

Master of International Trade Policy and Law (MITPL 4)

Agriculture, SPS and TBT

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Wednesday 15 February 2017

Menu for Today

4. SPS and TBT Applications

 *Quiz Debriefing*

 *SPS Exercise*

Tea Break

5. Agreement on Agriculture

 Questions and discussion

4. Applications of the SPS and TBT Agreements

- ✚ Recent cases
- ✚ Private standards (mainly for TBT): what is WTO good for?
- ✚ Priority topics for Viet Nam

US – Tuna II

- Various US regulations set out the conditions under which tuna products may be labelled as “**dolphin-safe**”.
- The Appellate Body found compliance was **mandatory** because «dolphin safe» was legally mandated (= technical regulation) and disallowed the use of other labels. This modified the competitive conditions in the US market to the detriment of Mexican tuna products, and the US did not demonstrate that this stemmed solely from “legitimate regulatory distinctions” (Art.2.1).

US – Country of Origin Labelling (COOL)

The “measure”:



Obligation to inform consumers at the retail level of the country of origin of beef and pork meat

Note: “US origin” is defined as meat from animals *born, raised and slaughtered* in the United States. This would exclude such a designation for beef or pork derived from livestock that is exported to the United States for feed or immediate slaughter.

Five different Labels!



“Fines” for COOL (and Tuna?) Labels



Chile in the WTO TBT Committee (2013-2015)



- ✚ Argentina, Australia, Canada, Colombia, Costa Rica, the EU, Guatemala, Mexico, Peru and the US emphasized their **support** to Chile's policy objective of promoting healthy dietary choices, reducing obesity and related NCDs.
- ✚ However, they reiterated various **concerns**, namely that the regulations for STOP signs on fatty, salty and sugary foods were not based on the relevant guidelines of Codex on nutrition labelling; would create unnecessary obstacles to international trade; were not based on science; and were likely to be more trade restrictive than necessary.

What are my rights under Article 2.2 TBT?



©

http://wflendangeredstreamlive.org/seal_03_02_08-016-001_448x322.jpg

©

<http://www.isuma.tv/inuit-knowledge-and-climate-change/movie>

❖ *Animal welfare vs Traditional way of life vs Economic welfare?*

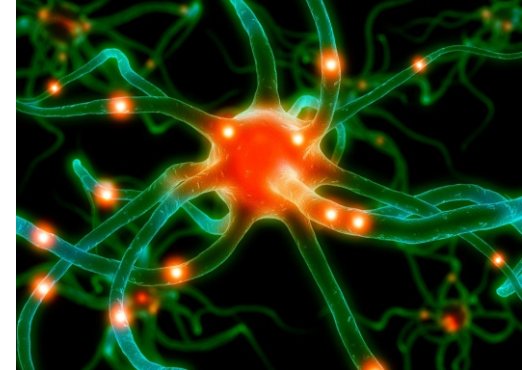
e.g. Health vs Cigarettes

- “Stripping branding strips our rights” (British American Tobacco BAT)



- “Standard packs: Time to act” (Smokefree Action Coalition SFAC)

EC – Hormones: a pragmatic solution?



- After a long and bitter feud, the EU and the US/Canada in 2012 reached a deal whereby the EU, instead of importing beef from cattle raised with growth hormones, would open (additional) “Hilton Beef” quotas for these 2 countries.
- The 2 complainants agreed to definitely withdraw the “retaliation measures” they had been granted after the EU import ban was found incompatible with the SPS Agreement.
- 😊 What does this deal mean for other suppliers (or for a EU – MERCOSUR FTA)? For EU cattle producers? For societal choices?

FlavrSavr®

The first genetically modified (GM) food crop to be marketed commercially (1992)

RIP...?

Source: Insight & Intelligence™ 12 April 2016

Genetic improvement of tomato by targeted control of fruit softening (to extend shelf life) **What's next...?**

Ullisik et al, published online in Nature Biotechnology, 25 July 2016;
doi:10.1038/nbt.36022016



New US Mandatory GMO Labeling

- ✚ US Law raises questions about mandatory product labels: whether there is a market failure, neoclassical or behavioral, that justifies them, and whether the benefits of such labels justify the costs.
- ✚ Absent scientific consensus on GM risks the argument for a **precautionary approach** is difficult to defend — at least if GM food promises significant benefits.
- ✚ **Willingness to pay**: a breakeven analysis will often show that mandatory disclosure is likely to be justified on welfare grounds – and often likely to show that it is not.

