A BOOK REVIEW ON LUKASZ GRUSZCZYNSKI AND JOANNE SCOTT "THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES" (OXFORD UNIVERSITY PRESS, 2023)

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ABSTRACT

The second edition of "The WTO Agreement on Sanitary and Phytosanitary Measures" by Lukasz Gruszczynski provides an in-depth analysis of the World Trade Organization (hereinafter "WTO") Agreement on Sanitary and Phytosanitary Measures (hereinafter "SPS"). Since the first edition by Joanne Scott in 2007, significant developments in SPS case law and practice necessitate this comprehensive update. Gruszczynski's commentary elucidates the complex interplay between international trade and public health, focusing on how the SPS Agreement balances trade facilitation with health protection in a rapidly evolving global landscape. This book is an essential resource for understanding the current relevance and application of the SPS Agreement amidst these changes on the basis of recent case law.

The primary audience includes legal practitioners, scholars, and advanced students specializing in international trade law,

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particularly those focused on WTO regulations and their practical implications. It is also invaluable for those interested in the intersection of international trade and public health, providing critical insights into legal frameworks governing food safety and animal and plant health standards.

Adopted in 1994 as part of the Marrakesh Agreement, the SPS Agreement has undergone significant jurisprudential developments, especially with recent political and economic shifts. Gruszczynski argues that the SPS Agreement remains a cornerstone of international trade law, highlighting its resilience and continued effectiveness even amid broader WTO disruptions. The recent adoption of the SPS Declaration by WTO Members reaffirms the agreement's critical role in balancing trade and health protections, making this updated commentary essential for current and future developments in international trade law.

KEYWORDS: *WTO Agreement, sanitary and phytosanitary measures, SPS Agreement, international trade law, public health, food safety standards, animal health standards, plant health standards, jurisprudential developments, trade facilitation, WTO regulations, SPS committee, science-based obligations, risk assessments, transparency requirements, non-discrimination principles, control and inspection procedures, international standards, developing countries, free trade agreements, legal frameworks, global trade*

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I. INTRODUCTION

The second edition of "The WTO Agreement on Sanitary and Phytosanitary Measures" by Lukasz Gruszczynski provides an in-depth analysis of the World Trade Organization (hereinafter "WTO") Agreement on Sanitary and Phytosanitary (hereinafter "SPS") Measures. Since the book's first edition was published in 2007 by Joanne Scott, significant developments have occurred in SPS case law and practice, necessitating a comprehensive update. The commentary aims to elucidate the complex interplay between international trade and public health, focusing on how the SPS Agreement balances trade facilitation with health protection in a rapidly evolving global landscape. This work serves as a vital resource for understanding the current relevance and application of the SPS Agreement amidst these changes.[1]

The primary readership for this commentary includes legal practitioners, scholars, and advanced students specializing in international trade law, with a particular focus on WTO regulations and their practical implications. The book is also invaluable for those interested in the intersection of international trade and public health, as it provides critical insights into the legal frameworks governing food safety and animal and plant health standards.

II. THE BOOK'S CONTENT AND ITS MAIN UPDATES

Adopted in 1994 as part of the Marrakesh Agreement establishing the WTO, the SPS Agreement has undergone significant jurisprudential developments, particularly in light of political and economic shifts over the past two decades. Gruszczynski argues that the SPS Agreement remains a cornerstone of international trade law. The author provides a detailed reassessment of SPS case law, emphasizing the agreement's sustained

[1] LUKASZ GRUSZCZYNSKI & JOANNE SCOTT, THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES xxxv (2d ed., 2023).

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relevance and the need for continual adaptation to address emerging challenges in global trade and health standards. He highlights the resilience of the SPS Agreement and its mechanisms, which continue to function effectively even amid broader disruptions in the WTO framework.[2] While the WTO has faced significant hurdles, including stalling negotiations and the incapacitation of the Appellate Body (hereinafter "AB"), the SPS Agreement has continued to operate smoothly.[3] The recent adoption of the SPS Declaration by WTO Members reaffirms the agreement's critical role in balancing trade and health protections, making this updated commentary an essential resource for current and future developments in international trade law.

