

**REGULATORY CONFLICTS THAT LEAD TO TRADE DISPUTES:  
IMPORTANT, BUT ARE THEY RESOLVABLE?**

*Linda R. Horton, Partner, Hogan & Hartson LLP*

**I. SPS ISSUES ARE BECOME INCREASINGLY PREVALENT TODAY, LEADING TO AN UPTICK IN WTO CASES AND TRADE IRRITANTS**

- A. Concerns over food safety and the lack of international food standards has caused an increase in trade restrictive measures. Many of these are motivated by substantial and justified concerns about product safety, while others may be attributable to prejudice against foreign-sourced products, or even economic concerns in the current recession.
- B. Ongoing WTO cases include *EC – Beef Hormones*, the *EC – Poultry Import Restrictions* consultations requested by the United States in January 2009, and the recently announced *US – Poultry Ban* consultations requested by China.
- C. Other recent SPS issues include China’s tainted milk scandal in 2008, a pending WTO case against EC poultry restrictions by the United States, and a variety of measures imposed by Russia and China ostensibly due to the recent “pig flu.”

**II. SPS ISSUES ARE COMPLICATED AND LONG-LASTING – EXAMPLE IS EC – BEEF HORMONES**

- A. Lengthy WTO proceedings, now more than a decade without resolution.
- B. Intensive EC compliance procedures, which included the gathering of additional evidence and arguments about whether “new science” has yielded different results.
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**III. WTO AND DOMESTIC REGULATORY ISSUES: A FORMER REGULATOR’S PERSPECTIVE**

- A. Standard of review/burden of proof
- B. Overview of the FDA regulatory system –gathering of evidence, the internal decision-making process, stakeholder involvement, transparency, judicial review.
- C. Assessment of the scientific evidence
  1. U.S. administrative law includes the notion that the administrative agency should be the finder of fact.
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  3. WTO panel reports in which trade law experts make findings about asbestos safety seem odd to regulators (Canada v. EC TBT case)

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- D. Deference-worthiness of measure or regulation:
- Can principles from US administrative law of
- (a) an administrative record to document the scientific basis for a requirement, along with
  - (b) fair notice and comment procedures, allowing any interested person to present contrary scientific evidence
  - (c) final regulation accompanied by document responding to each significant comment
- make the resulting measure or regulation more worthy of deference in WTO proceedings (as in a US case involving judicial review of agency action)?
- D. There is no “precautionary principle” in the SPS agreement beyond the time-limited Article 5.7 provision. Yet all effective regulators use precautionary approaches, hopefully based on science. What are the limits? Consider the current swine flu situation. The WHO and OIE say that there is no risk of disease from pork yet some countries are blocking Mexican pork.
- E. Under the TBT agreement, technical regulations must be notified to the WTO.
1. However, most countries don’t notify proposed legislation or statutes. Do trading partners have sufficient opportunity to comment on proposed legislation in other countries?
  2. The rationale is that notification/participation by trading partners can occur at the stage where the statute is being implemented, through regulations.
  3. However, some statutes are so very prescriptive, e.g., U.S. Consumer Product Safety Amendments of 2008, that the legislator has severely limited the discretion of the regulatory body AND the ability of interested persons to change the regulation.
  4. The U.S. is not alone here. The EU is famous for intense internal negotiations on the content of regulations and directives (e.g., REACH) and being impervious to efforts of trading partners to request amendments.
  5. Even if the French “decree” banning asbestos at issue in the Canada v. EC case was notified, I wonder if there was an administrative record or a meaningful opportunity for the Canadian government or Canadian asbestos companies to comment.