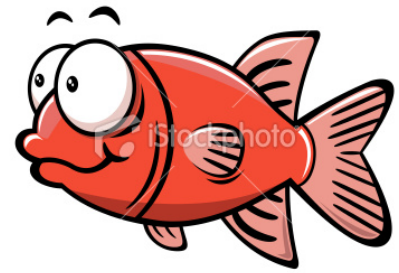
Source: Cass R. Sunstein, On Mandatory Labeling, With Special Reference to Genetically Modified Foods (Draft 18 August 2016, for the University of Pennsylvania Law Review)

US GMO Label

Mark Bittman (NYT Op-Ed 2 September 2016)

- ✚ President Obama recently signed the weakest labeling law imaginable. At first glance, it seems like another tacit agreement between government and industry to rob consumers of our right to know what's in our food.
- ✚ But what if the food industry has inadvertently opened the door to a transparency revolution? Now that we're "allowed" to know about GMO, there are some other questions about the food we buy that we might like answered.
- ✚ Eventually, companies that don't disclose information could be assumed to have something to hide.

The first GM animal



- ✚ Few GM animals have so far been approved for commercial use. Closest to large-scale commercialisation is the fast-growing GM salmon developed by US-based company *AquaBounty* (FT 110113+).
- ✚ November 2015: FDA-approved version to be marketed 2017, in neighbouring countries. Harvesting time (and feed) is halved from 36 to 18 months.
- ✚ Will GM-Labeling Law signed by President Obama change acceptance?
- ✚ How might this affect Vietnam's position?

Avian Flu: Innovation vs SPS

- ✚ GM chickens boost hopes on avian flu: Scientists have genetically modified chickens to prevent the transmission of avian influenza, an innovation that could cut the risk of a lethal strain crossing to the human population and boost the poultry industry.
- ✚ Your opinion? Which SPS provisions are relevant?

“Science-based” chlorine-washed chicken?



15 February 2017

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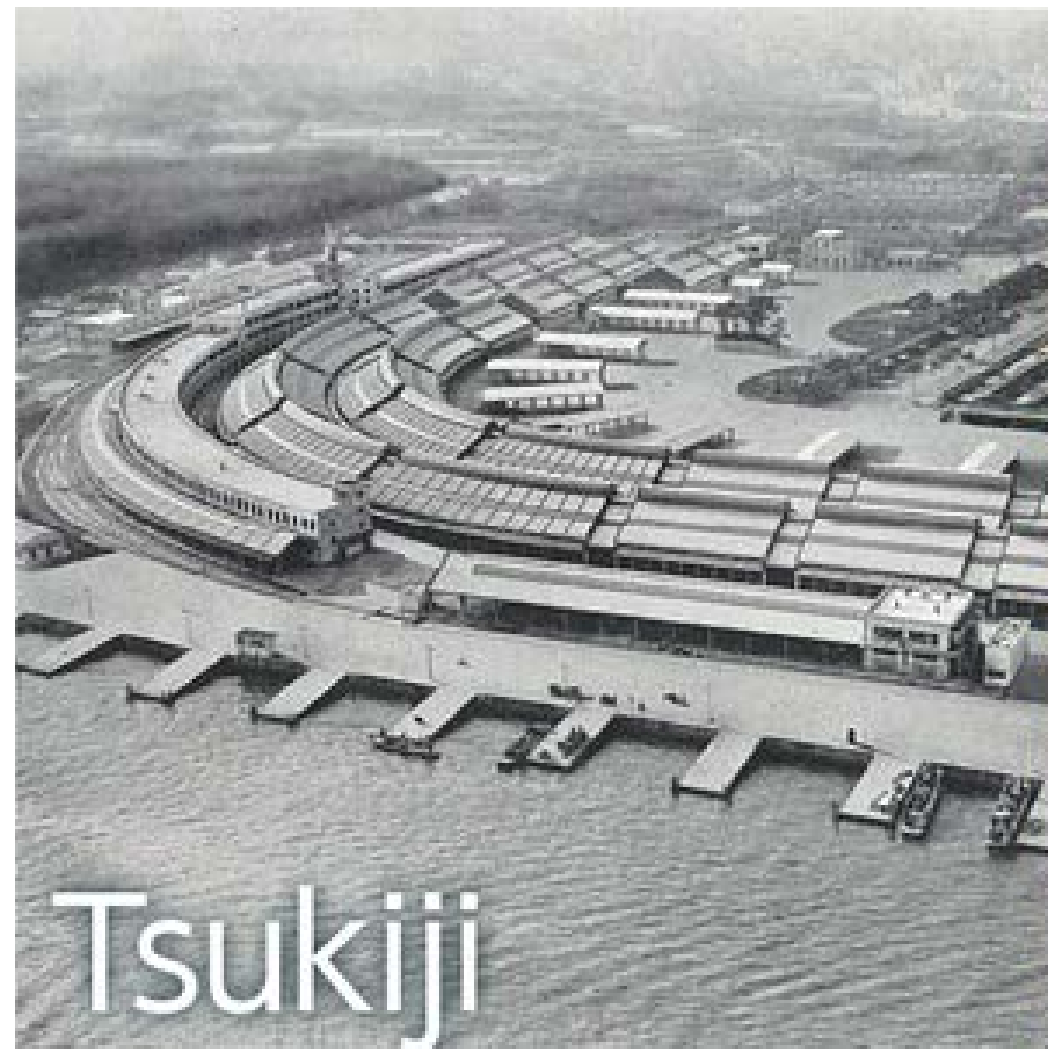
~~SAY NO TO RACTOPAMINE~~

