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EU, SPS and Brexit: Comparing SPS Chapters in the CETA and the EU-UK TCA

ABSTRACT

The interpretation of sanitary and phytosanitary measures in an international trade law context has always been problematic. The SPS Agreement, operating within the World Trade Organization's treaty framework, sets some basic rules, but many trade agreements contain their own SPS chapters as well. Ever since the separation of the EU and the UK, SPS measures have been a hot topic between the two sides, both considering the matter to be of particular importance. The purpose of this article is to examine how advanced the EU-UK TCA's SPS chapter is, in comparison to both the SPS Agreement and the EU-Canada CETA agreement. During this process, we will also identify potential issues and, in the conclusion, we will attempt to answer how these issues could be resolved.

Keywords: international trade law ■ Brexit ■ SPS ■ EU-UK TCA ■ CETA

I. INTRODUCTION

Sanitary and phytosanitary concerns have long been a major aspect of trade negotiations. In past eras, trade networks often brought disease and vermin alongside them, and sometimes caused significant harm to either public health or the local ecosystems in the process. Therefore, it is unsurprising that protecting against such concerns would be one of the fulcrums of modern international trade-related legislation. The primary modern method of achieving this is via the so-called SPS measures, measures which relate to the protection of human, animal and plant health via regulating trade, principally in the sector of agriculture, but not exclusively.

The existence of these SPS measures in turn caused a problem. Every country has different standards, different demands and different perspectives on the necessary levels of protection. During the 20th Century, attempts were made to somewhat harmonize these measures. The General Agreement on Tariffs and Trade (GATT) itself contained a clause in Article XX (regarding General Exceptions) that made it possible for member states

to introduce restrictions on international trade, if they were necessary to protect human, animal or plant life or health. However, the GATT quickly proved insufficient in handling this rather sensitive topic, and thus, the SPS Agreement was born, a specialized agreement, part of the World Trade Organization's (WTO) treaty system that contained more specific rules compared to the GATT, notably also demanding a higher level of scientific proof as justification for introducing SPS measures. It became a useful general framework for handling such issues, though individual trade agreements between given countries sometimes included SPS chapters designed to provide a greater level of cooperation than the SPS Agreement.

Recently, the question of SPS measures in the context of the UK has become rather relevant for the EU once again, as the UK is preparing to introduce tighter SPS restrictions on both animal and plant products arriving in the UK, starting from the end of October 2023.^[1] Thus, it would be an appropriate moment to analyse the existing situation on SPS regulations between the two sides. One of the most convenient formats for such an analysis would be a comparative study.

Therefore, two trade agreements will be at the centre of this study. The first is the Comprehensive Economic and Trade Agreement (CETA), which was signed between the EU and Canada in 2016. The second is the EU-UK Trade and Cooperation Agreement (EU-UK TCA), which was signed between the EU and the United Kingdom as a trade-related addendum to the Brexit affair. These agreements have sometimes been compared to each other, and indeed, both contain explicit SPS chapters. However, on one hand, we have a country on a different continent that was never really part of the European community. On the other hand, we have the UK, which had been a member of the EU for decades and participated previously in its Single Market. Therefore, it would be common sense to assume that the level of cooperation on SPS measures would be deeper in the latter case, if only because of shared legal and economic history, and the UK carrying over much of the EU-level food regulations that would be qualified as SPS measures under international trade law. As for why the CETA was chosen for this study, the answer is that despite the aforementioned differences, Canada and the UK are both Atlantic countries with an Anglo-Saxon legal culture. The difference of course, as noted, is that the UK spent decades as part of the European project, and harmonized its legal system with the EU, whereas Canada naturally did not. This difference lends itself to the hypothesis the study presents below.

Thus, our hypothesis is this: given the closer economic, historical and legal ties between the UK and the EU compared to Canada and the EU, the EU-UK TCA's SPS chapter should include a deeper level of cooperation compared to the equivalent SPS chapter of the CETA. The testing of this hypothesis is a simple matter: as previously mentioned, we will use the comparative method, contrasting the respective SPS chapters with each other and evaluating the level of cooperation between the member states in each. The baseline is naturally the WTO SPS Agreement.

[1] ASD Group: Brexit: New obligations for exporters to the UK from the end of October 2023, 2023.

The structure is thus also a given. We will begin with a brief contextualization, providing a general view of the SPS Agreement to the reader, before proceeding to examine and contrast the CETA and EU-UK TCA SPS chapters. We have to note here that the purpose of this study is not the exact reproduction of the highly complex and manifold SPS regulations on the side of the EU, the UK or Canada. As the conclusion of this short study, we will determine whether the hypothesis held up, and whether any further negotiation on SPS matters between the EU and the UK is warranted, especially given recent events.

