European Journal of Risk Regulation (2024), **15**, 966–984
doi:10.1017/err.2024.7

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

The Right to Refuse Equivalence of Sanitary and Phytosanitary Measures: Trading on Regulatory Trust?

Christian Delev[1] and Jochelle Greaves Siew[2]

[1]University of Bristol Law School, Bristol, UK and [2]University of Southern California Sol Price School of Public Policy, Los Angeles, CA, USA
Corresponding author: Christian Delev; Email: christian.delev@bristol.ac.uk

Abstract

Equivalence is an essential discipline for liberalising trade between States whose sanitary and phytosanitary (SPS) measures are based on divergent regulatory approaches. During the Uruguay Round negotiations, "equivalence" under the SPS Agreement was regarded by negotiators as being "of great importance", and it was even considered to establish a right for exporting States. In practice, the discipline has remained ineffective, with only thirty-six equivalence recognition decisions made since 1995. This article argues that the underperformance of equivalence as an obligation is structural in nature: in effect, the SPS Agreement establishes a conditional right of importing Members to refuse equivalence requests. As such, exporting Members only gain equivalence protection where they either demonstrate that their measures (1) meet the importing Member's appropriate level of protection or (2) achieve the same level of protection as parties to recognition agreements. Finally, the need for fostering regulatory trust between domestic SPS regulatory agencies is underscored as a prerequisite for achieving broader equivalence recognition.

Keywords: Regulatory cooperation; regulatory diplomacy; regulatory policymaking; regulatory trust; SPS Agreement; SPS equivalence

I. Introduction

Equivalence is a foundational discipline of international trade law for ensuring that product-related measures taken for the protection of human, animal and plant welfare are not used as barriers to international trade. The obligation, in brief, requires importing States to recognise as equivalent sanitary and phytosanitary (SPS) measures adopted by exporting States where such measures meet the importing State's appropriate level of protection (ALOP). At first sight, equivalence appears to be a deceptively high watermark for the deep integration of international trade in light of – or perhaps despite – States' typically divergent SPS measures, particularly in sensitive policy areas including food safety and wildlife protection.[1] Indeed, during the Uruguay Round negotiations that eventually led to the establishment of the World Trade Organization (WTO), various

[1] Although equivalence recognition is a significant tool for achieving deep integration, there are alternatives available. Members may choose to harmonise their SPS measures under Art 3 Agreement on the Application of Sanitary and Phytosanitary Measures (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 493 (SPS Agreement) to achieve deep economic integration. States may also mutually recognise their SPS measures ("functional equivalence") within regional trade agreements, particularly in agreements negotiated by the European Union. See discussion in JHH Weiler, "Mutual Recognition, Functional Equivalence and Harmonization

delegations held that the discipline is "of great importance" for protecting Members' regulatory differences and "should be recognized to a larger extent" where harmonisation "was not possible".[2] One delegation went further and even framed this as a question of protecting an exporting Member's "right", arguing[3]:

> [i]t should be the right of exporting countries to use different techniques if they could demonstrate that they achieved similar results. However, if the exporter were using an internationally agreed method or standard, the importer should bear the onus of justifying why it was not acceptable.

In practice, Members' high hopes that the duty to grant equivalence would become a tool for enabling economic integration have failed to materialise. At the time of writing, only eleven notifications of equivalence recognition have been made by Members to the SPS Committee.[4] This is not to say that the issue is either uncontentious or unimportant for Members. As the 2020 Review of the Operation and Implementation of the SPS Agreement highlights, Members shared their broad-ranging concerns over the limited extent to which equivalence had been granted for SPS measures and systems alike and the need for transparency around equivalence recognition to the SPS Committee.[5]

What explains the practical weakness of SPS equivalence as a discipline for liberalising international trade? In addition to importing States' pursuit of trade policies favouring domestic producers, a common explanation offered is that the rules and procedures necessary to ensure equivalence are excessively onerous to satisfy, particularly by developing country Members. Echols, for instance, has argued that while "the text of Article 4 is deceptively simple", the rules governing equivalence recognition are characterised by "unworkable complexity", and Echols suggested that "Article 4.2 type agreements, mutual recognition agreements and as-yet-undefined market access tools, might fill the void".[6] Moreover, various Members have considered this to be a technical question and pointed to the need for harmonising approaches and adopting further SPS Committee guidelines.[7]

This article suggests that it is the structure of the obligation to grant equivalence – beyond the technical difficulties associated with proving equivalence – that prevents deeper economic integration based on equivalence recognition. It argues that

in the Evolution of the European Common Market and the WTO" in F Kostoris and P Schioppa (eds), *The Principle of Mutual Recognition in the European Integration Process* (London, Palgrave Macmillan 2005).

[2] GATT, "Summary of the Main Points Raised at the Third Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers – Note by the Secretariat" (17 October 1989) MTN.GNG/NG5/WGSP/W/6, 2, para 3; GATT, "Summary of the Main Points Raised at the First Meeting of the Working Party on Sanitary and Phytosanitary Regulation and Barriers – Note by the Secretariat" (12 October 1988) MTN.GNG/NG5/WGSP/W/1, para 10.

[3] GATT, "Summary of the Main Points Raised at the Seventh Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers" (31 May 1990) MTN.GNG/NG5/WGSP/W/22, para 10.

[4] This figure is based on a review of documents belonging to the G/SPS/N/EQV/Member/ series of notifications to the SPS Committee of the WTO available through WTO, "WTO Documents Online" <docs.wto.org> (last accessed 29 January 2024). Of the notifications reviewed, there are six decisions by a developed country Member granting equivalence to a developing country Member, three decisions by a developed country Member granting equivalence to a developed country Member and two equivalence recognition decisions by a developing country Member granting equivalence to a developed country Member. The most notifications were made by the USA (eight notifications), whereas the Dominican Republic, New Zealand and Panama each made one notification.

[5] WTO, "Review of the Operation and Implementation of the SPS Agreement – Part A" (3 August 2020) G/SPS/64, paras 4.4, 4.10–4.11 (Fifth Review).

[6] MA Echols, "Equivalence and Risk Regulation under the World Trade Organization's SPS Agreement" in MD Prévost and G van Calster (eds), *Research Handbook on Environment, Health and the WTO* (Cheltenham, Edward Elgar 2013) pp 80–82.

[7] Fifth Review, supra, note 5, paras 4.4–4.11.

international trade law effectively creates a broad and well-defined right of importing States to refuse to recognise the equivalence of exporting States' SPS measures. Given the limited scope and structure of equivalence obligations, the right to refuse equivalence is often exercised by importing States particularly where there is limited regulatory trust with exporting States. Accordingly, the practical implications of this right for achieving regulatory cooperation between States are examined. Section II considers how the right to refuse equivalence is established under the SPS Agreement and where its limits lie. Section III examines the policy preconditions for the adoption of equivalence determinations and discusses the broader implications of the right to refuse equivalence of SPS measures. It then proposes that, under the existing legal framework of the SPS Agreement, ensuring trust between domestic SPS regulatory agencies has become an essential precondition for achieving broader equivalence recognition within this sensitive trade policy area, and it examines strategies and policy options to enhance trust. Finally, a summary of the argument is presented in Section IV.

II. Refusing equivalence requests under the SPS Agreement

1. *Framing the right to refuse equivalence*

The ability of WTO Members to regulate trade in goods for the protection of health is clearly embedded within the WTO covered agreements. The general exception found in Article XX(b) General Agreement on Tariffs and Trade (GATT), for instance, conditionally permits Members to adopt measures "necessary to protect human, animal or plant life or health" where this would otherwise breach their obligations under the GATT.[8] As succinctly explained by Viñuales[9]:

> Conceptually, this clause can be characterized as an exception *stricto sensu* in that its operation assumes a prior finding of inconsistency with a primary norm. The distinction between the two inquiries, one relating to the breach of primary norm ... and the other focusing on whether the breach can be justified, has been consistently emphasized by the WTO Appellate Body.

