Equivalence in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures

Submitted by: World Trade Organization
EQUIVALENCE IN THE WTO AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES (SPS AGREEMENT)

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SCSC-FSCF Workshop on Trade Facilitation through the Recognition of Food Safety Systems Equivalence
21-22 June 2018
Lima, Peru
1. Introduction to the SPS Agreement
2. The SPS Agreement and equivalence
3. The SPS Committee and equivalence
4. Transparency and equivalence
5. Dispute Settlement and equivalence
The SPS Agreement

Agreement on the application of sanitary and phytosanitary measures

• 1995
Objectives of the SPS Agreement

Recognizing Members’ right to protect human, animal, plant life or health

Obligation to avoid unnecessary barriers to trade
SPS Measures
Definition - Annex A

- A measure taken to protect:

<table>
<thead>
<tr>
<th>Category</th>
<th>Protection Provided</th>
</tr>
</thead>
<tbody>
<tr>
<td>Human or animal health</td>
<td>from risks arising from additives, contaminants, toxins or disease organisms in food, drink, feedstuff</td>
</tr>
<tr>
<td>Human life</td>
<td>from plant- or animal-carried disease</td>
</tr>
<tr>
<td>Animal or plant life</td>
<td>from pest, diseases, disease-causing organisms</td>
</tr>
<tr>
<td>Territory of Member</td>
<td>from other damage caused by entry, establishment or spread of pests</td>
</tr>
</tbody>
</table>
Key Provisions: SPS Agreement

- Non-discrimination
- Scientific justification
  - harmonization
  - risk assessment
  - consistency
  - least trade-restrictiveness
- Equivalence
- Regionalization
- Transparency
- Technical assistance/special treatment
- Control, inspection and approval procedures
Remember: Conditions under which an SPS Measure can be taken:

- Restrain trade to protect health
- Measures based on scientific principles (*international standards or risk assessment*)
- Non-discriminatory
- No disguised restrictions
THE SPS AGREEMENT AND EQUIVALENCE
What is Equivalence?

- Legal terms - Article 4
- In practice – ?
Members shall accept the sanitary and 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 and phytosanitary protection.
What is Equivalence?

Article 4 – SPS Agreement

If the exporting country objectively demonstrates that its measures achieve the ALOP of the importing country, Members shall accept SPS measures of other Members as equivalent.
What is Equivalence?

Article 4 – SPS Agreement
Equivalence – in practice

- How to determine if another measure/process/product is equally safe?
  - *Is aging equivalent to pasteurization re: cheese safety?*
  - *Can cold treatment replace fumigation?*
  - *Can vaccination ensure disease freedom?*

- What is the ALOP (acceptable level of risk)?
  
  *The level of protection deemed appropriate by the Member establishing SPS measure* (Annex A, para. 5)
SPS Committee
Guidelines/Recommendations

- The SPS Committee has developed guidance for the implementation of provisions as follows:
  - Decision on Equivalence (G/SPS/19/Rev.2)
  - Guidelines on Consistency (G/SPS/15)
  - Guidelines on Regionalization (G/SPS/48)
  - Recommended procedures on transparency (G/SPS/7/Rev.3)
  - Procedure to enhance transparency of S&D Treatment in Favour of Developing Country Members (G/SPS/33/Rev.1)
  - Procedure to encourage and facilitate ad hoc consultations (G/SPS/61)
  - Catalogue of Instruments available to WTO Members to Manage SPS Issues (G/SPS/63)
Equivalence – Guidelines

Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures

(G/SPS/19/Rev.2)

- “…to make operational the provisions of Article 4…”
- “…equivalence... does not require duplication or sameness of measure, but the acceptance of alternative measures that meet an importing Member’s appropriate level of sanitary or phytosanitary protection.”
- “…taking into account the specific concerns raised by developing and LDC Members regarding their difficulties in having the equivalence of their sanitary and phytosanitary measures accepted by importing Members.”
Equivalence – Guidelines  
(G/SPS/19/Rev.2)