II. DEFINING THE BASELINE: THE WTO SPS AGREEMENT

Our objective in this chapter, as stated in the introduction is to provide a general context to the reader, a baseline against which we can evaluate both the CETA and the EU-UK TCA. It is not our purpose here to provide an in-depth analysis of the SPS Agreement's history and contents. It would not only be beyond the scope of this short study, but also widely covered by international scholarship in the past decades.^[2]

Therefore, to identify this baseline, it would be most useful to determine the key characteristics of the SPS Agreement and examine it from the perspective of being a framework for international coordination in the field. The first step here would be to identify what constitutes an SPS measure in the context of the study and the SPS Agreement itself. Annex A (Definitions) of the SPS Agreement provides a lengthy definition for the term. To sum it up, an SPS measure is a trade-affecting government measure (whether it is a law, a decree, or any other regulation or measure) that is applied with several possible justifications, principally to protect human, animal or plant life or health from various threats, including diseases, pests and contaminants.

Human health in the context of the SPS Agreement specifically refers to the concept of public health. There is more controversy regarding the interpretation of animal health, by contrast, with some (such as the European Commission) generally taking the stance that any alteration of an animal's normal functions could be considered potentially harmful, and therefore a threat to animal health, while other interpretations take a narrower view: absence of disease. Regardless, animal health as a concept necessarily includes all measures related to the health of livestock, domestic animals, aquatic animals and wild animals. In a similar fashion, plant health-related measures naturally cover both wild and commercial plants.^[3]

[2] See as examples: Epps, 2008; Gruszczynski, 2010; Henson – Loader, 1999, 355-369.; Alemanno, 2007, 225-290.

[3] Epps, 2008, 10-12.

Now that we have briefly established what sort of measures the SPS Agreement covers, we can move on to examining the key aspects of the treaty. In the author's opinion, these would be risk assessment, harmonization, equivalence, transparency, control, inspection and approval procedures, and regional adaptation. The SPS Agreement also covers some other topics, such as technical assistance, but these will not be our focus here. Instead, if necessary, we will mention these more miscellaneous aspects of SPS regulation in the following chapter as part of our comparison.

Risk assessment is a central part of the SPS Agreement and governs the general method member states should use to assess health-related risk, determine the appropriate level of protection and formulate SPS measures. Article 5 of the SPS Agreement (divided into eight paragraphs) concerns this topic, but we must also mention Article 2.2 here. This latter paragraph clarifies that SPS measures should only be applied to the extent necessary to protect human, animal or plant life or health, are based on scientific principles and that they are not maintained without sufficient scientific evidence. This clause (part of the general obligations of member states) serves as the basis of Article 5, which expands upon this topic in greater detail, and thus the two should be read together.^[4] Let us note the key elements of this article. First, that SPS measures are to be based upon an assessment that also considers practices developed by relevant international organizations (5.1). Second, assessment must take into account available scientific evidence, as well as various other factors, such as the prevalence of specific diseases or pests (5.2). Third, economic factors should be also considered when conducting the assessment (5.3). Fourth, negative trade effects must be minimized when formulating SPS measures (5.4). Fifth, avoidance of discrimination and disguised restrictions on trade (5.5). Sixth, SPS measures are no more restrictive to trade than necessary to achieve their SPS goals (5.6). Seventh, rules for provisional SPS measures where scientific evidence is insufficient (5.7). Finally, rules for requests of explanations if another member state believes that the SPS measure is overly constraining its exports and is not based on relevant international standards (5.8). We should especially highlight the aspect of scientific evidence here. The SPS Agreement demands a higher level of scientific evidence as justification for implemented measures compared to Article XX of the GATT, or other WTO treaties in general. The rationale behind this is the assumption that this assures that the SPS measures are implemented based on an objective rationale independent of political interests. However, the efficacy of this is questioned by some scholars.^[5] Furthermore, significant debate arose in connection with what should be the required level of "scientific evidence", especially in relation to GMOs.^[6] It is also interesting to note that in case law, there has been a tendency for states to attempt to argue their way out of having their

[4] For a more in-depth examination of this relationship, see: Gruszczynski, 2010, 111-112.

[5] Gruszczynski, 2010, 143-145.

