



**THE UNIVERSITY OF QUEENSLAND**  
AUSTRALIA

**The Implementation of the WTO Agreement on the Application of Sanitary and  
Phytosanitary Measures in Selected Southeast Asian Developing Countries:  
A Comparative Analysis and Evaluation**

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*A thesis submitted for the degree of Doctor of Philosophy at  
The University of Queensland in 2017  
T.C. Beirne School of Law*

## **Abstract**

This PhD thesis critically analyses how the selected countries in Southeast Asia, particularly Indonesia, the Philippines and Malaysia, should approach the SPS Agreement implementation with regard to imports and exports in order to create a balance of SPS application, that is, one that protects health while promoting the liberalisation of trade. The WTO Specific Trade Concerns demonstrates that the selected countries face issues of imbalance in their SPS implementation, which hamper other WTO Members' international trade. Similarly, the selected countries' international trade is affected by other WTO Members' trade restrictions. It is crucial to examine these issues in order to prevent further detriment to international trade.

This thesis specifically investigates the conformity of the selected countries' SPS measures to the SPS principles, namely the principles of non-discrimination, scientific justification, transparency, harmonisation, regionalisation, equivalence, and special and differential treatment and technical assistance. It further analyses the impediments faced by the selected countries in SPS implementation, as well as the underlying reasons and the attempts undertaken to address the impediments. This thesis argues for a potential improvement in the selected countries' SPS implementation. To accomplish the research aim, doctrinal and field research was undertaken and a comparative analysis on the experience of the selected countries was carried out.

The main findings of this thesis are that both internal and external factors play a role in the imbalance of SPS implementation in the selected countries. This thesis argues distinctively against some predominant literature, which state that the challenges in SPS implementation by developing countries are caused primarily by their internal factors. On the contrary, this thesis found that external factors can play a significant role in the issues of imbalance of SPS implementation in the selected countries.

The selected countries share key similarities in their SPS application although the underlying reasons for this vary among them. The most notable common internal factors are insufficient legal and regulatory implementation, different national policies, lack of financial resources and infrastructure, as well as insufficient human resources and a lack of coordination among them. The external factors include the ambiguity of the provisions of the SPS Agreement, particularly provisions on transparency and harmonisation, and further implementation of the SPS Agreement. For example, problems arise due to the unpredictability of the equivalence and regionalisation recognition process, the non-compulsory nature of the procedures and the procedural-based approach rather than outcome oriented-based approach of the guidelines, decisions and procedures. The external factors include international standards-setting bodies not providing equitable opportunities for developing countries to become involved in the standards setting process. Further,

the emerging issue of SPS private standards bring about difficulties, particularly for small and medium enterprises in the selected countries, in dealing with market access. The silence of the SPS Agreement on the legal relationship with private standards affects the legal uncertainty as to how the selected countries deal with challenges related to private standards. Notwithstanding the five actions that have been decided by the SPS Committee, no formal remedy has been provided by the WTO, included a dispute settlement system, when private standards restrict international trade.

This thesis recommends the selected countries reform the SPS regulatory system in order to improve recognition of the SPS principles in establishing their SPS measures. The selected countries should actively take advantage of the benefit of trade facilities and technical assistance that can be provided by the WTO, as well as other international organisations and developed Members, to improve their SPS legislation implementation. With regard to private standards, this thesis argues that the selected countries should improve cooperation with relevant institutions to find a consensus regarding the legal certainty of private standards within the operation of the SPS Agreement. It is recommended that there should be a set of guidelines for Members regarding how they should treat private standards bodies in their territories as well as adopt them into their regulation. However, the balance of health protection and promotion of trade liberalisation complying with the SPS Agreement should be the main consideration.

## **Declaration by author**

This thesis is composed of my original work, and contains no material previously published or written by another person except where due reference has been made in the text. I have clearly stated the contribution by others to jointly-authored works that I have included in my thesis.

I have clearly stated the contribution of others to my thesis as a whole, including statistical assistance, survey design, data analysis, significant technical procedures, professional editorial advice, and any other original research work used or reported in my thesis. The content of my thesis is the result of work I have carried out since the commencement of my research higher degree candidature and does not include a substantial part of work that has been submitted to qualify for the award of any other degree or diploma in any university or other tertiary institution. I have clearly stated which parts of my thesis, if any, have been submitted to qualify for another award.

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No publications

**Publications included in this thesis**

No publications included

**Contributions by others to the thesis**

No contributions by others

**Statement of parts of the thesis submitted to qualify for the award of another degree**

None

## **Acknowledgements**

I am grateful to my principal advisor, Dr Alan Davidson, and associate advisor, Dr Barbora Jedlickova, for the academic advice and support during my PhD journey. Their critical review and strong encouragement were invaluable in improving my research project.

I am grateful to The University of Queensland for providing me with scholarship support through The University of Queensland International Scholarship and The University of Queensland Research Scholarship, which enabled me to undertake my PhD. I want to extend my gratitude to the TC Beirne School of Law for providing me with the financial funding to undertake my field research in Indonesia and Philippines. I am grateful to the staff of administrative in the Law School and in The University of Queensland library for assisting me while I pursued my PhD.

I admire the assistance from the Indonesian and the Philippines' government for approving my proposal to undertake the field research. I appreciate particularly the research participants in Indonesia and the Philippines for the generosity to share their knowledge and experience, which are invaluable to my research.

I am thankful to the Faculty of Law and the Universitas Gadjah Mada for providing me with a permission to undertake my PhD. I appreciate my colleagues and church community in Indonesia and Brisbane for supporting me during my PhD. I specially thank to Professor M. Hawin, Professor Tomi Suryo Utomo, and Professor Simon Butt for the valuable discussion and advice to complete the final journey of my PhD. I appreciate my PhD colleagues in Hartley Teakle Building for the support and togetherness, especially to my officemates, Jessica Ritchie for her assistance in regards to technical matters of thesis format, Helen Punter for giving me moral support, and Kerstin Braun for her assistance. I also thank to Lalotoa Mulitalo, who assisted me in preparing proposal for funding request for my field research to the TC Beirne School of Law, and to Ruth Walker for her support. I also appreciate Laura Marshall for assisting me in the proofreading of my thesis. I am thankful to my immediate and extended family in Indonesia for supporting me with the endless prayers.

Last but not least, I acknowledge the unstinting support from my husband, Ananto Nugroho, and my first son, Adriel Bintang Nugroho, for always being there through my PhD journey, as well as from my second son, Timothy Langit Nugroho, for supporting me in the final journey of my PhD. Thank you for your love and sacrifice.

## **Keywords**

World trade organisation, sanitary and phytosanitary measures agreement, international trade, developing countries

## **Australian and New Zealand Standard Research Classifications (ANZSRC)**

ANZSRC code: 180117, International Trade Law, 90%

ANZSRC code: 180106, Comparative Law, 10%

## **Fields of Research (FoR) Classification**

FoR code: 1801, Law, 90%

FoR code: 1899, Other Law and Legal Studies, 10%

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## LIST OF ABBREVIATIONS

ACFTA	ASEAN China Free Trade Agreement
ADB	Asian Development Bank Institute
AEC	ASEAN Economic Community
AI	Avian Influenza (H1N1)
ALOP	Appropriate Level of Protection
AO	Administrative Order
APEC	Asia Pacific Economic Cooperation
ASC	Aquaculture Stewardship Council
ASEAN	Association of Southeast Asian Nations
ASEAN GAP	ASEAN Good Agricultural Practices
ATI	Agricultural Training Institute
AusAID	Australian Agency for International Development
BAFPS	Bureau of Agricultural and Fisheries Product Standards
BAI	Bureau of Animal Industry
BFAR	Bureau of Fisheries and Aquatic Resources
BIMP - EAGA	Brunei Indonesia Malaysia Philippines – East Asia Growth Area
BPI	Bureau of Plant Industry
CCQI	Coordination Committee for Quarantine and Inspection
Codex	Codex <i>Alimentarius</i> Commission International Food Standards
DoA	Department of Agriculture
DoH	Department of Health
DPR	<i>Dewan Perwakilan Rakyat</i>
DS	Dispute Settlement
DSB	Dispute Settlement Body

DVS	Department of Veterinary Service
EC	European Community
EU	European Union
EU-RASFF	EU Rapid Alert System for Food and Feed
EUREPGAP	Euro-Retailer Produce Working Group Good Agricultural Practices
FAMA	Federal Agricultural Marketing Authority
FAO	Food and Agricultural Organisation
FDA	Food and Drug Administration
FMD	Foot and Mouth Disease
FQIA	Fish Quarantine and Inspection Agency
FQSD	Food Safety and Quality Division
FTA	Free Trade Agreement
GAA	Global Aquaculture Alliance
GATT	General Agreement on Tariffs and Trade
GCI	Global Competitiveness Index
GNI	Gross National Income
GLOBALG.A.P.	GLOBAL Good Agricultural Practices
GSP	Generalised System of Preferences
HACCP	Hazard Analysis and Critical Control Points
IAQA	Indonesia Agricultural Quarantine Agency
IPPC	International Plant Protection Convention
IRA	Import Risk Analysis
ISO	International Organisation for Standardisation
ISPM	International Standards for Phytosanitary Measures
LDC	Least Developed Country
LGU	Local Government Units
MAQIS	Malaysian Quarantine and Inspection Services
MFN	Most Favoured Nation
MITI	Ministry of International Trade and Industry
MoA	Ministry of Agriculture & Agro-Based Industry
MoH	Ministry of Health
MPIC	Ministry of Plantation Industry and Commodities
MRA	Mutual Recognition Arrangement
MRL	Maximum Residue Limit
NA-DFC	National Agency of Drug and Food Control

NAQCC	National Animal Quarantine Coordinating Committee
NEP	National Enquiry Point
NMIS	National Meat Inspection Service
NNA	National Notification Authority
NT	National Treatment
NTB	Non-Tariff Barriers
OECD	Organisation for Economic Co-operation and Development
OIE	Office International des Epizootics
PEMUDAH	<i>Pasukan Petugas Khas Pemudahcara Perniagaan</i>
PFA	Pest Free Area
PQS	Plant Quarantine Service
RCEP	Regional Comprehensive Economic Partnership
RSPO	Roundtable on Sustainable Palm Oil
S&D Treatment	Special and Differential Treatment
SPID	Strategic Planning and International Division
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
SPS-IMS	Sanitary and Phytosanitary Measures Information Management System
SPS Measures	Sanitary and Phytosanitary Measures
STC	Specific Trade Concerns
STDF	Standard and Trade Development Facility
TBT	Technical Barriers to Trade
TPP	Trans-Pacific Partnership
TPR	Trade Policy Review
UNCTAD	United Nations Conference on Trade and Development
UPT	<i>Unit Pelaksana Teknis</i>
US	United States of America
USAID	United States Agency for International Development
WEF	World Economic Forum
WHO	World Health Organisation
WTO	World Trade Organisation
WWF	World Wildlife Fund

## CHAPTER 1

### I INTRODUCTION

#### A Overview

The purpose of the World Trade Organisation (WTO)<sup>1</sup> *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement)<sup>2</sup> is to improve the protection of human, animal, and plant life or health<sup>3</sup> in international trade. This is reflected by providing rights to WTO member countries (Members) to establish Sanitary and Phytosanitary Measures (SPS measures).<sup>4</sup> The SPS Agreement also aims to promote trade liberalisation in line with the key purpose of the WTO.<sup>5</sup> Members are required to establish SPS measures that are consistent with SPS requirements, which involve, for instance, compliance of SPS measures with scientific-based<sup>6</sup> principles and risk assessment processes.<sup>7</sup> Thus, the SPS Agreement has the central aim to create a balance between the protection of health and the promotion of trade liberalisation.<sup>8</sup>

The balance between health protection and trade liberalisation is a key feature of the implementation of the SPS Agreement, because the SPS measures of Members may result in barriers to international trade<sup>9</sup> and impact on ‘iniquity’ for Members.<sup>10</sup> In practice, there are significant issues with respect to the balance of implementation of SPS Agreement by Members, and according to the 2012 WTO report, SPS measures have been identified as impacting

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<sup>1</sup> The WTO is an international trade organisation which handles trade aspects in international economic cooperation. It was established by Marrakesh Agreement Establishing the World Trade Organisation, open for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

<sup>2</sup> *Marrakesh Agreement Establishing the World Trade Organisation*, open for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘*SPS Agreement*’).

<sup>3</sup> SPS Agreement, the Preamble [1-2].

<sup>4</sup> Ibid Annex A.1. SPS Measures are any measures to protect animal or plant life from pests or diseases; protect human or animal life from disease; protect human life or health from diseases or pests; prevent or limit other damage from pests. SPS measures might be embodied in ‘relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety’.

<sup>5</sup> SPS Agreement, the Preamble [1]

<sup>6</sup> SPS Agreement, art 2.2.

<sup>7</sup> Ibid art 5.1.

<sup>8</sup> World Trade Organisation, *Sanitary and Phytosanitary Measures: Ensuring safe trading without unnecessary restrictions* <[https://www.wto.org/english/thewto\\_e/20y\\_e/sps\\_brochure20y\\_e.pdf](https://www.wto.org/english/thewto_e/20y_e/sps_brochure20y_e.pdf)>. Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization—Text, Cases and Materials*, Third Edition, (Cambridge University Press, 2013) 901.

<sup>9</sup> See, e.g. Jason D. Soberblom, SPS Agreement: Balancing National Sovereignty Against Disguised Protectionism, World International Community Expert <[www.World-ICE.com](http://www.World-ICE.com)> 4; Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization—Text, Cases and Materials*, Third Edition, (Cambridge University Press, 2013) 498.

<sup>10</sup> Patrick Love and Ralph Lattimore (2009) ‘Protectionism? Tariffs and Other Barriers to Trade’ in *International Trade: Free, Fair and Open?*, OECD Publishing <<http://dx.doi.org/10.1787/9789264060265-5-en>> 68. Love and Lattimore stated that another factor can support inequities is ‘trade barriers’.

international trade.<sup>11</sup> Further, the WTO has also noted an increasing number of Specific Trade Concerns (STC) raised by Members regarding the SPS measures of other Members.<sup>12</sup> These STC include non-compliance of Members, such as insufficient scientific basis and harmonisation with SPS international standards,<sup>13</sup> as well as non-notification of their SPS measures.<sup>14</sup>

The imbalance in the implementation of the SPS Agreement in developing Members remains greater than that of developed Members. The 2012 WTO Report states that SPS implementation issues are more likely to occur in developing countries.<sup>15</sup> For example, certain developing countries and least developed countries (LDCs)<sup>16</sup> have not fulfilled their transparency obligations, such as to establish a SPS National Notification Authority (NNA)<sup>17</sup> or to notify their SPS measures in timely manner.<sup>18</sup> In general, SPS implementation for developing Members is not a main focus for the country and they often pay insufficient attention to health protection standards for humans, animals, and plant life. Developing country Members, on the other hand, are eager to apply the SPS Agreement by establishing high levels of SPS measures. Therefore, many products of developing

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<sup>11</sup> WTO, *World Trade Report 2012, Trade and Public Policies: A Closer Look at Non-Tariff Measures in the 21<sup>st</sup> Century* <[http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report12\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf)> 10 September 2014 ('*World Trade Report 2012*'), 153.

<sup>12</sup> WTO: 2013 News Items, *Sanitary and Phytosanitary Measures: Formal Meeting, Members Greet Food Safety Body's Half Centuries with Plea for Science Based Trade Measures*, 28 June 2013, <[http://www.wto.org/english/news\\_e/news13\\_e/sps\\_28jun13\\_e.htm](http://www.wto.org/english/news_e/news13_e/sps_28jun13_e.htm)>. See also WTO, G/SPS/GEN/1253, 14 June 2013 (13-3100), Committee on Sanitary and Phytosanitary Measures, *50<sup>th</sup> Anniversary of the Codex Alimentarius Commission: The Importance of the Scientific Principle*, Communication from Brazil; and WTO, Committee on Sanitary and Phytosanitary Measures, G/SPS/GEN/1143/Rev.1 21 March 2012 (12-1521), *SPS Measures and International Standards, Guidelines, and Recommendations*.

<sup>13</sup> Ibid.

<sup>14</sup> World Trade Organisation, *World Trade Statistical Review 2016* <[https://www.wto.org/english/res\\_e/statis\\_e/wts2016\\_e/wts2016\\_e.pdf](https://www.wto.org/english/res_e/statis_e/wts2016_e/wts2016_e.pdf)> 68.

<sup>15</sup> *World Trade Report 2012*, above n11, 153.

<sup>16</sup> UNCTAD defines LDCs as 'a category of States that are deemed highly disadvantaged in their development process (many of them for geographical reasons), and facing more than other countries the risk of failing to come out of poverty'. The criteria to decide a country as LDC are, per capita income (based on three years average of the Gross National Income per capita is under \$750), human assets (based on Human Assets Index), and economic vulnerability (based on Economic Vulnerability Index). Further, the WTO states that developing countries includes least developed countries (LDCs). See, e.g., WTO, *Who are the developing countries in the WTO*; the United Nations Conference on Trade and Development (UNCTAD), *Least Developed Countries (LDCs)* <<http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/LDCs.aspx>>; UNCTAD, *UN Recognition of the Least Developed Countries* <<http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-recognition-of-LDCs.aspx>>.

<sup>17</sup> See, e.g., WTO, *Current Issues in SPS* (2014) <[http://wto.org/english/tratop\\_e/sps\\_e/sps\\_issues\\_e.htm](http://wto.org/english/tratop_e/sps_e/sps_issues_e.htm)>; *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement*, WTO Doc G/SPS/GEN/804/Rev. 9 (10 October 2016) (Note by the Secretariat, Revision) 2-3. As of 15 September 2016, only 154 out of 164 Members had provided their contact information of their national notification authority (NNA), and 158 out of 164 Members had provided national enquiry point (NEP).

<sup>18</sup> WTO Doc G/SPS/GEN/804/Rev. 9, 4. As of 15 September 2016, 42 (consisting of 19 developing countries, 15 LDCs, and 1 developed country) out of 160 Members had not notified the SPS Committee with their SPS measures.

Members are not able to fulfil the SPS measures of the developed Members, resulting in export refusals by the developed Members.<sup>19</sup>

This issue is in line with the WTO's report, which stated that SPS measures have been identified as impacting trade, particularly for developing Members.<sup>20</sup> Further, the World Bank released its preliminary research findings reporting that developing countries and LDCs in Southeast Asia and Africa may face export impediments, since emerging economies are inclined to set higher standard for their SPS measures.<sup>21</sup> Thus, SPS implementation issues faced by developing Members are not solely in the formulation of the SPS measures but also in meeting the SPS measures of importing countries. Indonesia is one such Southeast Asian country facing issues with SPS implementation, and they must balance their SPS implementation in order to comply with the SPS Agreement.

With regard to SPS implementation issues faced by developing Members, the SPS Agreement recognises these difficulties<sup>22</sup> and provides a range of options for redress, such as by providing technical assistance<sup>23</sup> and Special and Differential (S&D) Treatment to developing Member countries.<sup>24</sup> However, the SPS provisions and specific redress measures are often nuanced, which can affect the ability of the developing countries to balance their SPS implementation.

Ultimately, the aforementioned issues associated with the imbalance of SPS implementation are of great significance to Members<sup>25</sup> and it is therefore crucial that they are examined. Thus, the core aim of this thesis is to undertake specific research and, engage in an examination of the implementation and practice of the SPS Agreement in the selected countries in order to provide a comparative analysis of the implementation of the SPS Agreement measures and assist with the analysis of how the selected countries might improve their SPS implementation by applying SPS principles to achieve a balanced application of the SPS Agreement. This thesis makes specific recommendations for each of the selected countries for improved practice and procedures in international trade standards in order to comply with the aims of the WTO, including the creation of

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<sup>19</sup> Organisation of Economic Co-operation and Development (OECD), *The Impact of Regulations on Agro-Food Trade: the Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) Agreements*, (2003), 41-42.

<sup>20</sup> *World Trade Report 2012*, above n11, 146 and 153.

<sup>21</sup> WTO, *Measuring the Impacts of Standards on Agricultural Exports of Low Income Countries: The Standards Restrictiveness Index*, WTO Doc GEN/SPS/GEN/1228 (13 March 2013) (*the World Bank Development Economic Research Group – Trade and Integration*) 2.

<sup>22</sup> SPS Agreement, the Preamble [7].

<sup>23</sup> *Ibid* art 9.

<sup>24</sup> *Ibid* art 10.

<sup>25</sup> See, e.g., WTO, *Implementation Related Issues and Concerns*, WTO Doc WT/(MIN) 01/17 (20 November 2001, Decision of 14 November 2001) (Ministerial Conference Fourth Session, Doha 9-14 November 2001) (*'Implementation Related Issues and Concerns'*) 1; WTO Committee on Sanitary and Phytosanitary Measures, *Review of the Operation and Implementation of the SPS Agreement*, G/SPS/53, 3 May 2010 (10-2381).



trade liberalisation. This is achieved throughout the thesis by an analysis of the implementation procedures, interviews with key personnel and practical recommendations and conclusions.

## B *Research Scope, Novelty and Limitation*

This legal, PhD thesis involves critical research on the implementation of the SPS Agreement in Southeast Asian developing countries, namely Indonesia, the Philippines and Malaysia (selected countries). The analysis of the SPS implementation covers both imports and exports, since the SPS measures<sup>26</sup> or SPS regulations<sup>27</sup> of the selected countries govern both of these sectors. Thus, the comparative analysis in this thesis provides a comprehensive description and examination of the issues of implementation associated with the selected countries' experiences in the adoption and application of the SPS Agreement, including the difficulties and underlying reasons, as well as the efforts undertaken to address the issues. This analysis aims to provide a platform for each of the selected countries to learn from one another with regards to the efforts undertaken to improve their respective SPS implementation efforts, most significantly with regards to the balance of SPS implementation principles in protecting health and liberalising international trade. The comparative analysis will be discussed specifically in Chapter 6, while the SPS implementation of each selected country is discussed in Chapter 3 (Indonesia), Chapter 4 (the Philippines) and Chapter 5 (Malaysia).

To address the SPS implementation issues, it is important to analyse the compliance of the selected countries' SPS measures with the SPS Agreement principles, namely the non-discrimination principle stipulated in Article 2.3, the scientific principle stipulated in Article 2.2, the transparency principle stipulated in Article 7 and Annex B, the harmonisation principle stipulated in Article 3.1, the regionalisation principle stipulated in Article 6, the equivalence principle stipulated in Article 4, technical assistance as stipulated in Article 9 and S&D treatment as stipulated in Article 10. It is also necessary to examine the impact of the SPS measures of other Members toward exports from the selected countries. The analysis relies primarily on relevant WTO documents, such as STC, Trade Policy Review (TPR) and SPS dispute settlements through the WTO dispute settlement system, as well as the relevant SPS measures of the selected countries.

It is significant to scrutinise the impediments and the underlying reasons faced by the selected countries in implementing the SPS Agreement, by analysing both internal and external factors. Internal factors refer to those affecting the SPS implementation that are caused by matters inside the territory of the selected countries, for example lack of resources. External factors, on the other hand,

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<sup>26</sup> SPS Agreement, *Annex A.1*.

<sup>27</sup> 'SPS regulations' are 'sub-category' of SPS measures, such as 'laws, decrees or ordinances which are applicable generally'. See SPS Agreement, Annex B.1.

refer to those factors of SPS implementation that arise from matters outside of the selected countries, such as private standards and the WTO SPS system. In this regard, it is crucial to examine the recognition of the SPS Agreement by developing countries and its implementation difficulties, including the S&D treatment and technical assistance provisions, specific redresses following the Doha Development Agenda,<sup>28</sup> and further implementation procedures, guidelines, and applicable decisions of the SPS Agreement.<sup>29</sup> In particular, it is important to analyse SPS-related private standards (private standards), since these result in implementation difficulties particularly for developing Members.<sup>30</sup> There is uncertainty regarding legal relationship between the SPS Agreement and private standards, because the SPS Agreement is silent on this issue. This legal void of private standards and the SPS Agreement operational system is crucial and will be examined in this thesis. These are critical for determining the link between SPS implementation issues in the selected countries with internal and external factors and for seeking possible solutions and legal remedies for improvements and reform.

The novelty of this thesis is reflected in the different focus and scope of analysis. This thesis is a legal study focusing on the implementation of the SPS Agreement and the way in which countries can create a balance of SPS implementation in order to conform with the SPS Agreement. This thesis uniquely researched the SPS implementation in the selected Southeast Asian developing countries, namely Indonesia, the Philippines and Malaysia, looking at both the imports and exports. This research examined the SPS application in association with the SPS principles in the SPS Agreement, most notably the non-discrimination principle, scientific justification principle, transparency principle, harmonisation principle, regionalisation principle and equivalence principle. Prior works, on the other hand, have focussed more on economic studies with limited and partial aspects of SPS implementation, such as SPS implementation on vegetable production and trade.<sup>31</sup> Furthermore, prior research has focussed on different jurisdictions, and emphasised different issues not pertinent to the selected countries of this thesis.<sup>32</sup> This thesis is an original examination and

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<sup>28</sup> *Implementation Related Issues and Concerns*, above n24. This includes longer time frames for developing countries to comply with other countries' SPS measures, reasonable intervals between the publication of Members' new SPS measures and entry forces, the equivalence principle, participation of developing Members in international SPS standards setting and technical assistance.

<sup>29</sup> See, e.g., *Decision on the Implementation of the Equivalence Principle*, WTO Doc G/SPS/19/Rev.2; *Guideline for Regionalisation Principle*, WTO Doc G/SPS/48; *Procedure for Implementing Transparency Obligation*, WTO Doc G/SPS/7/Rev.3.

<sup>30</sup> WTO, *Report of the Ad Hoc Working Group on SPS Related Private Standards to the SPS Committee*, WTO Doc G/SPS/W/256 (3 March 2011) 5 ('*Ad Hoc Working Group on Private Standards*').

<sup>31</sup> See Greg I. Johnson, Katinka Weinberger and Mei-Huey Wu, the World Vegetable Centre, 2008, *The Vegetable Industry in Tropical Asia: An overview of production and trade, with a focus on Thailand, Indonesia, the Philippines, Vietnam, and India* <[http://203.64.245.61/fulltext\\_pdf/EB/2001-2010/eb0100.pdf](http://203.64.245.61/fulltext_pdf/EB/2001-2010/eb0100.pdf)>.

<sup>32</sup> See, e.g., Kees van der Meer (STDF Consultant), *Implementing SPS Agreement to Facilitate Safe Trade: Principles and practice in Cambodia, Lao PDR, Philippines and Thailand* (15 August 2014) <<http://sasec.asia/uploads/events/2014/tfweek-2014/am/stdf-implementing-sps-measures.pdf>>; United Nations, *Challenges and Opportunities Arising from Private Standards on Food Safety and Environment for Exporters of*

comparative analysis of the legal and practical issues faced by the selected countries. Thus, it provides an opening for further research to analyse SPS implementation issues from other points of view.

The further novelty of this thesis is that it promotes a different perspective on the impact of international factors on SPS implementation, rather than focussing solely on the national factors within the selected countries. The WTO states that the common issues of SPS implementation in developing countries are primarily caused by natural impediments.<sup>33</sup> Trebilcock and Howse agree with the WTO approach, stating that the difficulties in applying the SPS Agreement are caused mainly by the national factors of the developing countries.<sup>34</sup> The WTO Director General, Roberto Azevedo, holds a similar view, stating that the implementation of WTO agreements by Members is directly related to the proficiency of the Members.<sup>35</sup> Additionally, Low affirms that developing Members continually request the WTO to provide more assistance and direction.<sup>36</sup> These statements reinforce the claim that implementation issues and difficulties are caused by national factors within the developing countries, without any impact from international factors.

The primary argument of this thesis is that the issues of SPS implementation faced by the selected countries are not solely affected by national factors, international factors also play a significant role. International factors can impinge on the capabilities of developing countries,<sup>37</sup> for example, private standards operate outside the SPS system but, in practice, hamper Members' trade, particularly developing countries.<sup>38</sup> With regards to private standards,<sup>39</sup> the SPS Committee<sup>40</sup> is attempting to undertake five responses to the concerns of Members,<sup>41</sup> first raised more than ten

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*Fresh Fruit and Vegetables in Asia: Experiences of Malaysia, Thailand and Viet Nam* (2007)

<<http://p166.unctad.org/file.php/54/29feb2008/docs/ChallengesAndOpportunitiesArising.pdf>>.

<sup>33</sup> WTO, *The WTO Agreement Series: Sanitary Phytosanitary Measures*, 25

<[https://www.wto.org/english/res\\_e/booksp\\_e/agrmtseries4\\_sps\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/agrmtseries4_sps_e.pdf)>.

<sup>34</sup> Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, (Routledge, 3<sup>rd</sup> ed, 2005), 23.

<sup>35</sup> WTO: 2014 News Items, 22 July 2014, Trade Facilitation, *Azevedo Launches New WTO Facility to Deliver Support to LDCs and Developing Countries*, 4 <[http://wto.org/english/news\\_e/news14\\_e/fac\\_22jul14\\_e.htm](http://wto.org/english/news_e/news14_e/fac_22jul14_e.htm)>.

<sup>36</sup> Patrick Low, 'Is the WTO Doing Enough for Developing Countries?' In Bermann, George A. and Mavroidis, C. Petros (eds), *WTO Law and Developing Countries* (Cambridge University Press, 2007) 324.

<sup>37</sup> See, e.g., Asian Development Bank Institute (ADBI), *ADBI Year in Review 2008*, 29-30

<<http://www.adbi.org/files/2009.04.16.keydocs.2008.year.in.review.pdf>>; Office of the Chief Plant Protection Officer Australian Government Department of Agriculture Fisheries and Forestry-DAFF (Canberra), *Mid-Term Review of Australia's Regional 'Sanitary Phytosanitary Capacity Building Program' (SPSCBP), Final Report of the mid-Term Review Team*, May 28<sup>th</sup> 2008

<[www.usaid.gov/Publications/Documents/ardcp-ipr.doc](http://www.usaid.gov/Publications/Documents/ardcp-ipr.doc)> 6.

<sup>38</sup> *Ad Hoc Working Group on Private Standards*, above n29, 5.

<sup>39</sup> WTO, *Actions Regarding SPS-Related Private Standards*, WTO Doc G/SPS/55 (6 April 2011) (Decision of the Committee) ('*Actions Regarding Private Standards*') 1.

<sup>40</sup> SPS Agreement, art 12.1. The SPS Committee was established to provide a regular forum for consultations on SPS matters. Its functions are to implement the provisions and objectives of the SPS Agreement, particularly with regards to harmonisation.

<sup>41</sup> The five responses are namely 'defining private standards', sharing information between the SPS Committee and the 'Three Sisters', sharing information on relevant developments in other WTO committees, encouraging communication between Members and entities involved in private standards in its territories, and exploring

years ago.<sup>42</sup> Thus, it is clear that private standards impact SPS implementation and must be considered along with other international factors. Indeed, it is inequitable to place the full burden of responsibility on developing countries alone. Both national and international factors must be examined to offer a balance of recommendations for the improvement of SPS application in the selected countries.

The criteria for the selection of the three selected countries were based on the comparative law research principle. Hutchinson states that when comparing countries as a sample of research, you must consider the similarities and likenesses among the compared countries.<sup>43</sup> Associated with the comparative law research principle, Gutteridge states that ‘like must be compared with like’.<sup>44</sup> However, differences among jurisdictions should not be ignored in order to strengthen the analysis. Gutteridge<sup>45</sup> and Hutchinson elaborate similar matters, which may be considered in the comparison, such as ‘historic development, sources of law, hierarchy of legal institutions, and economic and politic structures’.<sup>46</sup>

In this regard, the following selection criteria were used:

#### 1 *Specific Trade Concerns (STC)*

Exporting Members have claimed that the selected countries maintain SPS measures that, do not comply with the SPS Agreement and affect other exporting Members.<sup>47</sup>

#### 2 *Developing Countries*

The selected countries are developing countries. The term ‘developing countries’ is one of classification that separates them from ‘developed countries’, which is acknowledged by the General Agreement on Tariffs and Trade (GATT) WTO. Article XVIII describes developing countries as those whose economies ‘can only support low standard of living and are in the early

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possible collaboration between the SPS Committee and the ‘Three Sisters’. See *Actions Regarding SPS-Related Private Standards*, above n39.

<sup>42</sup> Ibid. Private standards was first raised in the SPS Committee meeting in June 2005 by St Vincent and Grenadine regarding private standards applied on the exportation of bananas to EU countries.

<sup>43</sup> Terry Hutchinson, *Researching and Writing in Law* (Lawbook, Sydney, 3<sup>rd</sup>ed, 2010), 122.

<sup>44</sup> H.C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2<sup>nd</sup>ed, Cambridge: University Press, 1949) 73.

<sup>45</sup> Ibid. Gutteridge states these as ‘stage of legal, political and economic development’.

<sup>46</sup> Hutchinson, above n43, 22.

<sup>47</sup> Countries maintaining SPS measures means their SPS measures might not comply with the SPS Agreement but may impact on other countries’ international trade. See, e.g., *WTO Report: Specific Trade Concern*, sps\_dataset\_wtr2012\_e.xsl; WTO SPS-IMS, *Specific Trade Concerns* <<http://spsims.wto.org/web/pages/search/stc/Search.aspx>>.

stages of development'.<sup>48</sup> Members may determine for themselves which category they are in, but other Members are able to challenge this determination. Another classification of developing countries relies on their geographic region and income group, such as the World Bank's classification of countries' level of economy based on Gross National Income per capita as 'low income, middle income (subdivided into lower middle and upper middle), or high income'.<sup>49</sup> Low and middle-income economies are commonly referred to as developing economies, which the term 'economy' is used interchangeably with 'country'.<sup>50</sup> Developing countries are recognised by the SPS Agreement as having the potential to struggle with implementing the SPS Agreement.<sup>51</sup>

### 3 Southeast Asian Country

The selected countries are all in South East Asia.<sup>52</sup> As countries in the same region, they are more likely to have identical or similar characteristics in accordance with Article 6 of the SPS Agreement that specifically requires 'characteristics of the area' as a relevant consideration in applying the regionalisation principle.<sup>53</sup> Further, the emerging agenda of the Association of South East Asia Nations (ASEAN) Economic Community (AEC)<sup>54</sup> is also considered. Having proposed that one of the AEC's agenda items is to liberalise trade,<sup>55</sup> the AEC recommends the implementation of key measures, such as minimising trade barriers, in particularly Non-Tariff Barriers (NTB).<sup>56</sup> As ASEAN Members, the selected countries have a significant role to realise trade liberalisation in the Southeast Asian region by removing non-tariff barriers along with

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<sup>48</sup> See, e.g., WTO, *GATT-1947* (July 1986) <[http://wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://wto.org/english/docs_e/legal_e/gatt47_e.pdf)>; WTO, *Who Are the Developing Countries in the WTO* <[http://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm)>.

<sup>49</sup> The World Bank divides developing countries into six regions: East Asia and Pacific, Europe and Central Asia, Latin America and the Caribbean, Middle East and North Africa, South Asia, and Sub-Saharan Africa. See the World Bank, *How Does the World Bank Classify Countries* <<https://datahelpdesk.worldbank.org/knowledgebase/articles/378834-how-does-the-world-bank-classify-countries>>.

<sup>50</sup> Ibid.

<sup>51</sup> SPS Agreement, the Preamble [7].

<sup>52</sup> The Food and Agriculture Organisation (FAO), *Indonesia* (2014) <<http://www.fao.org/countryprofiles/index.asp?lang=en&iso3=IDN&paia=3>>. Based on FAO's geographic and economic classification, South-eastern Asia comprises of Cambodia, Indonesia, Laos, Malaysia, Myanmar, Phillipines, Thailand, Timor Leste, and Vietnam.

<sup>53</sup> SPS Agreement, art 6. It stipulates that the characteristics include '...all of a country, parts of a country, or all or parts of several countries...'. Considering this, Members must take into account, for example, the existence of eradication or control programs. In this regard, ASEAN operates eradication or control programs with respect to SPS under regional coordination mechanisms, such as ASEAN Task Force on Codex, ASEAN Sectoral Working Group on Crops, ASEAN Expert Working Group on Food Safety, Working Group on Harmonisation of Sanitary and Phytosanitary Measures, ASEAN Rapid Alert System for Food and Feed.

<sup>54</sup> ASEAN Economic Community <<http://asean.org/asean-economic-community/>>.

<sup>55</sup> ASEAN Integration Report 2015, xviii <<http://www.asean.org/wp-content/uploads/images/2015/November/media-summary-ABIS/ASEAN%20Integration%20Report%202015.pdf>> .

<sup>56</sup> ASEAN Economic Community Blueprint 2025, <<http://www.asean.org/wp-content/uploads/images/2015/November/aec-page/AEC-Blueprint-2025-FINAL.pdf>> 4.

ensuring food safety in trade. Therefore, the SPS implementation in the selected countries has a crucial role in realising the success of the AEC agenda.

#### 4 *Role as Trading Countries in Commodities under the SPS Scope*

The selected countries have significant roles as both exporters and importers,<sup>57</sup> including agriculture, fisheries, and animal products. The agricultural sector is significantly impacted by the application of the SPS Agreement.<sup>58</sup> The selected countries must apply the SPS Agreement, either in formulating and applying their SPS measures in their own territory, or in complying with the SPS measures of the importing Members.

#### 5 *WTO Accession Date*

The selected countries' accession to the WTO occurred on the same date, 1 January 1995.<sup>59</sup> As a consequence, the period of time of the development in applying the SPS Agreement is identical.

#### 6 *Multi Island Nations*

The territory of each selected country comprises a great number of islands.<sup>60</sup> This complicates implementation issues and the application of the SPS Agreement due to the substantial number of SPS entry points,<sup>61</sup> the surveillance needed to control the spread of diseases or pests through each of the SPS entry points, the infrastructures which must be provided in each SPS entry point and the coordination required.

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<sup>57</sup> Christie F. Robert and Sathianathan Menon, qa plus Asia-Pacific Sdn. Bhd., *National Experiences With GAP Standards: Malaysia*, 31, in UNCTAD United Nations, *Challenges and Opportunities Arising from Private Standards on Food Safety and Environment for Exporters of Fresh Fruit and Vegetables in Asia: Experiences of Malaysia, Thailand and Viet Nam* (2007).

<sup>58</sup> See, e.g., Gloria O Pasadilla, 'Preferential Trading Agreements and Agricultural Liberalization in East and Southeast Asia' (Working Paper Series No. 11, Asia-Pacific Research and Training Network on Trade, April 2006) 38 <[http://artnet.unescap.org/pub/tipub2451\\_chap3.pdf](http://artnet.unescap.org/pub/tipub2451_chap3.pdf)>; Russele Bond, et al., 'Agriculture in Indonesia- A review of consumption, production, export and import regulation' (Paper presented at Abare Conference, Australian Government-Australian Bureau of Agricultural and Resource Economics, 13th Meeting of the Australia-Indonesia Working Group on Agriculture, Food and Forestry Cooperation, Gold Coast, Queensland, 28-31 August 2007) 11 <[http://s3.amazonaws.com/zanran\\_storage/www.abareconomics.com/ContentPages/49459711.pdf](http://s3.amazonaws.com/zanran_storage/www.abareconomics.com/ContentPages/49459711.pdf)>.

<sup>59</sup> WTO, *Understanding the WTO: the Organisation, Members and Observers* (2014) <[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)>.

<sup>60</sup> Indonesia comprises more than 17,500 islands, the Philippines comprises approximately 7,100 islands, and Malaysia comprises around 800 islands.

<sup>61</sup> For example Indonesia has 152 entry points for plant and 52 for animal products.

## 7 *Level of Economy*

The selected countries have the same classification of economy by international organisations, such as the World Bank,<sup>62</sup> as middle level economies. This potentially influences the application of the SPS Agreement, since financial aspects are indicated as one of several difficulties faced by developing countries.<sup>63</sup>

Table 1 below demonstrates the similarities and differences of the selected countries with regards to the implementation of the SPS Agreement.

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<sup>62</sup> The economies classification for Indonesia and the Phillipines is lower middle-income economies, while Malaysia is upper middle-income economy. As of the 2017 fiscal year, low-income economies are those countries with a GNI per capita of \$1,025 or less; lower-middle-income economies have a GNI per capita of \$1,026 to \$4,035; upper-middle-income economies have a GNI per capita of \$4,036 to \$12,475; and high-income have a GNI per capita of \$12,476 or more. See the World Bank, *World Bank Country and Lending Groups* <<https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>>.

<sup>63</sup> Simonetta Zarrilli, '*WTO Sanitary and Phytosanitary Agreement: Issues for Developing Countries*' (Working Papers No 3, Trade Related Agenda, Development and Equity (TRADE) South Centre, Juli 1999) 16 <[http://www.carib-export.com/obic/documents/WTO\\_Agreement\\_On\\_Sanitary\\_and\\_Phytosanitary\\_Measures.pdf](http://www.carib-export.com/obic/documents/WTO_Agreement_On_Sanitary_and_Phytosanitary_Measures.pdf)>.

*Table 1.1. Similarities and Differences of the Selected Countries*

Country	Similarities	Differences
Indonesia	<ol style="list-style-type: none"> <li>1. Specific trade concerns on SPS</li> <li>2. Developing country</li> <li>3. WTO accession (1 January 1995)</li> <li>4. Trading country role in agricultural commodities</li> <li>5. Lower, middle-level economy</li> <li>6. Southeast Asia</li> <li>7. Comprised of many islands</li> <li>8. Government system (Republic, Presidential)</li> <li>9. Civil law country</li> </ol>	<ol style="list-style-type: none"> <li>1. Former colony of the Dutch, Great Britain, and Japan</li> </ol>
The Philippines	<ol style="list-style-type: none"> <li>1. Specific trade concerns on SPS</li> <li>2. Developing country</li> <li>3. WTO accession (1 January 1995)</li> <li>4. Trading country role in agricultural commodity</li> <li>5. Lower, middle-level economy</li> <li>6. Southeast Asia</li> <li>7. Comprised of many islands</li> <li>8. Government system (Republic, Presidential)</li> <li>9. Civil law country</li> </ol>	<ol style="list-style-type: none"> <li>1. Former colony of Spain and the United States of America (US)</li> <li>2. Culture and religion</li> </ol>
Malaysia	<ol style="list-style-type: none"> <li>1. Specific trade concerns on SPS</li> <li>2. Developing country</li> <li>3. WTO accession (1 January 1995)</li> <li>4. Trading country role in agricultural commodities</li> <li>5. Southeast Asia</li> <li>6. Comprised of many islands</li> </ol>	<ol style="list-style-type: none"> <li>1. Former colony of Great Britain</li> <li>2. Upper middle level economy</li> <li>3. Government system: Parliamentary democracy with a constitutional monarchy)</li> <li>4. Common law country</li> </ol>

Other than the similarities discussed among the selected countries, they also face challenges with regards to their SPS implementation. A number of actions taken by Indonesia in its SPS



implementation have been claimed by other Members to be ‘trade restrictive’.<sup>64</sup> While both the Philippines and Malaysia are acknowledged as having a good practice in particular aspects of SPS implementation, they have nevertheless faced implementation difficulties of their own.<sup>65</sup> Thus, Indonesia needs to learn from the Philippines’ and Malaysia’s good practices in order to improve its SPS implementation and to minimise any prospects of introducing barriers to international trade. Indeed, the comparative study of this thesis aims to describe, analyse, and then propose recommendations for the balance of Indonesia’s SPS implementation in protecting health issues and in promoting international trade.

### C *Issues in SPS Implementation in the Selected Countries*

The selected countries continue to face problems in balancing their SPS implementation to protect health and liberalise international trade due to several difficulties. Southeast Asian developing countries are specifically singled out in the World Bank’s report as a group of countries likely to face difficulties in meeting the importing countries’ SPS measures,<sup>66</sup> which has resulted in an imbalance of SPS implementation. Difficulties are also faced by these countries in the area of exportation. In relation to this, Konuma, the Deputy Representation of the Food and Agricultural Organisation Regional office for Asia and the Pacific, has stated that many countries in Asia have difficulties providing a scientific basis and justification for their SPS measures.<sup>67</sup> Consequently, their SPS measures are becoming a barrier to international trade and are viewed as more protectionist than necessary. These also become problematic for exporting Members,<sup>68</sup> and subsequently may be challenged by other Members.<sup>69</sup>

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<sup>64</sup> Indonesia is currently facing several specific trade concerns claimed by its trade partners, including the US, the EU and New Zealand with regards to Indonesia’s SPS measures on Jakarta Port Closure.

<sup>65</sup> For example, the Philippines has a remarkable notification record in fulfilling the transparency principle, while Malaysia has good port infrastructure development with regards to quarantine operations.

<sup>66</sup> *Measuring the Impacts of Standards on Agricultural Exports of Low Income Countries: The Standards Restrictiveness Index*, WTO Doc GEN/SPS/GEN/1228 (13 March 2013) (*the World Bank Development Economic Research Group – Trade and Integration*) 2. See also Naumann, Ian and Wendy Lee, Sanitary and Phytosanitary Capacity Building Program for ASEAN Member Countries, AusAID Activity 027K0F Record of Understanding 12942, Office of the Chief Plant Protection Officer Australian Government of Agriculture Fisheries and Forestry (7 October 2009) (Activity Completion Report) 17.

<sup>67</sup> See, e.g., Hiroyuki Konuma, Deputy Representative of FAO-RAP, *Main Activities of Codex and Associated Activities of FAO* (Executive Summary of the Workshop Proceedings, Workshop on WTO Sanitary and Phytosanitary (SPS) Measures Asian Development Bank Institute (ADB), Tokyo, Japan Organised by ADBI in Cooperation with FAO, 9-12 December 2008) [45] <<http://www.adbi.org/files/WTO-Sanitary-Executive-Summary.pdf>>; Johnson, Weinberger and Wu, above n31, 43.

<sup>68</sup> The SPS Committee noted that there is currently an increase in the number of concerns of Members on SPS measures with inadequate scientific justifications. See *SPS Measures and International Standards, Guidelines and Recommendations*, WTO Doc G/SPS/GEN/1143/Rev.1 21 March 2012).

<sup>69</sup> See, e.g., *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.12 (2 March 2012) (Note by the Secretariat, Revision) 55-56. The EU supported by Canada and the US raised concerns regarding Malaysia’s import restriction on pork and pork products; Office of the United State Representative, 2011 Report on Sanitary and

Indonesia, as a Southeast Asian developing country, faces SPS implementation issues. In the area of importation, several STC claim that Indonesia's SPS measures lack scientific justification,<sup>70</sup> transparency<sup>71</sup> and regionalisation recognition.<sup>72</sup> In the area of exportation, Indonesia has been experiencing difficulties exporting shrimp to the US, Japan and European Union (EU) countries,<sup>73</sup> due to requirements that the products must be virus-free and antibiotic-free by the EU.<sup>74</sup> The Philippines and Malaysia, on the other hand, also face problems in the SPS implementation as a result of some STC raised by other Members.<sup>75</sup> Therefore, the selected countries continue to face problems in their SPS implementation, while the need for Southeast Asian countries, including the selected countries, to access the market in OECD countries increases.<sup>76</sup>

The SPS Agreement aims to improve the SPS implementation by Members, and particularly recognises the difficulties faced by developing Members in their SPS implementation<sup>77</sup> by providing S&D Treatment provisions,<sup>78</sup> including technical assistance.<sup>79</sup> In responding to the concerns of the Doha Development Agenda<sup>80</sup> on the issues related to the implementation of the SPS Agreement, the SPS Committee issued procedures, guidelines, and decisions on particular SPS

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Phytosanitary Measures, 70

<<http://www.ustr.gov/sites/default/files/SPS%20Report%20Master%20Final%20Draft%20March%202025.pdf>>.

The challenge from the USA towards the implementation of the Philippines' Administrative Order (AO) 22, which established rules and regulations for the handling of frozen and chilled meat and meat products.

<sup>70</sup> See, e.g., WTO, 2012 News Items, SPS Measures Committee: Formal Meeting, *Indonesia's Port Closure Causes Concern among Fruits and Agriculture Exporters* (28-29 March 2012)

<[http://www.wto.org/english/news\\_e/news12\\_e/sps\\_28mar12\\_e.htm](http://www.wto.org/english/news_e/news12_e/sps_28mar12_e.htm)>; Trade Policy Review: Indonesia, *Concluding Remarks by the Chairperson* (10 and 12 April 2013)

<[http://wto.org/english/tratop\\_e/tpr\\_e/tp378\\_crc\\_e.htm](http://wto.org/english/tratop_e/tpr_e/tp378_crc_e.htm)>.

<sup>71</sup> *Trade Policy Review Report by the Secretariat-Indonesia*, WTO Doc WT/TPR/S/278 (6 March 2013) 53.

<sup>72</sup> Indonesia's import restrictions on beef and poultry meat faced trade concerns raised by Brazil on the grounds of a lack of recognition on the adaptation to regional conditions. See, e.g., *Specific Trade Concerns* (Document No. 286) <<http://spsims.wto.org/web/pages/search/stc/Search.aspx>>; *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.12, 49-51.

<sup>73</sup> WTO Publication, *Managing the Challenges of WTO Participation: Case Study 18*, Rina Octaviani and Erwidodo, *Indonesia's Shrimp Exports: Meeting the Challenge of Quality Standards* (2014)

<[http://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case18\\_e.htm](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case18_e.htm)>.

<sup>74</sup> Ibid.

<sup>75</sup> See, e.g., *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.12 (2 March 2012) (Note by the Secretariat, Revision) 55-56. The EU supported by Canada and the US raised concerns on Malaysia's import restriction on pork and pork products; Office of the United State Representative, 2011 Report on Sanitary and Phytosanitary Measures, 70

<<http://www.ustr.gov/sites/default/files/SPS%20Report%20Master%20Final%20Draft%20March%202025.pdf>>.

The challenge from the USA towards the implementation of the Philippines' Administrative Order (AO) 22, which established rules and regulations for the handling of frozen and chilled meat and meat products.

<sup>76</sup> OECD was built on 14 December 1960. Its member countries include Australia, Austria, Belgium, Canada, Germany, the United Kingdom, the US. See OECD, *List of OECD Member countries-Ratification of the Convention on the OECD* <<http://oecd.org/about/membersandpartners/list-oecd-member-countries.htm>>.

<sup>77</sup> SPS Agreement, the Preamble [7].

<sup>78</sup> Ibid art 10.

<sup>79</sup> Ibid art 9.

<sup>80</sup> *Implementation Related Issues and Concerns*, WTO Doc WT/(MIN) 01/17.

Agreement provisions.<sup>81</sup> Notwithstanding the recognition and further redress, this has become a crucial concern, which must be dealt with and examined to provide significant improvements.

#### D *Thesis Objectives*

The thesis aims to achieve three specific objectives:

1. Examine the extent of the implementation of the SPS Agreement in the selected countries, and the extent to which internal and external factors contribute to the implementation difficulties faced by the selected countries.
2. Assess the adequacy of the existing forms of redress under the SPS Agreement for developing Members, particularly the selected countries.
3. Assess the contribution of a range of potential solutions, including a critical review of the principles of the SPS Agreement and their application, and in particular laws and regulations in the selected countries to assist and encourage them to fulfil their international commitments within the WTO and to maintain international fair trade.

#### E *Research Questions*

The questions addressed throughout this thesis are:

1. What are the implementation issues of the SPS Agreement in the selected countries?
  - (a) To what extent does the formulation of the SPS measures in the selected countries comply with the SPS principles?
  - (b) To what extent do the selected countries meet the SPS measures of the importing countries?
2. What impediments are faced by the selected countries in formulating and applying the SPS Agreement, and why do these impediments exist?
  - (a) What national factors do they encounter? Do the selected countries have similar experiences in relation to these impediments?
  - (b) To what extent do the relevant SPS provisions and further implementation play a role in the impediments?
  - (c) What is the extent and form of technical assistance provided by the WTO Secretariat, other WTO Members, and international organisations to the selected countries?

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<sup>81</sup> See Chapter 2, 39.

3. What impediments are faced by the selected countries in meeting the SPS measures of importing countries, and why do the impediments exist?
  - (a) What national factors do they encounter? What similarities are there in the impediments the selected countries have?
  - (b) How do other importing countries' SPS measures affect the selected countries?
  - (c) To what extent do private standards affect the impediments?
4. How can the SPS implementation of the selected countries be improved in order to create a balance of implementation according to the SPS Agreement?
  - (a) What lessons can be learned by each of the selected countries from the experience of the other? How should the proficiency of the selected countries in the implementation of SPS Agreement be improved?
  - (b) How should the application of relevant SPS principles be improved? How should the applicability of private standards be incorporated into the application of the SPS Agreement?

## F *Significance of Thesis*

This thesis provides the selected countries with a qualitative study on how to approach a balanced SPS implementation in the areas of importation and exportation, as well as recommendations to improve their SPS implementation by applying the SPS principles. This thesis also provides a methodical and common platform for an analysis of the legal implementation of the SPS Agreement and other such measures into the laws and regulations on animal and plant life or health and food safety. Finally, this thesis assists and encourages the selected countries to fulfil their international commitments within the WTO and to maintain international fair trade. The compliance of the selected countries with the SPS Agreement principles will enable the selected countries to balance health protection to SPS international standards and improve the promotion of their international trade.

## G *Research Method*

### 1 *Design of Research*

The research method<sup>82</sup> used in this thesis relied on a combination of doctrinal<sup>83</sup> and non-doctrinal research.<sup>84</sup> Data from the research include qualitative data,<sup>85</sup> collected through qualitative

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<sup>82</sup> See, e.g., Sharan B. Meriam, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, San Francisco, 2009) 66; Hutchinson, above n43, 21. Meriam and Hutchinson refer to 'methodology'.

research methods attempting to recognise the multifaceted aspects of experience occurring in social phenomena.<sup>86</sup> This method is most appropriate here as this research examines social phenomena regarding the implementation of SPS, the impediments faced by the selected countries and explores factors contributing to issues of SPS implementation. This research acknowledges all of the different situations and circumstances<sup>87</sup> within the selected countries and further develops concepts<sup>88</sup> for ways to improve implementation.

This thesis involves a comparative research method and analysis,<sup>89</sup> since it analyses the implementation of the SPS Agreement in the selected countries. The research addresses the legal approaches taken by the selected countries to learn from other jurisdictions' experiences in order to determine improvements to the national system.<sup>90</sup> Basing the selection of the countries on their similarities will assist in the formulation of common recommendations.<sup>91</sup>

As this thesis is a combination of doctrinal and non-doctrinal research, it was carried out through a combination of library-based research and field-based research methods. The library research analyses the primary and secondary legal sources,<sup>92</sup> as the important aspects of doctrinal research,<sup>93</sup> while the field research examines the practical implementation of the law.<sup>94</sup>

#### (a) Library Research

The library research was mostly undertaken at The University of Queensland library, commencing in September 2011. The library research investigated primarily the SPS Agreement,

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<sup>83</sup> Nigel Duncan and Terry Hutchinson, *Defining and Describing What We Do: Doctrinal Legal Research* (online) *Deakin Law Review* 17 (1) 2012, 85. Doctrinal research is defined as 'research into the law and legal concepts'.  
<sup>84</sup> Hutchinson, above n43, 7-8. Non-doctrinal research or 'fundamental research' is a 'research designed to secure a deeper understanding of law as a social phenomenon, including research on...political implications of law'.  
<sup>85</sup> See, e.g., Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (Sage Publication, 3<sup>rd</sup>ed, 2002) 4; Lee Epstein and Andrew D. Martin, *An Introduction to Empirical Legal Research* (Oxford University Press, 1<sup>st</sup>ed, 2014) 3. Patton states that qualitative data is usually presented through words, which includes data from participants obtained through interviews, while Epstein and Martin state qualitative data as 'non-numerical'.  
<sup>86</sup> See, e.g., Michael Bloor, 'Addressing Social Problems through Qualitative Research' in David Silverman (ed), *Qualitative Research: Theory Method and Practice* (Sage Publication, 2<sup>nd</sup>ed, 2004) 307. Bloor states that qualitative research technique is favoured technique for research focusing on daily work practices; Hutchinson, above n43, 37 and 106. She states that qualitative research is 'a process of selecting and weighing materials taking into account hierarchy and authority as well as understanding social context and interpretation'.  
<sup>87</sup> Hutchinson, above n43, 106.  
<sup>88</sup> Meriam, above n82, 14 and 64. A qualitative research has characteristics, include, 'focussing on process, understanding and meaning; has an inductive process...results in descriptive style of writing, and the researcher is the primary instrument of data collection and analysis'.  
<sup>89</sup> Gutteridge, above n44, 9-10.  
<sup>90</sup> Geoffrey Wilson, 'Comparative Legal Scholarship' in Mike McComille and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 88.  
<sup>91</sup> Ibid. Wilson states that comparative research aims to overcome common issues by providing common solutions.  
<sup>92</sup> Sue Milne and Kay Tucker, *A Practical Guide to Legal Research* (Lawbook Co, 2008) 8-9.  
<sup>93</sup> Ian Dobinson and Francis John, 'Qualitative Legal Research' in Mike McComille and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 18-19.  
<sup>94</sup> Hutchinson, above n43, 7-8 and 21.

the relevant GATT WTO documents, studies and debates, including the limited academic scholarship concerning the legal, economic, and theoretical perspectives in this field. Particular attention was given to the SPS principles, international standards, private standards and the pertinent laws on SPS measures of the selected countries.

### *(b) Field Research*

The field research was carried out in Jakarta and Yogyakarta in Indonesia, and Quezon City in the Philippines in January and February 2013. Field research was not undertaken in Malaysia as no approval was obtained. Thus, data on Malaysia's experience has been collected online and from other sources. The field research was undertaken by interviewing key professionals and practitioners of the selected government institutions and academics.

### *(i) Sample Selection*

The sample of this research from the selected countries was chosen non-randomly,<sup>95</sup> by using purposive sampling or 'criterion sampling'.<sup>96</sup> The criteria used for sample selection in this research are:

- Government institutions at the focus of, or which have significant concern with the implementation of SPS measures in Indonesia and the Philippines;
- Professionals as key persons in the selected government institutions involved with the implementation of the SPS Agreement in Indonesia and the Philippines.

The research participants include policy makers and practitioners<sup>97</sup> in the Indonesian Agricultural Quarantine Agency (IAQA)<sup>98</sup> of the Ministry of Agriculture, the Fish Quarantine and Inspection Agency (FQIA)<sup>99</sup> of the Ministry of Marine and Fisheries and the Ministry of Trade,<sup>100</sup>

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<sup>95</sup> Meriam, above n82, 76-77. Meriam names it 'non-probability' sampling, a method used most in qualitative research to select participants who could be interviewed in order to gain qualitative data to solve research issues.

<sup>96</sup> Ibid 77. Purposive sampling relies on the assumption that the researcher aims to learn from those selected participants from which she or he can learn the most. The researcher must determine the essential selection criteria.

<sup>97</sup> Bloor, above n86, 306-307. The respondents or samples for qualitative research include the policy makers who make the policies, and practitioners who implement the policies in their everyday practices.

<sup>98</sup> The officials are Mulyanto (Secretary of the IAQA), Sujarwanto (Head of Animal Quarantine), Catur Putra Budiman (Head of Division of Quarantine Cooperation and Compliance), Arifin Tasrif (Head of Plant Quarantine), Sophia Setyawati (Division of Quarantine Cooperation) and Kartini Rahayu (Division of Quarantine Cooperation). Interview was conducted with four officials and officers.

<sup>99</sup> The interview was undertaken with one official of the FQIA, and the discussion was undertaken with four staff members of the FQIA.

<sup>100</sup> Interview was undertaken with one staff member of Centre for International Trade Advocacy, and one staff member of Directorate of Trade Defence.

an academic from the *Universitas Gadjah Mada*<sup>101</sup> Yogyakarta Indonesia and officials from the Office of the Director of the Policy Research Service Office Department of Agriculture<sup>102</sup> of the Philippines. This selection contributes to the validity, integrity and robustness of the thesis for the purposes of forming informal conclusions and practical recommendations.<sup>103</sup>

### (ii) Data Collection

Data were collected through interviews, both structured and semi-structured, and discussions. Interviews were chosen because the researcher can then respond to the situation at hand.<sup>104</sup> The interviews were undertaken in three ways; in person, *via* telephone and online. The interviews were carried out with selected key persons in selected institutions such as the IAQA, FQIA, Ministry of Trade based on Jakarta and *Universitas Gadjah Mada* in Yogyakarta Indonesia, as well as the Policy Research Office in Quezon City, the Philippines.

Along with interviews, a study of legal documents<sup>105</sup> was undertaken. The type of legal documents studied included government information concerning the implementation of the SPS Agreement in Indonesia, the Philippines and Malaysia published by the WTO and of each of the selected countries' governments.<sup>106</sup> The documents include SPS documents based on SPS Committee meetings and the SPS Information Management System.

### (iii) Data Analysis

A critical rationalistic approach was employed to analyse this research. The data collected were analysed qualitatively<sup>107</sup> through an examination of the information collected from the interviews and discussions combined with information gathered from the library and online

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<sup>101</sup> Andi Trisyono (Professor of Faculty of Agriculture UGM).

<sup>102</sup> The officials are Maribel G. Marges (SPS office), Belinda S. Raymundo (Chief of Fisheries Product Testing Laboratory/FPTL), Gerald Glenn F. Panganiban (Bureau of Plant Industry/BPI), (Bureau of Animal Industry/BAI), Karen Kristine A. Roscom (Chief Science Research Specialist Bureau of Agriculture and Fisheries Product Standards/BAFPS), Renato L. Gutierrez (Bureau of Fisheries Aquatic Resources/BFAR), Florence D. Silvano (National Veterinary Quarantine Service/NVQS). Interview was also undertaken with officials in National Meat Inspection Service/NMIS laboratory and BFAR laboratory.

<sup>103</sup> Hutchinson, above n43, 114.

<sup>104</sup> Meriam, above n82, 87 and 90.

<sup>105</sup> Marci Hoffman and Mary Rumsey, *International and Foreign Legal Research: A Coursebook* (Martinus Nijhoff Publishers, 2008) 134.

<sup>106</sup> Robert Watt, *Concise Legal Research* (The Federation Press, 5<sup>th</sup> ed, 2004) 1-2.

<sup>107</sup> Gale Miller, Robert Dingwall and Elizabeth Murphy, 'Using Qualitative data and analysis' in David Silverman (ed), *Qualitative Research: Theory Method and Practice* (Sage Publication, 2nd ed, 2004), 332 and 337. Miller, Dingwall and Murphy state that a qualitative analysis can clarify the social, cultural and structural context of a phenomena, and also allows the researcher to explore issues of process and explain how outcomes are achieved, or not.

research. Furthermore, data were analysed inductively and comparatively.<sup>108</sup> The data analysis led to the development of the conclusion for answering the research questions and providing recommendations for improvement.

## H *Structure of the Thesis*

This thesis contains eight chapters. Chapter 1 is the Introduction and is followed by Chapter 2, which focuses on the discussion of the WTO SPS Agreement and its link with international trade and developing countries. This chapter elaborates on the reason for the establishment of the SPS Agreement and the relevant issues surrounding the SPS Agreement and developing countries.

Chapter 3 discusses the ‘external factors’, which affect SPS implementation. The discussion includes the current issues on SPS Agreement provisions and further implementation, as well as private standards and the relevant difficulties faced by the selected countries. This chapter concludes with a discussion on the potential methods to improve the application of the relevant provisions under the SPS Agreement and the extent of private standards applicability.

Chapters 4, 5 and 6 examine the implementation of the SPS Agreement in the selected countries. The discussion most notably explores the extent of compliance of SPS implementation in formulating and applying SPS measures and in meeting the SPS measures of importing Members. The barriers that each selected country faces and the underlying national and international factors are also discussed. These chapters address the potential methods to improve the SPS implementation of the selected countries, including the necessary steps they should take at the national, regional and international levels.

Chapter 7 compares the implementation of SPS measures in each selected country. This includes a discussion on the similarities and dissimilarities of SPS implementation and the lessons learned from the successful and unsuccessful attempts in addressing impediments.

Chapter 8, the concluding chapter, addresses the research questions and provides recommendations.

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<sup>108</sup> Meriam, above n82, 70 and 175. Meriam states that inductive means the data collection will be analysed to build ‘a concept, hypothesis, or theory’, rather than ‘testing hypotheses or theories which already exist’.



## CHAPTER 2

### II THE MULTILATERAL AND LEGAL FRAMEWORK OF THE SPS AGREEMENT

#### A Introduction

This chapter focuses on the elaboration and contextual analysis of the significant role that the SPS Agreement plays in international trade along with its implications for developing countries. This approach is in line with the underlying aim of the thesis to provide an understanding of the need to balance the protection of health and promotion of international trade through SPS principles and basic rights and obligations of Members. This chapter clarifies that the proper implementation of the SPS Agreement by developing countries will enable them to protect health and improve international trade. However, several constraints exist between the linkage of developing countries in general and the SPS Agreement, which are necessary to overcome. This chapter specifically discusses the underlying rationale for the existence of the SPS Agreement in international trade, the basic principles under the SPS Agreement to achieve its goals and, the emerging issues of concern between the SPS Agreement and developing countries.

