

The appropriate level of protection

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The concept of appropriate level of protection (ALOP) underpins contemporary quarantine policy and practice. While the term is new, the concept is not. It may be difficult for a World Trade Organization (WTO) Member to clearly define its ALOP but the concept is, and always has been, of primary significance to the responsibilities of quarantine services to protect against the entry and establishment of unwanted pests and diseases.

The concept

In its Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement), the WTO refers to the term as the ‘appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health’, and defines it as ‘the level of protection deemed appropriate by the Member establishing a sanitary and phytosanitary measure to protect human, animal or plant life or health within its territory’ (Annex A, paragraph 5).

The ALOP may also be defined as a country’s expressed goals in protecting its human, animal and plant life from hazards, as reflected in legislation and other official documents, policies and procedures. Many WTO Members refer to this concept as ‘acceptable risk’. In a similar vein, the Australian Government used the term ‘managed risk’ in its response to the 1996 report of the Australian Quarantine Review Committee to indicate that a ‘zero-risk’ approach was not sustainable for a country with a significant trade in agricultural commodities.

Each Member of the WTO has the sovereign right to determine its ALOP – this is not the prerogative of the WTO SPS Committee nor of the Appellate Body. It is not an unfettered right, but must take into account the objectives of minimising negative trade effects (Article 5.4 of the SPS Agreement) and consistency in application (Article 5.5).

The SPS Agreement does not require a Member to have a scientific basis for its ALOP, nor for it to be expressed in quantitative terms. As an indication of the goal of a government, ALOP is generally expressed in broad terms such as ‘conservative’. Australia, for example,

has stated before the WTO dispute panel in the Australia–salmon case that its appropriate level of protection is a high or ‘very conservative’ level of protection aimed at reducing risk to ‘very low levels’, ‘while not based on a zero-risk approach’.¹ This conservative position is set against the background level of risk, involving natural pathways of entry for many pests and disease agents, and the impracticability of preventing entirely the accidental or deliberate entry of contaminated material.

The ALOP is an expression of government policy and reflects community expectations with regard to regulated risk generally and, in particular, with regard to protecting agricultural industries and the environment. It is a societal value judgement to which quarantine services and other relevant agencies contribute by providing technical advice. In determining its ALOP, a Member decides, on a global basis, the balance it wishes to take between the risk of pest or disease incursions and the benefits it gains from all trade, as perceived at the time. A conservative quarantine policy minimises the likelihood of such incursions but sacrifices trade benefits. Costs of such a policy include restricted access to products of other countries for both consumption and investment in improved production through new genetic material, and the cost of maintaining larger border services. A decrease in protection may mean an increase in the likelihood of pest and disease incursions, and the associated costs to industry, the community and the environment.

A country with little domestic agricultural production may set a low ALOP to maximise the benefits of trade, while a nation with significant domestic agricultural production and unique biodiversity may need to resolve a dilemma between risking damage to agriculture and the environment, and maximising the benefits of international trade.

Applying the concept

While recognising that the SPS Agreement does not contain an explicit provision obliging WTO Members to determine their ALOP, the Appellate Body (Australia–salmon) stated that ‘this does not mean, however, that an importing Member is free to determine its level of protection with such vagueness or equivocation that the application of the relevant provisions of the SPS Agreement...becomes impossible’.² Relevant provisions include:

- ensuring that there is a scientific justification for measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standard (Article 3.3);
- assessing the sanitary or phytosanitary measures of other Members as equivalent to its own, on the basis that the former achieve the importing Member’s ALOP (Article 4.1);
- taking into account the objective of minimising trade effects when determining its ALOP (Article 5.4);
- ensuring that measures are not more trade restrictive than necessary to meet its ALOP (Article 5.6); and
- answering reasonable questions from other WTO Members about the determination of its ALOP (Annex B, paragraph 3).

Australia has been looking into ways of expressing its ALOP in more detail but, in common with other WTO Members, has not been in a position to do so.

¹ WT/DS18/AB/R, para 197

² WT/DS18/AB/R, para 206

Quarantine measures are based on the ALOP and are designed to align with the ALOP – the ALOP is not derived from quarantine measures. The determination of the ALOP is an element in the decision-making process which logically precedes the selection and use of a sanitary or phytosanitary measure. However, in the absence of a detailed statement from a Member describing its ALOP in precise terms, a guide to a Member's ALOP may be found in the protection afforded by the body of quarantine policies and practices developed and adopted over the years.