[6] For more on this topic, see: Peel, 2013; Hajdu, 2020, 86.; Gruszczynski, 2014; Gonzalez, 2007.

measures classified as SPS measures, due to the higher level of scientific justification necessary for them to be considered appropriate under the SPS Agreement's risk assessment system.^[7]

We discussed the risk assessment aspect of the SPS Agreement in relative brevity above, and so we must now turn to the second important characteristic of the Agreement: harmonization. This topic is largely covered by Article 3 of the Agreement. To summarize, the SPS Agreement induces its member states to base their SPS measures on international standards and guidelines (3.1). It explicitly states that SPS measures conforming to such standards and guidelines will be presumed to be consistent with both the SPS Agreement and the WTO Agreement (3.2). However, it does not rule out the imposition of a higher level of standards by member states, assuming there is sufficient scientific justification (3.3). Article 3.2 may be viewed as a sort of positive reinforcement or reward by the SPS Agreement towards member states who decide to follow international standards and guidelines, by essentially rendering their SPS measures unchallengeable under both the SPS Agreement and the GATT. By contrast, Article 3.3 does establish the option to apply a higher level of protection but demands an appropriate level of scientific justification, which, according to case law, is to be specifically obtained via the risk assessment process outlined in Article 5.^[8]

Equivalence could be considered another central characteristic of the SPS Agreement. Described in Article 4, it posits a basic requirement for member states to accept the SPS measures of other member states as equivalent to their own, even if they differ in nature or execution, provided the exporting member state demonstrates objectively that its measures achieve the importing member state's appropriate level of SPS protection. It also establishes the right of the importing member state to be provided reasonable access upon request, for purposes of inspection or testing. Interestingly, this Article also induces the member states to enter into negotiations regarding multilateral or bilateral agreements on recognition of equivalence. In the author's opinion, this Article essentially establishes a very basic form of equivalency that is neither automatic nor guarantees mutual recognition. This can be considered sensible given the SPS Agreement's nature as essentially a framework of coordination in this field.

Transparency should also not be disregarded. Article 7 of the Agreement, in conjunction with Annex B, provides some transparency rules regarding SPS measures. In essence, member states have to publish their SPS regulations promptly and allow a period of adaptation (except in urgent circumstances) between publication and entry into force. They also have to establish an enquiry point for answering all reasonable questions regarding their SPS measures. Finally, Annex B also outlines a notification procedure by which member states are to

[7] See Peel, 2013; Hajdu, 2020, 86.; Gruszczynski, 2014; Gonzalez, 2007.

[8] Gruszczynski, 2010, 105-106.

notify the other member states of their planned SPS measures if they differ from international guidelines (or if such guidelines do not exist) and may significantly affect trade with other member states.

The penultimate key element of the SPS Agreement we should briefly discuss is the control, inspection and approval procedures. Much like with transparency, the basic obligation of the member states is established by an article (Article 8), while an annex (Annex C) contains more specific rules. These rules essentially establish that member states should ensure, with respect to any procedure to check and ensure the fulfilment of SPS measures, that a) these procedures are undertaken and completed without undue delay, in a non-discriminatory fashion and b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request, among other rules concerning topics such as equitable procedural fees with like domestic or third party products or that whenever specifications of a product are changed subsequent to its control and inspection in light of the applicable regulations, the procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the regulations concerned.

Finally, we should also briefly discuss the question of regional adaptation. While this might not seem like as central of a characteristic as the others, we will see that both of our investigated trade agreements will contain additional rules on this matter. In the WTO SPS Agreement itself, three paragraphs within Article 6 discuss this matter. In essence, the Agreement induces its member states to ensure that their SPS measures are adapted to the SPS characteristics of the area the product originated from or is destined to (6.1). Member states are likewise induced to recognize the concept of pest- or disease-free areas, as well as areas of “low prevalence” (6.2). Finally, exporting member states claiming that areas within their borders are pest- or disease-free (or areas of “low prevalence”) must provide the necessary evidence for objectively demonstrating this claim to the importing member state. This includes an obligation to provide reasonable access to the importing member state for inspection or testing purposes (6.3). In the author’s opinion, this element of the WTO SPS Agreement essentially assists in a smoother running of trade between countries where there is no major risk of disease or pests.

Based on the above, we can now see what sort of baseline the SPS Agreement sets out: a risk assessment procedure based on scientific objectivity, a relatively basic harmonization system that nevertheless rewards adherence to international guidelines, a somewhat rudimentary system of equivalence, relatively well-detailed rules of transparency and control, inspection and approval procedures, as well as guidelines for regional adaptation. This is what we will evaluate both the CETA and the EU-UK TCA against, examining whether they provide more than the SPS Agreement in their SPS chapters.

III. TESTING THE HYPOTHESIS: CETA VS. EU-UK TCA

In this chapter, we will examine the SPS chapters of the CETA and the EU-UK TCA on a side-by-side basis. We will not deal with the history of the agreements, or the various other parts of the agreements, and instead focus solely on comparing the two SPS chapters and evaluating them regarding how much they add to cooperation compared to the baseline, the WTO SPS Agreement. As noted in the introduction, we will also not deal with the SPS Agreement's implementation into domestic regulation.^[9]

First of all, as referred to throughout the study, both the CETA and the EU-UK TCA contain SPS chapters. Chapter Five in the case of the CETA, and Chapter 3 in the case of the EU-UK TCA. If we glance at these chapters, we can already see that the EU-UK TCA appears to be lengthier, seemingly supporting our hypothesis. However, we will need to examine them in further detail before making such a conclusion. The first element that becomes obvious to the reader of both chapters is that both SPS chapters, as expected in the author's opinion, affirm the adherence of the parties to the WTO SPS Agreement. These establish the author's view that these articles are to be read as additional supplements to the WTO SPS Agreement, building on its rules. Thus, our use of the WTO SPS Agreement as a baseline is immediately justified.