#### B International Trade and the WTO

##### 1 Impacts of International Trade

International trade can be defined as the exchange of goods or services between traders in two national markets.<sup>1</sup> It has the potential to develop the economy of a country<sup>2</sup> by elevating the standard of living and the wealth of the people.<sup>3</sup> All parties in international trade expect to gain mutual advantages,<sup>4</sup> which enable countries to supply goods and services to consumers, increase the standard of living, and provide a source of income and profit for business enterprises.<sup>5</sup>

Nevertheless, international trade can bring disadvantages,<sup>6</sup> such as environmental, labour<sup>7</sup> and health issues.<sup>8</sup> Impediments in international trade are often called barriers,<sup>9</sup> and are either tariff<sup>10</sup> or

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<sup>1</sup> Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2005) 2.

<sup>2</sup> See, e.g., *Ibid*, 2; Gilbert R Winham, 'The evolution of the world trading system-the economic and policy context' in Daniel Bethlehem et al (eds), *The Oxford Handbook of International Trade Law* (Oxford University Press, 2009) 7. Winham states that the aim of trading relationships is to increase wealth.

<sup>3</sup> Bossche, above n1, 2.

<sup>4</sup> *Ibid* 3.

<sup>5</sup> Michael Pryles, Jeff Waincymer and Martin Davies, *International Trade Law: Commentary and Material* (Lawbook, 2<sup>nd</sup> ed, 2004) 9-13.

<sup>6</sup> Bossche, above n1, 23.

non-tariff barriers.<sup>11</sup> The impact of international trade on health<sup>12</sup> might occur from imported goods containing diseases that impact human, animal, plant life or health.<sup>13</sup> For example, Bovine Spongiform Encephalopathy disease in beef ('mad-cow'), Avian Influenza ('bird flu') and Foot and Mouth Diseases,<sup>14</sup> foodborne diseases<sup>15</sup> and fruit flies.<sup>16</sup> Global food supply activities have the potential to cause infectious diseases to flourish,<sup>17</sup> and the importing of these harmful organisms could easily erase any of the benefits to be gained from trade.<sup>18</sup>

## 2 The WTO Role in International Trade

Given the above issues, international trade must be managed properly. The regulation of international trade,<sup>19</sup> which may be based on agreements among countries,<sup>20</sup> is generally established

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<sup>7</sup> Ray August, Don Mayer, and Michael Bixby, *International Business Law – Text, Cases, and Readings* (Pearson Education International, 5<sup>th</sup>ed, 2009) 332.

<sup>8</sup> See, e.g., WHO, *Statement of the World Health Organisation on International Trade and Health* (World Trade Organisation Ministerial Conference Sixth Session, Hongkong 13-15 December 2005) 1 <[http://who.int/trade/WHO\\_Statement\\_Hong\\_Kong.pdf](http://who.int/trade/WHO_Statement_Hong_Kong.pdf)>; Mina Mashayekhi and Elisabeth Tuerk, UNCTAD, *Implication of International Trade and Trade Agreements for Primary Health Care: the Case of Services* (United Nations, 2010) 1 <[http://unctad.org/en/docs/ditctncd200916\\_en.pdf](http://unctad.org/en/docs/ditctncd200916_en.pdf)>.

<sup>9</sup> Paul Beynon, 'Community Mutual Recognition Mutual Agreements, Technical Barriers to Trade, and the WTO Most Favoured Nation Principles', *E.L.Rev.* 2003, 28 (2), 231-249, 231.

<sup>10</sup> Shawkat Alam and Md Rizwanul Islam, Barriers to Trade in Goods and Services, in Indira Carr, Shawkat Alam, and Md Jahid Hossain Bhuiyan (Eds), *International Trade Law and the WTO* (Federation Press, 2013) 147. Tariff barriers can be embodied in tax or custom duties towards trade commodities.

<sup>11</sup> Ibid. Non-tariff barriers can be manifested in law, regulation, policy, or duties other than import duties.

<sup>12</sup> Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (Routledge, 3<sup>rd</sup> ed, 2005) 15. Trebilcock and Howse state that another potential issue is the impact of international trade on the environment. Ibid 17.

<sup>14</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GN/204/Rev.12 (2 March 2012) (Note by the Secretariat) (Revision) 2. It is stated that since 1995 mad-cow disease reached 35% of all SPS trade concerns, the 1995 Avian Inluenza reached 10% of all SPS trade concerns, while food and mouth disease reached 24%.

<sup>15</sup> WHO, *The World Health Report 1995: Bridging the Gaps* (1996) 62 <[http://www.who.int/whr/1995/en/whr95\\_en.pdf](http://www.who.int/whr/1995/en/whr95_en.pdf)>. It reports that foodborne diseases occurs from the contamination of food with bacterial, viral, parasitic or chemical agents.

<sup>16</sup> WTO Agreement Series: *Sanitary Phytosanitary Measures*, 23 <[http://www.wto.org/english/res\\_e/booksp\\_e/agrmtseries4\\_sps\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/agrmtseries4_sps_e.pdf)>.

<sup>17</sup> WHO, *the World Health Report 1996: Fighting diseases fostering development* (1996) 3 <[http://www.who.int/whr/1996/en/whr96\\_en.pdf](http://www.who.int/whr/1996/en/whr96_en.pdf)>.

<sup>18</sup> Edward A. Evans, *Understanding the WTO Sanitary and Phytosanitary Agreement*, 4 <[http://www.whitehouse.gov/sites/default/files/omb/assets/oira\\_0583/0583\\_120409-1.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/oira_0583/0583_120409-1.pdf)>.

<sup>19</sup> It is generally named as international trade law, a body of legal rules which has global acceptance as well as a striking similarity in all national legal system. See Loukas Mistelis, Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law, pp 8-9 in Ian Fletcher et al (Loukas Mistelis, Marise Cremona), *Foundation and Perspectives of International Trade Law* (Sweet and Maxwell, 2001) 5.

<sup>20</sup> Yasuhei Taniguchi, 'The WTO's Tenth Anniversary' in Yasuhei Taniguchi, Alan Yanovich and Jan Bohanes (eds), *World Trade Organization, The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia* (2007) 7.

with particular purposes, and includes the control and prevention of negative impacts and the balance of rights and obligations of the trading countries.<sup>21</sup>

The WTO,<sup>22</sup> established in 1994, is an international economic cooperation that regulates international trade.<sup>23</sup> Its predecessor was the General Agreement on Tariffs and Trade (GATT)-1947,<sup>24</sup> which regulated the reduction of custom tariffs.<sup>25</sup> The GATT was expected to come under the authority of the expected International Trade Organization,<sup>26</sup> which failed to be established<sup>27</sup> because its charter (Havana Charter) was not ratified before the time limit for its entry into force.<sup>28</sup> GATT-1947 remained an international trade instrument, which acted *de facto* as a quasi-organisation<sup>29</sup> up until the establishment of the WTO.

The WTO was established primarily to tackle the complexity of trade issues and disputes not covered by the GATT-1947<sup>30</sup> and to realise the intention to create an international trade organisation. Trade negotiation rounds,<sup>31</sup> such as the Uruguay Round as the most important round, resulted in the Marrakesh Agreement on the establishment of the WTO. The WTO amended GATT-1947 into GATT-1994 (GATT) as its regulations, which includes multilateral agreements among

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<sup>21</sup> See, e.g., Bossche, above n1, 35 who states that international trade regulations are needed to prevent the negative impacts of trade; Gilbert R. Winham, 'The evolution of the world trading system-the economic and policy context' in Daniel Bethlehem et al (eds), *The Oxford Handbook of International Trade Law* (Oxford University Press, 2009), 7 states that the regulation is needed to control international trade; Trebilcock, and Howse, above n12, 2. International trade law is aimed at maintaining a favorable balance of trade, to promote the processing or manufacturing of raw materials in the home country (export taxes and import duties). It is to restrain countries from taking trade-restrictive measures for the benefits of their own interests, for providing 'security and predictability' to business actors, for assisting government when facing economic globalisation challenges and for achieving a 'greater measure of equity' in international economic relations.

<sup>22</sup> The WTO was established by Marrakesh Agreement Establishing the World Trade Organization, open for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

<sup>23</sup> WTO, Understanding the WTO: Basics: *The GATT years: from [the] Havana to Marrakesh* <[http://wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm)>.

<sup>24</sup> General Agreement on Tariffs and Trade, signed on 30 October 1947, effectively applied on 1 January 1948. GATT 1947 is an agreement on trade barriers and tariff reduction signed by 23 countries.

<sup>25</sup> WTO, above n23.

<sup>26</sup> Petros C. Mavroidis, *Trade in Goods, The GATT and the Other Agreements Regulating Trade in Goods* (Oxford University Press, 2007) 4.

<sup>27</sup> Gabriel Moens and Peter Gillies, *International Trade and Business: Law, Policy and Ethics* (Routledge-Cavendish, 2<sup>nd</sup>ed, 2006) 359.

<sup>28</sup> Carole Murray, David Holloway, and Daren Timson-Hunt, *Schmitthoff's Export Trade: The Law and Practice of International Trade* (Sweet & Maxwell, 11<sup>th</sup>ed, 2007) 882.

<sup>29</sup> R Bhala, 'International Trade Law: Theory and Practice 127' in Laura Nielson, Series on International Law and Development, *The WTO, Animals and PPMs* (Martinus Nijhoff Publishers, 2001) 108.

<sup>30</sup> The agreement rounds include Geneva round 1947, Annecy round 1948, Turkey round 1950, Geneva round 1956, Dillon round 1960-1961, Kennedy round 1964-1967, Tokyo round 1973-1979, and Uruguay round 1986-1994. See The WTO, above n23.

<sup>31</sup> Ibid.

most countries in the world<sup>32</sup> and becomes a core of the world's multilateral trading system.<sup>33</sup> Consequently, Members are under an obligation to comply with the WTO's legal system.

The WTO aims to raise the standards of living, ensure full employment and a large and steadily growing number of real incomes and effective demand, and to expand the production of trade in goods and services, allowing for the optimum use of the world's resources according to the objective of sustainable development.<sup>34</sup> The Preamble of the WTO recognises the need to ensure that developing countries, and especially LDC can take advantages of their economic development through international trade.<sup>35</sup>

The functions of the WTO include administering trade agreements, serving as a trade negotiation forum for Members, settling trade disputes among Members, reviewing Members' trade policy and implementation through TPR,<sup>36</sup> assisting developing country with trade policy issues through technical assistance and cooperating with other international organisations.<sup>37</sup>

## C Why the SPS Agreement Is Needed

### 1 Background of the SPS Agreement

International trade is among the factors that can spread health threats, for example the Black Death in the 14<sup>th</sup> century followed international trading routes.<sup>38</sup> Before the establishment of the SPS Agreement, the protection of human, animal and plant life or health fell under the GATT-1947:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this

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<sup>32</sup> See, e.g., Taniguchi, above n20, 7; WTO, Understanding the WTO: the Organisation, *Members and Observers* <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)>. The WTO has 164 Members since 29 July 2016. Afghanistan is the 164<sup>th</sup> member of the WTO.

<sup>33</sup> See, e.g., Robert Cunningham, 'The ABC of GMOs, SPS and the WTO: an analysis of the application of the Agreement on Sanitary and Phytosanitary Measures within the context of biotechnology and international trade' (online) *Southern Cross University Law Review*, (9) 2005: 19-37, 20; Trebilcock and Howse, above n12, 26.

<sup>34</sup> *Marrakesh Agreement Establishing the World Trade Organisation*, open for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) the Preamble.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid art III.

<sup>37</sup> WTO, Understanding the WTO: *Who We Are* (2014) <[http://wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](http://wto.org/english/thewto_e/whatis_e/who_we_are_e.htm)>. See also Pryles, Waincymer and Davies, above n5, 706. Structurally, the WTO's instruments include: Multilateral Trade Agreements, Plurilateral Trade Agreements (include Agreement on Trade in Civil Aircraft, and Agreement on Governmental Procurement), GATT, the Understanding on Rules and Procedures Governing the Settlement of Disputes, Trade Policy Review Mechanism, Trade Related Aspects of Intellectual Property Rights, General Agreement on Trade in Services.

<sup>38</sup> DW Bettcher, D Yacht & GE Guindon, 'Critical Reflection, Global trade and health: key linkages and future challenges', *Bulletin of the World Health Organization*, 78(4) (2000) 521-522.

Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ... (b) necessary to protect human, animal or plant life or health; ...<sup>39</sup>

Article XX is generally acknowledged as an exception clause for obligations under the GATT-1947,<sup>40</sup> while Article XX(b) is an exception from GATT's principles for the protection of human, animal and plant life or health.<sup>41</sup> The GATT's principles that are excepted includes, the non-discrimination principle, which includes Most Favoured Nation principle in Article I and National Treatment principle in Article III GATT.<sup>42</sup> Article XX(b) GATT-1947 can be applied if the requirements are fulfilled, namely they are 'necessary' to protect human, animal and plant life or health, and do not 'arbitrarily or unjustifiably' discriminate between Members with the same conditions, or is not a 'disguised restriction on international trade'.<sup>43</sup> Nevertheless, Article XX(b) is silent on the criteria of 'necessary' above, which might result in a restriction to trade and protectionism within countries when applying Article XX(b).<sup>44</sup> Consequently, there was a need to develop the criteria of 'necessary' to ensure health and food safety standards could cope with the problems faced, for example criteria for determining whether or not measures are necessary.<sup>45</sup> It was also necessary to enhance the scope of Article XX(b), particularly regarding specific procedures for settling disputes, which might arise on such matters.<sup>46</sup>

In 1979, the Technical Barriers to Trade (TBT) Agreement,<sup>47</sup> which resulted from the Tokyo Round, and is known as the 'Standards Code',<sup>48</sup> made provisions on such matters. The TBT Agreement is an expansion of Articles III, XI and XX of GATT-1947, and aims to provide protection for national security, human health or safety, animal or plant life or health, environment,

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<sup>39</sup> GATT, art XX(b).

<sup>40</sup> Peter-Tobias Stoll and Lutz Strack, 'Article XX lit. b GATT 1994, 5 SPS' in Rudiger Wolfrum, Peter-Tobias Stoll and Anja Seibert Fohr (eds), *WTO Technical Barriers and SPS Measures, Max Planck Commentaries on World Trade Law* (Martinus Nijhoff Publishers, 2007) 101. Members have obligations to obey the principles of the GATT, such as the non-discrimination principle including the Most Favoured Nation and National Treatment principles.

<sup>41</sup> GATT, art XX(b).

<sup>42</sup> WTO, *WTO Analytical Index: Sanitary and Phytosanitary Measures-Agreement on Sanitary and Phytosanitary Measures*, I.B.3 The Relationship between the SPS Agreement and Article XX(b) of GATT 1994 <[https://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/sps\\_01\\_e.htm](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_01_e.htm)> ('*SPS Agreement Analytical Index*').

<sup>43</sup> GATT, art XX(b).

<sup>44</sup> Norbert L. W. Wilson, Clarifying the Alphabet Soup of the TBT and the SPS in the WTO, 8 *Drake J. Agric. L.* 703, Westlaw, 2.

<sup>45</sup> Stoll and Strack, above n40, 113.

<sup>46</sup> JM Migai Akech, 'Developing Countries at Crossroads: Aid, Public Participation, and the Regulation of Trade in Genetically Modified Foods', 29 *Fordham Int'l L.J.* 265, Westlaw, 6.

<sup>47</sup> *Marrakesh Agreement Establishing the World Trade Organisation*, open for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('Agreement on Technical Barriers to Trade').

<sup>48</sup> See, e.g., WTO, *Technical Barriers to Trade: Technical Explanation, Technical Information on Technical Barriers to Trade* (2014) <[http://wto.org/english/tratop\\_e/tbt\\_e/tbt\\_info\\_e.htm](http://wto.org/english/tratop_e/tbt_e/tbt_info_e.htm)>; Markus Krajewski, 'Articles 11 TBT' in Wolfrum, Stoll and Fohr (eds), above n40, 317. TBT Agreement has been effective since 1 January 1980.

or consumer information in general. It encourages Members to create technical regulations,<sup>49</sup> standards<sup>50</sup> and conformity assessment procedures<sup>51</sup> to ensure the quality of exports, protection of human, animal or plant life or health, or the environment, or for the prevention of deceptive practices.<sup>52</sup>

The TBT Agreement requires technical regulations and standards to not be more restrictive than necessary to fulfil the legitimate objectives,<sup>53</sup> by considering relevant elements, such as available scientific and technical information, related processing technology or intended end-uses of products.<sup>54</sup> The requirements of the TBT measures are generally more substantial and specific than Article XX(b) GATT-1947. However, the TBT Agreement is not only applied for the protection of human, animal or plant life or health, but also for other products, including industrial and agricultural products.<sup>55</sup> The TBT Agreement was not developed with the particular purpose of regulating SPS measures, therefore it does not necessarily apply to SPS measures.<sup>56</sup> Consequently, the TBT Agreement does not fill the vacuum within Article XX(b).<sup>57</sup>

The SPS Agreement was established through the Marrakesh Agreement in 1994, with the aim to develop clearer and more detailed rules for the application of Article XX(b) GATT-1947 to ensure the protection of health and food safety.<sup>58</sup> Prevost and Bossche state that the SPS Agreement has the purpose of balancing health protection and international trade liberalisation.<sup>59</sup> It sets forth more specific and strict requirements in establishing SPS measures, such as that they must be scientifically justified, must be transparent, they must not discriminate between like and unlike products<sup>60</sup> and must not discriminate between similar and different products.<sup>61</sup> The SPS Agreement's specific requirements go beyond the requirements under Article XX(b).<sup>62</sup> Thus, the

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<sup>49</sup> Technical regulation has a mandatory characteristic. See TBT Agreement, Annex 1.1.

<sup>50</sup> Ibid Annex 1.2. Compliance to standard is not a mandatory.

<sup>51</sup> Ibid Annex 1.3. Conformity assessment procedure defined as 'Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled'.

<sup>52</sup> Ibid the Preamble (6).

<sup>53</sup> The objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.

<sup>54</sup> TBT Agreement, art 2.2.

<sup>55</sup> Ibid art 1.3.

<sup>56</sup> Ibid art 1.5.

<sup>57</sup> Wilson, above n44, 3.

<sup>58</sup> See, e.g., SPS Agreement, the Preamble [8]; WTO, SPS Measures: Introduction-Understanding the WTO Agreement on Sanitary and Phytosanitary Measures <[https://www.wto.org/english/tratop\\_e/sps\\_e/spsund\\_e.htm](https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm)>.

<sup>59</sup> Denise Prevost and Peter Van den Bossche 'The Agreement on the Application of Sanitary and Phytosanitary Measures', in Patrick F.J. Macrory, Arthur E. Appleton, and Michael G. Plummer (eds) *The World Trade Organisation: Legal, Economic and Political Analysis*, Volume 1 (Springer Science, 2005) 362.

<sup>60</sup> WTO, *WTO E-Learning: Sanitary and Phytosanitary Measures* (February 2014) 125.

<sup>61</sup> SPS Agreement Analytical Index. See also *Australia-Salmon* [76].

<sup>62</sup> Ibid I.B.3 The Relationship between the SPS Agreement and Article XX (b) of GATT 1994.

SPS Agreement is *lex specialis* compared to Article XX(b) for SPS measures.<sup>63</sup> Further, the SPS Agreement complements the TBT Agreement;<sup>64</sup> it can be said that the relationship between the TBT Agreement and the SPS Agreement is one of ‘mutual exclusivity’.<sup>65</sup> This means that the TBT Agreement does not apply to SPS measures,<sup>66</sup> while the SPS Agreement does not apply to measures outside the scope of SPS measures.<sup>67</sup> However, the SPS Agreement may apply to measures which are under the scope of applicable provisions of the TBT Agreement, since a measure may have more than one purpose.<sup>68</sup>

### 1 *The Objective and Scope of the SPS Agreement*

The Preamble of the SPS Agreement states that its objective is to protect human, animal and plant life or health,<sup>69</sup> while minimising negative impacts on trade.<sup>70</sup> The SPS Agreement aims to improve human, animal and plant life or health within Members. With regards to this, Guzman and Pauwelyn state that SPS measures are established by Members to protect health in their own country from the negative impact of imported products, not for the protection of health abroad.<sup>71</sup> However, in practice Members tend to set out SPS regulations related to exports to assist their business actors in accessing markets abroad, because the importing Members require them to attach particular documents, such as phytosanitary and health certificates from the exporting Members. Thus, SPS implementation consists of two aspects, namely an importation and an exportation dimension as recognised by the SPS Agreement.<sup>72</sup>

The SPS Agreement also aims to develop a multilateral framework of rules for the enforcement of SPS measures.<sup>73</sup> Therefore, engagement with the relevant international organisations and rules is required. In addition, the SPS Agreement encourages Members to harmonise their SPS measures with the SPS international standards, and recognise the contribution of the international standards in the development and enforcement of SPS measures.

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<sup>63</sup> See, e.g., Jeffery Atik, ‘*Trade and Health*’ in Daniel Bethlehem et al (eds), *The Oxford Handbook of International Trade Law* (Oxford University Press, 2009) 599; Koebele Michael, ‘Preamble TBT, Articles 1 and Annex 1, 4 and Annex 3, 9, 10 TBT’ in Wolfrum, Stoll and Fohr (eds), above n40, 185.

<sup>64</sup> See, e.g., August, Mayer, and Bixby, above n7, 371.

<sup>65</sup> Bossche, above n1, 902.

<sup>66</sup> TBT Agreement, art 1.5.

<sup>67</sup> SPS Agreement, art 1.4.

<sup>68</sup> See, e.g., Reports of the Panel, *EC – Approval and Marketing of Biotech Products (2006)*, para.7.165; Bossche, above n1, 862.

<sup>69</sup> Ibid the Preamble [1].

<sup>70</sup> Ibid [4].

<sup>71</sup> Andrew T. Guzman and Joost H.B. Pauwelyn (eds), *International Trade Law* (Wolters Kluwer Law & Business, 2012) 533.

<sup>72</sup> SPS Agreement, the Preamble [7].

<sup>73</sup> Ibid the Preamble [4].

SPS measures are measures to protect animal, plant life or health or food safety,<sup>74</sup> which may be embodied in ‘relevant laws, decrees, regulations, requirements and procedures’.<sup>75</sup> According to Annex A, the scope of ‘animal’ includes ‘fish and wild fauna’, while ‘plant’ includes ‘forest and wild flora’, ‘pests’ include ‘weeds’, and ‘contaminants’ include ‘pesticide and veterinary drug residues and extraneous matter’.<sup>76</sup>

## D *Balancing the Protection of Health and Trade*

### 1 *Basic Rights and Obligations*

The SPS Agreement provides Members with rights and obligations in order to balance the protection of health and the facilitation of trade.<sup>77</sup> Members shall not maintain protectionism, using health protection as an excuse, as to do so would unnecessarily restrict international trade.<sup>78</sup>

Members have rights governed in Article 2.1, that is to formulate SPS measures for the protection of human, animal, plant life or health consistent with the SPS Agreement.<sup>79</sup> Members may determine their SPS measures according to their Appropriate Level of Protection (ALOP)<sup>80</sup> or ‘acceptable level of risk’.<sup>81</sup>

Members have an obligation set out in Article 2.2 that the SPS measures must be applied when they are necessary to protect health, are based on scientific principles and are maintained with sufficient scientific evidence.<sup>82</sup> Members must also ensure that their SPS measures do not arbitrarily or unjustifiably discriminate between Members with identical or similar conditions and must not be applied in a manner which would constitute a disguised restriction on international trade.<sup>83</sup> The obligations of Members are further elaborated in the following SPS guiding principles.

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<sup>74</sup> Ibid Annex A.1.

<sup>75</sup> Ibid. The requirements and procedures include, *inter alia*, ‘end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety’.

<sup>76</sup> Ibid Annex A nn 4.

<sup>77</sup> Prevost and Bossche, above n59.

<sup>78</sup> Jeffery Atik and David A. Wirth, *Science and International Trade: Third Generation Scholarship*, 1 <[http://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bcicl/26\\_2/01\\_FMS.htm](http://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bcicl/26_2/01_FMS.htm)>.

<sup>79</sup> Ibid art 2.1.

<sup>80</sup> See, e.g., Ibid Annex A.5; art 5.5. ALOP is defined as ‘the level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory’.

<sup>81</sup> Oliver Landwehr, Article 3 SPS, in Wolfrum, Stoll, and Seibert-Fohr (Eds), above n40, 417.

<sup>82</sup> SPS Agreement, art 2.2.

<sup>83</sup> Ibid art 2.3.



## 2 SPS Principles

The SPS Agreement sets out a general framework for governments to comply with when establishing SPS measures.<sup>84</sup> The SPS Agreement incorporates seven guiding principles for Members in establishing their SPS measures,<sup>85</sup> as outlined below.

### (a) Non-Discrimination Principle

The principle of non-discrimination aims to maintain fair conditions of international trade and establish what is fair or unfair in trade.<sup>86</sup> According to Article 2.3, SPS measures must not arbitrarily or unjustifiably discriminate between Members with similar or identical conditions prevailing, so that the measures do not form a disguised restriction on international trade.<sup>87</sup> These requirements are cumulative in nature, as demonstrated by the Panel decision in *Australia–Measures Affecting Importation of Salmon (Australia-Salmon)*.<sup>88</sup> Article 5.5 further requires a consistency of the use of the ALOP concept by Members in establishing SPS measures.<sup>89</sup>

Article 2.4 stipulates that conformity of the SPS measures to relevant provisions in the SPS Agreement must be presumed to be in accordance with Article XX GATT. Thus, Article 2.4 clearly indicates that SPS measures will not always breach GATT provisions. The breach of GATT provisions is a pre-requisite for the application of Article XX GATT, as an exception provisions towards GATT's principles, such as the non-discrimination principles, which include the MFN principle<sup>90</sup> and the NT principle.<sup>91</sup>

### (b) Scientific Principle and Risk Assessment

Article 2.2 requires SPS measures to be scientifically based and maintained with sufficient scientific evidence.<sup>92</sup> Science is viewed as 'neutral and authoritative' in determining whether SPS measures are legitimate or protectionist.<sup>93</sup> Members must undertake a risk assessment,<sup>94</sup> which is defined in Annex A.4 as:

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<sup>84</sup> Cunningham, above n33, 24.

<sup>85</sup> WTO Agreement Series: *Sanitary Phytosanitary Measures*, 19  
<[http://www.wto.org/english/res\\_e/booksp\\_e/agrmtseries4\\_sps\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/agrmtseries4_sps_e.pdf)>.

<sup>86</sup> WTO, *Understanding the WTO: Principles of the Trading System*  
<[http://wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](http://wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm)>.

<sup>87</sup> SPS Agreement, arts 2.3., 5.5.

<sup>88</sup> WTO, *Dispute Settlement: DS18, Australia- Measures Affecting Importation of Salmon*.

<sup>89</sup> SPS Agreement, art 5.5.

<sup>90</sup> GATT, art I.1.

<sup>91</sup> *Ibid* art III.4.

<sup>92</sup> SPS Agreement, art 2.2.

<sup>93</sup> Atik and Wirth, above n78, 1.

The evaluation of the likelihood 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; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.<sup>95</sup>

The risk assessment is part of the risk analysis, or ‘a systematic way of gathering, evaluating and recording information leading to recommendations for a position or action in response to identified hazard’.<sup>96</sup> Risk analysis comprises a number of steps: initiation, hazard identification, risk assessment, risk management and risk communication.<sup>97</sup> In this way, risk assessment is different from risk management. According to Bossche, risk assessment is the scientific process to identify the existence of risks and to establish measures that could address the risks. Risk management, on the other hand, is the policy-based process for determining the appropriate level of protection of health in a particular country and in choosing the measures to achieve the ALOP.<sup>98</sup> The Panel in the *EC - Measures Concerning Meat and Meat Products (Hormones)* argued the distinction between risk assessment and risk management, in that in risk assessment there is a ‘scientific’ examination of data and actual studies; it is not, a ‘policy’ exercise involving social value judgements made by political bodies.<sup>99</sup> In this connection, it must be underlined that Article 5 and Annex A of the SPS Agreement state of ‘risk assessment’ and the term ‘risk management’ is not to be found in the SPS Agreement.<sup>100</sup>

However, the distinction is not strict, because risk assessment might consider non-scientific considerations, such as economics aspects, while risk management usually considers the risk assessment processes to choose the policy in regard to the ALOP. The economic factors to be considered in undertaking a risk assessment include the loss of production or sales due to entry, establishment or spread of pests or diseases, the costs of control or eradication needed, and the relative cost-effectiveness of alternative approaches to limit the risks.<sup>101</sup> With regards to the determination of the ALOP, Members are required to minimise the negative effects of trade.<sup>102</sup>

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<sup>94</sup> SPS Agreement, art 5.1.

<sup>95</sup> Ibid Annex A.4.

<sup>96</sup> See, e.g., Robert L. Griffin (IPPC-FAO UN), Risk Analysis: Fundamentals and Application, presented in the SPS Risk Analysis Workshop, 19-20 June 2000, 6; Summary Report on the SPS Risk Analysis Workshop, WTO Doc G/SPS/GEN/209 (19-20 June 2000) 3-5.

<sup>97</sup> Ibid.

<sup>98</sup> Bossche, above n1, 914.

<sup>99</sup> Report of the Panel, *EC - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/R/CAN (18 August 1997) ‘*EC – Hormones (Canada)*’ para 8.100.

<sup>100</sup> Jackson, John H, Davey, William J and Sykes Jr, Allan O, *Legal Problems of International Economic Relations: Cases, Materials and Text* (West, 6<sup>th</sup> ed, 2013) 705.

<sup>101</sup> SPS Agreement, art 5.3.

<sup>102</sup> Ibid art 5.4.

Risk assessment comprises ‘scientific evidence, relevant processes and production methods, relevant inspection, sampling and testing methods, prevalence of specific diseases or pests, existence of pest or diseases free areas, relevant ecological and environmental conditions, and quarantine or other treatment’.<sup>103</sup> To provide scientific evidence, Members must undertake scientific justification, an examination and evaluation of the available scientific information in accordance with the relevant provisions of the SPS Agreement.<sup>104</sup> Scientific justification is essential method for preventing Members from establishing illegitimate measures and engaging in disguised restrictions on trade with their SPS measures.<sup>105</sup>

Significantly, the rationale for the sufficient scientific evidence requirement is to enable an appropriate balance between the protection of health and promotion of international trade.<sup>106</sup> The SPS Agreement addresses the issue of insufficient scientific evidence<sup>107</sup> by allowing Members to adopt provisional measures on the basis of the available pertinent information, including that of the SPS international standards or that of other Members.<sup>108</sup> This approach within Article 5.7 is also recognised in public international law, such as environmental law, and is known as the ‘precautionary principle’.<sup>109</sup> The precautionary principle states that ‘where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’.<sup>110</sup> Thus, based on the precautionary principle, countries may take more cautious measures to address risk factors<sup>111</sup> despite the lack of scientific certainty. Within the context of the SPS Agreement, however, the term of ‘precautionary principle’ or ‘precautionary approach’ is not explicitly stated,<sup>112</sup> even though some of its key aspects have been addressed in the WTO case law.<sup>113</sup> The Appellate Body in EC –

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<sup>103</sup> SPS Agreement, art 5.2.

<sup>104</sup> Ibid art 3.3.

<sup>105</sup> Ibid. See also Guzman and Pauwelyn (eds), above n71, 535. Scientific justification is ‘an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement’.

<sup>106</sup> SPS Agreement Analytical Index, article 5.3. See also *EC – Hormones*, para 27.

<sup>107</sup> SPS Agreement, art 5.7. Relevant scientific evidence is insufficient if ‘the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required’. See also Notification of the Appeal, *US/Canada – Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320/12, WT/DS321/12 (2 June 2008 [375].

<sup>108</sup> SPS Agreement, art 5.7.

<sup>109</sup> *Report of the United Nations Conference on Environment and Development: Annex I- Rio Declaration on Environment and Development* (3-14 June 1992) United Nations GA A/CONF.151/26 (Vol. I) Distr. GENERAL (12 August 1992) Principle 15 <<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm/>>.

<sup>110</sup> Ibid.

<sup>111</sup> Pryles, Waincymer and Davies, above n5, 1177.

<sup>112</sup> Terrence P. Stewart and David S. Johanson ‘A Nexus of Trade and the Environment: The Relationship Between the Cartagena Protocol on Biosafety and the SPS Agreement of the World Trade Organization’ (2003) *14 Colo. J. Int’l Envtl. L. & Pol’y* 1, 28.

<sup>113</sup> Jan Bohanes ‘Risk Regulation in WTO Law: A Procedure Based Approach to the Precautionary Principle’ (2001-2002) *40 Colum. J. Transnat’l L.* 323, 335.

Hormones mentions that the ‘precautionary principle’ is ‘reflected’ in Article 5.7.<sup>114</sup> However, the application of the reflection of precautionary principle in Article 5.7 is more specific.

Ultimately, the explicit requirements of Article 5.1 and 5.2 of the SPS Agreement are crucial requirements which must be applied by Members.<sup>115</sup> With regards to Article 5.7 of the SPS Agreement, the application is available when four cumulative requirements are fulfilled, as follows:

1. Relevant scientific evidence is insufficient,
2. The measure is adopted on the basis of available pertinent information,
3. The Member seeks to obtain the additional information necessary for a more objective assessment of risk, and
4. The Member reviews the measure accordingly within a reasonable period of time.<sup>116</sup>

The reasonable period of time is determined on a ‘case by case basis’.<sup>117</sup> For example, in the Japan – Agricultural Product II, the reasonable period of time is four years.<sup>118</sup>

### (c) *Transparency*

Members are required to provide transparency of their SPS measures.<sup>119</sup> This includes providing explanations to requesting Members on their SPS measures,<sup>120</sup> establishing a National Notification Authority (NNA)<sup>121</sup> and a National Enquiry Point (NEP),<sup>122</sup> and providing notification and information regarding the SPS measures<sup>123</sup> to the SPS Committee.<sup>124</sup> Notification comprises regular notifications<sup>125</sup> and emergency notifications<sup>126</sup> and any changes to an original notification, such as an addendum, corrigendum or revision.<sup>127</sup>

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<sup>114</sup> Appellate Body Reports, EC – Hormones (1998), para 124.

<sup>115</sup> Ibid, para 123-124.

<sup>116</sup> SPS Agreement Analytical Index, Article 5.7 [293]. See also *Japan-Agricultural Products II* [369].

<sup>117</sup> Appellate Body Report on Japan-Measures Affecting Agricultural Products ‘*Japan – Agricultural Product II*’, WT/DS76/AB/R, AB-1998-8 (Feb. 22, 1999), para 93 <<http://www.wto.org/english/tratop-e/dispu-e/dispu-e.htm>>.

<sup>118</sup> Ibid.

<sup>119</sup> SPS Agreement, art 5.8, 7, Annex B.

<sup>120</sup> Ibid art 5.8.

<sup>121</sup> Ibid Annex B [10].

<sup>122</sup> Ibid Annex B.3.

<sup>123</sup> Ibid art 7.

<sup>124</sup> Ibid art 7.

<sup>125</sup> *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement*, WTO Doc G/SPS/GEN/804/Rev.5 (4 October 2012) 2.

<sup>126</sup> Ibid.

<sup>127</sup> See, e.g., *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)*, WTO Doc G/SPS/7/Rev.3 (20 June 2008) 6; *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement*, WTO Doc G/SPS/GEN/804/Rev.5 (4 October 2012), 2. The changes include an addendum (to add some information to the original SPS measure), a corrigendum (to make corrections to some errors in the original SPS measures) and a revision (to replace the original SPS measures).

Annex B provides that SPS measures that need to be published are ‘SPS regulations’,<sup>128</sup> such as ‘laws, decrees or ordinances which are applicable generally’.<sup>129</sup> SPS regulations are named as a ‘sub-category’<sup>130</sup> of SPS measures, which means that SPS regulations are narrower than SPS measures. However, the definition may not cover narrower instruments because the phrase ‘such as’,<sup>131</sup> indicates that there may be other instruments that need to be considered.<sup>132</sup> The expression ‘applicable generally’ is important, since SPS measures that are not applicable generally might not need to be published, such as a general moratorium on application approval and marketing of biotech products of the EC in *EC-Approval and Marketing of Biotech Products*.<sup>133</sup> With regard to the terms of ‘measures’ and ‘regulations’, the SPS Committee clarified that those terms are used interchangeably.<sup>134</sup>

Annex B.5 stipulates that SPS regulations must be notified when no SPS international standards exist, when the SPS regulations are not substantially the same as the content in international standards and when they may have significant effect in international trade.<sup>135</sup> According to the 2008 Transparency Procedure,<sup>136</sup> whether or not SPS regulations have a significant effect on international trade will be assessed by three criteria; whether it is, affected by one or more SPS regulations in combination; in a specific product, group of products or products in general; and between two or more Members’.<sup>137</sup> The transparency obligation has been enhanced by the designation of the SPS Information Management System (SPS-IMS) in 2007,<sup>138</sup> which has allowed Members to provide notification of SPS measures online since 2011.<sup>139</sup>

The purpose of the transparency principle is to achieve a greater level of clarity, predictability and information regarding the trade policies, rules and regulations of Members.<sup>140</sup> The transparency

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<sup>128</sup> SPS Agreement, Annex B.1

<sup>129</sup> Ibid Annex B.1 nn5.

<sup>130</sup> Ibid, Analytical Index, Annex B [545].

<sup>131</sup> Ibid Annex A nn5.

<sup>132</sup> WTO, Dispute Settlement: DS76 on *Japan-Agricultural Products II*.

<sup>133</sup> WTO, Dispute Settlement: DS291, DS292 on *European Communities-Approval and Marketing of Biotech Products*.

<sup>134</sup> *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Doc G/SPS/36 (Report by the Committee) (11 July 2005, Adopted on 30 June 2005) XIV [94] 21.

<sup>135</sup> SPS Agreement, Annex B.5.

<sup>136</sup> The 2008 Transparency Procedures have been developed to assist Members in fulfilling their transparency obligations under Article 7 and Annex B of the SPS Agreement regarding the notification of SPS regulations, answering information requests under the NEP system and publishing regulations. See *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)*, WTO Doc G/SPS/7/Rev.3 (20 June 2008).

<sup>137</sup> Ibid A.9.

<sup>138</sup> WTO, SPS Information Management System (SPS-IMS) <<http://spsims.wto.org/>>.

<sup>139</sup> WTO, 2011 News Items, Sanitary and Phytosanitary Measures: Formal Meeting, *Members Take First Step on Private Standards in Food Safety, Animal-Plant Health* (30-31 March 2011) <[http://www.wto.org/english/news\\_e/news11\\_e/sps\\_30mar11\\_e.htm](http://www.wto.org/english/news_e/news11_e/sps_30mar11_e.htm)>.

<sup>140</sup> SPS Agreement Analytical Index, art 7 para 366.

principle is intended to be in line with the transparency and procedural fairness principle in GATT.<sup>141</sup> Members are obliged to make their trade policy or measures publicly available by providing notification of their trade policy to the WTO. This principle is supported by the WTO program under the TPR mechanism,<sup>142</sup> which examines national trade policy and the practice of Members, including SPS policy. The TPR is undertaken by the WTO TPR Body by reviewing reports provided by Members under review and reports provided by the TPR Division in the WTO Secretariat.<sup>143</sup> The TPR is undertaken at various time frequencies depending on the size of the Members<sup>144</sup> and the Members' share of world trade.<sup>145</sup>

#### (d) Harmonisation

The SPS Agreement encourages Members to harmonise their SPS measures with SPS international standards,<sup>146</sup> which are universally referred to as the 'Three Sisters'.<sup>147</sup> The Three Sisters is comprised of *Codex Alimentarius* Commission (*Codex*), the International Office of Epizootics (OIE), also known as World Animal Health Standards, and the International Plant Protection Convention (IPPC). Harmonisation<sup>148</sup> is necessary since SPS measures applied by Members vary due to 'heterogeneity',<sup>149</sup> such as the different situations among countries.<sup>150</sup> Thus, harmonisation is meant to diminish conflict among national standards.<sup>151</sup>

Members have three options with regards to SPS international standards, namely, they can formulate SPS measures which 'conform' to,<sup>152</sup> are based on<sup>153</sup> or deviate from the SPS international standards.<sup>154</sup> With harmonisation, Members are likely to gain the advantage that they

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<sup>141</sup> WTO, Understanding the WTO Basics, *Principles of the Trading System* <[http://wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](http://wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm)>.

<sup>142</sup> WTO, *Trade Policy Reviews* <[http://wto.org/english/tratop\\_e/tpr\\_e/tpr\\_e.htm](http://wto.org/english/tratop_e/tpr_e/tpr_e.htm)>.

<sup>143</sup> Ibid, Brief Introduction, *Overseeing National Trade Policy: the TPRM*.

<sup>144</sup> WTO, Understanding the WTO: the Agreements, *Trade Policy Reviews: Ensuring Transparency* <[http://wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm11\\_e.htm](http://wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm)>. The frequency of reviews is generally undertaken once every two years (for the four biggest trader Members, namely the US, the EU, Japan and China), once every four years (for sixteen Members based on their share in world trade) and once every six years (for the rest).

<sup>145</sup> WTO, above n142.

<sup>146</sup> SPS Agreement, art 3.1.

<sup>147</sup> See, e.g., *Three Sisters Standard-Setting Procedure Background Document*, WTO Doc G/SPS/1115 (10 October 2011) (Note by the Secretariat) 1; WTO G/SPS/53, 28.

<sup>148</sup> SPS Agreement, Annex A 2. Harmonisation means the adoption of common SPS measures by different Members.

<sup>149</sup> Leonardo Iacovone, 'The Analysis and Impact of Sanitary and Phytosanitary Measures', 99 <<http://www.cid.harvard.edu/cidtrade/Papers/iacovone.pdf>>.

<sup>150</sup> David G Victor, 'The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years, (2000) 32 *N.Y.U. J. Int'l L. & Pol.* 865, 1 <<https://litigation-essentials.lexisnexis.com/>>.

<sup>151</sup> Atik and David A. Wirth, above n78, 1.

<sup>152</sup> SPS Agreement, art 3.2.

<sup>153</sup> Ibid art 3.1.

<sup>154</sup> Ibid art 3.3.

do not need to undertake risk assessment. Further, their SPS measures are less likely to be disputed by other Members, because they have conformed to the international standards. When Members deviate from the SPS international standards, they must provide a scientific justification<sup>155</sup> and risk assessment,<sup>156</sup> as well as any additional information necessary for an objective consideration within a reasonable period of time.

Members are allowed to create measures of protection for humans, animal, and plants which are higher than the international standards.<sup>157</sup> However, if this occurs, there must be sufficient scientific evidence, or the Member must determine that it is ‘appropriate’ in accordance with the relevant provisions Article 5.2.<sup>158</sup> In addition, the Member must ensure that the measures are ‘not more trade restrictive’ than necessary.<sup>159</sup> The word ‘sufficient’ is a relational concept, which requires adequate connection between the SPS measure and the scientific evidence.<sup>160</sup> The scientific evidence must be established by scientific methods, including evidence or the probability of specific risk and evidence that a certain requirement may reduce or eliminate the risk.<sup>161</sup>

#### (e) *Equivalence*

Given the SPS Agreement allows Members to deviate their SPS measures from the SPS international standards<sup>162</sup> and that individual Members’ circumstances differ consistently, the SPS measures across Members also vary. Article 4 of the SPS Agreement opens the possibility for recognition of SPS measures among Members as equivalent. Equivalence recognition is a tool to eliminate conflict between national SPS measures.<sup>163</sup> Members must accept the SPS measures of other Members as equivalent to their own SPS measures, although they can differ if the exporting Members can demonstrate that their SPS measures meet the ALOP of the importing Member’s SPS measures.<sup>164</sup> The equivalence recognition is usually achieved through a bilateral or multilateral agreement.<sup>165</sup>

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<sup>155</sup> Ibid.

<sup>156</sup> Ibid art 5.1, 5.2., 5.3.

<sup>157</sup> Ibid art 3.3.

<sup>158</sup> Ibid art 3.3.

<sup>159</sup> Ibid arts 3.3, 5.6.

<sup>160</sup> Ibid. See also *Japan – Agricultural Products II* [28].

<sup>161</sup> Ibid. See also *Japan – Agricultural Products II* [31].

<sup>162</sup> Ibid art 3.3.

<sup>163</sup> Atik and David A. Wirth, above n78, 1.

<sup>164</sup> SPS Agreement, art 4.1.

<sup>165</sup> Ibid art 4.2.

(f) *Regionalisation*

The SPS Agreement permits the adaptation of measures to take into consideration regional conditions, known as ‘regionalisation’. Members shall ensure that their SPS measures are adapted to the ‘SPS characteristics of an area, whether within the entire country, part of the country, or parts of several countries from which the products originated and to which the products are destined, by taking into account specific diseases or pests, existence eradication programs, or appropriate guidelines developed by international standards’.<sup>166</sup> Members shall recognise the area of pests or disease free, and area of low pest or disease prevalence of other Members. This is generally based on factors such as geography, epidemiological surveillance, and the effectiveness of SPS control.<sup>167</sup>

Regionalisation recognition may be reached through a trade agreement, either bilateral or regional. Members are required to provide evidence and access for inspection concerning pests or disease-free areas as well as areas of low pest or disease prevalence.<sup>168</sup>

(g) *Technical Assistance and Special and Differential (S&D) Treatment Principle*

The SPS Agreement provides S&D treatment, technical assistance and further implementation mechanisms to engage in technical assistance with developing countries and LDCs.<sup>169</sup> Through technical assistance developing countries are expected to gain benefits by receiving assistance.<sup>170</sup> Developing countries need technical assistance, such as capacity building, in order to establish SPS measures that meet the SPS Agreement requirements and take full advantage of the opportunities offered by the agreement.<sup>171</sup>

The S&D treatment provisions<sup>172</sup> are governed by Article 10 of the SPS Agreement. These provisions are essential, as they enable the SPS Committee to assist developing countries with difficulties in implementing the SPS Agreement, and take into consideration their financial, trade and development needs. The S&D treatment provisions comprise three categories; provisions under

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<sup>166</sup> Ibid art 6.1.

<sup>167</sup> Ibid art 6.2.

<sup>168</sup> Ibid art 6.3.

<sup>169</sup> *Procedure to Enhance Transparency on Special and Differential Treatment in Favour of Developing Country Members*, WTO Doc G/SPS/33/Rev.1 (18 December 2009) (Decision) (Revision).

<sup>170</sup> There are ‘four broad categories: information; training; ‘soft’ infrastructure development; and ‘hard’ infrastructure development’. See *Technical Assistance Typology*, WTO Doc G/SPS/GEN/206 (18 October 2000) (Commentary) (Note by the Secretariat) 1.

<sup>171</sup> Ian Naumann and Wendy Lee, Office of the Chief Plant Protection Officer Australian Government Department of Agriculture Fisheries and Forestry (Canberra Australia), *Activity Completion Report Sanitary and Phytosanitary Capacity Building Program for ASEAN Member Countries AusAID Activity*, 027KOF Record of Understanding 12942, 7 October 2009  
<[http://www.ippc.int/file\\_uploaded/1266453103\\_ACTIVITY\\_COMPLETION\\_REPORT\\_SPS\\_C.pdf](http://www.ippc.int/file_uploaded/1266453103_ACTIVITY_COMPLETION_REPORT_SPS_C.pdf)> 48.

<sup>172</sup> Ibid art 10. It states that a longer-time frame for compliance with the Agreement may be provided for developing countries and least-developed countries in the phased introduction of new SPS measures.



which Members should safeguard the interests of developing Members,<sup>173</sup> transitional time periods<sup>174</sup> and technical assistance.<sup>175</sup> According to the S&D treatment, ‘a longer time frame of compliance’ with the SPS Agreement is given to developing countries when new SPS measures are introduced.<sup>176</sup> Technical assistance can be manifested in areas of processing technologies, research and infrastructure, and can include the establishment of national regulatory bodies, advice, credits, donations and grants, technical expertise, training and equipment.<sup>177</sup>

S&D treatment in the SPS Agreement is in line with the WTO’s principle of development and economic reform.<sup>178</sup> Due to differences in the conditions and development among Members, the WTO aims to improve the economic position of Members by providing special treatment and trade concessions.<sup>179</sup> Historically, the S&D treatment was originally rooted in Article XVIII GATT regarding particular privileges for developing countries. This provision was then expanded by articles XXXVI, XXXVII and XXXVIII GATT which are especially intended for the issues of developing countries. However, due to insufficient implementation of these articles,<sup>180</sup> the Tokyo Round adopted an Enabling Clause that explicitly recognises the principle that developing countries should receive differential and more favourable treatment in GATT.<sup>181</sup> The Enabling Clause includes the Generalised System of Preferences (GSP), a program by developed countries granting preferential tariffs to imported products originating in developing countries.<sup>182</sup> According to the UNCTAD, there are currently 13 GSP schemes.<sup>183</sup>

S&D treatment is a measure provided by developed countries to assist developing countries in dealing with their difficulties in international trade.<sup>184</sup> The S&D treatment includes provisions which aim to ‘increase trade opportunity to developing countries, provisions which require Members to safeguard the interest of developing countries when applying protective trade

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<sup>173</sup> Ibid art 10.1, 10.4.

<sup>174</sup> Ibid art 10.2, 10.3.

<sup>175</sup> Ibid art 9. The technical assistance may be provided either bilaterally or through the appropriate international organisations.

<sup>176</sup> *Procedure to Enhance Transparency on Special and Differential Treatment in Favour of Developing Country Members*, WTO Doc G/SPS/33/Rev.1, 2. The ‘longer time frame’ is not less than a six month period.

<sup>177</sup> SPS Agreement, art 9.1.

<sup>178</sup> GATT, art XVIII, governmental assistance to economic development.

<sup>179</sup> See, e.g., *Understanding the WTO: Principles of the Trading System*; WTO, G/SPS/GEN/206 (18 October 2000) Commentary on Sanitary and Phytosanitary Measures, *Technical Assistance Typology--Note by the Secretariat*. Jackson, Davey and Sykes Jr, above n100, 1277.

<sup>180</sup> See Decision of the Contracting Parties of 25 June 1971 relating to the establishment of “generalised non-reciprocal and non-discriminatory preferences beneficial to the developing countries” BISD 18S/24 ‘Enabling Clause’ <[https://www.wto.org/english/docs\\_e/legal\\_e/enabling1979\\_e.htm](https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm)>.

<sup>181</sup> Ibid, art 2.a.

<sup>182</sup> The 13 countries grant GSP preferences are Australia, Belarus, Canada, the European Union, Iceland, Japan, Kazakhstan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey and the US. See UNCTAD, *Preferential Market Access and the Generalized System of Preferences* <<http://unctad.org/en/Pages/DITC/GSP/Generalized-System-of-Preferences.aspx>>.

<sup>183</sup> Frank J Garcia, ‘Beyond Special and Differential Treatment’ (2004), 27 *B.C. Int’l & Comp. L. Rev.* 291, 291-292.

measures, provisions which allow flexibility in using economic and commercial instruments, provisions which grant longer period of implementation of obligation, and a provision on technical assistance'.<sup>185</sup> The purpose of the S&D treatment is not to be discriminatory, but to foster the development of both developing countries and LDCs.<sup>186</sup> S&D treatment may be granted upon request from the developing countries.<sup>187</sup>

## E *The SPS Agreement and Developing Countries*

The following section discusses the common issues faced by developing countries in implementing the SPS Agreement in the areas of importation and exportation, and specific redress undertaken under the SPS system. This discussion aims to provide a general background for the specific discussion of SPS implementation in the selected countries in Chapters 3, 4 and 5.

### 1 *Difficulties in the SPS Implementation*

SPS measures in practice are considered one of the key barriers to trade.<sup>188</sup> As a type of non-tariff barrier, the effect of SPS measures on trade in practice is not readily measurable and difficult to evaluate.<sup>189</sup> However, adoption of the SPS Agreement naturally brings challenges to developing countries and LDCs for the adaptation process and application.<sup>190</sup> The WTO notes that issues of SPS implementation in general include transparency<sup>191</sup> and harmonisation.<sup>192</sup>

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<sup>185</sup> WTO, The WTO Agreements Series - Sanitary and Phytosanitary Measures, <[https://www.wto.org/english/res\\_e/booksp\\_e/agrmntseries4\\_sps\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/agrmntseries4_sps_e.pdf)> 62.

<sup>186</sup> Marrakesh Agreement Establishing the World Trade Organisation, The Preamble. The Agreement Establishing the WTO states that 'Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'.

<sup>187</sup> SPS Agreement, art 12.1.

<sup>188</sup> See, e.g., Bossche, Peter Van den and Werner Zdouc, *The Law and Policy of the World Trade Organisation – Text, Cases and Materials*, Third Edition, (Cambridge University Press, New York, 2013), 498; WTO, *World Trade Report 2012, Trade and Public Policies: A Closer Look at Non-Tariff Measures in the 21<sup>st</sup> Century* <[http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report12\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf)> 146; ICTSD, *Fish-Policy Paper*, Geneva, 2007, 40.

<sup>189</sup> Patrick Love and Ralph Lattimore (2009) "Protectionism? Tariffs and Other Barriers to Trade" in *International Trade: Free, Fair and Open?*, OECD Publishing <<http://dx.doi.org/10.1787/9789264060265-5-en>> 63.

<sup>190</sup> J. Michael Finger, 'The WTO's Special Burden on Less Developed Countries', *Cato Journal*, Vol. 19 No. 3 (Winter 2000) 426 <<http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/2000/1/cj19n3-9.pdf>>.

<sup>191</sup> WTO, *Current Issues in SPS* <[http://wto.org/english/tratop\\_e/sps\\_e/sps\\_issues\\_e.htm](http://wto.org/english/tratop_e/sps_e/sps_issues_e.htm)>

<sup>192</sup> See, e.g., WTO: 2013 News Items, 28 June 2013, Sanitary and Phytosanitary Measures: Formal Meeting, *Members Greet Food Safety Body's Half Centuries with Plea for Science Based Trade Measures* <[http://www.wto.org/english/news\\_e/news13\\_e/sps\\_28jun13\\_e.htm](http://www.wto.org/english/news_e/news13_e/sps_28jun13_e.htm)>; WTO, G/SPS/GEN/1253, 14 June 2013, Committee on Sanitary and Phytosanitary Measures, *50<sup>th</sup> Anniversary of the Codex Alimentarius Commission: The Importance of the Scientific Principle*, Communication from Brazil; and *SPS Measures and International Standards, Guidelines, and Recommendations*, WTO Doc G/SPS/GEN/1143/Rev.1 (21 March 2012).

Developing countries face challenges in formulating and applying their SPS measures and in meeting the SPS standards of importing countries. The WTO stated that difficulties faced by developing Members are usually due to the ‘natural impediments’ they face,<sup>193</sup> such as a lack of financial capacity.<sup>194</sup> Trebilcock and Howse agree with this statement by adding that the difficulties are caused mostly by internal factors within the developing countries,<sup>195</sup> such as insufficient resources,<sup>196</sup> including the lack of legal structure and economic base,<sup>197</sup> and technical expertise and infrastructure.<sup>198</sup> However, some literature recognises that the influence of external factors also plays a role in these difficulties.<sup>199</sup> As explained earlier in Chapter 1, external factors refer to those factors that come from outside the selected countries, for example, the high level of SPS standards set by developed Members. With regards to the impacts of the standards applied to agricultural exports, the World Bank’s research preliminary findings stated that developing countries, particularly LDCs in Southeast Asia and Africa might face export challenges, since emerging economies tend to set higher standards when implementing SPS measures.<sup>200</sup> The Asian Development Bank Institute (ADBI) states that the high standards of importing countries and international standards, such as the Codex, and the inability of developing countries to assess the SPS Agreement implications are, issues that affect developing countries’ ability to access the export market.<sup>201</sup> It is often the case that developing countries have less SPS regulations and lower standards than developed Members.<sup>202</sup>

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<sup>193</sup> WTO, above n185, 24.

<sup>194</sup> WTO News: Speeches-DG Roberto Azevedo, *Azevedo Says Lack of Trade Finance Can be A Significant Trade Barrier for Developing Countries* (26 March 2015) <[https://www.wto.org/english/news\\_e/spra\\_e/spra51\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra51_e.htm)>.

<sup>195</sup> Trebilcock and Howse, above n12, 23.

<sup>196</sup> John S Wilson, World Bank 2002, *Liberalizing Trade in Agriculture: Developing Countries in Asia and the Post-Doha Agenda*, 19 <<http://www.ppl.nl/bibliographies/wto/files/1280.pdf>>.

<sup>197</sup> Spencer Henson and Rupert Loader, ‘Impact of Sanitary and Phytosanitary Standards on Developing Countries and the Role of the SPS Agreement’, *Agribusiness* Summer 1999, 15, 3, ABI/INFORM, 360.

<sup>198</sup> Australian Government-Department of Agriculture Fisheries and Forestry-AusAID, *Sanitary Phytosanitary Capacity Building Program, The WTO Sanitary and Phytosanitary (SPS) Agreement-Why You Need To Know*, 17 <[http://www.agriculture.gov.au/SiteCollectionDocuments/animal-plant/plant-health/publications/taxonomy/wto\\_sps\\_agreement\\_booklet.pdf](http://www.agriculture.gov.au/SiteCollectionDocuments/animal-plant/plant-health/publications/taxonomy/wto_sps_agreement_booklet.pdf)>.

<sup>199</sup> Office of the Chief Plant Protection Officer Australian Government Department of Agriculture Fisheries and Forestry-DAFF (Canberra), *Mid-Term Review of Australia’s Regional ‘Sanitary Phytosanitary Capacity Building Program’ (SPSCBP), Final Report of the mid-Term Review Team*, May 28<sup>th</sup> 2008 <[www.ausaid.gov.au/Publications/Documents/ardcp-ipr.doc](http://www.ausaid.gov.au/Publications/Documents/ardcp-ipr.doc)> 6.

<sup>200</sup> *Measuring the Impacts of Standards on Agricultural Exports of Low Income Countries: The Standards Restrictiveness Index, the World Bank Development Economic Research Group – Trade and Integration*, WTO Doc GEN/SPS/GEN/1228 (13 March 2013) 2.

<sup>201</sup> Asian Development Bank Institute (ADBI), *ADBI Year in Review 2008*, 29-30 <<http://www.adbi.org/files/2009.04.16.keydocs.2008.year.in.review.pdf>>.

<sup>202</sup> Jurgen Kurtz, ‘A Look Behind the Mirror: Standardisation, Institutions and the WTO SPS and TBT Agreements’ (2007) *UNSW Law Journal* Volume 30 (2) 505.

## 2 WTO Specific Redresses

The SPS Agreement recognises the difficulties faced by developing country Members<sup>203</sup> by providing S&D treatment<sup>204</sup> and technical assistance provisions.<sup>205</sup> The technical assistance and S&D treatment provisions aim to bridge the gaps between the capacity of the developing countries and the application of SPS measures in line with the SPS Agreement. Notwithstanding this recognition, the issue of the SPS Agreement application remains, which is of significance to Members.<sup>206</sup> The SPS Agreement provides specific redress for the difficulties faced by developing countries, which include specific redress resulting from the Doha Ministerial decision. Article 10 provides for a ‘longer time-frame for compliance’ for developing countries, not less than six months. Annex B para 2 provides for a ‘reasonable interval’ which is not less than six months, for a request to the SPS Committee to provide further implementation of the equivalence recognition in Article 4. Members may request the SPS Committee review the application of the SPS Agreement. Pursuant to Article 12.7, the review must be held at least once every four years, and permits Member participation in the setting of international standards and technical assistance for developing countries and LDCs.<sup>207</sup> Further procedures, decisions and guidelines were issued by the SPS Committee, including the Review of the Operation and Implementation of the SPS Agreement, Decision on the Implementation of Article 4, Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7), Guideline to Further the Practical of Article 6, and the Procedure to Enhance Transparency of Special and Differential Treatment in Favour of Developing Country Members.<sup>208</sup>

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<sup>203</sup> SPS Agreement, the Preamble [7].

<sup>204</sup> SPS Agreement art 10.

<sup>205</sup> SPS Agreement art 9.

<sup>206</sup> *Review of the Operation and Implementation of the SPS Agreement*, WTO Doc G/SPS/53.

<sup>207</sup> *Implementation Related Issues and Concern*, WTO Doc WT/MIN/01/17 (20 Nov 2001, Adopted 14 November 2001) (Ministerial Conference) (Decision) 1.

<sup>208</sup> See, e.g., *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Doc G/SPS/19/Rev. 2 (23 July 2004); *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)*, WTO Doc G/SPS/7/Rev.3 (20 June 2008, as of 1 December 2008) Revision; *Guideline to Further the Practical of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Doc G/SPS/48 (16 May 2008); *Procedure to Enhance Transparency of Special and Differential Treatment in Favour of Developing Country Members*, WTO Doc G/SPS/33/Rev.1 (18 December 2009) (Decisions by the Committee) (Revision); *Review of the Operation and Implementation of the SPS Agreement*, WTO Doc G/SPS/53. The review of the SPS Agreement has been undertaken in 1999 (G/SPS/12), 2005 (G/SPS/36), and 2010 (G/SPS/53).

### 3 Private Standards

Private standards<sup>209</sup> have been an emerging issue,<sup>210</sup> first raised in the SPS Committee meeting in June 2005.<sup>211</sup> Historically, private standards in developed countries arose in 1990s<sup>212</sup> to, amongst others, respond to consumer preferences on food safety and quality improvements.<sup>213</sup> There is ‘regulatory gap’ – the multilateral and governmentally regulations are limited in their ability to respond to emerging risks for ensuring food safety<sup>214</sup> due to several factors, such as a difficulty in reaching political consensus to adopt new legislation.<sup>215</sup> This came along with the diminishing role of governments’ food law systems towards food suppliers, such as by shifting the liability of food law to the private sector with due diligence requirements.<sup>216</sup>

Private standards have some advantages and disadvantages. The advantages include assisting suppliers in meeting national and international standards, the promotion of best practices and improved productivity. The disadvantages are that, for example, private standards are not always arranged on a scientific basis, they may be less transparent, deviate from international standards and are costly to complete.<sup>217</sup> This creates disproportionate burdens<sup>218</sup> on small and medium-sized exporters in developing countries,<sup>219</sup> as they can be impeded from participating in the global food

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- <sup>209</sup> When Do Private Standards Works: Literature Review Series on the Impact of Private Standards-Part IV, 2 <[http://www.intracen.org/uploadedFiles/intracenorg/Content/Policy\\_Makers/Articles/When%20do%20Private%20Standards%20Work%20-%20Part%20IV%20for%20web.pdf](http://www.intracen.org/uploadedFiles/intracenorg/Content/Policy_Makers/Articles/When%20do%20Private%20Standards%20Work%20-%20Part%20IV%20for%20web.pdf)>. The International Trade Centre defines private standards as ‘norms developed by private entities such as companies, non-governmental organisation or multi-stakeholders coalition’.
- <sup>210</sup> See, e.g., WTO News Items (30-31 March 2011) SPS Measures Formal Meeting, *Members take first steps on private standards in food safety, animal-plant health*, 1-3 <[http://wto.org/english/news\\_e/news11\\_e/sps\\_30mar11\\_e.htm](http://wto.org/english/news_e/news11_e/sps_30mar11_e.htm)>; *Actions Regarding SPS-Related Private Standards*, WTO Doc G/SPS/55 (Decision of the Committee) (6 April 2011).
- <sup>211</sup> *Actions Regarding SPS-Related Private Standards*, WTO Doc G/SPS/55, 1. Private standards was first raised in the SPS Committee meeting in June 2005 by St Vincent and Grenadine regarding private standards applied on their exportation of bananas to EU countries.
- <sup>212</sup> Denise Prevost, ‘Private Sector Food Safety Standards and the SPS Agreement: Challenges and Possibilities’, 33 *S. Afr. Y.B. Int’l L.* 1 (2008), 3.
- <sup>213</sup> Jill E Hobbs, ‘Public and Private Standards for Food Safety and Quality: International Trade Implications’, 11 *Journal of International Law and Trade Policy* 1 (2010) 136-152, 149.
- <sup>214</sup> Jan Wouters, Axel Marx and Nicolas Hachez, ‘Private Standards, Global Governance and Transatlantic Cooperation: The Case of Global Food safety Governance’, Leuven Centre for Global Governance Studies, 2008, 3 <[www://Private\\_Standards\\_Final\\_Jan24.pdf](http://www://Private_Standards_Final_Jan24.pdf)>. The article was prepared for the Workshop on ‘Managing Biosafety and Biodiversity in a Global World’ organised by the University of California, Berkeley (11-12 December 2008).
- <sup>215</sup> Elena Fagotto, ‘Private Role in Food Safety Provision: the Law and Economics of Private Food Safety’, *Eur J Law Econ* (2014) 37:83–109, 91.
- <sup>216</sup> Michael T. Roberts, ‘The Compatibility of Private Standards with Multilateral Trade Rules: Legal Issues at Stake’ in Alexander Sarris and Jamie Morrison, *The Evolving Structure of World Agricultural Trade: Implication for Trade Policy and Trade Agreements* (FAO, 2009) 264.
- <sup>217</sup> WTO, 2011 News Items, SPS Measures Formal Meeting, *Members take first steps on private standards in food safety, animal-plant health* (30-31 March 2011) 2 <[http://www.wto.org/english/news\\_e/news11\\_e/sps\\_30mar11\\_e.htm](http://www.wto.org/english/news_e/news11_e/sps_30mar11_e.htm)>.
- <sup>218</sup> Roberts, above n216, 265.
- <sup>219</sup> WTO, above n210.

supply chain due to the high cost of the operation of private standards<sup>220</sup> and a lack of infrastructures and support services.<sup>221</sup>

Although private standards are ‘voluntary’<sup>222</sup> in the sense they are not required by law,<sup>223</sup> the ‘market power’ of private retailers and importers has resulted in private standards being utilised in practice<sup>224</sup> and they have become ‘de facto mandatory requirements’.<sup>225</sup> For example, GLOBAL Good Agricultural Practices (GLOBALGAP), known previously as EUREPGAP,<sup>226</sup> and the Safe Quality Food Standard<sup>227</sup> are both widely applied in the agricultural area.

The proliferation of private standards, therefore, is likely to become another trade barrier for developing countries.<sup>228</sup> The legal position and applicability of private standards under the SPS Agreement is still uncertain,<sup>229</sup> because hitherto only measures attributable to a government come under the purview of the SPS Agreement.<sup>230</sup> This is due to the regulation of the SPS Agreement, which was established before the rise of private standards, and was aimed to discipline the governments in creating SPS measures for the purpose of health protection in line with the SPS requirements under the SPS Agreement.<sup>231</sup>

In addressing private standards issues, the SPS Committee has been discussing appropriate actions,<sup>232</sup> and in 2008 an ad hoc working group was formed to formulate a response. In 2011, the SPS Committee announced five actions, including ‘defining private standards’, sharing information between the SPS Committee and the ‘Three Sisters’ and sharing information on the relevant

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<sup>220</sup> UNCTAD, Joint UNCTAD/WTO Informal Information Session on Private Standards, *The Rise and Implication of Voluntary Private Standards for Access of Developing Countries to Key Export Markets*, 2 <[http://unctad.org/sections/wcmu/docs/ditc\\_tedb\\_ted0010\\_en.pdf](http://unctad.org/sections/wcmu/docs/ditc_tedb_ted0010_en.pdf)>.

<sup>221</sup> Gretchen H. Stanton, *Private (Commercial) Standards and the SPS Agreement*-Remarks at the Round Table on the Role of Standards in International Food Trade (24 September 2007), 3.

<sup>222</sup> Ibid 2.

<sup>223</sup> Jan Wouters and Dylan Geraets, Private Food Standards and the World Trade Organisation: some legal considerations, *World Trade Review* (2012), 11:3, 479-489, 481.

<sup>224</sup> UNCTAD, above n220, 2.

<sup>225</sup> See, e.g., Ulrich Hoffmann and Rene Vossenaar (eds), UNCTAD, *Challenges and Opportunities Arising from Private Standards on Food Safety and Environment for Exporters of Fresh Fruit and Vegetables in Asia: Experiences of Malaysia, Thailand and Viet Nam* (2007) 2; Ching-Fu Lin, Public-Private Interactions in Global Food Safety Governance, *69 Food & Drug L.J.* 143 (2014) 1.

<sup>226</sup> The GLOBALG.A.P., *From EUREPGAP to GLOBALG.A.P.* <[http://www.globalgap.org/uk\\_en/who-we-are/about-us/history/](http://www.globalgap.org/uk_en/who-we-are/about-us/history/)>. GLOBALGAP is a private food agricultural practice initiated by a Euro-retailer produce working group, which is concerned with product safety, as well as the environmental impacts on health, safety and welfare of workers and animals.

<sup>227</sup> The SQF certification of the *Societe Generale de Surveillance* (SGS) is recognised by the Global Food Safety Initiative (GFSI) and comprises of two types of certification: SQF 1000 for supply chain management for primary production and SQF 2000 for food manufacturing and distribution. See the SGS, Agriculture and Food, Safe Quality Food Standard (SQF) Certification <<http://www.sgs.com/En/Agriculture-Food/Food/Primary-Production/GFSI-Certification/Safe-Quality-Food-Standard-SQF-Certification.aspx>>.

<sup>228</sup> Stanton, above n221, 5.

<sup>229</sup> Wouters and Geraets, above n223, 488.

<sup>230</sup> Mavroidis, above n26, 298.

<sup>231</sup> Prevost, above n212, 6.

<sup>232</sup> *Actions Regarding SPS-Related Private Standards*, WTO G/SPS/55 (6 April 2011).

development in other WTO committees.<sup>233</sup> However, the SPS Committee failed to reach a consensus in defining private standards and has been undertaking different approaches in this matter by looking at and adapting a definition of private standards used by other international fora.<sup>234</sup> The SPS Committee's working definition of private standards itself was published in 2015 as follows:

“An SPS-related private standard is a written requirement or condition, or a set of written requirements or conditions, related to food safety, or animal or plant life or health that may be used in commercial transactions and that is applied by a non-governmental entity that is not exercising governmental authority.”<sup>235</sup>

The difficulties in reaching a consensus with regard to the definition of private standards might bring about a sceptical view about when would the consensus of Members regarding appropriate redress to private standards be reached.

## F Conclusion

The SPS Agreement plays a vital role within the WTO system in the maintenance of health and food safety while promoting international trade by providing requirements, principles and obligations with which Members must comply. However, the application raises issues for most developing countries, which typically become barriers to trade. External factors, such as private standards have become a serious challenge for developing countries. These external factors will be discussed in the next chapter, Chapter 3.

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<sup>233</sup>

Ibid.

<sup>234</sup>

WTO, 2014 News Items (25-26 March 2014) Sanitary and Phytosanitary Measures: Formal Meeting, *Members to try new approach for defining private sanitary phytosanitary standards*.

<sup>235</sup>

WTO, *Report of The Co-Stewards of The Private Standards E-Working Group To The March 2015 Meeting of The SPS Committee on Action 1 (G/SPS/55) Submission By The Co-Stewards of The E-Working Group*, G/SPS/W/283, 17 March 2015.

## CHAPTER 3

### III THE EXAMINATION OF THE SPS AGREEMENT PROVISIONS AND RELATED EXTERNAL FACTORS AND POTENTIAL METHODS FOR IMPROVEMENT

#### A Introduction

This chapter analyses the SPS Agreement and related external factors, that is those factors coming from outside the selected countries (Indonesia, the Philippines and Malaysia), which impinge on SPS implementation. These include provisions on scientific principles, transparency, regionalisation, equivalence, harmonisation, technical assistance and Special and Differential (S&D) treatment, standard-setting of the SPS international standards and private standards. The second part of this chapter discusses potential solutions including legal remedies, to assist with the improvement of the SPS application.

#### B SPS Provisions and Related International Factors and Possible Solutions

##### 1 Scientific-based Provision

A basic requirement of SPS measures, scientific justification, as governed in Article 2.2 of the SPS Agreement, is significant in SPS implementation. Science is viewed as ‘neutral and authoritative’ in determining whether SPS measures are legitimate or protectionist.<sup>1</sup> However, Cunningham states that the use of science-based justifications contains several levels of uncertainty.<sup>2</sup> Thus, Gruszczynski argues that due to the uncertain nature of science and the scientific method, scientific judgments should be limited.<sup>3</sup> Moreover, Peel states that it seems impossible to provide adequate evidence of health risks where a precise cause is uncertain.<sup>4</sup> In other words, science is unable to provide absolute certainty of the effects of a particular risk.<sup>5</sup> Science deals in probabilities of risks and attempts to gather evidence.<sup>6</sup> The common view is that Members

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<sup>1</sup> Jeffery Atik and David A. Wirth, *Science and International Trade: Third Generation Scholarship*, 1 <[http://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bcicl/26\\_2/01\\_FMS.htm](http://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bcicl/26_2/01_FMS.htm)>.

<sup>2</sup> Robert Cunningham, ‘The ABC of GMOs, SPS and the WTO: an analysis of the application of the Agreement on Sanitary and Phytosanitary Measures within the context of biotechnology and international trade’ (online) *Southern Cross University Law Review*, (9) 2005: 19-37, 35.

<sup>3</sup> Lukasz Gruszczynski, *Science in the Process of Risk Regulation under the WTO Agreement on Sanitary and Phytosanitary Measures*, 393 <[https://www.germanlawjournal.com/pdfs/Vol07No04/PDF\\_Vol\\_07\\_No\\_04\\_371-398\\_Articles\\_Gruszczynski.pdf](https://www.germanlawjournal.com/pdfs/Vol07No04/PDF_Vol_07_No_04_371-398_Articles_Gruszczynski.pdf)>.

<sup>4</sup> Jacqueline Peel, *Risk Regulation under the WTO SPS Agreement: Science as an International Normative Yardstick?* Jane Monet Working Paper June 2004, 8.

<sup>5</sup> Gruszczynski, above n3.

<sup>6</sup> WTO, *SPS Agreement Training Module Chapter 8-Current Issues: The Precautionary Principle* <[https://www.wto.org/english/tratop\\_e/sps\\_e/sps\\_agreement\\_cbt\\_e/c8s2p1\\_e.htm](https://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c8s2p1_e.htm)>.



with the ability to provide scientific evidence will determine the level of compliance of their SPS policy. Developing countries, including the selected countries, are thus at a disadvantage.

The SPS Agreement addresses issues of scientific uncertainty by requiring Members to undertake a risk assessment for establishing scientific justification and evidence, including economic risks.<sup>7</sup> In practice, many considerations, along with scientific justifications, are being assessed in formulating SPS policy, such as cultural, economic and political situations. For example, the Indonesian Minister of Agriculture stated that the objective of the measures was to ensure the flow of imports and to ensure the imported products meet the safety, health and *halal* (Islamic purity) requirements for health protection and reassurance.<sup>8</sup> SPS measures on the importation for food require importers to meet certain requirements with regard to food safety, quality, nutrition, religion, beliefs and culture.<sup>9</sup> Indonesia considers religious compliance and cultural reasons in its SPS measures. Despite this, scientific justification should not be removed from the requirements in establishing compliance, however, the assessment of scientific justifications should not be the primary consideration; the aforementioned limitations and warnings by commentators should be considered.

Where there is insufficient scientific evidence, Members may provisionally adopt SPS measures on the ‘basis of available pertinent information’.<sup>10</sup> However, according to Gruszczynski the existing uncertainty in scientific evidence cannot lead to the application of Article 5.7,<sup>11</sup> rather it is the insufficient scientific data that cause the problem.<sup>12</sup> Thus, the uncertainty of the method used remains unaddressed.

Scientific justification should be retained to help establish SPS measures, however, the difficulties in implementation faced by developing countries, including the selected countries, must be stressed. While scientific evidence is a vital test to determine compliance, the author agrees with Peel’s suggestion that the assessment of scientific justification should not be the only consideration. The limitations in gathering scientific evidence should be considered by undertaking an assessment of additional factors, such as consistency of the government’s policy in protecting health.<sup>13</sup>

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<sup>7</sup> Ibid.

<sup>8</sup> *Regulation of the Minister of Agriculture No. 84/Permentan/PD.410/9/2013*, Consideration.b.c.

<sup>9</sup> *Undang-Undang Nomor 18 Tahun 2012 tentang Pangan* [Law No 18 of 2012 on Food] (Indonesia), art 37(1).  
<sup>10</sup> SPS Agreement, art 5.7.

<sup>11</sup> Gruszczynski, above n3, 391

<sup>12</sup> Ibid 393.

<sup>13</sup> Peel, above n4.

## 2 Transparency Provisions

The provisions of the transparency obligations laid down in Article 7,<sup>14</sup> Annex B,<sup>15</sup> Article 5.8<sup>16</sup> and the ‘Notification Procedure’ provide rules of procedure for notification to the WTO SPS Committee.<sup>17</sup> Nevertheless, ambiguity in the provision impacts its successful implementation.

The use of different terms of SPS ‘measures’ in Annex A.1 and SPS ‘regulations’ in Annex B.1<sup>18</sup> with similar definitions as discussed in Chapter 2,<sup>19</sup> is unclear. The WTO analytical index states that SPS regulations are a ‘sub-category’<sup>20</sup> of SPS measures, which implies that SPS regulations are narrower than SPS measures. Since this term is in Annex B in the context of the transparency obligation, this may result in different perceptions as to whether or not only SPS ‘regulations’ need to be notified. On the other hand, the SPS Committee has clarified that the terms ‘measures’ and ‘regulations’ are interchangeable,<sup>21</sup> meaning that both terms are the same. However, confusion remains in demonstrating the incoherency within the WTO SPS system.

Notification procedures are broad and unclear. For example, notification must be undertaken only if criteria is met that may ‘have a significant effect on trade’,<sup>22</sup> which is elucidated as criteria that has been ‘affected by one or more SPS regulations in combination; in a specific product, group of products or products in general; and between two or more Members’.<sup>23</sup> With regard to the selected countries’ experience, the Philippines’s interpretation is that it did not need to notify of its SPS regulation, AO22, since it was only an amendment to a previous regulation and did not impose any different import requirements,<sup>24</sup> while exporting partners claim the reverse was true.

The transparency obligations are more concerned with procedures rather than the outcome of the procedures set out. Annex B of the SPS Agreement and the Notification Procedure comprise detailed procedures for transparency, such as regular notifications and emergency notifications, timings of the notifications, type of changes of notifications and the documents to be provided. The 2008 Transparency Procedure requires Members to use a new format and provide details of

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<sup>14</sup> Article 7 governs the obligations of the Members to provide notification on their SPS measures, the changes and relevant information.

<sup>15</sup> Annex B ‘Transparency of Sanitary and Phytosanitary Regulations’, provides procedures in relation to the establishment of a National Notification Authority (NNA), a National Enquiry Point (NEP), and a notification obligation for Members.

<sup>16</sup> Article 5.8 requires Members to be transparent in providing an ‘explanation of reasons’ for their SPS measures.

<sup>17</sup> *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)*, WTO Doc G/SPS/7/Rev.3 (20 June 2008, as of 1 December 2008) Revision.

<sup>18</sup> Members obliged to notify their ‘SPS regulations’, those are ‘sub-category’ of SPS measures, such as ‘laws, decrees or ordinances which are applicable generally’. See Annex B.1.

<sup>19</sup> See Chapter 2, 32.

<sup>20</sup> SPS Agreement Analytical Index, Annex B [545].

<sup>21</sup> *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Doc G/SPS/36 (Report by the Committee) (11 July 2005, Adopted on 30 June 2005) XIV [94] 21.

<sup>22</sup> SPS Agreement, Annex B[5].

<sup>23</sup> *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)*, WTO Doc G/SPS/7/Rev.3 (20 June 2008) A.9.

<sup>24</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.12, 59.

explanations whether the notification is new or an amendment, and whether or not the notification refers to international standards. However, the detailed, rigid and procedural approach makes the transparency obligation more burdensome for Members.<sup>25</sup> The SPS Information Management System (SPS-IMS) is an online system to submit notifications, which is intended to manage the flow of notification documents. However, some Members experience challenges in setting up the infrastructure required for this method, such as computers, internet facilities and skilled human resources. Consequently, Members might be more focused on the procedures rather than the substantive nature of the obligation, which is transparency.

On the other hand, some procedures are voluntary, such as attaching an electronic copy of the regulations to the notification<sup>26</sup> and procedures to notify the determination of the equivalence recognition of SPS measures of particular Members.<sup>27</sup> These procedures have been ineffective,<sup>28</sup> in part because many Members have ignored them, although in practice they grant the equivalence recognition to particular Members. The WTO noted that only two Members have notified the determination of the equivalence recognition of SPS measures.<sup>29</sup> However, the transparency procedure cannot be challenged through dispute settlement.<sup>30</sup>

The SPS Agreement should unify the terms to protect health to avoid ambiguity and improve legal certainty; the use of different terms might impact on the implementation of SPS transparency. The term ‘SPS measures’ seems more appropriate than ‘SPS regulations’, since the former have a wider and more certain scope. To improve transparency, it should consider publishing and notifying all SPS measures without any limiting factor such as whether they are ‘SPS measures’ or ‘SPS regulations’.

The notification provisions should be outcome-oriented rather than procedural-based and the proposed procedures should be legally binding, such as attaching SPS regulations and procedures to share equivalence experience. Such an approach would reduce the time taken to access the

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<sup>25</sup> Developing Members view the transparency principle as ‘excessive, burdensome and costly’. See L. Biukovic, ‘Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan’ (2008) 11 JIEL 803, 811 in L. Biukovic, ‘International Law Interrupted-A Case of Selective Adaptation’ 60 U.N.B.L.J 161, 171 <<http://international.westlaw.com>>.

<sup>26</sup> *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)*, G/SPS/7/Rev.3, 4[19].

<sup>27</sup> Ibid 7[H.44].

<sup>28</sup> From 15 September 2011 to 15 September 2012, 12% of Member notifications did not include the attachment of full text or a summary of the regulations, which made it difficult and time consuming to access a copy of the regulations, in particular the official translation. This might significantly affect the availability of time to provide comment to the notifying Members. See *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement, Note by the Secretariat, Revision*, G/SPS/GEN/804/Rev. 5, 13.

<sup>29</sup> These are Panama, which notified in 2007, and the Dominican Republic in 2008. See *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement, Note by the Secretariat, Revision*, WTO Doc G/SPS/GEN/804/Rev. 5 (4 October 2012) 3.

<sup>30</sup> Denise Prevost and Peter Van den Bossche ‘The Agreement on the Application of Sanitary and Phytosanitary Measures’, in Patrick F.J. Macrory, Arthur E. Appleton, and Michael G. Plummer (eds) *The World Trade Organisation: Legal, Economic and Political Analysis*, Volume 1 (Springer Science, 2005) 367.

regulation, maximise the time for providing responses and sharing information regarding the equivalence recognition experience. Although the 2008 Transparency Procedure provision is stated to be a guideline only,<sup>31</sup> to be applied on a voluntary basis, it was adopted by the SPS Committee as an ‘ad referendum’ basis.<sup>32</sup> Members should adhere thus to the agreement.

### 3 Harmonisation

The harmonisation provisions in Article 3 are ambiguous and lack coherency. Article 3.1 is intended to promote harmonisation, however Landwehr states that Article 3.3 weakens the promotion by allowing Members to establish higher SPS measures based on their Appropriate Level of Protection (ALOP) which differ from international standards.<sup>33</sup> Consequently, despite the promotion of harmonisation, Members have been developing SPS measures which do not conform to international standards.<sup>34</sup> Although Article 3.3 seems to hinder Article 3.1, this does not mean that Article 3.3 weakens Article 3.1. The SPS Agreement provides rights for Members to establish higher standards for the benefit of the public. Thus, the SPS Committee should improve the promotion of harmonisation and improve cooperation with other international organisations and developed Members for providing assistance to developing countries.

Further, harmonisation has not resulted in benefits to all Members,<sup>35</sup> because compliance with international standards is only rewarded by a presumption of consistency,<sup>36</sup> which may be challenged by other Members. Thus, harmonisation does not guarantee that the measures are secure from challenges by other Members. For example, the Philippines’ AO22 stated that it referred to the *Codex Code of Practice for the processing and Handling of Quick Frozen Foods-CAC/RCP 8 1976*, however several Members challenged this<sup>37</sup> because the Philippines did not provide the additional information required by Article 5.7. Thus, Members should be aware of the SPS obligation framework.

One benefit of harmonisation is that Members do not need to undertake risk assessments. However, harmonisation would only be possible where international standards already exist.<sup>38</sup> One problem with this is that international standards are not always viable. For example, Malaysia is not

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<sup>31</sup> Ibid, 1.

<sup>32</sup> This means that all Members agreed, with no objections. See *Decision on SPS Transparency Confirmed*, WTO: 2008 News Items (30 May 2008) September 2014.

<sup>33</sup> Oliver Landwehr, ‘Article 3 SPS’, in Rudiger Wolfrum, Peter-Tobias Stoll, and Anja Seibert-Fohr (Eds), *WTO-Technical Barriers and SPS Measures* (Martinus Nijhoff, 2007), 421.

<sup>34</sup> *Overview regarding the level of implementation of the transparency provisions of the SPS Agreement*, WTO Doc G/SPS/GEN/804/Rev.4 (2011).

<sup>35</sup> Landwehr, above n33, 421.

<sup>36</sup> Ibid 414; SPS Agreement, art 3.2.

<sup>37</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.12, 58.

<sup>38</sup> SPS Agreement, article 3.1.

able to establish a Maximum Residue Limits (MRL) on tropical fruits due to the lack of international standards.<sup>39</sup>

Harmonisation is at great concern for ASEAN countries<sup>40</sup> because the adoption of international standards can be difficult to implement. Harmonisation is a ‘generalisation of practice and standards’,<sup>41</sup> thus the selected countries must adapt both their legal systems and technical applications. This involves high level of complexity in relation to quarantine, customs and food safety.<sup>42</sup> The political and cultural situations often hamper the harmonisation process, as countries with sovereign, national governments are likely to apply their own legal policy. Thus, the government should aim to improve political will to adopt international standards into their SPS legislation.

#### 4 International Standards Setting

International standards usually set higher level of standards than those of the developing countries, including the selected countries,<sup>43</sup> primarily because the formation of international standard-setting has been, for the most part, undertaken by developed countries.<sup>44</sup> The majority of developing countries are ‘standard-takers’ instead of ‘standard-makers’.<sup>45</sup> The participation of developing countries in international standards body meetings and in the process of the international standard-setting and development is low.<sup>46</sup> Likewise, developing countries’ participation in the Codex’s committee on drafting proposed standards is below the level of participation in the Commission,<sup>47</sup> and the quality of their participation in OIE is also low.<sup>48</sup> Financial difficulties as

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<sup>39</sup> Norma Othman, Crop Quality Control Division Department of Agriculture, *Malaysian Agricultural Produce Challenge Meeting International Standards* (16 March 2010) 17.

<sup>40</sup> Office of the Chief Plant Protection Officer Australian Government Department of Agriculture Fisheries and Forestry-DAFF (Canberra), *Mid-Term Review of Australia’s Regional ‘Sanitary Phytosanitary Capacity Building Program’ (SPSCBP), Final Report of the mid-Term Review Team* (28 May 2008) <[www.ausaid.gov.au/Publications/Documents/ardcp-ipr.doc](http://www.ausaid.gov.au/Publications/Documents/ardcp-ipr.doc)> 6.

<sup>41</sup> J. Michael Finger, ‘The WTO’s Special Burden on Less Developed Countries’, *Cato Journal*, Vol. 19 No. 3 (Winter 2000) 431 <<http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/2000/1/cj19n3-9.pdf>>. Ibid 435.

<sup>43</sup> *Relationship with Codex, IPPC and OIE*, WTO Doc G/SPS/GEN/775 (Note by the Secretariat) (15 May 2007).

<sup>44</sup> WTO Agreement Series: *Sanitary Phytosanitary Measures* (2014) 19 <[http://www.wto.org/english/res\\_e/booksp\\_e/agrmntseries4\\_sps\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/agrmntseries4_sps_e.pdf)>.

<sup>45</sup> ‘Influencing Market Standards: A Voice for Developing Countries’, *the Quarterly Magazine of the International Trade Center, Issue 2/2003*, 3 <<http://www.tradeforum.org/Influencing-Market-Standards-A-Voice-for-Developing-Countries/>>.

<sup>46</sup> See, e.g., *Summary Report on the Workshop on the International Standard-Setting Organisation: Process and Participation*, WTO Doc G/SPS/GEN/250 (14 May 2001) 1; *Decision on the Implementation of Article 4 of the Agreement of the Application of Sanitary and Phytosanitary Measures*, WTO Doc G/SPS/19/Rev.2 (23 July 2004) 2.

<sup>47</sup> Ibid 5.

<sup>48</sup> Ibid 2.

well as lack of resources, infrastructures and communications at the national level are particular challenges in the standards-setting process.<sup>49</sup>

The system of international standards setting has affected the low level of participation of developing countries. In the International Plant Protection Convention (IPPC), the review and approval of drafts of international standards are undertaken by the Interim Standard Committee before the drafts are distributed to Members for comment. The draft standards will be amended if there are comments from Members, but the draft will be sent to the Interim Commission on Phytosanitary Measures (Commission) for adoption when no comment exists. The adoption of the standards by the Commission is on a unanimous basis, or voting based on a two-thirds majority.<sup>50</sup> On one hand, the IPPC system of standard-setting allows Members, including developing countries, to participate in the standard-setting process. However, this may be insufficient for Members, particularly developing countries, since this is the only opportunity to provide comments on standards which have already been drafted. The input would be broader if this opportunity was given in the drafting stages. Further, the system of adoption based on a two-thirds majority might be of less benefit to developing countries, since it is developed countries who are the majority in the draft standard-setting, and will be likely to agree to adopt the international standards.<sup>51</sup>

The standards-setting in the Office International des Epizooties (OIE) relies on scientific material in recognised international scientific journals submitted under peer review. An international expert drafts the standards based on the material, which will then be commented on by an ad-hoc team selected by the Director-General in consultation with viable laboratories who provide the experts. The draft will then be reviewed by the OIE Specialist Commission for consideration and will finally be submitted to the International Commission for adoption.<sup>52</sup> The OIE standard-setting system is likely to be less concerned with the situation of developing countries because consultation with the viable laboratories will most likely provide the name of experts from internationally recognised laboratories from developed countries. The resulting standards will more likely to be that of the developed countries, since the best practice standards will be applied and these are usually those of developed Members.<sup>53</sup>

The standards-setting process in Codex Alimentarius Commission (Codex) comprises eight steps, including the draft arrangement by the Codex committee. The draft is sent by the task force to the government and organisation for comments and they are adopted on a consensus basis, by a

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<sup>49</sup> Ibid 3-5.

<sup>50</sup> Ibid 2.

<sup>51</sup> Ibid.

<sup>52</sup> *Summary Report on the Workshop on the International Standard-Setting Organisation: Process and Participation*, WTO Doc G/SPS/GEN/250, 3.

<sup>53</sup> Ibid.

simple majority.<sup>54</sup> However, in practice consensus is not always reached, and voting usually takes place. According to Ni, the scientific principle orientation in Codex standard-setting is diluted due to a high participation of trade and industries.<sup>55</sup> Thus, the standard setting process of the Codex seems to indicate that this is de facto skewed in favour of business interests.<sup>56</sup>

Notwithstanding the weakness of international standard-setting, Malaysia has been involved in the international standards meeting of Codex and has influenced the development of international standards, particularly of filled milk and milk substitutes of vegetable nuts made of palm oil.<sup>57</sup> This demonstrates that developing countries may benefit from the development of international standards provided they are actively involved in the process of trade facilities.<sup>58</sup>

With respect to standard setting, the SPS Agreement has no authority over international standards bodies. Thus, the SPS Committee may be able to urge for the establishment of international standards to improve opportunities for developing countries to participate. The SPS Committee should actively encourage developing countries to participate in such international standards fora.

With regard to the participation of developing Members in the international standard-setting, Article 10.4 of S&D treatment provides ‘Members should encourage and facilitate the active participation of developing country Members in the relevant international organisations’.<sup>59</sup> However, the construction of this provision has a ‘best-efforts’<sup>60</sup> characteristic because of the use of ‘should’ and is included in a ‘non-mandatory’ S&D.<sup>61</sup> Thus, this provision is less likely to be enforceable in practice,<sup>62</sup> with the result that no sanction can be imposed on developed countries who do not comply.<sup>63</sup>

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<sup>54</sup> Ibid 5.

<sup>55</sup> Kuei-Jung Ni, ‘Does Science Speak Clearly and Fairly in Food Safety Dispute? The Search for an Optimal Response of WTO Adjudication to Problematic International Standard-Making’, 68 *Food & Drug L.J.* 97, 2013, 13.

<sup>56</sup> David G. Victor, ‘The Sanitary and Phytosanitary Agreement of the World Trade Organisation: An Assessment After Five Years’ (2000) 32 *N.Y.U.J. Int’l L. & Pol.*, 887 <<https://litigation-essentials.lexisnexis.com/>>.

<sup>57</sup> International Trade Forum (16 August 2014) 2-3 <<http://www.tradeforum.org/Quality---A-Prerequisite-for-Exports-Increasing-Complexity-of-Technical-Requirements-in-Export-Markets/#sthash.A2ycMRLO.dpuf>>.

<sup>58</sup> See, e.g., STDF, *History* <<http://www.standardsfacility.org/history>>; STDF, *Vision and Mission* <<http://www.standardsfacility.org/vision-and-mission>>. STDF is a joint committee of “FAO, OIE, World Bank, WHO and WTO at the Doha Ministerial Conference in November 2001...agreed to jointly explore new technical and financial mechanisms for coordination and resource mobilization to ensure the most effective use of technical and financial resources”.

<sup>59</sup> SPS Agreement, art 10.4.

<sup>60</sup> Edwini Kessie, ‘The Legal Status of Special and Differential Treatment’ in George A Bermann and Petros C Mavroidis (eds), *WTO Law and Developing Countries* (Cambridge University Press, 2007), 14.

<sup>61</sup> *Implementation of Special and Differential Treatment Provisions in WTO Agreement and Decisions: Mandatory and Non-Mandatory Special and Differential Treatment Provisions, Corrigendum*, WTO Doc WT/COMTD/W/77/Rev.1/Add.1/Corr.1 (4 February 2002) 3.

<sup>62</sup> Nandang Sutrisno, ‘Conceptualizing Substantive Justice Conference Article: Substantive Justice Formulated, Implemented, and Enforced as Formal and Procedural Justice: A Lesson from WTO Special and Differential Treatment Provisions for Developing Countries’ (2010) 13 *J. Gender Race & Just.* 671, 11-15.

<sup>63</sup> JM Migai Akech, ‘Developing Countries at Crossroads: Aid, Public Participation, and the Regulation of Trade in Genetically Modified Foods’, 29 *Fordham Int’l L.J.* 265, *Westlaw*, 2.

In responding to financial difficulties, the Food and Agriculture Organisation (FAO), OIE, World Health Organisation (WHO), WTO and World Bank established the Standards and Trade Development Facility (STDF) in December 2004<sup>64</sup> to explore new technical and financial mechanisms to facilitate inter-agency collaboration and resource mobilisation for the most effective use of the resources.<sup>65</sup> The WTO also established Aid for Trade, which aims to operationalise aid for trade. In 2006, the Aid for Trade Task Force recommended Aid for Trade focus on the identification of recipient countries' needs, respond to donors and take the role as a bridge between them.<sup>66</sup> STDF assists the capacity of developing countries in meeting SPS standards and funds projects on capacity building.<sup>67</sup> Thus, financial difficulties and problems of capacity have been addressed by the establishment of the STDF.

## 5 *Equivalence Principle*

The equivalence provision of the SPS Agreement uses language that Members 'shall accept'<sup>68</sup> the SPS measures of other Members as equivalence. According to Landwehr, this means that Members have no discretion to refuse requests of the equivalence recognition once the inspection, test and relevant procedures have been met.<sup>69</sup> In addition, the equivalence recognition does not require 'duplication or sameness' of the measures, but accept 'the alternative' of the measure.<sup>70</sup>

Despite this, the Equivalence Decision<sup>71</sup> results in a lack of predictability with regard to the period of time for the process of equivalence recognition. It only regulates the period of time for importing Members to respond to a request for a consideration of equivalence recognition of an exporting Member, which is must be 'in a timely manner' and to be within 'a six-month period of time'.<sup>72</sup> Instead of ruling the estimated time for the whole process of recognition, the Equivalence Decision authorises Members involved in the process to estimate the time needed.<sup>73</sup> The provision is unpredictable and brings about legal uncertainty in the process of equivalence recognition,<sup>74</sup> because the agreement depends primarily on a consensus between the Members involved in the

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<sup>64</sup> STDF, above n58.

<sup>65</sup> Ibid.

<sup>66</sup> WTO, *Aid for Trade* <[https://www.wto.org/english/tratop\\_e/devel\\_e/a4t\\_e/aid4trade\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm)>.

<sup>67</sup> *Standards and Trade Development Facility*, WTO Doc G/SPS/GEN/371 (18 February 2003).

<sup>68</sup> SPS Agreement, art 4.1.

<sup>69</sup> Oliver Landwehr, Article 4 SPS, in Rudiger Wolfrum, Peter-Tobias Stoll, and Anja Seibert-Fohr (Eds), *WTO-Technical Barriers and SPS Measures* (Martinus Nijhoff, 2007), 433.

<sup>70</sup> Decision on the Implementation of article 4 by the SPS Committee called "Decision on Equivalence". This was adopted by the SPS Committee in 2001 and was revised in 2002, 2003, and 2004. See *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Doc G/SPS/19/Rev. 2 (23 July 2004) 1.

<sup>71</sup> See Chapter 2, page 39 f/n208.

<sup>72</sup> G/SPS/19/Rev. 2, 2 [3].

<sup>73</sup> G/SPS/19/Rev. 2, 3.

<sup>74</sup> Landwehr, above n69, 434.



process, rather than a particular time period determined by the SPS Agreement. Consequently, Members usually take a long time to achieve recognition, for example Malaysia takes two to five years.<sup>75</sup> Similarly, Indonesia takes about five years of negotiation.<sup>76</sup>

Further, as a consensus, the consideration of the equivalence recognition might be heavily influenced by the political will of the Members involved towards the advantages that they may gain. It often occurs that the equivalence recognition from importing Members requires the exchange of the equivalence recognition from exporting Members, for example the granting of an import license for Korean oranges to the Philippines in exchanged for the export of mangoes from the Philippines to Korea.<sup>77</sup> This situation is acceptable provided that the process complies with the guidelines in the Equivalence Decision and both Members wish to accommodate their other national trade interests in the arrangement. Thus, the complex procedure on the equivalence principle decision does not assist the outcomes, because the outcomes depend on the political will and negotiation processes among the Members.

The Equivalence Decision recommends exporting Members provide all of the relevant information and documents, as the more information provided the quicker the request of equivalence recognition will be processed by importing Members.<sup>78</sup> Further, the SPS Committee has adopted a special format and procedure for the notification of equivalence recognition experiences in the SPS-IMS in order to provide Members with predictability in practice. However, the selected countries do not include their experiences in the notification.<sup>79</sup> Thus, the unpredictability in the timing of the equivalence recognition process and a lack of examples of other Members' experiences become additional barriers to international trade.

With regard to Article 9 of the SPS Agreement and the Equivalence Decision, the selected countries should be active in bilaterally negotiating the technical assistance proposal with importing Members.<sup>80</sup> This technical assistance might be in the form of assistance in identifying measures which can be recognised as equivalent and in accessing markets.<sup>81</sup> Technical assistance is important in the improvement of scientific capacities, laboratory facilities and certification and accreditation authorities.

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<sup>75</sup> DoA, *Crops and Quarantine, Market Access of Malaysian Agriculture Produce* (18 December 2014) <<http://www.doa.gov.my/363>>.

<sup>76</sup> IAQA, *Ekspor Perdana Sarang Walet Indonesia ke Tiongkok* (The first Export of Indonesia Bird Nests to China) (29 January 2015) <[http://www.karantina.deptan.go.id/?page=pers\\_detail&&id=24](http://www.karantina.deptan.go.id/?page=pers_detail&&id=24)>.

<sup>77</sup> BPI-PQS, *RP allows for Importation of Oranges from Korea* <<http://pqs.da.gov.ph/index.php/component/content/article/48-controt/74-rp-allows-importation-of-oranges-from-korea>>.

<sup>78</sup> G/SPS/19/Rev. 2, 3.

<sup>79</sup> See *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement, Note by the Secretariat, Revision*, WTO Doc G/SPS/GEN/804/Rev. 5 (4 October 2012) 3.

<sup>80</sup> See, e.g., *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, 6 [8]; SPS Agreement, art 9.

<sup>81</sup> G/SPS/19/Rev. 2, 6 [8].

The Equivalence Decision should be amended in order to be more outcome-oriented rather than process oriented, by providing a time frame for the whole process of equivalence recognition. This would provide greater predictability and legal certainty around the equivalence recognition arrangement. Additionally, importing Members should be encouraged to provide technical assistance and, where possible should be obligated to do so.

## 6 *Regionalisation Provisions*

The provision of regionalisation in Article 6<sup>82</sup> and the Regionalisation Guideline<sup>83</sup> contribute to the difficulties faced by the selected countries from a lack of predictability about the outcome. The Guideline sets out procedures containing general considerations, discussion, and steps required, however it does not provide an estimated time for the whole process. The Guideline only stipulates the period of time for discussion, which is normally 90 days, but this can be altered by the Members involved,<sup>84</sup> and may be postponed for a reasonable period of time with particular considerations.<sup>85</sup> Consequently, the recognition of regionalisation process is unpredictable and lengthy.

The Guideline, as further implementation for Article 6 does not provide a quicker or shorter time schedule for the regionalisation recognition. Before Members agreed to the Guideline, there was some unease that the Guideline is ‘not stronger in trying to avoid ‘undue delay’ in recognising a region’s status’.<sup>86</sup> However, they agreed to apply the Guideline and then review it once it had been applied in practice.<sup>87</sup> Moreover, since the Guideline is ‘non-binding’<sup>88</sup> it would be difficult to make the guidelines stricter and expect compliance.

The Regionalisation Guideline encourages those importing developed Members involved in the trade of regionalised products from certain developing countries to provide assistance in the process of regionalisation. However, in practice such assistance has been infrequent. Importing developed Members usually choose those developing Members who are politically and socially appropriate to be assisted.<sup>89</sup> For example, technical assistance has been granted by the EU to

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<sup>82</sup> SPS Agreement, art 6.

<sup>83</sup> *Guideline to Further the Practical of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Doc G/SPS/48 (16 May 2008).

<sup>84</sup> *Ibid.*, 3 [15].

<sup>85</sup> *Ibid.*, 3 [17].

<sup>86</sup> WTO: 2008 News Items, Sanitary and Phytosanitary Measures, *Members Set to Agree on Regionalisation, Improve SPS Transparency* (2-3 April 2008) <[http://www.wto.org/english/news\\_e/news08\\_e/sps\\_apr08\\_e.htm](http://www.wto.org/english/news_e/news08_e/sps_apr08_e.htm)>.

<sup>87</sup> *Ibid.*

<sup>88</sup> WTO: 2008 News Items, Sanitary and Phytosanitary Measures, *Decision on SPS ‘Regionalisation’ Confirmed* (19 May 2008) <[http://www.wto.org/english/news\\_e/news08\\_e/sps\\_may08\\_e.htm](http://www.wto.org/english/news_e/news08_e/sps_may08_e.htm)>.

<sup>89</sup> See WTO Doc G/SPS/GEN/204/Rev.11/Add.3, 30.

Bolivia, although Argentina and Chile have made the same request.<sup>90</sup> Thus, not all exporting developing Members who asked for assistance will be granted it.

The Regionalisation Guideline should be amended to make the process of regionalisation speedier, by providing time frames for the entire process. The Guideline should also be stricter in requiring importing Members, where possible, to provide technical assistance to developing countries.

## 7 *Technical Assistance and S&D Treatment Provisions*

The issue of the ineffectiveness of technical assistance is affected by the legal nature of the technical assistance provision. Article 9 has unassertive characteristics as it provides that ‘Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organisations...’.<sup>91</sup> The use of the word ‘agree’ is viewed as ambiguous, because there is no assurance that Members will facilitate technical assistance to developing countries. Seibert-Fohr commented that Article 9.1 is merely a ‘best-endeavour’ clause<sup>92</sup> in that Members may grant technical assistance based on availability and convenience, due to political and cultural considerations.

Article 9.2 stipulates that importing Members “shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunity...”.<sup>93</sup> Notwithstanding the word ‘shall’ in that article, it is still uncertain whether or not the Member will provide technical assistance, because the Member is only required to ‘consider’ whether the Member is to provide technical assistance or not. Thus, it is purely a directory provision. Seibert-Fohr states that Article 9.2 has ‘no legally binding obligation’ on importing Members to provide technical assistance.<sup>94</sup> Consequently, there is less certainty and no guarantee that developed countries will provide technical assistance.

Article 10 regarding the S&D treatment provision has a similar legal nature to the technical assistance provision in Article 9.2. Article 10.1 stipulates: ‘...Members shall take account of the special needs of developing country Members...’,<sup>95</sup> which is also characterised as a ‘best

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<sup>90</sup> Annamalai Sivapragasam, Booty Othman Asna, and Add. Thalib Samsinar, Asian Productivity Organisation (APO), *Sanitary and Phytosanitary Measures*, Report of the APO Seminar on Sanitary and Phytosanitary Measures held in Japan 4-11 December 2002 (02-AG-GE-SEM-09), 133 and 135 <<http://www.apo-tokyo.org/publications/wp-content/uploads/sites/5/pjrep-02-ag-ge-sem-09.pdf>>.

<sup>91</sup> Emphasis added.

<sup>92</sup> Anja Seibert-Fohr, Article 9 SPS, in Rudiger Wolfrum, Peter-Tobias Stoll, and Anja Seibert-Fohr (Eds), *WTO-Technical Barriers and SPS Measures* (Martinus Nijhoff, 2007) 497.

<sup>93</sup> Emphasis added.

<sup>94</sup> Seibert-Fohr, above n92.

<sup>95</sup> SPS Agreement, art 10.

endeavours obligation'.<sup>96</sup> Article 10.2 emphasises 'longer time frames for compliance' of developing countries with regard to the introduction of new SPS measures of other Members,<sup>97</sup> which is normally 'not less than six months'.<sup>98</sup> However, the longer time frames for compliance are not automatically provided, they 'should be accorded on products interest to developing country Members so as to maintain opportunities for their exports'.<sup>99</sup> The words 'should be accorded' similarly contain 'no legal binding obligation'.<sup>100</sup> Further, the longer time frames for compliance might be provided when the ALOP of the SPS allows for the scope of a phased introduction of new SPS measures. In the situation where the ALOP does not allow scope for this, it requires Members 'upon request enter into consultations'.<sup>101</sup>

Moreover, Article 10.3 of the SPS Agreement provides 'time-limited exceptions in whole or in part from obligations' of the agreement. This is to ensure that developing country Members are able to comply with the SPS Agreement provisions. Nevertheless, this time-limited exception is not granted automatically, but requires a request from developing country Members, which can only be granted after considering the countries' 'financial, trade and developments need'.<sup>102</sup>

With regard to the uncertainty and lack of predictability of the technical assistance and S&D treatment provisions,<sup>103</sup> Members have recommended the WTO Commission of Trade and Development identify those S&D treatment provisions that are mandatory in nature, and make mandatory any which are currently non-binding in character.<sup>104</sup> Therefore, the WTO split the S&D treatment into six categories<sup>105</sup> and determined the legal nature of each on the basis of rule, namely 'mandatory' which uses 'shall' and 'non-mandatory', which use 'should'.<sup>106</sup> To determine the provisions that are ambiguous in their language, the Commission determined Articles 9.1 and 9.2,

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<sup>96</sup> Anja Seibert-Fohr, Article 10 SPS, in Rudiger Wolfrum, Peter-Tobias Stoll, and Anja Seibert-Fohr (Eds), *WTO-Technical Barriers and SPS Measures* (Martinus Nijhoff, 2007) 507.

<sup>97</sup> SPS Agreement, art 10.2.

<sup>98</sup> *Procedure to Enhance Transparency of Special and Differential Treatment in Favour of Developing Country Members*, Decisions by the Committee, Revision, WTO Doc G/SPS/33/Rev.1 (18 December 2009) 2 [3].

<sup>99</sup> SPS Agreement, art 10.2.

<sup>100</sup> Seibert-Fohr., above n96, 508.

<sup>101</sup> G/SPS/33.

<sup>102</sup> Emphasis added.

<sup>103</sup> *Report on Proposal for Special and Differential Treatment*, WTO Doc G/SPS/35 (7 July 2005) (Adopted by the Committee on 30 June 2005) 7.

<sup>104</sup> *Implementation Related Issues and Concerns: Decisions of 14 November 2001*, WTO Ministerial Conference Fourth Session Doha 9-14 November 2001, WT/MIN(01)/17 12.1(1), 8.

<sup>105</sup> *Implementation of Special and Differential Treatment Provisions in WTO Agreement and Decisions: Mandatory and Non-Mandatory Special and Differential Treatment Provisions, Corrigendum*, WTO Doc WT/COMTD/W/77/Rev.1/Add.1/Corr.1 (4 February 2002) 1.

<sup>106</sup> The categories are '(i) provisions aimed at increasing the trade opportunities of developing country Members; (ii) provisions under which WTO Members should safeguard the interests of developing country Members; (iii) flexibility of commitments, of actions, and use of policy instruments; (iv) transitional time periods; (v) technical assistance; and (vi) provisions relating to least-developed country Members. It is recalled that provisions in Category (vi) all fall into one of the other five categories, but are distinctive insofar as their application relates exclusively to least-developed countries'. Ibid.

Article 10.1, and Annexes B.1, B.2., and B9 as mandatory, and Articles 10.2 and 10.4 as non-mandatory.<sup>107</sup>

According to Shaffer, there are indications that technical assistance in practice is never neutral,<sup>108</sup> since it might be more ‘donor country-driven’<sup>109</sup> in that it is offered for the interest of the donor countries, rather than the recipient countries. Some technical assistance programs may be provided with a disguised purpose and do not necessarily match the needs of the developing Members.<sup>110</sup> Further, technical assistance in practice is usually granted to Members with a historical background relationship, such as between a Member and its former colonies.<sup>111</sup> Therefore, technical assistance, which is ‘donor country-driven’, is relatively random,<sup>112</sup> and may not be specifically offered to those Members most in need.

Technical assistance would be more neutral if it was requested by the developing countries. In most cases, technical assistance, such as a capacity building program, is likely to be most effective if targeted to meet the specific needs at the national or sub-regional levels, particularly in the area of technical skills training.<sup>113</sup> The Secretariat of the SPS Committee noted that technical assistance provided with a ‘demand-driven’<sup>114</sup> approach, based on an application from the interested participants, results in a more effective program. For that reason, the SPS Committee has provided technical assistance recommendations, such as training, based on requests from participants training in Members’ regions and based on requests from the Member’s government. Such requests are submitted to the WTO Trade Related Technical Assistance.<sup>115</sup>

The SPS Agreement has provided a mechanism, a procedure of transparency for S&D treatment, to assist developing countries in approaching technical assistance towards the application

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<sup>107</sup> Ibid 3.

<sup>108</sup> Gregory Shaffer, ‘Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?’ (Fall 2005) *LexisNexis*, 23 *Wis. Int’l L.J.* 643, 4.

<sup>109</sup> For example, EU technical assistance was provided for equipping Bolivia’s laboratories. The goal was to ensure Bolivia’s compliance with the EU standards, with the intention that the EU standards will be followed by Bolivia and possibly other countries. See, e.g., Ibid; J. Michael Finger, ‘The WTO’s Special Burden on Less Developed Countries’, *Cato Journal*, Vol. 19 No. 3 (Winter 2000) 432 <<http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/2000/1/cj19n3-9.pdf>>; G/SPS/GEN/204/Rev.11/Add.3, 31 [136].

<sup>110</sup> See, e.g., Uche Ewelukwa, ‘Special and Differential Treatment in International Trade Law: A Concept in Search Content’, (2003), 79 *N. Dak. L. Rev.* 831, *LexisNexis*, 3; Akech, above n 45, 3; Frank J Garcia, ‘Beyond Special and Differential Treatment’ (2004), 27 *B.C. Int’l & Comp. L. Rev.* 291, 292.

<sup>111</sup> European Commission, *International Cooperation and Development-Historical Overview of EU Cooperation and Trade*, <[https://ec.europa.eu/europeaid/historical-overview-eu-cooperation-and-aid\\_en](https://ec.europa.eu/europeaid/historical-overview-eu-cooperation-and-aid_en)>.

<sup>112</sup> Shaffer, above n108, 11.

<sup>113</sup> Aus Mid-Term Review of Australia’s Regional Sanitary and Phytosanitary Capacity Building Program/SPSCBP, ix.

<sup>114</sup> See, e.g., *SPS Technical Assistance and Training Activities 1 September 1994 to 31 December 2012*, Note by the Secretariat-Revision, WTO Doc G/SPS/GEN/521/Rev.8 (4 March 2013) 2; G/SPS/GEN/521/Rev.7 (5 March 2012) 3.

<sup>115</sup> *WTO SPS Technical Activities in 2013: General Information, Selection Process, and Application Form*, Note by the Secretariat-Revision, WTO Doc G/SPS/GEN/997/Rev.3 (13 March 2013) 16.

of new SPS measures of other Members.<sup>116</sup> However, the enforceability of the S&D Transparency Procedure is likely to be weak because it can be modified, suspended and terminated at any time by the SPS Committee.<sup>117</sup> The S&D Transparency Procedure comprises procedures that include that Members ‘shall take account the special need’<sup>118</sup> of developing countries and LDCs, and states that the S&D should be employed ‘in favour of’<sup>119</sup> developing countries. Developing countries have opportunities to discuss any difficulties they may have in meeting new SPS measures of importing Members during the comment period after notification of the measures.<sup>120</sup> They can also have a consultation upon request when there is little time for introduction of new SPS measures,<sup>121</sup> or discuss with the importing Members upon request if they have difficulties in meeting the new SPS measures following the entry of these measures.<sup>122</sup> Developing countries also have a longer time to comply with new SPS measures. This longer time period is usually not less than six months.<sup>123</sup> The S&D Procedure also encourages importing Members to inform the SPS Committee whether and how S&D is provided or not provided to the requesting developing countries.<sup>124</sup> However, in practice this provision has been ineffective, as donor Members seem reluctant to share experiences.<sup>125</sup>

With respect to technical assistance, the selected countries should actively pursue technical assistance from donors and take advantage of the benefit of the trade facilities of international cooperations, such as STDF and Aid for Trade.

## 8 *Import Restrictions Affecting the Selected Countries*

The SPS measures of importing countries often contain import restrictions which hamper the selected countries’ exports. According to the World Bank, many countries establish higher standards for their SPS measures.<sup>126</sup> For example, the EU SPS measures on the application and modification of the EU Regulations on novel foods, which came into force in 2007<sup>127</sup> affect

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<sup>116</sup> *Procedure to Enhance Transparency of Special and Differential Treatment in Favour of Developing Country Members*, Decisions by the Committee, Revision, WTO Doc G/SPS/33/Rev.1 (18 December 2009).

<sup>117</sup> Ibid 8.

<sup>118</sup> Ibid [1].

<sup>119</sup> Ibid [9].

<sup>120</sup> Ibid 2.

<sup>121</sup> Ibid 4.

<sup>122</sup> Ibid 5.

<sup>123</sup> Ibid 3.

<sup>124</sup> Ibid 8.

<sup>125</sup> Ibid.

<sup>126</sup> *Measuring the Impacts of Standards on Agricultural Exports of Low Income Countries: The Standards Restrictiveness Index*, the World Bank Development Economic Research Group – Trade and Integration, WTO Doc GEN/SPS/GEN/1228 (13 March 2013) 2.

<sup>127</sup> Regulation (EC) No 258/97 of the European Parliament and of the Council (of 27 January 1997) Concerning Novel Foods and Novel Food Ingredients, *OJ L 043*, 14/02/1997 P. 1 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R0258:20090120:EN:PDF>>.

traditional and exotic foods of exporting countries, including Indonesia and the Philippines, since they require these commodities to fulfil the feature of ‘novelty’.<sup>128</sup> Some exporting countries, including Indonesia and the Philippines, have raised official concerns about this, requesting the EU reconsider the regulation since it would result in an unjustified non-tariff barrier to the trade of traditional foods, which would in turn impede economic activities.<sup>129</sup>

Some SPS measures of other Members have affected exports in the Philippines,<sup>130</sup> and have become import restrictions on the Philippines’s international trade. The US SPS measures on food safety laid down in the US Food Safety Enhancement Act of 2009 set tight requirements, such as the registration of export food companies, follow-up inspections and compulsory certifications for high-risk imported products. The expansion of the FDA’s authority under the US measure has presented a challenge for particular countries, including the Philippines. Exporting Members, such as China and India, supported by Costa Rica, Jamaica, Mexico, Pakistan and the Philippines, have raised their concerns regarding this. The Philippines requested that the measure be removed, claiming that it is unnecessarily burdensome and unduly increases the cost of compliance for small industries.<sup>131</sup>

The EU’s new SPS measures on maximum levels for certain contaminants (aflatoxins) in foodstuffs, are deemed to impose new restrictions on trade without a proper risk assessment. The sampling procedure is costly and burdensome, where, at that time, no international standards existed.<sup>132</sup> Through consultation undertaken by some countries, the problem was resolved in March 2004 with maximum levels set for some products and sampling procedures revised.<sup>133</sup>

Nevertheless, the above issues are available under the SPS Agreement, which allowed Members to create higher levels of SPS measures where international standards were insufficient to achieve Members’ ALOP, as governed by Article 3.3 of the SPS Agreement. However, Members must ensure their measures are based on scientific justifications or have undergone a risk assessment.<sup>134</sup>

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<sup>128</sup> Official Journal of the European Communities, 14.2.97 EN No. L 43/1, *Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 Concerning Novel Foods and Novel Food Ingredients*.

<sup>129</sup> Specific Trade Concerns (Note by the Secretariat-Revision), WTO Doc G/SPS/GEN/204/Rev.12 (2 March 2012) 23-29. Columbia, Ecuador, and Peru raised concern on this EU Regulation supported by Argentina, Bolivia, Plurinational State of, Brazil, Chile, Colombia, Costa Rica, Cuba, Benin, El Salvador, Honduras, India, Indonesia, Mexico, Paraguay, the Philippines, Uruguay, Bolivarian Republic of Venezuela.

<sup>130</sup> Bates M. Bathan and Flordeliza A. Lantican, *Economic Impact of Sanitary and Phytosanitary Measures on Philippine Pineapple Exports*, *J. ISSAAS Vol. 15, No. 1: 126-143 (2009)*, 134.

<sup>131</sup> *Specific Trade Concerns (Note by the Secretariat-Revision)*, WTO Doc G/SPS/GEN/204/Rev.12 (2 March 2012) 69-70.

<sup>132</sup> *Specific Trade Concerns (Note by the Secretariat-Addendum) Resolved Issues*, WTO Doc G/SPS/GEN/204/Rev.11/Add. 3 (1 March 2011) 30.

<sup>133</sup> *Ibid.*

<sup>134</sup> SPS Agreement, art 3.3.

Since importing Members have the opportunity to establish SPS measures higher than the international standards, the selected countries should improve their capacity to meet the SPS standards required. They should take advantage of technical assistance to enable them to maintain and enhance market access. Technical assistance in the area of equivalence recognition and regionalisation recognition should be continuously available for developing countries. Technical assistance in the form of capacity building support should be improved, since it is likely to be most effective if targeted to meet specific needs at the national or sub-regional levels, particularly in the area of technical skills training.<sup>135</sup> Article 9.2 allows developing countries to request longer time frames for compliance with new SPS measures. Developing countries are also allowed to request the SPS Committee for specified time-limited exceptions from their obligations in Article 10.3.

(i) *Private Standards*

The long unsettling issue of private standards in SPS implementation<sup>136</sup> is likely caused by their negative impact on international trade and their uncertain legal status under the SPS Agreement.<sup>137</sup> Private standards are viewed as being ‘in conflict with the letter and spirit of the SPS Agreement, such as lack of transparency; veritable barriers to trade, which the very SPS Agreement discourages; and having the potential to cause confusion and inequity’.<sup>138</sup> Private standards hamper trade and innovation, rather than promote trade<sup>139</sup> and the proliferation of their use likely impedes developing countries’ trade.<sup>140</sup> Wilson stated that more barriers to trade are likely to reduce the advantages that may be gained by developing countries.<sup>141</sup> Thus, the effects of private standards include those on market access, developmental aspects and legal concerns,<sup>142</sup> as well as the legitimacy.<sup>143</sup> The legitimacy is the real concern in the growing use of private standards.<sup>144</sup>

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<sup>135</sup> Office of the Chief Plant Protection Officer Australian Government Department of Agriculture Fisheries and Forestry-DAFF (Canberra), *Mid-Term Review of Australia’s Regional ‘Sanitary Phytosanitary Capacity Building Program’ (SPSCBP), Final Report of the mid-Term Review Team*, May 28<sup>th</sup> 2008, ix <[www.ausaid.gov.au/Publications/Documents/ardcp-ipr.doc](http://www.ausaid.gov.au/Publications/Documents/ardcp-ipr.doc)>.

<sup>136</sup> See Chapter 2 point E.3, 40-43.

<sup>137</sup> *Actions Regarding SPS-Related Private Standards*, WTO Doc G/SPS/55 (6 April 2011) (Decision of the Committee) 1.

<sup>138</sup> Private Industry Standards, WTO Doc G/SPS/GEN/766 (Communication from Saint Vincent and the Grenadines) (28 February 2007) [3] 1.

<sup>139</sup> Phillipp Aerni, *Do Private Standards Encourage or Hinder Trade and Innovation*, NCCR Trade Regulation, Working Paper No. 2013/18/June 2013.

<sup>140</sup> WTO, G/SPS/W/256, 3 March 2011, *Report of the Ad Hoc Working Group on SPS Related Private Standards to the SPS Committee*, 5.

<sup>141</sup> Norbert L. W. Wilson, Clarifying the Alphabet Soup of the TBT and the SPS in the WTO, 8 *Drake J. Agric. L.* 703, Westlaw, 2.

<sup>142</sup> Gretchen H. Stanton, ‘Private SPS Standards – The WTO Perspective’, Presentation Given at the Workshop ‘Globalization, Global Governance and Private Standards’, Leuven, 4-5 November 2008.

<sup>143</sup> Jan Wouters, Axel Marx, Nicolas Hachez, ‘Private Standards, Global Governance and Transatlantic Cooperation: The Case of Global Food safety Governance’, Leuven Centre for Global Governance Studies, 2008, 15. The article was prepared for the Workshop on ‘Managing Biosafety and Biodiversity in a Global World’ organised by the University of California, Berkeley (11-12 December 2008).



With regard to their uncertain legal status, Roberts argues that private standards' potential legal relationship with the SPS Agreement might be analysed through Articles 1.1 and 13.<sup>145</sup> However, there are pros and cons as to whether or not private standards can or should be included on Annex A.1 under 'SPS measures',<sup>146</sup> or Article 13 under the scope of 'non-governmental body'.<sup>147</sup>

Article 1.1 stipulates that the SPS Agreement 'applies to all sanitary and phytosanitary measures which may directly or indirectly affect international trade..'. It may be appropriate that private standards are included here. However, Wouters and Geraets state that the SPS Agreement drafters most likely had a narrow meaning of these, and that only the governments have right to set out SPS measures.<sup>148</sup> Further, the second part of Article 1.1 provides that '...Such measures shall be developed and applied in accordance with the provisions of this Agreement'. Moreover, it is likely that private standards do not meet SPS measures, because they are in place for many different purposes, not just to protect food safety and plant and animal health, but also environmental and social issues, such as consumer demand.<sup>149</sup> Further, private standards likely do not meet the requirements due to factors that are non-scientific,<sup>150</sup> for example consumers' perceptions of the food safety that are not based on the scientific evidence.<sup>151</sup> Moreover, Private standards are not always transparent and exclude some players—thus, their application and interrelationship is

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<sup>144</sup> Alexia Brunet Marks, 'A New Governance Recipe for Food Safety Regulation', (2016), *Loyola University Chicago Law Journal*, Vol. 47, 966.

<sup>145</sup> Michael T. Roberts, 'The Compatibility of Private Standards with Multilateral Trade Rules: Legal Issues at Stake' in Alexander Sarris and Jamie Morrison, *The Evolving Structure of World Agricultural Trade: Implication for Trade Policy and Trade Agreements* (FAO, 2009), 266.

<sup>146</sup> Annex 1.1. governs that SPS measures are any measures to protect "animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; and to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests".

<sup>147</sup> Article 13 stipulates "Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement".

<sup>148</sup> Jan Wouters and Dylan Geraets, Private Food Standards and the World Trade Organisation: some legal considerations, *World Trade Review* (2012), 11:3, 479-489, 484.

<sup>149</sup> Gretchen H. Stanton, *Private (Commercial) Standards and the SPS Agreement*-Remarks at the Round Table on the Role of Standards in International Food Trade (24 September 2007) 4.

<sup>150</sup> Anja Seibert-Fohr, Article 2 SPS, in Rudiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (eds), *WTO-Technical Barriers and SPS Measures* (2007, Martinus Nijhoff, Leiden) 400.

<sup>151</sup> Gretchen H. Stanton, Food Safety – Related Private Standards: the WTO Perspective, in Axel Marx, Miet Maertens, Johan Swinnen, Jan Wouters (eds), *Private Standards and Global Governance: Economic, Legal and Political Perspectives* (2012, Edward Elgar Publishing) 239.

problematic.<sup>152</sup> The WTO has also noted that private standards lack a scientific basis for their requirements, they deviate from international standards, lack transparency in consultation and appeal mechanisms and are more costly to complete, which pose disproportionate burdens on small and medium-sized exporter in developing countries.<sup>153</sup> Therefore, Article 1.1 would likely not work for private standards.

Pursuant to Article 13, private standards might be included in ‘non-governmental entities’ and ‘regional bodies’. However, there is no definition provided on this term. The SPS Agreement is also silent as to what constitutes the ‘reasonable measures’ a government must undertake, such as further governance or mechanism. The SPS Committee should set out further procedures for the assessment for governments. In this regard, Wouters and Geraets argue that this obligation should be seen as a ‘best-endeavour’ obligation, so that governments only need to take any reasonable measures available to them to ensure compliance.<sup>154</sup> If not, Members would be burdened with a heavy responsibility.<sup>155</sup>

With regard to a possible solution, Roberts proposed three approaches in dealing with private standards: first, ‘carve out regulatory space to accommodate private standards; second, challenge the legitimacy of private standards; and third, work to abate the consequences of private standards’.<sup>156</sup> With regard to the second approach, Roberts suggests two possible methods: Members could attempt to discharge their obligations over private standards or the SPS Agreement should be amended to enlarge its coverage to ‘non-governmental entities’ in which private standards might be covered.<sup>157</sup>

Wouters and Geraets, on the other hand, propose that dialogue between public and private standards setters might be the best solution to deal with private standards issue.<sup>158</sup> Similarly, Henson and Humphrey state that government should respond private standards, in both national and international fora.<sup>159</sup> Thorstenson and Vieira, add that the negotiation is needed with regard to private standards’ ‘meta-regulation’ as well as their rule and representative in international trade fora.<sup>160</sup>

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<sup>152</sup> Roberts, above n145.

<sup>153</sup> *Report of the Ad Hoc Working Group on SPS Related Private Standards to the SPS Committee*, WTO Doc G/SPS/W/256 (3 March 2011) 5.

<sup>154</sup> Wouters and Geraets, above n148, 486.

<sup>155</sup> Makane Moise Mbengue, *Private Standards and WTO Law*, *Biores* Volume 5-Number 1 International Centre for Trade and Sustainable Development-ICTSD (6 April 2011), 3.

<sup>156</sup> Roberts, above n145, 279.

<sup>157</sup> *Ibid* 180-181.

<sup>158</sup> Wouters and Geraets, above n148, 489.

<sup>159</sup> Spencer Henson and John Humphrey, ‘Understanding The Complexities Of Private Standards In Global AgriFood Chains’, *the Journal of Development Studies*, 46: 9, 1628-1646, 18.

<sup>160</sup> Vera Thorstenson and Andreia Costa Vieira, *Private Standards or Market Standards: in search for legitimacy and accountability in the international trading system*, 21  
<<http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/16370/Private%20Standards%20or%20Market%2>

Mavroidis and Wolfe argue that private standards can be attributed to every individual Member of the WTO,<sup>161</sup> and there are signals that governments prefer to adopt private standards in their food safety protection.<sup>162</sup> With regard to this, the selected countries have undertaken this action by adopting private standards in their regulations.<sup>163</sup>

Thorstenson and Vieira have a different point of view, it is that according to them private standards are better to be covered in international standards.<sup>164</sup> However, private standards must fulfil the requirements for the establishment of international standards, including that it must be scientifically based as well as transparent. Thus, the interests of health protection and promotion of international trade based on the SPS Agreement must be fulfilled.