The book consists of the following chapters. The first Chapter provides an introduction to the SPS Agreement. Chapter 2 (Cooperative Regulation in the WTO: The SPS Committee) introduces the SPS Committee. Chapter 3 (Science and SPS) delves into the operation of the specific trade concerns mechanism and the legal status of decisions made by the SPS Committee in WTO law and touches on the three key science-based obligations of the SPS Agreement. Chapter 4 (Provisional SPS Measures) explores the parameters of required risk assessments, the involvement of scientific experts in SPS dispute settlement, and the applicable standard of review. Chapter 5 (Additional Obligations) examines the principle of non-discrimination of Articles 2.3 and 5.5, as well as the requirement for using the least trade-restrictive means (Art. 5.6), and obligations related to regionalization (Art. 6). Chapter 6 (The Transparency Obligations), discusses the notification requirements of Annex B and the principle of transparency. Chapter 7 (Control, Inspection, and Approval Procedures) focuses on the nature of control, inspection, and approval procedures requirements outlined in Annex C and Art. 8 of the SPS Agreement. Chapter 8 (International Standards) analyzes international standards (Annex A(3), Art. 3) and sister organizations like the Codex Alimentarius Commission (hereinafter "Codex"), the World Organization for Animal Health (hereinafter "WOAH"), the International Plant Protection Organization (hereinafter "IPPC"). Chapter 9 (The SPS Agreement and Developing Countries), addresses special and differential treatment under the SPS Agreement in developing countries (Art. 10), technical assistance (Art. 9), and the role of private standards. Finally, Chapter 10 (Looking Beyond the SPS Agreement: SPS Requirements in FTAs) addresses SPS rules in free trade agreements, such as bilateral or regional trade agreements.[4]

[2] *Id*.
[3] *Id*. at 281.
[4] *Id*. at xxxvi.

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A. Main Updates

Two of the most relevant updates included in the second edition are on SPS case law and regional trade agreements. There have been numerous disputes involving SPS measures, leading to clarifications of various provisions of the agreement.[5] The rulings from the WTO's Dispute Settlement Body (DSB) have further defined and clarified the interpretation of the SPS Agreement, particularly concerning scientific evidence and risk assessment. Members have increasingly notified the WTO of their SPS measures, enhancing transparency. The WTO Secretariat has continued to improve the notification system, making it easier for countries to access information about new SPS measures. The rise in regional trade agreements (hereinafter "RTAs") including SPS chapters, is aiming for deeper cooperation and harmonization at the regional level.[6] The launch of the ePing system in 2016 has significantly improved transparency by allowing stakeholders to receive notifications about SPS and Technical Barriers to Trade (hereinafter "TBT") measures affecting their products.[7]

Furthermore, there has been a stronger push towards harmonization of SPS measures based on international standards set by organizations such as Codex, WOAH, and the IPPC. Efforts have been made to promote the concept of equivalence, where different measures that achieve the same level of health protection are recognized as equivalent, facilitating smoother trade flows. The Standards and Trade Development Facility (STDF), a joint initiative of the WTO, World Bank, Food and Agriculture Organization of the United Nations (FAO), WHO, and WOAH, has continued to provide technical assistance and capacity-building projects to developing countries. These initiatives aim to enhance their ability to meet SPS standards and benefit from international trade.[8] Projects have ranged from improving pest control systems, strengthening food safety frameworks, to enhancing veterinary services in developing countries.[9]

Increasing attention has been given to the impact of climate change on pest and disease distribution, and how SPS measures need to adapt accordingly. The WTO has also focused on the implications of new technologies such as biotechnology and nanotechnology in food safety and plant and animal health.[10] The COVID-19 pandemic highlighted the importance of SPS measures in ensuring food safety and animal health while maintaining trade flows. The WTO and its members have discussed ways to

[5] *Id*. at xxxv.
[6] *Id*.at 282.
[7] *Id*. at 36.
[8] *Id*. at 51, 199.
[9] *Id*. at 88.
[10] *Id*. at 62, 122.

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ensure that SPS measures do not unnecessarily hinder trade during health crises.[11]

These developments reflect the ongoing evolution and adaptation of the SPS Agreement to new challenges and opportunities in international trade. The focus remains on maintaining a balance between protecting health and facilitating trade, with an increasing emphasis on transparency, scientific basis for measures, and international cooperation.

B. SPS Case Law

To understand how measures fall under the SPS Agreement, it is essential to analyze the interplay between Articles 2.2 (scientific obligations) and 5.1 (risk assessment). Key cases like *EC — Hormones* (DS48) and *EC — Biotech Products* (DS291) have established pivotal principles. Article 2.2 stipulates that SPS measures must be necessary to protect human, animal, or plant life or health, grounded in scientific principles, and supported by adequate scientific evidence. Therefore, Article 2.2 mandates that domestic SPS measures must satisfy three cumulative criteria. First, they must be necessary to safeguard human, animal, or plant life or health. Second, they must be based on scientific principles, indicating methodological soundness, objectivity, peer review, and falsifiability and third, they must not be maintained without sufficient scientific evidence.[12] Risk assessment, as defined in Annex A(4) of the SPS Agreement, encompasses two distinct categories: (i) evaluating the likelihood of pest or disease entry, establishment, or spread and their associated biological and economic impacts (pest/disease risk assessment); and (ii) evaluating potential adverse health effects from additives, contaminants, toxins, or disease-causing organisms in food, beverages, or feedstuffs (food-borne risk assessment).[13]