By contrast to the GATT general exception, Article 2.1 SPS Agreement expressly recognises Members' conditional "right" to adopt "necessary" SPS measures, subject to their obligations under the SPS Agreement being satisfied.[10] This framing of the relationship between Members' rights and duties appears to carry significant weight for how all obligations under the SPS Agreement are envisaged, as evidenced by the provision's heading ("Basic Rights and Obligations"). In *US – Poultry (China)*, the panel relied on the heading to argue that "obligations in Article 2 inform all of the SPS Agreement".[11] There is no reason why the same argument cannot by analogy be extended to the conditional rights established under Article 2.[12] In fact, it

[8] Art XX(b) General Agreement on Tariffs and Trade 1994 (adopted 14 April 1994, entered into force 1 January 1995) 1867 UNTS 187 (GATT).

[9] JE Viñuales, "Seven Ways of Escaping a Rule: Of Exceptions and Their Avatars in International Law" in L Bartels and F Paddeu (eds), *Exceptions in International Law* (Oxford, Oxford University Press 2020) p 73.

[10] Importantly, Art 2.1 SPS Agreement frames the "right" in the conditional terms "provided that such measures are not inconsistent with the provisions of this Agreement".

[11] Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China* (adopted 25 October 2010) WT/DS392/R, para 7.142 (Panel, *US – Poultry (China)*).

[12] This relationship between Arts 2.1 and 4 SPS Agreement is implicitly recognised by the SPS Committee, particularly when addressing questions of burden of proof, in SPS Committee, "Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures" (23 July 2004) G/SPS/19/Rev.2, preamble, para 4 (Equivalence Decision).

appears to be reflected in the subsequent practice of Members in implementing the SPS Agreement.[13] Applying the principle to questions of equivalence, importing Members maintain the right to reject equivalence requests of SPS measures so long as their decision to do so is consistent with their obligations under the SPS Agreement.[14]

2. The limits of the obligation to grant equivalence

Given this conditional formulation of Members' right to regulate for the protection of health, it is important to first identify the circumstances in which importing Members are required under Article 4 to grant equivalence to SPS measures adopted by exporting Members. The principal obligation is found in the first sentence of Article 4.1 SPS Agreement, which states[15]:

> 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.*

The conditional framing of the discipline further indicates that there is a presumption that importing Members may refuse equivalence requests. The exercise of this right, however, depends on whether the exporting Member satisfies their burden of proof. For the equivalence of their SPS measures to be recognised, exporting Members are first required to "objectively" show that they "achieve" the importing Member's ALOP.[16] As such, exporting Members must provide sufficient scientific evidence to demonstrate to the importing Member that their chosen SPS measures would provide protection that is equivalent to the latter. Once this burden is satisfied, importing Members must comply with their obligation of result and grant equivalence.

As already highlighted, there are a number of practical complications that emerge from the process of determining equivalence. Notably, providing evidence may create technical obstacles for exporting Members that take time and resources to be overcome, particularly where there is insufficient scientific evidence that is readily available.[17] Moreover, complications may arise even where evidence is provided by the exporting Member to demonstrate that their measures achieve sufficient protection. The importing and exporting Members may disagree over whether the evidence provided "objectively demonstrates" equivalence, for instance, because they rely on different metrics or where

[13] United Kingdom Trade and Agriculture Commission, "Advice to the Secretary of State for International Trade on the UK-Australia Free Trade Agreement" (Department for International Trade, April 2022) 19 <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1068872/trade-and-agriculture-commission-advice-to-the-secretary-of-state-for-international-trade-on-the-uk-australia-free-trade-agreement.pdf> (last accessed 29 January 2024) ("In practice, so far, however, importing WTO Members have operated on the basis that they have the right to reject equivalence requests").

[14] This normative interaction is broadly confirmed in Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products* (adopted 19 June 2015) WT/DS430/AB/R, para 5.21.

[15] Art 4.1 SPS Agreement (emphasis added). Panel, *US – Poultry (China)*, para 7.139 confirms that equivalence is further regulated by Arts 2 and 5 SPS Agreement.

[16] O Landwehr, "Article 4 SPS" in R Wolfrum, P-T Stoll and A Seibert-Fohr (eds), *WTO – Technical Barriers and SPS Measures* (Leiden, Brill 2007) p 433, at para 20.

[17] K Das, "Coping with SPS Challenges in India: WTO and Beyond" (2008) 11(4) Journal of International Economic Law 971, 1010–15 discussing the practical difficulties of exporting Members demonstrating equivalence. Importantly, the SPS Committee has suggested that products "historically imported from the exporting Member" may be subject to an accelerated procedure based on the importing Member's existing "information" and "confidence": Equivalence Decision, para 5.

there is discrepancy in the value attached to certain types of scientific and technical evidence by different regulators.[18] Likewise, although the importing Member must reach its assessment of equivalence in good faith, the time taken to make a determination by domestic regulators could be lengthy and inadvertently cause trade frictions in the intermediate period for the exporting Member's producers.[19]

Turning to the broader structure of equivalence, however, it is first important to address a preliminary point. Although each importing Member retains the right to determine their own ALOP, such a determination is subject chiefly to the conditions found in Article 5.[20] Members are thus required to "take into account", amongst other factors, the "available scientific evidence" and "relevant economic factors".[21] In interpreting Article 5, the Appellate Body in *Australia – Salmon* further clarified that (1) there is an "implicit" obligation for Members to determine their own ALOP and (2) it can be framed either quantitatively or qualitatively but must nonetheless satisfy certain standards of clarity.[22] Unfortunately, although the Appellate Body further noted that the ALOP may be established based on Members' measures where no ALOP is adopted, the practical application of this approach by panels has been less than consistent.[23] Moreover, Annex B of the SPS Agreement establishes additional transparency requirements relating to the public availability of Members' SPS regulations and the creation of enquiry points.[24] These obligations ensure that exporters and other "interested parties" are aware of an importing Member's SPS measures, and they provide a key condition for regulatory trust and cooperation between Members.[25]

The terse wording of Article 4.1 leaves two crucial questions open: first, does the obligation only extend to SPS measures or could it be applied to SPS systems comprising various complementary measures? Second, under what circumstances does an exporting Member's measure "achieve" the importing Member's ALOP? As discussed below, these

[18] Although WTO panels have jurisdiction to "make ... an objective assessment of the facts of the case" per Art 11 Understanding on Rules and Procedures Governing the Settlement of Disputes (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401, this is seemingly restricted to whether the importing Member has acted in good faith in reaching its determination based on the evidence provided. Ultimately, the importing Member retains the responsibility to reach its determination per Art 4.1 SPS Agreement. See, on related questions over the role of panels in scientific disagreements, A Alemanno, "The Dialogue between Judges & Experts in the EU and WTO" in F Fontanelli, G Martinico and P Carrozza (eds), *Shaping Rule of Law through Dialogue – International and Supranational Experiences* (Zutphen, Europa Law Publishing 2010).

[19] Issues regarding length of assessments have further been raised in the context of equivalence recognition agreements as well: see, illustratively, SPS Committee, "Summary of the Meeting of 3–5 November 2021" (8 March 2022) G/SPS/R/104, paras 3.168–3.170.