- Following the 69:67 vote at the Codex Alimentarius (29 October 2012), the EU, China and Russia reaffirmed their position against the use of *ractopamine*, a controversial veterinary drug that boasts growth and increasing leanness in pigs.
- They also argued that this may affect the overall credibility and universal acceptance of the multilateral trade food regime as enshrined in the WTO SPS Agreement and Codex Alimentarius (Alemanno 2012, Cosbey 2013)

✳ **Will TPPA or TTIP solve this issue?**

✳ **What about SPS-Art.3.3 and 5.7?**

The world's biggest fish market

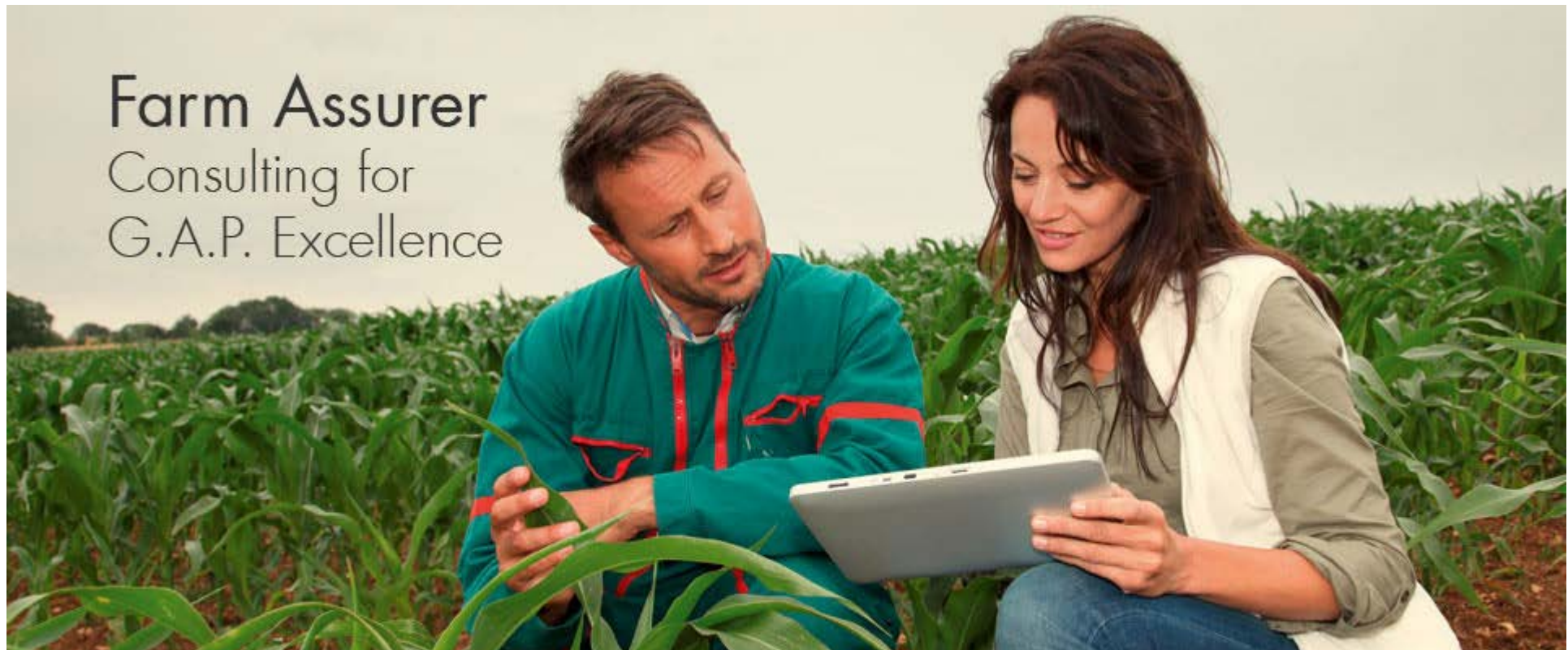




Private Standards e.g. GLOBALG.A.P. “Putting Food Safety and Sustainability on the Map”

