

Master of International Trade Policy and Law (MITPL 4)

Agriculture, SPS and TBT

Presentations by Christian Häberli (PhD)

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Tuesday 14 February 2017

Menu for Today

+ Follow-up questions

3. TBT Agreement

Tea Break

➤ *Specific Trade Concern Process (Ms. Uyen)*

+ (“**mid-term test**”) SPS and TBT Quiz

+ Questions and discussion

My SPS questions to you (1)

- After the outbreak of avian flu in Guangzhou, reported by «Vietnam News» on 12 February 2017), can VN
 - block imports of eggs in Sapa?
 - block imports of poultry from the whole of China?
 - inspect every airplane (passengers and luggage) from Guangzhou?

My SPS questions to you (2)

- What are the 'scientific disciplines' set forth in Article 2.2 of the SPS Agreement?
- When is a measure maintained 'without sufficient scientific evidence'?
- Are Members ever allowed to maintain SPS measures for which there is insufficient scientific evidence?
- What is the relationship between Article 2.2 and Article 5.7 of the SPS Agreement?
- What is the implication of this relationship for the burden of proof?

SPS? TBT? Neither?

- “Viet Nam launches safeguard investigation on monosodium glutamate” (in order to determine whether increased imports threaten to cause serious injury to a domestic industry). Cf. WTO-Doc. G/SG/N/6/VNM/3 dated 7/9/15 (Source: WTO - https://www.wto.org/english/news_e/news15_e/safe_vnm_04sep15_e.htm).
- Monosodium glutamate (MSG) is a flavor enhancer commonly added to Chinese food, canned vegetables, soups and processed meats. The Food and Drug Administration (FDA) has classified MSG as a food ingredient that's "generally recognized as safe," but its use remains controversial. For this reason, when MSG is added to food, the FDA requires that it be listed on the label. (Source: Mayo Clinic - <http://www.mayoclinic.org/healthy-lifestyle/nutrition-and-healthy-eating/expert-answers/monosodium-glutamate/faq-20058196>

SPS Exercise (TOMORROW!)



- «Healthy Fruits»
 - Newland, with Tutti Frutti, vs Richland
- Presentations tomorrow:
 - Each group designates
 - a Legal advisor to Newland
 - Newland's representative to the SPS Committee
 - We'll have only 2 discussions between one advisor and one representative (10 minutes each, followed by 5 minutes Q/A).

3. The TBT Agreement: What is at issue?

- ✚ Technical regulations and standards are necessary for a range of reasons, from environmental protection, safety, national security to consumer information. And they can help trade. Therefore the same basic question is: how to ensure that standards are genuinely useful, and not arbitrary or an excuse for protectionism?
- ✚ Standards vary from country to country. Having too many different standards makes life difficult for producers and exporters. Arbitrary standards can become obstacles to trade.

Scope

- TBT Agreement applies to three types of measures (Annex 1.1-3):
 1. **technical regulations:** “document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is *mandatory*” (e.g. origin info)
 2. **standards:** “document approved by a recognized body, that provides [...] rules [...] with which compliance is *not mandatory*” (e.g. CEN)
 3. **conformity assessment procedures** (e.g. for sampling, testing and inspection)

Application



- TBT Agreement applies to measures relating to
 1. industrial and agricultural products [not services!] and
 2. product-related processes and production methods (**PPM**)
- Unclear whether the non-product-related PPM are included (e.g. prohibitions of coal, foie gras, or child labour).

Entities covered

- Art.4.1: «Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3»
- Art.3: Members must
 1. take “such reasonable measures as may be available to them” to ensure compliance by local government and non-governmental bodies; and
 2. shall not take measures that could *require actions by these bodies that are inconsistent* with the provisions of the TBT.

➤ For all private standards (e.g. labour standards, side airbags, «tar-free cigarettes»)?! (3.1 last sentence)

Relation to the SPS Agreement

- ✚ By their purpose sanitary and phytosanitary measures are excluded from the scope of application of the *TBT Agreement* even if they take the form of technical regulations, standards or conformity assessment procedures (Art.1.5).

Basic Principles: Rights and Obligations

- ✚ The TBT agreement also recognises countries' **rights to adopt the standards they consider appropriate** — for example, for human, animal or plant life or health, for the protection of the environment or to meet other consumer interests.
- ✚ Moreover, members are not prevented from taking measures necessary to ensure their standards are met. But that is counterbalanced with disciplines. A myriad of regulations can be a nightmare for manufacturers and exporters.
- ✚ The agreement encourages governments to apply **international standards**.

Basic Principles: Voluntary Standards (?)