In this regard, the SPS Committee has been monitoring the development of private standards<sup>165</sup> and produced five actions.<sup>166</sup> These are to develop a working definition of private standards, inform the SPS Committee regularly about the development to the SPS international standards organisations and invite them to attend meeting, as well as looking for possible fora in which to work together with them, invite the Secretariat to inform the SPS Committee on the development of private standards in other WTO fora, and encourage Members to collaborate with relevant organisations and the SPS international standards recommended by the SPS Agreement.<sup>167</sup>

Nevertheless, the outcome might be difficult to predict, because the decision will depend on Members will to find and agree on private standards. For example, the SPS Committee meeting in March 2014 did not reach a consensus on the definition of the SPS private standards proposed by New Zealand and China. Therefore, Canada suggested looking at other definitions used by other international organisations.<sup>168</sup> It seems that the final definition is yet to come. The SPS Committee's working definition of private standards itself was:

“An SPS-related private standard is a written requirement or condition, or a set of written requirements or conditions, related to food safety, or animal or plant life or health that may be used in commercial transactions and that is applied by a non-governmental entity that is not exercising governmental authority.”<sup>169</sup>

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0Standards\_%20in%20search%20for%20legitimacy%20in%20the%20International%20Trading%20System.pdf?sequence=1>.

<sup>161</sup> Petros C. Mavroidis and Robert Wolfe, 'Private Standards and the WTO: Reclusive No More' *World Trade Review* (2017), 16:1, 1-24, 12.

<sup>162</sup> Henson and Humphrey, above n159, 17.

<sup>163</sup> See for further discussion on Chapter 7.

<sup>164</sup> Thorstenson and Vieira, above n160, 21.

<sup>165</sup> *Informal Ad Hoc Group meeting*, WTO (December 2008).

<sup>166</sup> *Actions Regarding SPS-Related Private Standards*, WTO Doc G/SPS/55 (6 April 2011) (Decision of the Committee) 1-3.

<sup>167</sup> Ibid.

<sup>168</sup> The WTO: 2014 News Items, 25 and 26 March 2014, *Sanitary and Phytosanitary Measures: Formal Meeting, Members to Try New Approach for Defining Private Sanitary Phytosanitary Standards*, 1.

<sup>169</sup> WTO, *Report Of The Co-Stewards Of The Private Standards E-Working Group To The March 2015 Meeting Of The SPS Committee On Action 1 (G/SPS/55) Submission By The Co-Stewards Of The E-Working Group*, G/SPS/W/283, 17 March 2015.

Considering the aforementioned problem, some potential solutions are recommended as to whether or not private standards should be placed outside the operation of the SPS Agreement system. Members should boost their efforts to reach a consensus with regard to the legitimacy of private standards in the WTO's framework. This is significant to regulate private standards in international trade, because there is an uncertainty with regard to their position in the WTO framework. Regulation on private standards is crucial to prevent them from becoming restriction to international trade. The SPS Committee should continue to encourage Members and other relevant stakeholders to cooperate at the national, regional, and international levels to achieve a consensus with regard to private standards.

Members, including the selected countries need to maintain their attempts to make a dialogue with private standards, the Three Sisters, as well as the SPS Committee. Mavroidis and Wolfe argue that there should be a 'Telecom Reference Paper' containing a set of commitments concerning how Members would treat private standards bodies in their jurisdiction, and how they would maintain sharing information among Members.<sup>170</sup>

In the absence of a consensus of Members with regard to private standards, in the meantime when Members have disputes in this regard, Members would not be able to settle these disputes under the WTO discipline. This neither through an ad hoc consultation that based on a voluntary basis<sup>171</sup> as stipulated under Article 12.2 of the SPS Agreement,<sup>172</sup> nor through dispute settlement mechanism.<sup>173</sup> This is for the reason that an action will come under the WTO discipline only if it can be attributed to one of its Members.<sup>174</sup>

### C Conclusion

Particular SPS provisions and their further implementation, namely scientific justification, transparency, harmonisation, equivalence, regionalisation, and technical assistance, affect the legal certainty and predictability of the SPS Agreement system. The setting of international standards and private standards has become significant issues challenges in the implementation of SPS, particularly for small and medium enterprises in developing countries. The developing countries have been forced to amend their SPS legal systems, including their quarantine systems, in order to meet private standards to access export markets. However, the developmental gap between developing and developed countries ensures that the recognition and specific redresses provided by

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<sup>170</sup> Mavroidis and Wolfe, above n161, 17.

<sup>171</sup> *Procedure to Encourage and Facilitate the Resolution of Specific Sanitary or Phytosanitary Issues Among Members*, WTO Doc G/SPS/61 (8 September 2014, adopted 9 July 2014) (Decision) 1.

<sup>172</sup> SPS Agreement, art 12.2. It states that Members may be facilitated by the SPS Committee to make ad hoc consultations or negotiations with other Members on specific SPS issues.

<sup>173</sup> This is based on a telephone communication with a staff of the WTO SPS Committee on January 9<sup>th</sup> 2015.

<sup>174</sup> Mavroidis and Wolfe, above n161, 17.

the SPS Agreement and its further implementation remain a problem. It is recommended that developing countries, including the selected countries continue to undertake the five actions decided by the SPS Committee with regard to SPS standards as part of reaching a consensus among Members.

The next three chapters, Chapter 4 (Indonesia), Chapter 5 (the Philippines) and Chapter 6 (Malaysia), will discuss the experience of the selected countries in applying the SPS legal system. The comparative analysis itself will be discussed in Chapter 7.

## CHAPTER 4

### IV THE SPS AGREEMENT IMPLEMENTATION IN INDONESIA, ITS IMPEDIMENTS AND POTENTIAL SOLUTIONS

#### A Introduction

This chapter explores the implementation of the SPS Agreement in Indonesia in the areas of importation and exportation. The discussion on the Members' SPS obligations and SPS principles set out in the previous chapter lead to the analysis in this chapter with respect to the compliance of Indonesia's SPS measures. The chapter also further outlines the impediments faced by Indonesia and the underlying reasons for these. The analysis relies primarily on the WTO's Specific Trade Concerns (STC) on Indonesia's SPS measures, the SPS measures of other Members affected to Indonesia, Trade Policy Review (TPR) of Indonesia and selected Indonesian SPS dispute settlements. The second part of this chapter analyses potential recommendations for solutions, including legal remedies for improvement.

#### B SPS Regulations and Administration

Indonesia's first regulation of a sanitary and phytosanitary nature predated the SPS Agreement and was published when Indonesia was under Dutch colonisation. The first plant quarantine measure was the *Ordinance of 19 December 1877*, published in Government Gazette No. 262, which prohibited the importation of coffee plants and seeds from Sri Lanka (Ceylon). The first regulation on animal health was the *Ordinance of 13 August 1912*, published in Government Gazette No. 432, regarding the Regulation of Government Interference in the Field of Veterinary and Veterinary Police.<sup>1</sup>

Subsequent SPS measures have been promulgated, for example *Law No. 18 of 2012* on Food, which amended *Law No. 7 of 1996*.<sup>2</sup> The *Food Law* was issued by the House of Representatives (*Dewan Perwakilan Rakyat - DPR*) and the Government of Indonesia in November 2012 and deals with food authority, including planning, availability, affordability, consumption, safety, labels and advertising, control, information systems, research and development, community participation and

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<sup>1</sup> IAQA, *Brief History of the IAQA*, 1

<[http://www.karantina.deptan.go.id/eng2/index.php?option=com\\_content&view=article&id=5&Itemid=2](http://www.karantina.deptan.go.id/eng2/index.php?option=com_content&view=article&id=5&Itemid=2)>

<sup>2</sup> *Undang-Undang Nomor 18 Tahun 2012 tentang Pangan* [Law No 18 of 2012 on Food] (Indonesia) 'the Food Law'.

investigation with regards to food.<sup>3</sup> *Law No. 13 of 2010* regarding Horticulture<sup>4</sup> was issued by the DPR and the government and deals with the horticultural authority, which comprises horticultural planning, resource utilisation and development, distribution trade advertising and consumption and finance and investment.<sup>5</sup> *Law No. 18 of 2009* regarding Animal Husbandry and Animal Health<sup>6</sup> was amended by *Law No. 41 of 2014* on the Amendment of Law on Animal Husbandry and Animal Health,<sup>7</sup> and focuses on the government responsibility to protect public health from unsafe food supply from animal and animal products, and food health.<sup>8</sup> *Law No. 16 of 1992* regarding Animal, Fish and Plant Quarantine<sup>9</sup> deals with the prevention of the entry of pests and/or diseases of animal, fish and plants into Indonesian territory, as well as the spread of them inside and outside the territories.<sup>10</sup> This law authorises the Ministry of Agriculture to provide maximum protection for the entry into and out of animal husbandry to prevent the spread of diseases and zoonosis, and to improve law enforcement.<sup>11</sup> Additionally, *Law No. 45 of 2009* regarding Fisheries, which amended *Law No. 31 of 2004*, was enacted by the DPR and the government, authorise the Ministry of Marine and Fisheries Affair to regulate the management and utilisation of the fisheries industry for the interests of the public.<sup>12</sup>

Indonesia's SPS regulations generally impose import requirements for food, in which importers must meet certain standards of food safety, quality, nutrition, religion, belief and culture.<sup>13</sup> Imported food must be accompanied by a health certificate, as well as a sanitary or phytosanitary certificate; while exported food must fulfil the food safety, quality and nutrition requirements of the importing countries.<sup>14</sup>

The institutions in charge of SPS administration in Indonesia are laid down under two ministries and an agency, namely the Indonesia Agricultural Quarantine Agency (IAQA) of the Ministry of Agriculture for plant and animal quarantine,<sup>15</sup> the Fish Quarantine and Inspection

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<sup>3</sup> Ibid, art 5.

<sup>4</sup> *Undang-Undang Nomor 13 Tahun 2010 tentang Hortikultura* [Law No 13 of 2010 on Horticulture] (Indonesia).

<sup>5</sup> Ibid art 4.

<sup>6</sup> *Undang-Undang Nomor 18 Tahun 2009 tentang Peternakan dan Kesehatan Hewan* [Law No. 18 of 2009 on Animal Husbandry and Animal Health] (Indonesia).

<sup>7</sup> *Undang-Undang Nomor 41 Tahun 2014 Tentang Perubahan Atas Undang-Undang Nomor 18 Tahun 2009 Tentang Peternakan dan Kesehatan Hewan* [Law No. 41 of 2014 on The Amendment of Law No. 18 of 2009 on Animal Husbandry and Animal Health] (Indonesia) 'the Amendment Law'.

<sup>8</sup> Ibid, the Consideration.

<sup>9</sup> *Undang-Undang Nomor 16 Tahun 1992 tentang Karantina Hewan, Ikan dan Tumbuhan* [Law No. 16 of 1992 on Animal, Fish and Plant Quarantine] (Indonesia) 'the Quarantine Law'.

<sup>10</sup> Ibid, the Consideration (a).

<sup>11</sup> Ibid, the Consideration (b).

<sup>12</sup> *Undang-Undang Nomor 45 Tahun 2009 tentang Perubahan atas Undang-Undang Nomor 31 Tahun 2004 tentang Perikanan* [Law No. 45 of 2009 on Fisheries] (Indonesia).

<sup>13</sup> The Food Law, art 37(1).

<sup>14</sup> Ibid art 36(1).

<sup>15</sup> IAQA, above n1.

Agency (FQIA) of the Ministry of Marine Affairs and Fisheries for fish and fish products<sup>16</sup> and the National Agency of Drug and Food Control (NA-DFC) for food safety.<sup>17</sup> Other institutions, such as the Ministry of Trade, are also involved in the establishment of SPS measures.<sup>18</sup>

## C *Implementation of SPS Principles, Difficulties and Potential Solutions*

### 1 *Introduction*

Indonesia has been implementing the SPS Agreement since it became a member of the WTO on 1 January, 1995.<sup>19</sup> The implementation of SPS measures in Indonesia is still developing in both the importation and exportation dimensions, and the country continues to face issues in balancing the implementation due to a number of difficulties. Recommendations are proposed in this chapter to improve Indonesia's SPS implementation.

### 2 *Importation Dimension*

In some respects, Indonesia has not satisfactorily complied with the SPS Agreement in formulating and applying its SPS regulations. Pursuant to the WTO SPS Information Management System (SPS-IMS), there have been hitherto 14 STC on Indonesia's SPS measures.<sup>20</sup> To date, the majority of the STC and TPRs have been related to non-compliance in conjunction with the non-discrimination principle as governed by Article 1.3 of the SPS Agreement, insufficient scientific principles in undertaking a risk assessment governed by Article 2.2, a lack of harmonisation governed by Article 3.1, lack of transparency governed by Article 7, insufficient recognition of

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<sup>16</sup> Fish Quarantine and Inspection Agency (FQIA), *Fish Quarantine and Inspection Agency* <<http://www.bkipm.kkp.go.id/bkipm/en/history>>.

<sup>17</sup> The National Agency of Drug and Food Control (NA-DFC), *Strong Organisation* <[http://www.pom.go.id/pom/profile/e\\_struktur\\_organisasi.php](http://www.pom.go.id/pom/profile/e_struktur_organisasi.php)>. The NA-DFC was established based on the *Keputusan Presiden No. 166 Tahun 2000 tentang Kedudukan, Tugas, Fungsi, Kewenangan, Susunan Organisasi dan Tata Kerja Lembaga Pemerintah Non Departemen* (Presidential Decree No. 103 of 2001 on Position, Duty, Function, Authority, Formation of Organisation and Working Procedure of Non-Departmental Government Institution) (Indonesia) as a non-departmental government institution which responsible to the President of the Republic of Indonesia.

<sup>18</sup> The Ministry of Trade of the Republic of Indonesia, *Directorate General of Foreign Trade* <<http://www.kemendag.go.id/id/about-us/main-duty/directorate-general-of-foreign-trade>>.

<sup>19</sup> WTO, *Understanding the WTO: the Organisation, Members and Observers* <[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)>.

<sup>20</sup> WTO, *Specific Trade Concerns* <<http://spsims.wto.org/web/pages/search/stc/Results.aspx>>. Those are STC21, STC82, STC111, STC132, STC146, STC243, STC244, STC279, STC280, STC286, STC305, STC330, STC343, and STC414.



regionalisation principle governed by Article 6 and the use of provisional measures<sup>21</sup> governed by Article 5.7.

(a) *Non-Discrimination Principle*

An example of Indonesia's non-compliance with the non-discrimination principle can be found in STC330 on Indonesia's port closure.<sup>22</sup> STC330 included the claim that Indonesia granted several exporting Members, namely Australia, New Zealand, the USA, and Canada, preferential market access through Port Tanjung Priok Jakarta based on the country's Pest Free Area (PFA) recognition. The EU raised concerns that Indonesia had not granted such preferential access to the EU despite its high standards of food safety.<sup>23</sup>

In DS484,<sup>24</sup> Brazil brought a dispute through the Dispute Settlement Body (DSB), claiming that Indonesia failed to respond to Brazil's request to export chicken meat and chicken products after having approached Indonesia for roughly five years. Brazil claimed that Indonesia discriminated against Brazil accessing Indonesia's market without reasonable justification under the SPS Agreement by not approving the health certificate proposal by Brazil.<sup>25</sup> A panel for the case was composed on 3 March 2016 and is expected to give a report in early April 2017.<sup>26</sup>

Brazil also brought a dispute, DS506, claiming that Indonesia applied restrictive rules and procedures to Brazil's export of bovine meat, which prohibit Brazil from accessing Indonesia's market. Brazil claimed that Indonesia discriminated against Brazil's bovine meat compared to its

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<sup>21</sup> *Trade Policy Review: Indonesia*, WTO Doc WT/TPR/M/278 (10 and 12 April 2013) (Record of the Meeting) 50.  
<sup>22</sup> STC330 with regard to *Peraturan Menteri Pertanian Nomor 89/Permentan/OT.140/12/2011* [Minister of Agriculture Regulation No 89/Permentan/OT.140/12/2011 on the Technical Requirement and Quarantine Action for the Importation of Fresh Fruits and/or Vegetables] (Indonesia) and *Peraturan Menteri Pertanian Nomor 90/Permentan/OT.140/12/2011* (Minister of Agriculture Regulation No 90/Permentan/OT.140/12/2011 on the Technical Requirement and Quarantine Action for the Importation of Horticultural Products) (Indonesia), which requires imports through four entry points, namely Surabaya ship Port, Medan ship Port, Jakarta airport and Makassar ship port, while the Jakarta main ship Port is among the port closures.

<sup>23</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.15 (24 February 2015) (Note by the Secretariat) (Revision) 51.

<sup>24</sup> See, e.g., WTO, Dispute Settlement: Dispute DS484, *Indonesia—Measures Concerning the Importation of Chicken Meat and Chicken Products* <[http://wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds484\\_e.htm](http://wto.org/english/tratop_e/dispu_e/cases_e/ds484_e.htm)>; *Indonesia—Measures Concerning the Importation of Chicken Meat and Chicken Products*, WTO Doc WT/DS484/1, G/L/1075, G/SPS/GEN/1371, G/LIC/D/49, G/TBT/D/47, G/AG/GEN/120, G/PSI/D/5 (23 October 2014) (*Request for Consultation by Brazil*) 1-3.

<sup>25</sup> *Ibid* 1.

<sup>26</sup> WTO, Dispute Settlement: Dispute DS484, *Indonesia—Measures Concerning the Importation of Chicken Meat and Chicken Products* <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds484\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds484_e.htm)>.

treatment of other exporting countries. Indonesia has not yet responded to Brazil's claim, since this dispute is currently undergoing a consultation process.<sup>27</sup>

*(b) Scientific Principle and Risks Assessment*

Relying on the WTO STC, exporting Members have claimed that several Indonesian SPS measures lack scientific justification as governed under Articles 2.2 and 5 of the SPS Agreement.<sup>28</sup> In STC330, importing Members claimed that the SPS measure of Indonesia's port closure was not supported by scientific justification since the measures did not state the scientific basis for the measures.<sup>29</sup> Indonesia responded that the port closure was based on four considerations, namely the 19 agriculture issues identified entering Indonesia through Port Tanjung Priok, limited laboratory facilities to perform examination, the lack of quarantine installation and an insufficient number of quarantine inspectors at Port Tanjung Priok.<sup>30</sup> However, the SPS measures do not outline a justification for the port closure,<sup>31</sup> nor did the later notification, which was silent on the part of objective and rationale.<sup>32</sup>

In DS484, Brazil claimed that Indonesia's SPS regulations embodied in the Minister of Agriculture Regulation No. 110/Permentan/OT.410/9/2014, Minister of Agriculture Regulation No. 96/PD.410/9/2013 and Minister of Agriculture Regulation No. 84/Permentan/PD.410/8/2013 contained discriminatory policies, a lack of scientific justification and risk assessment, a lack of recognition of the harmonisation principle and a lack of transparency.<sup>33</sup> The consideration of the Minister of Agriculture Regulation No. 110/Permentan/OT.410/9/2014 only stated that the regulation was established due to the development of infectious animal diseases and country of origin status.<sup>34</sup> Regulation No. 96/PD.410/9/2013 stated the reason for the measure was to improve efficiency, effectivity and certainty in granting importation approval service,<sup>35</sup> while Regulation No. 84/Permentan/PD.410/8/2013 stated the reasons for the measures were to ensure the flow of the

<sup>27</sup> *Indonesia-Measures Concerning the Importation of Bovine Meat*, WTO Doc WT/DS506/1, G/L/1145, G/SPS/GEN/1486, G/LIC/D/50, G/TBT/D/49, G/AG/GEN/130 (7 April 2016) (*Request for Consultation by Brazil*) 1-4.

<sup>28</sup> See, e.g., *Trade Policy Review*, WTO Doc WT/TPR/G/278 (Report by Indonesia) (6 March 2013) 9; *Trade Policy Review: Indonesia* (10 and 12 April 2013) Concluding Remarks by the Chairperson <[http://wto.org/english/tratop\\_e/tpr\\_e/tp378\\_crc\\_e.htm](http://wto.org/english/tratop_e/tpr_e/tp378_crc_e.htm)>.

<sup>29</sup> WTO, 2012 News Items, *Indonesia's Port Closure Causes Concern among Fruits and Agriculture Exporters* (SPS Committee: Formal Meeting) (28 and 29 March 2012) <[http://www.wto.org/english/news\\_e/news12\\_e/sps\\_28mar12\\_e.htm](http://www.wto.org/english/news_e/news12_e/sps_28mar12_e.htm)>.

<sup>30</sup> *Summary of the Meeting*, WTO Doc G/SPS/R/66 (23 May 2017) [19-25] 6 (Note by the Secretariat), 8.

<sup>31</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.15, 49.

<sup>32</sup> *Notification*, WTO Doc G/SPS/N/IDN/46 (7 May 2012).

<sup>33</sup> *Indonesia-Measures Concerning the Importation of Chicken Meat and Chicken Products*, WTO Doc WT/DS484/1, G/L/1075, G/SPS/GEN/1371, G/LIC/D/49, G/TBT/D/47, G/AG/GEN/120, G/PSI/D/5, 1-2.

<sup>34</sup> Regulation of the Minister of Agriculture No. 110/Permentan/OT.410/9/2014, Consideration.b.

<sup>35</sup> Regulation of the Minister of Agriculture No. 96/Permentan/PD.410/9/2013, Consideration.b.

imports and to ensure that import products met the safety, health and *halal* (Islamic purity) requirements for health protection and reassurance.<sup>36</sup> Thus, the consideration of the SPS measures was not specific.

(i) *Difficulties and Underlying Reasons*

The underlying factors of Brazil's claim were likely caused by the weaknesses in the regulation drafting process. According to the *Undang-Undang Nomor 10 Tahun 2004 Tentang Pembentukan Peraturan Perundang-Undangan* [Law No 10 of 2004 on Legislations Formation] (Indonesia), laws must *inter alia* meet the fundamental principle of having a clear purpose.<sup>37</sup> However, this principle is often ignored, and the legislature fail to consider the real and fundamental purpose. Several laws were formulated with abstract and ambiguous considerations, such as Regulation No. 84/Permentan/PD.410/8/2013, which among its stated purposes was to provide *ketenteraman hati* (peace of heart) for the community,<sup>38</sup> a purpose that is impossible to measure.

There is insufficient research activity and quality in Indonesia's regulatory drafting process. For the purpose of legislation drafting, a *naskah akademik* (academic document) used to be utilised, however, from the FQIA's report it has been acknowledged that weaknesses in providing scientific evidence exists as some regulations have not been enacted on proper scientific evidence or an academic basis.<sup>39</sup> A staff member in the IAQA added that there was insufficient research undertaken for enacting SPS regulations before 2000.<sup>40</sup> Policy decision-making was previously based on insufficient research and scientific justification,<sup>41</sup> which has resulted in a lack of consistency in trade policy.<sup>42</sup> Research was undertaken only after there were complaints from exporting Members on the scientific basis of a particular SPS measure.<sup>43</sup> Thus, it used to be that research relevant to the formulation of SPS measures was undertaken as a reactive approach.<sup>44</sup> This situation was common with respect to research development programs in Indonesia, which are

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<sup>36</sup> Regulation of the Minister of Agriculture No. 84/Permentan/PD.410/9/2013, Consideration.b.c.

<sup>37</sup> *Undang-Undang Nomor 10 Tahun 2004 Tentang Pembentukan Peraturan Perundang-Undangan* [Law No 10 of 2004 on Legislations Formation] (Indonesia) 'Law on Legislations Formation', art 5.a.

<sup>38</sup> *Regulation of the Minister of Agriculture No. 84/Permentan/PD.410/9/2013*, Consideration.b.c.

<sup>39</sup> Ibid.

<sup>40</sup> Interview with an IAQA staff member in Jakarta on 7 February 2013.

<sup>41</sup> Erik Meijaard, 'Commentary: Indonesia Needs to Start Taking Science Seriously' *Jakarta Globe* (online) <<http://thejakartaglobe.beritasatu.com/opinion/commentary-indonesia-needs-start-taking-science-seriously>>.

<sup>42</sup> Margit Molnar, and Molly Leshner, 'Indonesia' in OECD, *Globalisation and Emerging Economies: Brazil, Rusia, India, Indonesia, China, South Africa* (2009) 341 <<http://dx.doi.org/10.1787/9789264044814-11-en>>.

<sup>43</sup> Interview with Professor Andi Trisyono, an academic staff of the Faculty of Agriculture of the *Universitas Gadjah Mada* (UGM), 5 February 2013.

<sup>44</sup> Interview with a staff member in the Ministry of Trade, 29 January 2013.

lacking in most developmental aspects.<sup>45</sup> In the last decade, research has been subsequently undertaken in many universities and research institutions. Nevertheless, the World Economic Forum (WEF) reported that the quality of scientific research institutions in Indonesia only places it 41<sup>st</sup> out of 138 countries, while its availability of research and training service is rated 49<sup>th</sup>.<sup>46</sup>

Insufficient human resources, both quantity and quality, are other underlying factors.<sup>47</sup> The country's legal drafters have a distinct lack of proficiency in the legal drafting process of SPS regulations.<sup>48</sup> SPS regulatory systems have included inter-departmental matters covering broad rules and wide commodities, and a lack of human resource capacity.<sup>49</sup> Legal drafters do not have sufficient knowledge of the technical aspects in each sector or the WTO legal aspects, particularly SPS laws.<sup>50</sup>

Additionally, there is an insufficient number and quality of infrastructure in many SPS entry points.<sup>51</sup> As an archipelagic country consisting of more than 17,300 islands, Indonesia has only 52 *Unit Pelaksana Teknis* (technical implementation units)<sup>52</sup> covering around 151 entry points<sup>53</sup> and 47 fish quarantine stations covering 285 entry points.<sup>54</sup> This deficiency impedes quarantine inspections and examinations for imported commodities and surveillance tasks, as is the case in *Port Tanjung Priok*,<sup>55</sup> which results in undetected unsafe imported commodities, such as plant seeds.<sup>56</sup> For example, 600 kg of the Brassica seed (*parent seed*) from Japan and 5 kg of corn seed (*parent seed*) from India have been detected as being infected positively with OPTK A1 *Pseudomonas viridiflava* and *Pantoea stewartii*, which are both dangerous for Indonesian agriculture.<sup>57</sup> This potentially

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<sup>45</sup> See, e.g., Subejo, 'The Performance of Research in Indonesia' *The Jakarta Post* (online), <<http://www.thejakartapost.com/news/2010/07/02/the-performance-research-indonesia.html>>; Meijaard, above n41.

<sup>46</sup> World Economic Forum (WEF), *The Global Competitiveness Report 2016-2017*, 205 <[http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017\\_FINAL.pdf](http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf)>.

<sup>47</sup> *Laporan Tahunan Barantan 2013* (IAQA Annual Report 2013) 137.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> IAQA, *Border Coordination Meeting in NTT9* (26 August 2014) <[http://www.karantina.deptan.go.id/?page=article\\_detail&&id=486](http://www.karantina.deptan.go.id/?page=article_detail&&id=486)>.

<sup>52</sup> Technical implementation unit is based on *Peraturan Menteri Pertanian* [Regulation of the Minister of Agriculture No 22/Permentan/OT.140/4/2008 on Organisation and Administration of Technical Implementation Unit of the Agricultural Quarantine] (Indonesia). See, *Badan Karantina Pertanian* [IAQA], *Profil Barantan* (IAQA's Profile) <<http://www.karantina.deptan.go.id/?page=profile>>.

<sup>53</sup> IAQA, *UPT* (Technical Implementation Unit) <<http://karantina.deptan.go.id/?page=action&&c=subcat&&idcat=1&&idsubcat=2>, 22 January 2014>.

<sup>54</sup> Fish Quarantine and Inspection Agency (FQIA), *Profil* (Profile) <<http://www.bkipm.kkp.go.id/bkipm/profil/upt>>.

<sup>55</sup> IAQA, *NAQCC Coordination for the Sake of National Animal Health* <[http://www.karantina.deptan.go.id/index.php?page=quarantine\\_detail&&id=208](http://www.karantina.deptan.go.id/index.php?page=quarantine_detail&&id=208)>.

<sup>56</sup> IAQA, *Protect the Country from the Entry of Quarantine Pest of Plants (OPTK)* (30 January 2015) <[http://karantina.pertanian.go.id/index.php?page=quarantine\\_detail&&id=732](http://karantina.pertanian.go.id/index.php?page=quarantine_detail&&id=732)>.

<sup>57</sup> IAQA, *Pemusnahan Benih Tanaman Asal Luar Negeri Terinvaksi Penyakit Berbahaya* (26 November 2013) <[http://www.karantina.deptan.go.id/index.php?page=quarantine\\_detail&&id=211](http://www.karantina.deptan.go.id/index.php?page=quarantine_detail&&id=211)>.

threatens agribusiness<sup>58</sup> and animal health, and introduces exotic diseases and zoonoses which may spread to humans.<sup>59</sup> Many exporters claimed that the public services in many of Indonesia's major ports were inadequate, caused delays and increase port dwelling time<sup>60</sup> and resulted in higher trade costs and inefficiencies.<sup>61</sup> Competence, commitment and speed of public service are crucial in maintaining efficient and safe port activities.<sup>62</sup> According to the WEF, Indonesia places 75<sup>th</sup> out of 138 countries with respect to port infrastructure.<sup>63</sup> Moreover, the lack of quality of infrastructure is also influenced by a conflict of institutional mandates, since there is no coherent trade policy in Indonesia.<sup>64</sup>

### (ii) Attempts Undertaken

Many efforts have been undertaken in relation to scientific justification, such as undertaking research for the scientific basis of the SPS measures established since 2000.<sup>65</sup> The establishment of the SPS Coordination Team within the Ministry of Agriculture aims to improve the formulation of SPS measures.<sup>66</sup> The FQIA established the National Animal Quarantine Coordinating Committee, which has been tasked with improving the scientific basis of the SPS measures.<sup>67</sup> The IAQA integrates its infrastructure services through Single Sign on Quarantine and e-service integrated licenses,<sup>68</sup> such as electronic systems for plant quarantine and electronic system for quarantine veterinary<sup>69</sup> within the Indonesia National Single Window framework.<sup>70</sup> This aims to make the SPS

<sup>58</sup> Ibid.

<sup>59</sup> IAQA, *Destruction of 11 Tons of Materials of Animal Origin Contaminated by Harmful Bacteria* (4 February 2015) <[http://karantina.pertanian.go.id/index.php?page=quarantine\\_detail&&id=737](http://karantina.pertanian.go.id/index.php?page=quarantine_detail&&id=737)>.

<sup>60</sup> IAQA, *Synergy between Malaysian Quarantine and Customs could become a Sample of Effective and Accountable Public Service* <[http://www.karantina.deptan.go.id/index.php?page=quarantine\\_detail&&id=204](http://www.karantina.deptan.go.id/index.php?page=quarantine_detail&&id=204)>.

<sup>61</sup> Indonesia-Investments, *World Bank: Optimizing Indonesia's Main Sea Port Tanjung Priok in Jakarta* (20 February 2014) <<http://www.indonesia-investments.com/news/todays-headlines/world-bank-optimizing-indonesias-main-sea-port-tanjung-priok-in-jakarta/item1666>>.

<sup>62</sup> IAQA, *Animal Quarantine Measures in TPFT 2014, Evaluated* (29 December 2014) <[http://karantina.pertanian.go.id/index.php?page=quarantine\\_detail&&id=684](http://karantina.pertanian.go.id/index.php?page=quarantine_detail&&id=684)>.

<sup>63</sup> WEF, above n46.

<sup>64</sup> DFC S.A.U, *Indonesia's Export Quality Infrastructure*, <[http://eeas.europa.eu/archives/delegations/indonesia/documents/more\\_info/pub\\_2011\\_idnexport\\_en.pdf](http://eeas.europa.eu/archives/delegations/indonesia/documents/more_info/pub_2011_idnexport_en.pdf)> 3.

<sup>65</sup> Interview with an IAQA staff member in Jakarta on 7 February 2013.

<sup>66</sup> *Keputusan Menteri Pertanian Nomor 300/Kpts/KP.150/6/2003* [Decree of the Minister of Agriculture No. 300/Kpts/KP.150/6/2003] (Indonesia) regarding the Establishment of Coordination Team of SPS.

<sup>67</sup> NAQCC was established relied on the Decree of the Minister of Agriculture No. 688/Kpts/KP.150/12/2002. See <<http://perundangan.pertanian.go.id/admin/file/Sk-688-02.pdf>>.

<sup>68</sup> IAQA, *Single Sign On (SSO) Karantina dan Layanan Elektronik Terintegrasi Diluncurkan* (SSO Quarantine and Integrated Electronic Service were Launched) (19 November 2013) <[http://www.karantina.pertanian.go.id/index.php?page=quarantine\\_detail&&id=196](http://www.karantina.pertanian.go.id/index.php?page=quarantine_detail&&id=196)>.

<sup>69</sup> IAQA, *Press Release: Dukung Penurunan Dwelling Time BBKP Tanjung Priok optimalkan E-QVet* (Support to Reduce Dwelling Time BBKP Tanjung Priok Optimise E-QVet) <[http://www.karantina.deptan.go.id/?page=pers\\_detail&&id=17](http://www.karantina.deptan.go.id/?page=pers_detail&&id=17)>.

<sup>70</sup> FQIA, *Implementation Inauguration of NSW by the President of the Republic of Indonesia* <<http://www.bkipm.kkp.go.id/bkipm/en/read/236/.html>>.

licensing process more efficient, less costly and less time consuming to boost the flow of goods in trade<sup>71</sup> and reduce port dwelling time.<sup>72</sup>

Indonesia has been developing facilities to provide an integrated system of quarantine, customs and warehousing for imported commodities while being examined by quarantine.<sup>73</sup> Furthermore, a joint cooperation between the IAQA and Directorate General of Customs and Excise in January 2013 was aimed to operate Integrated Physical Examination of goods to reduce dwelling times.<sup>74</sup> Improvements to laboratory quality have included the accreditation of 40 out of 47 technical implementation units by ISO-17025<sup>75</sup> for Examining Laboratory of Fish Disease and Fishery Products Quality. Moreover, accreditation has been received for 20 out of 47 technical implementation units by ISO-9001<sup>76</sup> for inspection agencies.<sup>77</sup>

To improve the knowledge and skills of the staff, many programs have been undertaken, such as basic, middle and advanced training and educational programs provided by the IAQA to meet the requirements for commencing employment and during employment service.<sup>78</sup> Other programs include in-house training for staff at airports,<sup>79</sup> internships on the assessment of particular diseases<sup>80</sup> and the dissemination of quarantine laws to government staff.<sup>81</sup> However, the FQIA reported that the acceleration of human resources capacity improvement is not yet optimal.<sup>82</sup> Thus, the IAQA has

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<sup>71</sup> IAQA, *Press Release: Uji Coba Sistem Indonesia National Single Window (INSW) di Bandara Kualanamu (INSW Testing in Kualanamu Airport)* <[http://www.karantina.deptan.go.id/?page=pers\\_detail&&id=19](http://www.karantina.deptan.go.id/?page=pers_detail&&id=19)>.

<sup>72</sup> 'President Forms Task Force to Shorten Port- Dwelling Time' *The Jakarta Post* (Online) (26 February 2015) <<http://www.thejakartapost.com/news/2015/02/26/president-forms-task-force-shorten-port-dwelling-time.html>>.

<sup>73</sup> IAQA, *SPS News Letter*, Edisi 22 (July-September 2012), 3

<[http://www.mediafire.com/view/7v4ufscwrft9u2b/Edisi\\_Juli\\_-\\_September\\_2012.pdf](http://www.mediafire.com/view/7v4ufscwrft9u2b/Edisi_Juli_-_September_2012.pdf)>.

<sup>74</sup> IAQA, *Press Release: Cooperation Agricultural Quarantine Agency and the Director General of Customs in place an Integrated Physical Examination (TPFT)*

<[http://www.karantina.deptan.go.id/?page=pers\\_detail&&id=2](http://www.karantina.deptan.go.id/?page=pers_detail&&id=2)>.

<sup>75</sup> International Organisation for Standardisation (ISO), ISO/IEC 17025:2005 regarding 'general requirements for the competence of testing and calibration laboratories'

<[http://www.iso.org/iso/search.htm?qt=ISO+17025&sort\\_by=rel&type=simple&published=on&active\\_tab=standards](http://www.iso.org/iso/search.htm?qt=ISO+17025&sort_by=rel&type=simple&published=on&active_tab=standards)>.

<sup>76</sup> ISO, ISO 9001:2008 regarding 'quality management system-requirements'

<[http://www.iso.org/iso/search.htm?qt=ISO+9001&sort=rel&type=simple&published=on&active\\_tab=standards](http://www.iso.org/iso/search.htm?qt=ISO+9001&sort=rel&type=simple&published=on&active_tab=standards)>.

<sup>77</sup> FQIA, *Capaian Kinerja dan Sasaran BKIPM Tahun 2013* (FQIA's Performance and Target Achievement 2013) <<http://www.bkipm.kkp.go.id/bkipm/news/read/962/capaian-kinerja-dan-sasaran-bkipm-tahun-2013.html>>.

<sup>78</sup> IAQA, *Pembukaan Diklat Dasar Karantina 2014* (Quarantine Basic Training 2014 Opening)

<[http://karantina.deptan.go.id/?page=quarantine\\_detail&&id=340](http://karantina.deptan.go.id/?page=quarantine_detail&&id=340)>. The technical training and educational program for year 2014 is undertaken in March 2014.

<sup>79</sup> IAQA, *In House Training di BBKP Soeta* (In House Training in BBKP Soeta) (20 September 2013)

<[http://www.karantina.pertanian.go.id/index.php?page=article\\_detail&&id=115](http://www.karantina.pertanian.go.id/index.php?page=article_detail&&id=115)>.

<sup>80</sup> IAQA, *Personnel Competency Enhancement (Internship) and Comparative Study of Agricultural Quarantine*

<[http://www.karantina.deptan.go.id/index.php?page=quarantine\\_detail&&id=225](http://www.karantina.deptan.go.id/index.php?page=quarantine_detail&&id=225)>.

<sup>81</sup> IAQA, *Socialisation of Quarantine Laws and Regulations in Aruk Border Post* (16 February 2015)

<[http://karantina.pertanian.go.id/index.php?page=quarantine\\_detail&&id=746](http://karantina.pertanian.go.id/index.php?page=quarantine_detail&&id=746)>.

<sup>82</sup> FQIA, above n77.

undertaken bureaucratic reforms for the technical implementation unit to improve their commitment to quality public service.<sup>83</sup>

(iii) *Potential Improvements*

To address the scientific justification issue Indonesia needs to improve the SPS regulatory drafting process by emphasising the fundamental purpose of regulations, as governed by the *Law on Legislation Formation*.<sup>84</sup> It is necessary to undertake a regulatory reform process by requiring research on the scientific basis of the SPS measures. Indonesia should improve the legal enforcement of its regulations, such as the *Amendment Law*, which requires a ‘risk analysis’ for the import of animal products into Indonesia’s territories.<sup>85</sup>

Indonesia needs to develop research culture and science in relevant SPS institutions, in particular, and in all developmental aspects generally. Indonesia must improve their investment into research and science<sup>86</sup> to foster trade and economic development, and they must refer to international scientific methodologies to be universally and commercially accepted. A proper research methodology will result in greater credibility. Indonesia also needs to take steps to improve the research quantity and quality and be more proactive in undertaking research by providing academic documentation for each regulation. Research culture is important in pushing the development of science and technology, and in improving national competitiveness in international trade.

With regard to insufficient infrastructure, Indonesia needs to legislate at the ministerial level with regard to its preference for developing modern and integrated infrastructure. It is indicated that there is no coherent trade policy in Indonesia due to a conflict of institutional mandates. This impacts on the insufficiency of infrastructure.<sup>87</sup> This legislation and regulation is important to form the basis of the implementation. For example, the Ministry of Agriculture needs to regulate detailed requirements for laboratories, to be facilitated with integrated network systems among relevant SPS bodies, including quarantine agencies and customs to adequately fulfil the daily activities in all UPT. The procurement division typically undertakes its obligations according to what is regulated in the law. This aforementioned discussion is a crucial focus particularly in facing regional

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<sup>83</sup> IAQA, *Agricultural Quarantine Agency Committed to Implement Public Service Standards* <[http://www.karantina.deptan.go.id/?page=pers\\_detail&&id=20](http://www.karantina.deptan.go.id/?page=pers_detail&&id=20)>.

<sup>84</sup> Law on Legislations Formation, above n37.

<sup>85</sup> The Amendment Law, art 59(4) and art 36C(2).

<sup>86</sup> Dewi Safitri, ‘Commentary: Indonesia Needs to Boost Science Spending Now’, *Jakarta Globe* (Online) <<http://thejakartaglobe.beritasatu.com/opinion/indonesia-needs-to-boost-science-spending-or-it-will-be-left-behind>>.

<sup>87</sup> DFC S.A.U, above n64, 3.

competition within the ASEAN Economic Community (AEC).<sup>88</sup> The existing attempts undertaken by the government should be maintained and improved. However, given the lack of partnership between government and private sectors, Indonesia should develop and strengthen public-private partnerships, in particular, to foster the development and improvement of SPS infrastructure. The government should allow private sectors, such as banking industries, to contribute to infrastructure development. Public-private partnerships will benefit the country's development programs.

With regard to human resources, Indonesia should improve human resources management systems, including recruitment, placement, rewards, punishment and rotation. Recruitment and placement should be held on a needs basis, transparent and professional. The supply of human resources in the government institutions usually to be determined by the central government, therefore it often does not match the needs of each institution. Further, Indonesia should empower the existing SPS human resources by strengthening capacity building programs to improve the proficiency and competency of the staff, such as legal drafters or quarantine officers. This could be undertaken through programs such as training, internships, seminars, workshops and courses,<sup>89</sup> and could collaborate with technical assistance programs provided by international donors.

At the regional level, Indonesia should maintain and improve its cooperation among ASEAN members and sub-ASEAN collaborations, both bilaterally and multilaterally, for example through the Brunei Indonesia Malaysia Philippines-East Asia Growth Area (BIMP-EAGA), the Malaysia Thailand Growth Triangle and RCEP. These collaborations aim to improve the country's capacity in undertaking risk assessments and providing scientific evidence, managing notification obligations by conforming to international standards, strengthening the SPS system, improving infrastructure network and technical cooperation and building capacity.<sup>90</sup>

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<sup>88</sup> ASEAN, *ASEAN Economic Community* <<http://www.asean.org/communities/asean-economic-community>>.

<sup>89</sup> See, workshop programs held by the WTO which are beneficial as mentioned by a staff member of the IAQA in the interview in the IAQA office on 6 February 2013.

<sup>90</sup> For example workshop on quarantine, which was held in Karawang Indonesia for quarantine officers of BIMP-EAGA Members sponsored by the ADB in July 2013, and conference on '*Transparency of Food Safety System toward Better Trade Facilitation*' was held in Bali in June 2013. See Badan Karantina Pertanian (IAQA), *Workshop Teknis Karantina Negara BIMP-EAGA* <[http://www.karantina.deptan.go.id/index.php?option=com\\_content&view=article&id=668:workshop-teknis-karantina-negara-bimp-eaga&catid=43:nasional](http://www.karantina.deptan.go.id/index.php?option=com_content&view=article&id=668:workshop-teknis-karantina-negara-bimp-eaga&catid=43:nasional)>; Badan Karantina Pertanian (IAQA), *Penyelenggaraan ASEAN China Conference on Food Safety Nusa Dua Bali* <[http://www.karantina.deptan.go.id/index.php?option=com\\_content&view=article&id=658:penyelenggaraan-asean-china-conference-on-food-safety-nusa-dua-bali&catid=43:nasional](http://www.karantina.deptan.go.id/index.php?option=com_content&view=article&id=658:penyelenggaraan-asean-china-conference-on-food-safety-nusa-dua-bali&catid=43:nasional)>.



(c) *Transparency Principle*

According to the SPS-IMS transparency table, Indonesia has undertaken three transparency obligations under the SPS Agreement,<sup>91</sup> which are governed by Articles 5.8 and 7, and Annex B of the SPS Agreement. Indonesia has appointed the IAQA as the National Enquiry Point (NEP)<sup>92</sup> and the National Notification Authority (NNA).<sup>93</sup> For the notification obligation, Indonesia has provided notification of the majority of its SPS regulations to the SPS Committee.<sup>94</sup> The IAQA has provided 128 SPS notifications,<sup>95</sup> 105 of which were regular notifications,<sup>96</sup> 11 were emergency notifications<sup>97</sup> and 12 were addenda/corrigenda notifications.<sup>98</sup>

Nevertheless, Indonesia did not fully comply with the notification provisions governed by Annex 7. For example, notifications of some SPS measures were not provided in a timely manner, but only after the measures had been put in place.<sup>99</sup> This is a non-compliance with Annex B.5(b), which requires Members to provide regular notification ‘at an early stage’,<sup>100</sup> at least sixty calendar days *before* its measures enter into force, to allow time for other Members to comment.<sup>101</sup> Consequently, some exporting Members raised concerns through STC, such as STC330, which states that Members were not notified in a timely manner about the Minister of Agriculture Regulation No 15 of 2012 and the Minister of Agriculture Regulation No 16 of 2012, which were amendments to the former regulations.<sup>102</sup>

In some cases, Indonesia did not send its notification to all of the relevant WTO Committees as required by the Transparency Procedure, which stipulates that in the case where a measure is

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<sup>91</sup> See, e.g., WTO, SPS-IMS, *Report12\_Transparency*, 3 <<http://spsims.wto.org>>; SPS Agreement art 7 and Annex B. The obligations include establish national enquiry point, national notification authority, and provide notification.

<sup>92</sup> WTO, G/SPS/ENQ/16, Committee on SPS, *National Enquiry Points: Note by the Secretariat* (3 March 2017) 21.

<sup>93</sup> See, e.g., WTO, G/SPS/NNA/8, Committee on SPS, *National Notification Authorities: Note by the Secretariat* (3 March 2017) 13; WTO SPS-IMS, *Information on Enquiry Points and Notification Authorities* <<http://spsims.wto.org/web/pages/settings/country/Selection.aspx>>.

<sup>94</sup> WTO, SPS-IMS, *Notification* <<http://spsims.wto.org/web/pages/search/notification/Results.aspx>> March 2017.

<sup>95</sup> WTO, SPS-IMS, *Notification* <<http://spsims.wto.org/web/pages/search/notification/Results.aspx>> March 2017. The information of the number of notifications published by the IAQA is not updated, since the IAQA reports there are only 96 SPS notifications as of February 2015. See IAQA, *Daftar Notifikasi SPS Indonesia Terbaru* (List of SPS Indonesia Notifications) <<http://karantina.deptan.go.id/?page=action&&c=subsubcat&&idcat=2&&idsubcat=30&&idsubsubcat=17>>.

<sup>96</sup> *Ibid Regular Notification.*

<sup>97</sup> *Ibid Emergency Notifications*-for example G/SPS/N/IDN/14; G/SPS/N/IDN/15; G/SPS/N/IDN/18; G/SPS/N/IDN/26; G/SPS/N/IDN/34; G/SPS/N/IDN/35; G/SPS/N/IDN/50; and G/SPS/N/IDN/62.

<sup>98</sup> *Ibid Addenda/Corrigenda Notifications.*

<sup>99</sup> See, e.g., WTO documents G/SPS/N/IDN/44 on 1 March 2011; G/SPS/N/IDN/46 on 7 May 2012; G/SPS/N/IDN/47 on 7 May 2012; G/SPS/N/IDN/48 on 7 May 2012; G/SPS/N/IDN/49 on 7 May 2012; G/SPS/N/IDN/53 on 13 July 2012; and G/SPS/N/IDN/54 on 13 July 2012. *Trade Policy Review Report by the Secretariat-Indonesia*, WTO Doc WT/TPR/S/278, 53.

<sup>100</sup> SPS Agreement, Annex B.5.b.

<sup>101</sup> *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)*, WTO Doc G/SPS/7/Rev.3 (20 June 2008) as of 1 December 2008, Revision, B [13].

<sup>102</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.15, 49.

both an SPS measures and a Technical Barrier to Trade (TBT) measures, then notifications must be given according to both Agreements.<sup>103</sup> However, Indonesia notified its measure for permits on horticultural products, which both an SPS measure and an import license measure to the Import Licensing Committee only instead of both the Import Licensing Committee and the SPS Committee.<sup>104</sup> This indicates Indonesia's insufficient implementation of the notification procedures, since Indonesia should have also notified the SPS Committee.

(i) *Difficulties and Underlying Reasons*

Indonesia has insufficient notification management and coordination and the consistency of coordination among institutions in general is insufficient.<sup>105</sup> The IAQA recognised that their achievement of SPS bodies' performance was not optimum<sup>106</sup> and this was impacted by insufficient coordination among the relevant SPS institutions<sup>107</sup> and SPS inter-agencies.<sup>108</sup> This situation is exacerbated by the large number of technical implementation units within the IAQA and FQIA, which causes communication problems among SPS institutions.<sup>109</sup> Communication issues often occur where there is a change in leadership in relevant institutions, as different points of view in relation to political approaches, implementation and priorities add another layer of complexity. A lack of awareness of the officials of their responsibility is another complicating factor. According to a staff member at the IAQA, meetings coordinated by the IAQA were often not attended by the expected officials from other SPS institutions. Instead, junior staff attended, who did not have the authority to make decisions at the meeting.<sup>110</sup> Likewise, some SPS institutions did not provide requested feedback to the IAQA in time, feedback which is important for responding to other Members' queries.<sup>111</sup> An examination of this situation shows that there is an issue in the provision and exchange of information among the relevant SPS institutions. According to the IPPC report, challenges with the exchange of phytosanitary information among SPS institutions include 'bureaucracy, facility, local government autonomy and coordination' at the national level, and 'IT facility and cooperation and harmonisation for the international level'.<sup>112</sup> Further, there is a lack of

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<sup>103</sup> *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)*, WTO Doc G/SPS/7/Rev.3, G [43].

<sup>104</sup> WTO, SPS-IMS, *Specific Trade Concerns*, Document No. 343, Permits on horticultural products, SPS Information Management System, 18 <<http://spsims.wto.org/web/pages/search/stc/Results.aspx>>.

<sup>105</sup> Molnar, above n42.

<sup>106</sup> BKIPM.

<sup>107</sup> Interview with a staff in the Ministry of Trade, 29 January 2013.

<sup>108</sup> IAQA, above n51.

<sup>109</sup> FQIA, *Sejarah* (History) <<http://www.bkipm.kkp.go.id/bkipm/profil>>.

<sup>110</sup> Interview with a staff of the IAQA, 7 February 2013.

<sup>111</sup> Ibid.

<sup>112</sup> *National Plant Protection Information Exchange and Supporting System in Indonesia*, Slide Presentation on Regional Training Workshop on Capacity Building in Use of the International Phytosanitary Portal (IPP) and

transparency of government policy making, for which Indonesia is placed 62<sup>nd</sup> out of 138 based on WEF report.<sup>113</sup>

(ii) *Attempts Undertaken*

The FQIA has addressed the coordination issues through, for example, the establishment of the National Animal Quarantine Coordinating Committee (NAQCC), improvements to the FQIA functions and the creation of networks among veterinary laboratories.<sup>114</sup> The Ministry of Agriculture established the SPS Coordination Team in 2003 for such duties as notification arrangements to the SPS Committee, responding to Member SPS enquiries and preparing materials for SPS Committee meeting.<sup>115</sup> However, the performance of the coordination team was not sufficient or continuous<sup>116</sup> due to a lack of coordination. Therefore, a memorandum of understanding was signed by the IAQA and relevant SPS institutions<sup>117</sup> to improve the agency's performance and to strengthen their networks. The Coordinating Committee has attempted to optimise the SPS inter-agency cooperation<sup>118</sup> by developing and implementing an integrated physical examination service to users and stakeholders at the Integrated Physical Examination in Tanjung Priok Port, which aims to achieve time and cost efficiencies in facing the implementation of ASEAN National Single Windows.<sup>119</sup>

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APPPC Website for Information Exchange 4-9 July 2011, Kuala Lumpur, Malaysia,7  
<[https://www.ippc.int/sites/default/files/documents/1310180367\\_16b\\_Indonesia2.pdf](https://www.ippc.int/sites/default/files/documents/1310180367_16b_Indonesia2.pdf)>.

<sup>113</sup> WEF, above n46.

<sup>114</sup> NAQCC was established relied on *Keputusan Menteri Pertanian Nomor 688/Kpts/KP.150/12/2002 tentang Komite Kerjasama Karantina Hewan Nasional* [Decree of the Minister of Agriculture No. 688/Kpts/KP.150/12/2002 on National Animal Quarantine Coordinating Committee] (Indonesia). See <<http://perundangan.pertanian.go.id/admin/file/Sk-688-02.pdf>>.

<sup>115</sup> *Keputusan Menteri Pertanian No. 300/Kpts/KP.150/6/2003* [Decree of the Minister of Agriculture No. 300/Kpts/KP.150/6/2003] (Indonesia) regarding the Establishment of Coordination Team of SPS.

<sup>116</sup> Interview with an official of the IAQA, January 2013.

<sup>117</sup> The other institutions include the Directorate General of Standardisation and Consumer Protection of the Ministry of Trade; the Directorate General of Foreign Trade; the Directorate General of Customs and Excise of the Ministry of Finance; the National Agency of Drug and Food Control; the Directorate General of Processing and Marketing of Agricultural Products of the Ministry of Agriculture; the Directorate General of Marine and Fisheries Resources of the Ministry of Marine Affairs and Fisheries; the Agency for Fish Quarantine, Quality Control, and Safety of Fishery Products of the Ministry of Marine Affairs and Fisheries. See IAQA, *Barantan Signed the Memorandum of Understanding on Cooperation* <[http://www.karantina.deptan.go.id/?page=quarantine\\_detail&&id=242](http://www.karantina.deptan.go.id/?page=quarantine_detail&&id=242)>.

<sup>118</sup> Ibid.

<sup>119</sup> The integrated physical examination is undertaken by the Directorate General of Custom and Excise, the IAQA, and the Fish Quarantine Quality Control and Safety of Fishery Product. See the BKIPM, *BKIPM Received Certificate of Merit from World Customs Organisation* <<http://www.bkipm.kkp.go.id/bkipm/en/read/753/-bkipm-receive-certificate-of-merit-from-world-customs-organization-.html>>.

(iii) *Potential Solutions*

Indonesia should improve its understanding of its transparency obligations, particularly with regard to the management of notification arrangements to enable staff to manage the flow of data. Failure to do so will likely result in complaints and disputes from Members. In WT/DS466/1, one of New Zealand's and the US's reasons for filing their dispute was due to Indonesia's notification failure and a failure to publish information regarding its importation measures.<sup>120</sup> Internal arrangements and cooperation among SPS bodies should be improved to comply with the procedures; by, for example, improving the discipline and responsibility of staff, improving the work efficiency among staff and technical officers and strengthening the cooperation among relevant SPS institutions.

SPS institutions should incorporate transparency into their daily public service. At present, there are some SPS institution websites, which do not disclose pertinent information to the public. For example, the FQIA's website publishes the SPS requirement of one importing country only,<sup>121</sup> even though there are a number of countries that Indonesia exports its fisheries products to. Thus, there have been complaints from exporters that information regarding the import requirements of importing countries is not publicly available. Further, access to the news often requires the readers to register and log in,<sup>122</sup> information is not always up-to-date and the accuracy of particular sites is questionable. This situation hampers the dissemination of information to the public. The author argues that the SPS institutions should disclose information to the public provided it is not otherwise sensitive or confidential; the right of access to public information is warranted by law.<sup>123</sup> Spreading information through websites should be used as part of the transparency fulfilment and dissemination media for Indonesia's quarantine system to educate people, particularly business actors.

Given the insufficient awareness of the staff, the government should improve the integrity of staff through seminars, workshops, and training. Existing programs should be maintained and improved, and implemented over time to ensure continued and permanent outcomes. Maintaining these programs, as well as consistent evaluation and strict supervision will be beneficial for Indonesia.

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<sup>120</sup> WTO News, *New Zealand, US Files Disputes against Indonesia on Imports of Agricultural Products* <[http://www.wto.org/english/news\\_e/news14\\_e/ds477rfc\\_09may14\\_e.htm](http://www.wto.org/english/news_e/news14_e/ds477rfc_09may14_e.htm)>.

<sup>121</sup> FQIA's website only publishes Russia's import requirements. See BKIPM, *Index Regulasi* <<http://www.bkipm.kkp.go.id/bkipmnew/regulasi/index/10>> 20 August 2016.

<sup>122</sup> An example is the FQIA's website, which requires intended readers to be members first in order to enable them to access its current news.

<sup>123</sup> *Undang-Undang Nomor 8 Tahun 2008 Tentang Keterbukaan Informasi Publik* [Law No. 8 of 2008 on Public Information Transparency] (Indonesia).

Indonesia should strengthen the SPS institution network system and improve coordination among SPS bodies. The IAQA needs to improve its coordination performance, since the IAQA as the National Plant Protection Organisation has among its roles to coordinate the relevant agencies in the implementation of plant protection in Indonesia.<sup>124</sup>

(d) *Harmonisation*

Indonesia is a member of the SPS international standards ‘the Three Sisters’,<sup>125</sup> namely World Organization of Animal Health (Office International des Epizootics - OIE),<sup>126</sup> Codex Alimentarius International Food Standard (Codex)<sup>127</sup> and International Plant Protection Convention (IPPC).<sup>128</sup> Indonesia’s SPS regulations are based on both national and international standards.<sup>129</sup> The international standards include the Codex, IPPC and Convention on Biological Diversity 1992 for the plant quarantine.<sup>130</sup> Indonesia complies with the harmonisation principle in the plant health area with International Standards for Phytosanitary Measures particularly Pest Risk Analysis.<sup>131</sup>

A number of STC of exporting Members have identified the issue of harmonisation.<sup>132</sup> In STC280, the EU claimed that Indonesia’s meat import conditions laid down in the Regulation of the Minister of Agriculture No. 20 of 2009 went beyond the OIE standard on Terrestrial Animal Health Code without a clear scientific justification.<sup>133</sup> STC279 referred to a temporary ban on the entry of swine and swine products into Indonesia under the Regulation of the Minister of Trade No. 16/M-DAG/PER/5/2009, and Decree Number 30/Permentan/PD.620/5/2009. Mexico, the EU and the US

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<sup>124</sup> The appointment of the IAQA as the NPPO is relied on *Keputusan Menteri Pertanian* [Decree of the Agriculture Minister No. 264/Kpts/OT.140/4/2006 on the Appointment of the Focal Point of National Plant Protection Organisation] (Indonesia).

<sup>125</sup> *Membership in WTO and International Standards-Setting Bodies*, WTO Doc G/SPS/GEN/49/Rev.8 (9 October 2007) (Note by the Secretariat) Revision.

<sup>126</sup> OIE World Organisation for Animal Health, *Member Countries, The 180 OIE Members* <<http://www.oie.int/about-us/our-members/member-countries/>>.

<sup>127</sup> Codex Alimentarius International Food Standard, *List of Codex Members* [28 August 2014] <[http://www.codexalimentarius.org/members-observers/members/en/?no\\_cache=1](http://www.codexalimentarius.org/members-observers/members/en/?no_cache=1)>.

<sup>128</sup> See, e.g., International Plant Protection Convention, *Countries List* <<https://www.ippc.int/countries/list-countries/>>; International Plant Protection Convention [12 December 2013] <[http://www.fao.org/fileadmin/user\\_upload/legal/docs/4\\_004s-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/4_004s-e.pdf)>.

<sup>129</sup> IAQA, *Pers Kit-Pusat Karantina Tumbuhan* (Pers Kit-Plants Quarantine Centre), 6 <<http://www.karantina.deptan.go.id/?page=profile>>.

<sup>130</sup> *Ibid.*

<sup>131</sup> IAQA, *Plant Protection Profile of Indonesia*, International Standards for Phytosanitary Measures No. 2 and No. 11.

<sup>132</sup> Examples are STC111 on Foot Mouth Disease restriction raised by Argentina in 2001, STC132 on import restriction on dairy products, STC244 on importation of live animals and meat products, STC243 on lack of recognition of pest free areas, STC279 on import restrictions on pork products due to Influenza A/H1N1 and STC280 on new meat import conditions. See, e.g., *Specific Trade Concerns* <<http://spsims.wto.org/web/pages/search/stc/Results.aspx>>; *Issues Considered in 2009*, WTO Doc G/SPS/GEN/204/Rev.10/Add.1 (Note by the Secretariat) Addendum (11 February 2010) 27.

<sup>133</sup> *Issues Considered in 2009*, WTO Doc G/SPS/GEN/204/Rev.10/Add.1 (Note by the Secretariat) Addendum (11 February 2010) 27.

alleged that there was no scientific basis for this ban and, as a result, Indonesia's actions restricted trade.<sup>134</sup> Indonesia stated that the temporary ban anticipated the spread of swine fever into Indonesia, and protected public health and national bio-resources in response to the World Health Organisation (WHO) 2009 report.<sup>135</sup> However, the OIE, WHO and Food and Agricultural Organisation (FAO) have stated that there was no risk of infection of H1N1 through the consumption of pork meat.<sup>136</sup> Thus, Indonesia did not correctly make use of the provisional measure.<sup>137</sup> In DS484, Brazil claimed that Indonesia's SPS measures contained a lack of harmonisation with international standards.<sup>138</sup>

(i) *Difficulties and Underlying Reasons*

Indonesia's policy in formulating its SPS regulations is based on both national and international standards.<sup>139</sup> The reason for basing policy on both standards is because Indonesia aims to build SPS measures that are appropriate for Indonesian conditions. Further, a sole reliance on international standards was discouraged by the decision in *Mahkamah Konstitusi* (Indonesian Constitutional Court) No. 137/PUU-VII/2009, 138,<sup>140</sup> which annulled Indonesia's ability to adopt international standards stipulated in *Law on Animal Husbandry and Animal Health*.<sup>141</sup> The Indonesian Constitutional Court *Decision* considered that in order to adopt international standards Indonesia must first undertake a ratification process.<sup>142</sup> However, it was agreed that this consideration was likely improper, because Indonesia had ratified and became a member of the 'Three Sisters'.<sup>143</sup> Indonesia ratified the IPPC through Presidential Decree No. 2 of 1977,<sup>144</sup> and became a member of Codex in 1971<sup>145</sup> and OIE in 1954.<sup>146</sup> As a result of the single undertaking

<sup>134</sup> Ibid 2.

<sup>135</sup> IAQA, *Laporan Mengikuti Sidang Komite Sanitary and Phytosanitary (SPS)* (Report of Committee Meeting on Sanitary and Phytosanitary) <<http://karantina.deptan.go.id/index2.php?link2=kr7>> '[author's trans]'.

<sup>136</sup> *Issues Considered in 2009*, WTO Doc G/SPS/GEN/204/Rev.10/Add.1, 2.

<sup>137</sup> *Trade Policy Review: Indonesia Record of the Meeting*, WTO Doc WT/TPR/M/278 (10 and 12 April 2013) 50.

<sup>138</sup> DS484: *Indonesia-Measures Concerning the Importation of Chicken Meat and Chicken Products*.

<sup>139</sup> IAQA, *Selayang Pandang Pusat Karantina Tumbuhan dan Keamanan Hayati Nabati* (Plants Quarantine Centre and Plant Food Safety at A Glance)

<<http://www.karantina.deptan.go.id/?page=action&&c=subsubcat&&idcat=2&&idsubcat=9&&idsubsubcat=13>>

<sup>140</sup> The recognition of harmonisation to international standards "international rules" in *Law on Animal Husbandry and Animal Health*, art 59 sec 4 was declared does not have a legal binding anymore. See *Mahkamah Konstitusi* (Indonesian Constitutional Court), No. 137/PUU-VII/2009, 138.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> 'Three Sisters' comprises Codex Alimentarius, IPPC, and OIE. See, e.g., *Three Sisters Standard-Setting Procedure Background Document*, WTO Doc G/SPS/1115 (10 October 2011) (Note by the Secretariat) 1.

<sup>144</sup> International Plant Convention Protection, *List of Countries* <<https://www.ippc.int/en/countries/all/list-countries/>>. See also the Ministry of Foreign Affairs of the Republic of Indonesia, *Daftar Perjanjian Internasional* (List of Treaties)

<[http://treaty.kemlu.go.id/index.php/treaty/index?fullPage=1&Treaty\\_page=61&sort=validity](http://treaty.kemlu.go.id/index.php/treaty/index?fullPage=1&Treaty_page=61&sort=validity)>.

<sup>145</sup> Codex Alimentarius, *List of Codex Members* <[http://www.fao.org/fao-who-codexalimentarius/members-observers/members/en/?no\\_cache=1](http://www.fao.org/fao-who-codexalimentarius/members-observers/members/en/?no_cache=1)>.

approach,<sup>147</sup> Indonesia ratified the SPS Agreement since the ratification of the Agreement on the Establishment of the WTO.<sup>148</sup> According to the SPS Agreement, Member countries are encouraged to harmonise their SPS measures with the international standards provided by the Three Sisters. Thus, there is a good reason to refer to the SPS international standards. Some previous decisions show that the Indonesian Constitutional Court referred to international treaties in decided cases.<sup>149</sup> If the Indonesian Constitutional Court views that the SPS international standards contradict the Constitution, they should declare where such contradictions exist.

Other factors include a lack of infrastructure and human resources, as discussed previously.<sup>150</sup>

### (ii) *Potential Improvement*

Indonesia should regulate to adopt or refer to the SPS international standards when establishing its SPS measures, so that it will be compliant. Harmonisation is likely to provide advantages because Indonesia will then not need to undertake a risk assessment, and it will achieve conformity to international standards, which will result in fewer STC and disputes.