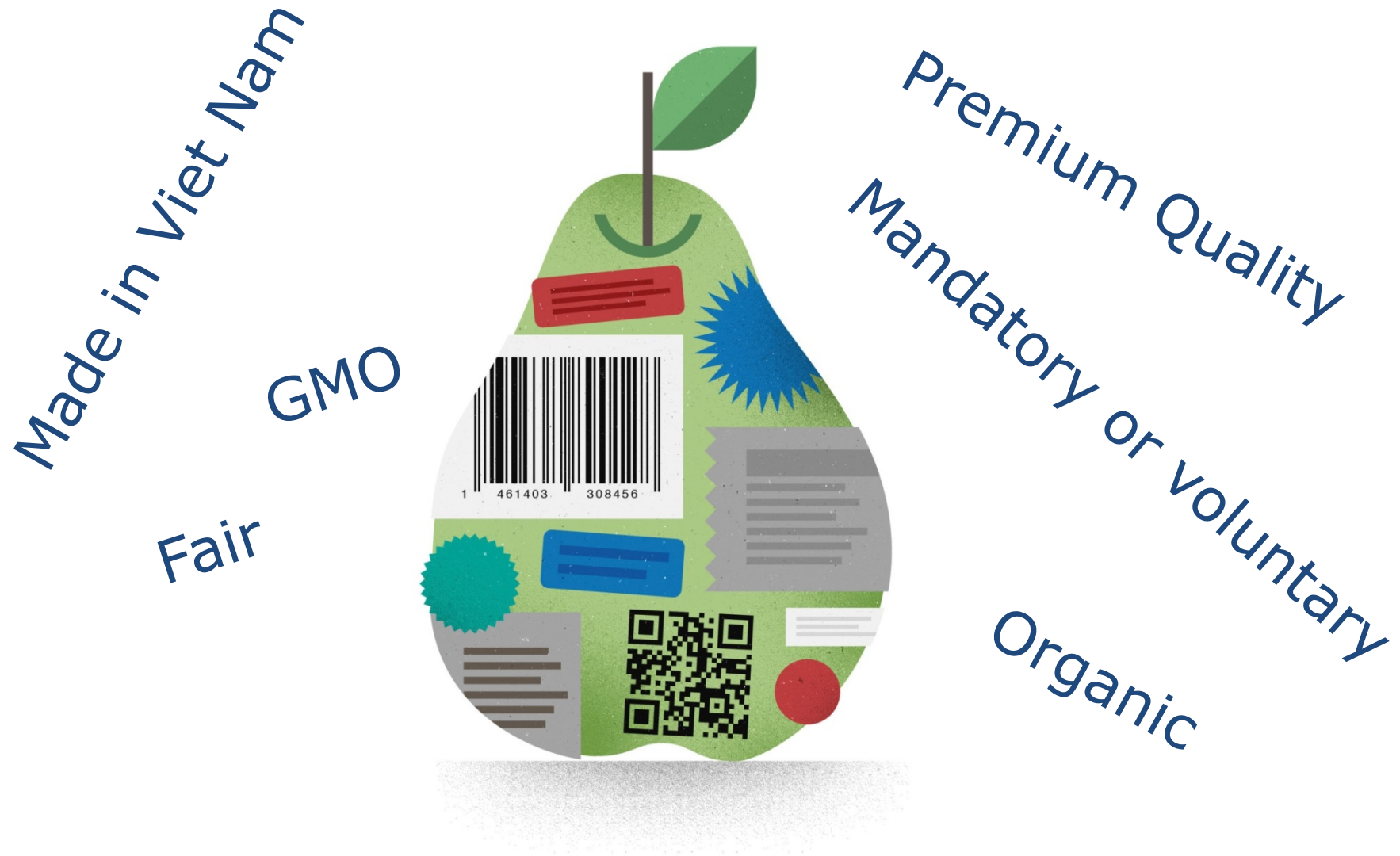
3 main certification products:

- ✓ 16 standards for 3 scopes: Crops, Livestock, and Aquaculture
- ✓ programs for developing customized solutions for our members
- ✓ the most widely accepted private sector food safety certification