Recommended actions of exporting and importing Members in the process of implementation of Article 4

**Exporting Member**

A. Make a request for recognition of equivalence

C. Objectively demonstrate equivalence of its SPS Measure:
   - Science based and technical information to show same ALOP, like International standard, risk assessment by another Member
   - Access to importing Member for inspection, testing

**Importing Member**

B. Explain objective and rationale of SPS Measure; identify risks to be addressed:
   - Indicate the desired ALOP
   - Risk assessment or based on international standard
   - Any additional information to assist exporting Member

D. Analyze the information provided to determine if it achieves the same ALOP

Make a determination
Possibility of expedited process

Importing Member shall respond in a timely manner to any request for consideration of equivalence: normally within 6 months (para. 3)

Importing Member should accelerate the procedure for the products which it has historically imported from the exporting Member (para. 5)

- Historic knowledge and confidence among competent authorities
- Existence of an evaluation and recognition system of inspection and certification
- Available scientific information

The more such information is available, the more rapid the procedure should be
Monitoring of the Implementation of Art. 4

- Members encouraged to provide information on: (para. 12)
  - experiences on the implementation of Article 4
  - Successful conclusion of bilateral equivalence agreements

- Standing agenda item for the regular meetings of the SPS Committee
THE SPS COMMITTEE AND EQUIVALENCE
The SPS Committee

*What does it do?*

- Implementation of SPS Agreement
- Reviews compliance
- Potential trade impacts
- Co-operation with technical organizations
SPS Committee
Who is on it?

- All 164 WTO Members
- Observer governments (acceding members)
- Intergovernmental organizations

2016

Liberia

Afghanistan
<table>
<thead>
<tr>
<th>Date Range</th>
<th>Type of Meetings</th>
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<tr>
<td>28 February - 2 March 2018</td>
<td>Informal and formal meetings</td>
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<tr>
<td>11-13 July 2018</td>
<td>Informal and formal meetings</td>
</tr>
<tr>
<td>30 October - 3 November 2018</td>
<td>Informal and formal meetings</td>
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SPS Committee Meetings

Typical agenda items

- Activities of Members
- Specific trade concerns
- Implementation of the Agreement
  - Equivalence
    - Pest- or disease-free areas
    - Transparency
    - Special and differential treatment
    - Monitoring use of international standards
    - Review of SPS Agreement
- Cross-cutting issues
- Technical assistance
- Private standards
- Observers
- ... Other business
Specific Trade Concerns

What is a specific trade concern?

A specific trade complaint raised by Members in the SPS Committee in relation to SPS measures maintained by other Member(s).

(whether draft measures or measures currently in force)
Specific Trade Concerns
By year (1995-2017)

Source: G/SPS/GEN/204/Rev.18

- Food safety: 32%
- Animal health: 37%
- Plant health: 25%
- Other concerns: 6%

Total STCs = 439

Source: G/SPS/GEN/204/Rev.18.
SPS Information Management System (http://spsims.wto.org)
SPS Committee – Specific Trade Concerns
Equivalence

Total STCs = 439

STCs related to equivalence = 14

- Food Safety: 36%
- Plant Health: 21%
- Animal Health: 36%
- Other: 7%
In 2015, Senegal reported on its equivalence agreement with China for peanut seed exports.

In 2016:

- Madagascar informed on the recognition, since 2012, of their regulatory measures on fishery products, as equivalent to those provided in the European sanitary regulations. In 2014, China had recognized their measures for shrimp exports as equivalent to those of China.