- ✚ The agreement also sets out a **code of good practice** for both governments and non-governmental or industry bodies to prepare, adopt and apply voluntary standards. Over 200 standards-setting bodies apply the code.
- ✚ The agreement discourages any methods that would give domestically produced goods an unfair advantage. It also encourages countries to **recognize each other's procedures** for assessing whether a product conforms. Without recognition, products might have to be tested twice, first by the exporting country and then by the importing country.

Basic Principles: Transparency

✚ Manufacturers and exporters need to know what the relevant standards are in their prospective markets. To help ensure that this information is made available conveniently, all WTO member governments are required to establish **national enquiry points** and to keep each other informed through the WTO — around 900 new or changed regulations are notified each year. The Technical Barriers to Trade Committee is the major clearing house for members to share the information and the major forum to discuss concerns about the regulations and their implementation.

Transparency (Art. 2.9 et al)

- Notifications to the TBT Committee subject to scrutiny and «specific trade concerns»
- *TBT Information Management System* established as a publicly available database of transparency information for TBT measures, national enquiry points etc.
 - <http://tbtings.wto.org>
 - <http://tbtings.wto.org/web/pages/search/stc/Search.aspx>

Equivalence and Mutual Recognition

- «Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.» (Art. 2.7)
 - Question: Can a non-Member to a RTA demand accession to a Mutual Recognition Agreement (MRA) on a technical standard between two other WTO Members?

Substantive Provisions/1

- **MFN and NT:** “Members shall ensure that in respect of *technical regulations*, products imported from the territory of any Member shall be accorded *treatment no less favourable* than that accorded to *like products* of national origin and to like products originating in *any other country*” (Art.2.1)
 - NT test: (i) technical regulation? (ii) like product? (iii) treatment no less favourable?
 - ± same test for MFN «any other country» (*US – Tuna II*)
- u^b No Article XX defense justifying Art.2.1 violations!

Substantive Provisions/2

- **Treatment no Less Favourable:**
 - the prohibition under GATT Art.III:4 applies to both *de iure* and *de facto* less favourable treatment (*Korea – Beef*)
 - but in *US – Cloves* the AB found that the existence of such detrimental impact is *not sufficient* for a violation of Article 2.1: “a panel must further analyze whether the detrimental impact on imports stems exclusively from a *legitimate regulatory distinction* rather than reflecting discrimination against the group of imported products.”

Substantive Provisions/3

- **Legitimate regulatory distinction (LRD):** a panel must “carefully scrutinize the particular circumstances of the case, that is, the *design, architecture, revealing structure, operation, and application* of the technical regulation at issue, and, in particular, whether that technical regulation is *even-handed*.”
- AB (in *US – Cloves*) also recalled TBT sixth preamble recital: “no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment”

Substantive Provisions/4

- **Unnecessary Obstacles to International Trade (Art.2.2, 2nd sentence):** [...] “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the *risks non-fulfilment would create.*”
 - Some trade restrictiveness allowed (*US – Tuna II* and *US – COOL*)
 - Legitimate objective: to be determined by panel
 - Not More Trade-Restrictive than Necessary: relational analysis (*US – Tuna II*)
- So far no case of a violation of Art.2.2 (or 2.4)!

Substantive Provisions/5

- **International Standards (Art.2.4):** «Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives.»
 - large definition of «standardising bodies» and consensus not required for decisions, but
 - standards must be an *effective* and *appropriate* means, and membership should be open to at least all WTO Members (*US - Tuna II* and *EC – Sardines*).

Questions to you

- Do WTO Members have to use relevant international standards as a basis for their technical regulations? If so, when is this requirement satisfied? What is an 'international' standard and when is it 'relevant' within the meaning of Article 2.4 of the *TBT Agreement*?
- Under what circumstances may Members adopt or maintain a technical regulation that is not based on an existing international standard?
- Is it for the complainant to prove that the international standard is 'effective' and 'appropriate', or for the respondent to show that the international standard is u^b 'ineffective' or 'inappropriate'?

Special and Differential Treatment

- Art.12.1-12.3 similar to SPS...
- ...and for case law: in *US – Clove Cigarettes* and *US – COOL* Indonesia and Mexico argued that the United States had acted inconsistently with its obligation by failing to take into account the complainant's special development, financial and trade needs when preparing and applying the measures at issue. Both panels recalled the findings in *EC – Biotech* when they rejected these claims.

