguments (e.g. examination of the word “to elaborate”) while it was possible to make a strong teleological and more systemic argument. Making Article XX(b) of the GATT 1994 a possible form of defense, when a measure was already found to be inconsistent with the SPS Agreement, will effectively undermine the legal significance of the latter. Why bother to comply with the stringent requirements of risk assessment or quasi-consistency of the SPS Agreement if a measure can be saved under more lenient provision of GATT 1994? One may also criticize one of the observations made by the panel in this context. It explained that all measures “defined in Annex A(1) are included within the type of measures contemplated in Article XX(b) of the GATT

1994.”²⁹ That statement does not seem to be entirely correct. Note that the notion of an SPS measure also includes those measures which are adopted in order to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests (Annex A(1)(d)). As noted by the *EC – Biotech* panel this phrase has to be understood broadly and encompasses damage to property (e.g. water intake systems), economic damages (damage in terms of sales lost by farmers due to the presence of unwanted genetically modified organisms (GMO) on agricultural fields) as well as damage to the environment other than damage to the life and health of animals or plants (e.g. adverse effects of GMOs to non-living components of the environment).³⁰ It is not clear how measures aimed at such risks could be considered under Article XX(b), which relates exclusively to human, animal and plant life and health. Although, the SPS Agreement in principle elaborates and builds upon disciplines of subparagraph (b), it also seems to go beyond its scope.

The panel report may be also significant from the political point of view. The fact that the dispute ended up in the formal panel proceeding (rather than remaining in the negotiation process) may indicate that China is taking a more proactive stance in the enforcement of its rights under the SPS Agreement. A successful challenge of the US measure may encourage this country to rely more often on adversarial mechanisms of dispute settlement at the expense of its traditional tactic that is based on informal negotiations and consultations.

28 *Ibidem*, para. 7.481

29 *Ibidem*, para. 7.475.

30 *Cf.*, Panel Report, *EC – Biotech Products*, paras. 7.370–7.372.