

Overview of International Law on Pre-import Risk Screening of Live Animal Imports in International Trade

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Introduction. National governments face challenges in complying with international law while regulating intentional imports of live animals. This paper provides an overview of relevant international laws with global reach. It does not delve into bilateral or regional treaties or agreements. Several nations have created pre-import regulatory systems that help to “screen out” introductions of potentially harmful live animals that may become invasive or may carry human or animal pathogens. New Zealand and Australia are examples. Their systems have not violated international law and no legal obstacle prevents other nations from implementing similar systems. The global agreements discussed here that may apply to risks of live animal imports are: the Convention on Biological Diversity (CBD); International Plant Protection Convention (IPPC); World Organization for Animal Health (OIE); and World Trade Organization (WTO).² Their applicability to any particular nation depends on whether it is a party to the agreement.

CBD. The CBD, to which almost all nations belong (190 parties, except the United States), provides:

Art. 8. In-situ Conservation - Each Contracting Party shall, as far as possible and as appropriate: (h) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species.

This language is non-mandatory in that is highly conditional: “as far as possible and as appropriate.” Further, the CBD, which is a framework rather than a regulatory convention, lacks a Secretariat or other mechanism with a mandate to issue regulatory standards for invasive alien species, whether plants or animals. It also lacks enforcement powers to police the parties' compliance.

In 2005, the CBD convened an Ad Hoc Technical Expert Group (AHTEG) on Gaps and Inconsistencies in the International Regulatory Framework in Relation to Invasive Alien Species. The AHTEG made key findings regarding the laws on the animal trade, stating:

(f) A significant general gap in the international regulatory framework relates to lack of international standards to address animals that are

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² Other relevant, but less significant, agreements exist, e.g., the UN Convention on the Law of the Sea's Article 196 calls for parties to avoid releases of marine invaders. Note that the regulatory Convention on International Trade in Endangered Species (CITES) addresses conservation risks to the exporting countries of trade in certain listed animals. CITES does not apply to issues of invasiveness or disease risks to the importing countries associated with traded species.

*invasive alien species but are not pests of plants under the International Plant Protection Convention.*³

IPPC. The Rome-based IPPC has 166 parties. Its mission is: “to secure action to prevent the spread and introduction of pests of plants and plant products, and to promote appropriate measures for their control.”⁴ The CBD AHTEG statement, above, notes the IPPC does provide standards addressing those animals that meet the definition of “pests of plants”. The vast majority of such plant pests are invertebrate animals, such as insects and snails. As a practical matter, very few intentionally traded live animals are known plant pests, thus there are very few situations in which the IPPC standards - which are detailed and rigorous as far as the plant trade - would be applied to the animal trade.⁵ Little reason exists to think that the small and resource-poor IPPC has the capacity, or the interest, to renegotiate and broaden its mandate in order to promulgate standards on trade in potentially invasive animals, beyond IPPC's narrow plant pest focus.

OIE. The Paris-based OIE has 172 parties. The stated objectives of OIE are to:

*...ensure transparency in the global animal disease situation; collect, analyze and disseminate veterinary scientific information; provide expertise and encourage international solidarity in the control of animal diseases; within its mandate under the WTO SPS Agreement, to safeguard world trade by publishing health standards for international trade in animals and animal products; [and] improve the legal framework and resources of national Veterinary Services.*⁶

OIE lists high-priority animal diseases as “notifiable” in order to enhance their surveillance and control their spread through trade. OIE’s detailed veterinary-based standards for a particular notifiable disease may apply to a broad variety of traded animals that may carry it. OIE’s historic mission aimed at diseases of livestock and other commercially valuable animals. However, it is increasingly recognizing that wildlife diseases also fall under its authority. Nevertheless, the Animal Codes promulgated by OIE address just mammals, birds, fish, molluscs, crustaceans, and bees.⁷ Members may adopt regulations beyond the limited set of standards OIE has promulgated and have done so on many occasions.

Little reason exists to suggest OIE has the capacity, or the interest, to renegotiate and broaden its mandate so as to promulgate standards for the live animal trade to cover general invasiveness concerns, beyond OIE's veterinary focus.

³ See, Note by the CBD Executive Secretary, UNEP/CBD/SBSTTA/11/16, 2005, at p. 2; at: www.biodiv.org/doc/meetings/sbstta/sbstta-11/official/sbstta-11-16-en.pdf .

