

BOOK REVIEW

“The WTO Agreement on Sanitary and Phytosanitary Measures. A Commentary”

by Łukasz Gruszczyński, Oxford University Press 2023, 384 pp. £175. Hardback

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The WTO Agreement on Sanitary and Phytosanitary Measures. A Commentary by Łukasz Gruszczyński (Oxford University Press 2023) is an updated and amended version of the 2007 Commentary by Joanne Scott. It is a very welcome update, reflecting the wealth of new case law and the outcomes of several discussions, including those revolving around the operationalisation of science within the scope of the Agreement on Sanitary and Phytosanitary Measures (hereinafter: the SPS Agreement).

While this review is focused mostly on the elements which have been added or modified according to the Author¹, the structure of the whole book merits a few remarks. Instead of being an article-by-article commentary, it provides commentary in the form of a comprehensive guide to the SPS Agreement. This should be regarded as a correct choice; not only does it make for more pleasant reading, but also retains the value of a reference work thanks to the largely well-defined chapters.

There are ten chapters preceded by two introductions, to the second and first edition respectively. Chapter 1, “Introducing the SPS Agreement”, shines light on the scope of application of the Agreement, its place in law of the World Trade Organization (hereinafter: WTO law), and key issues related to its implementation. Chapter 2, “Cooperative Regulation in the WTO. The SPS Committee” details the role of the SPS Committee with a focus on norm elaboration and Specific Trade Concerns. Chapter 3, “Science and SPS”, introduces the complex issue of references to science in SPS provisions and their interrelations, underlining several definitional and operational challenges. Chapter 4, “Provisional SPS Measures”, deals with instances of insufficient scientific evidence and the precautionary principle/approach. Chapter 5, “Additional Obligations”, explains the nature and purpose of non-discrimination, the obligation to choose the least trade-restrictive means, the principle of equivalence, and regionalisation – understood as the obligation to adapt levels of protection to specificity of certain areas. Chapter 6, “The Transparency Obligations”, describes the modalities of notification, publication, responses to enquiries, and assessment of transparency. Chapter 7, “Control, Inspection, and Approval Procedures”, adopts a more article-by-article approach to illustrate the shift towards “proceduralization” visible in Annexes to the SPS Agreement. Chapter 8,

¹ Based on the introduction to the second edition. Disclaimer: the conclusions are based entirely on an electronic copy of the second edition; the first edition was not available to the reviewer.

“International Standards”, illuminates the source and character of “international standards, guidelines, and recommendations developed by the relevant international organizations”, providing a balanced assessment of their importance. Chapter 9, “The SPS Agreement and Developing Countries”, demonstrates the differences between the systemic regulations and practice of support for developing countries and their regulatory compliance. Chapter 10, “Looking beyond the SPS Agreement”, is focused on SPS requirements in free trade agreements (FTAs).

The topic of the SPS Agreement is a vast one and Gruszczyński had to be selective to distil it to the digestible 384 pages. It was achieved through a couple of decisions. First, the target group of the publication seems to consist of persons familiar with WTO law, who have grasped the essence of the SPS Agreement and wish to build on those foundations to achieve a higher level of understanding. The narrative is well-balanced and easy to follow, resembling neither a student’s manual, nor a collection of technicalities. Second, context is provided only when it is necessary, saving the reader from lengthy backgrounds of disputes and other digressions. Third, the Author does not shy away from forming own opinions on contentious issues. This is perhaps the most valuable and refreshing aspect of the book, especially when contrasted with the descriptive nature of many commentaries.

Naturally, the high concentration of facts and the brevity of opinions sometimes leaves a bit to be desired when doubts and controversies are discussed. Working definitions and interrelations of notions such as necessity, sufficiency, negligibility of risk, zero-risk, theoretical uncertainty, appropriateness, rationality, and proportionality, could perhaps be discussed more at length in the next editions, particularly since their meaning in the context of the SPS Agreement does not always reflect the most popular understanding (as the Author rightfully observed, many of these notions are quasi-subjective). The term “scientific justification” (Article 3.3) could also be explored in more detail, as it tends to cause confusion in the doctrine. That notwithstanding, the Author achieves the objective of presenting a substantial panorama of various terms and their use in case law, paying attention to differences which may be easily overlooked by a non-specialist. The new analysis of risk assessment and a deeper dive into the standard of review are a valuable addition to this panorama.

The focus on the role of science and scientific experts in the SPS Agreement should be appreciated; even if they are generally hard to escape, references to science require special background information and for that reason are often misinterpreted by non-scientists. The role of minority scientific opinions and the struggle for conclusive tests play a major role in the credibility and popularity of science-intensive regulations, so it is good that they found their place in the commentary. The extensive use of case law is also commendable, as it has been crucial for establishment of procedures complementing the brevity of the SPS Agreement. While it may be unsurprising, as drawing conclusions from case law is one of the primary purposes of a commentary, in this instance it is particularly useful and succinct. Further improvements could involve an overview of the expertise which hides behind the notion of science – disciplines, methodologies, types of arguments, and profiles of experts appearing most often in the disputes. While on the surface it looks like an unnecessarily deep dive into other disciplines, knowledge about the origin and purpose of expertise could be helpful in dispelling the aura of mystery, surrounding science in the eyes of many apprehensive lawyers.

Provisional SPS measures, which used to be a part of Chapter 3 (“Science and SPS”), are now in a separate chapter. This was a good decision, not only because of the provisional measures being based on insufficiency of scientific evidence, but also because of the tendency of non-specialist audiences to conflate risk, uncertainty, and insufficiency of evidence. In this context, the references to the precautionary principle in subchapter 4.4 should be considered very useful.

While the author of this review is biased towards “science and . . .” reflections, other updates provided in the second edition are similarly logical and helpful. Unfortunately, updates of reference books and commentaries often stop short of anything more than a summary of recent case law. In this case, the added value of the work is visible in conclusions and informed guesses derived from said case law. For example, it is easy to see how the new information about the Specific Trade Concerns and the SPS Committee can be a part of the larger debate on long-term sustainability of the WTO legal system – its dynamic adaptation, dispute settlement, and the role of Members.

From regionalisation and equivalence, through the role of guidelines and international standards, to the entirely new (slightly ambiguously titled) chapter on SPS requirements in FTAs, the Author paints a thought-provoking picture of recent developments. Soft law, global governance, cosmopolitan law, fragmentation, national circumstances, and legal transplants are just a few keywords which can be explored by scholars in the light of these topics. The latter seems particularly interesting, as transplantation of some elements of the SPS Agreement into other agreements can tell us a lot about how these provisions are being understood – not to mention that the separate life of the transplants may influence the development of their roots. Besides that, the commentary gives plenty of opportunities for SPS-related environmental studies, notably in the context of an acceptable level of risk to animal or plant life or health and its comparison to the thresholds for human life and health. Overall, the publication has a significant potential for being a starting point for further research.

From a technical point of view, the only major problem was a formatting issue on page 69 of the electronic version of the book, where footnotes were moved upwards and some of the text is missing. It should be noted that the Author resisted the urge to put additional explanations in the footnotes, except for the instances in which it was really needed. The text-to-footnotes ratio greatly contributed to the enjoyable reading experience.

When reading, I was often pleasantly surprised to learn something new, not only in the freshly added chapters, but also in introductions to the old ones, which often offer a panorama of key processes (see eg p 29 and following), while avoiding long-winded backstories. I enjoyed it thoroughly, but I was sometimes getting a little bit contradictory, too. To be honest, that last feeling made me like this book the most. There were some clearly voiced opinions on matters where my approach has differed to some extent (my favourite being the expressive last paragraph of p 64), and some briefly described elements which I found so interesting I wish there was at least a separate academic article about them – just to mention the view that proportionality can be a needlessly provocative phrase (p 73) or the potential for further exploration of “scientific justification”. Commentaries of highly specific, technical agreements tend to be long and tedious reads, provoking at best some lukewarm responses. This one is not exactly a beach read, either, but I found there more than enough value and inspiration to read it with considerable interest. I hope more works of this type will follow in its footsteps.

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