

Component 1: Regulatory Assessment

General reflections on national legislation in light of SPS Agreement

Why SPS Agreement?

World Trade Organisation (WTO) grew out of the GATT

GATT Article XX(b) exceptions were not working. In fact, they were being abused. As tariffs and quotas were being reduced, non-tariff trade barriers were increasing. XX(b) needed to be **defined** further AND **enforced**.

“XX(b) Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;...”

Therefore, the SPS drafters attempted to write trade rules that would allow WTO member nations to continue to protect human, animal and plant life and health,

BUT....

would essentially define what was meant by “arbitrary or unjustifiable discrimination” and “disguised restrictions on international trade”

AND

transform GATT from a ‘rich country club’ into a global trade organisation

- Governments have the right to --
 - Establish, maintain and enforce SPS measures necessary for the protection of human and animal or plant life or health
 - Set their Appropriate Level of Protection (ALOP)
 - SPS deals with countries' "**measures**" to control **risks** to plant, animal or human health. It does not deal with products, *per se*.

SPS measures must be

- non-discriminatory (Article 2)
- transparently established and applied (Article 7/Annex B)
- based on science/risk assessment, as appropriate to the circumstances (Article 2/5)
- consistent with the level of health protection sought (Article 2)
- no more trade-restrictive than necessary to achieve goal (Article 2)
- based on Equivalence as necessary (Article 4)
- based on international standards (Article 3)
- Consistent with requirements for Control, Inspection and Approval Procedures (Article 8/Annex C)

The SPS Agreement specifically recognizes the standards of the (International Standard Setting Bodies) “three Sisters”

- Food Safety -- Codex Alimentarius Commission
- Animal Health World Organization for Animal Health (OIE) – retaining original French acronym
- Plant Health – Secretariat of International Plant Protection Convention (IPPC)

- “SPS Compliant” – key provisions (principles) of the SPS Agreement inserted in the legislation (at least primary and implementation set in secondary); SPS measures based on “three sisters” standards and recommendations IPPC, Codex, OIE (at least in the process)
- “Partially Compliant” – key provisions mentioned in the primary legislation but no implementation procedures set, therefore, no execution. “Three sister standards” used only marginally as a basis, if at all
- “Least Compliant” – key provisions not mentioned, or very scarcely in the primary legislation, no implementation procedures, nor practice. International standards not used as a basis, or even if partially adopted, not implemented

CAREC Member states SPS compliance level

- SPS Compliant: No CAREC member is SPS compliant, except for China, which compare to other members shows clear interest in harmonization
- Partially Compliant: Kazakhstan, Kyrgyzstan, Mongolia, Pakistan, Tajikistan
- Least Compliant: Afghanistan, Azerbaijan, Turkmenistan, Uzbekistan

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- Afghanistan and Azerbaijan are both actively in the process of accession, therefore, many new laws and regulations being adopted in the process. Both have made certain progress in amending/adopting legislation containing key SPS Agreement provisions. However, the main problem is implementation. Reasons for weak implementation are different.
- Azerbaijan as a former Soviet republic still bases its standards on Soviet GOSTs. Major export is oil, therefore, government take slow path in taking more proactive steps toward harmonization of SPS standards with international.
- Afghanistan's political situation and uncontrolled borders with Pakistan allowing for free movement of animals creates high risks for diseases.

- Uzbekistan and Turkmenistan are not in the WTO accession process. Uzbekistan suspended the process in 2006, although member to all 'three sister' organisations.
- SPS Agreement principles are not defined in primary legislation. Most of the SPS related procedures and rules are based on soviet standards and GOSTs.
- Uzbekistan exports no animals/meat products, but there is growing exports of plant origin products (fruits and vegetables) which puts pressure on adopting international standards, getting international accreditation for local labs for certain products/indicators.
- Several food safety related standards have been harmonized with Codex standards. However, implementation is still weak.