Next, we will move on to using the previously discussed key characteristics of the SPS Agreement to examine both agreements: risk assessment, harmonization, equivalence, transparency, control, inspection and approval procedures, and regional adaptation. Afterwards, we will examine more miscellaneous elements of the SPS chapters that don't necessarily build upon the characteristics we established in the previous chapter, but which nevertheless could be considered notable for testing our hypothesis.

The first characteristic is risk assessment. In both the CETA and the EU-UK TCA, there is not much direct elucidation on any sort of substantive addition to the risk assessment rules of the WTO SPS Agreement. In the EU-UK TCA's case, risk assessment appears in Article 73.1 (under General Principles), where the TCA notes that the parties should apply SPS measures based on "risk assessments in accordance with relevant provisions, including Article 5 of the SPS Agreement."^[10] The TCA has some further references to risk assessment, but these are not in strict connection with any substantive rules or additions to the WTO SPS Agreement's Article 5. In comparison, the CETA only very briefly refers to risk assessment in its SPS chapter with regard to the joint management committee for SPS measures (this will be discussed below), as well as in Article 5.10 regarding import checks. Therefore, it seems we can conclude that at least with regard to risk assessment rules, there was no real substantive change in either agreement compared to the WTO SPS Agreement, and we likewise cannot

[9] For the EU aspect of this, see: Alemanno, 2007; Downes, 2014.

[10] EU-UK TCA Article 73.1.

state that the TCA would have any marked advantage over the CETA here. In the author's opinion, this is perhaps unsurprising, as the WTO SPS Agreement, as we have seen, contains relatively detailed rules on risk assessment principles, and as such, further coordination in this field is perhaps not quite that much of a pressing "need". As an interesting sidenote, the Trans-Pacific Partnership Agreement, another recent trade agreement with SPS content (though involving neither the EU nor the UK), while also largely conforming to the SPS Agreement's risk assessment rules, also imposed a greater restriction on regulatory autonomy compared to the SPS Agreement,^[11] and thus the CETA and the EU-UK TCA as well.

Harmonization in the WTO SPS Agreement mainly referred to member states following international guidelines when formulating their SPS measures and being "rewarded" by the treaty for doing so.^[12] Therefore, regarding this characteristic, we should look into how said international guidelines and recommendations are potentially implemented in both SPS chapters. In the CETA's case, this aspect mainly crops up (if in a brief way) in relation to regional adaptation, and therefore we shall discuss it there. However, the EU-UK TCA has more concrete examples of such guidelines being integrated into the treaty. In Article 74 on official certification, the TCA mentions that should an importing party require official certification, then the model certification should be in line with the principles laid down in the international standards of the Codex,^[13] the IPPC^[14] and the OIE^[15]. Furthermore, several more TCA articles reference cooperation with regard to adhering to and developing international standards and guidelines. An example of this is Article 82, in which the EU and the UK agree to cooperate in multilateral international fora on the development of international standards, guidelines and recommendations, with respect to SPS measures. In addition, Articles 84 and 85 both deal with the question of cooperative implementation and development of international guidelines (with regard to animal welfare-related SPS measures and antimicrobial resistance-related SPS measures respectively). Therefore, we can state that with regard to the harmonization characteristic, the EU-UK TCA appears to be the more advanced and deeply cooperative agreement.

Our next characteristic to be used as a perspective for comparison is equivalence. In the CETA, this is directly addressed in Article 5.6. The basic principle here remains the same as with the WTO SPS Agreement, that is to say, the exporting party must objectively demonstrate achieving the importing party's appropriate level of SPS protection with its own measures. However, the Article also refers to two annexes (Annex 5-D and Annex 5-E), with the former outlining further principles and guidelines for determining, recognizing and main-

[11] Wagner, 2017, 454.

[12] Mayeda, 2004, 746-747.

[13] Codex Alimentarius Commission.

[14] International Plant Protection Convention.