When a Member establishes a sanitary or phytosanitary measure in a particular situation, that measure inherently reflects or achieves a certain level of protection which can be presumed to be at least as high as the ALOP of that Member. Since WTO Members must also conform with Article 5.6 of the Agreement, which says that measures can be no more trade restrictive than necessary to achieve the ALOP, it follows that any measure must inherently effect a level of protection which is no higher than the Member's ALOP.

The availability of appropriate measures and the preferences of exporting countries play a role in determining the measures put in place in a particular situation. As well, among decisions made will be 'outliers' made for reasons perhaps significant at the time but which do not align well with the ALOP. As Members need to be cognisant of the objective of consistency in the application of ALOP, review of such decisions needs to be carried out on a continuing basis, and such reviews may lead to changes to import policies and procedures. While ever a Member allows such 'outliers' to persist, it is of course vulnerable to challenge by another Member under WTO procedures, on grounds that risk is not being managed in a consistent way.

Consistency

Article 5.5 of the SPS Agreement provides that, with the aim of 'achieving consistency in the application of the concept of [ALOP]', Members shall avoid adopting different levels of protection in different situations, where the levels of protection show arbitrary or unjustifiable distinctions, if such distinctions result in discrimination or a disguised restriction on international trade. The Appellate Body (EC–hormones) emphasised that the goal of consistency 'does not establish a legal obligation of consistency...it is only arbitrary or unjustifiable inconsistencies that are to be avoided'.³

Mindful of the objective of consistency in the application of ALOP, a Member should not set a high level of import protection against the entry of certain commodities (for example, ones that would compete with a domestic industry) while accepting a much lower level of protection in relation to other commodities (for example, those considered to be economically beneficial, such as new genetic material or consumer items not produced domestically).

As well, under the national treatment provisions of the SPS Agreement, Members may not set different levels of protection between imported commodities and those produced domestically, where there are hazards in common. For example, quarantine restrictions cannot be applied to an imported commodity against particular pests and diseases where the same or similar pests and diseases, present in the importing country, do not result in restrictions on free trade.

³ WT/DS26/AB/R, para 213

Risk is a function of:

- the likelihood of entry, establishment and spread of pests and diseases; and
- the consequences of entry, establishment and spread (both their possible magnitudes in different scenarios and the relative likelihood of those scenarios occurring).

Rationally, for a given acceptable level of risk, damage and likelihood are inversely related. This relationship may be illustrated via a graph with axes of likelihood and consequences. The line indicating a Member's ALOP will differ in position and shape from one Member to another. This is because it defines the boundary between points representing acceptable risks (points on the line, and between the line and the axes) and unacceptable risks (all points outside the line). That boundary is established according to the Member's averseness to risk.

These provisions mean that measures should be specified so that they bring an unrestricted risk lying outside the line into alignment with the ALOP, either:

- by reducing the likelihood of entry, establishment and spread of the pest or disease (the usual approach in risk management); or
- by reducing the expected consequences (for example, by restricting the end use of the commodity).

Measures which when applied bring the associated risk well below the ALOP are likely to be more trade restrictive than they need be and the Member would be obliged to examine such measures with regard to consistency. In practice it is very difficult for any Member to plot its own ALOP in an absolute sense but pair-wise comparisons of measures may yield some indicative conclusions as to whether consistency in risk management is being achieved.

In order to be found to have acted inconsistently under Article 5.5, the Appellate Body (Australia–salmon) considered that a Member must be found to have met all of the following three elements:

- the Member adopts different ALOPs in several different situations;
- those levels of protection exhibit 'arbitrary or unjustifiable' differences in their treatment of different situations; and
- the measures embodying or implementing those differences result in 'discrimination or a disguised restriction on international trade'.⁴

The Appellate Body also found that different situations can be comparable under Article 5.5 if they involve the same or similar hazards, or a risk of the same or similar associated potential biological or economic consequences. There is no need for both the hazards and the consequences to be similar to make the situations comparable. It follows that consequences may be compared if they can be described in terms of a common denominator, such as monetary units (for example, value of trade lost, cost of an eradication program, temporary or irreversible damage to an ecosystem). Consequences which are not usually described in monetary terms, such as the loss of public amenity, or temporary or irreversible damage to an ecosystem, are more difficult to compare.