[20] Art 5 introduces stricter disciplines when compared with the necessity test under Art XX(b) GATT, which requires the least trade-restrictive means to be resorted to depending particularly on Members' technical capacity, which recognises "the fundamental principle is the right that WTO Members have to determine the level of protection they consider appropriate in a given context" per Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* (adopted 17 December 2007) WT/DS332/AB/R, para 210. See further, on the relevance of proportionality under the SPS Agreement, C Downes, "Worth Shopping Around? Defending Regulatory Autonomy under the SPS and TBT Agreements" (2015) 14(4) World Trade Review 553, 560–77.

[21] Art 5(2) and (3) SPS Agreement.

[22] Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* (adopted 6 November 1998) WT/DS18/AB/R, paras 205–207 (Appellate Body Report, *Australia – Salmon*) notably holding that the ALOP cannot have "such vagueness or equivocation that the application of the relevant provisions of the SPS Agreement ... becomes impossible".

[23] ibid, para 207. For a discussion, see Y Rovnov, "Appropriate Level of Protection: The Most Misconceived Notion of WTO Law" (2021) 31(4) European Journal of International Law 1343, 1345–59.

[24] SPS Agreement, Annex B, paras 1–2, 3(c).

[25] MA Karttunen, *Transparency in the WTO SPS and TBT Agreements: The Real Jewel in the Crown* (Cambridge, Cambridge University Press 2020) pp 47–51.

points carry significant implications for the effectiveness of Article 4.1 as an obligation in fostering deep trade integration.

a. The scope of Article 4.1 SPS Agreement

Turning to the first question, Article 4.1 adopts the phrase "[SPS] measures" to define the material scope of the obligation. Annex A(1) supports a narrower view of the term "measure" to mean individual SPS measures, as opposed to SPS systems more broadly.[26] Similarly, the definition found in Annex A(1) has been interpreted to extend to other obligations under the SPS Agreement.[27] This approach has been contrasted with the meaning of the term used in the Equivalence Decision of the SPS Committee or the non-binding Codex Alimentarius Commission Guidelines on Equivalence, the former stating that equivalence "can" be granted to measures or entire systems.[28] Upon closer inspection, however, there does not seem to be any clear conflict between these instruments. Notably, the Equivalence Decision itself only provides guidelines on implementation, and the precise wording merely advises on how importing Members may recognise SPS systems should they choose to do so without extending the obligation under Article 4.1.[29]

b. Satisfying the importing Member's appropriate level of protection

The second question chiefly concerns whether exporting Members' SPS measures would satisfy the importing Member's ALOP, where the latter sets a higher standard of protection than is achieved by the latter's own adopted SPS measures.[30] This issue stems from the early conceptual distinction drawn between ALOP and a Member's SPS measures in the *Australia – Salmon* Appellate Body report.[31]

One view that emerged from the distinction holds that failure to achieve the importing Member's ALOP would in any circumstance fall outside of the scope of the obligation to grant equivalence. The chief justification for such an interpretation is textual[32]: if the dichotomy suggested by the Appellate Body is accurate and the first sentence of Article 4.1 expressly refers to the importing Member's ALOP, then this should be the only relevant benchmark in line with Article 31(1) Vienna Convention on the Law of Treaties (VCLT). Notably, Scott contends that following the logic of the *Australia – Salmon* report,

[26] An SPS systems approach "requires two or more measures that are independent of each other, and may include any number of measures that are dependent on each other" per IPPC, "The Use of Integrated Measures in a Systems Approach for Pest Risk Management" (2019) <www.fao.org/3/y4221e/y4221e.pdf> (last accessed 29 January 2024).

[27] Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (adopted 21 November 2006) WT/DS291/R; WT/DS292/R; WT/DS293/R, paras 7.147–7.149 (Panel, *EC – Biotech*) considering Annex A(1) before turning to Arts 2, 5, 7 and 8 SPS Agreement.

[28] Echols, supra, note 6, 84–85. See Equivalence Decision, para 1; Codex Alimentarius Commission, "Guidelines on the Judgement of Equivalence of Sanitary Measures associated with Food Inspection and Certification Systems" Cac/Gl 53-2003 (2003), passim <www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FStandards%252FCXG%2B53-2003%252FCXG_053e.pdf> (last accessed 29 January 2024) (Codex Alimentarius Commission Guidelines).

[29] Compare the first sentence of Equivalence Decision, para 1, which addresses when Members "can be accepted for a specific measure … or on a systems-wide basis", with the second sentence on when Members "shall … seek to accept the equivalence of a measure …".

[30] SPS Committee, "Equivalence: Interpretation of Paragraphs 5, 6 and 7 of Decision G/SPS/19 on the Implementation of Article 4 of The Agreement on the Application of Sanitary and Phytosanitary Measures" (19 June 2002) G/SPS/GEN/331, para 11. See also J Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (Oxford, Oxford University Press 2009) pp 166–67.

[31] Appellate Body Report, *Australia – Salmon*, paras 200–01.

[32] Art 31(1) Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

"an exporting Member's measures may actually achieve equal or greater protective effects than those of the importing Member, but still be denied recognition of equivalence, because they fail to achieve the importing Member's deemed level of protection".[33] At the same time, this reading of *Australia – Salmon* appears to contradict the first subordinate clause of Article 4.1, first sentence, which implies (through the phrase "even if these measures differ") that identical measures adopted by both importing and exporting Members concerning the same SPS issue would generally be equivalent.

The more persuasive view, however, is that it is sufficient for the exporting Member's SPS measures to merely satisfy the importing Member's ALOP *to the extent* achieved by the latter's own SPS measures. There are broadly three reasons to support this view: (1) the context and purpose of the SPS Agreement; (2) the practice of the SPS Committee; and (3) the Uruguay Round negotiating history. First, taking a contextual view of the SPS Agreement "as a whole", Landwehr argues that the "same" level of protection as the importing Member must be achieved by the exporting Member's measures to gain equivalence.[34] However, this argument could be understood more sharply in teleological terms. The preamble to the SPS Agreement supports this interpretation by referring to the "desir[e] to guide the development, adoption and enforcement of [SPS] measures in order to minimize their negative effects on trade" and the "special difficulties" that "developing country Members" encounter in satisfying developed Members' SPS measures.[35] If Article 4.1 were narrowly interpreted, then importing Members could hypothetically determine their ALOP – even if informed by scientific and economic factors – so as to exclude imports from developing Members with similar regulatory capacities. Following this purposive argument, the degree to which the importing Member's measures achieve its own ALOP should serve as an appropriate *de minimis* benchmark to prevent the unjustifiably protectionist use of SPS measures.[36]

Second, this latter view has been adopted by the SPS Committee. In its Equivalence Decision, whilst noting that equivalence "does not require duplication or sameness of measures", the Committee states that "if the exporting Member demonstrates ... that its measure has *the same effect* in achieving the objective as the importing Member's measure, the importing Member *should recognize both measures as equivalent*".[37] Accordingly, where an exporting Member's measures are demonstrated to have objectively equivalent effects to those of the importing Member, then the latter is under an obligation to accept the equivalence request. The extent to which the Decision is relevant for the interpretation of Article 4, however, depends on whether it could qualify as either subsequent practice or subsequent agreement for the purposes of Article 31(3) VCLT.[38]

Finally, this position found support from various Members during the Uruguay Round negotiations. As shown by the *travaux preparatoires* of the SPS Agreement, the European Communities, Nordic and Japanese delegations supported comparing the exporting

[33] Scott, supra, note 30, 166–67.

[34] Landwehr, supra, note 16, 432, at para 17. Notably, Scott, supra, note 30, 167 points to how this latter approach "is consistent with the principle of non-discrimination embodied in Article 2.3" SPS Agreement.

[35] Preamble, SPS Agreement.