[15] World Organisation for Animal Health.

taining equivalency, while the latter sets out the areas for which the importing party recognises that an SPS measure of the exporting party is equivalent to its own, as well as the areas for which the importing party recognises that the fulfilment of the specified special condition, combined with the exporting party's SPS measure, achieves the importing party's appropriate level of SPS protection. With regard to Annex 5-D, the CETA did not list such guidelines for determination and recognition of equivalence (as this was agreed by the parties to be negotiated at a later date), but guidelines for maintenance of equivalence were agreed on. This essentially posits that if one of the parties intends to adopt, modify, or repeal an SPS measure in an area for which it has made a recognition of equivalence, then it should also evaluate whether this change would affect the recognition of equivalence, and notify the other party of its intentions. Importing parties implementing such changes in areas where mutual recognition has been achieved should continue to accept the recognition of equivalence until it has communicated to the exporting party whether special conditions must be met and what these would be. The CETA then induces the parties to develop these conditions cooperatively. As for Annex 5-E, this annex contains an extensive list of SPS measures from both parties, classified in specific areas, and listing recognitions of equivalence in the given areas. For the purposes of this study, it is not necessary to describe these minute details at length.

As for the EU-UK TCA, we encounter a very different approach here to equivalence. While the CETA's SPS chapter directly references equivalence, as do the attached annexes, there is no such direct reference to the concept of equivalence in the EU-UK TCA. This is not to say, however, that such equivalence rules regarding SPS measures do not exist in the treaty. But the TCA's approach to the matter is different. Instead of singling out SPS measures and describing specific equivalence rules for them, it does the same with relation to organic products, specifically in Annex 14. Some of the laws mentioned under this annex could necessarily be also classified as SPS measures given their nature. The general structure here is that there are two sets of product lists (Appendix 14-A and 14-B) and two sets of regulations (Appendix 14-C and 14-D) within the agreement, with the EU recognizing the equivalence of UK regulations listed in 14-C to its own with regard to the products listed in 14-A, while the UK does the same with EU regulations listed in 14-D with regard to the products listed in 14-B. These products include unprocessed plant products, seeds, unprocessed animal products and others. Beyond this straightforward (and limited) recognition, the TCA has procedural rules for the maintenance of this recognition, much like with the CETA. Namely, there is automatic maintenance of equivalence in the case of modification, revocation or replacement of the listed regulations, but the other party is allowed to object, which in turn possesses its own procedural rules. As per Article 3.5 of Annex 14, if a party considers that the laws, regulations or administrative procedures or practices of the other party no longer meet the requirements for equivalence, that party shall issue a reasoned request to the other party to amend the relevant laws, regulations or administrative procedures

or practices, and shall provide the other party with an adequate period, which shall not be less than three months, for ensuring equivalence. If such is not accomplished, or if there are other issues, the TCA empowers the aggrieved party to suspend unilaterally the recognition of equivalence with regard to the measure at hand.^[16] Despite the apparently different approach here on the surface, the author is of the view that this is not necessarily all that different in practical outcomes from the approach taken by the CETA. In both cases, there is a limited list of recognized equivalence, and only rules for maintenance (and suspension) of these recognitions, but no specific, treaty-provided way to add further recognitions (beyond new negotiations of course), and most importantly, no automatic way of establishing new recognitions of equivalence.

Our next characteristic to use as a basis for comparison is general transparency. In the case of the CETA, this topic is primarily covered by Article 5.11, which contains rules regarding notification and information exchange. With regard to notification, the CETA mandates that parties shall notify each other without undue delay regarding three different scenarios: significant change to pest or disease status, finding of epidemiological importance with respect to an animal disease or significant food safety issue related to a product traded between the parties. With regard to information exchange, the parties are instructed to exchange information on issues such as a change to a party's SPS measure, any significant change to the structure or organisation of a party's competent authority, and other similar matters. The EU-UK TCA takes a somewhat similar approach, and in Article 80, mandates a similar requirement of notifying the other party without undue delay in case of a significant change to pest or disease status, the emergence of a new animal disease, a significant food safety issue identified by the party, etc. However, it also contains a separate transparency article in the form of Article 77. This Article ensures that both parties will promptly communicate to the other party any changes to its SPS measures and approval procedures, and enhance mutual understanding of its SPS measures and their application, among other commitments to information exchange. A somewhat related aspect to transparency in the case of both agreements is the option to hold technical consultations with respect to food safety, plant health, animal health, an SPS measure. In the CETA, this receives its own (short) article, Article 5.12, while in the case of the TCA, it is integrated into Article 80 as its second paragraph. In the author's opinion, with regard to this characteristic, there seems to be a general equivalency between the two agreements, though the TCA is somewhat more fleshed out and detailed, with its stronger separation of notification and information exchange.

