

*Katalin Sulyok**

Lukasz Gruszczynski, Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures. A Commentary, 2nd ed.*, Oxford University Press, Oxford: 2023, pp. 384

ISBN: 978-0-19284-519-1

1. INTRODUCTION

This book review provides a brief overview of the comprehensive commentary on the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) written by Lukasz Gruszczynski. The volume was published by Oxford University Press in 2023, and is entitled “The WTO Agreement on Sanitary and Phytosanitary Measures. A Commentary.” This is the second edition of the commentary, which is based on the first version written by Joanne Scott in 2007.¹ This second edition is a renewed and extended version of its predecessor, which not only comments the numerous SPS-related disputes decided between 2007 and 2023, but also provides new analyses concerning regional SPS agreements outside the scope of the SPS Agreements (Chapter 10), and with regard to provisional measures (Chapter 4).

The adjudicatory practice pertaining to the SPS Agreement that accumulated after 2007 is undoubtedly ripe enough to warrant an updated commentary. Lukasz Gruszczynski navigates his readers through this highly technical field in a clear and concise manner, with an analysis which remains pragmatic while also being richly referenced with theoretical accounts of scholarly works. The depth of the commentary is owing to the author’s expertise in WTO law, which is grounded in his working experience at the WTO, and is marked by his numerous scholarly

* Ph.D., LL.M. (Harvard); Associate Professor in International Law and Environmental Law, ELTE Law School (Budapest, Hungary); e-mail: sulyok.katalin@ajk.elte.hu; ORCID: 0000-0003-1807-8183.

¹ J. Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures. A Commentary*, Oxford University Press, Oxford: 2007.

publications not only on the SPS Agreement,² but also on further aspects of WTO law³, as well as other equally science-heavy aspects of international trade law, such as tobacco control regulation,⁴ and the wider issue of how international courts set their standards of review in cases involving technical expertise.⁵

The SPS Agreement sets out detailed rules for introducing so-called SPS measures that are specific measures sought to protect human, animal, and plant life.⁶ The treaty is in fact a fascinating instrument, which carries some broader lessons also outside its narrow context of WTO law, for many reasons. First, the Agreement sets forth strict procedures and highly technical rules to guard against protectionist measures. Its narrow focus notwithstanding, the regulatory approach of the Agreement and the decade-long adjudicatory practice concerning its potential, as well as the limitations on protecting human, animal, plant life or health against the forces of international trade may provide important lessons for the ever-more resounding voices that recently demand a deep reform of international trade law to better “align with nature and societies”⁷ and to adequately facilitate a world-wide transition to a net-zero society.

Second, the SPS Agreement serves as a symbol of permanence at a time when the forces undermining multilateralism have challenged the world of international trade law and paralyzed the functioning of the Appellate Body. Curiously, as Gruszczynski

² L. Gruszczynski, *Regulating Health and Environmental Risks under WTO Law: A Critical Analysis of the SPS Agreement*, Oxford University Press, Oxford: 2010; L. Gruszczynski, *How Deep Should We Go – Searching for an Appropriate Standard of Review in the SPS Cases*, 2 *European Journal of Risk Regulation* 111 (2011), pp. 111–114.

³ L. Gruszczynski, *Science and the Settlement of Trade Disputes in the World Trade Organization*, in: B. Mercurio, N. Kuei-Jung (eds.), *Science and Technology in International Economic Law: Balancing Competing Interests*, Routledge, London: 2014, pp. 11–29; L. Gruszczynski, *Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration*, in: L. Gruszczynski, W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford University Press, Oxford: 2014, pp. 152–172; L. Gruszczynski, *The Role of Experts in Environmental and Health Related Trade Disputes in the WTO: Deconstructing Decision-Making Processes*, in: M. Ambrus et al. (eds.), *Irrelevant, Advisors or Decision-Makers? The Role of ‘Experts’ in International Decision-Making*, Cambridge University Press, Cambridge: 2014, pp. 1–16.

⁴ L. Gruszczynski, *Saving Regulatory Space for States through the Standard of Review: A Case Study of Tobacco Control-Related International Disputes*, in: G. Kajtar, B. Cali, M. Milanovic (eds.), *Secondary Rules of Primary Importance – Attribution, Causality, Standard of Review and Evidentiary Rules in International Law*, Oxford University Press, Oxford: 2021, pp. 65–82; L. Gruszczynski, M. Melillo, *The FCTC Dilemma on Heated Tobacco Products*, 16 *Globalization and Health* (2020), pp. 1–13; L. Gruszczynski (ed.), *The Regulation of E-Cigarettes: International, European and National Challenges*, Edward Elgar Publishing, Cheltenham: 2019.