[36] To "achieve" means to "successfully bring about or reach (a desired objective or result) by effort, skill or courage": A Stevenson (ed.), *Oxford Dictionary of English* (3rd edition, Oxford, Oxford University Press 2010) p 15.

[37] Equivalence Decision, preamble and para 7 (emphasis added).

[38] Panel, *US – Poultry (China)*, para 7.136 ambiguously determines the interpretative value of the Decision, stating that it "does not determine the scope of Article 4" and at the same time "expands on the Members' own understanding of how Article 4 relates to the rest of the SPS Agreement and how it is to be implemented". On the significance of WTO Committee Decisions for interpreting the covered agreements based on Art 31(3) VCLT, see the discussion in I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford, Oxford University Press 2009) pp 340–43, 348; Scott, supra, note 30, 61–74. See also L Gruszcynski, *Regulating Health and Environmental Risks under WTO Law: A Critical Analysis of the SPS Agreement* (Oxford, Oxford University Press 2010) p 267.

Member's SPS measures with the level of protection achieved by the importing Member's measures.[39] Other delegates, including the influential Cairns Group, recognised the distinction between a Member's SPS measure and their ALOP and emphasised that the correct comparator should be the extent to which the SPS measures of both the exporting and importing Members achieve the latter's ALOP.[40] These positions were clearly reflected in the drafting of the agreement itself. The penultimate draft version of Article 4 and clarification of the term "equivalence" both referred expressly to equal levels of protection being achieved by the importing and exporting Members' SPS measures.[41] Crucially, a negative inference cannot be drawn from the removal of these clarifications in the adopted text since none of the negotiating delegations favoured an approach drawn on the assumptions in *Australia – Salmon*.[42]

3. *Equivalence recognition agreements*

Under the SPS Agreement, the right of an importing Member to refuse to grant equivalence to an exporting Member's SPS measures cannot be exercised where an agreement on equivalence has been reached pursuant to Article 4.2. This is a result of the principle of *pacta sunt servanda* insofar as such agreements establish legally binding obligations. Unilateral declarations of equivalence may similarly be legally binding, although this would be only to the extent that they create obligations as independent sources of international law rather than under the SPS Agreement itself.[43]

When concluding recognition agreements, Members are required to comply with the principle of non-discrimination. Mavroidis, for instance, suggests "WTO members that are not parties to [a recognition agreement] can request that the [agreement] be extended to them if they can establish that their regulatory framework is equivalent to those of the [agreement] partners" by citing Article 4.[44] Although the text of Article 4.2 does not specifically address this issue, the principle of non-discrimination may apply to equivalence regimes by virtue of Article 2.3 operating in conjunction with Article 4.[45]

Article 2.3 requires importing Members to "ensure that their [SPS] measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar

[39] GATT, "Submission of the European Communities on Sanitary and Phytosanitary Regulations and Measures" (29 December 1989) MTN.GNG/NG5/W/146, 3; GATT, "Form and Disposal of the Agreement on Sanitary and Phytosanitary Regulations and Barriers (SPS Agreement) – Note by the Nordic Delegations" (12 February 1990) MTN.GNG/NG5/WGSP/W/10, 3 and Draft Article 14.1 in GATT, "Draft Agreement on Sanitary and Phytosanitary Measures – Note by the Nordic Countries" (28 May 1990) MTN.GNG/NG5/WGSP/W/21, 11; GATT, "Supplementary Submission of Japan on Sanitary and Phytosanitary Regulations and Measures" (7 March 1990) MTN.GNG/NG5/W/156, para 2.

[40] GATT, "Sanitary and Phytosanitary Issues – Communication from the Cairns Group" (2 October 1989) MTN.GNG/NG5/W/112, 3, para 10.

[41] GATT, "Draft Text for the Framework of an Agreement on Sanitary and Phytosanitary Measures" (28 June 1990) MTN.GNG/NG5/WGSP/W/23, para 29 ("... provided the importing contracting party is satisfied that these measures result in a level of health assurance similar to that required by its own [SPS] measures") and Annex I, para 11 ("Equivalent – [SPS] measures which are not identical but which achieve similar results, including ensuring the appropriate level of health assurance").

[42] See table 6 for the summarised views of GATT delegates in "Synoptic Table of Proposals Relating to Key Concepts – Note by the Secretariat" (30 April 1990) MTN.GNG/NG5/WGSP/W/17.

[43] *Legal Status of Eastern Greenland*, PCIJ Series A/B No 53, 71–73; *Nuclear Tests Case (Australia v France)* [1974] ICJ Rep 253, para 46. See discussion in Landwehr, supra, note 16, 433, at para 19.

[44] PC Mavroidis, *The Regulation of International Trade, Volume 2: The WTO Agreements on Trade in Goods* (Cambridge, MA, MIT Press 2016) p 482.

[45] Panel, *US – Poultry (China)*, para 7.139. See, more broadly, LR Guardiola, "Reconciling Equivalence and Non-discrimination under the SPS Agreement" (2022) 32(3) Swiss Review of International and European Law 369, 390–94.

conditions prevail, including between their own territory and that of other Members".[46] Recognition agreements create preferential treatment for imports from Members that are parties, insofar as the covered SPS measures or systems are concerned, and would thus fall within the scope of the obligation. Crucially, Article 2.3 would not differentiate whether the recognition agreement affects the application of SPS measures or systems. This is because SPS systems are formed of various independent SPS measures, in the sense of Annex A(1), which are treated collectively under the recognition agreement itself.

Any exporting Members attempting to accede to existing equivalence recognition agreements must satisfy the "demanding exercise" of demonstrating the equivalent effects of their SPS measures (individually, or collectively where they operate as SPS systems) to the extent required of the initial parties to the agreement.[47] The principle of non-discrimination under Article 2.3, however, does not provide any opportunities for exporting Members to avoid meeting the burden of proof under Article 4 to benefit from equivalence determinations. Nonetheless, Article 2.3, second sentence, ensures that any Members that successfully satisfy their burden cannot be "arbitrarily or unjustifiably discriminate[d]" against where "identical or similar conditions prevail".[48] As such, the onus rests with the importing Member to provide a legitimate justification for refusing to grant equal treatment to exporting Members, where the latter has provided as much evidence as an exporting Member that is already a party to the equivalence recognition agreement.

The absence of any obligations to enter into such recognition agreements, as opposed to a mere obligation to "enter into consultations", may explain why so few have been concluded in practice. This is exacerbated by the policy consideration that entering into such an arrangement creates opportunities for third country exporting Members to request equivalence recognition by satisfying a lower burden of proof. Considering the language of Article 4.2 ("Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements"), the provision seems to establish an obligation of conduct.[49] As such, importing Members may ultimately refuse to enter into such agreements following consultations.[50] In this sense, the SPS Agreement disciplines should be seen as an attempt to facilitate (some of) the conditions for Members to consult on, negotiate and conclude equivalence recognition agreements.

III. Trade policy implications of the right to refuse equivalence: a matter of regulatory trust?

1. Implications of the right to refuse equivalence

Where States choose to exercise their right to refuse equivalence, this decision holds significant economic, international trade relations as well as consumer welfare implications. It is crucial to emphasise that this matter is far from being uncontroversial

[46] Art 2.3 SPS Agreement. See, notably, Appellate Body Report, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides* (adopted 29 April 2019) WT/DS495/AB/R, 5.57–5.93 stressing that Art 2.3 focuses on discrimination between Members where "identical or similar conditions prevail", as opposed to between like product groups. It is important to highlight that Art 2.3 further applies to other recognition arrangements beyond those directly envisaged under Art 4.2, particularly mutual recognition agreements.