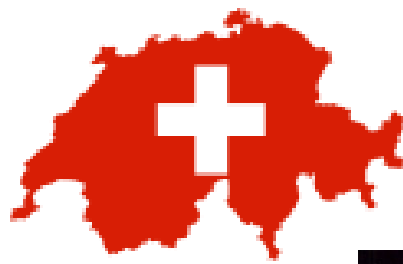


Source: http://www.globalgap.org/uk_en/

Consumer Information Labels

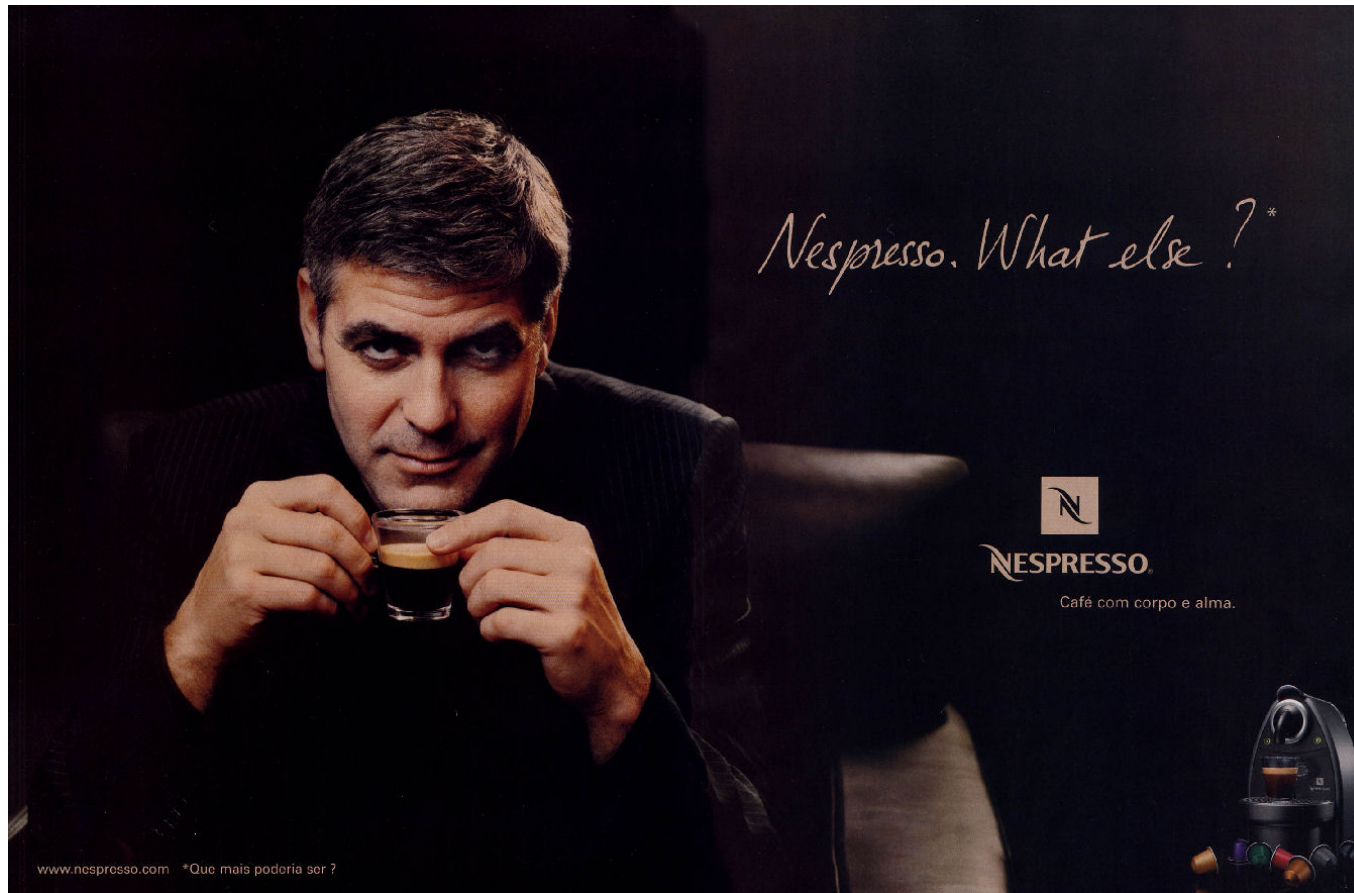


Source: Marc Bittman, NYT 2 September 2016 / Ed Nacional



Thank you, George!

Nestlé



Swiss roast coffee exports (2013): \$1.98bn (Ø \$18.75/lb = top exporter by value, vs best of world Ø\$4/lb)!

Source: David Yanofski, How Switzerland turns a little coffee into a lot of money. *in* Quartz, 8 May 2014



**DURIANS ARE NOT
ALLOWED
RECOVERY FEE: RM250**

Key Issue: How to distinguish protection from protectionism?

- GATT Art. XX (since 1947)
 - defines legitimate protection and the conditions
- The SPS Agreement prohibits
 - *unfair use of health-related measures as non-tariff barriers.*
- The TBT Agreement says measures must not be
 - prepared, adopted or applied so as to create *unnecessary obstacles to international trade*
 - *more trade restrictive than necessary* to achieve a legitimate objective.



Quiz Debriefing

- Results: not so good
- How difficult for you (1-5)?
- Why does this matter: Horsemeat in Europe
- Q 12: A requirement that tobacco used in *cigarettes* be *free of pesticides and herbicides*:
 - ☐ SPS
 - ☒ **TBT**
 - ☐ None of the above

SPS Exercise



- «Healthy Fruits»
 - Newland, with Tutti Frutti, vs Richland
- Presentations (each group designates a Legal advisor to Newland and Newland's representative to the SPS Committee)
- Discussion between two advisors and two representatives
 - 10 minutes each, followed by 5 minutes Q/A

You think SPS and TBT are simple?