However, the problem for Indonesia and other developing countries is that it is a challenge to comply with the international standards, since they are typically created by the developed Members, and often reflect the developed Members' culture, infrastructure and capabilities.<sup>151</sup> It is often difficult for developing countries to fill the gaps in technology, science and finances.<sup>152</sup> To solve this problem, technical assistance from other developed countries, international bodies and the WTO is crucial.

### (e) *Regionalisation Principle*

Indonesia applies regionalisation governed under Article 6 of the SPS Agreement in some of its territories, particularly for exportation purposes. Indonesia has been successfully declared as free

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<sup>146</sup> OIE-World Organisation for Animal Health, *The 180 OIE Members* <<http://www.oie.int/about-us/our-members/member-countries/>>. See also the Ministry of Foreign Affairs of the Republic of Indonesia, *Keanggotaan Indonesia Pada Organisasi Internasional* (Indonesia's Membership at International Organisations) <[http://kemlu.go.id/Documents/Keanggotaan\\_Indonesia\\_pada\\_OI.pdf](http://kemlu.go.id/Documents/Keanggotaan_Indonesia_pada_OI.pdf)>.

<sup>147</sup> WT/MIN(01)/DEC/1, 20 November 2001, Number 47, 10.

<sup>148</sup> *Undang-Undang Nomor 7 Tahun 1994 Tentang Pengesahan* Agreement on the Establishment of the World Trade Organisation [Law No 7 of 1994 legalisation of the Agreement on the Establishment of the World Trade Organisation] (Indonesia).

<sup>149</sup> See, e.g., *Mahkamah Konstitusi* (Constitutional Court decisions) MK No. 011-017/PUU-I/2003 on General Election; *Mahkamah Konstitusi* (Constitutional Court decision) MK No. 006/PUU-IV/2006 on Judicial Review of the Law on the Truth and Reconciliation Commission (Law No. 27 of 2004).

<sup>150</sup> Interview with an official of the IAQA, Jakarta, 6 February 2013.

<sup>151</sup> The WTO Agreement Series: *Sanitary Phytosanitary Measures*, 19 <[http://wto.org/english/res\\_e/publications\\_e/sps\\_dataset\\_wtr2012\\_e.xls](http://wto.org/english/res_e/publications_e/sps_dataset_wtr2012_e.xls)>.

<sup>152</sup> WTO, Understanding the WTO Basic: *Principles of the Trading System* <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm)>.

from some diseases, such as Early Mortality Syndrome - a particular disease of shrimp<sup>153</sup> and Foot and Mouth Disease.<sup>154</sup>

Indonesia also recognises the regionalisation principle in the importation area in its laws and regulations, for example the *Government Regulation Number 4 of 2016*, the *Law on Animal Husbandry and Animal Health*, and in previous laws such as *Government Regulation No. 82 of 2000 on Animal Quarantine* art 76; *Decree of the Ministry of Agriculture No 3026/kpts/PD620/8/2009 on Licence on Importation of deboned meat*, *Government Regulation No. 15 of 1977 on Refusal, Prevention, Eradication and Cure of Animal Disease*.<sup>155</sup> Indonesia has also recognised PFA for a number of Members on particular products,<sup>156</sup> such as Potato Cyst Nematode (*Globodera Rostochchiensis*) of Western Australia,<sup>157</sup> Fruit Fly Free Area on Med Fly (*Ceratitis Capitata*) on California grape of the US,<sup>158</sup> PFA on onion of the Netherlands<sup>159</sup> and ‘Kinnow’ oranges of Pakistan.<sup>160</sup>

However, the regionalisation recognition in the importation area is not consistently applied and a number of STC were raised regarding this: STC243 on a lack of recognition of PFA,<sup>161</sup> STC286 on the import of poultry meat,<sup>162</sup> STC305 on import restrictions on beef and recognition of the principle of regionalisation,<sup>163</sup> STC280 on new meat import conditions<sup>164</sup> and DS506 on Indonesia’s measures concerning the importation of bovine meat.<sup>165</sup> Brazil raised concerns about Indonesia’s import restrictions on beef and recognition of the principle of regionalisation, which

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<sup>153</sup> FQIA, above n70.

<sup>154</sup> OIE, *General Disease Information Sheet-Food and Mouth Disease*, 2  
<[http://www.oie.int/fileadmin/Home/eng/Media\\_Center/docs/pdf/Disease\\_cards/FMD-EN.pdf](http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Disease_cards/FMD-EN.pdf)>.

<sup>155</sup> Law on Animal Husbandry and Animal Health] (Indonesia) art 59 sec 2 states that fresh animal products which are imported to the territory of Indonesia shall come from animal production unit in a country or zone within a country which has fulfilled importation requirement and procedure; *Peraturan Pemerintah Nomor 82 Tahun 2000 Tentang Karantina Hewan*[Government Regulation No 82 of 2000 on Animal Quarantine] (Indonesia) art 76; *Keputusan Menteri Pertanian Nomor 3026/kpts/PD620/8/2009 tentang Persetujuan Pemasukan Daging Tanpa Tulang* (Decree of Minister of Agriculture No 3026/kpts/PD620/8/2009 on deboned meat), *Peraturan Pemerintah Nomor 15 Tahun 1977 tentang Penolakan, Pencegahan, Pemberantasan dan Pengobatan Penyakit Hewan* [Government Regulation No 15 of 1977 on Refusal, Prevention, Eradication and Cure of Animal Disease] (Indonesia).

<sup>156</sup> IAQA, *Rekognisi PFA/PSAT* (PFA/PSAT Recognition)  
<<http://karantina.deptan.go.id/?page=action&&c=subsubcat&&idcat=2&&idsubcat=9&&idsubsubcat=15>>

<sup>157</sup> *Decree of the Director General of the IAQA No. 1015/Kpts/KT.420/L/7/2012*.

<sup>158</sup> *Decree of the Director General of the IAQA No. 348/Kpts/PD.540.220/L/12/2006*.

<sup>159</sup> *Decree of Director General of the IAQA No. 147/Kpts/HK.030/L/02/2014*.

<sup>160</sup> IAQA above n129.

<sup>161</sup> WTO, Committee on SPS Measures, *Specific Trade Concerns*, Note by the Secretariat, Addendum, Issues Not Considered in 2010, G/SPS/GEN/204/Rev.11/Add.2, 119.

<sup>162</sup> Ibid, 15. See also *Trade Policy Review Indonesia Record of the Meeting, Addendum*, WTO Doc WT/TPR/M/278/ Add.1 (10 and 12 April 2013) (2 August 2013) 77.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid 14.

<sup>165</sup> *Indonesia-Measures Concerning the Importation of Bovine Meat*, WTO Doc WT/DS506/1, G/L/1145, G/SPS/GEN/1486, G/LIC/D/50, G/TBT/D/49, G/AG/GEN/130 (7 April 2016) (Request for Consultation by Brazil) 1.



import restriction on poultry meat,<sup>166</sup> and raised the issue of the import of chicken meat and chicken products to the DSB under DS484.<sup>167</sup> In STC330, the recognition of PFA, which opened access through the Port Tanjung Priok to several exporting Members, is likely to be an issue of non-compliance; recognition on a country basis is not compliant with Article 6 of the SPS Agreement on regionalisation recognition.<sup>168</sup>

(i) *Difficulties and Underlying Reasons*

Indonesia faces challenges in applying the regionalisation principle in its territories for a number of reasons, including insufficient risks management infrastructure<sup>169</sup> for particular diseases and pests, in the form of laboratories and surveillance facilities and a lack of veterinary experts to undertake risk management.<sup>170</sup> Modern infrastructure, such as, laboratories, as well as proficient experts; particularly veterinarian, is vital for the purpose of risk management, particularly disease management.<sup>171</sup> The judicial review, *Indonesian Constitutional Court Decision* No. 137/PUU-VII/2009, 138, addresses and highlights that producers and exporters face challenges applying regionalisation due to a lack of resources.<sup>172</sup> Furthermore, a lack of communication among the relevant SPS agencies, such as customs, immigration and quarantine, has a negative impacts on the country's ability to undertake surveillance to prevent the spread of diseases in the border areas.<sup>173</sup>

In the import sector, Indonesia tends to apply a country - based importation policy, instead of a region or zonation - based policy which has been enacted in several laws.<sup>174</sup> This preference is in line with the government's policy to provide maximum protection for the public. Further, the policy for not importing commodities on a region or zone - basis, but country - basis only, is affected by the judicial review of *Indonesian Constitutional Court Decision* No. 137/PUU-VII/2009, 138, which annulled the regionalisation recognition on *Law on Animal Husbandry and Animal Health*.

<sup>166</sup> WTO, above n161, 118.

<sup>167</sup> WTO, Dispute Settlement: Dispute DS484, *Indonesia-Measures Concerning the Importation of Chicken Meat and Chicken Products* <[http://wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds484\\_e.ht](http://wto.org/english/tratop_e/dispu_e/cases_e/ds484_e.ht)>.

<sup>168</sup> SPS Agreement, art 6.

<sup>169</sup> See, e.g., BKIPM, *Rencana Kerja Program Pengembangan Karantina Ikan, Pengendalian Mutu dan Keamanan Hasil Perikanan Tahun 2015* (Work Plan on 2015 FQIA Development Program) <<http://www.bkimp.kkp.go.id/bkimp/news/read/1043/rencana-kerja-program-pengembangan-karantina-ikan,-pengendalian-mutu-dan-keamanan-hasil-perikanan-tahun-2015.html>>.

<sup>170</sup> Interview with a staff of Animal Quarantine and Animal Safety Centre of the IAQA (Jakarta, 7 February 2013).

<sup>171</sup> See, e.g., *Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Doc G/SPS/48, Committee on SPS Measures (16 May 2008) 6; WTO: 2006 News Items, *SPS Committee grapples with 'regionalisation'* (24 October 2005 and 1-2 February 2006) <[http://www.wto.org/english/news\\_e/news06\\_e/sps\\_feb06\\_e.htm](http://www.wto.org/english/news_e/news06_e/sps_feb06_e.htm)>.

<sup>172</sup> The lawsuit was submitted by interested organisations and individuals, the Institute for Global Justice, Indonesian Veterinary Association, and Indonesian Consumers Organisation.

<sup>173</sup> IAQA, above n51.

<sup>174</sup> Indonesia has prohibited the importation of meat and meat products from countries whose territories are not completely free from pest or diseases. See discussion on Regionalisation Principle in Chapter 2 page 60-61.

The *Indonesian Constitutional Court Decision* No. 137/PUU-VII/2009, 138 declared that Article 59(2) of *Law Animal Husbandry and Animal Health*, which stipulates the recognition of the import of fresh animal products ‘from a zone within a country’, is no longer legally binding.<sup>175</sup> The *Indonesian Constitutional Court Decision* No. 137/PUU-VII/2009, 138 has a divergent perspective, and ruled on whether or not imported products from regionalised zones are free from any contamination of diseases or pests in non-regionalised zones. Therefore, the *Indonesian Constitutional Court Decision* No. 137/PUU-VII/2009, 138 deals more with national health and consumer protection issues rather than the regionalisation principle and is over emphasise risks that have not been scientifically proven. On the other hand, the regionalisation principle clearly states that scientifically it is possible for some zones or areas within a country to be free from disease or pest while other zones are infected. Thus, it would be safe to import such products from regionalised zones within a country which, is not as a whole, free from particular diseases or pests.

(ii) *Attempts Undertaken*

Indonesia has undertaken efforts to overcome the regionalisation issues by setting targets for preventing the spread of disease, such as zoonoses,<sup>176</sup> in particular by addressing specific diseases, such as rabies. The target is for Sumatera predicted to be free from rabies by 2015, Bali by 2013-2014 and the Moluccas by 2017.<sup>177</sup> The Bali province has become a model for the control of the rabies for Indonesia.<sup>178</sup> Indonesia has collaborated with the Food Agricultural Organisation (FAO) in establishing Influenza Virus Monitoring online for preventing and eradicating Avian Influenza.<sup>179</sup> Further, the FAO granted technical assistance to Indonesia through a project TCP/INS/3203/D ‘Strengthening Quarantine Control System for Invasive Alien Species’.<sup>180</sup> Indonesia has also engaged technical assistance from donors to assist in the risk management, such as technical assistance from FAO, AusAID and USAID, for the rabies-free agenda in Bali.<sup>181</sup>

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<sup>175</sup> *Mahkamah Konstitusi* [Indonesian Constitutional Court] No 137/PUU-VII/2009, 27 August 2010. The recognition of the importation of fresh animal products ‘from a zone within a country’ in Law No. 18 of 2009 on Animal Husbandry and Animal Health, Article 59 sec 2 was declared to no longer be legally binding.

<sup>176</sup> World Health Organization, Zoonoses, *Zoonoses and the Human-Animal-Ecosystem Interface* <<http://www.who.int/zoonoses/en/>>. Zoonoses are diseases, which can be transmitted from vertebrate animals to human and vice versa.

<sup>177</sup> IAQA, above n51.

<sup>178</sup> FAO, *Bali Serves as a Model for Control of Rabies* <<http://www.fao.org/in-action/bali-serves-as-a-model-for-control-of-rabies/en/>>.

<sup>179</sup> *Ditjend Peternakan dan Kesehatan Hewan Tingkatkan Kewaspadaan Pengendalian Flu Burung dengan Membangun Influenza Virus Monitoring (IVM) Online* (24 May 2014) <<http://ditjennak.pertanian.go.id/index.php?page=berita&action=detail&idberita=445>>.

<sup>180</sup> IAQA, *SPS News Letter 15 Edition* (March-April 2011), 6.

<sup>181</sup> ‘Bali Strives to be Rabies-Free by 2015’ *The Bali Times* (online) <<http://www.thebalitimes.com/2014/02/03/bali-strives-to-be-rabies-free-by-2015/>>.

In the area of imports, the *Law on Animal Husbandry and Animal Health* has been amended by *the Amendment of Law on Animal Husbandry and Animal Health*.<sup>182</sup> The *Amendment Law* attempts to adopt the regionalisation principle by regulating a veterinary authority in *Sistem Kesehatan Hewan Nasional - Siskeswanas* (national animal health system) in Articles 68A, 68B, 68C, 68D and 68E.<sup>183</sup> According to the IAQA, these provisions will be applied by establishing ‘quarantine islands’.<sup>184</sup> The *Amendment Law* also allows for the import of ruminant cattle from zones of a country after meeting the requirements<sup>185</sup> and importing animal husbandry and/or animal products.<sup>186</sup> Nevertheless, the *Amendment Law* does not recognise the regionalisation principle on the import of fresh animal products, because Article 59(2) governs country-based imports only.<sup>187</sup> However, Indonesia recently enacted Government Regulation No. 4 of 2016,<sup>188</sup> which allows zone-based imports under certain conditions.<sup>189</sup> Thus, the body of legislation seems to be inconsistent, because it accommodates the *Constitutional Court Decision* by not recognising imports on a zone basis.

### (iii) *Potential Solutions*

Indonesia’s legislative body should be consistent in formulating Indonesia’s SPS laws to fully recognise the regionalisation principle, both in imports and exports, such as in the *Amendment Law*. The inconsistency in regulating the regionalisation principle is considered a non-compliance with Article 6 of the SPS Agreement. Further, Indonesia should implement the laws properly, since the regulation adopting regionalisation<sup>190</sup> was not well implemented for financial and technical reasons.<sup>191</sup>

Indonesia should regulate to enhance the SPS Agreement dissemination particularly to relevant government agencies. This will prevent divergent perspectives among relevant government institutions, particularly on the regionalisation principle, and should allow them to form a shared understanding on the role of the SPS Agreement in international trade. It is expected that, in

<sup>182</sup> ‘The Amendment Law’, above n7.

<sup>183</sup> Ibid arts 68A, 68B, 68C, 68D, 68E.

<sup>184</sup> IAQA, *Quarantine Island and Challenges for Disease* (3 November 2014) <[http://www.karantina.deptan.go.id/?page=quarantine\\_detail&&id=60](http://www.karantina.deptan.go.id/?page=quarantine_detail&&id=60)>.

<sup>185</sup> The requirements are determined by veterinary authority based on a risk analysis in the field of animal health especially for the benefit of the national interest. See the Amendment Law, art 36C sec 2, above n7.

<sup>186</sup> Ibid art 36E.

<sup>187</sup> Ibid art 59 sec 2.

<sup>188</sup> *Peraturan Pemerintah Nomor 4 Tahun 2016 tentang Pemasukan Ternak Dan/Atau Produk Hewan dalam Hal Tertentu Yang Berasal Dari Negara Atau Zona Dalam Suatu Negara Asal Pemasukan* [Government Regulation No 4 of 2016 on Importation of Cattle and/Or Animal Products In Certain Conditions From Exporting Country Or Country Zone] (Indonesia).

<sup>189</sup> Ibid art 5. These are: in the impact of catastrophe, lack of meat supply, high price of meat which causes inflation and influences national economic stability.

<sup>190</sup> See ‘The Quarantine Law’ above n9.

<sup>191</sup> Ministry of Trade, above n18.

examining cases, courts would consider the context of international trade rules, the WTO and the SPS Agreement, in particular, to which Indonesia as a WTO member must comply. The courts should also carefully consider when to apply the Indonesian national legal sources<sup>192</sup> and when to adopt international standards. Indonesia may improve its SPS institutional performance in undertaking border area control, surveillance and eradication of particular diseases and pests. A comparative study may also be undertaken to learn of the other countries' experiences and best practices.

(f) *Equivalence Principle*

Indonesia has applied the equivalence principle as stipulated under Article 4 the SPS Agreement. For example, Indonesia achieves equivalence recognition through a Mutual Recognition Arrangement (MRA) on the Fish and Fishery Products Inspection and Control Systems between Indonesia and Canada,<sup>193</sup> recognition by China on aquatic products<sup>194</sup> and hygiene quarantine and examination importation requirement on bird nests.<sup>195</sup> Indonesia has also granted equivalence recognitions to exporting Members, such as an MRA to Mandarin 'Kinnow' oranges from Pakistan in August 2013.<sup>196</sup> Recognition of SPS measures have been previously granted to the US, Australia, Canada, Thailand and New Zealand to allow them to export agricultural commodities through the Tanjung Priok Port.<sup>197</sup>

(i) *Difficulties and Underlying Reasons*

Indonesia faces challenges in practice, in that the equivalence recognition is often difficult to attain due to the lengthy negotiation processes for achieving a consensus. For example, recognition by China on hygiene quarantine and examination import requirements on bird's nests was granted to Indonesia after almost five years of negotiation.<sup>198</sup> The US claimed that Indonesia did not grant

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<sup>192</sup> *Undang-Undang Nomor 10 Tahun 2004 Tentang Pembentukan Peraturan Perundang-Undangan* [Law No 10 of 2004 on Legislations Formation] (Indonesia). Art 7 states that the legislations formation shall rely on national legislation hierarchy as the legal sources, Indonesian Constitution 1945, Act/Government Regulation which substituted Act, Government Regulation, Presidential Regulation, Local Regulation.

<sup>193</sup> The MRA was undertaken by the Directorate General of Capture Fisheries of the Department of Marine Affairs and Fisheries and Canadian Food Inspection Agency in March 2002.

<sup>194</sup> General Administration of Quality Supervision Inspection and Quarantine (AQSIQ) Decree No. 135 on Administrative Measures of Inspection, Quarantine and Supervision on Entry and Exit Aquatic Product (China).

<sup>195</sup> IAQA, *Ekspor Perdana Sarang Walet Indonesia ke Tiongkok* (The first Export of Indonesia Bird Nests to China) (29 January 2015) <[http://www.karantina.deptan.go.id/?page=pers\\_detail&&id=24](http://www.karantina.deptan.go.id/?page=pers_detail&&id=24)>.

<sup>196</sup> IAQA, Press Release: *Signing Mutual Recognition Agreement (MRA) between Indonesia and Pakistan in the Implementation of Quarantine Measures* <[http://www.karantina.deptan.go.id/?page=pers\\_detail&&id=11](http://www.karantina.deptan.go.id/?page=pers_detail&&id=11)>.

<sup>197</sup> Indonesia Now, *Preferential Trade Agreement between Indonesia and Pakistan* <<http://indonesia-now.com/investment/preferential-trade-agreement-of-pakistan-indonesia/>>.

<sup>198</sup> IAQA, above n156.

equivalence recognition to the US SPS measures on beef and pork inspection systems, although the bilateral negotiation had been ongoing for more than three years.<sup>199</sup>

The equivalence recognition negotiation process is often complicated because it relates to governments' political will and agendas. For example, discussions between Indonesia and China in establishing an MRA on the import of horticultural products took a great deal of time because both countries have their own separate agendas,<sup>200</sup> which impacted on the country's ability to reach an agreement. Additionally, Indonesia faces challenges in undertaking cooperation and negotiation both inside and outside the WTO fora<sup>201</sup> due to a lack of bargaining power and the limited negotiation skills of its delegations.

### *(ii) Attempts Undertaken*

Indonesia has adopted the SPS measures of some importing Members into its SPS measures for assisting exportation<sup>202</sup> and has made efforts by continuing negotiations with its trading partners. Such negotiations include for requesting the balance of implementation and the mutual advantages gained by both countries. For example, in the context of the MRA with China, Indonesia negotiated for the export of certain products from China in return for Indonesia's export of bird's nests.<sup>203</sup> Fortunately, Indonesia reached a consensus with China and began to export bird's nests in 2014.

### *(iii) Potential Solutions*

Indonesia should better prepare its negotiation arrangements and improve its negotiation capabilities. Relevant information and documents should be provided, as more information will allow Indonesia to achieve an improved outcome. Indonesia should actively engage in the negotiation process, such as in determining the estimation time for the process in order to be more predictable.

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<sup>199</sup> USTR, *2014 Report on Sanitary and Phytosanitary Measures*, 58  
<[http://www.ustr.gov/sites/default/files/FINAL-2014-SPS-Report-Compiled\\_0.pdf](http://www.ustr.gov/sites/default/files/FINAL-2014-SPS-Report-Compiled_0.pdf)>.

<sup>200</sup> Kontan, *MRA China dan Indonesia Mundur* [Delay of MRA China and Indonesia], 10 October 2013  
<<http://industri.kontan.co.id/news/mra-china-dan-indonesia-mundur>>. Indonesia wanted China to export garlic in return for its bird's nests, while China wanted to export its horticulture such as oranges.

<sup>201</sup> *Trade Policy Review Report by Indonesia*, WTO Doc WT/TPR/G/278, 9.

<sup>202</sup> For example, Indonesia adopted the Protocol of Inspection, Quarantine and Hygiene Requirements for the Importation of Bird's Nests Products from Indonesia to China signed by both countries in 2012 which was adopted through *Peraturan Menteri Pertanian (Permentan) Nomor: 41 Tahun 2013* and *Surat Keputusan Kepala Badan Karantina Pertanian Nomor: 832 Tahun 2013*. See IAQA, above n184.

<sup>203</sup> Kontan, above n200.

In the area of import, Indonesia should respond more appropriately to requests for the equivalence recognition of other countries. DS484, brought by Brazil to the WTO DSB, was affected by Indonesia's poor response towards Brazil's request for equivalence recognition.<sup>204</sup>

Indonesia should actively seek SPS cooperation with developed countries, international organisations and the WTO STDF for technical assistance. In this respect, Indonesia should clearly identify its needs, so that the technical assistance will be targeted specifically to assist Indonesia in addressing its difficulties and improve its SPS implementation. Indonesia should encourage the relevant governmental staff to actively participate in the SPS international fora, through such activities as seminars, trainings and workshops to improve their proficiency. To maximise its access for technical assistance, Indonesia also needs to more active in engaging in the relevant international bodies programs, such as the SPS international standards body.

Equivalence recognition arrangements with many more countries should be expanded and improved by providing comprehensive information on the related SPS measures, as the more comprehensive the information the smoother the negotiation process.

#### (g) *Technical Assistance*

Indonesia has cooperated in technical assistance through capacity building programs such as training and short courses. For example, Indonesia received a capacity building program from Australia<sup>205</sup> and cooperated in Agricultural Quarantine Services Partnership Agreement with New Zealand.<sup>206</sup> Indonesia has also collaborated with FAO in establishing online Influenza Virus Monitoring for preventing and eradicating the Avian Influenza.<sup>207</sup>

#### (h) *Difficulties and Underlying Reasons*

Indonesia has often faced challenges in implementing into practice the knowhow gained from the technical assistance. The issue exists<sup>208</sup> because of the different circumstances in Indonesia

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<sup>204</sup> WTO, Dispute Settlement: Dispute DS484, *Indonesia-Measures Concerning the Importation of Chicken Meat and Chicken Products* <[http://wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds484\\_e.ht](http://wto.org/english/tratop_e/dispu_e/cases_e/ds484_e.ht)>.

<sup>205</sup> Office of the Chief Plant Protection Officer Australian Government Department of Agriculture Fisheries and Forestry (Canberra), *Mid-Term Review of Australia's Regional 'Sanitary Phytosanitary Capacity Building Program' (SPSCBP), Final Report of the mid-Term Review Team*, May 28<sup>th</sup> 2008 <[www.ausaid.gov.au/Publications/Documents/ardcp-ipr.doc](http://www.ausaid.gov.au/Publications/Documents/ardcp-ipr.doc)>.

<sup>206</sup> IAQA, above n55, 59.

<sup>207</sup> *Ditjend Peternakan dan Kesehatan Hewan Tingkatkan Kewaspadaan Pengendalian Flu Burung dengan Membangun Influenza Virus Monitoring (IVM)* (Directorate General of Animal Husbandry and Animal Health Improves Vigilance on the Control of Avian Influenza through Influenza Virus Monitoring (IVM)) Online (24 May 2014) <<http://ditjennak.pertanian.go.id/index.php?page=berita&action=detail&idberita=445>>.

<sup>208</sup> Interview with an official in the IAQA, 7 February 2013.

which may render the knowhow unsuitable for implementation. Insufficient infrastructure and human resources can also result in difficulties in implementation.

Internally, Indonesia faces divergent priorities and philosophical bases with respect to existing policies. Changes in the structure of the SPS institutions often affect a change of policies from decision makers,<sup>209</sup> different management usually produces different policies. This, combined with complex structures, a large and diverse population and lack of communication, results in a system that lacks coherence and stability.

Moreover, enterprises are often unaware of the government's efforts in enhancing market access through agreements with trading countries. The priority of the enterprises is to include real market access for their products and a capital injection to meet their needs.<sup>210</sup> For instance, small fishermen and farmers usually expect subsidies. Their interest has focussed more on financial assistance, rather than capacity building and a transfer of knowledge. In fact, capacity building programs in the form of transfer of technology are much more important for developing countries such as Indonesia.

*(i) Potential Improvement*

Indonesia should regulate to establish a stable SPS system and policies into a SPS system blueprint to accommodate the short, middle and long-term plan of SPS development mapping. This would minimise changes in priorities and the vacuum of development planning in the event of leadership changes within the SPS bodies.<sup>211</sup> The successors and new chief officers only have to continue to implement the SPS system and improve it where possible. Indonesia should also inventory its needs and establish action plans for SPS development. This would be a better approach for technical assistance to the donors and avoid confusion in determining and implementing knowledge and skills gained from technical assistance.

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<sup>209</sup> Plant Protection Profile (2007-2008), *Indonesia*, 158.

<sup>210</sup> 'RI Told to Learn from Mistakes on Regional Trade Pacts' *The Jakarta Post* [online], (7 April 2014) <<http://www.thejakartapost.com/news/2014/04/07/ri-told-learn-mistakes-regional-trade-pacts.html>>.

<sup>211</sup> The SPS bodies include the IAQA and the FQIA. See Chapter 2 page 42.

### 3 *Exportation Dimension*

#### (a) *Issue of Market Access*

Indonesia has exported products under the scope of the SPS Agreement, including main commodities,<sup>212</sup> potential commodities,<sup>213</sup> and fruits.<sup>214</sup> Nevertheless, some of Indonesia's exporters face difficulties in accessing the markets of importing Members, as demonstrated in twelve STCs raised by Indonesia and other exporting Members.<sup>215</sup>

#### (i) *Difficulties and Underlying Reason*

The issue of market access is affected by various reasons, including:

- *High Level of SPS Measures*

There are several high level SPS measures of importing countries,<sup>216</sup> such as the EU 'Rapid Alert System for Food and Feed for tuna commodity',<sup>217</sup> and quality standards of shrimp required by major importers, namely Japan, the US and the EU.<sup>218</sup> Indonesia faces difficulties in meeting such high standards resulting in the ban or refusal of Indonesia's exports,<sup>219</sup> such as the exports of cacao to the US containing pesticide residue exceeding Maximum Residue Level (MRL), and coffee exports to Japan due to contamination by pesticide residue exceeding the MRL, as well as, prohibition of particular horticultural products to Taiwan due to their containing particular pests.<sup>220</sup> A number of Indonesia's fisheries products have also been refused by some importing countries,<sup>221</sup>

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<sup>212</sup> Ministry of Trade, *Economic Profile-Export Destination Country for 10 Main Commodities* (31 October 2014), <<http://www.kemendag.go.id/en/economic-profile/10-main-and-potential-commodities/10-potential-commodities>>. The commodities include palm oil, shrimp, cocoa and coffee.

<sup>213</sup> Ibid. The commodities include medicinal herbs, processed food, fish and fish products and spices.

<sup>214</sup> Statistics Indonesia, *Export of Fruit by Major Countries Destination, 2008-2012* <[http://www.bps.go.id/eng/tab\\_sub/view.php?kat=2&tabel=1&daftar=1&id\\_subyek=08&notab=20](http://www.bps.go.id/eng/tab_sub/view.php?kat=2&tabel=1&daftar=1&id_subyek=08&notab=20)>. Export of fruit from 2008 to 2012 had a foreword trend, which totals US\$45725.70 in 2008 and US\$183491.50 in 2012.

<sup>215</sup> The twelve STC are: STC 39 on maximum level for certain contaminants (aflatoxins) in foodstuffs, STC 85 on import restriction on prawn, STC 99 on the import restrictions of sugar cane top, STC 130 on restriction on shellfish, STC 155 on importation requirements for Netherlands truss tomatoes, STC 219 on EurepGAP requirements for bananas, STC277 on NAPPO draft standard for ships and cargo, STC 321 on Japan's MRL applied to sesame, STC 360 on import policy on swallow nests, STC382 on EU revised proposal for categorisation of compounds as endocrine disruptors and STC416 on China's import ban on fresh mangosteen. See WTO, above n161.

<sup>216</sup> FAO Corporate Document Repository, *WTO Agreement on Agriculture: the implementation experience-Indonesia*, 15 <<http://www.fao.org/docrep/005/y4632e/y4632e0l.htm#TopOfPage>>.

<sup>217</sup> *Peluang dan Hambatan Usaha Perdagangan Tuna* (Opportunities and Challenges of Tuna Trading, *Warta Pasar Ikan*, June 2011 vol. 94, 6) '[author's trans]'.  
<sup>218</sup> WTO Publication, *Managing the Challenges of WTO Participation: Case Study 18*, Rina Octaviani and Erwidodo, *Indonesia's Shrimp Exports: Meeting the Challenge of Quality Standards*, <[http://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case18\\_e.htm](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case18_e.htm)> 17 May 2012.

<sup>219</sup> *Trade Policy Review (Report by Indonesia)*, s278-e.pdf., 9.  
<sup>220</sup> IAQA, above n131.

<sup>221</sup> For example is the refusal of particular Indonesia's fisheries products by Germany, Italy, France, Spain, Canada, South Korea and Russia in 2013. See FQIA, above n77.



including fourteen EU cases in 2012 and five cases in 2013.<sup>222</sup> According to the United State Food and Drug Administration (US-FDA), there were more than 100 cases of import refusals on fisheries products from Indonesia in 2014.<sup>223</sup>

- *Non-Compliance of Exporters*

Indonesian exporters lack compliance with the SPS standards of importing Members, which results in Indonesia receiving non-compliance notifications. Currently, there are 10 Notification of Non-Compliance from the EU Rapid Alert System for Food and Feed (EU-RASFF)<sup>224</sup> for particular commodities contaminated by aflatoxins. There are also notifications on the prohibition of particular horticultural products to Taiwan containing particular pests,<sup>225</sup> as well as the refusal of fisheries products because neither comply with the required standards, such as Hazard Analysis and Critical Control Points (HACCP), or the export procedures such as submission of registration numbers.<sup>226</sup> According to the FQIA, Indonesian enterprises are more concerned with sales than with product quality<sup>227</sup> and this results in low levels of competitiveness of Indonesia's fishery products, and its products in general. This situation is reflected in Indonesia being placed number 41 out of 138 countries in term of their competitiveness.<sup>228</sup> The country needs a much greater effort to be able to compete with other producers in the world.

Indonesia's non-compliance is affected by a lack of legal and procedural awareness.<sup>229</sup> For example, quarantine service users often fail to comply with product quality standards in order to be consistent with quarantine rules particularly in fulfilling reporting times for health certificate arrangements for fish and fish products.<sup>230</sup> This situation is also affected by insufficient proficiency

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<sup>222</sup> FQIA, *Kuliah Umum Kepala Badan: Produk Perikanan Indonesia Berdaya Saing Internasional* (Study General of FQIA Chief Board: Indonesia's Fishery Products International Competitive) <<http://www.bkipm.kkp.go.id/bkipm/event/read/1723/kuliah-umum-kepala-badan:-produk-perikanan-indonesia-berdaya-saing-internasional.html>>.

<sup>223</sup> US Food and Drug Administration (FDA), *Import Refusal Report* <[http://www.accessdata.fda.gov/scripts/importrefusals/ir\\_months.cfm?LType=C](http://www.accessdata.fda.gov/scripts/importrefusals/ir_months.cfm?LType=C)>.

<sup>224</sup> European Commission, *RASFF-Food and Feed Safety Alert* <[https://ec.europa.eu/food/safety/rasff\\_en](https://ec.europa.eu/food/safety/rasff_en)>. The EU-RASFF's role is to provide an alert to public when risks to health are detected in food chain.

<sup>225</sup> IAQA, above n131.

<sup>226</sup> Widodo Sumiyanto, Chief Department of Harmonisation and Case Handling, Pusat Sertifikasi Mutu dan Keamanan Hasil Perikanan BKIPM-KKP 2012, *Permasalahan Mutu dan Keamanan Hasil Perikanan Produk Ekspor dan Tindakan-tindakan Perbaikan dan Pencegahan*, 26.

<sup>227</sup> FQIA, *Rapat Koordinasi Permasalahan Operasional Tindak Karantina Ikan Ekspor* (Coordination Meeting on Issue of Exported Fishery Quarantine Operational Action) <<http://www.bkipm.kkp.go.id/bkipm/event/read/1726/rapat-koordinasi-permasalahan-operasional-tindak-karantina-ikan-ekspor.html>>.

<sup>228</sup> World Economic Forum (WEF), *The Global Competitiveness Report 2016-2017* <[http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017\\_FINAL.pdf](http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf)>.

<sup>229</sup> FQIA, above n70.

<sup>230</sup> Ibid.

of domestic producers, such as a lack of infrastructure and low level partnership between the government and the private sector.<sup>231</sup> Indonesia's lack of infrastructure,<sup>232</sup> such as insufficient warehouses, lack of an integrated laboratory network and high dwelling time in major ports affects the quality of its exported products'. Further, exporters face problems in accessing the current regulations of importing countries<sup>233</sup> and need further valuable information on export requirements.

- *Lack of Proficiency in Trade Negotiation*

Indonesia has entered into trade cooperations with other countries, such as ASEAN, which involves free trade agreements with other countries. While the ASEAN FTA and ASEAN economic communities may bring about new opportunities for Indonesia, they also create potential challenges. In particular, Indonesia faces the issue of weak bargaining power due to a lack of proficiency in the negotiation process. For example, Indonesia suffered a trade deficit after ASEAN China Free-Trade Agreement (ACFTA) was signed in 2004 and entered into force in 2005.<sup>234</sup> This is because Indonesia and China have a similar competitive advantage of products, such as agricultural products. After the ACFTA, Chinese agricultural products flooded the Indonesian market, while Indonesia's products struggled to penetrate China's market in return.<sup>235</sup> In this regard, Indonesia should consider all ramifications before entering into trade agreements, because experience demonstrates that such trade agreements do not always lead to benefits.<sup>236</sup>

- *Private Standards*

Private standards are a growing dilemma in Indonesia's SPS implementation,<sup>237</sup> including the fisheries product standards area.<sup>238</sup> Indonesia's products that are exported to the US and the EU

<sup>231</sup> See, e.g., 'Industri Perikanan, Ini 5 Hambatan Utama', (Fisheries Industry, 5 Main Obstacles) *Bisnis.com* (online), 2 December 2013 <<http://m.bisnis.com/industri/read/20131202/99/189967/industri-perikanan-ini-5-hambatan-utama>>; 'Infrastruktur Jadi Kendala', (Infrastructure Becomes Barrier) *Kompas.com* (online), 12 February 2010 <<http://bisniskeuangan.kompas.com/read/2010/02/12/03455119/Infrastruktur.Jadi.Kendala>>.

<sup>232</sup> IAQA, *SPS News Letter*, Edisi 22 (July-September 2012) <[http://www.mediafire.com/view/7v4ufscwrft9u2b/Edisi\\_Juli\\_-\\_September\\_2012.pdf](http://www.mediafire.com/view/7v4ufscwrft9u2b/Edisi_Juli_-_September_2012.pdf)>.

<sup>233</sup> FAO Corporate Document Repository, above n216.

<sup>234</sup> 'RI Told to Learn from Mistakes on Regional Trade Pacts' *The Jakarta Post* [online], (7 April 2014) <<http://www.thejakartapost.com/news/2014/04/07/ri-told-learn-mistakes-regional-trade-pacts.html>>.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

<sup>237</sup> See, e.g., Tim Bartley, Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards 'Theoretical Inquiries in Law 12.2 (2011)' 526-527; DFC S.A.U, *Indonesia's Export Quality Infrastructure-Executive Summary*, 8 and 10; Greetje Schouten, Sietze Vellema, and Jeroen Van Wik, 'Diffusion of Global Sustainability Standards: The Institutional Fit of the ASC-Shrimp Standard in Indonesia' *RAE São Paulo V. 56 n. 4, Jul-Ago 2016*, 411-423.

<sup>238</sup> Schouten, Vellema and Wik, above n237, 418.

have been facing private standards, namely Aquaculture Stewardship Council (ACS) and Global Aquaculture Alliance (GAA) Best Aquaculture Practices Standards. The problems arise in relation to the implementation of the private standards by small scale exporters,<sup>239</sup> since those usually have tight requirements for Indonesia's exporting commodities. For example, the EU-RASFF requires tuna commodities to be free from dangerous substances, such as aflatoxins.<sup>240</sup> Further, Japan's MRL on sesame requires lower standards of residue than other products.<sup>241</sup> The high requirement of private standards set out by importing retailers, such as that of the EU regarding food safety, affects Indonesia's export capacity.<sup>242</sup>

On the other hand, in general, Indonesia's exporters do not have sufficient proficiency to fulfil the requirements. One such insufficiency relates to the obligation to fulfil the necessary certification. For example, small coffee producers in Indonesia are unable to meet the high cost of coffee certification of Starbucks C.A.F.E. Practices Standards.<sup>243</sup> Another insufficiency is the lack of infrastructure for certification.<sup>244</sup> Thus, the high level of private standards combined with insufficient proficiency of exporters results in the inability of Indonesia's products to access international markets. Importing Members will generally not enter into a trade agreement unless the private standards are met, and so these private standards hamper Indonesia's market access.

#### (ii) Attempts Undertaken

To assist with export market share, the Ministry of Trade in cooperation with relevant institutions<sup>245</sup> introduced an Indonesian Technical Regulations Information Management System, an information portal provided for exporters on the technical requirements, such as quality products and export licences, for importing regions, such as the EU and China.<sup>246</sup> The IAQA has also

<sup>239</sup> Ibid; Online interview with staff of the IAQA.

<sup>240</sup> *Warta Pasar Ikan* (June 2011 vol. 94, 6), above n217.

<sup>241</sup> WTO, 2012 News Items, 28 and 29 March 2012, Sanitary, Phytosanitary Measures Committee: Formal Meeting, *Indonesia's Port Closure Causes Concern among Fruits and Agriculture Exporters* <[http://www.wto.org/english/news\\_e/news12\\_e/sps\\_28mar12\\_e.htm](http://www.wto.org/english/news_e/news12_e/sps_28mar12_e.htm)> 11 September 2014. See also *Specific Trade Concerns No. 321 (Japan's RML Applied to Sesame)*.

<sup>242</sup> WTO, SPS-IMS, STC 219, EurepGAP requirements for bananas by the EU, 11 <<http://spsims.wto.org/web/pages/search/stc/Results.aspx>>.

<sup>243</sup> International Trade Centre, *The Impacts of Private Standards on Global Value Chains: Literature Review Series on the Impacts of Private Standards – Part I*, 2011, 18.

<sup>244</sup> 'Infrastruktur Jadi Kendala', (Infrastructure Becomes Barrier) *Kompas.com* (online), 12 February 2010 <<http://bisniskeuangan.kompas.com/read/2010/02/12/03455119/Infrastruktur.Jadi.Kendala>>.

<sup>245</sup> The other institutions are the Ministry of Agriculture, Ministry of Industry, Ministry of Marine and Fisheries, National Standardisation Board, NA-DFC, National Accreditation Commission, Indonesia Science Institution (KIM-LIPI). See 'Kemendag Perkuat Ekspor ke Uni Eropa Melalui INATRIMS' *Hukumonline.com* <<http://www.hukumonline.com/berita/baca/lt54001fca6af17/kemendag-perkuat-ekspor-ke-uni-eropa-melalui-inatrimis>>.

<sup>246</sup> Indonesia Technical Requirements Information System (INATRIMS) <<http://inatrimis.kemendag.go.id/en/?market=eu>>.

undertaken capacity building and SPS dissemination programs for the general community. Examples of this, include, the one month quarantine services dissemination program (*Bulan Bakti Karantina*) in June-July of every year<sup>247</sup> to producers and exporters,<sup>248</sup> as well as the ‘Quarantine Goes to Campus’ roadshow program for students and academics.<sup>249</sup> The FQIA held a community awareness program on fish export quality<sup>250</sup> by establishing a public forum of fish quality and quarantine (*Forum Masyarakat Sadar Mutu dan Karantina Ikan*) in all technical implementation units in May 2013.<sup>251</sup>

With regards to private standards, Indonesia requires exports to meet the requirements of importing countries to improve their quality and competitiveness. For example, Indonesia built the Certification Catch Fish for exportation to the EU,<sup>252</sup> Good Agricultural Practices, Good Handling Practices, Standard Operating Procedures, and Hazard Analysis Critical Control Point and Certification.<sup>253</sup> However, these requirements are applied to products exported to specific importing countries only, not for general purpose. This is in line with the requirements applied to the exportation of plant products, which are imposed only when required by the importing countries.<sup>254</sup> Indonesia has been involved in dialogues with private standards institution, such as the Shrimp Aquaculture Dialogues initiated by the WWF,<sup>255</sup> and engaged in a working group for standards of the Roundtable on Sustainable Palm Oil (RSPO) certification.<sup>256</sup> Indonesia has also adopted GAP,

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- <sup>247</sup> IAQA, *Pembukaan Bulan Bakti Karantina Pertanian 2013 Di Atas Kapal Ferry ASDP Pratitha IV* <[http://karantina.deptan.go.id/index.php?page=quarantine\\_detail&&id=37](http://karantina.deptan.go.id/index.php?page=quarantine_detail&&id=37)>. The 167<sup>th</sup> Bulan Bakti Karantina is held in 2013.
- <sup>248</sup> See, e.g., IAQA, *Sosialisasi SPS dan Kebijakan Importasi Negara Mitra Dagang* <[http://karantina.deptan.go.id/?page=quarantine\\_detail&&id=106](http://karantina.deptan.go.id/?page=quarantine_detail&&id=106)>; BKIPM, *Bimtek Penerapan In Line Inspection ke Pelaku Usaha Ikan Hias, Satsiun KIPM Kelas II Tanjungpinang* <<http://www.bkipm.kkp.go.id/bkipm/event/read/1361/bimtek-penerapan-in-line-inspection-ke-pelaku-usaha-ikan-hias,-stasiun-kipm-kelas-ii-tanjungpinang.html>>.
- <sup>249</sup> IAQA, *Kepala Badan Karantina Sosialisasikan Perkarantinaan di Universitas Jambi* <[http://www.karantina.deptan.go.id/?page=quarantine\\_detail&&id=379](http://www.karantina.deptan.go.id/?page=quarantine_detail&&id=379)>.
- <sup>250</sup> Ministry of Marine Affairs and Fisheries, *MMAF Plan to Aware of Quality* <[http://www.kkp.go.id/en/index.php/archives/c/2594/MMAF-PLAN-TO-AWARE-OF-QUALITY/?category\\_id=2](http://www.kkp.go.id/en/index.php/archives/c/2594/MMAF-PLAN-TO-AWARE-OF-QUALITY/?category_id=2)>.
- <sup>251</sup> See, e.g., Formikan in Bali, South Sulawesi, and North Sumatera. See BKIPM, *Formikan Bali Dibentuk* [Bali’s Formikan Is Established] <<http://www.bkipm.kkp.go.id/bkipm/news/read/884/formikan-bali-dibentuk.html>>; *Formikan Makassar Dibentuk* [Makassar’s Formikan Is Established] <<http://www.bkipm.kkp.go.id/bkipm/news/read/891/formikan-makassar-dibentuk-.html>>; *BKIPM dan Pemprop Sumut Bersinergi dalam Membentuk Formikan Sumatera Utara* [FQIA and North Sumatera Local Government Province Synergise in Establishing North Sumatera Formikan] <<http://www.bkipm.kkp.go.id/bkipm/event/read/1370/bkipm-dan-pemprop.-sumut-bersinergi-dalam-membentuk-formikan-wilayah-sumatera-utara.html>>.
- <sup>252</sup> Decree of the Minister of Marine and Fisheries Affairs No. 32 of 2012, art 2.
- <sup>253</sup> Ministry of Trade, *Management Systems* <[http://inatrims.kemendag.go.id/en/read/management-systems\\_83](http://inatrims.kemendag.go.id/en/read/management-systems_83)>.
- <sup>254</sup> Badan Karantina Pertanian, *Prosedur Ekspor Karantina* <<http://karantina.pertanian.go.id/pages/prosedur-ekspor-karantina-tumbuhan>> 2.
- <sup>255</sup> Schouten, Vellema and Wik, above n237, 415.
- <sup>256</sup> Atika Wijaya and Pieter Glasbergen, ‘Toward a New Scenario in Agricultural Sustainability Certification? The Response of the Indonesian National Government to Private Certification’, *Journal of Environment & Development* 2016, Vol. 25(2) 219–246, 228-229.

which includes Global G.A.P for the importation of agricultural products,<sup>257</sup> and Good Aquaculture Practice (*Cara Budidaya Ikan yang Baik—IndoGAP*).<sup>258</sup>

### (iii) Potential Solutions

The government, through its relevant SPS institutions, should regulate and undertake technical assistance in and with the community, particularly the producers, exporters, and relevant business actors, to improve their proficiency with regard to exportation requirements. Technical assistance may be employed through production systems, capacity building, and infrastructure facilities rather than subsidies. A capacity building program could be undertaken through workshops, training and seminars in order to improve understanding of the SPS Agreement in general, and the export requirements of relevant importing countries in particular.

Programs undertaken by the government should be expanded to strengthen and empower those small stakeholders involved in the agricultural and fisheries industries, because most small producers lack specific knowledge and information on the SPS. Education programs for farmers and fishermen, both formal and informal, should be expanded and infrastructure development should be boosted to assist them in improving the quality of their products and in dealing with the issues of standardisation.

The dissemination program undertaken by the SPS bodies should be held continuously and completely, because such programs are often held unsustainably and sporadically, which results in the dissemination being ineffective in establishing awareness towards quarantine matters. SPS dissemination programs should be strengthened to change the mindset of the business actors on the significant benefits of capacity building.

As private standard are a growing dilemmas in SPS implementation, Indonesia is recommended to continue its efforts in addressing the difficulties with regard to this area. Such efforts may include legislating for the adoption of a certification system of the private standards and disseminating this regulation to exporters. Indonesia needs to improve the dissemination of information regarding the SPS standards of importing countries, so that exporters are well informed and understand them. Further, Indonesia should improve the legal awareness of producers and exporters on food safety to ensure an improvement in the quality of commodities to meet private standards.

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<sup>257</sup> Institute of Developing Economies Japan External Trade Organisation (IDE-JETRO), Report on Open Seminar, *Roles of Regulation and Private Standards: in the Management and Performance of Value Chains*, February 2015 <[http://www.ide.go.jp/English/Publish/Download/Workshop/pdf/2015\\_ws.pdf](http://www.ide.go.jp/English/Publish/Download/Workshop/pdf/2015_ws.pdf)> 9.

<sup>258</sup> Schouten, Vellema and Wik, above n237, 417.

Furthermore, Indonesia needs to improve, enhance and strengthen its engagement in the SPS international standards-setting process, so that it will be able to participate in the establishment of international standards. To participate in this standards-setting process, Indonesia needs to improve its capacity in the standards-setting process itself, such as proficiency in undertaking risk assessments. Indonesia also needs to improve cooperation with the STDF, the WTO, developed country Members and other international bodies in SPS areas in order to gain technical assistance in establishing standards.

Indonesia needs to enhance its SPS cooperation with countries in the ASEAN, Asia Pacific and other regions in order to expand health protection and market access. However, Indonesia must determine the level of cooperation it should enter into. Adiningsih states that before entering into a trade agreement it is important to consider the competitive and comparative potentials between Indonesia and other countries. It would be better to enter into agreements with countries whose products are complementary to those of Indonesia.<sup>259</sup> Indonesia should also look at improving its negotiation capacity and capability.

Finally, it is recommended that Indonesia improve the implementation of its SPS regulations since there is a lack of law enforcement in general. The regulations must be well-implemented in order to provide a better result, and the law must be implemented as it is.

The above mentioned recommendations are summarised in the following table.

**Table 4.1. List of Key Normative Directives to Indonesia**

No.	Indicators	Level of normative directive	Key normative directives	Actions to realise
1	Scientific principle	National	Indonesia needs to undertake SPS regulatory reform process	<ul style="list-style-type: none"> <li>-Prior research should become the fundamental requirement</li> <li>-Develop research culture by providing funding resource</li> <li>-Apply international scientific methodology</li> <li>-Establish academic documentation for the legislation</li> <li>-Coherent policy inter SPS institutions</li> <li>-Transparency procedure with respect to the reform process</li> <li>-Improve human resources recruitment</li> <li>-Apply public private partnership</li> </ul>

<sup>259</sup> 'RI Told to Learn from Mistakes on Regional Trade Pacts' *The Jakarta Post* [online], above n234.

		Regional/International	Improve cooperation within ASEAN especially regarding SPS matters	-Strengthen the SPS system -Improve infrastructure network and technical cooperation
2	Transparency principle	National	Improve management of notification arrangement	-Strengthen SPS institutions network in providing the relevant data -Improve the capacity building of SPS institutions' staff
			Incorporate transparency in daily activities	-Disclose non-confidential information to the public and update institutions websites daily, especially regarding Indonesia's SPS legislation and import requirements -Arrange capacity building on managing notification obligation
		Regional/International	Improve cooperation within ASEAN especially regarding SPS matters	Improve cooperation in the SPS notification management system: the capacity building of the staff
3	Harmonisation principle	National	Political will of the government to adopt SPS international standards	Adopt the SPS international standards in Indonesia's SPS legislation
		Regional/International	Improve cooperation within ASEAN especially regarding SPS matters	Propose technical assistance to more regional/international donors
4	Regionalisation principle	National	Strengthen political will of the government to recognise regionalisation in export and import	Adopt and apply consistency the 'region or zone base' import system
			Strengthen the diseases/pests surveillance management system	Maintain quarantines islands
			Dissemination of the WTO SPS Agreement to other SPS related institutions	Holding seminars or training
		Regional/International	Cooperation to strengthen the diseases/pests surveillance management system	Propose technical cooperation among veterinarian services in ASEAN and the world

5	Equivalence principle	National	Targeting to increase the MRA number for Indonesia's products	-Improve the capacity in negotiating MRA -Improve the quality of products and data of Indonesia's products
		Regional/International	Propose cooperation to regional and/or international organisations	Propose technical assistance to WTO SPS Committee, STDF, 'Three Sisters'
6	Technical assistance	National	Strengthen SPS System and policies	Establish a stable SPS development blueprint containing the short, middle and long-term mapping of SPS development
		Regional/International	Improve cooperation with international donor countries and institutions	Propose cooperation to ASEAN, STDF, 'Three Sisters'
7	Market access: Private standards	National	Strengthen Indonesia's competitiveness products	Improve capacity of small producers & exporters in agricultural and fisheries industries through technical assistance (training and workshops)
			Adopt private standards into the Indonesia's (public/national) SPS regulations	-Dialogue with private standards institutions -Establish working groups to arrange the adoption of private standards -Adopt the certification system into national SPS regulations
		Regional/international	Improve communication with regard to private standards	-Improve communication and sharing information within ASEAN GAP -Improve communication with relevant international bodies (WTO SPS Committee, 'Three Sisters', STDF)

#### D Conclusion

The implementation of the SPS Agreement in Indonesia has been gradually evolving. The STC raised against Indonesia by importing Members demonstrate various ranges of non-compliance, including insufficient scientific evidence, non-transparency, lack of recognition of regionalisation, lack of equivalence recognition and lack of harmonisation. The most notable impediments faced by



Indonesia are a lack of research quality, lack of infrastructure and human resources, lack of coordination and lack of risk management.

The main recommendation for the improvement of Indonesia's SPS application in the importation dimension is to reform the regulatory formulation system and improve its legal enforcement. Indonesia should adopt the SPS Agreement principles in its regulations in order to better achieve the goal of the health protection of health and prevent the legislation from being challenged by exporting countries. For example, Indonesia should regulate risk assessments, including the scientific principle as the basis for the establishment of regulations, and the recognition of the regionalisation principle in the import sector in SPS regulations. Indonesia should regulate to create a stable SPS system and introduce policies into the SPS system blueprint, including a notification management system to improve notification performance by strengthening cooperation among relevant SPS agencies and incorporating transparency into its routine public service.

The aforementioned recommendations should be made along with the existing redresses Indonesia has already undertaken. The country needs to enhance the dissemination of the SPS Agreement to the relevant governmental institutions and communities. The government needs to strengthen the capacity building programs to improve the competence of staff and develop programs of legal awareness to change the mindset of the producers and exports communities so that they understand the long-term advantages rather than just those in the short-term, such as subsidising SPS compliance. Indonesia also needs to improve its infrastructure development, most notable by strengthening public-private partnerships. Indonesia should be more active in making approaches for technical assistance based on the country's needs. Finally, Indonesia should improve its negotiation capacity in regional and international cooperation to gain positive outcomes in its market expansion.

## CHAPTER 5

### V THE SPS AGREEMENT IMPLEMENTATION IN THE PHILIPPINES, ITS IMPEDIMENTS AND POTENTIAL SOLUTIONS

#### A Introduction

This chapter analyses the application of the SPS Agreement in the Philippines as the second selected country in this thesis. This comparative analysis is significant to demonstrate a comparison with regard to the SPS application in Indonesia and the other selected country, Malaysia, discussed in the following chapter. By using a comparative approach, it is expected that Indonesia might gain an insight into the Philippines' best experience of SPS implementation. For example, the Philippines has established clear procedures with respect to the transparency principle. In contrast, as discussed in the previous chapter, Indonesia continues to face transparency issues in its SPS implementation. Thus, Indonesia can enhance its own practices based on the achievement of the Philippines' in this area and improve the balance of its SPS application. To assist in understanding the comparison of the SPS implementation in the selected countries, this chapter will also contrast and elaborate on aspects of Indonesia's SPS implementation and that of the Philippines'. The chapter will focus particularly on the SPS principles of non-discrimination, scientific justification, transparency, harmonisation, regionalisation, equivalence and technical assistance, as well as the difficulties in implementation, the underlying reasons for these difficulties, and will address the issue of private standards. This chapter also analyses and utilises WTO documents, most notably the Specific Trade Concerns (STC) on the Philippines' SPS measures, the SPS measures of other Members affecting the Philippines' trade, Trade Policy Review (TPR) of the Philippines and the Philippines SPS dispute settlement through the WTO Dispute Settlement Body (DSB). The final part of this Chapter discusses potential recommendations and includes some possible legal remedies for improvement.

#### B SPS Regulations and Administration

The first SPS measure of the Philippines was the *Quarantine Act (21450) of 1912* regarding 'An Act to Prevent the Introduction in the Philippines Islands of Plant Diseases and Epidemic'.<sup>1</sup>

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<sup>1</sup> Gerald Glenn F. Panganiban, *Bureau of Plant Industry: Plant Quarantine Service (PQS)*, presentation material from the BAFPS-DA in the discussion on 31 January 2013 in the DA-Policy Office, Quezon City-The Philippines, 4.

The first animal quarantine law was enacted in 1923 for the preparation, sale, traffic, shipment and importation of viruses, serums, toxins or analogous products used for the treatment of animals.<sup>2</sup>

Subsequent SPS regulations can be categorised as either general or specific. The general SPS regulations include *Agriculture and Fisheries Modernisation Act (AFMA) of 1997*,<sup>3</sup> *Code of Sanitation of The Philippines (Presidential Decree 856)*,<sup>4</sup> *Food and Drug Administration Act of 2009 (Republic Act 9711)*<sup>5</sup> and *Consumer Act of The Philippines (Republic Act 7394)*.<sup>6</sup>

The main specific SPS regulations include the *Meat Inspection Code of The Philippines (Republic Act 9296)*.<sup>7</sup> This Code authorises the National Meat Inspection Service (NMIS) to deal with the strengthening of the meat inspection system.<sup>8</sup> The Department of Agriculture subsequently enacted *the Implementing Rule and Regulation (IRR) of RA 9296*,<sup>9</sup> which aimed to ‘prescribe the procedures and guidelines for the implementation of the *Meat Inspection Code of the Philippines* to facilitate compliance and achieve the objective thereof’.<sup>10</sup> Further, the *Fisheries Code of 1998 (Republic Act 8550)*,<sup>11</sup> issued by the Senate and House of Representative of The Philippines, provides a mandate for the Department of Agriculture particularly through the Bureau of Fisheries and Aquatic Resources (BFAR) to provide for the development, management and conservation of fisheries and aquatic resources, integrating all laws pertinent thereto, and for other purposes.

The *Plant Quarantine Law of 1978*<sup>12</sup> deals with the revision and consolidation of the existing Plant Quarantine Laws to further improve and strengthen the plant quarantine service of the Bureau of Plant Industry (BPI). The *Livestock and Poultry Feeds Act (Republic Act 1556)*<sup>13</sup> is administered by the Secretary of Agriculture and Natural Resources through the Bureau of Animal Industry (BAI) to regulate and control the manufacture, import, labelling, advertising and sale of livestock and poultry feeds and providing funds thereof.

Further, the *Food Safety Act of 2013*<sup>14</sup> aims to strengthen the food safety regulatory system to achieve high levels of food safety, protect consumer health and facilitate market access of foods.<sup>15</sup>

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<sup>2</sup> Bureau of Animal Industry (BAI), *About Us* <<http://www.bai.da.gov.ph/index.php/about-us>>.

<sup>3</sup> *Republic Act No. 8435 on the Agricultural and Modernisation Act of 1997.*

<sup>4</sup> *Presidential Decree No. 856 on Code on Sanitation of the Philippines.*

<sup>5</sup> *Republic Act 9711 on the Food and Drug Administration (FDA) Act of 2009 .*

<sup>6</sup> *Republic Act No. 7394 on the Consumer Act of the Philippines.*

<sup>7</sup> *Republic Act 9296 on the Meat Inspection Code of the Philippines.*

<sup>8</sup> *Ibid* sec 4(2).

<sup>9</sup> *DA-Administrative Order No. 28 Series of 2005 on Implementing Rule and Regulation (IRR) of RA 9296 known as the Meat Inspection Code of the Philippines.*

<sup>10</sup> *Ibid* sec 1, rule 1.2.

<sup>11</sup> *Republic Act 8550 on The Philippines Fisheries Code of 1998.*

<sup>12</sup> *Presidential Decree No. 1433, June 10, 1978 on Plant Quarantine Law 1978.*

<sup>13</sup> *Republic Act No. 1556 (As Amended by S.B. No. 627) on Livestock and Poultry Feeds Act.*

<sup>14</sup> *Republic Act No. 10611 on the Food Safety Act 2013.*

<sup>15</sup> *Ibid* art I sec 3, 2.

This law was issued by the Senate and House of Representative of the Philippines and mandates the Department of Agriculture, Department of Health, Department of Interior and Local Government and Local Government Unit to implement the law.<sup>16</sup>

Imports to the Philippines generally require SPS import clearance for meat and meat products, fish and fish products and agricultural products. The import of meat and meat products requires a Foreign Meat Inspection Certificate and a Veterinary Quarantine Clearance. The import of wildlife occurs under an import restriction, and must be accompanied by a licence and a veterinary or phytosanitary certificate. The import of fish products must also be accompanied by a Fishery Sanitary and Phytosanitary Certificate.<sup>17</sup> The Philippines strictly prohibits import of products from certain countries on the grounds of Avian Influenza,<sup>18</sup> Foot and Mouth Disease<sup>19</sup> and Bovine Spongiform Encephalopathy.<sup>20</sup>

Exports from the Philippines<sup>7</sup> require registration and documentation for the exporter and importer, such as a certificate of origin, permits and licences. The export of fish requires a sanitary certificate, while the export of fish products must comply with the Sanitation Standard Operating Procedures and Hazard Analysis and Critical Control Point (HACCP) system.<sup>21</sup>

SPS functions in the Philippines are under the purview of the Department of Agriculture (DoA), and the Department of Health (DoH),<sup>22</sup> the DoA has the responsibility to implement SPS measures in collaboration with the DoH, and the Department of Environment and Natural Resources.<sup>23</sup> Technically, SPS-related functions and responsibilities are commodity-based and distributed among 11 various agencies and bureaus of the DoA and one agency of the DoH, the Food and Drug Administration.<sup>24</sup> The 11 agencies include the BAI, NMIS, BPI, BFAR, Bureau of Agricultural and Fisheries Product Standards (BAFPS), Food Development Centre, Fertilizer and Pesticide Authority, the Philippine Coconut Authority, Sugar Regulatory Administration, Fibre Industry Development Authority, and Cotton Development Administration.

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<sup>16</sup> Ibid art V sec 15, 14.

<sup>17</sup> *Trade Policy Review*, WTO Doc WT/TPR/S/261 (9 May 2012) (Report by the Secretariat: The Philippines) 44-45.

<sup>18</sup> BAI, *Annual Report 2012*, 32 <BAI\_Annual\_Report\_2012.pdf>.

<sup>19</sup> Ibid 33.

<sup>20</sup> Ibid.

<sup>21</sup> See, e.g., *Trade Policy Review*, WTO Doc WT/TPR/S/261 (Revision) 49-50; Maribel G. Marges, *DA Policy Office: The Philippines SPS Management System, SPS Measures and TBT-Seminar on Trade Negotiations and Agreements-A Joint DA-Policy Office and NAFC Undertaking*, 9 December 2012. The paper was represented for discussion on 31 January 2013 in the DA-Policy Office, Quezon City-The Philippines.

<sup>22</sup> Marges, above n21.

<sup>23</sup> NMIS, *National Meat Inspection Service* (NMIS), presentation material in the discussion on 31 January 2013 in the DA Policy Office, Quezon City-the Philippines.

<sup>24</sup> Marges, above n21.

The BPI comprises the Plant Quarantine Service (PQS), which serves as the Philippine National Plant Protection Organisation and a member of the International Plant Protection Convention (IPPC).<sup>25</sup> The roles of the PQS include issuing SPS clearance or import permits and phytosanitary certificates for accreditation, pest risk analysis, market access aid and capacity building.<sup>26</sup> The PQS consists of 30 stations, 91 major seaports, 94 sub-seaports and 41 airports and sub-airports.<sup>27</sup>

The management and administration of SPS in the Philippines is under the responsibility of the Undersecretary for Policy and Planning, Research and Development and Regulation of the DoA.<sup>28</sup> The DoA has functions for the development of SPS standards and enforcement, including registration, licencing, accreditation, quarantine and inspection, information dissemination and technical assistance or capacity development.<sup>29</sup>

## C *Implementation of SPS Principles, Difficulties and Potential Recommendations*

### 1 *Importation Dimension*

The Philippines has been actively engaging in international trade activity, both in imports and in exports. As a country with a relatively open trade regime,<sup>30</sup> the economy of the Philippines is predominantly supported by agriculture and related activities.<sup>31</sup> The five leading Members supplying to the Philippines in 2012 and 2013 were China, the US, Japan, Taiwan, and South Korea.<sup>32</sup> The Philippines imports commodities under the scope of the SPS, such as cereals, vegetables, flowers, beverages, poultry, crustaceans and tuna.<sup>33</sup>

The Philippines' SPS measures are viewed as quite strict for Members<sup>34</sup> due to its tight import requirements<sup>35</sup> which include licences for traders, permits for shipment, registration for all

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<sup>25</sup> Plant Quarantine Service (PQS)-Bureau of Plant Industry (BPI), *About Us* <<http://pqs.da.gov.ph/index.php/about-us>>.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Marges, above n21.