[47] Mavroidis, supra, note 44, 482. Exporting Members attempting to accede to recognition agreements regarding SPS systems must show that their systems have the same effects as those of existing parties to the agreement. This is because the original parties had treated the covered SPS measures collectively as a "system" in establishing their equivalence.

[48] Art 2.3 SPS Agreement.

[49] Art 4.2 SPS Agreement.

[50] *Obligation to Negotiate Access to the Pacific* (Bolivia v Chile) (2018) ICJ Rep 507, para 148; *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys)* [1931] Series A/B No 42, 116.

or insignificant for WTO Members. A substantial portion of trade concerns – nearly 10% – presented before the SPS Committee revolves around discussions on complying with the obligation to grant equivalence to the SPS measures of exporting Members or the negotiation of equivalence agreements to resolve concerns.[51] Upon closer examination of the trade concerns scrutinised, it becomes evident that the impact of this issue extends broadly across the diverse spectrum of the WTO membership. An analysis of fifty-seven trade concerns reveals a widespread impact across the WTO membership.[52] In particular, developing country Members have voiced concerns about their limited ability to capitalise on equivalence arrangements in key export markets. In response, they have proactively sought to implement the WTO's legal framework in this area through the work of the SPS Committee.[53] This diverse distribution highlights the pervasive trust and equivalence challenges affecting trade dynamics amongst both developed and developing nations within the WTO framework. Within this context, we can explore the significant economic, trade relations and consumer welfare implications when States choose to exercise their right to refuse.

The exercise of the right to refuse equivalence can lead to trade disruptions and strained economic relations. Where States refuse to recognise the equivalence of SPS measures or systems, they choose to maintain regulatory barriers to trade that directly affect their trading partners. Such trade disruptions may carry significant economic consequences for exporting States. Foreign exporters notably suffer reduced market access, decreased revenues and increased compliance costs associated with undergoing conformity assessments with the importing States' SPS regime.

For the importing State itself, exercising the right to refuse equivalence may be explained by pressure placed by influential domestic producers, such as the agricultural sector, particularly where they may face significant price competition.[54] At the same time, choosing to exercise the right where there is no justified human, animal or plant welfare concern emerging from importing products that conform to exporting States' SPS measures hurts domestic consumers where they bear the cost of higher-priced domestic products. Similarly, the importing State may face regulatory distrust where it chooses not to cooperate over equivalence determination with its trading partners. This may risk straining economic relations and escalating disputes over SPS measures, particularly where the exporting States themselves choose not to engage in open dialogue in the long term through tit-for-tat strategies.[55]

[51] In total, 57 out of 575 trade concerns raised before the SPS Committee focus on compliance with Art 4, address equivalence determination without specifying Art 4 or examine equivalence recognition or the conclusion of equivalence agreements as solutions to a trade concern. These data were collected through a review of publicly available SPS Committee meeting documents through WTO, "Trade Concerns Database" <tradeconcerns.wto.org/en> (last accessed 29 January 2024).

[52] Of the fifty-seven trade concerns relating to equivalence analysed, twenty-three were brought by developing country Members against a developed country Member, eleven by developed country Members against a developed country Member, ten by developed country Members against a developing country Member, eight by developing country Members against a developing country Member, four by mixed groups of developed and developing country Members against a developed country Member and one by a mixed group of developing and developed country Members against a developing country Member. The Members raising the most equivalence-related concerns are China (fourteen), the EU (thirteen), the USA (nine), India (seven) and Argentina (five). The Members responding to the most equivalence-related concerns are the EU (fourteen), the USA (twelve), India (four), Australia (four), China (three) and Mexico (three).

[53] A Lang, "Regulatory 'Reliance' in Global Trade Governance" (2024) European Journal of Risk Regulation, forthcoming.

[54] AO Sykes, "Regulatory Protectionism and the Law of International Trade" (1999) 66(1) University of Chicago Law Review 1, 7–12.

[55] R Axelrod, "More Effective Choice in the Prisoner's Dilemma" (1980) 24 The Journal of Conflict Resolution 380.

Although the right to refuse equivalence can disrupt trade, it remains a pivotal tool for safeguarding public health and consumer protection in which neither trust nor distrust is presupposed.[56] When States exercise this right, having the freedom of choice to cooperate or not where there is insufficient evidence to establish equivalence, they may prioritise the consumer welfare of their citizens over economic interests.

This is particularly evident in cases involving products with unclear yet politicised health risks, such as genetically modified organisms (GMOs). Concerns over the safety of GMOs have sparked debates about their potential long-term effects on human health and the environment, placing pressure on domestic institutions to reflect these concerns.[57] As a result, States refusing to grant equivalence to their trading partners' SPS measures in these cases may aim to ensure that imported products adhere to their own health and safety standards, maintaining the integrity of their domestic food systems. Such a choice may reflect efforts by States at ensuring public welfare and their choice of pursuing a precautionary approach in the face of scientific uncertainties. However, striking a balance between these health concerns and trade interests remains a complex and technical challenge.

It is important to note that there exist regional variations in approaches to precautionary measures. For example, the European Union (EU) takes a different approach internally when it comes to precautionary measures in the food space. The EU is known for its stringent regulatory framework, often adopting precautionary measures to address potential risks, especially in areas such as genetically modified crops.[58] This difference in approach is influenced by various factors, including trust in regulatory structures, cultural attitudes towards risk and enforcement mechanisms. The EU's internal stance reflects its commitment to ensuring a high level of public health and safety, and it showcases the role of these structural and cultural variables in shaping the regional approach to SPS regulation.

In the context of international trade, these variations in approaches to precautionary measures can create complexities, as different regions may have distinct risk perceptions and regulatory cultures. Navigating these differences while addressing the potential politicisation of health risks related to GMOs is an ongoing challenge in the realm of SPS measures and trade.

2. *Trust as a precondition for broader equivalence recognition*

Regulatory trust refers to the belief and confidence that regulatory systems, standards and procedures implemented by different States are compatible and achieve similar health and safety objectives. Equivalence recognition involves acknowledging that the SPS measures of an exporting State are as effective as the importing State's, leading to reduced duplicative testing and certification processes and thereby facilitating smoother trade relations. Regulatory trust, much like the concepts of mutual trust and loyal cooperation, can allow equivalence agreements to be adopted instead of requiring States to overcome the practical hurdles of harmonising SPS measures across significantly varying national legal systems.[59]

[56] R Wolfrum, "International Law of Cooperation" in R Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam, North-Holland 1995) p 1242; H Wenander, "Recognition of Foreign Administrative Decisions" (2011) 71(4) Heidelberg Journal of International Law 760.

[57] MA Pollack and GC Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford, Oxford University Press 2009) pp 80–83; E Hernández-López, "Racializing Trade in Corn: México Fights Maíz Imports and GMOs" (2022) 25 Journal of International Economic Law 259.

[58] Pollack and Shaffer, supra, note 57, 42, 53–68.

[59] G Majone, *Regulating Europe* (Abingdon, Routledge 1996) pp 278–79.

Achieving successful equivalence recognition hinges upon establishing and cultivating trust amongst domestic SPS regulatory agencies. Building regulatory trust between these agencies acts as an essential precondition for achieving broader equivalence recognition within this intricate trade policy domain, as it bolsters confidence and cooperation amongst trading partners. The task of building trust amongst countries and regulatory bodies involves fostering transparency, promoting open dialogue and creating mechanisms for effective communication. In this article, to illustrate the significance of our contention, we will look at various practices geared towards leveraging regulatory trust that have been established in different regional contexts.