❖ Just wait for Agriculture!



5. WTO Agreement on Agriculture

1. History and problems of agricultural trade under GATT 1947: from GATT 1947 to WTO (“GATT 1994”)
2. Basic features: The three pillars
3. Development provisions
4. The WTO Committee on Agriculture (regular and special sessions)
5. Some cases relevant for Vietnam

1. Trade in agriculture under GATT 1947

Weak disciplines and almost no trade liberalisation

- Rules \pm identical to industrial products
 - Art.XI:2 allows exceptions to the QR prohibition “to prevent or relieve critical shortages of foodstuffs”
- Commitments on tariff bindings and reductions \pm totally lacking for the EC (“préférence communautaire”) and the US (1955 waiver)
- *Idem* for domestic and export subsidies (cf. Art.VI:7 GATT)
- Progress through adjudication hampered by dispute settlement shortcomings

Problems for agricultural negotiations

Political and Economic Background

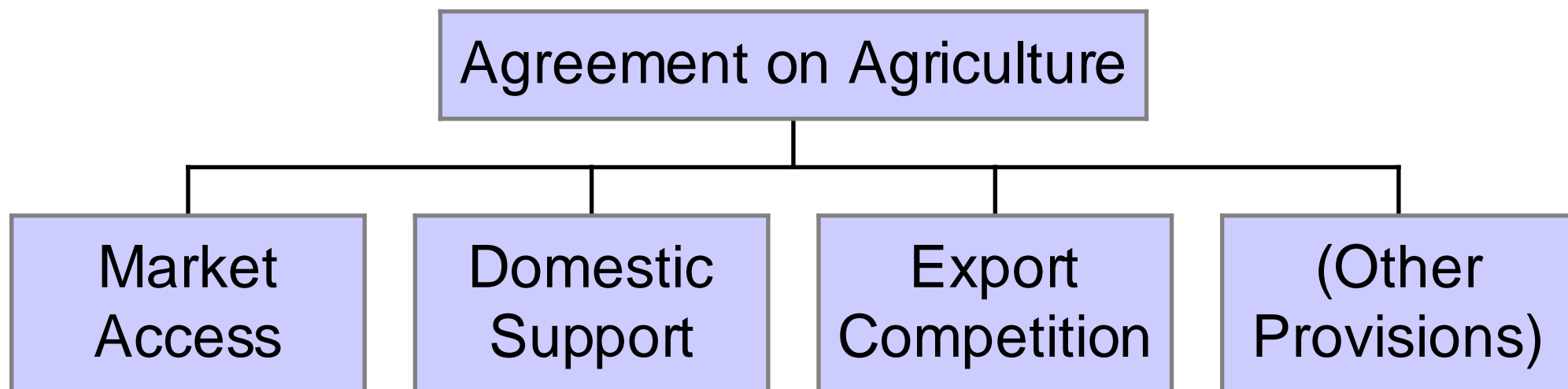
- „Food Sovereignty“ policies especially after WW II
- National Distortions to Farmer Incentives
- Impact of Big Players (stronger in the absence of free trade)
- Poor agrarian economies taxing agriculture more than other sectors

 Is Food Different?

(Anderson 2009; Jones 2010; Desta 2006)

 Could the new WTO rules be simple?