<sup>29</sup> Ibid.

<sup>30</sup> Larry R. Lacson, 'Philippines', in Cornelis Sonneveld (edt) (Report, Asian Productivity Organisation Seminar on Sanitary and Phytosanitary Measures held in Japan 4-11 December 2002 (02-AG-GE-SEM-09) 144 <<http://www.apo-tokyo.org/publications/wp-content/uploads/sites/5/pjrep-02-ag-ge-sem-09.pdf>>.

<sup>31</sup> *Trade Policy*, WTO Doc WT/TPR/S/261, 64.

<sup>32</sup> Department of Trade and Industry (DTI), *Statistics-Trade and Investment* (27 February 2014) <<http://www.dti.gov.ph/dti/index.php/resources/statistics>>.

<sup>33</sup> DTI-EMB, *Philippines Merchandise Import from the World* [Phl Imports from the World FY 2013 Adjusted.pdf] (3 June 2014) <<https://drive.google.com/file/d/0B0iL7KAK3i5NjUxb0xiWktwd2c/edit?pli=1>>.

<sup>34</sup> *Trade Policy Review*, WTO Doc WT/TPR/S/261, viii.

<sup>35</sup> United State of Trade Representative (USTR), *2014 Report on Sanitary and Phytosanitary Measures*, 75 <[http://www.ustr.gov/sites/default/files/FINAL-2014-SPS-Report-Compiled\\_0.pdf](http://www.ustr.gov/sites/default/files/FINAL-2014-SPS-Report-Compiled_0.pdf)>.

commodities and ex-ante information on the supply chain.<sup>36</sup> Thus, trading partners have encouraged the Philippines to simplify its non-tariff measures, including the SPS.<sup>37</sup> However, the WTO notes only three STC raised by Members regarding the Philippines' SPS measures hitherto, namely STC119 on the notification of Chinese fruit imports, STC150 on the certification of meat and dairy products and STC320 on the restriction of imported fresh meat.<sup>38</sup> A discussion of the issues associated with the Philippines' SPS implementation follows.

*(a) Non-Discrimination Principle*

From the three STC raised by Members, the US, Canada and the European Union (EU) raised one, STC320, regarding issue of non-discrimination principle on the Philippines SPS measures in Administrative Order 22 series 2010 (AO22).<sup>39</sup> AO22 requires different SPS measures between domestic and imported products. Handling frozen and chilled meat, which are mostly imported products, must be treated specially in 'cold chain' until reaching the consumers.<sup>40</sup> Imported meat which is 'accredited/licensed by the NMIS or registered in the Local Government Units (LGU)'<sup>41</sup> is required to be handled in frozen and chilled meat and meat products, while fresh meat, which are mostly domestically produced are treated as 'hot meat'.<sup>42</sup> The US claimed that AO22 was not equally applied to fresh meat, which is primarily produced domestically<sup>43</sup> and thus AO22 permits discrimination against imported chilled or frozen meat products.<sup>44</sup> This resulted in AO22 being inconsistent with the obligation stipulated in Article 2.3 of the SPS Agreement.<sup>45</sup>

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<sup>36</sup> Kees van der Meer, STDF Consultation, *Implementing SPS Measures to Facilitate Trade: Principle and Practice in Cambodia, Lao PDR, the Philippines and Thailand* (15 August 2014) 34 <<http://sasec.asia/uploads/events/2014/tfweek-2014/am/stdf-implementing-sps-measures.pdf>>.

<sup>37</sup> WTO, Trade Policy Review: The Philippines, *Concluding remarks by the Chairperson* (5 and 7 July 2005) <[http://wto.org/english/tratop\\_e/tptr\\_e/tp249\\_crc\\_e.htm](http://wto.org/english/tratop_e/tptr_e/tp249_crc_e.htm)>.

<sup>38</sup> WTO, SPS-IMS, *Specific Trade Concerns*, 6 <<http://spsims.wto.org/web/pages/search/stc/Results.aspx>>.

<sup>39</sup> *DA-Administrative Order No 22 Series 2010 on Rules and Regulations in the Handling of Frozen and Chilled Meat and Meat Products in the Meat Markets* (23 November 2010) <<http://spsissuances.da.gov.ph/attachments/article/203/AO.22.2010.pdf>>.

<sup>40</sup> Ibid sec 4.

<sup>41</sup> AO22, section 4.1.1.

<sup>42</sup> AO22, sec 2.3 allows 'hot meat'-'meat and meat products which was slaughtered, prepared, processed, handled, packed, stored in unregistered/unaccredited meat establishment', while art 2.6 states that '..., and which are exempted from definition of meat products by the Secretary under such conditions as he may prescribe to assure that the meat or other portions of such carcasses contained in such product are not adulterated and that such products are not represented as meat products'.

<sup>43</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.12 (2 March 2012) (Note by the Secretariat) (Revision) 57.

<sup>44</sup> The European Commission, Trade: Market Access Database, *SPS: Sanitary Phytosanitary Issues* (1 February 2012) <[http://madb.europa.eu/madb/sps\\_barriers\\_details.htm?barrier\\_id=115402&version=10](http://madb.europa.eu/madb/sps_barriers_details.htm?barrier_id=115402&version=10)>.

<sup>45</sup> The SPS Agreement, art 2.3. There it is stated that 'Members shall ensure that their SPS measures do not arbitrarily or unjustifiably discriminate...between their own territory and that of other Members'.

However, the Philippines stated that AO22 did not discriminate against products, since it was applied to both imported and domestic products.<sup>46</sup> However, the Philippines must provide reasons, or scientific justification, as to why AO22 is applied to frozen meat and meat products rather than fresh meat. The reasons will assist in determining whether or not AO22 contradicts Article 2.3.

*(i) Difficulty and Underlying Reasons*

Inconsistencies in the application of the SPS principles affect the country's compliance with the non-discrimination principle as governed under Article 2.3 of the SPS Agreement. AO22 demonstrates that the Philippines treat imported products differently from domestic products. While there are no sources that elaborate the reason for the difficulties, this thesis argues that this is related to the policy of the Philippines in managing the meat supply chain for public consumption.

*(ii) Attempts Undertaken*

The DoA has repealed the AO22 series of 2010 with *AO6 Series of 2012 on Rules and Regulations on Hygienic Handling of Chilled, Frozen and Thawed Meat in Meat Market*.<sup>47</sup> However, AO6 still differentiates treatment for newly slaughtered meat against the hygienic handling of chilled, frozen and thawed meat, because newly slaughtered meat is allowed to not be refrigerated.<sup>48</sup>

*(b) Scientific Principle and Risks Assessment*

The WTO STC demonstrates issues of implementation in the Philippines with regard to scientific principles and risk assessments under Articles 2.2 and 5 of the SPS Agreement. In STC119 China raised concerns regarding the Philippines emergency measures through DA22 series 2001 on the temporary ban of the import of apples and other hosts of the Codling Moth Pest on imported fruits from China.<sup>49</sup> China claimed that the Philippines identified the pests mistakenly. A re-identification undertaken by experts of both countries demonstrated that the existing pests are a kind of common pest, a peach pest moth.<sup>50</sup> The Philippines confirmed that it relied on its own

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<sup>46</sup> AO22 [2] states that 'frozen meat and meat products *whether local or imported*.....need to be maintained throughout the cold chain until it reach the consumers' (emphasis added).

<sup>47</sup> *DA-Administrative Order No. 6 Series of 2012 on Rules and Regulations on Hygienic Handling of Chilled, Frozen and Thawed Meat in Meat Market* (The Philippines), art 13.

<sup>48</sup> *Ibid* sec 2, 5.4., 3.

<sup>49</sup> *Notification of Emergency Measures*, WTO Doc G/SPS/N/PHL/35 (16 November 2001).

<sup>50</sup> *Specific Trade Concerns: Issues Not Considered in 2010*, WTO Doc G/SPS/GEN/204/Rev.11/Add.2 (1 March 2011) (Note by the Secretariat) (Addendum) 155.

investigation to identify the pest as Codling Moth Pest is *Carposina Nipponensis*, a pest which has not been known in the Philippines. The issue was partially resolved by the Philippines lifting the ban through AO24 series 2001 embodied in its notification in G/SPS/N/PHL/35/Add.1.<sup>51</sup> However, China claimed that the notification failed to mention the mistaken investigation and requested the Philippines make a correction. The Philippines provided the correct information through notification G/SPS/N/PHL/35/Add.2.<sup>52</sup>

STC150, which relates to control, inspection and procedures was lodged by Canada and supported by the EU, Australia, Korea, New Zealand and the US.<sup>53</sup> The STC raised related to Memorandum Order No.7 series of 2002 of the Philippines, which requires export of meat and milk and milk products to the Philippines to comply with a HACCP audit by a third independent party through international bidding.<sup>54</sup> Canada stated that the HACCP certificate would be provided by Canada's agency without a third independent certification body. Further, Canada questioned whether the requirement also applied to domestic producers, while Australia claimed that the requirement was not in line with SPS obligations. The Philippines argued that a HACCP certification by a third independent party were necessary due to issues of contaminated imported products under HACCP certification in practice, and that HACCP is a universal standard promoted by the FAO and WHO.<sup>55</sup> However, the Philippines and Canada engaged in a bilateral negotiation, and, as a result, the implementation of Memorandum Order No. 7 series of 2002 was postponed.<sup>56</sup>

STC320 was related to AO22, which applied to frozen meat and meat products, but not to fresh meat. The US claimed it was formulated without a risk assessment or scientific justification. Canada and the EU supported this claim.<sup>57</sup> The Philippines argued that AO22 adopted the best standards of the USDA code for frozen meat and the *Codex Code of Practice for the processing and Handling of Quick Frozen Foods-CAC/RCP 8 1976*, and consequently it did not need to undertake a risk assessment.<sup>58</sup> The US asked the Philippines to provide additional scientific justification pursuant to AO22.<sup>59</sup> The US's request was in line with the use of provisional measures, which requires Members to obtain additional information necessary for a more objective assessment of

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<sup>51</sup> Notification, WTO Doc G/SPS/ N/PHL/35/Add.1 (21 December 2001) (Addendum).

<sup>52</sup> Notification, WTO Doc G/SPS/ N/PHL/35/Add.2 (16 May 2002) (Addendum).

<sup>53</sup> *Specific Trade Concerns: Resolved Issues*, WTO Doc G/SPS/GEN/204/Rev 11/Add.3 (Notes by the Secretariat) (1 March 2011) (Addendum) 59.

<sup>54</sup> *DA-Memorandum Order MO No.7 Series of 2002, Subject: HACCP Audit of Meat and Milk Exporting Plants* <<http://nmis.gov.ph/attachments/article/315/DA-MO.07.2002.07.pdf>>.

<sup>55</sup> *Specific Trade Concerns: Resolved Issues*, WTO Doc G/SPS/GEN/204/Rev 11/Add.3, 60.

<sup>56</sup> *DA-Memorandum Order No. 07 Series of 2003* (24 February 2003) <[http://www.da.gov.ph/images/PDFFiles/LawsIssuances/MO/2003MO/mo07\\_s2003.pdf](http://www.da.gov.ph/images/PDFFiles/LawsIssuances/MO/2003MO/mo07_s2003.pdf)>.

<sup>57</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.12, 57.

<sup>58</sup> Ibid 58.

<sup>59</sup> Ibid.



risk.<sup>60</sup> Another relevant requirement is that Member reviews must be undertaken within a reasonable period of time.<sup>61</sup>

(i) *Difficulties and Underlying Reasons*

The Philippines has had difficulties in providing scientific evidence for its SPS measures,<sup>62</sup> due to insufficient infrastructure, both technical and legal.<sup>63</sup> Research is also insufficient in supporting the SPS working system,<sup>64</sup> although research is a routine activity in the relevant SPS institutions, such as the BPI through the National Crop Research and Development Centres.<sup>65</sup>

(ii) *Attempts Undertaken*

The Philippines' SPS bureaus, for example the BAI, has set forth their vision to strengthen SPS measures particularly risk analysis.<sup>66</sup> Parliament has legislated that the scientific principle is required as a basis for the formulation of SPS regulations. For example, the *Food Safety Act 2013* bases the food safety principle on the use of 'science-based risk analysis';<sup>67</sup> the science-based risk analysis will not be applied if this 'is not feasible due to circumstances' or 'the nature of the control measure'.<sup>68</sup> The Philippines also undertook capacity building for SPS staff to improve their performance and compliance with the SPS Agreement. For example, the BFAR has held training programs for stakeholders to improve their capacity,<sup>69</sup> and the NMIS sent staff to international SPS fora, such as, SPS Committee meetings, seminars, training and workshops.<sup>70</sup>

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<sup>60</sup> WTO Analytical Index: Sanitary and Phytosanitary Measures, *Agreement on Sanitary Phytosanitary Measures*. See also *Japan-Agricultural Products II*, para 369.

<sup>61</sup> Ibid.

<sup>62</sup> Alicia O. Lustre, *Management of SPS Measures in The Philippines*, paper prepared for the Specialists Meeting for Asia on the Challenges and Opportunities of Sanitary and Phytosanitary Standards Cost and Benefits of Strategies of Compliance, hosted by the Chinese Government, Sponsored by the World Bank, Beijing-China, 20 November 2004, 3 <[http://siteresources.worldbank.org/INTRANETTRADE/Resources/Topics/Standards/standards\\_training\\_challenges\\_philippines.pdf](http://siteresources.worldbank.org/INTRANETTRADE/Resources/Topics/Standards/standards_training_challenges_philippines.pdf)>.

<sup>63</sup> Gloria O. Pasadilla and Christine Marie M. Liao, *Market Access Limitation of the Philippines in the EU Markets*, Discussion Paper Series No. 2007: 15, The Philippine Institute for Development Studies, 33. Ibid 38.

<sup>64</sup> BPI, *Annual Report 2010*, 3 <<http://www.bpi.da.gov.ph/bpioldsite1/report.php>>.

<sup>65</sup> BAI, *Thrusts and Strategies 2012-2016* <<http://www.bai.da.gov.ph/index.php/agency-strategic-plan>>.

<sup>66</sup> *Food Safety Act 2013* (Philippines), art IV sec 7, 10.

<sup>67</sup> Ibid, 7a, 10.

<sup>68</sup> DA-Key Regulatory Agencies: Bureau of Fisheries and Aquatic Resources, presentation material from the BAFPS DA in the focus group discussion on 31 January 2013 in the DA Policy Office, Quezon City, The Philippines, 16.

<sup>69</sup> NMIS, *National Meat Inspection Service*, above n23, 16.

(iii) *Possible Solutions*

The Philippines should strengthen and improve the scientific basis for the formulation of its SPS measures and their application, because regulatory process involved with SPS measures affects the quality of the SPS measures and their implementation. In this regard, the Philippines might refer to the Organisation for Economic Co-operation and Development (OECD) guidelines.<sup>71</sup>

(c) *Transparency Principle*

The transparency table of the SPS Information Management System (SPS-IMS) demonstrates that the Philippines has developed all three transparency obligations,<sup>72</sup> namely appointed the Office of the Director Policy Research Service of the DoA as the SPS National Notification Authority (NNA)<sup>73</sup> and National Enquiry Point (NEP),<sup>74</sup> and notified its SPS regulations.<sup>75</sup> The Philippines has an outstanding record on transparency through notifications,<sup>76</sup> with 492 notifications hitherto,<sup>77</sup> including 161 regular notifications,<sup>78</sup> 202 emergency notifications<sup>79</sup> and 129 addenda/corrigenda notifications.<sup>80</sup> The Philippines has the second greatest number of emergency notifications since 1995 and the most emergency notifications in the period of September 2012 to September 2013.<sup>81</sup>

Notwithstanding this achievement, the Philippines has faced claims from Members regarding the non-compliance of their notification obligations governed under Annex B SPS Agreement. In particular, Members have called for increased transparency.<sup>82</sup> In STC320 Canada claimed the Philippines did not notify the SPS Committee regarding AO22.<sup>83</sup> The Philippines argued that AO22 did not require notification, because it was a post-border measure, which does not modify nor

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<sup>71</sup> OECD, *Guiding Principles for Regulatory Quality and Performance* <<http://www.oecd.org/fr/reformereg/34976533.pdf>>.

<sup>72</sup> SPS Information Management System (IMS), *Transparency Table-REPORT 12.doc*, <[spsims.wto.org](http://spsims.wto.org)> 4.

<sup>73</sup> WTO, Committee on SPS Measures, *National Notification Authorities*, WTO Doc G/SPS/NNA/8 (3 March 2017) (Note by the Secretariat) 22.

<sup>74</sup> WTO, Committee on SPS Measures, *National Notification Authorities*, WTO Doc G/SPS/ENQ/16, (3 March 2017) (Note by the Secretariat) 38.

<sup>75</sup> WTO SPS-IMS, *Information on Enquiry Points and Notification Authorities, Philippines* <<http://spsims.wto.org/web/pages/settings/country/Selection.aspx>>.

<sup>76</sup> *Trade Policy Review*, WTO Doc WT/TPR/S/261, vii and 67.

<sup>77</sup> WTO, SPS-IMS, *Notification* <<http://spsims.wto.org/web/pages/search/notification/Results.aspx>>.

<sup>78</sup> *Ibid*, *Regular Notification*.

<sup>79</sup> *Ibid*, *Emergency Notification*.

<sup>80</sup> *Ibid*, *Addenda/Corrigenda Notifications*.

<sup>81</sup> *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement*, WTO Doc G/SPS/GEN/804/Rev. 5 (4 October 2012) (Note by the Secretariat) (Revision) 4-5.

<sup>82</sup> WTO, Trade Policy Review: Philippines, *Concluding Remarks by the Chairperson* (20 and 22 March 2012) 2 <[http://wto.org/english/tratop\\_e/tp\\_r\\_e/tp361\\_crc\\_e.htm](http://wto.org/english/tratop_e/tp_r_e/tp361_crc_e.htm)>.

<sup>83</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.12, 58.

impose additional requirements on meat imports, and has no modification or significant changes.<sup>84</sup> Nevertheless, the Philippines' argument is not in line with Annex B.5 and the Transparency Procedure, which encourages Members to notify any changes from the original notification of the regulations, which may have 'a significant effect'.<sup>85</sup> Further, the concerns raised by some of the Philippines' trading partners on the non-notification of AO22 indicate that AO22 is likely to have significant changes and impacts on trade.

Given this, there is insufficient transparency for the SPS agency. In this regard, the Global Competitiveness Index (GCI) reported that the transparency of government policy making in the Philippines places it number 85 of 140 countries in the world.<sup>86</sup> This position is the same as it was in the previous year's survey.

Further, there is a lack of information with regard to the SPS requirements of importing countries. For example, exporters are not able to get the phytosanitary requirements of importing countries from the Philippines NPPO. As a result, exporters need to put in a request to the importing country about their phytosanitary import requirements.<sup>87</sup>

#### *(i) Difficulties and Underlying Reasons*

The non-notification of AO22 demonstrates that the Philippines faces issues in interpreting and adopting the relevant procedures and mechanisms of the SPS Agreement implementation,<sup>88</sup> particularly transparency procedures. The Philippines has a different perspective with regard to which SPS measures need to be notified on the basis of 'the significant effect' the measures might cause.

There is also a problem regarding conflicts and overlapping of functions and responsibilities which sometimes occur among the SPS agencies, for example between the BPI and the BAFPS on

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<sup>84</sup> Ibid 59. See also WT/TPR/S/261/Rev.2 in particular the S261R2-03.Pdf., 26 <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/MultiDDFDocuments/110146/Q/WT/TPR/S261R2-01.pdf;Q/WT/TPR/S261R2-02.pdf;Q/WT/TPR/S261R2-03.pdf;Q/WT/TPR/S261R2-04.pdf;Q/WT/TPR/S261R2-05.pdf;Q/WT/TPR/S261R2-06.pdf](https://docs.wto.org/dol2fe/Pages/FE_Search/MultiDDFDocuments/110146/Q/WT/TPR/S261R2-01.pdf;Q/WT/TPR/S261R2-02.pdf;Q/WT/TPR/S261R2-03.pdf;Q/WT/TPR/S261R2-04.pdf;Q/WT/TPR/S261R2-05.pdf;Q/WT/TPR/S261R2-06.pdf)>.

<sup>85</sup> See, e.g., SPS Agreement, Annex B.5; *the 2008 Transparency Procedure*, WTO Doc G/SPS/7/Rev.3, 6; *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement*, WTO Doc G/SPS/GEN/804/Rev.5 (4 October 2012) 2.

<sup>86</sup> World Economic Forum, *The Global Competitiveness Report 2015-2016*, 297 <[http://www3.weforum.org/docs/gcr/2015-2016/Global\\_Competitiveness\\_Report\\_2015-2016.pdf](http://www3.weforum.org/docs/gcr/2015-2016/Global_Competitiveness_Report_2015-2016.pdf)>.

<sup>87</sup> Meer, above n36, 44.

<sup>88</sup> Lacson, above n30, 143.

plant or agricultural areas, between the BAI and the BFAR, and between the BAFPS and the NMIS, as well as Fertilizer and Pesticide Authority.<sup>89</sup>

The Philippines also faces difficulties in communication, particularly in border areas.<sup>90</sup> This is impacted by a large number of SPS institutions and technical units across the country.<sup>91</sup> As an archipelagic country, the Philippines has many SPS entry points, and thus communication has proved problematic. Coordination at the national level, such as rationalising the submission of SPS notifications has become an obstacle for many Members, including the Philippines.<sup>92</sup>

### *(ii) Attempts Undertaken*

There have been several attempts undertaken by the Philippines Government with regard to transparency. For example, the government has been improving the transparency of government information to the public by requiring all national government agencies comply with the ‘transparency seal’ obligation.<sup>93</sup> The transparency seal must contain, for example, the agency’s mandates, functions, programs and implementation, as well as annual report. These must be maintained on the national agencies’ official websites, which are downloadable.<sup>94</sup> Thus, the Philippines Government requires full disclosure to the public by providing a transparent report of their activities.

Further, in association with SPS implementation the DoA established a website containing SPS measures and related legal issues. The information covered on the website includes SPS laws, programs and activities undertaken within the DoA. This was made possible through technical assistance from the EU-Trade Related Technical Project 2 and the Philippines Government.<sup>95</sup>

### *(iii) Potential Improvements*

The Philippines should improve its compliance with the notification obligation according to the SPS Agreement and its further implementation rules. The non-notification of AO22 series of

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<sup>89</sup> Ibid, 145. See also Pasadilla and Liao, above n63, 35.

<sup>90</sup> Information was gained from an official from the PQS in a discussion on 31 January 2013 in the DA-Policy Office, Quezon City-The Philippines.

<sup>91</sup> Ibid.

<sup>92</sup> *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement*, WTO Doc G/SPS/GEN/804/Rev.5, 9.

<sup>93</sup> The General Appropriations Act of the Fiscal Year 2012.

<sup>94</sup> Ibid Section 93.

<sup>95</sup> Department of Agriculture, *SPS Legal Issuances: Codification of DA-SPS Legal Issuances* <[http://sps\\_issuances.da.gov.ph/](http://sps_issuances.da.gov.ph/)>.

2010 shows that the Philippines has a different perspective and understanding about the provision of the transparency procedure. Thus, the Philippines should improve staff understanding of the SPS Agreement and its further procedures, guidelines and recommendations. According to the *Food Safety Act 2013*, the Philippines regulates technical assistance in the form of training and education to government officials and people in its SPS regulations.<sup>96</sup> Thus, the regulations should be implemented as they are regulated. Stricter controls should also be applied to provide deterrence to non-complying stakeholders. The Philippines should improve capacity building programs for its government staff and the public in order to significantly improve the SPS implementation.

As the government promotes its transparency policy through the ‘Transparency Seal’, the transparency in notifying of SPS measures should be inherent within this policy and practice. The Philippines should be better at notifying every new SPS measure and any amendment to existing SPS measures to improve transparency, since failure to do so will destroy the Philippines’ remarkable notification achievement.

With regard to the issue of communication, the Philippines should amend the regulations on SPS bureaus, particularly under the DoA, in order to harmonise the roles and functions among the SPS bureaus and eradicate any overlap in their roles and functions. Two researchers stated that the roles, power and jurisdictions should be redefined.<sup>97</sup> The Philippines should also improve the implementation of the regulations of the SPS management functions, such as Article VI regarding Food Safety Regulation Coordinating Board, in monitoring and coordinating the relevant agencies in performing mandates according to the *Food Safety Act 2013*.<sup>98</sup> The performance of the SPS focal group,<sup>99</sup> as an attempt to coordinate among SPS agencies under the DoA,<sup>100</sup> should also be improved. This is an area of communication, particularly in the border areas<sup>101</sup> that is still developing. The SPS focal group should strengthen the intensity and quality of communication among the SPS agencies. Coordination and consultation methods among bureaus and agencies should be enhanced through social media, such as email, Twitter and Facebook to create efficient and effective communication.

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<sup>96</sup> *Food Safety Act 2013*, art IX sec 31, 25.

<sup>97</sup> Pasadilla and Liao, above n63, 35.

<sup>98</sup> *Food Safety Act 2013*, art VI sec 20, 25.

<sup>99</sup> Marges, above n22. The SPS focal group was established based on DA-Special Order No. 19, s 2013.

<sup>100</sup> The IPPC, *Philippines’ Bureau of Plant Industry Conducts Training Workshop on the Use of the International Plant Protection Portal* <<https://www.ippc.int/news/philippines%E2%80%99-bureau-plant-industry-conducts-training-workshop-use-international-plant>>.

<sup>101</sup> Interview through email with an official of Plant Quarantine Service, 25 March 2014.

(d) *Harmonisation*

The Philippines is a member of the SPS international standards body, Codex,<sup>102</sup> the IPPC,<sup>103</sup> and the World Organisation for Animal Health (OIE).<sup>104</sup> The Philippines SPS standards refer to international standards, for example *the Food Safety Act 2013*, which clearly stipulates that the Codex standard is a significant source for establishing the Philippines' SPS regulations.<sup>105</sup> Further, the PQS states that it is based on the International Standard on Phytosanitary Measures.<sup>106</sup> The Philippines has adopted the Pest Risk Analysis for its SPS measures, which is important for assessing the risks involved in importing agricultural commodities before importing into the country.<sup>107</sup> For example, two academics relied on their research to find that the Philippines' SPS measures for pineapples were similar to that of the Codex.<sup>108</sup>

However, several Members claimed that the Philippines did not comply with the harmonisation principle governed by article 3.1 of the SPS Agreement. For example, the EU claimed that AO22 was not in line with the SPS international standards on food hygiene,<sup>109</sup> which requires food to be stored at certain temperatures,<sup>110</sup> while AO22 allows hot meat and other meat products to be traded.<sup>111</sup>

(i) *Difficulties and Underlying Reason*

The Philippines SPS regulations do not refer completely to SPS international standards, due to its national policy. For example, the *Philippines Food Safety Act 2013* was based on sources other than the Codex, such as scientific advice from experts or organisations, standards of other Members and existing Philippines National Standards.<sup>112</sup> The BAFPS does not completely refer to

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<sup>102</sup> The Codex Alimentarius International Food Standard, *List of Codex Members* (28 August 2014) <[http://www.codexalimentarius.org/members-observers/members/en/?no\\_cache=1](http://www.codexalimentarius.org/members-observers/members/en/?no_cache=1)>.

<sup>103</sup> See, e.g., International Plant Protection Convention, *Countries List* <<https://www.ippc.int/countries/list-countries/>>; International Plant Protection Convention (12 December 2013) <[http://www.fao.org/fileadmin/user\\_upload/legal/docs/4\\_004s-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/4_004s-e.pdf)>.

<sup>104</sup> OIE-World Organisation for Animal Health, *Member Countries: The 180 OIE Members* (2014) <<http://www.oie.int/about-us/our-members/member-countries/>>.

<sup>105</sup> *Food Safety Act 2013*, art IV sec 9(a), 12.

<sup>106</sup> Plant Quarantine Service, *About Us* <<http://pqs.da.gov.ph/index.php/about-us>>.

<sup>107</sup> Lacson, above n30, 144.

<sup>108</sup> Bates M. Bathan and Flordeliza A. Lantican, Economic Impact of Sanitary and Phytosanitary Measures on Philippine Pineapple Exports, *J. ISSAAS Vol. 15, No. 1: 126-143* (2009), 138.

<sup>109</sup> The European Commission, Trade: Market Access Database, *SPS: Sanitary Phytosanitary Issues* (1 February 2012) <[http://madb.europa.eu/madb/sps\\_barriers\\_details.htm?barrier\\_id=115402&version=10](http://madb.europa.eu/madb/sps_barriers_details.htm?barrier_id=115402&version=10)>.

<sup>110</sup> Codex Alimentarius, *Code of Hygienic Practice for Meat (CAC/RCP 58-2005)*, 23 [82] <[http://www.codexalimentarius.org/standards/list-standards/en/?no\\_cache=1](http://www.codexalimentarius.org/standards/list-standards/en/?no_cache=1)>.

<sup>111</sup> DA-Secretary Office, AO22 sec 2, 2.3.

<sup>112</sup> *Food Safety Act 2013*, art IV sec 9(a), 12.

international standards, since only 10% of its standards refer to IPPC standards.<sup>113</sup> With regard to this, the *Philippines Food Safety Act 2013* explicitly limits the adoption of Codex to situation, when Codex is not in conflict with consumer protection measures and no scientific justification exists for the measures taken to protect consumer.<sup>114</sup> An official of the DoA Office stated that SPS international standards will be adopted provided no Philippine SPS standards already exist.<sup>115</sup>

(ii) *Attempts Undertaken*

The EU claimed that the Philippines SPS implementation did not conform to harmonisation with international standards with regard to its regulation, AO22 series of 2010.<sup>116</sup> AO22 does not apply the hygienic conditions required by Codex standard on food hygiene. Codex requires food to be stored at specific temperature within ‘cooling, chilling and/or freezing’ equipment,<sup>117</sup> while AO22 allows warm or hot meat and meat products to be traded and consumed.<sup>118</sup>

Despite this, the Philippines has been trying to harmonise its SPS standards with the SPS international standards.<sup>119</sup> According to the WTO-TPR, the Philippines has undertaken efforts to make its SPS comply with international standards,<sup>120</sup> for example, the harmonisation of MRL of pesticides, the harmonisation of Regulations on Agricultural Products Derived from Biotechnology and the harmonisation of Fisheries Sanitary and Phytosanitary Measures.<sup>121</sup> Further, the PQS developed training programs for regulators, so that the Philippines phytosanitary measures would comply with international standards.<sup>122</sup> Public-private interaction through a cooperation between the Bureau of Food and Drug and the Philippines Chamber of Food Manufacturers was also undertaken to harmonise local standards of food in the development and implementation of SPS measures.<sup>123</sup>

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<sup>113</sup> Karen Kristine A. Roscom, *Agriculture and Fisheries Products Standards Setting in the Philippines*, 3, presentation material from the BAFPS-DA in the discussion on 31 January 2013 in the DA-Policy Office, Quezon City-Philippines, 23 and 26.

<sup>114</sup> *Food Safety Act 2013*, art IV sec 9(b), 12.

<sup>115</sup> Lacson, above n30, 146.

<sup>116</sup> The European Commission, above n109.

<sup>117</sup> Codex, above n102.

<sup>118</sup> AO22, sec 2.3.

<sup>119</sup> See, e.g., the PQS base its standards to IPSM, Plant Quarantine Service Bureau of Plant Industry, *About Us* <<http://pqs.da.gov.ph/index.php/about-us>>; the adoption of PRA.

<sup>120</sup> WTO Trade Policy Review: The Philippines, 5 and 7 July 2005, *Concluding remarks by the Chairperson* <[http://wto.org/english/tratop\\_e/tpr\\_e/tp249\\_crc\\_e.htm](http://wto.org/english/tratop_e/tpr_e/tp249_crc_e.htm)>.

<sup>121</sup> Lustre, above n62, 6.

<sup>122</sup> Panganiban, above n1, 15.

<sup>123</sup> Lustre, above n62, 2.

*(iii) Possible Improvement*

The Philippines should improve its harmonisation with international standards as promoted by Article 3 of the SPS Agreement. As a WTO Member, the Philippines should comply with the multilateral agreements including the SPS Agreement. For example, the Philippines should increase its level of conformity with international standards, such as the standard of the BAFPS, which should be greater than 10% from its current standard. Although harmonisation is not stipulated as a mandatory provision of the SPS Agreement, harmonisation would provide advantages, because Members' SPS measures that have been harmonised with international standards would likely receive fewer complaints in the future.<sup>124</sup>

*(e) Regionalisation Principle*

The Philippines has implemented the regionalisation principle as governed by Article 6 of the SPS Agreement by undertaking a zonation system within its territories.<sup>125</sup> In the sanitary sector, the Philippines has achieved the status of being free from Foot Mouth Disease (FMD) and Avian Influenza (AI),<sup>126</sup> and is developing a national plan for the prevention and control of rabies by 2020. The Department of Agriculture and Department of Health signed a memorandum of agreement in May 2014 establishing a joint force to accelerate the rabies-free program by 2016, through dog vaccinations.<sup>127</sup> In the phytosanitary sector, the Philippines has received the Area Freedom Certification from the US Department of Agriculture and has been declared a Pests Free Area (PFA) from mango seed weevils and mango pulp weevils, with the exception for Palawan Island.<sup>128</sup> This achievement has a positive impact on the successful export of mangoes to the US, Hawaii, Guam and the Mariana Islands.<sup>129</sup>

With respect to imports, while the Philippines has adopted the regionalisation principle, it often does not recognise the principle, since it only imports products from countries free from particular diseases. For example, the Philippines prohibits imports from certain countries on the

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<sup>124</sup> Roscom, above n113, 23 and 26.

<sup>125</sup> Lustre, above n62, 3.

<sup>126</sup> Proceso J. Alcala, DA-Secretary, *DA 2011 Year Report* (21 December 2011) 5 <<http://www.da.gov.ph/index.php/2012-03-27-12-04-16/year-end-report>>.

<sup>127</sup> BAI, *DA and DoH Partners for 2016 Rabies Eradication; P69.5M allocated for Animal Rabies Vaccine* <<http://www.bai.da.gov.ph/index.php/news-events/press-releases/303-da-doh-partners-for-a-rabies-free-philippines-2016>>.

<sup>128</sup> BPI, *US Declares PHL as Mango Pest Free Area (PFA)* <[http://www.bpi.da.gov.ph/index.php?option=com\\_content&view=article&id=382:us-declares-phl-as-mango-pest-free-area-pfa&catid=33:news&Itemid=193](http://www.bpi.da.gov.ph/index.php?option=com_content&view=article&id=382:us-declares-phl-as-mango-pest-free-area-pfa&catid=33:news&Itemid=193)>.

<sup>129</sup> WTO, Committee on SPS Measures, *Annual Report on the Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, Note by the Secretariat*, G/SPS/GEN/1412, 4 June 2015, 3.



grounds of AI, FMD, and Bovine Spongiform Encephalopathy<sup>130</sup> to protect the country from major animal diseases.<sup>131</sup> On the one hand, this import policy ensures that imported products are safe for the consumer, but on the other hand it lessens the risk analysis and risk-based management.<sup>132</sup>

The Philippines should strengthen its cooperation with other neighbouring countries and maintain its active participation at the regional level, including the Association of Southeast Asian Nation (ASEAN). To gain maximum advantage, the Philippines should improve its role in regional cooperations, such as the Regional Comprehensive Economic Partnership (RCEP) as well as harmonisation and conformity of its SPS measures to ASEAN harmonisation standards. Strong regional cooperation will strengthen the position of the Philippines in international trade, particularly in facing the ASEAN Economic Community 2015.

*(i) Difficulties and Underlying Reasons*

With regard to imports, the lack of recognition of the regionalisation principle is affected by a country-based importation policy,<sup>133</sup> which is a system of recognition of pest-free or disease-free area of an exporting country based on the situation of pest or disease-free areas of an exporting country based on whether the entire exporting country is pest or disease-free. This country-based importation system is applied in order to prevent the spread of pests or diseases from the exporting country, since the SPS system in the Philippines in general is still insufficient to control against health hazards.<sup>134</sup>

In the exports dimension, the Philippines continues to face challenges in convincing importing Members of the determination of PFA,<sup>135</sup> such as for mangoes and fresh coconuts.<sup>136</sup> This is due in part to the fact that the Philippines has been facing difficulties in providing scientific evidence for its SPS measures.<sup>137</sup> Therefore, importing countries have been questioning the food safety quality of the Philippines' commodities.

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<sup>130</sup> See, e.g., BAI, above n18, 32-33; *Trade Policy Review*, WTO Doc WT/TPR/S/261, 44-45.

<sup>131</sup> BAI, above n18, 32-33.

<sup>132</sup> Meer, above n36, 46.

<sup>133</sup> BAI, above n18, 32-33.

<sup>134</sup> Ibid

<sup>135</sup> Lacson, above n30, 143.

<sup>136</sup> Lustre, above n62, 3.

<sup>137</sup> Ibid.

*(ii) Attempts Undertaken*

The Philippines selected some islands to be quarantine checkpoints for particular commodities to prevent the spread of the pests and diseases, for example Cebu Island for rabies<sup>138</sup> and Southern Palawan Island for mangoes.<sup>139</sup> Additional SPS quarantine officers have been placed at checkpoints, and the dissemination of SPS information has been undertaken to improve stakeholders' awareness.<sup>140</sup> For example, BFAR held capacity building programs for both officials and the public, including training programs for stakeholders to improve performance and compliance with the SPS Agreement.<sup>141</sup> The Philippines has also undertaken cooperation with other Members, such as the US in its efforts to obtain regionalisation recognition for being free of the mango pulp weevil.<sup>142</sup>

*(iii) Possible Solutions*

The Philippines should improve its recognition of the regionalisation principle in its imports in compliance with the SPS Agreement. They should also adopt a recognition of regionalisation in their imports regulations to enable the importing of commodities from exporting Members. A change of political will in Philippines laws and regulations to adopt this regionalisation principle in its own SPS measures is encouraged, where available.

*(f) Equivalence Principle*

The Philippines has applied the equivalence principle, as stipulated in Article 4 of the SPS Agreement, by granting some exporting Members equal market access. In the area of exports, the Philippines has entered into agreements relating to equivalence recognition, such as the export of fresh mango and papaya to Japan<sup>143</sup> and the accreditation of poultry products to Dubai.<sup>144</sup>

However, the Philippines has faced challenges in relation to the implementation of the equivalence principle.<sup>145</sup> Implementation has been affected by difficulties in gaining the PFA due to

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<sup>138</sup> BAI, *CY 2011 Highlight of Accomplishments* <<http://www.bai.da.gov.ph/index.php/annual-accomplishments-reports/35-highlights-of-accomplishments>>.

<sup>139</sup> BPI, above n128.

<sup>140</sup> Ibid.

<sup>141</sup> DA-Key Regulatory Agencies: BFAR, above n69, 16.

<sup>142</sup> G/SPS/GEN/1412, 3.

<sup>143</sup> Maribel G. Marges, Market Access Case Study (II): Philippines Fresh Mango/Papaya Exports to Japan, in Workshop on WTO Sanitary and Phytosanitary (SPS) Measures, Bangkok-Thailand (8-11 September 2009) Organised by ADBI in cooperation with FAO <<http://www.adbi.org/files/wto.sps.executive.summary.pdf>>.

<sup>144</sup> BAI, *Philippines Poultry Products Now Are Available in Dubai Market* <<http://www.bai.da.gov.ph/index.php/news-events/309-philippines-exports-poultry-products-in-dubai>>.

<sup>145</sup> Lacson, above n30, 143.

lack of infrastructure and finance to perform surveillance activities and disease prevention and eradication.

The Philippines should improve its information management on SPS measures, so that importing Members will be better informed of the Philippines SPS regulations and are likely to be better considered for granting the equivalence recognition. A greater transparency of information is also required by importing Members for the equivalence arrangement to foster the process of recognition.

The Philippines needs to strengthen its trade cooperation in the Southeast Asian and Asia Pacific regions, both bilaterally and multilaterally, to improve its market access. With regard to the implementation of the equivalence principle, the Philippines should improve its cooperation with other countries to establish more MRA. The Philippines should also enhance its PFAs to enable the country to export commodities from many more areas.

#### *(g) Technical Assistance*

The Philippines has received technical assistance from developed countries and international organisations as governed under Article 9 of the SPS Agreement. Such assistance has included, the granting of the EU-Trade Related Technical Assistance 2 Project for the establishment of a laboratory quality assurance system.<sup>146</sup> The Philippines has also received technical assistance from the US in its effort to gain regionalisation recognition for being free of the mango pulp weevil.<sup>147</sup> An active approach of the Philippines in this regard will assist it in improving cooperation and in gaining technical assistance.

## *2 Exportation Dimension*

### *(a) Issue of Market Access*

The Philippines is recognised as a country that has been actively exporting commodities in the agricultural sector. Agricultural commodities that have been exported include fruits, coconuts, beverages, poultry, fish and crustaceans.<sup>148</sup> In the area of exports, the Philippines' top five markets for the fiscal years of 2012-2014 were Japan, the US, China, Hong Kong and Singapore.<sup>149</sup>

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<sup>146</sup> BAI, above n138.

<sup>147</sup> G/SPS/GEN/1412, 3.

<sup>148</sup> DTI-EMB, *Philippines Merchandise Export to the World* [Phl Exports to the World FY 2013 Adjusted.pdf] (3 June 2013) <<https://drive.google.com/file/d/0B0iIL7KAK3i5YmJnUXlhaG1kQkU/edit?pli=1>>.

<sup>149</sup> Ibid.

(i) *Difficulties and Underlying Reasons*

Despite significant trade activities, the Philippines has experienced difficulties in accessing markets, such as the export markets for bananas and pineapples to Australia and for mangoes to the US.<sup>150</sup> Some of the Philippines' export commodities face refusal by importing Members, for example China's refusal on bananas.<sup>151</sup> Hitherto, the Philippines raised 19 STC on importing Members' SPS regulations affecting the Philippines' international trade, the newest of which is STC414 on Indonesia's food safety measures affecting horticultural products and animal products.<sup>152</sup> Three of the STC ended in trade disputes, two of which were initiated by the Philippines, as the complainant, against Australia.<sup>153</sup> Another dispute on Australia's quarantine regime for export, DS287, was initiated by the EU, where the Philippines was joined as a third party together with Canada, Chile, China, India, Thailand and the US.<sup>154</sup>

A further dispute by the Philippines is DS270, titled *Australia-Certain Measures Affecting the Importation of Fresh Foods and Vegetables*. In this dispute, the Philippines requested a consultation with Australia in October 2002 with regard to Australia's SPS measures,<sup>155</sup> in particular Article 64 of *Quarantine Proclamation 1998*, which stipulates that the importation of fresh fruit and vegetables to Australia is prohibited unless there is a permit provided by the Director of Quarantine.<sup>156</sup> The Philippines then requested a Panel in July 2003, which was established in August 2003 after the second request.<sup>157</sup>

DS271 is also concerned with Article 64 of the *Quarantine Proclamation 1998* and the *Plant Biosecurity Memorandum 2002/45 Import Risk Analysis-Fresh Pineapple Fruit*, which requires the importation of pineapples from the Philippines, the Solomon Islands, Sri Lanka and Thailand must meet certain conditions, such as 'de-crowning of fruit and pre-shipment methyl bromide fumigation'.<sup>158</sup>

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<sup>150</sup> FAO, FAO Corporate Document Repository, *WTO Agreement on Agriculture: the implementation experience-Philippines*, 9 <<http://www.fao.org/docrep/005/y4632e/y4632e0u.htm>>.

<sup>151</sup> The Asia Sentinel, *The China-Philippine Banana War* (6 June 2012) <<http://www.asiasentinel.com/society/the-china-philippine-banana-war>>.

<sup>152</sup> WTO, SPS-IMS, *Specific Trade Concerns* <<http://spsims.wto.org/web/pages/search/stc/Results.aspx>>.

<sup>153</sup> See, *Australia-Certain Measures Affecting the Importation of Fresh Fruit and Vegetables*, WTO: Dispute DS270 (24 February 2010) <[http://wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds270\\_e.htm](http://wto.org/english/tratop_e/dispu_e/cases_e/ds270_e.htm)>; *Australia-Certain Measures Affecting the Importation of Fresh Pineapple*, WTO: Dispute DS271 (24 February 2010) <[http://wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds271\\_e.htm](http://wto.org/english/tratop_e/dispu_e/cases_e/ds271_e.htm)>.

<sup>154</sup> *Australia-Quarantine Regime for Export*, WTO: Dispute DS287 (24 February 2010)

<[http://wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A19#selected\\_agreement](http://wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A19#selected_agreement)>.

<sup>155</sup> *Australia-Certain Measures Affecting the Importation of Fresh Fruit and Vegetables*.

<sup>156</sup> *Quarantine Proclamation 1998* (Cth) sec 64(2), 71.

<sup>157</sup> *Australia-Certain Measures Affecting the Importation of Fresh Fruit and Vegetables*.

<sup>158</sup> Department of Agriculture, Fisheries and Forestry, *'Plant Biosecurity Memorandum 2002/45 Import Risk Analysis-Fresh Pineapple Fruit'* 8 October 2002.

- *High SPS Measures of Importing Members*

The Philippines faces impediments to the expansion of its international trade markets,<sup>159</sup> difficulties that are affected by producers and exporters lacking the capacities to meet the risk assessments required by importing Members.<sup>160</sup> For example, difficulties in the implementation of Vapour Heat Treatment, to protect fresh mango and papaya fruits against fruit flies, hampered the country's market access to Japan, Korea, New Zealand, Australia and the US.<sup>161</sup> Similarly, the Philippines faces difficulties in complying with the Australian SPS measures for pineapples.<sup>162</sup> The Philippines' local exporters often have general insufficient awareness or knowledge of the SPS measures of importing countries, which results in a failure to meet the importing Members' standards.<sup>163</sup> The Philippines's regulatory authority has also had a lack of response capacity in dealing with the non-tariff barriers affected the Philippines' exports, such as SPS measures.<sup>164</sup>

The STC demonstrate the perception that risk assessments undertaken by Philippine exporters are non-compliant with the SPS Agreement.<sup>165</sup> According to staff of the BFAR, the difficulties are caused by an insufficient budget for providing services to business actors.<sup>166</sup> This situation affects the ability of the agency to perform the necessary activities to assist business actors in fulfilling the required standards.

- *Private Standards*

The Philippines' SPS implementation, especially in the area of export has also been impacted by private standards.<sup>167</sup> Business enterprises in the Philippines, of which in 2012 99.58% were

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<sup>159</sup> Lacson, above n30, 143.

<sup>160</sup> Lustre, above n62, 3.

<sup>161</sup> Lacson, above n30, 145.

<sup>162</sup> Bathan and Lantican, above n108, 133.

<sup>163</sup> Interview with staff of Fish Inspection Unit of BFAR-DA the Philippines on 1 February 2013. See also John Lawrence Avila, *Non-Tariff Barriers Facing Philippine Exporters* <<http://siteresources.worldbank.org/INTEAPREGTOPINTECOTRA/Resources/579386-1145902243289/Philippines-John-6-27.pdf>>17.

<sup>164</sup> Avila, above n163.

<sup>165</sup> The STC on the Philippines SPS regulations include STC32 on maximum levels for certain contaminants (aflatoxins) in foodstuffs; STC46 on the import prohibition of coconut palms and related products; STC49 on the restriction on imports of sauces containing benzoic acid; STC56 on the notification of the amendment of Japanese plant protection law; STC72 on the measure regarding canned tuna in oil; STC79 on import restrictions on durian; STC85 on import restrictions on prawn and prawn products and revised generic IRA for prawn and prawn products; STC86 on access of California table grapes; STC110 on the agricultural biotech approval process; STC155 on import restrictions on Netherland truss tomatoes; STC169 on EC proposed regulation on the MRL of pesticides; STC179 on guidelines on MRL testing. SPS Information Management System; STC199 on deviation from international standards for wood packing materials; STC212 on the positive list system for pesticides, veterinary drugs and feed additive MRLs; STC238 on the application and amendment of the EU Regulation on Novel Foods; STC249 on the reform of Australia's IRA process; STC299 on US 2009 Food Safety Enhancement Act, and STC414 on Indonesia's Food Safety Measures Affecting Horticultural Products and Animal Products. See WTO, SPS-IMS <<http://spsims.wto.org/web/pages/search/stc/Results.aspx>>.

<sup>166</sup> Interview with a staff of BFAR on 1 February 2013.

<sup>167</sup> FAO, *Private Standards In The United States And European Union Markets For Fruit And Vegetables: Implications for developing countries* <<http://ftp.fao.org/docrep/fao/010/a1245e/a1245e03.pdf>>.

micro, small, and medium enterprises,<sup>168</sup> face difficulties in meeting the technology and human resources importation requirements.<sup>169</sup> Certification requirements and the high cost of private standards' operation have also become challenges.

(ii) *Attempts Undertaken*

The Philippines has established programs to improve parties' understanding of the SPS Agreement, through the Agricultural Training Institute (ATI), established in January 1987.<sup>170</sup> The ATI comprises several training centres to provide training for farmers and fishermen. In November 1998, the training centre for fishermen was transferred to the BFAR.<sup>171</sup> The ATI's agenda provides for capacity building programs for farmers, through such activities as training, conventions, courses, e-learning and scholarships.<sup>172</sup> The seminars held by the BAI aim to improve the understanding and awareness of exporters towards the SPS measures.<sup>173</sup>

The Government of the Philippines changed its policy regarding the intervention into the agricultural sector, by focussing on longer-term and longer-lasting, real productivity enhancing measures instead of short-term interventions, such as subsidies. The longer-term program is manifested in irrigation, postharvest facilities, research and development, extension and education and training programs.<sup>174</sup> The longer-term strategies are viewed as more effective, because they involve technical assistance from the government for a longer time schedule which is crucial for farmers in improving production capacity. On the other hand, the shorter-term solutions can lead to dependency of the farmers on the government. Short-term solutions have also had an impact on corruption,<sup>175</sup> where the *modus operandi* includes 'low quality of planting material, unhealthy farm animals, undelivered farm equipment'<sup>176</sup> and 'fertiliser fund scam'.<sup>177</sup> Looking through the Corruption Perceptions Index 2016, the Philippines' public sector corruption ranks number 101

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<sup>168</sup> DTI, *MSME Statistics* (27 February 2014) <<http://www.dti.gov.ph/dti/index.php/msme/msme-statistics>>.

<sup>169</sup> Pasadilla and Liao, above n63, 33.

<sup>170</sup> The Agricultural Training Institute was established based on Executive Order No. 116.

<sup>171</sup> The Agricultural Training Institute, *Our History* <<http://ati.da.gov.ph/about/history>>.

<sup>172</sup> See, e.g., The Agricultural Training Institute, *Our Mandates* <<http://ati.da.gov.ph/about/mandates>>; The Agricultural Training Institute, *News* <<http://ati.da.gov.ph/news>>.

<sup>173</sup> BAI, *BAI-MDD Hold Export Awareness Seminar* <<http://www.bai.da.gov.ph/index.php/news-events/186-bai-mdd-holds-export-awareness-seminar>>.

<sup>174</sup> Secretary of the Department of Agriculture, *DA 2011 Year End Report*, 8 <<http://www.da.gov.ph/index.php/2012-03-27-12-04-16/year-end-report>>.

<sup>175</sup> Ibid.

<sup>176</sup> Prime Sarmiento, 'Agriculture Weight Down by Corruption and Waste', *Philippine Center for Investigative Journalism* (Manila), 24-25 January 2000, 1 <<http://pcij.org/stories/2000/agri.html>>.

<sup>177</sup> Ernesto F. Herrera, 'Corruption in Agri Sector and Poverty', *The Manila Times* (Manila) (28 July 2014) <<http://www.manilatimes.net/corruption-agri-sector-poverty/114783/>>.

with a score of 35, the same as 2015, down from 38 in 2014. This index is measured of 176 countries, where 0 represents a country that is highly corrupt and 100 is very clean.<sup>178</sup>

The PQS has been engaging in bilateral cooperation with WTO Members in order to improve market access, for example, the Japan-Philippines Economic Partnership Agreement,<sup>179</sup> a partnership program with Japan in the Livestock ‘Oksyon’ Markets.<sup>180</sup> To bring about support in gaining market access, the PQS recently developed training programs for producers, so that their products would comply with international standards.<sup>181</sup> It is also developing capacity building with international agencies and trading partners, and cooperation and coordination with private industries.<sup>182</sup> The BFAR has held training program for stakeholders, and technical and advisory assistance for exporters.<sup>183</sup> The Philippines has engaged in trade agreements within the ASEAN Free Trade Area and other international organisations, such as the Asia-Pacific Economic Cooperation.<sup>184</sup> The Philippines also established cooperation with Japan under the Japan-ASEAN Integration Fund-Emergency Economic Assistance, which aims to strengthen the smallholder coconut-based industry.<sup>185</sup>

With regard to private standards, the Philippines Trade and Training Centre, under the Department of Trade Industry, held training on food safety management systems, good manufacturing practices and HACCP on low costs. The Food Processing Division of Industrial Technology Development Institute, under the Department of Science and Technology, provides assistance to small-and medium-size enterprises in establishing science-based processes for the manufacture of their products.<sup>186</sup> Further, with regard to standards setting, the Philippines has developed several standards, which have been reported to the WTO. Examples of such standards

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<sup>178</sup> Transparency International, *Corruption Perceptions Index 2016*  
<[http://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016)>.

<sup>179</sup> Department of Trade and Industry, *Trade Agreements* (27 February 2014)  
<<http://www.dti.gov.ph/dti/index.php/resources/trade-agreements>>.

<sup>180</sup> Department of Agriculture, *DA to Upgrade Livestock “Oksyon” Markets*  
<<http://www.da.gov.ph/index.php/2012-03-27-12-04-15/2012-04-17-09-30-59/4137-revied-da-to-upgrade-livestock-auction-markets>>; *NAFC Quarterly*, Vol. 15 No. 3, July to September 2013, DA GOJ official unveils modernised livestock ‘Oksyon’ market in Batangas, 4  
<[http://nafc.da.gov.ph/NAFC%20letters/2013/2013%203rd%20NAFC%20Quarterly\\_LastModifiedJan17,2014.pdf](http://nafc.da.gov.ph/NAFC%20letters/2013/2013%203rd%20NAFC%20Quarterly_LastModifiedJan17,2014.pdf)>; <phl-bas-wpma-2009-v1.0-tec.pdf>, 5. LOM is a ready market for livestock, particularly large animals for slaughter.

<sup>181</sup> Panganiban, above n1, 15.

<sup>182</sup> Ibid.

<sup>183</sup> DA-Key Regulatory Agencies: BFAR, above n69, 16.

<sup>184</sup> WTO, *Member Information: Philippines and the WTO*  
<[http://www.wto.org/english/thewto\\_e/countries\\_e/philippines\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/philippines_e.htm)>.

<sup>185</sup> Department of Agriculture, *Japanese Project to Strengthen Filipino Coco-based Industry*  
<<http://www.da.gov.ph/index.php/2012-03-27-12-04-15/2012-04-17-09-30-59/5072-japanese-project-to-strengthen-filipino-coco-based-industries>>.

<sup>186</sup> FAO, Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme, FAO/WHO Coordinating Committee for Asia, 1.

include the Pesticide Residues in Banana: Maximum Residue Limits,<sup>187</sup> standards for the Pesticide Residues in Mango: Maximum Residue Limits,<sup>188</sup> standards for the Pesticide Residues in Asparagus: Maximum Residue Limits<sup>189</sup> and standards for establishments conducting goat meat fabrication intended for the food trade.<sup>190</sup>

*(iii) Possible Solutions*

With respect to market access, it is recommended that the Philippines legislates export requirements in compliance with the SPS measures of importing Members. The Philippines should publish the technical requirements of the importing Members on relevant government websites and disseminates to businesses so that they will be better informed and more aware of export requirements. The Philippines also needs to maintain and improve existing programs, strengthen the capacity of exporters, improve the quality of its products and strengthen market access cooperation with other Members.

At the international level, the Philippines should improve the quality of its procedures surrounding product exports in order to expand market access. The Philippines needs to improve trade cooperation with other countries to gain recognition of the equivalence principle and, the regionalisation principle. Technical assistance is also still required to strengthen the proficiency of business actors and exporters.

The Philippines should improve its communication with the SPS international standards bodies, the WTO SPS committee and other Members, and build on the efforts already made at the international level through bilateral and multilateral cooperations with other countries.

The Philippines government should continue to expand and vigilantly maintain its efforts in order to improve the quality of implementation and to enhance market access through cooperation, for example through technical assistance and MRA. As a WTO Member, the Philippines must follow the decision of the SPS Committee to undertake the agreed actions towards private standards, particularly action number five ‘...to communicate with entities involved in SPS-related private standards in their territories to sensitise them to the issues raised in the SPS Committee and underline the importance of international standards...’.<sup>191</sup> The Philippines should also improve the quality of its commodities to access international markets, while waiting for the progress of private standards discussion in the SPS Committee meeting.

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<sup>187</sup> G/SPS/N/PHL/294.

<sup>188</sup> G/SPS/N/PHL/295.

<sup>189</sup> G/SPS/N/PHL/293.

<sup>190</sup> G/SPS/N/PHL/291.

<sup>191</sup> *Actions Regarding SPS-Related Private Standards*, WTO Doc G/SPS/55 (6 April 2011) (Decision) 1-3.



The above mentioned recommendations are summarised in the following table.

**Table 5.1. List of Key Normative Directives to the Philippines**

No	Indicators	Level of normative directive	Key normative directives	Actions to realise
1	Scientific principle	National	The Philippines needs to undertake SPS regulatory reform process	-Utilise risk-based assessment and analysis in the formulation of SPS regulations to provide their scientific justification -Amend regulations on SPS bureaus to harmonise their roles and functions
		Regional/International	Improve cooperation within ASEAN especially regarding SPS matters	-Strengthen the SPS system -Improve infrastructure network and technical cooperation
2	Transparency principle	National	Improve management of notification arrangement	-Improve the capacity building of SPS institutions' staff through training and seminars -Improve communication and consultation among SPS agencies -Arrange capacity building on managing notification obligation
			-Incorporate transparency in daily activities	-Improve disclosure of SPS import requirements -Implement the 'Transparency Seal' obliged by the government
		Regional/international	Improve cooperation within ASEAN and other countries especially regarding SPS matters	-Arrange for technical assistance on notification management -Conduct cooperation through training on notification submission online
3	Harmonisation principle	National	-Political will of the government to adopt SPS international standards	-Improve the adoption of the SPS international standards in the Philippines' SPS regulations
		Regional/International	-Improve cooperation within ASEAN especially regarding SPS matters	-Propose technical assistance to regional/international donors
4	Regionalisation principle	National	Strengthen the political will of the government to recognise regionalisation in import	Adopt the 'region or zone base' import system into SPS national legislation

			Strengthen the diseases/pests surveillance management system	Improve the checkpoints on quarantines islands
			Dissemination of the WTO SPS Agreement to other SPS related institution	Hold seminars or training
		Regional/International	Improve cooperation regarding surveillance of pest/diseases system	Improve cooperation with other countries to achieve PFA
5	Equivalence principle	National	Increase the MRA number for the Philippines' products	Improve the SPS information management system to exporters to boost the process of MRA
		Regional/International	Propose technical assistance & cooperation to regional and/or international organisations	Improve cooperation among ASEAN countries to establish MRA
6	Technical assistance	National	Strengthen the capacity of the SPS staff	Improve the negotiation capacity of the SPS staff to gain technical assistance
		Regional/International	Improve cooperation with international donor countries and institutions	Improve the active effort in establishing cooperation to ASEAN, STDF and other countries
7	Market access: Private standards	National	Strengthen the Philippines' competitiveness products	-Legislate export requirements for exported products in line with import requirements of other countries -Improve capacity of small producers & exporters in agricultural and fisheries industries through technical assistance (training and workshops)
			Adopt private standards into public (national) SPS regulations	-Dialogue with private standards institutions -Establish a working group to arrange the adoption -Adopt the certification system into SPS national regulations
		Regional/international	Improve communication with regard to private standards	-Improve communication and sharing information within ASEAN GAP -Improve communication with relevant international bodies

				(WTO SPS Committee, 'Three Sisters', STDF)
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#### D Conclusion

The implementation of the Philippines SPS measures, as discussed in this chapter demonstrates non-compliance with the SPS Agreement due to several factors, both internal and external, which need to be addressed and improved. As indicated in this chapter, the implementation of the SPS by the Philippines does not satisfactorily comply with the SPS Agreement and its further implementation requirements. Examples of the country's non-compliance include, a lack of transparency in AO22 due to the different perspective of the Philippines towards notification obligation affects the non-compliance of this particular obligation. Further, insufficient recognition of regionalisation principle, such as PFAs, that is caused by the application of a county-based import system. Moreover, the low level of conformity to international standards due to the Philippines' national policy being the source of the SPS standards in establishing SPS regulations, and in providing a level of protection to the people of the Philippines towards imported commodities.

The Philippines should keep and maintain its positive and remarkable achievement to date, such as the outstanding number of emergency notifications and active participation in international events. However, to address the issues raised in this chapter, it is recommended that the Philippines take action to overcome its weaknesses in implementation. For example, the Philippines can improve the recognition of regionalisation through PFA recognition to exporting Members, thereby improving the conformity of its SPS standards to international standards. It must also improve its compliance with the notification obligation by providing notification of all of the country's SPS regulations for the purposes of transparency.

It is recommended that the Government of the Philippines boosts its efforts to expand market access and that it maintain and strengthen the capacity of its exporters through technical assistance programs from government bodies, international organisations, and other Members. A further recommendation from the above issues is that trade cooperation with other Members through MRA be fostered and cooperation with international organisations in the area of technical assistance be actively improved. It is important that adjustments and improvements to its implementation and practices are executed and completed in a timely manner to avoid the SPS Agreement becoming a trade barrier.<sup>192</sup>

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<sup>192</sup> Lacson, above n30, 146.

## CHAPTER 6

### VI THE SPS AGREEMENT IMPLEMENTATION IN MALAYSIA, ITS IMPEDIMENTS AND POTENTIAL SOLUTIONS

#### A Introduction

This chapter analyses the application of the SPS Agreement in Malaysia, the third of selected countries in this thesis. This discussion is essential to demonstrate a comparison of the SPS implementation of Indonesia and the Philippines to that of Malaysia. From the comparison, it is expected that Indonesia and the Philippines' will be able to learn from Malaysia's experiences, such as in its SPS measures standards setting. As has been discussed in the previous two chapters, Indonesia and the Philippines continue to face issues in their SPS implementation, and thus, need to learn from Malaysia's achievements to improve the balance of their SPS application. To enable an accurate comparison of the SPS implementation in the selected countries, this chapter elaborates on the same aspects covered in the analysis of Indonesia's and the Philippines' SPS implementation, namely, the non-discrimination principle, scientific principle, transparency principle, harmonisation principle, regionalisation principle and equivalence principle in Malaysia's importation and exportation dimensions, as well as the difficulties in implementation and the underlying reasons. The analysis relies primarily on an examination of the Specific Trade Concerns (STC) on Malaysia's SPS measures, as well as the SPS measures of other Members that affect Malaysia's trade and Trade Policy Review (TPR) of Malaysia. The second part of this chapter examines potential solutions, including legal options, to improve Malaysia's SPS implementation.

#### B SPS Regulations and Administration

Malaysia's main SPS regulations include products under the SPS scope, namely phytosanitary or plants, and sanitary, which includes animals and fish and food products. The primary phytosanitary regulations, for example, the *Plant Quarantine Act 1976* and *Plant Quarantine Regulation (Amendment) 2005*, are administered by the Department of Agriculture and *Federal Agricultural Marketing Authority (FAMA) (Amendment) Act 2012*.<sup>1</sup> The *Plant Quarantine Act 1976* was issued by Seri Paduka Baginda Yang di-Pertuan Agong with the consent and authority of the

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<sup>1</sup> *Federal Agricultural Marketing Authority (Amendment) Act 2012*  
<[http://www.federalgazette.agc.gov.my/outputaktap/20120209\\_A1417\\_BI\\_JW001762%20Act%20A1417\(BI\).pdf](http://www.federalgazette.agc.gov.my/outputaktap/20120209_A1417_BI_JW001762%20Act%20A1417(BI).pdf)>.