The EU stands as one of the most compelling models for mutual recognition in international trade. This success is attributed to a foundation of trust in its legal structures to manage regulatory divergence effectively. The EU represents a highly institutionalised context where regulatory trust operates as a precondition for equivalence recognition. Within its Single Market, Member States have built a comprehensive framework of legal and administrative structures that emphasises cooperation, harmonisation and trust amongst trading partners. This institutionalised approach allows for the mutual recognition of standards and regulations, enabling goods and services to be exported with minimal restrictions across Member States. The EU's legal institutions, particularly the Commission and Court of Justice, further ensure the consistent application of rules, fostering trust amongst Member States that their shared regulations will be upheld. This harmonisation serves as a valuable lesson, highlighting the importance of establishing common standards and regulations to facilitate international trade effectively. Although the EU's structure is distinct from the global scope of the WTO, the emphasis on regulatory alignment and harmonisation can offer insights into the benefits of mutual recognition in enhancing trade facilitation, particularly within other regional trade agreements. The EU experience illustrates how regulatory trust, underpinned by robust legal and institutional frameworks, can lead to the successful implementation of mutual recognition, the reduction of trade barriers and the facilitation of economic integration.

Firstly, transparency is a cornerstone of regulatory trust. It involves openly sharing information about regulations, standards and decision-making processes. When States are transparent about their SPS measures, it builds confidence amongst trading partners by ensuring that regulations are science-based and free from hidden agendas. Transparent practices help dispel suspicions of protectionism and facilitate a more predictable trading environment.[60] For instance, the SPS Agreement emphasises the importance of transparency by requiring Members to publish proposed SPS measures (Article 7), provide information on risk assessments (Articles 5.8 and 7) and establish enquiry points for providing information to interested Members (Annex B(3)). Ensuring access to information allows third-country Members to publicly scrutinise an importing Member's SPS measures in front of the SPS Committee or initiate disputes before the dispute settlement system. Similarly, various regional trade agreements also create obligations to audit relevant authorities or enter into technical consultations should a disagreement emerge. Regional trade agreements often introduce additional consultation requirements that extend the principles of transparency outlined in the SPS Agreement. In these agreements, countries commit to sharing information not only on their SPS measures but also on their trade-related regulations and standards. These requirements are designed to enhance regulatory trust amongst trading partners further. For example, provisions in many regional trade agreements mandate the exchange of information regarding proposed SPS measures, risk assessments and the establishment of consultation mechanisms.[61] This extension of transparency principles aligns with the broader goal

[60] Karttunen, supra, note 25, 47–51.
[61] ibid.

of fostering predictability and accountability in international trade relations, serving as a critical component of effective trade governance.

In addition, creating a forum for open and collaborative dialogue allows regulatory authorities and stakeholders to engage in constructive discussions. Regular consultations and exchanges of information enable parties to voice concerns, share best practices and address misunderstandings. Such platforms foster a shared understanding of trading partners' respective regulatory priorities and facilitate consensus-building. Thus, these platforms provide an opportunity to bridge differences and find common ground, thus building regulatory trust. For instance, the Asia-Pacific Economic Cooperation (APEC) has established working groups on SPS issues that bring together officials, experts and stakeholders to discuss strategies for achieving regulatory cooperation in the region.[62]

Coordinated audits and inspections represent a valuable strategy to enhance regulatory trust in the context of SPS measures. These activities involve joint assessment teams from trading partners conducting on-site evaluations of each other's SPS systems. By doing so, they foster a first-hand understanding of regulatory processes, contributing to the building of trust in equivalence recognition. Auditors and inspectors play a pivotal role in this process, as they have the opportunity to observe how SPS measures are implemented, enforced and monitored on the ground. This approach enables the identification of areas of compatibility and divergence, allowing for corrective actions to be taken.

To formalise and institutionalise such a system for inspections within regional trade agreements, we can draw inspiration from successful models, including mutual recognition agreement (MRA) annexes for technical barriers to trade (TBTs). Such MRA annexes provide a framework for mutual recognition of conformity assessment procedures related to technical regulations and standards. Similarly, within regional trade agreements or as standalone agreements, an SPS-specific annex or framework can be established that could outline the procedures, criteria and mechanisms for conducting joint audits and inspections.

The framework should define the roles and responsibilities of auditors and inspectors, specify the process for conducting inspections and establish clear criteria for equivalence recognition. Additionally, it can set up a mechanism for dispute resolution in case of disagreements during inspections. By formalising such a system, countries can ensure that inspections are conducted consistently, fairly and transparently. Moreover, the process can be accompanied by capacity-building programmes and information-sharing mechanisms to further enhance the effectiveness of these joint evaluations.

Taking a cue from the APEC's promotion of coordinated audits to build regulatory trust, regional trade agreements can adopt similar mechanisms to facilitate mutual learning and collaboration amongst Member economies. This approach not only strengthens trust but also contributes to a more seamless and harmonised approach to SPS measures in international trade. It aligns with the overarching goal of reducing barriers to trade and promoting economic cooperation between nations. Likewise, international standard-setting bodies, such as the Codex Alimentarius Commission or World Organisation for Animal Health, offer a space for governments, industry representatives and civil society to engage in dialogue on food safety and quality standards, which can lead to the establishment of common standards – a crucial aspect for mutual recognition in trade.

Although these structures are effective at facilitating international cooperation and consensus-building, there are concerns over the involvement and legitimacy of industry coalitions in such contexts.[63] These concerns are visible in debates around the protection

[62] APEC, *Sub-Committee on Standards and Conformance (SCSC)* (2021) <www.apec.org/Groups/Committee-on-Trade-and-Investment/Sub-Committee-on-Standards-and-Conformance> (last accessed 29 January 2024).

[63] D Tussie, "Trade Diplomacy" in A Cooper, J Heine and R Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford, Oxford University Press 2013) p 633; P Delimatsis, "Transnational Economic Activism and Private Regulatory Power" (2023) 26 Journal of International Economic Law 559, 563–64.

of public health and TBT measures, as reflected in the Codex Alimentarius Commission. For example, in debates over health warnings for sugary beverages, the involvement of major corporations, such as Coca Cola representing Mexico, has raised concerns about potential conflicts of interest.[64] In the context of SPS measures, having similar involvement of major corporations can lead to decisions that prioritise commercial interests over public health, raising questions about the legitimacy of such decisions and their alignment with the best interests of consumers. Although it may be less discussed within this context, these concerns are present, as evidenced by instances involving companies such as Monsanto and their relationship with regulatory bodies including the Joint WHO/FAO Expert Committee on Food Additives and the European Food Safety Authority (EFSA), and their influence on Codex standards.[65] Their involvement in the development of regulations and standards can raise doubts about the objectivity and impartiality of the standards being established, especially when it comes to sensitive issues such as GMOs. Striking a balance between private-sector participation and the broader public good is an ongoing challenge in ensuring the legitimacy and effectiveness of international standard-setting processes in areas related to food safety and public health.[66]

Moreover, MRAs are bilateral or multilateral agreements between countries to recognise each other's conformity assessment procedures, testing methods and certification processes, but they may also extend to SPS measures. MRAs and other equivalence agreements can reduce redundant testing and certification and streamline trade by acknowledging that equivalent regulatory systems can achieve the same level of protection. They serve as a building block of legitimacy for a State's regulatory system, and this instils trust between trading partners. For example, in 2017, the EU and the USA concluded a MRA for pharmaceutical good manufacturing practices, demonstrating sectoral trust in each other's regulatory systems.[67]

More notably, New Zealand and Australia have strategically leveraged their geographical proximity and shared interests to mutually recognise each other's food safety standards, building on the Trans-Tasman Mutual Recognition Arrangement.[68] The Trans-Tasman Mutual Recognition Agreement exemplifies how bilateral agreements can foster mutual recognition between countries, offering a practical illustration of the principles discussed. Both Australia and New Zealand have adopted a harmonisation approach under the Food Regulation Agreement, aligning their regulatory frameworks and standards to a considerable extent.[69] This harmonisation is reinforced by joint efforts to enhance scientific expertise and share best practices in risk assessment and management. Transparency and open dialogue have played a pivotal role in fostering trust between New

[64] SF Halabi, "The Codex Alimentarius Commission, Corporate Influence, and International Trade: A Perspective on FDA's Global Role" (2015) 41 American Journal of Law & Medicine 417.