- Senegal reported on its equivalence agreement with China on groundnuts exports.
SPS Committee and Equivalence Review

- **Article 12.7**
  - 3 years after entry into force
  - *First Review completed March 1999 (G/SPS/12)*

- **2001 Ministerial Decision**
  - *reviews at least every 4 years*
    - Second Review completed June 2005 (G/SPS/36)
    - Third Review completed March 2010 (G/SPS/53)
    - Fourth Review completed July 2017 (G/SPS/62)
    - Fifth Review launched March 2018:
      - Process (G/SPS/W/296/Rev.1)
      - Draft background document (G/SPS/GEN/1612)
      - Proposals from Members to be discussed at the 2018 July meeting, including three on equivalence so far
Developing guidance on equivalent systems approaches (G/SPS/W/299, 6 June 2018)

The following communication, dated 1 June 2018, is being circulated at the request of the delegation of Australia.

The proposed topic:

1. The acceptance of equivalence as a concept and implementation of the concept is a fundamental obligation of the agreement on the Application of Sanitary and Phytosanitary Measures (the Agreement) (Article 4).

2. The SPS Committee adopted an initial decision regarding the implementation of Article 4 on equivalence in October 2001, which included a commitment to develop a work programme to further the implementation of Article 4 of the Agreement. This resulted in the SPS Committee adopting equivalence guidelines in July 2004.

3. There has been limited subsequent reporting to the SPS Committee, with only two issues of equivalence consideration being brought to the SPS Committee's attention.

4. To manage a specified pest risk and achieve a Member's appropriate level of protection, equivalence may be applied to an individual measure, a combination of measures, or integrated measures in a systems approach.

5. As the options for either new or alternate individual measures (for example, fumigation) have decreased, and are likely to further decrease in the future, as a result Members reviewing their import measures, treatments, and/or chemicals are no longer available or registered for a specific use, or maximum residue limits (MRLs) are lowered and are no longer be achievable. The application of systems approaches may be the only option available to exporting Members to maintain existing trade.

6. The use of the guidance developed by International Standard Setting Bodies (ISSBs) has been limited, and additional specific guidance from the SPS Committee may result in a broadened number of systems approaches being recognized as equivalent, with resultant improvement in trade, while maintaining importing Members' plants, animal and human health status.

7. The International Plant Protection Convention (IPPC) recognizes equivalence as one of the IPPC basic principles and has developed guidance on the issue of equivalence in a number of their adopted International Standards on Phytosanitary Measures (ISPMs).

8. Under IPPC guidance, a systems approach is a pest risk management option that integrates different measures, at least two of which act independently, with cumulative effect and may range in complexity. The ISSBs have all developed some guidance on the implementation of systems approaches to address pests, diseases and human health concerns.

9. The OIE standards relevant to the principle of equivalence are contained in the Terrestrial Code (mainly in Section 5) and the OIE provides guidelines and recommendations related to equivalence (and a number of other issues) in the publication International Trade Rights and Obligations of OIE Member Countries.

10. Codex recognizes equivalence as the state wherein sanitary measures applied in an exporting country, though different from the measures applied in an importing country, achieve, as demonstrated by the exporting country, the importing country's appropriate level of protection.

11. Codex members have developed guidelines on the judgement of the equivalence of sanitary measures associated with food inspection and certification systems. In addition, the Codex Committee on Food Import and Export Inspection and Certification Systems (CCIB ICOS) has commenced examining the issue of equivalence, in relation to import and export certification systems.

What the Review would do:

12. Within the framework of the Fifth Review, the SPS Committee would explore the impediments to the application of the concept and practice of equivalence to manage SPS risks in trade. Where it would assist Members to expand their use of equivalence to facilitate safe trade, the SPS Committee could expand on existing guidance on recognition of equivalence in relation to systems approaches for achieving equivalence in achieving the importing Members' appropriate level of protection of plant, animal and human health while permitting trade to be continuous or resume.


14. The Review would draw on existing and ongoing work of the SPS, in relation to systems approaches that may be used in determining if a systems approach could be considered as equivalent to existing measures and achieve the importing Members' appropriate level of protection.