Parliament in March 1976.<sup>2</sup> This Act deals with the ‘control, prevention and eradication of agricultural pests, noxious plants and plant diseases, and to extent cooperation in the control of the movement of pests in international trade...’.<sup>3</sup> The *Plant Quarantine Regulation (Amendment) 2005*<sup>4</sup> was enacted by the Minister of Agriculture (MoA) in order to impose section 23 of the *Plant Quarantine Act 1976*, which authorises the Minister to enact regulations for the ‘full and effective’ implementation of the purpose of the Act.<sup>5</sup>

Malaysia has a number of sanitary regulations. The *Animals (Amendment) Act 2013*,<sup>6</sup> deals with preventing the introduction and spreading of animal diseases for the control of animal movements, animal slaughter, prevention of animal cruelty, measures regarding the general welfare of animals and animal conservation and improvement.<sup>7</sup> This Act is administered by the Department of Veterinary Service (DVS). The *Fisheries (Amendment) Act 2012*,<sup>8</sup> issued by the Parliament, deals with the ‘conservation, management and development of maritime and estuarine fishing and fisheries in Malaysian fisheries water...’,<sup>9</sup> and is enforced by the Department of Fisheries.<sup>10</sup> The *Food (Amendment) Act 2006*,<sup>11</sup> which was issued by the Parliament and is administered by the Food Safety and Quality Division of the Ministry of Health (MoH), deals with the protection of the public ‘against health hazards and fraud in the preparation, sale and use of food’ and all related matters.<sup>12</sup> The MoH enacted the *Food Regulation 1985*<sup>13</sup> to further implement Article 34 of *Food Act 1983*, which was amended by the *Food (Amendment) Act 2006*.<sup>14</sup>

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<sup>2</sup> *Laws of Malaysia, Act 167 Plant Quarantine Act 1976*  
<<http://www.agc.gov.my/Akta/Vol.%204/Act%20167.pdf>>.

<sup>3</sup> Ibid 5.

<sup>4</sup> *Plant Quarantine (Amendment) Regulation 2005* (Malaysia) <[http://faolex.fao.org/cgi-bin/faolex.exe?rec\\_id=085920&database=faolex&search\\_type=link&table=result&lang=eng&format\\_name=@ERALL](http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=085920&database=faolex&search_type=link&table=result&lang=eng&format_name=@ERALL)>.

<sup>5</sup> *Plant Quarantine Act 1976* (Malaysia) s 23.1.

<sup>6</sup> *Animals (Amendment) Act 2013* (Malaysia).  
<[http://www.federalgazette.agc.gov.my/outputaktap/20130320\\_A1452\\_BI\\_WJW000296%20BI.pdf](http://www.federalgazette.agc.gov.my/outputaktap/20130320_A1452_BI_WJW000296%20BI.pdf)>.

<sup>7</sup> Ibid.

<sup>8</sup> *Fisheries (Amendment) Act 2012*  
<[http://www.federalgazette.agc.gov.my/outputaktap/20120209\\_1413\\_BI\\_JW001762%20Act%20A1413\(BI\).pdf](http://www.federalgazette.agc.gov.my/outputaktap/20120209_1413_BI_JW001762%20Act%20A1413(BI).pdf)>.

<sup>9</sup> Ibid.

<sup>10</sup> Department of Fisheries, *Acts and Regulations* <<http://www.dof.gov.my/en/31>>.

<sup>11</sup> *Food (Amendment) Act 2006* <[http://faolex.fao.org/cgi-bin/faolex.exe?rec\\_id=075315&database=faolex&search\\_type=link&table=result&lang=eng&format\\_name=@ERALL](http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=075315&database=faolex&search_type=link&table=result&lang=eng&format_name=@ERALL)>.

<sup>12</sup> Food Safety and Quality Division, *Online Public Engagement for Draft Food (Amendment) Regulations (No.1) 2014 and Food Import Regulations* (14 March 2014)  
<<http://fsq.moh.gov.my/v4/index.php/component/k2/item/694-online-public-engagement-for-draft-food-amendment-regulations-no-1-2014-and-food-import-regulations>>.

<sup>13</sup> *Food Regulation 1985* (Malaysia) <[http://fsq.moh.gov.my/v4/images/filepicker\\_users/5ec35272cb-78/Perundangan/Akta%20dan%20Peraturan/Food\\_Regs\\_1985/FR1985\\_arrangement.pdf](http://fsq.moh.gov.my/v4/images/filepicker_users/5ec35272cb-78/Perundangan/Akta%20dan%20Peraturan/Food_Regs_1985/FR1985_arrangement.pdf)>.

<sup>14</sup> *Food (Amendment) Act 2006* (Malaysia), s 34. It governs ‘power to make regulation’ of the MoH for the more effective and better implementation of the Act.

The Malaysian Government also enacted the *Malaysian Quarantine and Inspection Services (MAQIS) Act 2011 (Act 728)*, which is administered by the MAQIS.<sup>15</sup> This Act deals with the following matters:

‘intergrated services relating to quarantine, inspection and enforcement at entry points, quarantine station, premises quarantine and certification for the import and export of plants, animals, carcasses, fish, agricultural produce, soils and microorganism and include inspection of and enforcement relating to food and matters related to it’.<sup>16</sup>

MAQIS enacted several regulations to further implement the *MAQIS Act 2011*, including *MAQIS on Fees and Charges 2013*, *Quarantine and Inspection Regulation 2013*, *Registration of Importers, Exporters, and Agent Regulation 2013*, *Issuance of Permits, License and Certificate Regulation 2013* and *Quarantine Procedure Regulation 2013*.<sup>17</sup>

According to the *MAQIS Act 2011*, the general requirements in the SPS regulations for imported commodities are permits, licences and certificates.<sup>18</sup> Requirements for imported phytosanitary products include an import permit, a phytosanitary certificate and post-entry quarantine.<sup>19</sup> The import of animal by products must be accompanied by a veterinary certificate, while the importing of live animals requires certain procedures and documents depending on the type of animals, for example, a submission of an import application, vaccination record and customs clearance.<sup>20</sup> Imported food commodities to Malaysia and exported food commodities from Malaysia must fulfil the general requirements of the SPS regulations, such as processing, storing and handling in a sanitary manner.<sup>21</sup>

Malaysia’s international trade and industrial policy plans, legislation and implementation are laid down under the responsibility of the Ministry of International Trade and Industry (MITI).<sup>22</sup> SPS matters come under the purview of two Ministries: the Ministry of Agriculture and Agro-based Industry (MoA), including the Department of Agriculture, for crops, the DVS for livestock, the

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<sup>15</sup> *Undang-Undang Malaysia Akta 278 Akta Perkhidmatan Kuarantine dan Pemeriksaan Malaysia 2011*, Malaysia Quarantine and Inspection Services Act 2011 (Malaysia) (18 July 2014) <<http://www.maqis.gov.my/en/akta;jsessionid=61EB5FBBB302A1ECAB6DF2A5E46EFA34>>.

<sup>16</sup> Malaysian Quarantine and Inspection Services (MAQIS), *MAQIS Background* <[http://www.maqis.gov.my/en/latar\\_belakang](http://www.maqis.gov.my/en/latar_belakang)>.

<sup>17</sup> MAQIS, *Regulation* (18 July 2014) <<http://www.maqis.gov.my/en/peraturan>>.

<sup>18</sup> *MAQIS Act 2011* (Malaysia) art 11(1)(2) (18 July 2014) <<http://www.maqis.gov.my/akta>>.

<sup>19</sup> MAQIS, *Import Procedures- List of Controlled Imported Items/Substances under Plant Quarantine Act 1976 and Quarantine Regulations 1981* (28 November 2014) <[http://www.maqis.gov.my/en/prosedur\\_import\\_tumbuhan](http://www.maqis.gov.my/en/prosedur_import_tumbuhan)>.

<sup>20</sup> MAQIS, *Import Procedure* (30 May 2012) <[http://www.maqis.gov.my/en/import\\_eksport/binatang/prosedur\\_import](http://www.maqis.gov.my/en/import_eksport/binatang/prosedur_import)>.

<sup>21</sup> *MAQIS Act 2011*, above n18.

<sup>22</sup> See, e.g., Ministry of International Trade and Industry (MITI), *Vision and Mission* (27 May 2014) <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_aadfbbb8-c0a81573-5bbe5bbe-7cec752f](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_aadfbbb8-c0a81573-5bbe5bbe-7cec752f)>; MITI, *Malaysia and the WTO* (12 December 2012) <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_f5694606-c0a81573-78d578d5-759be8c9](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_f5694606-c0a81573-78d578d5-759be8c9)>.

Department of Fishery for fish and the MoH for food safety.<sup>23</sup> Particular plantation commodities that are within the SPS scope, such as palm oil, cocoa, pineapple and tobacco are under the control of the Ministry of Plantation Industry and Commodities (MPIC).<sup>24</sup> The overall administration of the SPS measures is managed by the Strategic Planning and International Division of the MoA.<sup>25</sup>

Malaysia imports commodities from other country Member countries, such as China, Singapore, Japan and the US.<sup>26</sup> In this regard, Malaysia has established SPS regulations in the form of import prohibitions in order to filter products entering the country on the basis of ‘public health and safety, environment and security reasons’.<sup>27</sup> Malaysia also exports commodities under the SPS scope, of which the major export commodity is palm oil.<sup>28</sup> The leading export destinations for Malaysia’s commodities include Singapore, China, Japan and the US.<sup>29</sup>

## C Implementation of SPS Principles, Difficulties and Potential Recommendations

### 1 Importation Dimension

Malaysia has applied the SPS Agreement, although several implementation issues exist, demonstrated in the five STC on Malaysia’s SPS measures from 1995-2017.<sup>30</sup> These STC are:

- STC66 on notification related to dioxin maintained by Switzerland, which has been successfully settled;<sup>31</sup>
- STC266 on price list for inspections raised by Brazil, supported by Australia, New Zealand, Uruguay and the European Union (EU);<sup>32</sup>
- STC294 on import restrictions on plant and plant products raised by Brazil supported by Japan;<sup>33</sup>

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<sup>23</sup> Email from a staff member of the International Section Strategic Planning and International Division of the Ministry of Agriculture and Agro-Based Industry, 25 September 2012.

<sup>24</sup> Ministry of Plantation, Industries and Commodities (MPIC), *Overview* (25 November 2014) <<http://www.kppk.gov.my/index.php/en/about-us/profile/overview.html>>.

<sup>25</sup> Ministry of Agriculture and Agro-Based Industry Malaysia (MoA), *Info MoA-Strategic Planning and International Division* (25 November 2014) <<http://www.moa.gov.my/web/guest/bahagian-perancangan-strategik-dan-antarabangsa>>.

<sup>26</sup> MITI, *Import Source-2014* (8 December 2014) <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.article.Article\\_9aaf4a4f-c0a81573-2de0a562-feffad8b](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.article.Article_9aaf4a4f-c0a81573-2de0a562-feffad8b)>.

<sup>27</sup> WTO, Trade Policy Review-Malaysia, *Minutes of the Meeting-Addendum* (3-4 March 2014) 71.

<sup>28</sup> MITI, *Exports by Major Products-2014* (8 December 2014) <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.article.Article\\_9a5a32d3-c0a81573-2de0a562-296164ad](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.article.Article_9a5a32d3-c0a81573-2de0a562-296164ad)>.

<sup>29</sup> MITI, *Export Destination-2014* (4 December 2014) <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.article.Article\\_9aae7ff8-c0a81573-2de0a562-332a3212](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.article.Article_9aae7ff8-c0a81573-2de0a562-332a3212)>.

<sup>30</sup> WTO, SPS-IMS, *Specific Trade Concerns* <<http://spsims.wto.org/web/pages/search/stc/Search.aspx>>.

<sup>31</sup> See, e.g., *Specific Trade Concerns-Resolved Issues*, WTO Doc G/SPS/GEN/204/Rev.11/Add.3 (1 March 2011) 52 (Note by the Secretariat)(Addendum); WTO, SPS-Information Management System (SPS-IMS), *Specific Trade Concerns*, 4 <<http://spsims.wto.org/web/pages/search/stc/Search.aspx>>.

<sup>32</sup> *Specific Trade Concerns*, WTO SPS-IMS, 14.

- STC323 on import restrictions on pork and pork products raised by the EU and supported by Canada and the US animal health;<sup>34</sup>
- STC391 on Malaysia's import restriction related to the approval of poultry meat plants raised by Brazil.<sup>35</sup>

Another trade concern relates to Malaysia's ban on poultry and poultry products due to avian influenza raised by the EU through bilateral consultation with Malaysia.<sup>36</sup> These issues will now be examined.

(a) *Non-Discrimination*

None of the STC is directly related to the issue of non-discrimination as governed in Article 2.3 the SPS Agreement. However, STC266, regarding the price list for inspections, is indicated covering non-discrimination principle. Australia claimed that the price for import inspections in that regulation was imposed differently on different Member countries.<sup>37</sup> Malaysia explained that the consideration to increase and apply different inspection fees to different trade partners was to prevent a disruption to the inspection due to an increase of costs in SPS and *Halal* (Islamic purity) examination.<sup>38</sup> However, Malaysia did not explain why the price was imposed on Members differently. This concern was then bilaterally discussed, but not reported to the WTO.

STC391, raised by Brazil, claimed that Malaysia's SPS measures resulted in arbitrary and unjustified discrimination between Members. Malaysia is claimed to have delayed providing approval for Brazilian poultry meat export plants. According to Brazil, it negotiated market access with Malaysia in 2010, however, no representative from the Malaysian government audit Brazilian plants before March 2014. This resulted in one feedback only for the establishment of plants. Brazil claimed that Malaysia was inconsistent with Articles 2 and 5 of the SPS Agreement and Annex C paragraph 1(a). Malaysia, on the other hand, confirmed that one of the Brazilian plants had been approved, however, three were rejected because they did not fulfil the *halal* requirements.<sup>39</sup>

There is no information available on the difficulties in applying the non-discrimination principle. According to Article 2.3 of the SPS Agreement, Malaysia should not charge different inspection prices to Members if the Members have identical or similar conditions. Should Malaysia

<sup>33</sup> Ibid 15.

<sup>34</sup> Ibid 17.

<sup>35</sup> WTO, *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.16 (23 February 2016) (Note by the Secretariat) (Revision), 82-83.

<sup>36</sup> The European Commission, *SPS Import Restriction on Poultry Due to Avian Influenza* (14 November 2012) <[http://madb.europa.eu/madb/sps\\_barriers\\_details.htm?barrier\\_id=105341&version=3](http://madb.europa.eu/madb/sps_barriers_details.htm?barrier_id=105341&version=3)>.

<sup>37</sup> *Specific Trade Concerns-Issues Considered in 2008*, WTO Doc G/SPS/GEN 204/Rev. 9/Add.1 (6 February 2009) 25 (Note by the Secretariat).

<sup>38</sup> WTO: 2008 News Items, Sanitary and Phytosanitary Measures, *Members Set to Agree on Regionalisation, Improve SPS Transparency* (2-3 April 2008) <[http://www.wto.org/english/news\\_e/news08\\_e/sps\\_apr08\\_e.htm](http://www.wto.org/english/news_e/news08_e/sps_apr08_e.htm)>.

<sup>39</sup> WTO Doc G/SPS/GEN/204/Rev.16, 82-83.



wish to impose different types and prices to Members, they are required to provide scientific justification, as stipulated in Article 2.2.

*(b) Scientific Principle and Risks Assessment*

Malaysia legislated to establish its SPS measures based on the scientific principles stipulated under Article 2.2 of the SPS Agreement. For example, Malaysia's *Food (Amendment) Act 2006* imposes a risk analysis as the basis for food safety development.<sup>40</sup> The risk-based analysis and scientific data have been undertaken through research collaboration in a partnership program with research institutes.<sup>41</sup>

However, several Members have raised concerns, claiming that Malaysia's particular SPS measures had been established without scientific evidence, which has resulted in protectionism in Malaysia since 2008.<sup>42</sup> In October 2011, 2012 and 2013<sup>43</sup> the EU claimed that STC323 on the importation of pork and pork products imposed in July 2011 lacked scientific justification and deviated from the World Organization for Animal Health's (OIE's) standard. The reason for this were that the import permit system was dependent on the DVS's consideration, rather than being an automatic system, application for approval were sometimes not addressed to the DVS and the approval process for foreign abattoirs was 'unnecessary lengthy and burdensome'.<sup>44</sup> The US agreed with the EU, claiming that the measure was not based on scientific evidence.<sup>45</sup> Canada shared these concerns as its pork products were banned by Malaysia at that time without notice, and thus Canada encouraged Malaysia to use a scientific basis for its measures and apply an approval approach system on imports.<sup>46</sup> Canada's argument is reasonable because pork is imported to Malaysia through the DVS on a permission basis, where the DVS will grant a license on 'a case-by-case basis' without always providing a clear explanation.<sup>47</sup> The pork import system is likely less transparent, and lacks scientific justification for why permission is granted or not. This issue is in the process of settlement through a bilateral negotiation.<sup>48</sup>

STC266, on price list for inspections, is related to the issue of risk assessment, particularly with regard to inspection fees. In April 2004, Brazil claimed that the annual inspection fees of

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<sup>40</sup> *Food (Amendment) Act 2006* (Malaysia), s 3, 3A 4-5.

<sup>41</sup> FAO-UN, *Food Safety Legislation-Science and Risk-based Approaches to Harmonisation: Food Safety Legislation in Malaysia* (Malaysia) FAO/WHO Regional Conference on Food Safety for Asia and the Pacific, Malaysia 24-25 March 2004, 5 <<ftp://ftp.fao.org/docrep/fao/meeting/006/ad698e.pdf>>.

<sup>42</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.12 (2 March 2012) (Note by the Secretariat)(Revision) 55-56.

<sup>43</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.14, 72.

<sup>44</sup> Ibid.

<sup>45</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.12 (2 March 2012) (Note by the Secretariat) (Revision) 56.

<sup>46</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.14, 72.

<sup>47</sup> FAO, *Malaysia*, Trade Summary, 2 <<ftp://ftp.fao.org/docrep/fao/meeting/006/ad698e.pdf>>.

<sup>48</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.14, 73.

\$30,000 were inequitable with the service provided.<sup>49</sup> The EU shared the concern and urged for an amendment to the regulation, while Australia requested an explanation from Malaysia regarding the justification of the regulation and suggested they apply a different method.<sup>50</sup> Based on Article 1.f of Annex C, inspection fees must be ‘equitable in relation to any fees charged on like domestic products or products originating in any other Members and should be no higher than the actual cost’ of the inspection.<sup>51</sup> There is no report on the progress of this STC.

STC294, on import restrictions on plant and plant products, was raised by Brazil in March 2010. Malaysia issued its SPS regulation based on the constitutive message of Asia and Pacific Plant Protection Commission on the South American leaf blight disease. Brazil was supported by Japan, claiming that the South American leaf blight disease was established without any scientific justification.<sup>52</sup> Since Malaysia’s SPS measure relied on the message from the Commission regarding South American leaf blight which is not scientific-based, the regulation was also likely not based on scientific evidence. The WTO SPS-Information Management System (SPS-IMS) notes that there has been no progress on this STC, although Malaysia has requested written concerns from Brazil, which would enable Malaysia to provide a proper response.<sup>53</sup>

Further, in STC391, Brazil claimed that the delay of approval and refusal of three Brazilian poultry meat export plants was without scientific evidence and was inconsistent with Articles 2 and 5 of the SPS Agreement and Annex C paragraph 1(a). However, Malaysia argued that the Brazilian plants were rejected due to a non-fulfilment of the *halal* requirement.<sup>54</sup>

#### (i) *Difficulties and Underlying Reasons*

The above claims from exporting Members regarding Malaysia’s SPS regulations, lacking scientific justification are in line with the statement of Ismail and Yong, who said that Malaysia faced challenges in applying its SPS measures.<sup>55</sup> According to Sivapragasam, Asna and Samsinar,

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<sup>49</sup> *Specific Trade Concerns-Issues Not Considered in 2010*, WTO, G/SPS/GEN/204/Rev.11/Add.2 (1 March 2011) (Note by the Secretariat) (Addendum) 145.

<sup>50</sup> Ibid 145.

<sup>51</sup> SPS Agreement, Annex C art 1.f.

<sup>52</sup> *Specific Trade Concerns-Issues Not Considered in 2010*, WTO, G/SPS/GEN/204/Rev.11/Add.2 (1 March 2011) (Note by the Secretariat) (Addendum) 33.

<sup>53</sup> WTO, SPS-IMS, *Specific Trade Concerns-Document No 294* (import restriction on plant and plant products raised by Brazil supported by Japan).

<sup>54</sup> WTO, *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.16 (23 February 2016) (Note by the Secretariat) (Revision), 82-83.

<sup>55</sup> Wan Normah Wan Ismail and Ricky Yong, Management of Sanitary and Phytosanitary Measures-The Malaysian Experience, paper submitted to the Specialist Meeting for Asia on ‘The Challenges and Opportunities of Sanitary and Phytosanitary Standards Costs and Benefits of Strategies of Compliance’ 20 November 2004, Beijing, 4 <[http://siteresources.worldbank.org/INTRANETTRADE/Resources/Topics/Standards/standards\\_training\\_challenges\\_malaysia.pdf](http://siteresources.worldbank.org/INTRANETTRADE/Resources/Topics/Standards/standards_training_challenges_malaysia.pdf)>.

Malaysia lacks the proficiency to undertake risk assessments and to provide scientific justifications as required by the SPS Agreement.<sup>56</sup>

These difficulties are impacted by a lack of research behind the establishment of Malaysia's SPS regulations. Malaysia has insufficient data on plant and animal health status, as well as standards and treatment, particularly in the field of local plant health.<sup>57</sup> This lack of data has presented challenges in the country's ability to undertake risk assessments and scientific justification for establishing the SPS regulations and regionalisation; for example in determining and establishing Pest Free Area (PFA).<sup>58</sup> Further, Malaysia has experienced insufficient infrastructure, such as modern laboratories, particularly for examining plant pests and diseases<sup>59</sup> and 'post-harvest infrastructures' and technology,<sup>60</sup> and, up until 2002, most assessments in Malaysia were based on a literature review only, rather than on research.<sup>61</sup> Malaysia also lacks the requisite expertise to conduct research and risk assessments in particular areas, for example in 'veterinary drug residues, analytical and sampling method'.<sup>62</sup>

#### *(ii) Attempts Undertaken*

In attempting to overcome these issues, Malaysia has been developing a comprehensive database of various plant quarantine aspects.<sup>63</sup> Malaysia has prioritised infrastructure development, such as modern laboratories particularly for plant pest and diseases,<sup>64</sup> an integrated system of quarantine and custom immigration, developing research culture, improving legal awareness and empowering human resources through capacity building. Malaysia has also sought investment to strengthen the research expertise of its staff<sup>65</sup> that is usually required by importing Members. Malaysia established the Coordination Committee for Quarantine and Inspection (CCQI), which functions to 'coordinate technical, science, procedural and other relevant matters to facilitate the implementation' of *MAQIS Act 2011*.<sup>66</sup> The CCQI is scheduled to meet at least twice a year.<sup>67</sup> In

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<sup>56</sup> Annamalai Sivapragasam, Booty Othman Asna, and Add. Thalib Samsinar, Asian Productivity Organisation (APO), *Sanitary and Phytosanitary Measures*, Report of the APO Seminar on Sanitary and Phytosanitary Measures held in Japan 4-11 December 2002 (02-AG-GE-SEM-09), 121 <<http://www.apo-tokyo.org/publications/wp-content/uploads/sites/5/pjrep-02-ag-ge-sem-09.pdf>>.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ismail and Yong, above n55, 4.

<sup>61</sup> Sivapragasam, Asna and Samsinar, above n56, 120.

<sup>62</sup> Ibid 119-120.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid 120.

<sup>65</sup> Ibid.

<sup>66</sup> *MAQIS Act 2011* (Malaysia), art 10.2.

<sup>67</sup> Ibid art 10.7.

addition, enforcement officers have been appointed to improve the implementation of the *MAQIS Act 2011* at entry points, quarantine stations and premises.<sup>68</sup>

(iii) *Possible Improvements*

Malaysia's implementation issues related to the scientific principle concern the issue of legal implementation. For example, the *Food (Amendment) Act 2006*<sup>69</sup> stipulated the undertaking of a risk analysis, which theoretically includes risk assessment as required by the SPS Agreement. However, this has not been properly implemented. Thus, Malaysia should improve the implementation of its SPS measures as they are legislated, a good law will result in nothing without good implementation.

Further, Malaysia should strengthen the role of CCQI in implementing SPS coordination in technical, scientific and procedural matters<sup>70</sup> for the improvement of the application of the scientific principle. Malaysia should continue to improve its SPS infrastructure development, by modernising laboratories, and introducing an integrated system of quarantine and custom immigration, SPS surveillance and equipment around SPS stations at border areas.

In relation to human resources, Malaysia needs to improve the proficiency of its staff so they are better able to perform their SPS obligations according to the SPS Agreement. Malaysia should boost the SPS capacity building programs through training, upgrading and workshops in particular areas of the SPS measures. Malaysia should also enhance capacity building through a further education program, such as scholarship programs, to pursue higher levels of knowledge and skills in the relevant areas and look to produce SPS experts. This program should be enhanced by engaging cooperation through technical assistance from international organisations, such as the WTO, as well as from other developed countries. Malaysia should also continue to promote legal awareness in its staff so that they can be more responsible in their jobs.

(c) *Transparency Principle*

To some extent, Malaysia has complied with the transparency principles as governed in Articles 7, 5.8 and Annex B SPS Agreement. According to the transparency table published by the SPS-IMS, Malaysia has provided a National Notification Authority (NNA), a National Enquiry Point (NEP) and notifications of its SPS measures.<sup>71</sup> Malaysia has appointed the Secretary General

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<sup>68</sup> *MAQIS Act 2011*, art 5(1)(2) and art 16(1).

<sup>69</sup> *Food (Amendment) Act 2006* (Malaysia) s 3, 3A 4-5.

<sup>70</sup> *MAQIS Act 2011* (Malaysia) art 10.2.

<sup>71</sup> SPS Information Management System, *Transparency Table-REPORT12.doc* (3 March 2017) <<http://spsims.wto.org/web/pages/report/report12/Report12.aspx>>.

of the Ministry of Agriculture Strategic Planning and International Division as the NNA<sup>72</sup> and NEP.<sup>73</sup> Hitherto, Malaysia has reported 55 SPS notifications,<sup>74</sup> which comprise 28 regular notifications,<sup>75</sup> 11 emergency notifications<sup>76</sup> and 16 addenda/corrigenda notifications.<sup>77</sup>

(i) *Difficulties and Underlying Reasons*

Despite this, there have been issues of notification claimed by New Zealand with regard to STC266, in that the price lists for inspection were not formally notified to the SPS Committee.<sup>78</sup> With regard to STC323 on the import restrictions on pork and pork products, Canada claimed that the change of Malaysia's SPS regulation was not transparently notified to impacted Members,<sup>79</sup> and the refusal of import licenses by the DVS were sometimes given without a clear explanation.<sup>80</sup> According to the Transparency Procedure 2008, however, it is stated that in the notification form Members only needs to identify other Members or regions that are expected to be impacted by the measure,<sup>81</sup> and there is no obligation to notify the Members, just the SPS Committee. Further, the WTO TPR noted that Malaysia did not provide the notification of the *MAQIS Act 2011* to the SPS Committee as at November 2013, due to amendment that were in process for this Act,<sup>82</sup> and even hitherto there is still no record of the notification for this Act. This suggests that, there has been an insufficient level of transparency regarding this Act.

Malaysia has faced challenges in handling the administrative structures and procedures necessary to provide notification of its SPS measures to the SPS Committee.<sup>83</sup> This is primarily due to the limitation of its staff, both in quantity and quality, which consequently hampers job performance.<sup>84</sup>

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<sup>72</sup> WTO, Committee on SPS Measures, *National Notification Authorities*, WTO Doc G/SPS/NNA/8 (3 March 2017) (Note by the Secretariat) 16.

<sup>73</sup> See, e.g., WTO, Committee on SPS Measures, *National Enquiry Points*, WTO Doc G/SPS/ENQ/16 (3 March 2017) (Note by the Secretariat) 28; WTO, SPS-IMS, *Information on Enquiry Points and Notification Authorities* <<http://spsims.wto.org/web/pages/settings/country/Selection.aspx>>.

<sup>74</sup> WTO SPS-IMS, *Notification* <<http://spsims.wto.org/web/pages/search/notification/Results.aspx>>.

<sup>75</sup> *Ibid Regular Notification*.

<sup>76</sup> *Ibid Emergency Notification*.

<sup>77</sup> *Ibid Addenda/Corrigenda Notifications*.

<sup>78</sup> *Specific Trade Concerns-Issues Considered in 2008*, WTO, G/SPS/GEN 204/Rev. 9/Add.1 (6 February 2009) (Note by the Secretariat) 25.

<sup>79</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.14, 72.

<sup>80</sup> FAO, *Malaysia-Trade Summary*, above n45.

<sup>81</sup> *2008 Transparency Procedure*, WTO Doc G/SPS/7/Rev.3; Annex A-1, 11; Annex B-1, 20.

<sup>82</sup> *Trade Policy Review-Malaysia*, WTO Doc WT/TPR/S/225/Rev.1 (15 February 2010) (Report by the Secretariat) (Revision) 48.

<sup>83</sup> Sivapragasam, Asna, and Samsinar, above n56,121.

<sup>84</sup> *Ibid*.

(ii) *Attempts Undertaken*

In this regard, the Ministry of Agriculture established a National SPS Committee to deal with current issues and notifications, which is comprised of officials from the MITI, the MoA, the MoH and the MPIC.<sup>85</sup> Malaysia continues to improve its proficiency in handling its notification management in order to comply with the SPS Agreement provisions,<sup>86</sup> and to improve notification compliance through an awareness program.<sup>87</sup> Relying on the TPR 2014, the Malaysian Government has attempted to address this issue through an awareness program among the regulators.<sup>88</sup> Malaysia also created a policy to improve trade transparency by establishing a Special Taskforce to Facilitate Business (*Pasukan Petugas Khas Pemudahcara Perniagaan- PEMUDAH*) in February 2007.<sup>89</sup>

(iii) *Possible Solutions*

Malaysia should amend its regulations in order to simplify the bureaucratic structure and procedure of its SPS institutions and thus improve the government service procedures in order to be more efficient. The slow nature of government service is due to the chain of bureaucratic processes, therefore, the simplification of government service will result in a much more efficient and cost-effective process. Malaysia should improve its notification management, strengthen cooperation among staff and relevant institution, and update and publish relevant SPS information on the official website to enable them to be publicly accessed.

(d) *Harmonisation Principle*

Malaysia has attempted to harmonise its SPS measures with the SPS international standards as governed in Article 3.1 of the SPS Agreement. Malaysia has become a member of the SPS international standards 'Three Sisters'.<sup>90</sup> As previously outlined, the 'Three Sisters' constitute the Codex Alimentarius Commission (Codex),<sup>91</sup> OIE<sup>92</sup> and International Plant Protection Convention (IPPC).<sup>93</sup> Malaysia has also complied with international standards by applying International

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<sup>85</sup> *Trade Policy Review-Malaysia*, WTO Doc WT/TPR/S/225/Rev.1, 41.

<sup>86</sup> Sivapragasam, Asna, and Samsinar, above n56,121.

<sup>87</sup> *Trade Policy Review*, WTO Doc WT/TPR/M/292/Add.1 (30 April 2014) (Minutes of the Meeting) 81.

<sup>88</sup> Ibid 80.

<sup>89</sup> PEMUDAH, *Background*

<<http://www.pemudah.gov.my/background.jsessionid=53BC91498E5E95C03C8A7BC60D072AF1>>.

<sup>90</sup> *Trade Policy Review Malaysia*, WTO Doc WT/TPR/S/156 (12 December 2005) (Report by the Secretariat) ix.

<sup>91</sup> Codex Alimentarius International Food Standard, *List of Codex Members* (28 August 2014)

<[http://www.codexalimentarius.org/members-observers/members/en/?no\\_cache=1](http://www.codexalimentarius.org/members-observers/members/en/?no_cache=1)>.

<sup>92</sup> OIE-World Organisation for Animal Health, *Member Countries, The 180 OIE Members* (2014)

<<http://www.oie.int/about-us/our-members/member-countries/>>.

<sup>93</sup> See, e.g., International Plant Protection Convention, *Countries List* <<https://www.ippc.int/countries/list-countries/>>; International Plant Protection Convention (12 December 2013)

<[http://www.fao.org/fileadmin/user\\_upload/legal/docs/4\\_004s-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/4_004s-e.pdf)>.

Standards for Phytosanitary Measures (ISPM) number 15 for import consignments, which is implemented for both imports and exports.<sup>94</sup> Malaysia also has a well-developed laboratory infrastructure to undertake most analyses required with regard to food safety in line with the international standards.<sup>95</sup>

(i) *Difficulties and Underlying Reasons*

Despite these efforts, several Members have raised concerns regarding Malaysia's SPS measures and their lack of harmonisation with international standards.<sup>96</sup> In 2012, only 45 of 191 Malaysia's standards in agriculture (equivalent to 23.5%) were identical to international standards.<sup>97</sup>

This issue is affected by Malaysia's policy, which stipulates that international standards will only be adopted where appropriate in developing standards in the agricultural sector as required by the stakeholders.<sup>98</sup> This means that Malaysia treats its national interests as the top priority, instead of prioritising harmonisation as recommended by the SPS Agreement. This does not constitute a non-compliance with the SPS Agreement, because Malaysia has the right to establish its SPS measures according to its Appropriate Level of Protection (ALOP), provided that they are based on scientific justification and risk assessment.<sup>99</sup> However, given that Article 3.1 of the SPS Agreement recommends harmonisation, Malaysia needs to consider adopting the international standards.

Malaysia has faced challenges in the application of its SPS measures for food safety standards, due to a lack of international standards on Maximum Residue Limit (MRL) particularly for tropical products.<sup>100</sup> This has made it particularly difficult for Malaysia to establish its SPS measures, because the standards of other Members vary.<sup>101</sup> Malaysia has also experienced difficulties in participating in the setting of international standards, due to the issue of travel costs for unscheduled meetings, which was not covered in Malaysia's annual budget.<sup>102</sup> Thus, financial issues prevented Malaysia from sending its delegations to the fora.

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<sup>94</sup> IPPC, *Country Implementing Standards* <[http://www.ippc.int/?id=1110520&no\\_cache=1&type=ispm](http://www.ippc.int/?id=1110520&no_cache=1&type=ispm)> 28 September 2012.

<sup>95</sup> FAO, *Prioritisation and Coordination of Capacity Building Activities: Food Safety Control System in Malaysia*, in FAO/WHO Regional Conference on Food Safety for Asia and the Pacific, Malaysia (24-27 Mei 2004) 3 <<http://www.fao.org/docrep/MEETING/006/AD700E.HTM>>.

<sup>96</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.14, 55-56.

<sup>97</sup> *Trade Policy Review*, WTO Doc WT/TPR/M/292/Add.1, 79.

<sup>98</sup> Ibid.

<sup>99</sup> SPS Agreement, art 3.3.

<sup>100</sup> Norma Othman, Crop Quality Control Division Department of Agriculture, *Malaysian Agricultural Produce Challenge Meeting International Standards* (16 March 2010), 17.

<sup>101</sup> Ibid.

<sup>102</sup> Sivapragasam, Asna, and Samsinar, above n56,120.

(ii) Attempts Undertaken

Given the lack of harmonisation, *Malaysia has* established the Food Safety and Quality Department within the MoH, which cover the divisions of planning and policy development and Codex standard, as well as compliance and industrial development.<sup>103</sup> The Department is attempting to amend several regulations, for example the *Draft Food (Amendment) (No.1) Regulations 2014* to include the amendment of ‘food standard, requirement of food labelling and food additive whilst the *Food Import Regulations* include the requirement of food import’.<sup>104</sup> Malaysia has also established a Technical Advisory Committee, an inter-agency which looks at the harmonisation process, particularly in food safety,<sup>105</sup> to overcome the challenges the country has faced with regard to the harmonisation process, such as financial and human resources.<sup>106</sup> Malaysia has increased the share of its SPS measures to align with the international standards;<sup>107</sup> however, there is no available data about the exact number compared to the previous level (23.5%).

To overcome the issue of the non-availability of international standards on MRLs, particularly for tropical products, Malaysia has developed an MRL for minor crops.<sup>108</sup> Malaysia has also influenced the development of international standards, particularly the standards of filled milk, a milk substitute of vegetables and nuts made of palm oil, by actively participating in the international standards meeting of the Codex.<sup>109</sup>

Malaysia has also established a National Codex Committee to deal with technical issues. The National Standards Committee reviews drafts of the ISPM, while the Food Safety and Quality Division established the National Food Safety Council, Food Safety Information System, which interfaces with the Custom Information System, and Crisis Alert Team to handle food safety crises.<sup>110</sup> In August 2008, Malaysia established MAQIS as an integrated service for quarantine, inspection, law enforcement and certification on the imports and exports of animal, plant, fish and agricultural commodities.<sup>111</sup> Two centres for export and treatment equipped with vapour heat treatment and minimal process facilities, have been established as one-stop-services for the

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<sup>103</sup> Ministry of Health Malaysia(MoH), *Ministry of Health Organisation Chart* <[http://www.moh.gov.my/images/gallery/carta\\_besar\\_en-100713.png](http://www.moh.gov.my/images/gallery/carta_besar_en-100713.png)>.

<sup>104</sup> Food Safety and Quality Division, above n12.

<sup>105</sup> FAO-the UN, above n41, 2-3.

<sup>106</sup> Ibid, 4.

<sup>107</sup> *Trade Policy Review-Malaysia*, WTO Doc WT/TPR/S/292/Rev.2 (Report by the Secretariat) (Revision) (8 April 2014) 9 <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=123898,123743,123643,123644&CurrentCatalogueIdIndex=0&FullTextSearch=>](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=123898,123743,123643,123644&CurrentCatalogueIdIndex=0&FullTextSearch=>)>.

<sup>108</sup> Othman, above n100.

<sup>109</sup> International Trade Forum (16 August 2014) 2-3 <<http://www.tradeforum.org/Quality---A-Prerequisite-for-Exports-Increasing-Complexity-of-Technical-Requirements-in-Export-Markets/#sthash.A2ycMRLO.dpuf>>.

<sup>110</sup> *Trade Policy Review-Malaysia*, WTO Doc WT/TPR/S/225/Rev.1, 41.

<sup>111</sup> MAQIS, *MAQIS Background-Powers* (20 October 2014) <[http://www.maqis.gov.my/objektif?p\\_p\\_id=56\\_INSTANCE\\_YxY5&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-1&p\\_p\\_col\\_pos=1&p\\_p\\_col\\_count=2&page=2](http://www.maqis.gov.my/objektif?p_p_id=56_INSTANCE_YxY5&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_pos=1&p_p_col_count=2&page=2)>.



treatment, packaging, storage and the issuance of certificates for plants and their products.<sup>112</sup> MAQIS has six animal quarantine stations to support the quarantine function in the whole territory.<sup>113</sup>

Malaysia has also improved the proficiency of Department of Agriculture staff through training programs held by Training Centre Division<sup>114</sup> and has disseminated the SPS through a cooperation program with Japan by undertaking training programs for the younger generation.<sup>115</sup>

### *(iii) Possible Solutions*

Malaysia should amend its SPS regulations to be more harmonised with international standards, and thus improve its compliance with the harmonisation principle and minimise trade concerns and claims from other Members.

Further, due to a lack of international standards regarding MRLs for particular commodities in which Malaysia has interests, Malaysia needs to establish its own MRL standards for the interest of exporters and for the stability of the commodities market. This would provide further benefits for Malaysia because the SPS international standards bodies may be influenced by Malaysia's standards when updating and adopting international standards.<sup>116</sup>

With regard to the financial issues that hamper Malaysia's ability to participate in international standards setting, the Planning, Information Technology and Communication Division of the Department of Agriculture<sup>117</sup> should amend its plans and budgets in order to enable the government to send delegations to SPS international fora.

### *(e) Regionalisation Principle*

Malaysia has adopted the SPS regionalisation principle as governed in Article 6 of the SPS Agreement in its disease control and eradication, including its zonation systems. As such, Malaysia has been declared free from Foot and Mouth Disease for Sabah and Sarawak, and free from Newcastle Disease for Pontian and Johor.<sup>118</sup>

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<sup>112</sup> Section I:Plant protection, Anex I-1, General Information, 2011.

<sup>113</sup> MAQIS, above n111.

<sup>114</sup> Department of Agriculture, *Course at Staff Training Centre* (18 December 2014) <<http://www.doa.gov.my/kursus-pegawai-jabatan-di-pusat-latihan-pegawai>>.

<sup>115</sup> Department of Agriculture, *Kursus Pertanian Belia Tani ke Jepun 2011* (Agro-youths Agricultural Course to Japan 2011) <<http://www.doa.gov.my/kursus-pertanian-beliatani-ke-jepun-2011>>.

<sup>116</sup> International Trade Forum, above n109, 2-3.

<sup>117</sup> Department of Agriculture, *Planning, Information Technology and Communication* (18 December 2014) <<http://www.doa.gov.my/85>>.

<sup>118</sup> Department of Veterinary Services, *Disease Control and Eradication* (8 December 2014) <<http://www.dvs.gov.my/en/509>>.

However, Malaysia lacks recognition of regionalisation in its import sector. This is reflected in that the country's import restrictions are maintained by applying a country-based policy instead of a regionalisation-based policy.

According to STC323, with regard to import restrictions due to avian influenza, the EU stated that Malaysia places an import restrictions based on the country as a whole,<sup>119</sup> meaning that Malaysia will only accept imports if the product is from a country that is stated to be completely disease-or pest-free. This policy impedes the recognition of the regionalisation principle, because Article 6 of the SPS Agreement recognises disease-or pest-free areas on the grounds of zones, part of a country or part of a region.<sup>120</sup> Thus, Malaysia's policy in this area is not compliant with the regionalisation principle, since this should be implemented in both the export and import dimensions. Malaysia should look to amend its SPS measures to be better recognise this principle.

*(f) Equivalence Principle*

To some extent, Malaysia recognises the equivalence principle governed in Article 4 of the SPS Agreement, in that they have been engaging in cooperation with other exporting countries based on an agreement on equivalence recognition for certain products. These exporting countries, for example, are Japan, India and Australia.

*(i) Difficulty Issues and Underlying Reasons*

The issues of implementation here concern the high standards of SPS measures of importing Members, and the length and unpredictability in the time needed for the process of recognition of equivalence.<sup>121</sup> Malaysia often needs to amend particular regulations to accommodate importing Members' requirements. For example, Japan applied Vapour Heat Treatment for disinfecting mango products against fruit flies, where Malaysia has used an irradiation system.<sup>122</sup> Further, the whole process of recognition usually takes a long time; it can take three to five years for the procedures to gain the recognition of equivalence for accessing market exports.<sup>123</sup>

*(ii) Possible Solution*

Malaysia should improve and enhance cooperation with other countries, such as in Southeast Asia and the Asia Pacific region. This cooperation should cover SPS technical assistance regarding

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<sup>119</sup> The European Commission, above n36.

<sup>120</sup> SPS Agreement, art 6.

<sup>121</sup> Othman, above n100,18.

<sup>122</sup> FAO-the UN, above n41, 119.

<sup>123</sup> Othman, above n100, 18.

SPS capacity building, such as eradication programs for diseases and pests, and implementation of laboratory surveillance. Malaysia should also maximise its role in the Association of Southeast Asian Nation (ASEAN) organisations, such as Brunei, Indonesia, Malaysia, Philippines East ASEAN Growth Area (BIMP-EAGA), Malaysia Thailand Growth Triangle, RCEP between ASEAN and its FTA partners and Asia Pacific Economic Cooperation (APEC).

(g) *Technical Assistance*

Malaysia has become a country whose trade plays an important role in its economy.<sup>124</sup> They have continued to liberalise trade by including agricultural products, they have developed export-oriented production for commodities,<sup>125</sup> and have been focussing on improving their global competitiveness.<sup>126</sup> Malaysia has also established PEMUDAH, which plays a role in addressing bureaucracy issues to significantly improve the effectiveness of the government's business activities. PEMUDAH promotes public-private sector engagement by fostering Malaysia's global businesses.<sup>127</sup>

Malaysia has gained the benefit of technical assistance from other Members, such as Australia and Japan. For example, Malaysia has cooperated in the field of agriculture with Australia through Malaysia Australia Agricultural Cooperation Working Group since 2006,<sup>128</sup> and Malaysia-Australia FTA, where Malaysia gains technical assistance from Australia in developing e-phytosanitary certifications, which improves the efficiencies in providing certifications.<sup>129</sup> Further, Malaysia and Japan cooperate in the Japan Agricultural Exchange Council for youth, in which Malaysian youth are able to participate.<sup>130</sup> Malaysia has also been engaging in a number of cooperations, such as ASEAN, APEC, Cairn Group,<sup>131</sup> and is involved in the Trans-Pacific Partnership, and the SPS international standards administered by 'Three Sisters' bodies.

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<sup>124</sup> WTO, Press Release Press/TPRB/180, 5 December 2001, Malaysia: December 2001, *Malaysia's Sustained Recovery Helped by Export Growth but Many Challenges Looming* <[http://wto.org/english/tratop\\_e/tpr\\_e/tp180\\_e.htm](http://wto.org/english/tratop_e/tpr_e/tp180_e.htm)>.

<sup>125</sup> *Trade Policy Review-Malaysia*, WTO Doc WT/TPR/S/225/Rev.1, vii-4.

<sup>126</sup> MITI, *Third Industrial Master Plan (IMP3)* (2 October 2013) <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_8ab58e8f-7f000010-72f772f7-dbf00272](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_8ab58e8f-7f000010-72f772f7-dbf00272)>.

<sup>127</sup> PEMUDAH, above n89.

<sup>128</sup> MoA, *6<sup>th</sup> Malaysia Australia Agricultural Cooperation Working Group (MAACWG) (22-24 March 2011) Hobart Tasmania* <<http://www.moa.gov.my/web/guest/6th-malaysia-australia-agricultural-cooperation-working-group-maacwg>>

<sup>129</sup> MITI, *Malaysia-Australia* (12 February 2014) <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_55b684ea-c0a8156f-2af82af8-5b2b191e](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_55b684ea-c0a8156f-2af82af8-5b2b191e)>.

<sup>130</sup> Department of Agriculture, above n114.

<sup>131</sup> WTO, *Member Information: Malaysia and the WTO* (12 March 2014) <[http://www.wto.org/english/thewto\\_e/countries\\_e/malaysia\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/malaysia_e.htm)>.

Malaysia needs to strengthen and enhance its cooperation with developed countries, as well as international organisations, such as ‘Three Sisters’ and the WTO Specific Trade and Development Facility (STDF), bilaterally and multilaterally. This is to gain technical assistance, for example through capacity building programs, to improve the proficiencies of the country’s officials in legislating and applying SPS regulations.

## 2 *Exportation Dimension*

### (a) *Issues of Market Access*

Malaysia’s exports play an important role in its economy.<sup>132</sup> Malaysia’s export commodities are subject to two types of importing Members’ SPS standards: first, Members impose lenient import conditions which require phytosanitary certification only,<sup>133</sup> and second, Members impose stringent import conditions.<sup>134</sup>

The WTO STC noted that Malaysia’s trade is impacted by the SPS measures of importing Members, as raised in seven STC: STC39 on the EU’s measure for the maximum level of certain contaminants (aflatoxins) in foodstuffs in 1998, STC46 on Brazil’s import prohibition of coconut palm and related products, STC49 on Australia’s import restrictions on sauces containing benzoic acid, STC74 on Australia’s import restrictions on tropical fresh fruit, STC79 on Australia’s import restrictions on durian, STC85 on Australia’s import restrictions on prawns and prawn products and, revised generic IRA for prawns and prawn products and STC382 on the EU’s revised proposal for the categorisation of compounds such as endocrine disruptors.<sup>135</sup>

In STC39, Malaysia raised a concern together with Indonesia, the Philippines and eight other Members, supported by ten other Members, in March 1998. These Members raised concern with the EU (at the time European Commission-EC)<sup>136</sup> regarding its proposed measure on the maximum level of aflatoxins in foodstuffs, which was deemed would have an impact on trade.<sup>137</sup> No international standard existed at the time, although the Codex Committee on Food Additives and Contaminants had been considering the matter. The ASEAN countries, including Malaysia expressed their concerns on the maximum level of aflatoxins in milk, which was predicted would

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<sup>132</sup> WTO Doc Press/TPRB/180 (5 December 2001), *Malaysia: December 2001-Malaysia’s Sustained Recovery Helped by Export Growth But Many Challenges Looming* (Press Release) <[http://wto.org/english/tratop\\_e/tpr\\_e/tp180\\_e.htm](http://wto.org/english/tratop_e/tpr_e/tp180_e.htm)>.

<sup>133</sup> These are Hong Kong, Singapore, Europe, Middle East, Canada, Brunei and Taiwan. Department of Agriculture, *Crops and Quarantine, Market Access of Malaysian Agriculture Produce* (18 December 2014) <<http://www.doa.gov.my/363>>.

<sup>134</sup> Ibid.

<sup>135</sup> WTO, SPS-IMS, *Specific Trade Concerns*, 2 <<http://spsims.wto.org/web/pages/search/stc/Results.aspx>>.

<sup>136</sup> Verbal Note, WTO Doc WT/L/779. The EU replaced the EC on 1 December 2009 based on the Treaty of Lisbon.

<sup>137</sup> *Specific Trade Concerns-Resolved Issues*, WTO Doc G/SPS/GEN/204/Rev.11/Add.3, 30.

impact their export of feed. The US suggested that the EU consider the recommendation of FAO/WHO on a risk assessment for the establishment of ‘maximum level for aflatoxins in consumer-ready products’.<sup>138</sup>

(i) *Difficulties and Underlying Reasons*

Malaysia continues to face issues in accessing markets, particularly those of Members who impose stringent import conditions. The process usually requires a two-way negotiation, which includes preparation and a technical document, such as preparation for Pest Risk Analysis and compliance with import protocols.<sup>139</sup> This results in a longer process for obtaining an approval, which can take two to five years.<sup>140</sup>

According to Sivapragasam, Asna, and Samsinar, Malaysia faces problems in meeting the SPS measures of importing Members due to exporters lacking the capacity to undertake risk assessments on SPS measures, which impede them from marketing their products to particular Members.<sup>141</sup> Malaysia has also faced challenges in meeting SPS measures from importing Members on fruit products, because the importing Members in question required the fruit to be produced from designated PFA.<sup>142</sup>

Othman further stated that Malaysia faces challenge in meeting the food safety and quality assurance requirements from importing Members,<sup>143</sup> specifically in addressing MRL standard. Importing Members tend to set high standards for this given that no international standards exist on MRLs particularly for tropical commodities.<sup>144</sup> This has caused refusal of Malaysia’s export commodities.<sup>145</sup> An example of this is the refusal by the United Kingdom and Australia for accepting seafood commodities in 2002 because they contained aflatoxins and were contaminated with microbiological contaminants.<sup>146</sup>

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<sup>138</sup> Ibid.

<sup>139</sup> Department of Agriculture, *Crops and Quarantine, Market Access of Malaysian Agriculture Produce* (18 December 2014) <<http://www.doa.gov.my/363>>.

<sup>140</sup> Ibid.

<sup>141</sup> Sivapragasam, Asna, and Samsinar, above n56, 121.

<sup>142</sup> FAO-the UN, above n41, 32.

<sup>143</sup> Othman, above n100.

<sup>144</sup> Ibid.

<sup>145</sup> Ismail and Yong, above n55, 2.

<sup>146</sup> FAO-the UN, above n41.

(b) *Issue of Private Standards*

With respect to private standards, Malaysia faces issues of coordination among government agencies in establishing a credible certification body,<sup>147</sup> which is challenging as private standards usually require commodities be certified by an approved certification body. Problems in establishing the approved certification body include, the difficult requirements and long process.

Moreover, Malaysia's small enterprises<sup>148</sup> face issues with regard to the private standards on food safety applied by some importers. These enterprises have found it difficult to meet the individual scheme, collective national scheme and collective international scheme of private standards;<sup>149</sup> due to private standards usually outlining requirements on quality assurance standards which can be complex and costly.<sup>150</sup>

(ii) *Attempts Undertaken*

Malaysia has established programs to improve its market access and to explore new markets<sup>151</sup> by building trade policies that focus on increasing and expanding market exports through FTA and trade promotion.<sup>152</sup> Malaysia has also overcome market challenges by exporting commodities strategically, for example by exporting fruits to countries or regions that do not impose strict SPS measures, such as Hong Kong, Singapore, Brunei, Taiwan and Middle East.<sup>153</sup> Malaysia amended the *FAMA Act 2005* in order to improve the supervision, coordination, regulation and marketing of agricultural produce in Malaysia, including both imported and exported agricultural products.<sup>154</sup>

Malaysia has also enacted new regulations to comply with importing countries' requirements.<sup>155</sup> Examples of these regulations include an amendment to the *Food Regulation 2009* to comply with the EU's requirement on aquaculture-sourced products, namely the *Food Hygiene*

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<sup>147</sup> United Nation, *Challenges and Opportunities Arising from Private Standards on Food Safety and Environment for Exporters of Fresh Fruit and Vegetables in Asia: Experiences of Malaysia, Thailand and Viet Nam* (2007) 32 <<http://p166.unctad.org/file.php/54/29feb2008/docs/ChallengesAndOpportunitiesArising.pdf>>.

<sup>148</sup> Ibid 46-48.

<sup>149</sup> Othman, above n100.

<sup>150</sup> WTO News Items, SPS Measures Formal Meeting, *Members take first steps on private standards in food safety, animal-plant health* (30-31 March 2011) <[http://www.wto.org/english/news\\_e/news11\\_e/sps\\_30mar11\\_e.htm](http://www.wto.org/english/news_e/news11_e/sps_30mar11_e.htm)> 2.

<sup>151</sup> *Trade Policy Review-Malaysia*, WTO Doc WT/TPR/S/225/Rev.1, 12.

<sup>152</sup> See, e.g., MITI, *Free Trade Agreement* (18 April 2014) <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_8ab55693-7f000010-72f772f7-46d4f042&curpage=tt](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_8ab55693-7f000010-72f772f7-46d4f042&curpage=tt)>; *Trade Policy Review-Malaysia*, WTO Doc WT/TPR/M/292/Add.1, 57.

<sup>153</sup> Ibid.

<sup>154</sup> Federal Agricultural Marketing Authority, *Background* (16 December 2014) <<http://www.fama.gov.my/en/latarbelakang#.VJDA4pV033g>>.

<sup>155</sup> See, e.g., Bilateral agreement with the EU. See Europa.eu, *The EU's Bilateral Trade and Investment Agreement-Where Are We?* <[http://europa.eu/rapid/press-release\\_MEMO-13-734\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-734_en.htm)>.

*Regulation 2009*,<sup>156</sup> and *Fisheries Regulation 2009 on Quality Control of Fish for Export to the EU* to enable its products to be exported to the EU.<sup>157</sup>

Malaysia has been improving the capacity of its people through training courses, for example, by the Department of Fisheries to ‘target groups’, such as fishermen, farmers and fishermen entrepreneurs, as well as staff of the Department of Fisheries,<sup>158</sup> and ‘Global Food Laws and Regulation’ by the International Food Safety Training Centre of Malaysia, to improve compliance with the legal requirements of global food industries.<sup>159</sup> Malaysia has also established a number of education agencies, namely the National Agency Training Program, National Agricultural Training Council and National Institute under the MoA.<sup>160</sup> Additionally, the Department of Agriculture provides an Entrepreneur and Farmers Course program, which is a transfer of knowledge program for farmers on reducing production costs, improving technical skills and practicing modern technology.<sup>161</sup>

With regard to private standards, the Department of Agriculture established Malaysian Good Agricultural Practices (GAP) and Malaysian Organic Scheme administered by the Quality Control Division,<sup>162</sup> Malaysian Phytosanitary Certification Assurance Scheme, Malaysian Fumigation Accreditation Scheme, and Malaysia Heat Treatment Accreditation Scheme<sup>163</sup> to improve the quality of its products. Malaysia has also implemented agriculture accreditation schemes, such as *Skim Amalan Ladang Baik Malaysia* (Malaysia Good Farm Practice Scheme)<sup>164</sup> relied on GAP and Euro-Retailer Produce Working Group-GAP (EurepGAP), now known as Global-Good Agricultural Practice (GLOBALGAP),<sup>165</sup> to meet the quality assurance requirements of importing countries<sup>166</sup> affected by private standards.

Further, the MoH built the Hazard Analysis and Critical Control Points (HACCP) Certification Scheme in 2001 for improving the quality of exported products, particularly to the EU. The MoH

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<sup>156</sup> *Trade Policy Review-Malaysia*, WTO Doc WT/TPR/S/225/Rev.1, 41.

<sup>157</sup> Department of Fisheries Malaysia, *Fisheries (Quality Control of Fish for Export to the EU) Regulations 2009* <<http://www.dof.gov.my/en/fisheries-quality>>.

<sup>158</sup> Department of Fisheries Malaysia, *Course and Training* <<http://www.dof.gov.my/en/130>>.

<sup>159</sup> MoH, Food Safety and Quality, Training Session: ‘Global Food Laws and Regulation’ (17-21 March 2014) <<http://fsq.moh.gov.my/v4/index.php/component/k2/item/681-training-session-global-food-laws-and-regulations-17-21-march-2014>> 18 September 2014.

<sup>160</sup> MoA (18 September 2014) <[www.moa.gov.my/web/guest/pendidikan](http://www.moa.gov.my/web/guest/pendidikan)>.

<sup>161</sup> Department of Agriculture, *Entrepreneur and Farmers Course* (18 December 2014) <<http://www.doa.gov.my/kursus-petani-dan-usahawan>>.

<sup>162</sup> Department of Agriculture, *Crop Quality Control* (18 December) <<http://www.doa.gov.my/kawalan-kualiti-tanaman>>.

<sup>163</sup> Department of Agriculture, *Malaysian Fumigation Accreditation System (MAFAS)* (18 December 2014) 2 <<http://www.doa.gov.my/skim-perakuan-pensijilan-pewasapan-malaysia-mafas->>.

<sup>164</sup> MoA, *Good Farm Practice Scheme Malaysia (SALM)* (4 December 2014) <<http://www.moa.gov.my/web/guest/salm>>.

<sup>165</sup> The GLOBALGAP is a private, good agricultural practice initiated by Euro-retailer produce working group, with concerns product safety, environmental impact on health, safety and welfare of workers and animal. See the GLOBALG.A.P., *From EUREPGAP to GLOBALG.A.P.* <[http://www.globalgap.org/uk\\_en/who-we-are/history/](http://www.globalgap.org/uk_en/who-we-are/history/)>.

<sup>166</sup> *Trade Policy Review-Malaysia*, WTO Doc WT/TPR/S/156 (12 December 2005) (Report by the Secretariat) 56.

appointed SIRIM QAS, Malaysia's certification, inspection and testing body, to audit the HACCP.<sup>167</sup> Malaysia has also developed MRLs, which are implemented for minor crops to overcome the issue of a lack of international standards on MRLs, particularly for tropical products.<sup>168</sup>

With respect to expanding its market access, Malaysia has become involved in cooperations at the regional level, such as ASEAN<sup>169</sup> and APEC,<sup>170</sup> and is currently joining in ASEAN Free Trade Area (FTA) and the ASEAN Trade in Goods, which cover SPS measures.<sup>171</sup> Within ASEAN, there are a number of agreements, namely ASEAN Comprehensive Investment Agreement, ASEAN Agreement on Customs<sup>172</sup> and BIMP-EAGA, from which it is expected that Malaysia's market access will benefit.

Malaysia has also engaged in bilateral agreements with other countries<sup>173</sup> and established FTAs with countries, such as Chile, Australia and New Zealand.<sup>174</sup> In addition, Malaysia joined the Trans-Pacific Partnership (TPP),<sup>175</sup> whose purposes include liberalising trade and investment.<sup>176</sup> The TPP agreement draft includes the cooperation of 'comprehensive market access, regional agreement, cross-cutting trade issues covering SPS measures, and new trade challenges'.<sup>177</sup>

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<sup>167</sup> SIRIM QAS International, *Hazard Analysis Critical Control Point (HACCP)* <<http://www.sirim-qas.com.my/index.php/en/business-sector/food-consumer-product-manufacturing/43>>.

<sup>168</sup> Ibid.

<sup>169</sup> MITI, *ASEAN* (19 April 2013)

<[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_8afd6855-7f000010-72f772f7-fd9c76ba](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_8afd6855-7f000010-72f772f7-fd9c76ba)>.

<sup>170</sup> MITI, *APEC* (20 March 2013)

<[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_1260a59f-ac1c231a-1ca18370-d5f97552](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_1260a59f-ac1c231a-1ca18370-d5f97552)>.

<sup>171</sup> MITI, *AFTA* (14 May 2014) 3

<[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_8de83760-7f000010-72f772f7-f5047602&curpage=tt](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_8de83760-7f000010-72f772f7-f5047602&curpage=tt)>.

<sup>172</sup> *Trade Policy Review-Malaysia*, WTO Doc WT/TPR/S/292/Rev.2, 30.

<sup>173</sup> See, e.g., Malaysia-Japan Economic Partnership Agreement (MJEPA), see MITI, *Malaysia-Japan*, <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_5451c5df-c0a8156f-2af82af8-a1ebb9df](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_5451c5df-c0a8156f-2af82af8-a1ebb9df)>; Malaysia-Pakistan Closer Economic Agreement (MPCEPA), MITI, *Malaysia-Pakistan*, <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_54a786dc-c0a8156f-2af82af8-cc529ea7](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_54a786dc-c0a8156f-2af82af8-cc529ea7)>; MITI, *Malaysia-India, Malaysia-India Comprehensive Economic Cooperation Agreement (MICECA)* <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_54ce4f96-c0a8156f-2af82af8-6735df31](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_54ce4f96-c0a8156f-2af82af8-6735df31)>.

<sup>174</sup> See, e.g., MITI, *Malaysia-Australia*; MITI, *Malaysia-New Zealand, Malaysia-New Zealand FTA (MNZFTA)*, <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_55b8f6ae-c0a8156f-2af82af8-4fed08f4](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_55b8f6ae-c0a8156f-2af82af8-4fed08f4)>, MITI, *Malaysia-Chile, Malaysia-Chile FTA (MCFTA)*, <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_55b49856-c0a8156f-2af82af8-e0d15984](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_55b49856-c0a8156f-2af82af8-e0d15984)>.

<sup>175</sup> The TPP is a cooperation among 12 countries in the Asia-Pacific region; Australia, Brunei, Canada, Chili, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the US, initiated in 2003. See Ian F. Fergusson, Mark A. McMinimy and Brock R. Williams, Congressional Research Service, *The Trans-Pacific Partnership (TPP) Negotiations and Issues for Congress* (30 January 2015) <<https://www.fas.org/spp/crs/row/R42694.pdf>>. However, post the Trump Era, since 30 January 2017, the US has no longer been a member. See, 'Letter From the United States', 30 January 2017 <<http://dfat.gov.au/trade/agreements/tpp/news/Pages/news.aspx>>.

<sup>176</sup> Australian Government, *Trans-Pacific Partnership Agreement*, 11 <<http://www.dfat.gov.au/fta/tpp/tpp-overview.pdf>>.

<sup>177</sup> Department of Foreign Affairs and Trade Australian Government, *TPP Trade Ministers' Report to Leaders* <<http://203.6.168.65/fta/tpp/111112-tpp-trade-ministers-report.html>>.



(iii) *Possible Solutions*

Malaysia has made a number of attempts to improve its SPS implementation, however, several recommendations are proposed here. Malaysia should maintain these existing efforts, such as amending relevant legislation to adopt the SPS measures from its main importing countries. Malaysia also needs to continue improving the proficiency of its producers and enterprises, through such activities as technical assistance, capacity building and developing infrastructure. Malaysia needs to strengthen and enhance its cooperation with other countries, bilaterally and multilaterally, and also with international organisations, to enhance its market access, such as by maximising the benefits of agreements like the TPP and establishing new cooperations with other potential trade partners.

With regard to private standards and market access issues, Malaysia needs to strengthen and enhance its existing cooperation with other countries on a broader scope, such as through ASEAN. Malaysia should play an active role in these cooperations and apply their arrangements, which at the very least should include relevant matters on the development of the SPS system and its application, for example by fostering the recognition of regionalisation and equivalence, and private standards. Malaysia should continue its actions with regard to private standards, as decided in the fifth action by the SPS Committee.

The above mentioned recommendations are summarised in the following table.