⁵ L. Gruszczynski, W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford University Press, Oxford: 2014.

⁶ For the exact definition of SPS measures, see Annex A(1) of SPS Agreement.

⁷ E. Cima, D.C. Esty, *Making International Trade Work for Sustainable Development: Toward a New WTO Framework for Subsidies*, 27 *Journal of International Economic Law* 1 (2024), pp. 1–17.

also highlights, the SPS Agreement has generated abundant case practice even despite these turbulences, and, thus it may be seen as an example of how multilateral treaty regimes can function despite attacks against the very system that created them. Finally, and perhaps most importantly, as will be elaborated on in Section 3 in more detail the SPS case-law stands out as one of the most science-intensive adjudicatory practices in the international arena. Therefore, it provides important lessons on how legally-trained adjudicators can use and interpret the complex technical evidence put before them, which is becoming an imperative for judicial bodies in a growing number of legal contexts, ranging from climate litigation to international criminal law.

Following these introductory points, Section 2 of this review will overview the main contents of the chapters, and Section 3 will comment on the uniquely science-intensive legal architecture of the SPS Agreement and its related adjudicatory practice, which has broader relevance even outside the scope of WTO law.

2. AN OVERVIEW OF THE CHAPTERS

Chapter 1 provides an introductory overview of the SPS Agreement by analysing, *inter alia*, the concept of SPS measures and the interrelationship between the SPS Agreement and the GATT, as well as the provisions regulating the obligation of Members to implement the Agreement under Art. 13, and their right to set their own appropriate level of protection (ALOP).

Chapter 2 concerns the cooperative regulation in the WTO and comments on the multifaceted nature of the SPS Committee, which performs both a dispute resolution and compliance function and enhances the external accountability of Member States. The SPS Committee, thus, has a two-fold task, namely to serve as a platform for information exchange and peer review, and to perform a norm elaboration function. Gruszczynski argues that there is more to WTO law than the widely known WTO panel and Appellate Body case law, and hence alerts both practitioners and scholars to the thus far largely overlooked aspects of the operation of the Agreement. The chapter points out the real life factors that influence the standard setting process in WTO law, and shows the ways in which the institutionalized cooperation makes a difference in achieving compliance.

Chapter 3 examines the inextricable – and legally precisely circumscribed – linkage between rules of the SPS Agreement and natural science evidence. Such a widespread use of science as a benchmark of conformity with the Agreement in fact represents a departure from the approach used under the GATT, which has been focusing on the discriminatory nature of trade measures. Chapter 3 comments on the factual and normative aspects of numerous provisions of the SPS Agreement which incorporate essentially scientific notions in the context of specifying States' obligations under the

Agreement. The legal qualifiers of a “risk assessment”, the “sufficiency of scientific evidence” and the “rational relationship between the measure and the risk assessment” are but a few examples. This chapter includes a separate and detailed discussion of the evidentiary issues that arise in SPS disputes, such as the burden of proof, the standard of review, and the modalities of using scientific experts. Notably, WTO panels are explicitly encouraged by the Agreement to seek expert advice and have the power to request an advisory opinion from an expert review group. The chapter also details the reach of relying on minority scientific opinions in SPS disputes.

Chapter 4 is dedicated to dissecting the provisional measures issued under the SPS Agreement. A separate section deals with the reach of the precautionary principle in the context of instituting provisional measures, in light of the disputes the application of this principle has generated before WTO panels and the Appellate Body. Chapter 5 sets out additional obligations, such as consistency, weak proportionality (i.e. requiring least-trade-restrictive means), equivalence, and regionalization, in relation to which the SPS Committee has announced specific guidelines.

Chapter 6 addresses the transparency obligations, which are of fundamental importance for the operation of the SPS Agreement and which place a duty on Members to disseminate information and additionally impose a burden on them to justify their regulatory steps. Chapter 7 comments on control, inspection and approval procedures, including but not limited to procedures for sampling, testing, and certification. The Commentary explains how these procedural requirements also function as a core requirement in checking compliance with the Agreement.