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1. G/WEO/14, (The use of unregistered measures as a guidance approach for pest risk management, 2001)
3. IPPC/SPS/40, (Equivalences between the IPPC and the SPS Agreement, 2003)
5. G/SPS/195/Rev.1 (Equivalences in ISPMs).
SPS Committee and Equivalence
Fifth Review - Proposal from Canada

Workshop on equivalent (G/SPS/W/302, 11 June 2018)

INTRODUCTION

1.1. As part of the Fifth Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures, pursuant to the provisions of Article 12.1 of the Agreement, the Secretariat has invited Members to identify issues they wish to be considered during the Review by 1 June 2018.

1.2. Canada respectfully submits a proposal for consideration by the Committee for a workshop on the thematic session on equivalence under the Fifth Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures.

1.3. Canada believes that all Members would benefit from a workshop on thematic session which examines the obligations in Article 4 of the SPS Agreement and the guidance provided in Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures (G/SPS/15/Rev.2).

1.4. Furthermore, G/SPS/15/Rev.2 invites the Codex Alimentarius Committee (Codex), the World Organization for Animal Health (OIE), the Commission on Phytosanitary Measures, to keep the Committee regularly informed regarding their activities relating to equivalence and indicates that Members should provide the Committee with information on their experience regarding the implementation of Article 4 of the Agreement.

1.5. As part of the workshop on thematic session on equivalence, Members and the International Standard-Setting Bodies (ISSB) would be invited to share developments, guidance, and best practices for the acceptance and recognition of equivalence. Additionally, it is proposed that the Secretariat would review the obligations as they relate to equivalence under Article 4 of the SPS Agreement and the guidance provided in G/SPS/15/Rev.2, assess relevant WTO jurisprudence, and analyze the issues related to equivalence raised in WTO dispute settlement cases and the relevant findings.

1.6. Members have undertaken significant work on the issue of equivalence through the acceptance and recognition of equivalence. As part of the workshop or thematic session, Members would be invited to share their experiences, including their approach to assessing equivalence, the process of maintaining equivalence, and how historic knowledge and confidence in another Member's competent authority can be considered in the recognition of equivalence.

2. PROPOSAL

2.1. Given the developments in this important area since 2004 by the ISSBs and Members, as well as the fact that a workshop or a thematic session has had to Canada's submission never been held on the topic of equivalence, Canada would like to propose, for the Committee's consideration, a workshop or thematic session on equivalence as part of the Fifth Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures.

2.2. This workshop or thematic session would provide Members an opportunity to expand their knowledge of the concept of equivalence. The following elements could be useful for Members to consider in detail the equivalence obligations in the SPS Agreement, the guidance provided in Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures (G/SPS/15/Rev.2), the jurisprudence relating to Article 4 in decisions of the Dispute Settlement Body, and the work of the ISSBs on developing international standards, guidelines and recommendations referring or relating to equivalence. Members' experience implementing the concept of equivalence, as well as any best practices that can be shared concerning the implementation of the obligations, guidelines, or recommendations on equivalence.
SPS Committee and Equivalence

Fifth Review - Proposal from Brazil

To reinforce Members’ commitments to implement the SPS Agreement, including equivalence (G/SPS/W/301, 5 June 2018)

1. BACKGROUND

1.1. Regulatory issues have been increasingly highlighted as a key element of the international trade architecture. The SPS Agreement provides a solid basis for the treatment of regulatory issues in the area of trade in agricultural products, but it is necessary reinforce its features to ensure the attainment of its objectives.

1.2. The core aim of the SPS Agreement the science-based approach. This approach needs to be reinforced, as a clear and precautionary, so that SPS measures are not applied in a manner which would create an arbitrary and unjustifiable discrimination or a disguised restriction on international trade. SPS measures without sufficient risk-based scientific evidence should not be maintained by Members.

1.3. By reinforcing SPS, the Committee has been able to address relevant issues under the past decade, and has contributed significantly to the implementation of the SPS Agreement. However, the Committee has been facing challenging issues in the past few years, as illustrated by the difficulties to adopt the Fourth Review of the Agreement (G/SPS/23), which was submitted by Brazil in October 2014, and is a move forward since July 2015 on the Instrument of Awareness (G/SPS/11); traded in March 2018.