Regardless of the level of development, there are common problems:

- Lack of understanding of the concept of risk assessment (for all food safety, animal, plant) as well as other key SPS Agreement principles
- For animal health and food safety, the traceability requirement is virtually impossible to implement due to the fact that most animals are in private households. No government compensation for slaughtering diseased animals. Main method applied is vaccination. No skills/knowledge for conducting proper zoning procedures.
- Institutional framework for SPS administration is overly fragmented, too many government bodies authorised for certain areas, as a result overlap in requirements, exhaustion of resources, weak implementation

- GOSTs still apply in many areas and the process of harmonization is slow, due to lack of institutional reform and weak private sector
- SPS Policy makers not advised by science people, as a result, certain SPS measures/restrictions are not science based, i.e. incompetent.
- Although overly restrictive GOSTs may still apply, generally, peoples reaction to health/safety concerns is quite low compare to other countries. As a result, public opinion/consumers do not put enough pressure on policy makers. Massive contamination of animals or humans, for instance, does not result in public uproar and critical reaction which could instigate reforms.
- Lack of regional cooperation on introduction of harmonisation and mutual recognition mechanisms to reduce costs for international accreditation and certification procedures

Plant Health

Plant health – adoption of International Plant Protection Convention (IPPC)

- Reviewing adoption of principles of 1997 version of IPPC in national legislation
- Observing traditional legislative split between ‘plant quarantine’ and domestic plant protection/pesticides control typical in CIS
- Often accompanied by institutional separation

Afghanistan

- The new *Law on Plant Protection and Quarantine* passed by Parliament but not yet in force adopts the principles of the *SPS Agreement* and mirrors the 1997 IPPC very closely. **This provides the highest level of adherence to IPPC yet seen for the CAREC region.**
- The law actually in force (not available in English) was not consistent with WTO or the IPPC. As yet there are is no secondary legislation of relevance.

Azerbaijan

- Law '*About phytosanitary control*' No. 102-IIIIG of 2006 fully implements all the principles of the *SPS Agreement* (equivalence, transparency, etc.) but also adopts the 1997 version of IPPC in full, including declaration of pest free areas and incorporating risk assessment into determination of quarantine pests and phytosanitary import requirements.
- However, the Law also deals with pesticides and, unusually for CIS, unifies domestic plant protection and plant quarantine.
- There are a number of Orders from Cabinet that indicate that implementation of the Law has been taken seriously.
- Contrary to international best practice it appears that all plant materials require a phytosanitary certificate, irrespective of the level of risk (or no risk at all with processed material) and all require an import permit.

Kazakhstan

- '*Law about quarantine*' No. 441-I of 1999 is broadly consistent with the 1997 version of IPPC but has adapted the traditional terminology of Soviet era legislation (e.g. 'quarantine object' and 'quarantinable product') rather than using the terms found in IPPC 1997 version.
- Risk assessment is referred to rather vaguely but rules for risk assessment in Joint Ministerial and also in Law '*About the state control and supervision in the Republic of Kazakhstan*'
- This is the basis for current quarantine pest lists that are regularly updated as working documents but not updated very often in legal form.
- No pest free areas have been established under IPPC (according to International Standards for Phytosanitary Measures)
- Low risk products (e.g. processed vegetables) don't require phytosanitary certificates (cf. Kyrgyz Republic)
- Import permits no longer required – decisions based on phytosanitary import requirements for each category

Kazakhstan (continued)

- As typical for CIS, there is a separate law for domestic plant protection (*'Law About protection of plants'*, No. 331-II of 2002) covering also pesticide management but administration of both plant health laws under Phytosanitary Department
- However, the scientific body responsible for **Pest Risk Analysis (PRA)** is the Committee on State Inspections, whereas according to international practice, PRA should be the responsibility of the competent authority.

Kyrgyz Republic

- The *Law about Plant Quarantine* (No. 26 of 1996) broadly reflects the principles in the 1997 version of the IPPC by which the IPPC was itself brought into line with the *SPS Agreement*.
- Secondary legislation includes general provisions but the Appendices provide some specific technical information on plant health.
- Contrary to international best practice, no risk processed food of plant origin (e.g. roasted nuts, canned vegetables) still requires phytosanitary certificate (cf. Kazakhstan) import permits are required for all plants and plant products. However, 'low risk products' not subject to inspection (in line with current practice in most CIS countries)
- There is a separate law for 'domestic' plant protection and pesticide management, 'Law about chemicalization and protection of plants', No. 12 of 1999.

Mongolia

- There is a Law including Plant Health and Plant Quarantine, which is the Quarantine Inspection Law for Animal, Plant and their Raw Products During Crossing the Border, that adopt the provisions of the 1997 version of the IPPC. The fact that this Law covers animal and plant quarantine and certain aspects of food safety reflects the institutional responsibilities.
- Specifies pest risk analysis/assessment as the basis for plant health import controls and there is a list of quarantine pests currently in force Ministry of Agriculture and Food (Order No.155 of 2005) and a new list is being developed based on pest-risk analysis.
- Import requirements apply to goods in transit and in addition to a phytosanitary certificate; an Import Permit is required for specified plant materials as is a transit permit. This indicates a differentiation between materials that pose different levels of risk.