We now turn to the question of control, inspection and approval procedures. Even beyond the scope of the topic in the WTO SPS Agreement, we will also endeavour to discuss here all elements of the SPS chapters that relate to SPS

[16] For detailed information on the domestic equivalence decision framework of both parties, see: Holger – Harle, 2020.

measure-based procedures to approve or inspect specific products, as well as the tools available to parties to inspect or monitor the implementation of their SPS measures. At first glance, this appears to be an area where both agreements are reasonably well-developed. In the case of the CETA, we have Articles 5.7, 5.8, 5.9 and 5.10 that could be connected to the topic. To be more specific, Article 5.7 establishes a system for jointly identifying a commodity as a priority. In such cases, the importing party has to undertake, without undue delay, the necessary process to establish specific SPS import requirements for the commodity that is identified as a priority. For this purpose, the exporting party has to provide all relevant information and give reasonable access for the purpose of inspection. Article 5.7 also contains rules for “authorised establishments” for the import of a commodity, which can be approved without prior inspection by the importing party if conditions are met. Article 5.8 establishes the possibility for parties to carry out audits and verifications of the other party’s competent authority, in order to ensure that the control programmes match the requirements of the CETA. Meanwhile, Article 5.9 covers rules regarding export certification, specifically with regard to live animals and animal products, where if equivalence has been recognized, the parties use a model health attestation that appears in Annex 5-I of the CETA. Finally, Article 5.10 concerns the topic of import checks and fees. In this case, Annex 5-J covers the more minute rules of such checks and fees, but the Article itself establishes that if the import checks reveal non-compliance with the relevant import requirements, the action taken by the importing party must be based on an assessment of the risk involved and are not be more trade-restrictive than required to achieve the party’s appropriate level of SPS protection (hence why we already mentioned Article 5.10 earlier). It also provides that importing parties are to notify importers of the reason for non-compliance and grant an opportunity to review the decision.

In the case of the EU-UK TCA, we encounter even more robust rules. Parts of Article 73, as well as Articles 75, 76 and 79, can all be tied to the present topic. To begin, Article 73.3 contains injunctions against undue delay in initiation and completions, as well as against unnecessary, scientifically and technically unjustified or unduly burdensome information requests in relation to SPS procedures or approval processes. These procedures and approvals are also to be applied without discrimination, are to be proportionate to the risk identified and not more trade restrictive than necessary. Furthermore, Article 73.4 bars parties from using these SPS procedures or information requests to delay market access. Likewise, Articles 73.5 and 73.6 deal with obligations to not impose administrative procedures or systems that hamper trade unnecessarily. To continue, Article 75 concerns import conditions and procedures, with a lengthy list of specific rules. We will highlight some of the most important ones. This Article notably mandates that the import conditions of the importing party should apply to the entire territory of the exporting party in a consistent manner. It also establishes an authorisation system, which allows importing parties to require authorisation for certain products, which is to be granted if the competent authority of the exporting party

objectively demonstrates the fulfilment of the authorisation conditions to the importing party. The Article also contains rules for cases where the exporting party requests to be examined only for a part of its territory for the authorisation, which in the author's opinion, is naturally a crucial feature when one of the parties is the EU. Control, inspection and approval procedures are also directly referred to here, mandating parties to initiate and complete such procedures without undue delay, while information requests are to be limited to what is necessary for the approval process to take into account information already available in the importing party. Another highlightable rule within this Article is the obligation for the parties to promptly take all necessary legislative and administrative measures to allow trade to take place without undue delay (assuming positive results on its assessment), as well as the establishment of a list of regulated pests for products, or other related objects, where a phytosanitary concern exists by the given importing party. Turning over to Article 76, we see something similar to the CETA's Article 5.7, as it concerns rules on approved establishments. This essentially allows importing parties to optionally maintain a list of approved establishments meeting their import requirements as a condition to specifically allow imports of animal products from these establishments. As for Article 79, here we find detailed rules on audits and verifications, similar in concept to CETA's Article 5.8. This specifically allows importing parties to carry out audits and verifications of the other parties' inspection and certification systems, as well as the results of the controls carried out by said systems. Notably, the parties have to discuss the objectives and scope of the audit or verification before its commencement, and the importing party also has to provide a plan for this at least 30 days prior to the commencement. In general, we can summarize that the EU-UK TCA is noticeably more detailed than the CETA from the perspective of this characteristic, though the latter is also relatively detailed, but not to the same extent.

The final characteristic we established regarding the WTO SPS Agreement was regional adaptation. Both trade agreements explicitly refer to this. In CETA, this would be Article 5.5, as well as some of the attached annexes. Here, the agreement outlines rules separately for animals, animal products and animal by-products as well as plants and plant products. These rules are associated with specific annexes, and principally concern recognizing zoning, regional conditions, as well as taking into account pest statutes of given areas when establishing SPS measures. As for the EU-UK TCA, Article 78 contains detailed rules for adaptation to regional conditions. Like the CETA, the parties are mandated to recognise the concept of zoning, disease-free areas, protected zones, pest-free areas, etc. This Article also mandates the establishment of close cooperation to maintain confidence in the procedures related to these zones and areas. In general, this Article refers strongly to the OIE standards. As for comparing the two Agreements on this front, we can say that there do not seem to be overly significant differences in the depth of cooperation. The EU-UK TCA article is technically more detailed, but we have to take into account that the CETA also has more specific rules related to these matters in the relevant annexes. Thus, we can roughly equate the two agreements here.