Summary

- ❖ The rules of the *TBT Agreement* apply (i) to (mandatory) technical regulations (ii) (non-mandatory) standards and (iii) conformity assessment procedures relating to products and (related) PPM.
 - ❖ Specific MFN and NT rules for TBT (**Art.2.1**)
 - ❖ Three-tier test for “unnecessary” TBT: *‘trade-restrictive’, ‘fulfilling a legitimate objective’, and ‘not more trade-restrictive than necessary’* to fulfil a legitimate objective, taking account of the risks non-fulfilment would create (**Art.2.2**)
 - ❖ Consistency requires *‘relevant international standard’, ‘used as a basis’* and *effective or appropriate means* for the fulfilment of the legitimate objectives (**Art.2.4**)

TBT in a Nutshell

- The **Technical Barriers to Trade Agreement (TBT)** tries to ensure that regulations, standards, testing and certification procedures do not create unnecessary trade obstacles.
- International standards, harmonisation and equivalence are important tools for conflict avoidance.

Specific Trade Concern process in the TBT and SPS Committees, especially for Vietnam

- Presentation by Ms. Ton Nu Thuc Uyen, Deputy Director, TBT Vietnam Office (MOIT)

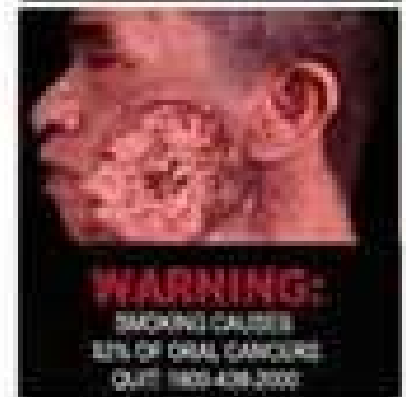
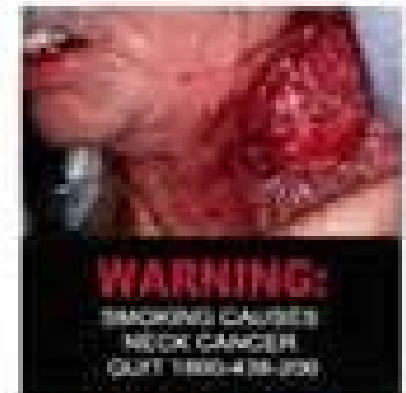
Before the Quiz:
may I know what you know?



Health protection measures

**Cigarette package
mandatory labelling
signalling health risks**

SAMPLE REPRESENTATION - FOR REFERENCE ONLY
WARNINGS FOR SMOKED TOBACCO PRODUCTS 2009



SPS Measure?

**No! TBT Measure!
(and/or IP...)**

Health protection measures

Regulation requiring that all dairy products for sale be from pasteurised milk (imports AND local production)

•TBT Measure?

No! SPS measure!

(Dispute solved first in DSB and then in Codex)

(from Switzerland, of course)