PRC

- Law of the People's Republic of China on the Entry and Exit Animal and Plant Quarantine (1991) is rather unique for the region in the way it is framed, not apparently relating to even the original version of the IPPC. Various categories of organism are prohibited but there is no reference to the precise concept of a quarantine pest as a specific type of pest of quarantine concern, and no reference to risk, but whether they meet the 'compulsory requirements of state technological criteria'.
- There is no mention of the phytosanitary certificate but this features in Regulations for implementing this.
- However, PRC has implemented several ISPMs and has a pest free area for apple codling moth (apples an important export crop)

Tajikistan

- The Law '*About Plant Quarantine*' No. 787 2011 sets out the legal and institutional framework for plant quarantine and includes phytosanitary quarantine measures It is broadly in line with the International Plant Protection Convention (1997 version). Concepts such as risk analysis are referred to in more detail than in some other CAREC countries.
- Government Order No. 450 of 2013 '*About Rules and regulations of ensuring quarantine of plants*' refers to the 'import quarantine permission' [import permit] issued by 'taking into account the international overview of quarantine harmful organisms'.
- However, phytosanitary certificates and import permits are required for all plants and plant materials.
- The Law '*About protection of plants*' No. 817 of 212 covers domestic plant protection and pesticide management.

Turkmenistan

- The Law of Turkmenistan on Plant Quarantine (№54-IV of 2009) was already the most compliant in the region with the SPS Agreement and the IPPC (1997). The terminology for quarantine pests, etc. reflects fully the IPPC. The Plant Quarantine Law adopted in 2014 is even more progressive compared to other CAREC states. It contains modern principles and approaches, such as Science-based requirement, risk-based approach, etc
- The Law is implemented by Rules of External Plant Quarantine in Turkmenistan. However, in practice, there is lack of implementation due to current lack of expertise, resources and institutional reforms.

Uzbekistan

- Law No 113-I of 1995 '*About plant quarantine*' has not been updated to reflect neither the SPS Agreement nor the 1996 version of the IPPC.
- There is no legal reference to PRA and the quarantine pest list for Uzbekistan has been drawn up without risk assessment.
- Phytosanitary certificate and import permits are required for all plant commodities regardless of the risk they pose.
- As typical for CIS, a separate Law '*About protection of agricultural plants against pests, diseases and weeds*' No. 116-II of 2000 deals with domestic plant protection and pesticide management.

Conclusions and recommendations on phytosanitary legislation

There are a number of barriers to reform of legislation to bring consistency with the *SPS Agreement* and the normative codes and conventions of the International Standard Setting Bodies:

- Low political priority to plant production and protection in national development strategies
- Politicians not responsive to constituencies that might lobby for reform
- Legal draftspersons lacking in 'technical' or science-based legislation, leading to legislative bottlenecks
- Administrative and legal split between domestic plant protection preventing optimal use of resources.

Recommended path to reform

- Complete reform of primary legislation may NOT be a necessary pre-requisite for implementation of phytosanitary measures that are consistent with the SPS Agreement because:
 - a given phytosanitary measure may be a NTB because of what it is, what it does and the manner in which it is implemented (Annex C of the SPS agreement), irrespective of whether the primary law prescribes a legal requirement for measures to be consistent with the *SPS Agreement* (scientifically justified, transparent, harmonized, etc.).
- Provided there is reference in Laws to equivalent of *phytosanitary measures*, Normative Acts (Orders) could be introduced to implement ISPMs in first instance.
- If reform of primary Law is possible, plant quarantine and plant protection should be unified in one Law.

Trade facilitating recommendations for phytosanitary legislation

- Awareness creation at political level of the need for fundamental updating of primary legislation and allocation government legal expertise for drafting Bills and allocation of parliamentary time to debate and approve Bills. *This could from activities from ADB, other donors and from lobbying from the private sector*
- Development of checklists for primary phytosanitary legislation relevant to each country to initiate amendment of existing laws when the priority for such action arises
- Holding workshops at CAREC or sub-regional level on necessary secondary legislation to initiate national legislative programmes as the most effective legislative approach to trade facilitation – see over.
- Schedules of fees based on cost-recovery
- Good prospects for harmonisation because of common legal legacy

Priority ISPMs for harmonised Orders

- Adopting ISPM11 on pest risk analysis as top priority
- Regulated pest lists in legal form based on pest risk analysis (PRA)*
- Phytosanitary import requirements based on PRA
- Rules and procedures consistent with relevant ISPMs:
 - Import and export inspection/certification to minimise administrative/procedural barriers
 - Surveillance, eradication and containment
 - Establishment of pest free areas
- More attention on quarantine pest lists and PRA in later session

Recommendations for technical activities

- ADB support EPPO membership over a period of 2-3 years for CIS countries not yet members and Mongolia **and Afghanistan**. Annual subscription is based on population. (The relevance of membership of APPC (applying to Pakistan and PRC) was discussed in the previous CAREC SPS report).
- ADB support training in PRA from EPPO.