Beyond the characteristics we established in the previous chapter, there are some other miscellaneous aspects we can use to compare the two SPS chapters. To be specific, coordination committees and enhanced cooperation in particular areas. With regard to the former, Article 5.14 of the CETA refers to the so-called Joint Management Committee for Sanitary and Phytosanitary Measures, which is to meet annually and as required by its tasks. This Committee fulfils manifold functions, including monitoring the implementation of the CETA's SPS chapter, providing direction for the identification, prioritisation, management and resolution of issues, and preparing and maintaining a document that details the state of discussions between the parties on their work on recognition of the equivalence of specific SPS measures, among other tasks related to the SPS measures of the parties. This Committee is also notably empowered to establish working groups to resolve discussions of specific SPS issues. A similar committee is established in Article 87 of the EU-UK TCA, called the Trade Specialised Committee on Sanitary and Phytosanitary Measures. This Committee has similar tasks to the CETA's committee, including discussing ongoing processes on the development of new SPS-related regulations, reviewing SPS measures by the parties of the agreement, and assisting in information exchange, among other tasks. In the author's opinion, both committees appear to be roughly on even footing with regard to their competencies.

Enhanced cooperation in particular areas is the last aspect we shall use to compare the two agreements. This aspect is entirely unique to the EU-UK TCA's SPS chapter, the CETA's chapter does not possess this. Articles 84, 85 and 86 of the TCA address this matter. The TCA specifies three areas of enhanced cooperation: animal welfare (Article 84), antimicrobial resistance (Article 85), and sustainable food systems (Article 86). With regard to animal welfare, the TCA's parties recognized animals as sentient beings and undertook to cooperate in developing the best possible animal welfare practices, exchange information with each other, and strengthen their mutual research in the area. For antimicrobial resistance, the TCA emphasizes the "fight against the development of antimicrobial resistance" and likewise establishes avenues of cooperation and information exchange between the TCA's parties. This Article (85) also emphasizes cooperation with relevant international organizations for further development of this field. Article 86 is considerably shorter in comparison, but still mandates that the parties will encourage their respective competent food safety, animal and plant health services to cooperate with each other for furthering sustainable food production methods and food systems. In the author's opinion, these articles are interesting, because they represent a further evolution, away from the simple generic SPS cooperation as we have seen in the CETA for example. Clearly, the parties considered these areas especially notable, and thus cooperation was reinforced by singling them out. An example we can cite in support of this notion is the EU's recent drive to develop further regulations regarding antimicrobial resistance.^[17]

[17] European Commission: European Health Union: EU steps up the fight against antimicrobial resistance, 2023.

IV. CONCLUSIONS

Our original hypothesis was that the EU-UK TCA would present a deeper cooperation between parties than the CETA did. Based on our previous chapter, it seems this hypothesis has been largely proved true at first glance. To summarize, we identified a rough equivalency between agreements regarding questions of risk assessment, equivalence, coordination committees, regional adaptation and transparency (though here, we identified the TCA as having a slight edge over the CETA). By comparison, we established that the TCA clearly realizes a deeper cooperation with regard to harmonization, control, inspection and approval procedures, and enhanced cooperation in particular areas. Therefore, we can state that our original hypothesis can be considered to have proven true.

However, it is another matter to consider whether this somewhat deeper level of cooperation can be considered significant compared to the CETA, or whether it represents a significant step forward compared to the baseline, the WTO SPS Agreement. In the author's opinion, the TCA largely doesn't show itself to be particularly revolutionary when it comes to SPS measures. The seeming failure to significantly further develop equivalence recognition mechanisms compared to both the WTO SPS Agreement and the CETA is particularly notable. This is because equivalence, in the author's opinion, is ultimately one of the most significant questions when it comes to the practical application of SPS measures. Of course, the fact that the TCA has more developed and robust rules of control, inspection and approval procedures is commendable and contributes to various practical benefits, but equivalence is perhaps still the most practically important element.