⁴ See www.ippc.int/IPPC/En/default.jsp.

⁵ A small number of known plant pests are imported for specialty use as biological control organisms. This typically is not commercial trade; it is done by government agencies pursuant to detailed biosafety rules.

⁶ OIE Objectives webpage, at: www.oie.int/eng/OIE/en_objectifs.htm?e1d1 .

⁷ See OIE Standards, at: www.oie.int/eng/normes/guide%20to%20OIE%20intl%20standards%20v6.pdf .

WTO. The key applicable international trade instrument, which in its broad mandatory standards also governs national regulation of the animal trade, is the WTO, based in Geneva, to which 151 nations belong. Parties adopting new, more precautionary, regulations must use care to not violate the rigorous WTO trade discipline.

A nation's chosen level of risk acceptance is known as its "appropriate level of protection" under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, ("SPS Agreement") Preamble and Article 5.⁸ The SPS Agreement Preamble and Art.s 2.1, 2.2, 3.3, 5.3, and 5.7 affirm that WTO members, in seeking to reach their appropriate level of protection, have the right to take what are described as "sanitary measures," which may include prohibitions on proposed animal imports. However, such prohibitions must be "applied only to the extent necessary to protect human, animal or plant life or health" and be "based on scientific principles" (Art. 2.2). The SPS Agreement imposes several procedural and substantive requirements upon such national measures. These include transparency, avoidance of discrimination against imports without justification, consistency of national protections across comparable categories of risks, and others. The goals of the SPS Agreement are not to eliminate all restraints on trade; rather they are to stop arbitrary, unreasonable, and discriminatory restraints.

Attention should be drawn to the risk assessment requirements in Art.s 5.1 through 5.3:

1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

A governmental decision by a WTO member nation to non-provisionally (i.e., permanently) prohibit a particular animal species proposed for importation would require an assessment taking into account the factors listed in those provisions. Importantly, **with respect to invasiveness risks, no other mandatory global law exists apart from SPS Art.s 5.1 through 5.3 that defines what a nation must consider in a full risk assessment addressing live animal imports.**⁹

⁸ For the complete WTO SPS Agreement see: www.wto.org/english/docs_e/legal_e/15sps_01_e.htm.

⁹ The SPS Agreement, **Annex A, definition 4**, defines "risk assessment" in pertinent part, as:

Animal species proposed for export to a particular nation for which inadequate information is available for a full risk assessment may be provisionally regulated by that nation while adequate scientific information is sought in order to fully assess their potential risk. This amounts to applying a “provisional measure” to that species under SPS Agreement Art. 5.7, which provides:

7. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

Thus, **nations can be WTO-compliant when provisionally prohibiting proposed animal imports even in the absence of relevant scientific evidence, so long as they make reasonably timely attempts to obtain the needed information.** If an animal species proposed for import was not provisionally prohibited during the phases of risk assessment, the potential risks of that animal would, in effect, be incurred by the importing nation. Allowing entry of an un-assessed risk may not meet the nation’s “appropriate level of protection,” as per the SPS Agreement. The risk assessment could become useless, i.e., too late to stop invasion by that species in the interim.

Past *laissez faire* national practices, including official or unofficial “approved animal species” lists that were not based on prior adequate risk assessments, would bear no legal significance under the WTO SPS Agreement. A member nation is affirmatively allowed to raise - or to lower - its level of protection if desired, thereby perhaps prohibiting a particular species it previously allowed or, conversely, allowing a species it previously prohibited. However, a general raising of a WTO member’s level of protection should be justified under SPS Agreement Art.s 5.3 through 5.6, which seek to ensure such changes do not create new discriminatory or unnecessary trade barriers. A member’s higher level of protection should be justified by scientific studies, expert and stakeholder reviews, and other analyses of the risks it seeks to avoid.

Conclusion. No mandatory global standards exist specifically on the issue of animal invasiveness. This leaves nations with extensive flexibility to adopt standards as they see fit to achieve their desired level of protection from animal invasions, so long as they comply with the broader WTO SPS provisions, which regulate international trade generally. Nations may raise their levels of protection and tighten their animal import systems including prohibiting any entry of un-assessed species, if they so choose. In doing so, WTO members must follow the rigorous SPS Agreement provisions with care.

The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences.