

CONTROL OF AGRICULTURAL PESTS IN INTERNATIONAL TRADE

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1. Background

Scope of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) provides a basis for ensuring that the application of phytosanitary measures (as defined in Annex A to the Agreement) does not become a technically unjustifiable obstacle to international trade in agricultural products.

According to Annex A to the Agreement, a sanitary or phytosanitary measure is any measure applied:

- (a) To protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
- (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

from which it may be concluded that the Agreement is not restricted exclusively to those phytosanitary measures which are applied in international trade to prevent the entry of new pests into the national territory but includes all the phytosanitary measures applied against any pest.

As the SPS/WTO is concerned with the application of sanitary and phytosanitary measures, it does not specify the type of pest to which these measures are applied. However, the link established with the International Plant Protection Convention (IPPC), which includes a definition of "quarantine pests", introduces a degree of uncertainty as to whether these are the only pests with which the Agreement is concerned.

In the field of phytosanitary measures, the Agreement forms an interface between the tasks of the World Trade Organization (WTO) and those of the IPPC, since it delegates to the latter, and the regional organizations operating within its framework, the technical aspects of the development and harmonization of international standards, guidelines and recommendations (Annex A, Article 3(c)):

- (c) For plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the convention;

Scope of the International Plant Protection Convention (IPPC)

The IPPC mentions two types of pests: quarantine pests which are defined in the text as:

"... a pest of potential economic importance to the country endangered thereby and not yet present there, or present but not widely distributed and being actively controlled".

and injurious pests, which are not mentioned in the text and appear only in the Model Phytosanitary Certificate annexed to the IPPC. There is no internationally harmonized definition for this type of pests.

This lack of a definition in the IPPC is reflected in the international standards approved by the FAO since they mention only "quarantine pests". We refer to the standards on "Principles of Plant Quarantine as Related to International Trade" and "Guidelines for Pest Risk Assessment". The former is clearly specified as being for the control of quarantine pests, while the latter terminates the analysis procedure if, in the first step, the pest does not qualify as a quarantine pest.

It must be acknowledged that, apart from quarantine pests, there are other groups of non-quarantine pests which can be legitimately controlled in international trade under the terms of the SPS/WTO Agreement but for which neither the IPPC nor other international instruments provide a basis for phytosanitary measures. Examples of this situation are the regulations concerning maximum percentages of certain pests (viruses, bacteria, mycoplasmas) transmitted in plant propagation materials or concerning the content of biological contaminants (*Claviceps purpurea*, mycotoxins) applied by most countries in international trade to protect human, animal or plant health. There is an asymmetrical relationship between this situation and the criterion upheld by the International Office of Epizootics (IOE) which envisages the international control of non-exotic pests.

Scope of the Agreement on Technical Barriers to Trade (TBT/WTO)

The TBT/WTO is the legal instrument agreed at international level for preventing technical regulations from being used as an unjustifiable technical barrier to international trade. Like the SPS/WTO, it forms an interface between the tasks of the WTO and those of the relevant technical international organizations.

As technical regulations, phytosanitary regulations are included in the provisions of the TBT/WTO:

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they 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, and otherwise in accordance with the provisions of this Agreement;

but, depending on their purpose, they may be regarded as phytosanitary measures (as defined in Annex A of the SPS/WTO) and/or as regulations of a phytosanitary nature (consumer protection), as in the case of certain requirements with respect to pests in plant propagation materials, a situation envisaged in Article 1.5 of the TBT/WTO:

1.5 The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.

The provisions of the TBT/WTO require that technical (phytosanitary) regulations be adopted only to fulfil a legitimate objective (Article 2.2), taking into account the intended end-uses of the products:

2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

2. Analysis

The control of pests in international trade should comply with the provisions of the SPS/WTO in so far as its purpose is that of a phytosanitary measure (as defined in Annex A of the SPS/WTO), or with those of the TBT/WTO if it has a different purpose that falls within the legitimate objectives of the TBT/WTO, the first of these Agreements having priority.

The only international legal instrument concerning the international control of agricultural pests - the International Plant Protection Convention - suffers from shortcomings as far as the definition of these pests is concerned, since although it describes quarantine pests it is vague about the injurious pests mentioned in the Model International Phytosanitary Certificate of the IPPC.