Chapter 8 concerns the role of international standards in setting SPS measures. Notably, the SPS Agreement seeks to promote the harmonization of SPS measures by allowing Members to deviate from international standards, so long as they justify their measures with reference to these standards. Chapter 9 addresses the situation of developing countries when it comes to complying with the Agreement. The chapter reviews the special provisions applicable to developing countries and concludes that despite the often-loud voices of discontent surrounding the Agreement, on balance its rules come across as “a friend to the developing world.”

Finally, Chapter 10, which is a new part compared to the first edition, puts the Agreement into a comparative perspective and examines how SPS requirements are provided for under other regional free trade agreements. By dissecting the similarities as well as divergencies between the SPS Agreement and other regional trade regimes, Gruszczynski explains the normative complexity of global SPS governance.

3. SOME ISSUES OF BROADER SIGNIFICANCE ARISING FROM THE SPS AGREEMENT: SCIENCE MEETS ADJUDICATION

The omnipresence of scientific references is one of the hallmark features of SPS law. Scientific requirements in the SPS Agreement function as an express mechanism guarding against those SPS measures that serve as disguised protectionism. The Agreement sets several scientific criteria with the objective of limiting the impact of such measures on international trade. To name just a few, Art. 5.1 of SPS Agreement requires that SPS measures “be based on” a risk assessment which, according to Art. 5.2, shall consider the “available scientific evidence”. Art. 5.1 mandates that such measures are to be applied only to the extent that (i) they are necessary to protect human, animal or plant life; (ii) are based on “scientific principles”; and (iii) are not maintained without “sufficient scientific evidence”. Art. 5.7 creates a possibility for Members to act even in cases where relevant scientific evidence is insufficient to perform risk assessment, in which cases they may adopt provisional SPS measures on the basis of “available pertinent information.”

The interpretation of these science-intensive provisions requires equally science-heavy arguments from litigants and WTO panels alike. It is no wonder then that the WTO dispute settlement system is seen as the most science-intensive among international fora.⁸ The role of scientific knowledge in SPS disputes is subject to continuous and sustained attention in the scholarly commentary.⁹ Gruszczynski’s commentary explores in great detail the interlinkages between scientific knowledge, regulatory autonomy, and the scope of judicial review. It provides an in-depth assessment of various legal situations where the “scientific” is inextricably entangled with the “normative” in risk regulatory decisions. The practice concerning the SPS Agreement, and hence the Commentary under review, are therefore highly useful resources for both scholars and practitioners who are preoccupied with the use of complex technical evidence in socio-legal settings.

Using scientific rationality in a legal context gives rise to a host of complications, which are also featured in this Commentary. The first issue lies in the standard of review, which encapsulates how legal adjudicators balance their inquiry on the law-science interface. Gruszczynski closely examines the nuanced, and changing,

⁸ K. Sulyok, *Science and Judicial Reasoning – The Legitimacy of International Environmental Adjudication*, Cambridge University Press, Cambridge: 2021.

⁹ C.-F. Lin, Y. Naiki, *An SPS Dispute without Science? The “Fukushima” Case and the Dichotomy of Science/Non-Science Obligations under the SPS Agreement*, 33 *European Journal of International Law* 651 (2022), pp. 651–678; E. Reid, *Risk Assessment, Science and Deliberation: Managing Regulatory Diversity under the SPS Agreement*, 4 *European Journal of Risk Regulation* 535 (2012), pp. 535–544.

standards of review applied to scrutinizing the parties' science-based arguments, and depicts an overall trend shifting towards a less intrusive standard.

The second complication concerns the finality of SPS measures, which is generally challenged by the progress of scientific research, which may render previously prevailing scientific positions outdated. Chapter 3 therefore addresses the issue of temporality and explores to what extent Members have an obligation under the SPS Agreement to keep track of the newest insights from scientific research and update their SPS measures in light of the state-of-the-art scientific evidence.

Finally, Gruszczynski also pays attention to the normative aspects of reviewing SPS measures. Notably, the assessment of a WTO panel is not dictated by science. After all, while risk assessment decisions are informed by scientific evidence, such measures must also answer to a host of societal considerations and, thus, they ultimately constitute value judgments. As the Commentary stresses, WTO panels allow Member States to retain a good measure of regulatory autonomy in setting their policies regarding such sensitive matters.

For all these reasons, Gruszczynski's commentary is a highly recommended reading and would be an essential addition to the libraries of practitioners working with WTO law as well as scholars who are interested in international trade law, or for that matter in any other areas of law where technical expertise is a prerequisite to the proper application of legal rules.