Panels examine the scientific rigor of each measure, ensuring a logical connection to its purpose. The sufficiency of scientific evidence demands a rational relationship with scientific findings, considering both quality and quantity. Even minority scientific opinions can substantiate a measure if they come from reputable sources. In *Japan — Apples* (DS245) and *Australia — Apples* (DS367) the panel stressed that measures must be both scientifically grounded and commensurate with the risk they aim to mitigate, striking a balance between risk management and policy measures.[14] In *Japan — Agricultural Products II* (DS76) the U.S. contested Japan's measure requiring testing of each variety of agricultural products to prevent the entry of certain pests. The ruling reinforced the necessity for SPS measures to be

[11] *Id*. at xxxv.
[12] *Id*. at 68.
[13] *Id*. at 74.
[14] *Id*. at 5, 115.

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based on scientific principles and appropriate risk assessment.[15]

Furthermore, Articles 2.2 and 5.1 interact in a circular manner, with Article 5.1 serving as a specific application of the broader obligations in Article 2.2. If a measure fails to conform to a risk assessment as per Article 5.1, there is a rebuttable presumption that it violates Article 2.2 by lacking a scientific basis. However, non-compliance with one article does not automatically indicate non-compliance with the other; each must be independently scrutinized, although panels often consolidate these analyses for efficiency. In practice, panels prioritize the scientific validity of measures over procedural adherence, reflecting the intertwined yet distinct roles of Articles 2.2 and 5.1 in ensuring that SPS measures are scientifically rigorous and proportional to the risks they address.[16] Cases like *United States — Poultry (China)* (DS392)[17] and *Russia — Pigs (EU)* (DS475)[18] further strengthened the rationale for the necessity of scientific justification and proper risk assessment for SPS measures.[19] Risk assessments must be systematic, rigorous, and objective to ensure confidence in their conclusions. *Australia — Salmon* (DS18) established that evaluations must satisfy the requirements of the second and third prongs of its definition. Understanding risk assessment hinges on several key points: distinguishing between ascertainable and theoretical risks, clarifying distinctions between 'likelihood' and 'potential', specifying the necessary level of assessment detail, considering alternative policy options, recognizing flexibilities, and incorporating economic considerations.[20] However, post-Fukushima the AB recognized the legitimacy of certain precautionary measures in *Korea — Radionuclides* (DS495) where Japan challenged South Korea's import bans and additional testing requirements on Japanese fishery products, implemented after the Fukushima nuclear accident. The WTO Panel found that South Korea's measures were partially inconsistent with the SPS Agreement, particularly regarding transparency and risk assessment.[21]

Other cases clarified the interaction between SPS measures and other WTO agreements such as *EC — Seal Products* (DS400 and DS401) where Canada and Norway challenged the EU's ban on the importation and

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[15] *Id*. at 70.
[16] *Id*. at 114.
[17] China challenged the U.S. prohibition on the importation of Chinese poultry products, claiming it was inconsistent with the Sanitary and Phytosanitary [hereinafter SPS] Agreement. The World Trade Organization (WTO) Panel ruled in favor of China, stating that the U.S. measure was not based on a risk assessment that evaluated the potential health risks posed by Chinese poultry.
[18] The EU challenged Russia's import ban on pigs, pork, and certain pig products from the EU, alleging that the ban was not based on an appropriate risk assessment and violated the SPS Agreement.
[19] GRUSZCZYNSKI & SCOTT, *supra* note 1, at 55, 178.
[20] *Id*. at 116.
[21] *Id*. at 55.

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marketing of seal products,[22] as well as, *United States — Tuna II (Mexico)* (DS381) where Mexico challenged the U.S. dolphin-safe labeling provisions. This case primarily dealt with the TBT Agreement but had implications for SPS measures by addressing labeling and certification issues.[23]

C. SPS Provisions in Regional Trade Agreements

Over the past two decades, WTO Members have increasingly fostered trade liberalization by way of concluding RTAs, primarily as free trade agreements (hereinafter "FTAs"). As a result, all WTO Members now participate in multiple overlapping RTAs, creating a complex network of agreements alongside their WTO commitments. Initially focused on border measures, FTAs have evolved to address non-tariff barriers (NTBs), including SPS issues. Nowadays, FTAs feature comprehensive SPS chapters with detailed or additional requirements beyond those stipulated in the SPS Agreement, termed "SPS-plus obligations", for two primary reasons: to facilitate market access for agricultural products by streamlining entry procedures, and to ensure product safety in domestic markets by out-sourcing certain regulatory activities. SPS chapters aim to balance these at times conflicting objectives.[24]