Since, by definition, any pest must be injurious, the situation creates a climate of uncertainty with serious consequences for international trade. It seems likely that as the international legal instruments are improved and progress is made with the harmonization of the control of quarantine pests, the possibility of the phytosanitary regulations on non-quarantine pests being used as technically unjustifiable barriers to trade will increase.

This situation is affecting international trade. In many countries, the phytosanitary quality regulations are independent of the quarantine regulations and in some cases impose requirements which are inconsistent with the principles applied to quarantine pests. It is common to encounter legislation which requires that the merchandise be "free of live insects", in open contradiction with the spirit and the letter of the Agreement and the principles of quarantine pest control (minimal risk, risk analysis, etc.). In addition, in some countries, the non-quarantine pest requirements are formulated and monitored by organizations not directly linked to the quarantine authority, which increases the chances of inconsistency.

3. Proposal

The objective being to eliminate the unjustifiable use of phytosanitary regulations and measures as a barrier to international trade, it is necessary to choose between two alternatives:

- (a) Abolish the control of international trade for any non-quarantine pest, which would have a considerable impact on the international trade in plant propagation materials; or
- (b) develop and harmonize the set of definitions and principles which govern the application of phytosanitary regulations and measures to non-quarantine pests. In the case of this second alternative, it would be necessary to begin by making the relevant changes in the text of the IPPC, in particular by defining the concept of injurious pest.

Classification of the pests subject to control in international trade and competence

The pests of economic importance in international trade could be categorized as follows:

- (a) Quarantine pests: Those which fit the definition of the IPPC; the international framework for their control is provided by the IPPC, the FAO standards and the SPS/WTO. The regulatory powers are generally concentrated in the National Plant Protection Organizations (NPPOs).
- (b) Injurious pests: "Non-quarantine pests of economic importance which directly affect the intended use of plants and plant products" (definition adopted by MERCOSUR).

For the purposes of this definition:

"Intended use" means the end-use of the plants or plant products, which can only be consumption, processing or propagation.

"Directly affect" means the direct adverse effects of the pest on the intended use of the plants or plant products (it does not include those which affect the commercial category of the product).

The international framework for the control of this type of pests is derived directly from the SPS and TBT/WTO Agreements. The regulatory powers are dispersed among various organizations, depending on the country, including the NPPOs, seed services, public health, and research organizations.

- (c) Cosmetic pests: "Non-quarantine pests which do not affect the intended use of the plants or plant products, but which adversely affect their commercial categorization".

There is no international legal framework for the control of this type of pest in international trade. If quality control were to be regarded as a legitimate objective under the TBT/WTO, it would have to be aimed at the quality defects caused by the pests (symptoms, signs, damage) and not at the pest itself.

Control of injurious pests in international trade

The introduction of the concept of injurious pests as a subject for control in international trade makes it necessary to broaden the conceptual basis for preventing such regulations from being used as a technically unjustifiable barrier to trade.

For this it will be necessary to harmonize the principles of sovereignty, necessity, minimal impact, transparency, modification, harmonization, equivalence, cooperation, technical authority, injury assessment, tolerances and non-discrimination which, as in the case of quarantine pests, limit these regulations and prescribe how and when they may be legitimately used.

In particular, taking into account the fact that, as distinct from quarantine pests, injurious pests (by definition) are present in the importing country and are not being officially controlled, agreement should be reached on a policy of levels of tolerance with respect to such pests. Within the context of that policy, it would not be legitimate to impose zero tolerance levels, except in the case of propagation materials which are carriers of injurious pests that could cause explosive epidemics with significant economic injury and/or when, because of their persistence, those pests could cause economic injury that extends beyond the crop cycle itself or when there are consequences for human or animal health.

In the light of these considerations, MERCOSUR has adopted a series of principles for the control of injurious pests in international trade (see Annex 1) which has been derived from the FAO Standard on "Principles of Plant Quarantine as Related to International Trade" by adapting it to the special situation of injurious pests. The document lays down thirteen principles:

1. Principle of sovereignty: In addition to recognizing the right of States to control injurious pests in international trade, this principle also establishes limitations in relation to the level of economic injury, the effects on human and animal health and the possibility of quantifying and verifying such effects.
2. Principle of necessity: Underscores the limitations introduced by the sovereignty principle by stating that phytosanitary requirements relating to injurious pests can only be applied when they are necessary to prevent significant economic injury and/or undesirable consequences for human and/or animal health due to the direct effect of those pests.
3. Principle of minimal impact: Relates to the proportionality of the phytosanitary requirements which must represent the least trade-restrictive measure available.
4. Principle of transparency: Equivalent to the corresponding principle for the control of quarantine pests in international trade.
5. Principle of modification: *Idem 4.*
6. Principle of harmonization: The use of phytosanitary requirements for controlling injurious pests presupposes their harmonization at international or regional level.
7. Principle of equivalence: *Idem 4.*
8. Principle of cooperation: *Idem 4.*
9. Principle of dispute settlement: *Idem 4.*