The World's Best Cheese

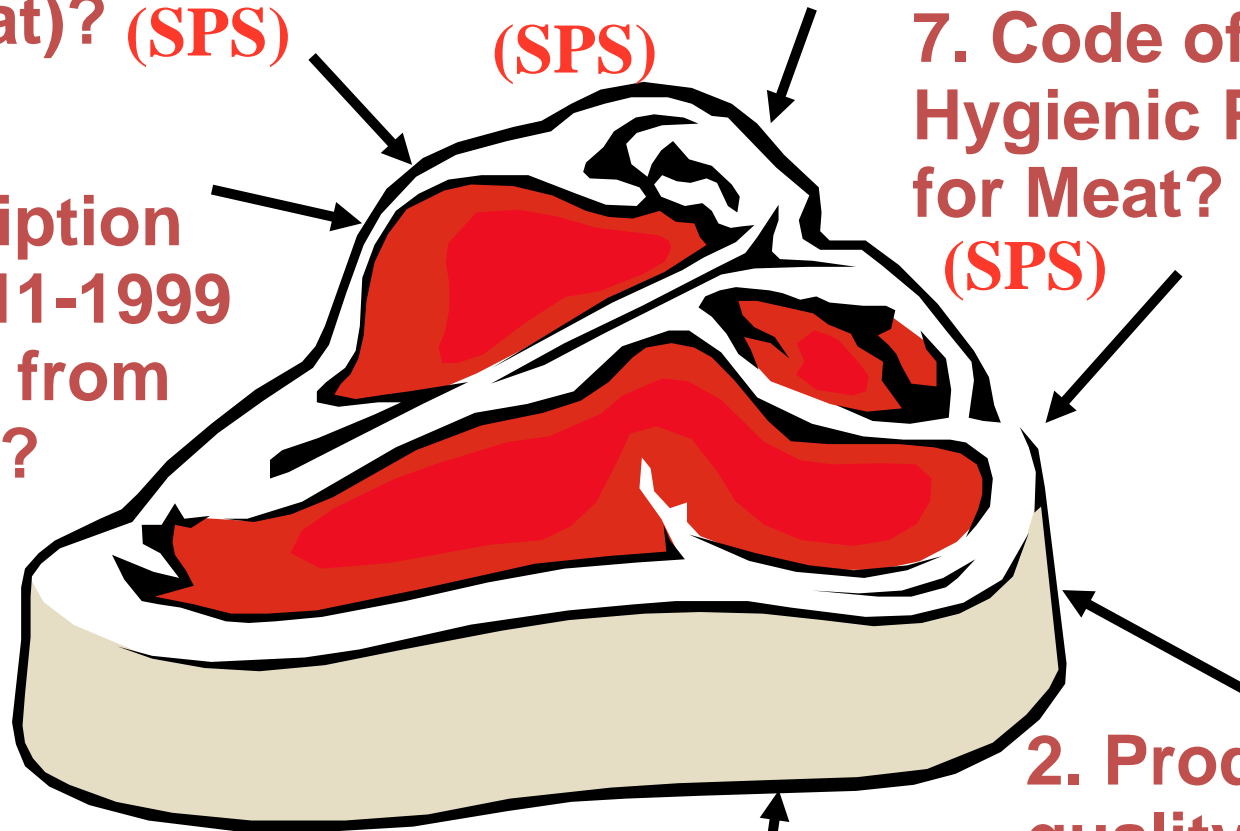


3. Methods of slaughtering & inspection (Codex Code of Hygiene for meat)? (SPS)

5. Packaging (in direct contact with the meat)? (SPS)

7. Code of Hygienic Practice for Meat? (SPS)

4. Product description (CODEX STAN 211-1999 for Fats and Oils from Animal Sources)? (SPS)



1. Contaminants (Codex standards for pesticides residues, veterinary medicines, contaminants)? (SPS)

6. Labelling of Prepackaged Foods (CODEX STAN 1-1985)? (TBT)

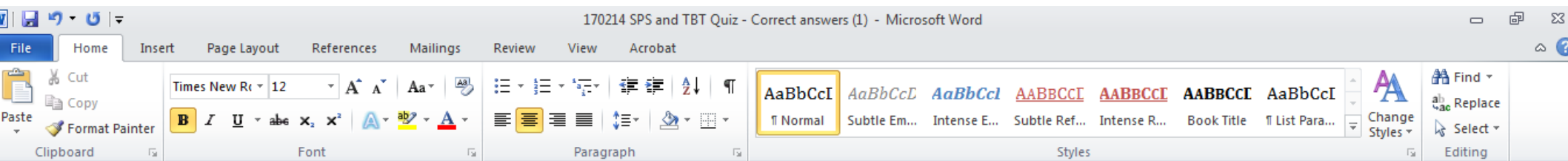
2. Product quality specifications (age, fat %, colour, species)? (TBT)

A Little Quiz on NTMs

How well do you know the SPS and TBT Agreements?



Correct answers!?

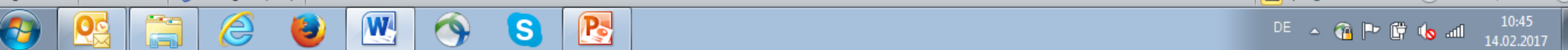


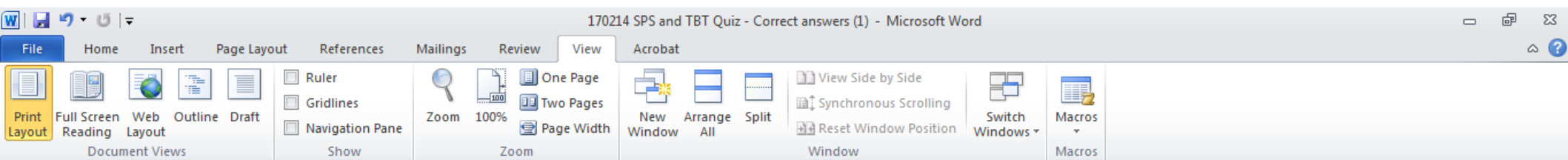
Quick Quiz SPS and TBT (MITPL 4, 14 February 2017)