2. Basic AoA features: The “Three Pillars”



2/1 First Pillar – Market Access



**Market
Access**

Tariffs

**Guaranteed Access
through Tariff Rate Quotas**

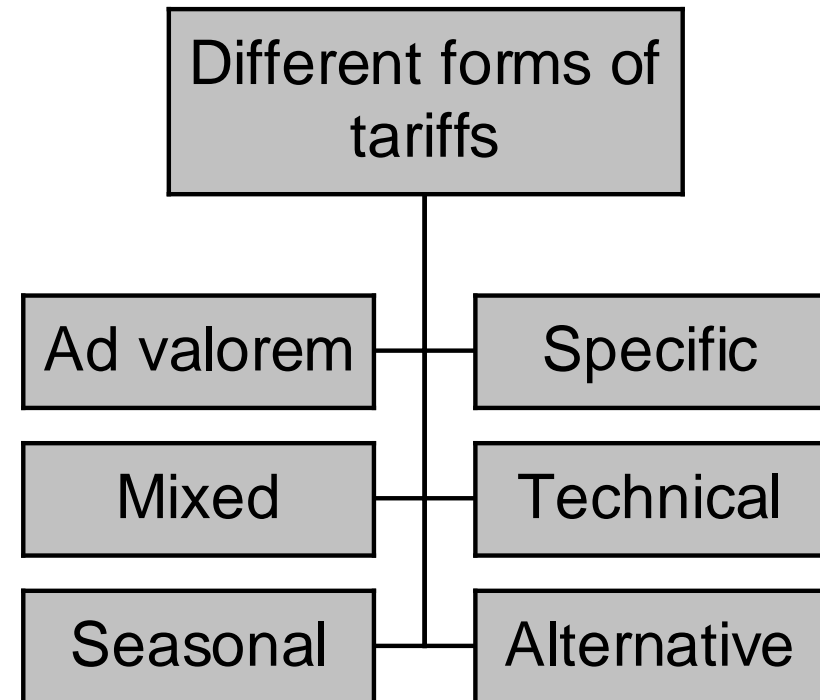
**Special Safeguard
Measures**

Tariffs

A *tariff* is a trade barrier that takes the form of a governmental tax imposed on goods (usually on imports, and sometimes on exports) when they cross borders.

Which forms in Viet Nam?

Agriculture is special...



Article 4.2 +Footnote

All non-tariff border measures were required to be converted into tariffs. They are now **prohibited**.

This includes:

- Quantitative import restrictions (QRs, like Art.XI GATT)
- Minimum import prices
- Variable import levies
- Discretionary import licensing
- Voluntary export restraints
- Non-tariff measures maintained through state trading enterprises

Tariff-Rate Quotas (TRQs)

- A tariff rate quota is a quantity of imports or exports within which a lower tariff applies (IQTR).
- A higher tariff applies above the volume of the quota (the out-of-quota tariff rate – OQTR).
- How to allocate TRQs?
(► GATT-Art.XIII) (a '**Bali deliverable**'?)

*How does Vietnam
allocate its TRQs?*



Special Safeguard Clause (SSG):

Art.5

- Why a safeguard clause in the AoA?
- Isn't GATT-Art.XIX enough?
 - Full tariffication as a new risk

Problems and debates on technicalities:

- Volume based trigger
 - import thresholds in relation to consumption
 - remedies (related to bound duties)
- Price based trigger
 - domestic vs world market
 - data availability, base period etc.

**Can Vietnam
use the SGS?**

2/2 Second Pillar - Domestic Support

Domestic Support

"Amber Box"

"Green Box"

"Blue Box"

*Compare with
SCM colours?*



Amber Box



- ❖ **Product and Price Support Measures:** not prohibited but limited.
- ❖ Article 3 & 6: Reduction commitments, *de minimis*
- ❖ Article 7: General disciplines
- ❖ Annex 3: **Aggregate Measurement of Support** (AMS)
- ❖ Annex 4: Equivalent Measurement of Support (EMS)

Green Box



AoA Annex 2

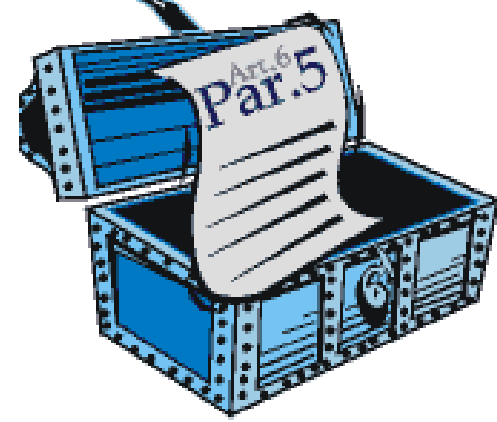
- ❖ The fundamental requirement to qualify for a “Green Box” **exemption from any limits** is that support measures should have “**no, or at most minimal**” distorting effects on trade or production.
- ❖ Green Box support measures are considered economically neutral. There are no limitations to this type of domestic support.
- 👉 Are such measures “neutral”? “Box painting” as an issue of notification, subject (only) to legal challenge

Examples of “green” domestic support measures

- ✓ General applicable government programmes
- ✓ Domestic food aid and stockpile management
- ✓ Direct payments
- ✓ Environmental aid and regional assistance
- ✓ Relief from natural disasters

**Check for THE
CHAPEAU and for
the SMALL PRINT!!!**

Blue Box



Article 6.5

- “Blue Box” exempts certain direct payments to farmers which are tied to production limiting programmes from reduction commitments.
- At present, there are no limits on spending for “Blue Box” subsidies.
 - Few users (the champion is Norway)

2/3 Third Pillar: Export Competition

Article 9 defines export subsidies which WTO Members are obliged to reduce in accordance with their country schedules

Prohibited are all export subsidies

- in excess of these ceilings
- those for non-scheduled commodities
- new export subsidies of any WTO Member

Export Subsidies (Art.9)