10. Principle of technical authority: Requires countries to set up an organization for establishing, applying and overseeing standards on injurious pests.
11. Principle of injury assessment: States that the use of phytosanitary requirements for controlling injurious pests must always be based on verifiable biological and economic evidence.
12. Principle of tolerance: Requires the use of tolerance levels for controlling injurious pests and allows the application of zero tolerance levels only when the intended use is propagation and the injurious pest satisfies the corresponding technical criteria or human and/or animal health is affected.
13. Principle of non-discrimination: As distinct from the case of quarantine pests, phytosanitary measures directed against injurious pests must be applied to the consignments, without considering the origin of the products. The measures should not discriminate between domestic and international markets.

ANNEX 1

Principles for the Application of Phytosanitary Measures in Connection
with the Control of Injurious Pests in International Trade

1. Sovereignty

With the aim of avoiding the harmful effects of injurious pests on the intended use of plants and plant products, it is recognized that States Parties may exercise the sovereign right to utilize phytosanitary measures to regulate the entry into their territory of materials affected by injurious pests when the latter directly affect the intended use of those materials to a degree which causes significant economic injury and/or affects human or animal health, both quantifiably and verifiably.

2. Necessity

States Parties may institute phytosanitary measures only where such measures are necessary to avoid significant economic injury and/or undesirable consequences for human and animal health stemming from the direct effects of the injurious pests on the intended use of the agricultural products.

3. Minimal impact

The phytosanitary measures applied for controlling injurious pests shall be consistent with the extent to which the intended use is affected and shall represent the least trade-restrictive measure available.

4. Transparency

States Parties shall publish and disseminate the phytosanitary tolerances, restrictions and requirements applied to injurious pests, including, on request, the rationale for such measures.

5. Modification

As conditions change, and as new facts become available, the phytosanitary measures applied to injurious pests shall be modified promptly, either by including tolerances, restrictions or requirements necessary for their success or by removing those deemed to be unnecessary.

6. Harmonization

Phytosanitary measures applied to injurious pests shall be based on international or regional standards, guidelines or recommendations.

7. Equivalence

States Parties shall recognize as being equivalent those phytosanitary measures which, while not identical, have the same result in relation to the effects of injurious pests on the intended use of the agricultural products.

8. Dispute settlement

It is preferable that any dispute between two countries regarding phytosanitary measures against injurious pests be resolved at a technical bilateral level. If such a solution cannot be achieved within

a reasonable period of time, further action may be undertaken in accordance with Article 10 and Annex D of the Mercosur Agreement on Sanitary and Phytosanitary Measures (ACSAFIM).

9. Cooperation

States Parties shall cooperate to harmonize the phytosanitary measures applied to the control of injurious pests and to promote the development and use of regional and international standards.

10. Technical authority

Each State Party shall provide an Official Organization to assume responsibility for:

- (a) Developing and establishing standards on injurious pests; and
- (b) applying and overseeing those standards, solely in those cases in which the direct effect of the injurious pests on the intended use of the agricultural products has externalizable consequences (entails injury to third parties not involved in the decisions) or may lead to consumer fraud.

11. Injury assessment

In order to assess the injury due to the effects of injurious pests on the intended use, States Parties shall use assessment methods based on verifiable biological and economic evidence.

12. Tolerance

States Parties shall agree on a policy of tolerance in the formulation of phytosanitary measures relating to injurious pests, as there is always some adverse effect on the intended use. Zero levels of tolerance shall be applicable only in those cases in which the proposed use is propagation and when:

- (a) The injurious pest is causing explosive epidemics with significant economic losses; and/or
- (b) because of its persistence, the injurious pest is prolonging the harmful effects beyond the current crop cycle and is causing significant economic losses;
- (c) when there are effects harmful to human or animal health.

13. Non-discrimination

Phytosanitary measures directed against injurious pests shall be applied without discrimination as regards the origin of the goods, nor shall there be any discrimination between domestic and external markets.