The SPS Committee's guidelines on the practical implementation of the provisions of Article 5.5, adopted earlier this year, will provide assistance to Members with regard to their obligations on consistency.

⁴ WT/DS18/AB/R, para 140

Linking ALOP and measures

While a guide to a Member's ALOP may be able to be deduced from the measures adopted in the recent past across a range of commodities, a mechanism to link a measure with the ALOP is necessary. This is because measures are, of necessity, narrowly focused on a specific hazard. The ALOP, on the other hand, is usually articulated in far less specific terms as a broad qualitative statement of quarantine policy. Work has commenced on attempts to provide that link through the use of terms such as 'animal/plant health objective' and 'food safety objective'.

An 'animal/plant health objective' or 'food safety objective' provides a reason or purpose for a sanitary or phytosanitary measure addressing a hazard, and describes the expected level of protection from the hazard which would result from application of the nominated measure. In serving as a link between the measure and the ALOP (by facilitating a comparison of likelihoods and impacts), such an objective facilitates consistent decision-making across commodities. The objective should be practical and technically feasible, and should be expressed in the most specific terms available (quantitatively if possible). In most cases the objective can only describe qualitatively the level of protection against a hazard the measure is expected to achieve (for example, that there would be a very low likelihood of exposure of an animal, plant or human to the hazard). In other cases, data may be available to permit a reference in the description of the objective to confidence levels with regard, for example, to the prevalence of a hazard in a commodity and the exposure potential.

The concept is important as it may provide a means for a Member to better define its objectives in the fields of animal and plant health, and food safety. Such definitions would apply, of course, to domestic as well as imported commodities.

Setting measures

Depending on the ALOP it has set, a Member may choose an international standard (for example, as set out in the OIE International Animal Health Code, an International Standard for Phytosanitary Measure or the Codex Alimentarius) as the sanitary measure to achieve its objective. Alternatively, if an international standard does not exist, or if the Member believes that the international standard does not provide the level of protection deemed appropriate and a higher level of protection is required, the Member may choose a different measure or combination of measures to achieve its animal/plant health or food safety objective. In such a case, the Member must ensure that the measure:

- is based on a risk assessment incorporating scientific principles;
- is applied only to the extent necessary to protect human, animal or plant life or health; and
- is not maintained without sufficient scientific evidence (Article 2.2).

These obligations apply irrespective of the political and administrative processes involved in developing quarantine policies and applying operational procedures.

In determining the measures to be applied, a Member may take relevant economic factors into account. Such factors include:

- the potential damage in terms of loss of production or sales in the event of an incursion of a pest or disease;
- the costs of control or eradication of an outbreak and the cost of programs to manage such responses;
- the costs associated with the loss of markets, nationally and internationally; and
- the relative cost-effectiveness of alternative approaches to limiting risks.

The likely competitive impact of imports on domestic industries may not be taken into account in determining measures for a particular commodity but may be part of any determination of ALOP.

In choosing measures, Members must also take into account the objective of minimising negative trade effects. For a particular import proposal, there is often a number of alternative measures which, singly or in combination, may be used to achieve the importing Member's ALOP (for example, treatment, inspection, testing). In choosing among such alternatives, the importing Member needs to adopt those measures which are no more trade restrictive than required to meet its animal/plant health or food safety objectives, if the measures proposed are technically and economically feasible. The importing Member needs also to be open to equivalence proposals submitted by the exporting Member with regard to alternative measures.

Review of ALOP

An ALOP is not 'cast in stone' but is open to review by government to ensure that it continues to express a government's broad policies, and reflect community and industry views on risk taking and the benefits of trade. Issues which may be relevant to such a review include the economic implications of the current ALOP and the possible net economic benefits to be gained under different quarantine protection regimens. A review of ALOP needs to be distinguished from a review of past technical decisions, which is a matter for technical experts. However, any significant change in ALOP would necessitate a review of quarantine policies and practices to ensure that they continued to reflect the new level of protection, and that the Member was not in breach of its obligations.

Conclusions

ALOP provides a unifying concept to the principles and practices embodied in the SPS Agreement. The concept allows Members to adopt levels of protection in accordance with their views toward risks, yet it protects Members against trade discrimination through the inconsistent application of import protection regimens.

The concept, while difficult to define, is being clarified in practical terms in cases before the WTO. Work underway on animal/plant health and food safety objectives should lead to the development of practical links between ALOP and measures, facilitating trade negotiations between Members.