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Short Communications

## Sanitary and phytosanitary measures in the context of the CPTPP agreement

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**Abstract.** The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is a notorious example of the proliferation of so-called mega trade agreements. The countries constituting its signatory parties include five hundred million inhabitants and almost fifteen percent of the global Gross Domestic Product. The objective of this paper is to analyze the role of sanitary and phytosanitary (SPS) provisions within the CPTPP regarding international food trade. Three sections are presented: (i) food production, imports and exports among CPTPP countries, (ii) the content of the SPS CPTPP chapter regarding the text of the WTO-SPS Agreement and (iii) concluding remarks. It stands out among the results that there are significant differences in agricultural production capabilities between CPTPP parties, which should be addressed in order to achieve the desired integration.

**Keywords.** Mega trade agreements, agricultural trade, food safety, sanitary and phytosanitary measures, Trans Pacific Partnership.

**JEL codes.** F13, F15, Q17.

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### 1. Introduction

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is a notorious example of the proliferation of so-called mega trade agreements. It was signed as Trans Pacific Partnership Agreement (TPP) initially on February 2016 by 12 Pacific basin countries: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam, which altogether comprise almost eight hundred million inhabitants and 40% of the global GDP. TPP partners had two years after signing to ratify the agreement. In January 2017, the president of the United States, Donald Trump, withdrew the country from the agreement on his first day in office. After a few months of impasse, the rest of the TPP members decided to go ahead without the United States, signing the new version of the agreement in March 2018. The

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CPTPP will come into effect 60 days after at least six of the signatory countries have ratified it.

One of the chapters in the new CPTPP that did not change at all from the TPP version is the chapter on Sanitary and Phytosanitary Measures (SPS). These technical, non-tariff measures, which aim to protect food safety as well as animal and plant health, have been characterized in recent decades by their increased visibility, with various effects on agricultural trade flows. The objective of this paper is to analyze the SPS provisions within the CPTPP, considering the already existing regulatory framework under the Agreement on Sanitary and Phytosanitary Measures of the World Trade Organization (WTO) and the agricultural sector profile of signatory countries. Our research represents a relevant contribution to the discussion on the possible implications of CPTPP for the agricultural sector, as the literature on the Trans Pacific Partnership has been focused so far on its repercussions in general terms (UNCTAD, 2016).

## 2. Agricultural production and trade among CPTPP members

The CPTPP partners are quite diverse regarding size, contribution to GDP and productivity of their agricultural sector. Some countries, such as Mexico, Peru and Vietnam, have labor intensive agriculture with low productivity per worker. Australia, Canada and Japan, on the other hand, have low participation in agriculture in terms of total employment but remarkable productivity. These differences are mainly due to technological development and the ability to add value to the products. In fact, in Peru and Vietnam, small-scale family farming and even subsistence agriculture are still common, but the fast economic growth of both economies and the lack of profitability of family farming are

**Table 1.** CPTPP partners' general data on agricultural production (2014).

	Australia	Brunei	Canada	Chile	Japan	Malaysia	Mexico	New Zealand	Peru	Vietnam
Total population (millions)	23.6	0.4	35.5	17.8	127	30.2	123.8	4.6	30.8	92.5
Rural population (millions)	2.4	0.1	6.8	1.8	8.8	7.6	26	0.6	6.7	62
Area harvested (millions ha)	36	0	66	4	12	100	61	1	11	49
Area equipped for irrigation (1000 ha)	2,550	1	870	1,110	2,469	380	6,500	722	2,580	4,600
Employment in agriculture (%)	3.3	-	2.4	10.3	3.7	12.6	13.4	6.6	25.8	47.4
Agricultural value added per worker (constant US\$)	52,701	83,868	-	6,638	50,720	10,127	4,416	28,677	1,949	489
Food production value (2004-06 millions US\$)	25,035	50	27,181	8,424	17,730	14,311	35,142	10,334	9,145	27,498
Agriculture, value added (% GDP)	3	1	2	3	1	9	3	7	7	18

Source: Prepared by the author based on FAO (2015).

motivating land abandonment. In Vietnam, 56% of rural youth express a desire to migrate to big cities for work (The Ahn and Minh Chanh, 2015).

The contribution of agricultural products to total trade also differs considerably among CPTPP partners. In some Asian economies such as Brunei, Japan and Singapore, the participation of the agricultural sector in exports is negligible (less than 2%). For New Zealand, however, it represents more than half of total exports. For most CPTPP partners, such as Australia, Chile, Malaysia, Peru and Vietnam, the contribution of agriculture to exports is ten to fifteen percent. Vietnam, in spite of the low agricultural productivity, is now the world's leading coffee exporter.