- Direct export subsidies
- Government exports of non-commercial stocks at a price lower than comparable prices for such goods on the domestic market; Export payments financed by virtue of government action, including payments financed by a levy on the product.
- Subsidies to reduce the cost of marketing exports, including cost handling, upgrading and other processing costs, and costs of international transport and freight
- Internal transport and freight charges on terms more favourable than for domestic shipments, if provided or mandated by government
- Subsidies on agricultural products contingent on their incorporation in export products

3. Development Provisions

“Special and Differentiated Treatment” (SDT)

- ✓ Lower reduction obligations in all 3 pillars
(DC = 2/3, LDCs only tariffication)
- ✓ Longer implementation periods
 - ✓ TRIPS/LDCs: forever?
- ✓ Fewer notifications
- ✓ Technical assistance

Developmental measures

“Developing country Green Box”

Article 6.2 exempts from reduction commitments **measures of assistance designed to encourage agricultural and rural development, which are an integral part of the development programmes of developing countries.**

- *Investment subsidies* (for whom?)
- *Input subsidies* (for whom?)
- Good enough? Too much? What's missing?

4. The WTO Committee on Agriculture

- Art.17 AoA – evolving mandate 1995-2008
- CTG nominates Chairperson for 1-2 years
- Transparency: Notifications and Q/A
- Trade performance, NFIDC etc.
- ‚Wailing wall‘, Peer pressure
- ‚Negotiations‘ between Rounds
- Pre-dispute settlement
- New subjects (e.g. irrigation, food reserves)
- Good Offices (Chairperson)

5. Some cases relevant for Vietnam

- EC – Biotech (= SPS...)
- Food Security and Food Safety
- Novel Food
- *Chile – Price Band*
- Post-Doha Litigation in Agriculture

EC – Biotech Main Findings



Complainants: Argentina, Canada and USA

EC-Measures on GMO Product Admissions in violation of SPS-
Article 8 and Annex C(1)(a), first clause:

1. There was a **general *de facto* moratorium** (1998-2003)
2. 24 out of 27 **product-specific measures** with „undue delays“ in the approval procedures
3. All 9 **Safeguards** in 6 Member States (A, F, D, GR, IT, LUX) [5.1 and 2.2 SPS] not based on sufficient risk assessments and hence maintained without sufficient scientific evidence.
4. EC has not acted inconsistently with its obligations under other provisions, including Articles 5.1, 5.5, 5.6, 2.2 or 2.3.

► *science* was not at stake

► *precautionary principle/CBD*: Panel „need not take a position“

☺ what will happen to non-GMO feed in a free trade context?

Food Security and Food Safety are Foes!

- ✓ Food safety policies seek to minimise health risks.
- ✓ There is no « zero risk » - but even minimising it means price increases at the expense of (poor) consumers and (often) developing country exporters, especially LDCs.
- ✓ New trade barriers favour established and global players at the expense of new market entrants.
- Food safety may reduce food security!

Novel Food (1997): Food Security à la CAP?

- Regulation to ensure the safety and the proper labelling of foods and food ingredients “not previously used for human consumption to a significant degree in the EU”
 - “novel” indigenous communities in the world of the Amazonas River: what about seals?
 - Violation of GATT-Art.III and SPS-Art.4
- MRA or litigation?

Chile – Price Band System

Panel/AB ruling

- The Appellate Body upheld the Panel's finding that Chile's price band system was designed and operated as a border measure sufficiently similar to "variable import levies" and "minimum import prices" within the meaning of footnote 1 and therefore prohibited by Art. 4.2.
- The amended price band system continued to be a border measure similar to a variable import levy and a minimum import price and was therefore still inconsistent with Art. 4.2 of the Agreement on Agriculture.

(Non-) Implementation

- Dispute settlement with Argentina over Chile's Price Band System (compliance report with findings of non-compliance in 2007, and no progress after that)
- Dispute settlement with Argentina over Chile's antidumping duties against wheat flour imports (“consultations” stage since 2009, no progress/outcome notified)

Post-Doha Litigation in Agriculture

- Peru—Additional Duty on Imports of Certain Agricultural Products (DS457)
- Indonesia—Importation of horticultural products, animals and animal products (DS455)
- Argentina—Measures Affecting the Importation of Goods (DS451)
- China—Measures Relating to the Production and Exportation of Apparel and Textile Products (DS446)
- United States—Certain Measures Affecting Imports of Poultry from China (DS392)
- China—Grants, Loans and Other Incentives (DS390, 388, and 387)
- European Communities—Certain Measures Affecting Poultry Meat and Poultry Meat Products (DS389)

Menu for Tomorrow

6. The Doha Round Negotiations for Agriculture

7. Vietnam: Agricultural Policies in the WTO and RTAs

Tea Break

6. Agricultural Dispute Settlement Cases

✚ Questions and discussion