[65] ibid.

[66] For a discussion of the subtle and nuanced pattern of relationships between State and non-State actors, see DC Esty and D Geradin, "Regulatory co-opetition" (2000) 3(2) Journal of International Economic Law 235, 238 describing the situation as one of "co-opetition" – "a mix of cooperation and competition both within and across governments and between government and non-governmental actors".

[67] Decision No 1/2017 of 1 March 2017 of the Joint Committee established under Art 14 of the Agreement on Mutual Recognition between the European Community and the United States of America, amending the Sectoral Annex for Pharmaceutical Good Manufacturing Practices [2017] OJ L58/36.

[68] Arrangement between the Australian Parties: the Commonwealth of Australia, the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania, the Australian Capital Territory, the Northern Territory of Australia, and New Zealand Relating to Trans-Tasman Mutual Recognition (adopted 14 June 1996, entered into on 9 July 1996) <www.dfat.gov.au/sites/default/files/ttmra.pdf> (last accessed 29 January 2024).

[69] Food Regulation Agreement (adopted 6 July 2010, entered into force 6 July 2010) <foodregulation.gov.au/internet/fr/publishing.nsf/Content/480670060E89F438CA257CED001BF485/$File/Food%20Regulation%20Agreement%206%20July%202010.pdf> (last accessed 29 January 2024).

Zealand and Australia. Regular consultations and information-sharing mechanisms have enabled both States to understand each other's regulatory priorities, scientific methodologies and risk assessment practices.[70] This open communication has contributed to a mutual understanding of each other's SPS measures and facilitated recognition of equivalence where the two States' SPS measures partially differ. Equivalence recognition between New Zealand and Australia has yielded tangible benefits, including streamlined trade flows, reduced administrative burdens and increased market access.[71] The harmonisation of food safety measures has accordingly minimised duplicative testing and inspection procedures, enhancing trade efficiency and cost-effectiveness for both States. Such agreements demonstrate regulatory alignment and contribute to mutual confidence and trust, which in turn may allow for expanded equivalence or mutual recognition commitments in other areas of SPS governance.

Moreover, supporting capacity-building and providing technical assistance to regulatory authorities in developing countries helps strengthen their ability to implement effective SPS measures. As pointed out by Lang, existing normative frameworks lack explicit provisions for the distinct circumstances of developing countries and fail to provide adequate guidance on addressing their development requirements.[72] Developed countries can offer expertise, training and resources to build regulatory capacity, enabling developing countries to effectively implement their SPS measures or harmonise them based on international standards. Initiatives such as the WTO Standards and Trade Development Facility or SPS committees under Regional Trade Agreements with allocated budgets may provide funding and technical assistance to help developing countries improve their capacity to effectively implement their SPS measures.[73] Collaborative capacity-building initiatives help regulatory agencies enhance their scientific and technical capabilities. Shared training programmes and exchanges strengthen trust by demonstrating a commitment to improving regulatory practices. These efforts may bolster regulatory systems and contribute to trust by ensuring that all Members have the necessary tools to adhere to global standards. Therefore, Members with newly developed infrastructures could be trusted to deliver a similar quality of conformity assessments as the domestic accredited bodies of their trading partners.

Similarly, establishing independent regulatory bodies free from political interference enhances regulatory trust. Consider, for example, one of the prominent regulatory disagreements between the EU and the USA: the *EC – Hormones* dispute. The EU's stringent regulations on the use of growth-promoting hormones in beef production have been a point of contention, leading to trade disputes and hindering effective regulatory cooperation. Although the USA employs a risk assessment approach that supports the safety of hormone-treated beef, the EU's reliance on the precautionary principle drives its more conservative stance. These stark differences in risk assessment methodologies and regulatory approaches have contributed to the lack of mutual acceptance of standards, impeding equivalence recognition in this critical area.[74] A mutually agreed solution to the dispute, replacing the earlier EU ban with a tariff-rate quota scheme, was only adopted in 2009.[75]

[70] Food Standards Australia New Zealand, *Annual Report, 2021-22* (2022) <www.foodstandards.gov.au/publications/Documents/FSANZ%20Annual%20Report%202021-22.pdf> (last accessed 29 January 2024).

[71] For a discussion of the extent of regulatory collaboration between Australia and New Zealand, see notably Food Standards Australia New Zealand, "The Analysis of Food-Related Health Risks" (2009) <www.foodstandards.govt.nz/publications/documents/Food%20Related%20Health%20Risks%20WEB_FA.pdf> (last accessed 29 January 2024).

[72] Lang, supra, note 53.

[73] Standards and Trade Development Facility <standardsfacility.org> (last accessed 29 January 2024).

[74] R Johnson, "The U.S.–EU Beef Hormone Dispute" (2015) <sgp.fas.org/crs/row/R40449.pdf> (last accessed 29 January 2024).

[75] WTO, "European Communities – Measures Concerning Meat and Meat Products (Hormones) – Joint Communication from the European Communities and the United States" (30 September 2009) WT/DS26/28.

Independent bodies would make decisions based on scientific evidence and risk assessments rather than political pressures. This fosters credibility and ensures that regulations are grounded in objectivity whilst also avoiding the pitfalls of a lack of agreed methodologies.[76] States must uphold science-driven risk assessments whilst exercising the right to refuse equivalence, ensuring that decisions are devoid of arbitrariness or veiled protectionism aimed at trade restrictions. For instance, the EFSA was established under Regulation 178/2002 and operates independently from the EU's political institutions to provide scientifically rigorous assessments of risks in the food chain.[77] This separation of functions builds trust in the regulatory process. Having such independent agencies conduct risk assessments allows for the WTO dispute settlement system, for instance, to remain a neural arbiter as opposed to an uncontrolled regulatory force.[78] Regulatory agencies' scientific competence and technical expertise play a pivotal role in engendering trust and depoliticising regulatory dialogue. To streamline the equivalence process, further efforts are required to establish harmonised standards for documentation and evidence requirements, as well as standardised on-site inspection protocols that can be applied across various jurisdictions.[79] This would help reduce the burden of multiple applications and processes.

By embedding certain structural elements and norms into the design of such independent bodies, including sound risk assessments and adherence to internationally recognised scientific methodologies, the transparency and credibility of regulatory decisions would be enhanced. The legitimacy and effectiveness of any independent body would also heavily rely on mechanisms that allow for cooperation with other independent bodies.

As presented, the implications of the right to refuse equivalence of SPS measures are profound and multifaceted. From trade disruptions and economic tensions to public health protection and regulatory autonomy, the exercise of this right reflects the intricate balance between national sovereignty and international cooperation. In particular, we must consider this from a developmental perspective, especially in relation to the interests of the Global South and its agricultural producers.

For Global South agricultural producers, the right to refuse equivalence can have significant implications. On the one hand, it can present trade disruptions and economic tensions, which can disproportionately affect economies that heavily rely on agricultural exports. These disruptions may hamper economic development and impact the livelihoods of small-scale farmers and rural communities. On the other hand, the right to refuse equivalence also serves as a critical tool for protecting public health and ensuring the safety of agricultural products, especially in cases where there are genuine concerns about the adequacy of SPS measures.