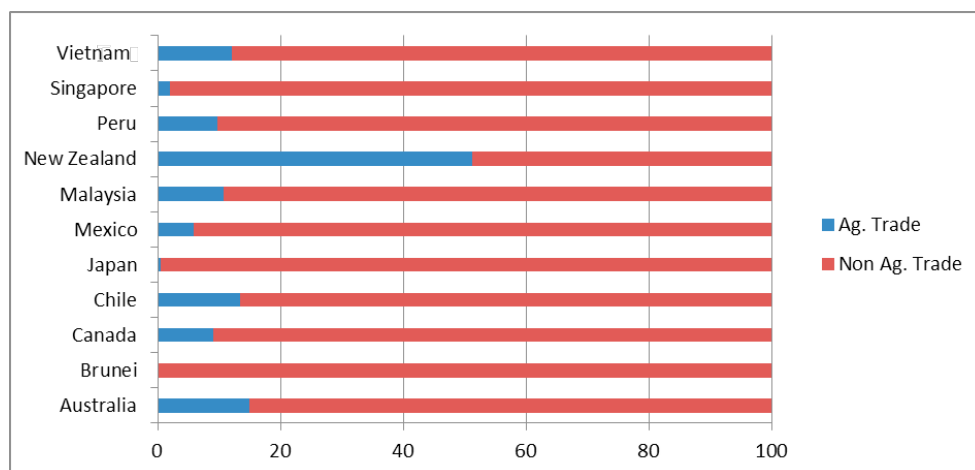
With respect to agricultural products as a percentage of total imports, the differences are not as significant among countries, with only a 10% gap between the minimum and the maximum. If we consider the size of each market, however, the situation changes. Global imports of agricultural products to Japan, Canada and Mexico alone constitute 58% of total CPTPP agricultural imports.

With regard to intra CPTPP agricultural trade, the situation is even more dramatic. Canada, Japan and Mexico concentrate 72% of imports of agricultural products from CPTPP countries.

### 3. Analysis of the CPTPP SPS Chapter considering the WTO SPS Agreement

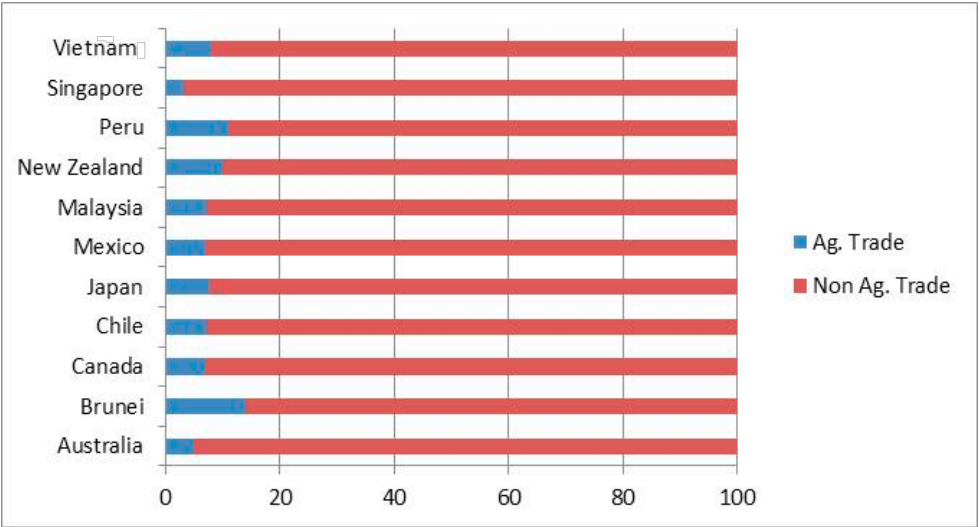
The CPTPP Agreement declares that one of its objectives is to *reinforce and build on the SPS Agreement* (art. 7.2.b). From its overture, however, it shows some substantial differences with the WTO-SPS Agreement with regards to its approach to SPS issues. The CPTPP Agreement stresses the importance of preserving compatibility between SPS measures and trade. In fact, it establishes within its objectives the protection of human, animal

**Figure 1.** Contribution of agricultural and non-agricultural products to total exports (% , 2005-2015).



Source: Prepared by the author based on WITS.

**Figure 2.** Contribution of agricultural and non-agricultural products to total imports (% , 2005-2015).



Source: Prepared by the author based on WITS.

**Figure 3.** Destination markets of intra CPTPP agricultural exports (2014).



Source: Prepared by the author based on WITS.

and plant life or health, as the SPS Agreement does, but *while facilitating and expanding trade* (art. 7.2.a). The WTO-SPS Agreement merely states that SPS measures must not constitute a *disguised restriction on international trade*.

One of the strategies posed in the CPTPP Agreement to reduce the potential impacts of SPS in trade is to *strengthen communication, consultation and cooperation between the Parties* (art. 7.2.c). For this, as well as for the general supervision of the Parties' implementation of the provisions in the Chapter, the CPTPP Agreement establishes its own Committee for SPS Measures. The main functions of this Committee are to: i) act as a forum for the Parties on SPS matters, ii) identify and develop cooperation projects on SPS within the Parties and iii) share issues and positions for the meetings at the WTO Committee on SPS Measures and at the three international standard-setting organizations recognized by the WTO-SPS Agreement, including Codex Alimentarius Commission, the World Organization for Animal Health and the International Plant Protection Convention. With regards to the third function, Suppan (2015) suggests that, despite these consultations being voluntary, it would be difficult for the related authorities to ignore them if the country's representatives want to give the impression that they are enhancing cooperation.

Increased communication between CPTPP Parties also relies on transparency provisions. A particularity of the CPTPP Agreement is that it highlights the importance not only of sharing information between the Parties, but also with "interested persons", giving both the *opportunity to comment on their proposed sanitary and phytosanitary measures* (art. 7.13.1). This suggests that the CPTPP Agreement seeks to facilitate the inclusion of Parties' private sectors in the conception of SPS measures; which would be consistent with the large amount of interest and support that food industry representatives gave to TPP SPS Chapter negotiations in the US (Johnson, 2014). In fact, in the US, a high level of participation already exists among companies, public opinion and interest groups in the development of the country's SPS measures (USTR, n.d.).

Furthering the goal of a discussion of SPS measures beyond the institutional level, another addition to the provisions of the WTO-SPS Agreement is that CPTPP Parties *shall make available to the public, by electronic means in an official journal or on a website, the proposed sanitary or phytosanitary measure (...) the legal basis for the measure, and the written comments or a summary of the written comments that the Party has received* (art. 7.13.5). Electronic publication is also mandatory for the final version of the SPS. These requirements are also recommended by the WTO. In the 2008 document "Recommended procedures for implementing the transparency obligations of the SPS Agreement" (G/SPS/7/Rev.3) the WTO encourages the submission of an electronic version of the draft regulation along with the traditional notification format. The CPTPP goes further, making electronic communication mandatory and expanding its scope.

Another particular provision of the transparency within the CPTPP SPS Chapter is that it enhances the communication between Parties beyond the notification of SPS measures, through their competent authorities and contact points. The information that Parties exchange is related to: i) detected SPS risks of exports from the other Party's territory, ii) relevant changes in the sanitary or phytosanitary situation in all or part of the exporting Party which may affect the existing trade, iii) research progress possibly impacting SPS regulation and iv) significant changes in the Party's food safety and pest and disease management policies, as well as related practices that have the potential to affect trade. The WTO SPS Agreement also enhances members' communication through national Enquiry Points. However, the CPTPP focuses this communication on the triggers for the generation of SPS measures, seeming to push for the CPTPP Parties to anticipate complex, pos-

sible, forthcoming scenarios related to SPS regulation and procedures of the other Parties in order to adapt and avoid negative impacts on trade flows.

In fact, the CPTPP Agreement gives relevance not only to the process through which measures are communicated, but also to their conception. Like the WTO-SPS Agreement, preference is given to adherence to international standards. However, when a Party decides to develop its own SPS measures, different from the international ones, the CPTPP Agreement establishes that they must be based on *documented and objective scientific evidence* (art. 7.9.2). The use of the adjectives “documented and objective” instead of “available”, as in the WTO-SPS Agreement, means that the precautionary principle (e.g., as in SPS Art. 5.7), by which the existence of a possible risk has to be considered, is undermined (Labonté *et al.*, 2016).

Another particularity in the CPTPP Agreement on the topic of transparency is that Parties give to other Parties, but also interested persons, the possibility to comment on their risk analysis. This is another sign of the aim to facilitate the inclusion of interested groups in SPS measures development. The problem is that, given the technical complexity of risk analysis, it is possible that only resourceful counterparts and their operators or interested groups will be able to make informed comments. For the CPTPP Parties, this could amplify the current gap in regulatory performance on SPS that already exists between WTO developed and developing countries due to their different scientific capabilities (Boza and Muñoz, 2017). In this sense, the CPTPP SPS Chapter assumes that every Party, and in this case also their interested groups, had a similar infrastructure “for doing science”, which is not factual whatsoever (Strether, 2015).

The approach that the CPTPP SPS Chapter adopts for the cooperation between Parties is quite different from the *technical assistance* and *special and differential treatment* provisions of the WTO-SPS Agreement, materialized, for example, in the Standards and Trade Development Facility. The CPTPP focuses on cooperation in terms of facilitating trade and exchanging information, but is not very specific on what comprises technical assistance. In fact, it establishes that the objective of cooperation in SPS is *eliminating unnecessary obstacles to trade between the Parties* (art. 7.15.2).

An important means to facilitate trade is the recognition of equivalence of other Parties’ SPS measures. In this sense, the CPTPP Agreement goes further than the WTO-SPS Agreement (SPS-Art. 4), as it establishes that, beyond the specific measures, *the Parties shall apply equivalence to a group of measures or on a systems-wide basis* (art. 7.8.1). The recognition of equivalence starts at the request of the exporting country, which is followed by an assessment carried out by the importing country. This evaluation has to be based on *available knowledge, information and relevant experience, as well as the regulatory competence of the exporting Party* (art. 7.8.5). The last criterion, “regulatory competence”, can be especially challenging, as it is difficult to quantify, and can lead to different interpretations. A measure, group of measures or systems wide basis is considered equivalent when it *achieves the same level of protection as the importing Party’s measure; or has the same effect in achieving the objective as the importing Party’s measure* (art. 7.8.6). These requirements are more specific than those in the WTO-SPS Agreement, which considers a measure equivalent if it guarantees an “appropriate” sanitary or phytosanitary protection level for the importer.

An additional way to facilitate trade is “regionalization”, a principle in the WTO-SPS Agreement and also explicitly recognized in the CPTPP SPS Chapter. The CPTPP pro-

cess declaring pest or disease-free areas, and areas of low pest or disease prevalence is very similar to the one specified for the equivalence assessment. It has to be requested by the exporting country, evaluated by the importing country and maintain a continuous exchange of information during the procedure. In this case the CPTPP Agreement is quite similar to the WTO-SPS Agreement and WTO-SPS Committee guidelines.

As already mentioned, transparency is one of the principles that the CPTPP SPS Chapter tries to enhance the most. To that end, another novelty proposed in the CPTPP is the auditing of the competent authorities and inspection bodies by the other Parties. That procedure is not mentioned in the WTO SPS Agreement. The objective of audits is *to determine an exporting Party's ability to provide required assurances and meet the sanitary and phytosanitary measures of the importing Party* (art. 7.10.1). Before the audit starts, both the auditing and the audited Parties will discuss the objectives, scopes, requirements to be assessed, and the procedures to assess them. The audit process does not imply a moratorium on the establishment of new SPS measures.

The results of the audit will be known by the audited Party, which can make comments that have to be considered by the auditing Party in the preparation of the final report of the conclusions of the process. Meanwhile, the information generated during the auditing procedures will not be released to the general public. The costs of the audit will be borne by the auditing Party, unless both Parties decide otherwise.

The CPTPP Agreement allows the auditing Party to take decisions or actions considering the results of the audits. However, those decisions have to be based on *objective evidence and data that can be verified, taking into account the auditing Party's knowledge of, relevant experience with, and confidence in, the audited Party* (art. 7.10.6). It is important to consider that the generation of "objective evidence and data" requires an adequate level of technical capabilities that are specialized in SPS issues. As we have already mentioned, the costs of the process are assumed by the auditing Party. It is therefore reasonable to wonder whether this mechanism will be used much more frequently by CPTPP Parties with the lowest specialized human resource constraints.