Final remarks on plant health

- *The above recommendations are confined to legislation and scientific basis of legislation (e.g. pest lists) only.*
- *Additionally, however, enhanced infrastructure and expertise for PRA, pest identification and diagnosis and risk-based inspection services will be necessary. Recommendations for pest identification and diagnosis and relating to PRA are to be given in later sessions.*

Animal Health

Food Safety 1. HACCP

- **None of the CAREC countries** have made HACCP, based on the Codex Alimentarius, **entirely mandatory** in the legislation for both products to be exported and for domestic production.
- China and Kazakhstan, however, require **mandatory HACCP** for respectively exported and CU traded products.
- Kyrgyz Republic makes reference to **mandatory monitoring** of food safety according to the seven principles without defining HACCP according to the Codex.
- Turkmenistan requires **mandatory Critical Control Points**.
- (Prescriptive) **GOST standards** are still applied

HACCP and SPS Agreement

- The terms used above, to ensure food safety, do not contribute to compliance with the principal of Equivalence in the WTO SPS Agreement (Article 4) and to understanding the food safety systems through mutual recognition.
- Codex Standard **CAC/RCP 1-1969 revision 4 2003** “General Principles of Food Hygiene” is not referenced which raised the question “Why are different terminologies used while all has been developed already”
- Most of the CAREC countries do not make reference to (generic) **secondary legislation** for primary production and processing (based on the Codex)
- **To understand further we need to explore HACCP further →**

Clarification on some misconceptions about HACCP

HACCP **ensures** a safe product

- The bulk (and cost) of work is the implementation of the Pre Requisites Programmes (PRPs) such as Improvement in infrastructure, Cleaning & Sanitation Programme, Pest Control, Training
 - Codex is the basis. A company should, at least, comply with these basic (**generic**) hygiene requirements.
 - PRP's provide the **conditions** to make a safe product
- HACCP is predominantly an administrative exercise

The National Treatment Principle (WTO)

- WTO rule 2; National Treatment Principle:
 - Treating foreign producers of imported products and locals equally
- What is the essence of this principle applied through the SPS Agreement
- Countries cannot apply a higher level of protection and requirements to importing countries.
 - For example; a country cannot set a MRL for a contaminant of 0.5 mg per kg for a locally manufactured product and set a MRL for the same product for importing countries of 0.05 mg per kg. This is not possible under the SPS Agreement.
- In other words; a country cannot require mandatory HACCP compliance for imported products as long as HACCP is not mandatory in the national legislation

The National Treatment Principle (WTO)

In other words;

HACCP is **not** mandatory in the national legislation;

➤ Inferior food products may still enter the country

HACCP is mandatory in the national legislation;

➤ The country has the power to deny entry to imported inferior products

Recommendations on HACCP and secondary food safety legislation

- The countries are recommended to make HACCP mandatory with a transition period and implemented based on risk categories or, at least, to make HACCP mandatory for export traded products.
- It is recommended to clearly define HACCP and its principles according to the Codex and to apply the same terminologies in order to prevent different interpretations
- The countries are recommended to follow the (generic) secondary legislation as described in the Codex for primary production and processing.

Conclusions Risk-based inspections and (mandatory) product certification;

- Final product testing according to detailed prescriptive product standards is still widely applied in CAREC countries. The detailed and prescriptive standards make the checks for import more difficult than necessary to ensure protection against food-borne illness.
- Risk categories have been identified in some countries (Kyrgyzstan, Mongolia)
- Risk based inspections are not widely applied in CAREC countries with the exception of Mongolia.

Recommendations Risk-based inspections and (mandatory) product certification

- The CAREC countries are recommended to shift from end product testing to process risk-based inspections and testing to be carried through the implementation and application of HACCP.
- The CAREC countries are recommended to develop risk categories based on the experience in countries such as Kyrgyzstan and Mongolia.