Balancing these interests requires transparent communication, adherence to science-based assessments and a commitment to resolving disputes through established mechanisms. In this context, it is imperative for both importing and exporting countries to engage in constructive dialogue to find common ground that allows for trade whilst addressing genuine concerns about health and safety. Development policies should consider implementing capacity-building programmes and technical assistance to help Global South agricultural producers meet the necessary standards, thereby facilitating their access to international markets and promoting economic growth.[80]

[76] Lang, supra, note 53.

[77] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/1.

[78] E Fisher, "Framing Risk Regulation: A Critical Reflection" (2013) 4 European Journal of Risk Regulation 129; V Heyvaert, "Governing Climate Change: Towards a New Paradigm for Risk Regulation" (2011) 74 The Modern Law Review 826.

[79] Lang, supra, note 53.

[80] ibid.

Recognizing the importance of sustainable development in the Global South, particularly in the agricultural sector, underscores the need to strike a delicate balance that ensures regulatory autonomy whilst fostering cooperation. It is in the collaborative efforts of nations and adherence to principles of fairness that the challenges and opportunities presented by the right to refuse equivalence can be effectively navigated, ultimately contributing to the growth and well-being of Global South agricultural producers.

Furthermore, the establishment of trade is not necessarily dependent on technical rules alone but rather on the facilitation of regulatory trust as a precondition for regulatory cooperation. Ensuring regulatory trust in the context of SPS measures involves a combination of mechanisms that promote transparency, open dialogue, mutual recognition, capacity-building and independent oversight. Establishing standardised risk assessment methodologies, sharing scientific information and promoting MRAs can help minimise conflicts and enhance harmonisation. These mechanisms contribute to a climate of cooperation in which regulatory authorities and stakeholders can work together to address disagreements and reduce barriers to trade created by SPS measures, particularly in the context of politically charged disputes over consumer, animal or plant welfare.

3. *Enhancing regulatory trust in SPS measures: strategies and policy recommendations*

Enhancing regulatory trust in the context of SPS measures could indeed benefit from more detailed strategies and mechanisms. This section briefly delves into some specific recommendations for policymakers to address this lack of trust – namely, four key approaches: programmatic funding and effective collaboration, regulatory diplomacy, trust assessment and confidence-building measures.

One of the fundamental strategies for enhancing regulatory trust is to advocate for increased programmatic funding, which supports collaborative efforts amongst nations. This approach involves allocating resources for collaborative initiatives, such as joint research projects, workshops and capacity-building programmes. Governments can encourage regulatory authorities to work together more effectively through these initiatives. Moreover, technical assistance and knowledge-sharing can foster a culture of cooperation. By investing in collaborative efforts, nations can promote transparency and open dialogue, which are key elements of regulatory trust.

Regulatory authorities often operate independently, making it crucial to emphasise the importance of regulator-to-regulator cooperation. Promoting platforms for dialogue and information exchange could bridge gaps and promote shared best practices. To achieve this, we can encourage the establishment of forums where regulators from different countries can discuss issues, share information and build personal relationships. This has been done broadly in the arena of international trade, for instance, through the establishment of the Trade and Technology Council (TTC). The TTC is a transatlantic political body that serves as a diplomatic forum to coordinate technology and trade policy between the USA and the EU.[81] Regulatory diplomacy facilitates the alignment of regulatory approaches, which, in turn, builds trust over time. This approach is particularly valuable in addressing politically charged disputes over the health implications of divergent SPS measures.

Nevertheless, increasing the number of international trade forums complicates the identification of a clear breach from specific rules by a trading partner. Under a single international regime, it is simpler for members to detect when a partner is straying from

[81] European Commission, "EU–US launch Trade and Technology Council to lead values-based global digital transformation" (2021) <ec.europa.eu/commission/presscorner/detail/en/IP_21_2990> (last accessed 29 January 2024).

established rules. However, when there are multiple, conflicting regimes addressing a particular issue, members can claim compliance with the regime that aligns most favourably with their interests, even if this means deviating from other regimes.[82]

Another novel and forward-thinking approach is to propose the concept of a "trust assessment." This assessment would run parallel to traditional risk assessments and be conducted by governments to measure the level of trust between trading partners, especially in agriculture and SPS trade. By mapping trust levels, policymakers can prioritise engagements and negotiations with countries where trust is lacking. This data-driven approach helps identify areas that require immediate attention and fosters targeted, trust-building efforts. It provides a strategic tool for enhancing regulatory trust.

Drawing inspiration from the confidence-building measures used in conflict scenarios, we can apply similar principles to address SPS-related disputes. These measures include the establishment of early warning systems, third-party mediation and information-sharing. Confidence-building measures pave the way for dialogue and trust-building, even in politically charged disputes. They promote transparency, reduce suspicions of protectionism and foster an environment of cooperation.[83]

In conclusion, these four strategies – programmatic funding and effective collaboration, regulatory diplomacy, trust assessment and confidence-building measures – offer a comprehensive approach to building regulatory trust in the context of SPS measures. By presenting these ideas to policymakers, we not only underscore the importance of addressing the issue of regulatory trust but also provide actionable solutions. Options to ensure regulatory trust should be pursued both within and outside of the WTO institutional framework. These strategies have the potential to promote harmonisation, reduce trade barriers and ultimately lead to a more cooperative and efficient SPS regulatory environment. This is also crucial in preventing arbitrary decision-making and discriminatory practices, which could have significant adverse effects on developing countries. With regulatory trust as a foundation, nations can work together to ensure the safety of food and agricultural products in international trade, benefitting both producers and consumers worldwide.

IV. Conclusion

Equivalence recognition is a key means for liberalising trade by overcoming differences between States' "behind-the-border" SPS measures and systems. In practice, however, importing States largely maintain their conditional right to refuse equivalence requests under the SPS Agreement except in the limited circumstances in which either (1) exporting States overcome the burden of proof and demonstrate that their measures achieve the same ALOP as the importing State or (2) an SPS equivalence recognition agreement is concluded and importing States must comply with their non-discrimination obligations under Article 2.3 SPS Agreement.

Although the SPS equivalence obligations are a structurally ineffective means for achieving greater trade liberalisation and maintaining regulatory diversity, States nonetheless maintain the power to recognise one another's SPS measures and systems as equivalent, even where there is insufficient scientific evidence to support this. Building regulatory trust is an important avenue for achieving this end. The exploration of mechanisms aimed at fostering regulatory confidence necessitates a comprehensive pursuit encompassing both the WTO institutional framework and the broader

[82] Tussie, supra, note 63, 630.

[83] OSCE, "OSCE Guide on Non-military Confidence-Building Measures (CBMs)" (2012) <www.osce.org/files/f/documents/6/0/91082.pdf> (last accessed 29 January 2024).

international trade law system. States must rely on a range of norms and institutions to allow for transparency, open dialogue and mechanisms for regulatory cooperation.

Acknowledgments. The authors would like to thank Lorand Bartels, Alexander Ferguson and Gregory Messenger for helpful discussions and comments on earlier versions of the article.

Financial support. This research is supported by the University of Southern California's Sol Price School of Public Policy PhD Fellowship and the Civic Leadership Education and Research (CLEAR) Initiative.

Competing interests. The authors declare none.

Cite this article: C Delev and J Greaves Siew (2024). "The Right to Refuse Equivalence of Sanitary and Phytosanitary Measures: Trading on Regulatory Trust?" *European Journal of Risk Regulation* **15**, 966–984. https://doi.org/10.1017/err.2024.7