1.4. Taking into the requesting need to maintain the balance between the need to protect human, animal or plant life or health, and the need to minimize the negative effects on trade of SPS measures, the following issues are presented for discussion with a view to contribute to possible consensus.

2. SCIENTIFIC JUSTIFICATION (ARTICLE 2.2) AND RISK ASSESSMENT

2.1. The link between the obligation to base SPS measures as science, contained in Article 2.2 of the SPS Agreement, and the precautionary obligation to ensure that SPS measures are based on an assessment, as a precautionary measure, of the risks to human, animal or plant life or health, contained in Article 3.1, has been recognized by the Committee in several bodies in a number of cases. [Regions, Members, International Organizations]. It has also been recognized by Article 2.3, under the title “Basic Rights and Obligations”, to highlight under which to read the aforementioned provisions, and is not unambiguous to be interpreted to mean that the precautionary principle and the measures by which scientific justification is satisfied are secondary to the precautionary principle.

2.2. A clear statement of this would strengthen the scientific basis of the SPS Agreement. The benefits of using SPS measures as an arbitrary and unreasonable discrimination or a disguised restriction on international trade.

3. EQUIVALENCE (ARTICLE 4)

3.1. Article 4.2 gives a clear statement regarding Members’ obligation to enter into consultations with the aim of achieving bilateral or multilateral agreements on the equivalence of existing or future sanitary or phytosanitary measures. Another, it is not a mechanism implemented and, according to the SPS Agreement, it is available in the context of the implementation of Article 4.2 of the Agreement (G/SPS/W/11/Rev.2).

3.2. To improve the implementation of Article 4.2, Members should recognize the importance of the Decision (WEO/G/12.1), which has provided Members with the procedures described in the Decision itself.

4. ASSESSMENT OF RISK AND DETERMINATION OF THE APPROPRIATE LEVEL OF SANITARY OR PHYTOSANITARY PROTECTION (ARTICLE 5)

5. REGIONALIZATION (ARTICLE 6)

5.1. The effective implementation of Article 6 is currently limited by several means, such as:

- The substantial investments needed to achieve and maintain the status of pest or disease-free areas, or areas of low pest or disease prevalence (particularly for developing countries);
- The different requirements adopted by the competent international organizations (particularly Codex), and importing Members.

5.2. Achieving international recognition may not necessarily achieve recognition. Furthermore, recognition by the WTO should not mean that adherence to the standards established in the WTO would be insufﬁcient. Members should be encouraged to harmonize their standards in the light of the standards set by international organizations in the same area.

5.3. The automatic recognition of OIE (and eventually the IPPC) status would not require any modiﬁcation of the SPS Agreement. Nevertheless, it can be considered as covered by Article 6.2. To avoid double standards, Members could collectively decide that they accept a dual recognition by the relevant international organization as an objective demonstration under Article 6.
TRANSPARENCY AND EQUIVALENCE
SPS Transparency obligations

1. Notification of draft regulations
2. Establishment of enquiry point
3. Designation of notification authority
4. Publication of regulations

SPS Article 7, Annex B
G/SPS/7/Rev.4
Transparency and equivalence
Recommended Transparency Procedures:

- Notification of Recognition of equivalence:
  measure recognized, products covered

  - (G/SPS/7/Rev.4 – specific format,
    G/SPS/19/Rev.2 – implementation of Art. 4)
### Notification Format (G/SPS/N/EQV/#)

**NOTIFICATION OF DETERMINATION OF THE RECOGNITION OF EQUIVALENCE OF SANITARY OR PHYTOSANITARY MEASURES**

The following notification of determination of the recognition of equivalence has been received.