Additional interesting innovations in the CPTPP SPS Chapter are related to the procedures for the inspection of imports. First, if required, Parties have to exchange complete information about the character, frequency and criteria of their inspections. The CPTPP Agreement establishes that Parties can adjust the frequency of inspections considering past experience, as well as "actions or discussions" under the agreement. According to the CPTPP Agreement, if a Party decides to refuse the import of a good from another Party, it has to notify *the importer or its agent; the exporter; the manufacturer; or the exporting Party* at the very least (art. 7.13.6). That notification has to be communicated *no later than seven days after the date of the decision* (art. 7.13.7) containing the reasons for the refusal, the legal basis and the situation of the rejected goods. One important thing to note is that, according to this provision, the Party refusing the shipment is not obligated to communicate its decision to the Party from which it proceeds, but only to the producer or to the trader. Again, the CPTPP is encouraging the role of the private sector. It allows the affected party to request a review of the decision, providing any relevant information during the process. That review process has received some criticism that considers it to be a mechanism that allows a sort of "State-to-State" or "Business-to-State" dispute (Food and Water Watch, 2015).



The CPTPP SPS Chapter also establishes parallel mechanisms to those under the WTO SPS Agreement. For example, the Cooperative Technical Consultations (CTC) can be used by a Party whenever there is an SPS matter that can potentially affect its trade and cannot be solved administratively or bilaterally. The CTC process is initiated when the concerned Party presents its request in writing and the responding Party acknowledges receipt. Both Parties have to meet within 30 days and attempt to resolve the matter within 180 days. The documents generated during the CTC remain confidential, unless the Parties agree otherwise. This concealment follows an aim of protecting Confidential Business Information, but neglects that the SPS objective, i.e. protection of public, animal and plant life and health, is of a collective nature (Suppan, 2015).

When Parties are not able to arrive at a solution within the CTC, the concerned Party can use the CPTPP Dispute Settlement Procedure, one of the most significant novelties of the agreement. This dispute settlement will begin operating progressively: for disputes related to equivalence principle, audits or import checks the procedure will be available one year after the agreement comes into effect for the responding Party; for disputes related to science and risk analysis, two years later.

There are specific provisions on equivalence and risk analysis that the CPTPP explicitly excludes from the dispute settlement. In the first case, that Parties have to recognize the equivalence of an SPS when it *has the same effect in achieving the objective as the importing Party's measure* (art. 7.8.6.b.). The second is the already mentioned article 7.9.2., according to which Parties have to assure that their SPS measures follow international standards, guidelines or recommendations or, if not, that they are based on *documented and objective scientific evidence that is rationally related to the measures*. These exceptions within the scope of disputes are not present in the WTO.

The details of how the CPTPP Dispute Settlement will operate are described in article 28 of the agreement. One of the most interesting features is that the deadlines for each stage of the dispute process are specified and are quite constraining. For example, once the panel has been fully established, it has 150 days to deliver a preliminary report on the case and another additional 30 days to present the final report to the disputing parties. If these terms were followed and are not regarded as a hopeful declaration of intentions, they would be much shorter than what is common for the WTO Dispute Settlement. That seems to be one of the main motivations for the establishment of the CPTPP Dispute Settlement. In any case, the CPTPP allows for the concurrent use of both the WTO and CPTPP Dispute Settlements.

Finally, indirectly related with future SPS disputes under the CPTPP is the inclusion of the "Trade of Products of Modern Biotechnology" in the National Treatment and Market Access for Goods Chapter. This means that any controversy between CPTPP Parties related to biotech food products, Genetically Modified Organisms (GMO's) included, will be primarily approached via the CPTPP Dispute Settlement considering principles of market access, rather than those of sanitary or phytosanitary protection. This is a completely different scenario than the 2003 WTO dispute on the European Union moratorium on the import of biotech products. In that case, the panel decision and aspects of the procedure were exclusively based on the WTO-SPS Agreement.

#### 4. Concluding remarks

The TPP Agreement is a paradigmatic example of a mega trade agreement given the high proportion of the world economy that is included. The economic weight and level of development of CPTPP partners is heterogeneous, however. If we focus on the agricultural sector, we can also see important differences in both production and trade patterns; for instance, the level of productivity, which is expected to be largely related to technical capabilities.

The SPS-CPTPP chapter has a stated goal of higher integration between partners. However, all of the above differences can make achieving this difficult. Particularly, dissimilarities in technical capabilities must be taken into account, as they are essential in the context of SPS. Thus, although the chapter provides equal rights for all members, the power to properly exercise some of those rights seems very unequal. An important consequence of this is that the developed partners might override the rest.

The TPP SPS chapter also encourages the participation of companies in the discussion related to partners' SPS measures. Although this can be very positive because companies are directly related to compliance with SPS, those in the most developed economies might have higher technical and human capabilities.

It is therefore strongly recommended to consider mechanisms for technical assistance in SPS issues among the countries in the CPTPP, which are not limited to information exchange only, but also balance capabilities to a greater extent.

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