Gruszczynski's analysis focuses on the most prevalent features found in selected SPS chapters of recent FTAs, which serve as benchmarks for other agreements. These agreements include the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the EU-Japan Economic Partnership Agreement (EU-Japan EPA), the Regional Comprehensive Economic Partnership (RCEP), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the United States-Mexico-Canada Agreement (USMCA). This selection, predominantly involving agreements led by the EU and US, is justified given their significant roles as global market regulators.[25]

III. CONCLUDING THOUGHTS

Compared to other leading works on the SPS Agreement, "The WTO Agreement on Sanitary and Phytosanitary Measures" (Second Edition) distinguishes itself through its meticulous case law analysis and practical insights. This book significantly enhances the understanding of SPS measures and their application within the WTO framework, offering fresh

[22] *Id*. at 141.
[23] *Id*. at 13, 57.
[24] *Id*. at 281.
[25] *Id*. at 28-83.

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perspectives on enduring legal debates.

The book adopts a rigorous approach, analyzing WTO dispute settlement reports, committee decisions, and academic literature, ensuring a robust examination of SPS issues grounded in authoritative sources and legal precedents. Given the evolving dynamics of international trade and health standards, the book remains highly relevant, offering a detailed exploration of the implications of the SPS Agreement in contemporary trade disputes and providing crucial insights for navigating complex legal challenges in global commerce. The book excels in providing an exhaustive examination of SPS case law and decisions, offering readers a comprehensive understanding of how these standards have evolved through WTO adjudication. This depth is crucial for legal practitioners and scholars seeking detailed insights into the nuances of SPS disputes. Furthermore, the commentary covers a wide spectrum of the SPS Agreement, including less-explored areas such as provisional measures and the role of international standard-setting organizations. This comprehensive approach ensures that all facets of SPS regulation are addressed, offering a holistic view for practitioners and researchers alike.

Gruszczynski's second edition advances legal scholarship by addressing three critical issues: the appropriateness of the disciplines established by the SPS Agreement, the consistency of their interpretation by WTO case law, and the normative content of requirements yet to be addressed by SPS jurisprudence. By delving into these areas, the book not only updates the existing legal discourse but also provides a forward-looking analysis of how the SPS Agreement can continue to adapt to emerging global trade and health challenges.

Practitioners will find the detailed case law discussions and practical insights into WTO dispute settlement processes extremely useful. The authors' methodical approach to explaining the balance between trade liberalization and the protection of human, animal, and plant life or health is particularly beneficial for those involved in formulating or challenging SPS measures. As a teaching resource, Gruszczynski's commentary is invaluable. Its comprehensive coverage of the SPS Agreement, combined with its clear and structured presentation, makes it an excellent textbook for advanced courses on international trade law and WTO law. The book's critical analysis encourages students to think deeply about the implications of the SPS Agreement and its impact on global trade and public health. The inclusion of case studies and practical examples helps bridge the gap between theory and practice, which is crucial for legal education. For example, the book's analysis of the most recent case law provides students with a real-world context to understand the application of the SPS Agreement. This approach not only elucidates complex legal concepts but also enhances students' analytical and problem-solving skills.

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Legal Practitioners should read this commentary because lawyers specializing in international trade law, agricultural law, or food safety law will find this book an indispensable resource for both litigation and advisory work. The detailed explanations of principles, procedures, and jurisprudence associated with the SPS Agreement offer practical tools for developing legal strategies and navigating complex legal issues. Furthermore, this book serves as a comprehensive textbook for courses on WTO law and international trade for academics and students, offering deep insights and fostering critical thinking. Its structured presentation and critical analysis make it an excellent resource for advanced students and researchers looking to understand the nuances of the SPS Agreement. For those involved in drafting and implementing SPS measures, understanding the legal framework and precedents set by the WTO is crucial. This book provides the necessary background and analysis to ensure that new regulations comply with international standards and effectively balance trade facilitation with health protection.

The book lays a strong foundation for further research on the SPS Agreement's adaptation to new global challenges, such as climate change and digitalization. By addressing the evolving landscape of international trade and health standards, Gruszczynski's commentary opens avenues for scholarly inquiry into how the SPS Agreement can continue to adapt and remain relevant. I highly recommend this book to legal practitioners, scholars, and advanced students in the field of international trade law. It is particularly valuable for those specializing in WTO regulations and the legal intricacies of SPS measures. The detailed analysis and practical insights make it an indispensable addition to any legal library. Policymakers and regulators will also benefit greatly from the book's clear explanations of legal principles and procedural guidance. This book is an authoritative and practical guide that bridges the gap between complex legal theory and practical application. Its thorough analysis, practical examples, and critical insights make it an invaluable resource for both practitioners and students. This book is a must-have for anyone involved in the intricacies of international trade and regulatory measures concerning health and food safety.

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Book

GRUSZCZYNSKI, LUKASZ & JOANNE SCOTT (2023), THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES (2d ed.).

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