CORRECT ANSWERS IN RED/BOLD

I. Which Agreement applies – SPS, TBT, or Neither?

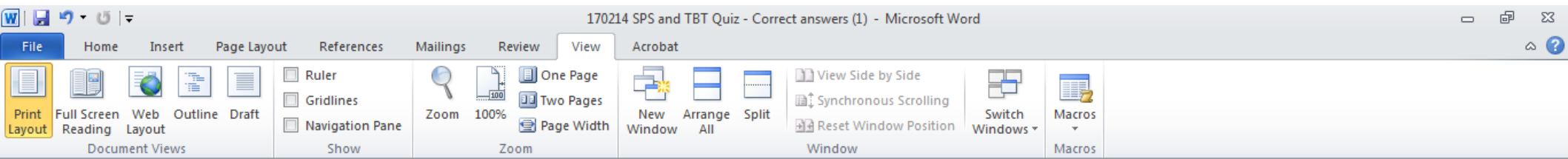
- 1) A requirement that the ingredients in a Coca-Cola bottle be listed on the label.
 SPS
 TBT
 None of the above
- 2) A law stating that all boxes of cookies be labeled as to whether they contain sugar.
 SPS
 TBT
 Potentially both of the above
- 3) A US requirement that the inside of all shipping containers previously used for the transport of oranges be sprayed with a pesticide before entry into the US State of Florida.
 SPS
 TBT
 None of the above
- 4) An EU law requiring that all foreign slaughterhouses where animals are slaughtered for shipment to the European Union be inspected for cleanliness.
 SPS
 TBT
 None of the above
- 5) A labeling requirement that a wine bottle list the alcohol content of the wine.
 SPS
 TBT
 None of the above





- 6) A requirement that all packaging for consumer goods be recyclable.
- SPS
 - TBT**
 - None of the above
- 7) A requirement that new machinery used to bottle fresh orange juice be delivered with safety instructions to prevent the injury of users.
- SPS
 - TBT**
 - None of the above
- 8) A law requiring that vegetables be labeled as to whether they are “organic.”
- SPS
 - TBT**
 - None of the above
- 9) A requirement that cigarette packages bear a label warning of health risks:
- SPS
 - TBT**
 - None of the above
- 10) A requirement that dogs entering a country with passengers from abroad be placed in quarantine to assure they are not infected with rabies.
- SPS**
 - TBT
 - None of the above





- 11) A requirement that the cholesterol content of butter and margarine be displayed on the product.
- SPS
 - TBT**
 - None of the above
- 12) A requirement that tobacco used in cigarettes be free of pesticides and herbicides:
- SPS
 - TBT**
 - None of the above
- 13) A requirement that imported and domestic animals transported over a distance of more than 200 kilometers be given adequate, food, water and space during and after the journey.
- SPS
 - TBT**
 - None of the above

II. True or False: CIRCLE THE BEST ANSWER.

- 14) The TBT Agreement obliges Members to use international standards where they exist as a basis for drafting their domestic technical regulations regardless of domestic circumstances.
- True** **False**
- 15) The TBT Agreement contains explicit rules applicable to supermarket labeling standards.
- True** **False**

170214 SPS and TBT Quiz - Correct answers (1) - Microsoft Word

File Home Insert Page Layout References Mailings Review View Acrobat

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16) Codex Alimentarius is explicitly listed as an international standardization organization in the TBT Agreement
True False

17) The *United States - Country of Origin Labeling (COOL)* case dealt with the labeling of menthol cigarettes.
True False

III. Multiple Choice Questions: CIRCLE the one best answer.

18) Which one of the following is the best answer?
(a) The TBT Agreement applies to all goods and services.
(b) The TBT Agreement may apply to both industrial and agricultural goods.
(c) The TBT Agreement does not apply to agricultural products.
(d) The TBT Agreement applies to goods being procured by Member Governments.
(e) All of the above are true.
(f) None of the above is true.

19) The precautionary approach set forth in Article 5.7 of the SPS Agreement may be invoked by a WTO Member to justify an SPS measure when:
(a) A respected minority scientific opinion asserts that a sufficient risk exists to justify an SPS measure such as an import ban.
(b) Respected scientific views contradict each other leading to a need for more research.
(c) Scientific evidence is insufficient to permit a Member to conduct a full risk assessment and reach a final decision on the safety of a product.

20) The notion of “equivalence” in Article 4 of the SPS Agreement means:
(a) Australia has to accept imported cheese produced with an equivalent food safety standard.
(b) Australia can refuse to accept non-pasteurized import cheese, provided it obliges

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Menu for Tomorrow

 *SPS Exercise*

**4. Application of the SPS and TBT
Agreements**

5. Agreement on Agriculture

Tea Break

**6. The Doha Round Negotiations for
Agriculture**

 Questions and discussion