By contrast, we can highlight the concept of enhanced cooperation in particular areas as a significant positive development in the TCA compared to the CETA (and the WTO SPS Agreement). In the author's opinion, designating certain SPS-related areas as especially important for establishing cooperation can be significant in mitigating the potential negative outcomes of these threats. Especially in relation to antimicrobial resistance, cross-border cooperation can be considered particularly valuable, since this issue is difficult to resolve on a purely domestic basis.^[18]

In the author's opinion, it would be perhaps advisable for the EU and the UK to consider negotiating a supplementary treaty related specifically to SPS measures. While the currently established framework is largely suitable and does expedite the implementation of SPS measures and reduce their impediment to trade, further cooperation could be useful. In particular, the concept of enhanced cooperation for areas could be expanded to cover further important areas judged by the parties to be critically important, and existing rules here could be further deepened. Likewise, establishing a more automatized system of equivalence recognition when it comes to SPS measures might be considered advisable. Given the

[18] Regarding this topic, see: Christen, 2018.

evident tightening of regulations on the UK side that we already referenced in the introduction, the need for further evolving the SPS aspects of the treaty appears to be ever more significant. As the EU also increasingly develops legislation on SPS-adjacent matters, it is important to establish closer regulatory cooperation with important trading partners like the UK.

LITERATURE

- Alemanno, Alberto (2007): *Trade in Food: Regulatory and Judicial Approaches in the EC and the WTO*. Cameron May, London.
- Christen, Margarita (2018): *The Antimicrobial Resistance Regulatory Strategy: The Practicality of the Adoption of National Action Plans on AMR in the EU and US Regions*. GRIN Verlag, München-Ravensburg.
- Downes, Chris (2014): *The Impact of WTO SPS Law on EU Food Regulations*. Springer Science & Business Media, Berlin.
DOI: <https://doi.org/10.1007/978-3-319-04373-9>.
- Epps, Tracey (2008): *International Trade and Health Protection: A Critical Assessment of the WTO's SPS Agreement*. Edward Elgar Publishing, Cheltenham, UK.
DOI: <https://doi.org/10.4337/9781848443877>.
- Gonzalez, Carmen G. (2007): Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology. In: *Georgetown International Environmental Law Review*. Vol. 19/2007.
- Gruszczynski, Lukasz (2010): *Regulating health and environmental risks under WTO law: a critical analysis of the SPS agreement*. Oxford University Press, Oxford.
DOI: <https://doi.org/10.1093/acprof:oso/9780199578924.001.0001>.
- Gruszczynski, Lukasz (2014): *The SPS Agreement Within the Framework of WTO Law: The Rough Guide to the Agreement's Applicability*. SSRN.
DOI: <https://doi.org/10.2139/ssrn.1152749>.
- Hajdu Gábor (2020): GMOs and the SPS Agreement: Lessons of the EC-Biotech Dispute. In: *European Legal Studies and Research*. S. C. Universul Juridic S. R. L., Bucharest.
- Henson, Spencer – Loader, Ruper (1999): Impact of sanitary and phytosanitary standards on developing countries and the role of the SPS Agreement. In: *Agribusiness*. 1999/15/3.
DOI: [https://doi.org/10.1002/\(sici\)1520-6297\(199922\)15:3%3C355::aid-agr5%3E3.0.co;2-i](https://doi.org/10.1002/(sici)1520-6297(199922)15:3%3C355::aid-agr5%3E3.0.co;2-i).
- Mayeda, Graham (2004): Developing Disharmony? The Sps and Tbt Agreements and the Impact of Harmonization on Developing Countries. In: *Journal of International Economic Law*. 2004/7/4.
DOI: <https://doi.org/10.1093/jiel/7.4.737>.
- Peel, Jacqueline (2013): *A GMO by Any Other Name ... Might Be an SPS Risk!: Implications of Expanding the Scope of the WTO Sanitary and Phytosanitary Measures Agreement*. SSRN.
DOI: <https://doi.org/10.1093/ejil/chl033>.
- Wagner, Markus (2017): The Future of SPS Governance: SPS-Plus or SPS-Minus? In: *Journal of World Trade*. 2017/51/3.
DOI: <https://doi.org/10.54648/trad2017018>.

ONLINE SOURCES

- European Commission: European Health Union: EU steps up the fight against antimicrobial resistance. (Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3187. Downloaded on: 2 October 2023).
- ASD Group: Brexit: New obligations for exporters to the UK from the end of October 2023. (Available at: <https://www.asd-int.com/en/brexit-new-obligations-for-exporters-to-the-uk-from-the-end-of-october-2023/>. Downloaded on: 4 October 2023).
- Schelling, Holger – Harle, Katharine (2020): The Equivalence Decisions Framework of the EU and UK – Brexit and beyond. (Available at: <https://www.dentons.com/en/insights/articles/2020/december/28/the-equivalence-decisions-framework-of-the-eu-and-uk-brexit-and-beyond>. Downloaded on: 1 October 2023).

LEGAL SOURCES

- Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).
- Comprehensive Economic and Trade Agreement (CETA).
- EU–UK Trade and Cooperation Agreement (TCA).
- International Plant Protection Convention.
- Trans-Pacific Partnership Agreement (TPP).