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<tbody>
<tr>
<td>1.</td>
<td>Member notifying:</td>
</tr>
<tr>
<td>2.</td>
<td>Title of the text stating the determination of the recognition of equivalence:</td>
</tr>
<tr>
<td>3.</td>
<td>Parties involved:</td>
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<td>4.</td>
<td>Date of entry into force of the determination of the recognition of equivalence and any associated procedures or regulations (dd/mm/yy):</td>
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<td>5.</td>
<td>Products covered (HS or CCCN where applicable, otherwise national tariff heading):</td>
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<tr>
<td>6.</td>
<td>Description of measures recognized to be equivalent:</td>
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<td>7.</td>
<td>Further information available from:</td>
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[ ] National Enquiry Point  [ ] Other (specify)
Transparency and Equivalence

Notifications

Total notifications (regular and emergency) > 17000

Notifications on equivalence: 2

G/SPS/N/EQV/DOM/1 (2008)

G/SPS/N/EQV/PAN/1 (2007)

Notifications with keyword equivalence = 28
DISPUTE SETTLEMENT AND EQUIVALENCE
Food safety:
US/Canada vs. EC - Hormones (WT/DS26, 48)
(EC vs. US/ Canada – Continued Suspension (WT/DS320, 321))
China vs. US – Poultry (WT/DS392)
[Canada vs. Korea - BSE (WT/DS391)]
Japan vs. Korea – Radionuclides (WT/DS495)

Food safety + plant and animal health: (biodiversity considerations)
US/Canada/Argentina vs. EC - GMOs (WT/DS291, 292, 293)

Animal health:
Canada / US vs. Australia - Salmon (WT/DS18, 21)
US vs. India – Avian Influenza (WT/DS430)
Argentina vs. US – Foot-and-Mouth Disease (FMD) (WT/DS447)
EU vs. Russia – African Swine Fever (WT/DS475)
Brazil vs. Indonesia – Chicken (WT/DS484)

Plant protection:
US vs. Japan - Variety Testing (WT/DS76)
US vs. Japan – Fire blight (WT/DS245)
New Zealand vs. Australia - Apples (WT/DS367)
<table>
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<tr>
<th>Case/Article</th>
<th>Scientific justification (2.2 / 5.7)</th>
<th>Harmonization (3.1 – 3.3)</th>
<th>Equivalence (4)</th>
<th>Risk assessment (5.1- 5.3)</th>
<th>Consistency (5.5)</th>
<th>Least trade restrictive (5.6)</th>
<th>Regionalization (6)</th>
<th>Transparency (7 / Annex B)</th>
<th>Approval proced. (8 / Annex C)</th>
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Note: The table indicates the presence or absence of case or article with corresponding references.
US – Poultry (DS392)

Parties & calendar

Complainant: China

Third Parties: Brazil, Chinese Taipei, EU, Guatemala, Korea, Turkey

Panel established: 31 July 2009

Panel report issued: 26 July 2010

Report adopted by DSB: 25 October 2010
US – Poultry (DS392)

*Disputed measure*

- Section 727 of the Agriculture Appropriations Act of 2009 ("AAA") – restricted funds to establish or implement rules allowing the importation of poultry products from China.

- Joint Explanatory Statement: “There remain very serious concerns about contaminated foods from China ...”

- Question: SPS measure (see Annex A(1))? Panel: YES.

- NO EXPERTS CONSULTED
US – Poultry (DS392)

Findings – equivalence (Article 4)

- US: Section 727 part of an equivalence regime and subject only to Article 4

- Panel: Article 4 not applied to the exclusion of other relevant provisions, not “in a vacuum”

- Equivalence not to be read in isolation to other provisions
US – Poultry (DS392)

Findings – Equivalence (Decision G/SPS/19/Rev.2)

- Not binding, does not determine the scope of Art. 4
- Members' own understanding of implementation and relationship of Article 4 with rest of the SPS Agreement
- Implies that equivalence measures should also comply with the other relevant provisions of SPS Agreement
THANK YOU!

rolando.alcala@wto.org

SPS gateway
http://www.wto.org/sps