**Table 6.1. List of Key Normative Directives to Malaysia**

No.	Indicators	Level of normative directive	Key normative directives	Actions to realise
1	Non-discrimination principle		Adopt non-discrimination principle into SPS national regulations and import procedures	Impose same requirements/procedures/price to importing products
2	Scientific principle	National	Malaysia needs to undertake SPS regulatory reform process	-Prior research should become the fundamental requirement before enacting SPS regulations -Develop research culture by providing funding resource -Transparency procedure of the process -Improve human resources' capacity

		Regional/International	Improve cooperation within ASEAN especially regarding SPS matters	-Strengthen the SPS system -Improve infrastructure network and technical cooperation
2	Transparency principle	National	Improve SPS notification management	-Strengthen SPS institutions network in providing the relevant data -Improve the capacity building of SPS institutions' staff -Simplify SPS bureaucratic procedures
			Incorporate transparency in daily activities	-Disclose non-confidential information to the public and updating institution website daily, especially regarding Indonesia's SPS legislations and import requirements -Arrange capacity building on managing notification obligations
		Regional/international	Improve cooperation within ASEAN especially regarding SPS matters	
3	Harmonisation principle	National	Improve the harmonisation to SPS international standards	Improve the adoption of the 'Three Sisters' standards in Malaysia's SPS regulations
		Regional/International	-Improve to influence SPS international standards  -Improve cooperation within ASEAN especially regarding SPS matters	-Improve the active role in the standards setting process, for example in Codex  -Propose technical assistance to regional/international donors
4	Regionalisation principle	National	Amend the SPS regulations to recognise regionalisation in import	Adopt region or zone base import system into the SPS regulations
		Regional/International	Cooperation to strengthen the diseases/pests surveillance management system	Arrange technical cooperation among veterinarian services in ASEAN and the world
5	Equivalence principle	National	Increase MRA number for Malaysia's products	-Improve the quality of Malaysia's products -Improve capacity of Malaysia's producers

		Regional/International	-Establish cooperation to regional and/or international organisations  -Propose technical assistance	-Cooperation among ASEAN countries  -Arrange technical assistance to STDF and donor countries
6	Technical assistance	National	Improve capacity building of producers	The government should provide training and workshops for the producers (farmers, fishermen and so forth)
		Regional/International	Improve cooperation with international donor countries and institutions	Cooperate with STDF, 'Three Sisters', World Bank, FAO, WHO, Trans Pacific Partnership
7	Market access: Private standards	National	Strengthen Indonesia's competitiveness products	Improve capacity of small producers & exporters in agricultural and fisheries industries in undertaking scientific principle through technical assistance (training and workshops)
			Adopt private standards into public (national) SPS regulations	-Improve dialogue with private standards institutions -Establishing a working group to arrange the adoption of private standards -Adopt the certification system into national SPS regulations
		Regional/international	Improve communication with regard to private standards	-Improve communication and sharing information within ASEAN GAP -Improve communication with relevant international bodies (WTO SPS Committee, 'Three Sisters', STDF)

#### D Conclusion

The most notable SPS implementation issues in Malaysia relate to the non-discrimination principle, the scientific principle, the transparency principle, the harmonisation principle and the regionalisation principle, particularly in the importation dimension.

Impediments faced by Malaysia with regard to imports in the last couple of years have been related to weaknesses in undertaking risk assessments. This weakness stems from insufficient resources, such as infrastructure and management administration, as well as insufficient data and

finances, which result in a lack of scientific evidence and participation in the setting of international standards. The regionalisation and harmonisation implementation issues are affected by political and legal issues, namely the policy to prioritise national interests. Difficulties in the export dimension are caused by limited market access due to the high standards of SPS measures of importing Members and private standards.

Along with the attempts the country has already made to ease its difficulties, Malaysia should amend its legislation to harmonise its laws and regulations and improve the legal enforcement of its SPS measures so that they comply with the SPS Agreement. The use of a country-based importation policy demonstrates that Malaysia's laws and regulation lack conformity to the SPS Agreement, particularly with respect to the regionalisation principle, and this is an issue that needs to be addressed. Malaysia should also improve its market access by establishing more SPS equivalence recognition agreements with other countries.

## CHAPTER 7

### VII COMPARISON OF THE APPLICATION OF THE SPS AGREEMENT IN THE SELECTED COUNTRIES AND LESSONS LEARNED FROM ONE ANOTHER

#### A Introduction

This chapter comparatively analyses the application of the SPS Agreement in the selected countries, namely Indonesia, the Philippines, and Malaysia, discussed individually in the previous three chapters.<sup>1</sup> The comparative analysis provides a comprehensive description of the issues of implementation, the reasons behind them and the analysis associated with the selected countries' experiences in the adoption and application of the SPS Agreement. Thus, the selected countries may learn from each other with regard to the efforts that have been undertaken to improve the SPS implementation in order to protect health and liberalise international trade. As previously acknowledged, a number of SPS implementation issues and difficulties exist in the selected countries due to internal and external factors. This chapter pays particular attention to the similarities and differences in the key features of implementation, using general patterns in the three previous chapters, including the difficulties and underlying reasons, existing efforts undertaken by the selected countries, and whether or not the attempts were successful so that the other selected countries might learn from the experiences. The discussion finally recommends possible solutions including legal remedies for the improvement of SPS implementation.

#### B Comparison of SPS Management, Administration and Regulations

##### 1 Structure of SPS Institution and Administration

The selected countries have similar patterns of SPS management and administration, falling under the authority of technical ministries. This is in line with the SPS Agreement's scope of operation of plant and animal health and food safety. Plant and animal health in the selected countries are under the purview of the relevant ministry of agriculture. Some plantation commodities in Malaysia fall under the Ministry of Plantation Industry and Commodities (MPIC).<sup>2</sup> Food safety or human health in the Philippines and Malaysia are managed by the respective ministries of health (MoH) and the Food Safety and Quality Division of Malaysia (FSQD),<sup>3</sup> while

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<sup>1</sup> This will necessitate the repetition of some issues, but they are placed here to analyse the similarities and differences, and the lessons to be learned.

<sup>2</sup> Ministry of Plantation and Commodities (MPIC), *Overview* (25 November 2014) <<http://www.kppk.gov.my/index.php/en/about-us/profile/overview.html>>.

<sup>3</sup> Ibid.

in Indonesia it is under the purview of the National Agency of Drug and Food Control (NA-DFC), an agency that worked under the Ministry of Health up to 2000.<sup>4</sup> In 2001, the NA-DFC became a non-departmental government institution directly responsible to the President.<sup>5</sup>

The authorised agency of SPS administration in all selected countries is an agency within the Ministry of Agriculture, namely the Indonesia Agricultural Quarantine Agency (IAQA),<sup>6</sup> the Strategic Planning and International Division (SPID) of Malaysia<sup>7</sup> and the Department of Agriculture (DoA) Office of the Undersecretary for Policy and Planning, Research and Development and Regulation of the Philippines.<sup>8</sup> The IAQA also plays a role in the SPS national enquiry point (NEP)<sup>9</sup> and SPS national notification authority (NNA).<sup>10</sup> The role of the NEP and NNA in the Philippines is mandated to the Office of the Director Policy Research Service DoA Policy Office,<sup>11</sup> while in Malaysia it is authorised to the Secretary General Ministry of Agriculture & Agro-Based Industry (MoA) SPID.<sup>12</sup>

Compared to the other selected countries, the Philippines has the largest<sup>13</sup> and most complicated structure, because the arrangement of its SPS agencies are product-based.<sup>14</sup> This type of SPS structure has both positive and negative impacts. While the arrangements might boost productivity, the specialisation and decentralisation might cause communication and coordination barriers among the SPS agencies. Subsequently, this could cause delays in gaining and distributing information, as well as delays in the SPS working system.

With regard to the issue of SPS implementation within the SPS institutions, Indonesia has a problem of poor coordination among its SPS bodies. Likewise, communication difficulties in the Philippines, particularly in the border areas,<sup>15</sup> are affected by the complex structure of its SPS bodies. These problems cause delays in disseminating information among SPS institutions and

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<sup>4</sup> NA-DFC, *Strong Organisation* (18 July 2014) <<http://www.pom.go.id/new/index.php/view/organisasolid>>.

<sup>5</sup> *Keputusan Presiden No. 166 Tahun 2000 tentang Kedudukan, Tugas, Fungsi, Kewenangan, Susunan Organisasi dan Tata Kerja Lembaga Pemerintah Non Departemen* (Presidential Decree No. 103 of 2001 on Position, Duty, Function, Authority, Formation of Organisation and Working Procedure of Non-Departmental Government Institution) (Indonesia).

<sup>6</sup> IAQA, *Brief History of the IAQA*, 3

<[http://www.karantina.deptan.go.id/eng2/index.php?option=com\\_content&view=article&id=5&Itemid=2](http://www.karantina.deptan.go.id/eng2/index.php?option=com_content&view=article&id=5&Itemid=2)>.

<sup>7</sup> Ministry of Agriculture and Agro-based Industry (MoA), *Info MOA-Strategic Planning and International Division* <<http://www.moa.gov.my/web/guest/bahagian-perancangan-strategik-dan-antarabangsa>>.

<sup>8</sup> Department of Agriculture (DA) Policy Office, *The Philippines SPS Management System, SPS Measures and TBT-Seminar on Trade Negotiations and Agreements-A Joint DA-Policy Office and NAFC Undertaking*, 9 December 2012 which was represented in the discussion on 31 January 2013 in the DA Policy Office, Quezon City-Philippines.

<sup>9</sup> *National Enquiry Points*, WTO Doc G/SPS/NEQ/16 (Note by the Secretariat).

<sup>10</sup> *National Notification Authorities*, WTO Doc G/SPS/NNA/8 (4 December 2014) (Note by the Secretariat).

<sup>11</sup> WTO, SPS-IMS, *Information on Enquiry Points and Notification Authorities* <<http://spsims.wto.org/web/pages/settings/country/Selection.aspx>>.

<sup>12</sup> Ibid.

<sup>13</sup> There are about 11 SPS bureaus and agencies under the purview of the Department of Agriculture.

<sup>14</sup> For example, there is fibre and their products, sugar, coconut.

<sup>15</sup> Information was gained from an official from PQS-BPI in a discussion on 31 January 2013 in the DA-Policy Office, Quezon City-Philippines.

officials, and also hamper the work of the SPS process particularly in responding to enquiries and complaints. This problem is exacerbated by the geographical position of Indonesia and the Philippines as archipelagic countries, with a large number of SPS entry points and SPS stations. Indonesia's coordination is affected by regular changes to officials and leadership in relevant SPS institutions, which further impacts coordination.<sup>16</sup> To improve the performance of SPS bodies, both countries have been promoting coordination among their SPS agencies.

## 2 Type of SPS Measures

All selected countries are highly dependent on the agricultural sector.<sup>17</sup> They set forth SPS measures in the importation and exportation dimensions covering permits, licenses and certificate requirements. Compared to the other two selected countries, the SPS measures of the Philippines' are the most stringent,<sup>18</sup> because they impose relatively high import requirements,<sup>19</sup> such as the requirement of handling meat frozen until it reach customers under AO22.<sup>20</sup> Consequently, some trading partners have encouraged the Philippines to simplify its non-tariff measures, including its SPS measures.<sup>21</sup>

The discussion of the comparison of SPS management, administration and regulation in the selected countries is summarised in the following table.

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<sup>16</sup> Information was gathered from online communications with an official of the IAQA, 22 July 2013.

<sup>17</sup> Analysis of Rejections of Asian Agri-food Export to Global Market, Regional Trade Standards Compliance Report - East Asia 2013, 8  
<[http://www.ide.go.jp/Japanese/Publish/Download/Collabo/pdf/2013UNIDO\\_IDE09.pdf](http://www.ide.go.jp/Japanese/Publish/Download/Collabo/pdf/2013UNIDO_IDE09.pdf)>.

<sup>18</sup> *Trade Policy Review*, WTO Doc WT/TPR/G/261 (30 January 2012) (Report by the Philippines) viii.

<sup>19</sup> USTR, *2014 Report on Sanitary and Phytosanitary Measures*, 75  
<[http://www.ustr.gov/sites/default/files/FINAL-2014-SPS-Report-Compiled\\_0.pdf](http://www.ustr.gov/sites/default/files/FINAL-2014-SPS-Report-Compiled_0.pdf)>.

<sup>20</sup> For example is *Administrative Order (AO)22 series of 2010*.

<sup>21</sup> WTO, Trade Policy Review: The Philippines, *Concluding remarks by the Chairperson* (5 and 7 July 2005)  
<[http://wto.org/english/tratop\\_e/tpr\\_e/tp249\\_crc\\_e.htm](http://wto.org/english/tratop_e/tpr_e/tp249_crc_e.htm)>.

**Table 6.1. Summary of the Comparison of SPS Management, Administration and Regulation**

No.	Indicators		Indonesia	The Philippines	Malaysia
1	SPS institution	Plant life	IAQA	BPI, PQS	MoA, MPIC
		Animal health	IAQA and Directorate General of Animal Husbandry, FQIA for fish	BAI, BFAR, NMIS,	MoA: Department of Veterinary Services (DVS)
		Human health (food safety)	NA-DFC	DoH	MoH: FSQD
2	SPS administration	Authorised agency	The IAQA	Office of the Undersecretary for Policy and Planning, Research and Development and Regulation of the DA	The Strategic Planning and International Division of the MoA
		NNA & NEP	The IAQA	Office of the Director Policy Research Service DoA Policy Office	Secretary General MoA SPID
3	SPS regulation		<ul style="list-style-type: none"> <li>• Importation and exportation area</li> <li>• Less strict</li> </ul>	<ul style="list-style-type: none"> <li>• Importation and exportation area</li> <li>• Stricter than the other selected countries</li> </ul>	<ul style="list-style-type: none"> <li>• Importation and exportation area</li> <li>• Less strict</li> </ul>

**C** *Comparison of SPS Implementation, Difficulties and Underlying Reasons, and Attempts Undertaken*

**1** *Importation Dimension*

The WTO Specific Trade Concern (STC) demonstrates that, compared to the other two selected countries, Indonesia's SPS measures received the highest number of claims from exporting Members, more than four times the number faced by Malaysia and the Philippines.<sup>22</sup> An interesting

<sup>22</sup> Since 1995, Indonesia has received 14 STC, Malaysia has received five STC, while the Philippines has received three STC. See WTO SPS Information Management System (SPS-IMS), *Specific Trade Concerns* <<http://spsims.wto.org/web/pages/search/stc/Results.aspx>>.



thing is that the Philippines has raised its concern on Indonesia's SPS measure, STC414 regarding Indonesia's food safety measures affecting horticultural products and animal products. This may be potentially a serious problem in the formulation of Indonesia's SPS measures indicating that they are more restrictive and have a greater impact on international trade than that of the Philippines and Malaysia. Due to their impact on the international trade of Members, Brazil brought two of Indonesia's SPS measures to be settled through the WTO Dispute Settlement Body (DSB).<sup>23</sup>

Based on the WTO STC and Trade Policy Review (TPR), all selected countries share experiences in their SPS implementation, as discussed below.

*(a) Non-Discrimination - Article 2.3 of the SPS Agreement*

Each selected country has faced claims by Members that their SPS regulations do not comply with the non-discrimination principle stipulated on Article 2.3 of the SPS Agreement. For example, the grant of export approvals and recognition of SPS measures by Indonesia to Australia, New Zealand, the US and Canada in Indonesia's ports closures were claimed to be discriminative.<sup>24</sup> AO22 of the Philippines was claimed to discriminate against the importing of chilled or frozen meat over domestic hot meat.<sup>25</sup> Malaysia's SPS measures on the price list for inspections was claimed to be discriminating towards certain imported products because the price imposed was different from one trade partner to another.<sup>26</sup> Likewise, Malaysia's import restriction related to the approval of poultry meat plants was claimed to discriminate against Members.<sup>27</sup>

*(b) Scientific Principle and Risks Assessment - Article 2.2 of the SPS Agreement*

Based on the WTO STC, all selected countries share similar features regarding the implementation of the scientific principle, in which their SPS regulations lack scientific justification. For example, Indonesia's port closures were claimed to lack the support of scientific evidence, because the measures were silent on the part of justification or objective and rationale.<sup>28</sup> Similarly, it was claimed that the Philippines' AO22 was not supported by a scientific justification,

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<sup>23</sup> WTO, Dispute Settlement: Dispute DS484, *Indonesia-Measures Concerning the Importation of Chicken Meat and Chicken Products* <[http://wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds484\\_e.ht](http://wto.org/english/tratop_e/dispu_e/cases_e/ds484_e.ht)>.

<sup>24</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.15 (24 February 2015) (Note by the Secretariat) (Revision) 51.

<sup>25</sup> The European Commission, Trade: Market Access Database, *SPS: Sanitary Phytosanitary Issues* (1 February 2012) <[http://madb.europa.eu/madb/sps\\_barriers\\_details.htm?barrier\\_id=115402&version=10](http://madb.europa.eu/madb/sps_barriers_details.htm?barrier_id=115402&version=10)>.

<sup>26</sup> *Specific Trade Concerns-Issues Considered in 2008*, WTO Doc G/SPS/GEN 204/Rev. 9/Add.1 (6 February 2009) 25 (Note by the Secretariat).

<sup>27</sup> WTO, *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.16 (23 February 2016) (Note by the Secretariat) (Revision), 82-83.

<sup>28</sup> *Notification*, WTO Doc G/SPS/N/IDN/46 (7 May 2012).

despite the fact that AO22 adopted measures applied by the US,<sup>29</sup> the Philippines did not provide the additional information necessary for an objective assessment of risk.<sup>30</sup> In Malaysia's price lists for inspections, Members claimed that the different imposition of inspection prices to Members was without scientific justification.<sup>31</sup> Further, in Malaysia's import restrictions related to the approval of poultry meat plants, Brazil claimed that the refusal of three plants was without scientific evidence.<sup>32</sup>

This lack of scientific evidence is affected by the quality of research in the selected countries. According to the Global Competitiveness Index (GCI), in terms of the quality of scientific research institutions, Indonesia places 41<sup>st</sup>, while Malaysia is placed 23<sup>rd</sup> and the Philippines 72<sup>nd</sup> out of 138 countries. With regard to the availability of research and training services, the Philippines is ranked 48<sup>th</sup>, Indonesia 49<sup>th</sup> and Malaysia 17<sup>th</sup>.<sup>33</sup>

Further, insufficient infrastructure, such as laboratories, affects the lack of scientific justification. The GCI reported that, in terms of the quality of overall infrastructure, Indonesia places 60<sup>th</sup>, the Philippines places 95<sup>th</sup> and Malaysia places 24<sup>th</sup>. Further, for port infrastructure Indonesia ranks 75<sup>th</sup>, Malaysia ranks 17<sup>th</sup> and the Philippines ranks 113<sup>th</sup>.<sup>34</sup> Insufficient port infrastructure and a large number of import permits in Indonesia have resulted in problems of dwelling time.<sup>35</sup>

The more developed infrastructure of Malaysia affects its ability to be more globally competitive, which places Malaysia as the 25<sup>th</sup> most competitive country in the world, while Indonesia is placed 41<sup>st</sup> and the Philippines 57<sup>th</sup>.<sup>36</sup> The World Bank and International Finance Corporation have a ranking which measures the 'ease of doing business', and in 2017 Malaysia places 23<sup>rd</sup>, the Philippines 99<sup>th</sup> and Indonesia 91<sup>st</sup>.<sup>37</sup>

Given these data, Malaysia's quality of research and infrastructure are likely much better than that of Indonesia and the Philippines. This might be affected by the economic condition of

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<sup>29</sup> See Chapter 4, 6.

<sup>30</sup> WTO Analytical Index: Sanitary and Phytosanitary Measures, Agreement on Sanitary Phytosanitary Measures. See also *Japan-Agricultural Products II*, para 369.

<sup>31</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.14 (24 February 2015) (Note by the Secretariat) (Revision)72.

<sup>32</sup> WTO, *Specific Trade Concerns*, above n26, 83.

<sup>33</sup> World Economic Forum (WEF), *The Global Competitiveness Report 2016-2017* <[http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017\\_FINAL.pdf](http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf)>.

<sup>34</sup> Ibid.

<sup>35</sup> There are about 18 institutions imposing import permits in Jakarta Port. See Agus Karyono, *Dwelling Time and Quarantine*, 13 May 2016 <<http://karantina.pertanian.go.id/artikel-karantina/dwelling-time-dan-karantina#>>. WEF, above n33.

<sup>37</sup> This report assesses business regulatory efficiency by measuring the distance of a country's economy to the frontier. See, e.g., the World Bank-IFC, *Doing Business 2017* <<http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Report.pdf>>; World Bank Group, *Doing Business, Economy Ranking* <<http://www.doingbusiness.org/rankings>>.

Malaysia, which is also better than Indonesia and the Philippines.<sup>38</sup> In addition, the greater number of entry points throughout Indonesia's and the Philippines' territories, as well as the governments, also play a role.

(c) *Transparency - Articles 5.8, 7, Annex B of the SPS Agreement*

The selected countries have been non-compliant, to some extent, with the notification obligation. Indonesia's non-compliance includes notifying the SPS Committee outside the time limit, and failing to send notifications to the SPS Committee, although it did notify the Import Licensing Committee.<sup>39</sup> The Philippines did not undertake any form of notification for AO22.<sup>40</sup> The Philippines's interpretation is that it did not need to notify of its SPS regulation, AO22, since it was only an amendment to a previous regulation and did not impose any different import requirements, while exporting partners claim the reverse was true. Similarly, Malaysia did not notify of the *MAQIS Act 2011* even after it came into force, due to the amendment process undertaken to the Act.<sup>41</sup> Canada also claimed that Malaysia did not notify the impacted Members of its SPS measure on import restrictions on pork and pork products.<sup>42</sup>

Notwithstanding the similarities, compared to Indonesia and Malaysia, the Philippines has provided more notifications to the SPS Committee.<sup>43</sup> The WTO noted that Philippines has the second greatest number of emergency notifications for the period 1995-2012 and the most emergency notifications for the period from September 2012-September 2013.<sup>44</sup> The Philippines has more emergency notifications than regular notifications, 202 compared to 161 notifications,<sup>45</sup> while the situation in Indonesia and Malaysia is reversed.<sup>46</sup> This means that the Philippines is more transparent compared to Indonesia and Malaysia with regard to the notification obligation. However, the GCI reported that the transparency of government policy-making in Indonesia places

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<sup>38</sup> The economies classification of Indonesia and the Philippines is 'lower middle income economies', whilst Malaysia is 'upper middle income economies' as of 2017 fiscal year. See the World Bank, World Data Bank: *Metadata* <<http://databank.worldbank.org/data/reports.aspx?source=world-development-indicators>>.

<sup>39</sup> See WTO documents G/SPS/N/IDN/44 on 1 March 2011, G/SPS/N/IDN/46 on 7 May 2012, G/SPS/N/IDN/47 on 7 May 2012, G/SPS/N/IDN/48 on 7 May 2012, G/SPS/N/IDN/49 on 7 May 2012, G/SPS/N/IDN/53 on 13 July 2012, and G/SPS/N/IDN/54 on 13 July 2012. See *Trade Policy Review-Indonesia*, WTO Doc WT/TPR/S/278 (Report by the Secretariat) (6 March 2013) 53.

<sup>40</sup> *Specific Trade Concerns*, WTO Doc G/SPS/GEN/204/Rev.12 (Note by the Secretariat) (Revision) (2 March 2012) 49.

<sup>41</sup> WTO, TPR, *Report by the Secretariat Malaysia-Revision*, 48.

<sup>42</sup> Ibid.

<sup>43</sup> The Philippines has hitherto 471 notifications, Indonesia 126 notifications and Malaysia 53 notifications. See WTO, SPS-IMS, *Notification* <<http://spsims.wto.org/web/pages/search/notification/Results.aspx>>.

<sup>44</sup> *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement*, WTO Doc G/SPS/GEN/804/Rev. 5 (4 October 2012) (Note by the Secretariat) (Revision) 4-5.

<sup>45</sup> WTO, SPS-IMS, *Notification* <<http://spsims.wto.org/web/pages/search/notification/Results.aspx>>.

<sup>46</sup> Ibid. Indonesia has more regular notifications than emergency notifications, 105 compared to 11, while in Malaysia it is 28 compared to 11.

it 62<sup>nd</sup>, Malaysia 22<sup>nd</sup> and the Philippines 86<sup>th</sup>.<sup>47</sup> Malaysia is, in general, more transparent compared to Indonesia and the Philippines. Thus, there is no correlation between the transparency performance through notifications with the transparency of government policy-making in general.

(d) *Harmonisation - Article 3.1 of the SPS Agreement*

All selected countries are members of ‘Three Sisters’ international standards, Codex Alimentarius Commission (Codex), World Organisation for Animal Health (Office International des Epizooties-OIE) and International Plant Protection Convention (IPPC). However, the selected countries do not all completely conform to the particular international standards. Indonesia did not comply with the harmonisation principle because it did not recognise the disease or pest free areas (PFA) to the level required by the SPS international standards, since it was beyond the OIE standard on Terrestrial Animal Health Code without a clear scientific justification.<sup>48</sup> Similarly, the Philippines’ AO22 faced a claim from the EU for not complying with the SPS international standards on food hygiene,<sup>49</sup> which requires food to be stored at a certain temperatures.<sup>50</sup> Malaysia has similar experience, that in 2012, only 45 of Malaysia’s 191 SPS standards in agriculture (equivalent to 23.5%) were identical to international standards.<sup>51</sup>

Some impediments to the harmonisation process are caused by the political will of the governments in undertaking harmonisation. The selected countries have similar policies towards harmonisation with international standards. Indonesia’s policy in formulating its SPS measures is based on both national and international standards.<sup>52</sup> The Philippines’ regulations limit the adoption of international standards, for example, the *Food Safety Act 2013* stipulates that the adoption of Codex will be undertaken if it does not conflict with consumer protection measures and when there is no scientific justification for the measures taken to protect consumers.<sup>53</sup> Malaysia, on the other hand, applies international standards only where appropriate in developing standards in the agricultural sector as required by the stakeholders.<sup>54</sup>

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<sup>47</sup> WEF, above n33.

<sup>48</sup> *Specific Trade Concern-Issues Considered in 2009*, WTO Doc G/SPS/GEN/204/Rev.10/Add.1 (11 February 2010) (Note by the Secretariat) (Addendum) 27.

<sup>49</sup> The European Commission, Trade: Market Access Database, *SPS: Sanitary Phytosanitary Issues* (1 February 2012) <[http://madb.europa.eu/madb/sps\\_barriers\\_details.htm?barrier\\_id=115402&version=10](http://madb.europa.eu/madb/sps_barriers_details.htm?barrier_id=115402&version=10)>.

<sup>50</sup> Codex Alimentarius, *Code of Hygienic Practice for Meat (CAC/RCP 58-2005)*, 23 [82] <[http://www.codexalimentarius.org/standards/list-standards/en/?no\\_cache=1](http://www.codexalimentarius.org/standards/list-standards/en/?no_cache=1)>.

<sup>51</sup> *Trade Policy Review*, WTO Doc WT/TPR/M/292/Add.1 (30 April 2014) (Minutes of the Meeting) 79.

<sup>52</sup> IAQA, *Selayang Pandang Pusat Karantina Tumbuhan dan Keamanan Hayati Nabati* (Plants Quarantine Centre and Plant Food Safety at A Glance)

<<http://www.karantina.deptan.go.id/?page=action&&c=subsubcat&&idcat=2&&idsubcat=9&&idsubsubcat=13>>

<sup>53</sup> Ibid, art IV sec 9(b), 12.

<sup>54</sup> *Trade Policy Review*, WTO Doc WT/TPR/M/292/Add.1.

Along with those factors, Indonesia's harmonisation suffers due to a lack of infrastructure and human resources,<sup>55</sup> while the Philippines' harmonisation suffers due to lack of financial and human resources.<sup>56</sup>

(e) *Regionalisation - Article 6 of the SPS Agreement*

All selected countries have recognised the regionalisation principle and established disease or pests-free areas in their territories for exportation purposes. For example, Indonesia is free from Foot and Mouth Disease (FMD) and Early Mortality Syndrome,<sup>57</sup> the Philippines is free from FMD and Avian Influenza,<sup>58</sup> while Malaysia is free from FMD for Sabah and Sarawak and free from Newcastle Disease for Pontian and Johor.<sup>59</sup>

In the importation area, however, the selected countries usually do not usually recognise PFA. They have formulated and applied country-based policies, instead of policies based on zones or regions, as required by the regionalisation principle.<sup>60</sup> The policies in general are intended to protect the health in the selected countries' territories, because to establish disease or pest-free areas in their territories requires effort and time. The selected countries do not want to destroy the efforts they have been undertaking by carelessly importing products from countries that are not free from particular pests or diseases.<sup>61</sup> As a result, several countries have raised concerns on the lack of recognition of the regionalisation principle by Indonesia<sup>62</sup> and Malaysia.<sup>63</sup>

In contrast to the Philippines and Malaysia, Indonesia's application of the regionalisation principle was impacted by the judicial review of the *Indonesian Constitutional Court Decision*.<sup>64</sup> The *Indonesian Constitutional Court Decision* demonstrates the need, in the opinion of the Court, for a more careful approach in protecting health in Indonesia's territories by enforcing 'maximum

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<sup>55</sup> Interview with an official member of the IAQA, Jakarta, 7 February 2013.

<sup>56</sup> Interview with an official member of the NMIS, Quezon City, 1 February 2013.

<sup>57</sup> FQIA, *Capaian Kinerja dan Sasaran BKIPM Tahun 2013* (FQIA's Performance and Target Achievement 2013) <<http://www.bkipm.kkp.go.id/bkipm/news/read/962/capaian-kinerja-dan-sasaran-bkipm-tahun-2013.html>>.

<sup>58</sup> Proceso J. Alcala, DA Secretary, *DA 2011 Year Report* (21 December 2011) 5 <<http://www.da.gov.ph/index.php/2012-03-27-12-04-16/year-end-report>>.

<sup>59</sup> Department of Veterinary Services (DVS), *Disease Control and Eradication* (8 December 2014) <<http://www.dvs.gov.my/en/509>>.

<sup>60</sup> See, e.g., The European Commission, *SPS Import Restriction on Poultry Due to Avian Influenza* (14 November 2012) <[http://madb.europa.eu/madb/sps\\_barriers\\_details.htm?barrier\\_id=105341&version=3](http://madb.europa.eu/madb/sps_barriers_details.htm?barrier_id=105341&version=3)>; Department of Agriculture Bureau of Animal Industry (Philippines), *Annual Report 2012*, 32-33.

<sup>61</sup> Indonesia needs roughly a century to become FMD-free. See Teguh Boediyana, *Quo Vadis Peternakan Sapi di Tanah Air?* (Where Is Indonesia's Cow Husbandry Going?) (21 March 2009) <<http://www.agribisnews.com/berita/4-peternakan/19-quo-vadis-peternakan-sapi-di-tanah-air.html>>.

<sup>62</sup> For example, STC243 raised by the US on a lack of recognition of pest free areas; STC280 raised by the EU on new meat import conditions; STC305 raised by Brazil on import restrictions on beef and the recognition of the principle of regionalisation, See WTO, SPS-IMS; *Trade Policy Review-Indonesia*, WTO Doc WT/TPR/M/278/Add.1 (10 and 12 April 2013 adopted 2 August 2013) (Record of the Meeting) (Addendum) 77.

<sup>63</sup> The EU stated that Malaysia placed the measure on a country-basis to the entire nation. See the European Commission, above n25.

<sup>64</sup> *Indonesian Constitutional Court Decision No. 137/PUU-VII/2009* annulled art 44 sec 3 and art 59 sec 2 of Law No. 18 of 2009 (in conjunction with importation from country or country zone).

security' and preventing the importing of animal products which are not completely free from diseases or pests.<sup>65</sup>

Challenges in establishing regionalisation exist in the selected countries. For example, the Philippines needs a long period of time in establishing the PFA for exported products as requested by importing Members, and in achieving recognition of the PFA for the exportation of particular commodities.<sup>66</sup> Indonesia faces difficulties in implementing the regionalisation principle due to public opposition through acting their legal standing before the *Indonesian Constitutional Court*. Further, infrastructure and human resources are technical aspects that add to the difficulties,<sup>67</sup> since the implementation of the regionalisation principle needs modern laboratories and proficient experts, particularly in the veterinary field.<sup>68</sup>

(f) *Equivalence Recognition - Article 4 of the SPS Agreement*

All selected countries have, to some extent, applied the equivalence recognition. They have granted equivalence recognition to some Members, and have gained equivalence recognition in return. In the exportation dimension, for example, Indonesia and Canada have engaged in a Mutual Recognition Arrangement (MRA) on Fish and Fishery Products Inspection and Control Systems,<sup>69</sup> while the Philippines and Japan have entered into an agreement on the export of fresh mango and papaya.<sup>70</sup>

However, Indonesia shares challenges with Malaysia in terms of unpredictable time frames to achieve recognition of the equivalence principle. For example, Malaysia needs two to five years to be able to export its commodities to other Members,<sup>71</sup> and Indonesia needs roughly five years.<sup>72</sup>

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<sup>65</sup> Ibid 137.

<sup>66</sup> Alicia O. Lustre, *Management of SPS Measures in the Philippines*, paper prepared for the Specialists Meeting for Asia on the Challenges and Opportunities of Sanitary and Phytosanitary Standards Cost and Benefits of Strategies of Compliance, hosted by Chinese Government, Sponsored by the World Bank, Beijing China 20 November 2004, 3.

<sup>67</sup> Information was gathered from the interview with a staff in the IAQA, 7 February 2013.

<sup>68</sup> See Chapter 2, 34.

<sup>69</sup> The Arrangement is undertaken by the Directorate General of Capture Fisheries of the Department of Marine Affairs and Fisheries and Canadian Food Inspection Agency in March 2002.

<sup>70</sup> Maribel G. Marges, Market Access Case Study (II): Philippines Fresh Mango/Papaya Exports to Japan, 20 in Workshop on WTO Sanitary and Phytosanitary (SPS) Measures, Bangkok Thailand 8-11 September 2009 Organised by ADBI in cooperation with FAO <<http://www.adbi.org/files/wto.sps.executive.summary.pdf>>.

<sup>71</sup> DoA, *Crops and Quarantine, Market Access of Malaysian Agriculture Produce* (18 December 2014) <<http://www.doa.gov.my/363>>.

<sup>72</sup> IAQA, *Ekspor Perdana Sarang Walet Indonesia ke Tiongkok* (The first Export of Indonesia Bird Nests to China) (29 January 2015) <[http://www.karantina.deptan.go.id/?page=pers\\_detail&&id=24](http://www.karantina.deptan.go.id/?page=pers_detail&&id=24)>.

(g) *Technical Assistance - Article 9 of the SPS Agreement*

All selected countries have received technical assistance from other Members and international organisations, and gained the benefits from this assistance. For example, Indonesia received technical assistance on animal health, food safety and plant protection from Australia between 2011 and 2013,<sup>73</sup> the Philippines received technical assistance from Japan's International Cooperation Agency,<sup>74</sup> while Malaysia received technical assistance, such as training programs, from Japan.<sup>75</sup>

The staff of Indonesia's and the Philippines' SPS Agencies are of the view that technical assistance is useful in assisting in the development of SPS systems. However, technical assistance can be difficult to implement. An official of the IAQA admitted that Indonesia faces challenges in implementing technical assistance,<sup>76</sup> because of its insufficient infrastructure, and also the political will of the decision-makers can become an obstacle to the implementation of the SPS legal structure. Notwithstanding these challenges, Indonesia is of the view that technical assistance is most beneficial, particularly for disseminating knowledge of the SPS systems.<sup>77</sup>

## 2 *Exportation Dimension*

### (a) *High Level of SPS Measures*

The SPS measures of importing Members often become trade barriers to the selected countries. The WTO STC demonstrates that the Philippines' international trade has been significantly affected by the SPS measures of some importing Members, followed by Indonesia and Malaysia.<sup>78</sup> This indicates that the Philippines has more export issues than Indonesia and Malaysia. The Philippines' export commodities have challenges in accessing markets due to non-tariff measures, including SPS requirements.<sup>79</sup>

The selected countries were affected by both STC39 and STC85.<sup>80</sup> STC39 was raised in March 1998 on the EU maximum level for certain contaminants (aflatoxins) in foodstuffs. Some

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<sup>73</sup> *Technical Assistance to Developing Countries Provided by Australia July 2011-June 2013*, WTO Doc G/SPS/GEN/717/Add.4 (7 July 2014) (Communication from Australia) (Addendum) 3-8.

<sup>74</sup> Marges, above n70, 85.

<sup>75</sup> DoA, *Kursus Pertanian Belia Tani ke Jepun 2011* (Agro-youths Agricultural Course to Japan 2011) <<http://www.doa.gov.my/kursus-pertanian-beliatani-ke-jepun-2011>>.

<sup>76</sup> Interviewed with an official in the IAQA, 6 February 2013.

<sup>77</sup> Ibid.

<sup>78</sup> The Philippines is affected by 18 SPS measures from importing Members, while Indonesia is impacted by nine SPS measures and Malaysia is affected by five SPS measures. See WTO, SPS-IMS, *Specific Trade Concern*.

<sup>79</sup> Gloria O. Pasadilla and Christine Marie Liao, 'Non-Tariff Measures Faced by Philippine Agriculture Exporters in East Asia', *Asian Journal of Agriculture & Development* Vol. 3 Nos. 1&2, 121.

<sup>80</sup> WTO, SPS-IMS, *Specific Trade Concerns*.

Members, including the selected countries, expressed concern that the EU's<sup>81</sup> proposed measures would impact international trade.<sup>82</sup> International standards did not exist at the time, however the Codex Committee on Food Additives and Contaminants considered the issue. The EU later revised the maximum level for some products and introduced sampling procedures. The concerns were resolved in March 2004.<sup>83</sup>

STC85 was raised in March 2001 on Australia's import restrictions on prawns and prawn products and revised general Import Risk Analysis (IRA) on prawns and prawn products. The issue was partially resolved in October 2013.<sup>84</sup> STC85 was initially raised by Thailand in March 2001 on behalf of ASEAN countries regarding Australia's notification of the 'risk analysis and interim measures, which required risk management measure for White Spot Syndrome and Yellow Head Virus'.<sup>85</sup> China shared the concerns, and these were supported by the Philippines, Malaysia, Indonesia, Sri Lanka and Vietnam. Before applying the measure, Australia applied interim measures on the import of uncooked prawns and prawn products from ASEAN countries claiming the products might be illegally used as fishing bait. Thailand claimed that the measures had insufficient scientific justification and were more trade-restrictive than necessary. Therefore, these countries raised concerns and requested Australia applies alternative measures based on the scientific principle. Australia then revised the IRA, which was adopted in October 2007. Thailand subsequently requested a bilateral negotiation with Australia through ASEAN SPS expert group, and the issue was resolved in October 2013.<sup>86</sup>

The two trade barriers were likely caused by the high SPS measures of the importing country Members, and a lack of the required infrastructures in the production and exportation process, such as laboratories and port equipment, in the selected countries, namely Indonesia,<sup>87</sup> the Philippines<sup>88</sup> and Malaysia.<sup>89</sup> As a result, a number of products were rejected.

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<sup>81</sup> *Verbal Note from the Council of the European Union and the Commission of the European Communities*, WTO Doc WT/L/779 (30 November 2009). The EU replaced the EC since 1 December 2009 based on Treaty of Lisbon.

<sup>81</sup> *Specific Trade Concerns-Resolved Issues*, WTO Doc G/SPS/GEN/204/Rev 11/Add.3 (Notes by the Secretariat) (1 March 2011) (Addendum) 30.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> WTO, SPS-IMS, *Specific Trade Concerns*.

<sup>85</sup> *Specific Trade Concerns-Issues Not Considered in 2010*, WTO Doc G/SPS/GEN/Rev. 11/Add.2 (Note by the Secretariat) (Addendum) (1 March 2011) 8.

<sup>86</sup> Ibid 8-11.

<sup>87</sup> IAQA, *Border Coordination Meeting in NTT9* (26 August 2014) <[http://www.karantina.deptan.go.id/?page=article\\_detail&id=486](http://www.karantina.deptan.go.id/?page=article_detail&id=486)>.

<sup>88</sup> Gloria O. Pasadilla and Christine Marie M. Liao, *Market Access Limitation of the Philippines in the EU Markets*, Discussion Paper Series No. 2007: 15, Philippine Institute for Development Studies, 33.

<sup>89</sup> Annamalai Sivapragasam, Booty Othman Asna, and Add. Thalib Samsinar, Asian Productivity Organisation (APO), *Sanitary and Phytosanitary Measures*, Report of the APO Seminar on Sanitary and Phytosanitary Measures held in Japan 4-11 December 2002 (02-AG-GE-SEM-09), 121 <<http://www.apotokyo.org/publications/wp-content/uploads/sites/5/pjrep-02-ag-ge-sem-09.pdf>>.



Indonesia amended its SPS measures in order to accommodate particular importing country's SPS measures, such as in relation to export requirements. Malaysia did a similar thing through the amendment of the *Food Regulation 2009* to comply with the EU's requirement on aquaculture-sourced products, namely the *Food Hygiene Regulation 2009*,<sup>90</sup> and *Fisheries Regulation 2009 on Quality Control of Fish for Export* to the EU to enable its products to be exported.<sup>91</sup>

(b) *Private Standards*

The impact and implementation of private standards have become a serious challenge for the selected countries, particularly for their small and medium exporters, due to strict certification requirements and high costs.<sup>92</sup> As a consequence, small and medium exporters in Indonesia,<sup>93</sup> the Philippines<sup>94</sup> and Malaysia<sup>95</sup> have struggled to comply with private standards.

The selected countries share similar attempts in meeting these private standards, by attempting to adopt the standards in their SPS measures for exporters. Indonesia developed *Cara Budidaya Ikan yang Baik* (IndoGAP-Good Aquaculture Practice),<sup>96</sup> Certification Catch Fish for exportation to the EU,<sup>97</sup> Good Agricultural Practices (GAP), Good Handling Practices, Standard Operating Procedures, and Hazard Analysis Critical Control Point (HACCP) and Certification.<sup>98</sup> The Philippines developed GAP,<sup>99</sup> which include GAP for Fruit and Vegetable, and GAP for Corn;<sup>100</sup> Good Animal Husbandry Practice,<sup>101</sup> and GAP Caravan towards AEC 2015.<sup>102</sup> Malaysia

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<sup>90</sup> *Trade Policy Review-Malaysia*, WTO Doc WT/TPR/S/225/Rev.1, 41.

<sup>91</sup> Department of Fisheries Malaysia, *Fisheries (Quality Control of Fish for Export to the EU) Regulations 2009* <<http://www.dof.gov.my/en/fisheries-quality>>.

<sup>92</sup> Pasadilla and Liao, above n79, 133.

<sup>93</sup> Information was gathered from online communications with an IAQA official, 22 July 2013.

<sup>94</sup> Lustre, above n66, 5.

<sup>95</sup> United Nation, *Challenges and Opportunities Arising from Private Standards on Food Safety and Environment for Exporters of Fresh Fruit and Vegetables in Asia: Experiences of Malaysia, Thailand and Viet Nam* (2007) 46-48 <<http://p166.unctad.org/file.php/54/29feb2008/docs/ChallengesAndOpportunitiesArising.pdf>>.

<sup>96</sup> Greetje Schouten, Sietze Vellema, and Jeroen Van Wik, 'Diffusion of Global Sustainability Standards: The Institutional Fit of the ASC-Shrimp Standard in Indonesia' *RAE São Paulo V. 56 n. 4, Jul-Ago 2016*, 417.

<sup>97</sup> *Peraturan Menteri Perikanan Nomor PER. 32/MEN/2012 tentang Jenis, Penerbitan dan Bentuk Dokumen Tindakan Karantina* [Decree of the Minister of Marine and Fisheries Affairs No. 32 of 2012 on Type, Issuance and Form of Document of Quarantine Action] (Indonesia), art 2.

<sup>98</sup> The Ministry of Trade, *Management Systems* <[http://inatrim.kemendag.go.id/en/read/management-systems\\_83](http://inatrim.kemendag.go.id/en/read/management-systems_83)>.

<sup>99</sup> BAFPS, *Good Agricultural Practice* <<http://www.bafps.da.gov.ph/index.php/services/good-agricultural-practices>>.

<sup>100</sup> Bureau of Agricultural Research (BAR), 'GAP for Corn Launched' *Chronicle* Issue 9 No. 12 ISSN 1655-3942 (December 2008) (DA Press Release) <<http://www.bar.gov.ph/chronicle-home/archives-list/187-december-2008-issue/2273-gap-for-corn-launched>>.

<sup>101</sup> BAFPS, *Good Animal Husbandry Practice* (18 August 2014)

<<http://www.bafps.da.gov.ph/index.php/services/good-animal-husbandry-practices>>.

<sup>102</sup> BAFPS, *GAP Caravan Towards AEC 2015* (4 December 2014) <<http://www.bafps.da.gov.ph/index.php/50-gap-caravan-towards-aec-2015>>.

developed Malaysian GAP and the Malaysian Organic Scheme,<sup>103</sup> Malaysian Phytosanitary Certification Assurance Scheme, Malaysian Fumigation Accreditation Scheme, and Malaysia Heat Treatment Accreditation Scheme,<sup>104</sup> and an HACCP Certification Scheme, *Skim Amalan Ladang Baik Malaysia* (Good Farm Practice Scheme Malaysia),<sup>105</sup> which relied on GAP and GLOBALGAP.<sup>106</sup> These efforts were in order to meet the quality assurance requirements of the importing countries<sup>107</sup> affected by private standards.

The discussion of the comparison of SPS implementation: problems and attempts undertaken in the selected countries is summarised in the following table.

**Table 6.2. Summary of the Comparison of SPS Implementation: Problems and Attempts Undertaken**

No.	Indicators		Indonesia	The Philippines	Malaysia
1	Importation dimension	Number of SPS disputes	2 disputes: DS484 and DS506	-	-
		Number of STC	14 (moderate)	3 (low)	5 (low)
	Non-discrimination principle	Issue	Discriminatory policy claimed in STC330, STC484	Unequal treatment between domestic and imported products in AO22	Different price of inspections in STC266
		Attempts	Information is not available	Amendment of AO22	Information is not available
	Scientific principle	Issue	Lack of research and infrastructure	Lack of infrastructure	Lack of research, data and infrastructure
		Attempts	Built a modern port pilot project	Built research centres	Investment in research, database and infrastructure development

<sup>103</sup> Department of Agriculture, *Crop Quality Control* (18 December) <<http://www.doa.gov.my/kawalan-kualiti-tanaman>>.

<sup>104</sup> Department of Agriculture, *Malaysian Fumigation Accreditation System (MAFAS)* (18 December 2014) 2 <<http://www.doa.gov.my/skim-perakuan-pensijilan-pewasapan-malaysia-mafas->>.

<sup>105</sup> MoA, *Good Farm Practice Scheme Malaysia (SALM)* (4 December 2014) <<http://www.moa.gov.my/web/guest/salm>>.

<sup>106</sup> The GLOBALGAP is a private good agricultural practice initiated by Euro-retailer produce working group concerns with product safety, environmental impact on health, safety and welfare of workers and animal. See the GLOBALG.A.P., *From EUREPGAP to GLOBALG.A.P.* <[http://www.globalgap.org/uk\\_en/who-we-are/history/](http://www.globalgap.org/uk_en/who-we-are/history/)>.

<sup>107</sup> *Trade Policy Review-Malaysia*, WTO Doc WT/TPR/S/156 (Report by the Secretariat) (12 December 2005) 56.

	Harmonisation principle	Issue	Lack of harmonisation	Lack of harmonisation	Lack of harmonisation	
		Attempts	No information available	Training programs for regulator	Special body development to undertake harmonisation	
	Transparency principle	Issue	Notification was not in a timely manner	Non-notification of AO22	Non-notification due to amendment of regulation	
		Attempts	Improve coordination among SPS agencies	No information available	Improve capacity of human resources	
	Regionalisation principle	Issue	Country-based importation policy	Country-based importation policy	Country-based importation policy	
		Attempts	Zone-based importation policy in particular situations	No information available	No information available	
	Equivalence principle	Issue	Lengthy process	Lengthy process	Lengthy process	
		Attempts	Keep negotiating	No information available	No information available	
	Technical Assistance Principle	Issue	Problem to implement	None	None	
		Attempts	Dissemination of SPS Agreement	None	None	
	2	Exportation dimension	Number of STC	12 (moderate)	19 (moderate)	7 (low)
		Market access	Issue of products rejection	Fisheries export to the EU	Mangoes export to the US	Fisheries export to the EU
Attempts			MRA	MRA	MRA	
Private standards		Issue	Lack of capacity of small exporters	Lack of capacity and technological requirements of small and medium enterprises	Lack of capacity of small enterprises	

		Attempts	Develop its own standards	Develop its own standards	Develop its own standards
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Note: score 1 to 10 (low); 11 to 20 (moderate); above 20 (high)

## D *Lessons Learned from Selected Countries' Experiences*

### 1 *Lessons Learned*

The three selected countries face their own challenges and reasons in applying the SPS Agreement. Principally, since each of the selected countries have different situations, interests and priorities, treatment must not be homogeneous,<sup>108</sup> and thus recommendations differ. However, since the selected countries share experiences, each can learn from both the failures and successes of other selected countries. There are also some common recommendations proposed below.

#### *(a) Importation Dimension*

##### *(i) Non Discrimination Issues - Article 2.3 of the SPS Agreement*

The lack of acknowledgement of the non-discrimination principle should be addressed by the selected countries through a review of the legislation-making process. The selected countries should provide equal treatment between national products and imported products, and imported products between Members; SPS measures which treat products of countries differently will only be challenged by other Members.

In this regard, Indonesia and Malaysia should learn from the Philippines, which amended AO22 to be implemented for both domestic and imported products. For example, Indonesia should amend its SPS measures in relation to the Jakarta port closures, by providing equal access to Members so they are able to fulfil requirements to export through the Jakarta Port. Malaysia, on the other hand, should amend its SPS measure related to price determination for imported products between Members, so that prices are imposed equally between Members.

##### *(ii) Scientific Justification Issues - Article 2.2 of SPS Agreement*

With regard to the lack of scientific justification in the establishment of SPS measures, the selected countries need to apply the scientific principle as the basis for the formulation of SPS measures, such as ensuring they undergo risk analysis. In this regard, the Philippines and Malaysia have required risk analysis on their regulations. Indonesia has added risk analysis to its SPS

<sup>108</sup> Patrick Low, *Is the WTO Doing Enough for Developing Countries?* in George A. Bermann and Petros C. Mavroidis (eds), *WTO Law and Developing Countries* (Cambridge University Press, 2007) 324.

measures such as the *Amendment Law on Animal Husbandry and Animal Health*, which requires ‘risk analysis’ for the import of animal products to Indonesian territory.<sup>109</sup>

In association with the development of SPS infrastructures, Indonesia and the Philippines might learn from Malaysia in developing modern and integrated SPS infrastructure, especially ports. Malaysia’s port infrastructure, such as Port Klang, is the most developed of the selected countries. Indonesia should maintain its effort in overcoming major port problems, such as dwelling time,<sup>110</sup> by learning from the Malaysia’s experience in Port Klang<sup>111</sup> with the establishment of an integrated system through a Pilot Project in Cikarang Dry Port referring to Port Klang.<sup>112</sup>

(iii) *Transparency Issues - Articles 5.8 and 7 and Annex B of the SPS Agreement*

With regard to the issue of transparency, Indonesia and Malaysia might learn from the Philippines’ experience in its outstanding record in notifying of SPS measures.<sup>113</sup> Indonesia and Malaysia should improve their notification processes and procedures to the same level, which will create and maintain improved records of transparency. The Philippines, on the other hand, should improve its transparency by notifying all its SPS measures.

Further, transparency should be a key objective and culture in the governments’ public information management in the SPS management systems. Indonesia should improve the implementation of *Law on Public Information Transparency*,<sup>114</sup> while the Philippines should address the ‘transparency seal’ obligation for government institutions to provide public access to government information.<sup>115</sup> Transparency in the daily services of government institutions’ will be useful for the improvement of the transparency of the SPS measures.

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<sup>109</sup> The Amendment of Law on Animal Husbandry and Animal Health, art 59(4) and art 36C(2).

<sup>110</sup> Agus Karyono, *Dwelling Time dan Karantina* [Dwelling Time and Quarantine], 2 <<http://karantina.pertanian.go.id/artikel-karantina/dwelling-time-dan-karantina#>>.

<sup>111</sup> In 2012, Port Klang was placed 12th in the world for logistical efficiency and smooth for the flow of the unloading goods by implementing an automatic system for quarantine inspections. The physical inspection system into the quarantine depot is held by the Authority of West Port of Port Klang, and an Approval Letter of Release of Goods (SPPB) is then issued by Customs. In 2010, Port Klang was the top 13<sup>th</sup> container port in the world and received a number of awards for its excellence in trajectory, business, logistic and IT applications in port management. Port Klang Malaysia, *Milestones* <<http://www.pka.gov.my/index.php/en/about-us-/port-klang-authority-/milestones.html>>.

<sup>112</sup> IAQA, *Synergy between Malaysian Quarantine and Customs could become a Sample of Effective and Accountable Public Service* <[http://www.karantina.deptan.go.id/index.php?page=quarantine\\_detail&&id=204](http://www.karantina.deptan.go.id/index.php?page=quarantine_detail&&id=204)>.

<sup>113</sup> *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement*, WTO Doc G/SPS/GEN/804/Rev. 5 (4 October 2012) (Note by the Secretariat) (Revision) 4-5.

<sup>114</sup> *Undang-Undang No. 14 Tahun 2008 tentang Keterbukaan Informasi Public* (Law No. 14 of 2008 on Public Information Transparency) (Indonesia).

<sup>115</sup> Official Gazette, *Office of the President: Philippine Transparency Seal* <<http://www.gov.ph/about/gov/exec/office-of-the-president/philippine-transparency-seal/>>.

(iv) *Harmonisation Issue - Article 3.1 of the SPS Agreement*

Given that the selected countries do not-completely conform to the SPS international standards, they should aim to improve their compliance with the harmonisation principle. Although harmonisation is not mandatory, rather it is recommended by the SPS Agreement, it provides advantages to Members, as other Members are less likely to challenge the measures.

In this respect, Indonesia could learn from the Philippines' and Malaysia's efforts to harmonise their SPS standards. The Philippines established the Codex Committee on Pesticide Residue and actively participate in the Codex meeting on Residue Pesticide,<sup>116</sup> and other SPS bodies' fora. Malaysia, meanwhile, is involved in the international standards meeting of Codex and has influenced the development of international standards particularly of filled milk and milk substitutes of vegetable nuts made of palm oil.<sup>117</sup>

(v) *Regionalisation Issue - Article 6 of the SPS Agreement*

The selected countries need to improve the recognition of the regionalisation principle in their SPS measures, particularly with regard to imports. As stipulated by Article 6 of the SPS Agreement, the recognition of regionalisation must be in both the exportation and importation dimensions. In this regard, it is recommended that the Philippines and Malaysia learn from Indonesia's experience of amending its SPS measures by changing country-based import policy to be zone-based through the Government Regulation No 4 of 2016.<sup>118</sup> This means Indonesia has been recognising the regionalisation principle in the area of imports, albeit under particular conditions only.

The selected countries should improve their implementation of the regionalisation principle, by strengthening their pest and disease surveillance systems and enhancing cooperation with other Members and international institutions to improve their infrastructure and risk assessment capabilities. The Philippines and Malaysia should learn from Indonesia, who has been recognising the regionalisation principle in the area of imports, albeit under particular conditions only. Indonesia's efforts in developing its national animal health system through the establishment of quarantine islands in their territories<sup>119</sup> may also be the attention of Malaysia and the Philippines.

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<sup>116</sup> Codex Committee on Residues Pesticide <<http://fsq.moh.gov.my/v4/index.php/component/k2/item/263-cc-pr>>.

<sup>117</sup> International Trade Forum (16 August 2014) 2-3 <<http://www.tradeforum.org/Quality---A-Prerequisite-for-Exports-Increasing-Complexity-of-Technical-Requirements-in-Export-Markets/#sthash.A2ycMRLO.dpuf>>.

<sup>118</sup> *Peraturan Pemerintah Nomor 4 Tahun 2016 tentang Pemasukan Ternak Dan/Atau Produk Hewan dalam Hal Tertentu Yang Berasal Dari Negara Atau Zona Dalam Suatu Negara Asal Pemasukan* [Government Regulation No 4 of 2016 on Importation of Cattle and/Or Animal Products In Certain Conditions From Exporting Country Or Country Zone] (Indonesia), Art 2 sec (1).

<sup>119</sup> IAQA, *Quarantine Island and Challenges for Disease* (3 November 2014) <[http://www.karantina.deptan.go.id/?page=quarantine\\_detail&&id=60](http://www.karantina.deptan.go.id/?page=quarantine_detail&&id=60)>.

However, Indonesia and Malaysia need to learn from the Philippines' experience in successfully gaining certificates of recognition from the US of being free of mango pulp weevil.<sup>120</sup>

(vi) *Equivalence Recognition Issue – Article 4 of the SPS Agreement*

Given that the selected countries have faced STC related to a lack of recognition of the equivalence principle, they should improve the recognition of other Members' SPS measures as equivalent to their own. In the export sector, the selected countries should improve their efforts so that their SPS measures are recognised as equivalent to that of importing Members.

From a practical perspective, they need to strengthen risk management, risks analysis and cooperation with other developed Members and international organisations. In this regard, Indonesia and Malaysia should learn from the Philippines' experiences in gaining the recognition from the US of being free of mango pulp weevil, meaning it can export its mango products to the US and other Members.

(vii) *Technical Assistance Issue - Article 9 of the SPS Agreement*

With regard to the problem of implementing technical assistance, Indonesia should learn from Malaysia's experience. Malaysia's top government established PEMUDAH to address bureaucracy issues in order to significantly improve the effectiveness of the government program, especially in business areas, including the agricultural sector. Malaysia promotes public-private sector engagement to foster the country's global businesses.<sup>121</sup>

(b) *Exportation Dimension*

(i) *Issues in Meeting Importing Countries' SPS Measures*

- *National level*

In order to improve the quality of its products, Indonesia should learn from the Philippines', who has developed longer-lasting real productivity for farmers, instead of providing short-term subsidies. Benefits will accrue from changing the mind set of farmers in doing business by acting more independently towards improving their products quality and thus ensuring they are more competitive in international trade.

With regard to private standards, the selected countries need to maintain and enhance their efforts in undertaking dialogues with private standards bodies and adopting these standards into

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<sup>120</sup> G/SPS/GEN/1412, 3.

<sup>121</sup> PEMUDAH, *Background*  
<<http://www.pemudah.gov.my/background;jsessionid=53BC91498E5E95C03C8A7BC60D072AF1>>.

their SPS measures. This is in line with the decision of the SPS Committee's action on private standards, particularly action number five '...to communicate with entities involved in SPS-related private standards in their territories to sensitise them to the issues raised in the SPS Committee and underline the importance of international standards...'.<sup>122</sup>

- *Regional Level*

The selected countries need to boost their regional trade within ASEAN in the framework of ASEAN Economic Community (AEC).<sup>123</sup> Indonesia, Malaysia and the Philippines should improve their significant role in minimising non-tariff barriers along with their efforts in protecting health in their territories. Indeed, they must establish their SPS measures comply with the SPS Agreement requirements, in particular the scientific justification principle.

In terms of private standards at the regional level, Indonesia should learn from SPS standards setting of the Philippines and Malaysia, as the standards of both selected countries are likely better than Indonesia's. The Philippines' and Malaysia's standards, along with those of Singapore and Thailand, have become the basis for the establishment of the ASEAN GAP (Good Agricultural Practices).<sup>124</sup>

- *International Level*

Indonesia should learn from the Philippines' and Malaysia's experiences in accessing markets, as both countries actively engage in cooperations, both bilaterally and multilaterally, as well as regionally and internationally. Although the Philippines is not quite active in negotiating FTAs,<sup>125</sup> its delegations have been acknowledged as actively participating in negotiation in international fora, especially inside the WTO, for example in WTO meetings regarding SPS matters.<sup>126</sup> On the other hand, Malaysia has been actively engaged in trade cooperations with other Members through FTAs, such as with Chile, Australia and New Zealand.<sup>127</sup> The more cooperation

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<sup>122</sup> *Actions Regarding SPS-Related Private Standards*, WTO Doc G/SPS/55 (6 April 2011) (Decision of the Committee) 1-3.

<sup>123</sup> ASEAN Economic Community Blueprint 2025 <<http://www.asean.org/wpcontent/uploads/images/2015/November/aec-page/AEC-Blueprint-2025-FINAL.pdf>> 4.

<sup>124</sup> ASEAN, *ASEAN GAP* (2006) <[http://www.asean.org/images/2012/publications/ASEAN\\_GAP\\_Standard.pdf](http://www.asean.org/images/2012/publications/ASEAN_GAP_Standard.pdf)>.

<sup>125</sup> Edwin Van De Haar, Philippines Trade Policy and the Japan-Philippines Economic Partnership Agreement (JEPA), *Contemporary Southeast Asia Vol 33 No. 1 (2011) pp. 113-39*, 119.

<sup>126</sup> WTO, Trade Policy Review: The Philippines, 5 and 7 July 2005, *Concluding remarks by the Chairperson* <[http://wto.org/english/tratop\\_e/tp249\\_crc\\_e.htm](http://wto.org/english/tratop_e/tp249_crc_e.htm)> 8 April 2013.

<sup>127</sup> See, e.g., MITI, *Malaysia-Australia*; MITI, *Malaysia-New Zealand FTA (MNZFTA)*, <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_55b8f6ae-c0a8156f-2af82af8-4fed08f4](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_55b8f6ae-c0a8156f-2af82af8-4fed08f4)>, MITI, *Malaysia-Chile, Malaysia-Chile FTA (MCFTA)*,



Indonesia engages in, the greater the MRA or Memorandum of Understanding will be to enhance market access for Indonesia's exports.

Further, Indonesia can learn from Malaysia's experiences in establishing its SPS quality standards. Malaysia has influenced the development of international standards particularly of filled milk and milk substitutes of vegetable nuts made of palm oil.<sup>128</sup> Malaysia's standard in this area is acknowledged by the 'Three Sisters' standard setting bodies as reference for international standards.

The discussion of the comparison of lessons learned of SPS implementation in the selected countries is summarised in the following table.

**Table 6.3. Summary of Lessons Learned for the Selected Countries**

No.	Indicators	Best practice	Indonesia	The Philippines	Malaysia
1	Importation Dimension	Non-discrimination principle		v	
		Scientific justification			v
		Harmonisation principle			v
		Transparency principle		v	
		Regionalisation principle	v		
		Equivalence principle		v	
		S&D Treatment principle			v
2	Exportation Dimension	Market access		v	v
		Private standards		v	v

### E Common Recommendations

The common issues with respect to SPS implementation in the selected countries include non-compliance with the transparency principle under Article 7 of the SPS Agreement, particularly the notification obligation; a lack of recognition of the regionalisation principle under Article 6, particularly for imports; a lack of harmonisation in Article 3; and lack of scientific evidence for

<[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_55b49856-c0a8156f-2af82af8-e0d15984](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_55b49856-c0a8156f-2af82af8-e0d15984)>.

<sup>128</sup> International Trade Forum (16 August 2014) 2-3 <<http://www.tradeforum.org/Quality---A-Prerequisite-for-Exports-Increasing-Complexity-of-Technical-Requirements-in-Export-Markets/#sthash.A2ycMRLO.dpuf>>.

their particular SPS measures under Article 2.2. The common recommendations are proposed to improve SPS implementation around these four issues.

Given the area of non-compliance, the selected countries should make SPS regulatory reforms, particularly for the improvement of the adoption of SPS principles. The selected countries should reform their regulatory structures in order to improve SPS implementation. They may utilise the Organisation for Economic Co-operation and Development (OECD) guidelines for this reform.<sup>129</sup> According to OECD, regulatory reform should:

‘adopt...clear objectives and frameworks for implementation; assess impacts and review regulations systematically...; ensure that regulations, regulatory institution charged with implementation, and regulatory processes are transparent and non-discriminatory; review and strengthen where necessary the scope of effectiveness and enforcement of competition policy; design economic regulation in all sectors to stimulate competition and efficiency, and eliminate them except where clear evidence demonstrate that they are the best way to serve the broad public interests; eliminate unnecessary regulatory barriers to trade and investment through continue liberalisation an enhance a consideration and better integration of market openness throughout the regulatory process, thus strengthening economic efficiency and competitiveness; identify important linkages with other policy objectives and develop policies to achieve those objective in ways that support reform’.<sup>130</sup>

Regulatory reforms can be employed through legislative amendments and issuance of orders. Some example of issues that could take the form of legislative amendments are, the formulation of SPS measures based on scientific justification and risk assessments, recognition of a zone or region-based imports and transparency of the regulatory process. The selected countries should focus on regulatory reforms since they are a dynamic and multidisciplinary long-term process.<sup>131</sup> Cooperation among SPS institutions should be strengthened for better SPS implementation by improving the notification compliance, because unsatisfactory compliance of the notification obligation is considered a trade barrier.<sup>132</sup>

Indonesia, the Philippines and Malaysia should strengthen the implementation of the regionalisation principle and establish a strong SPS system on surveillance, eradication, control and monitoring of pests and diseases. These are real challenges for the selected countries as developing countries, as they lack the necessary skills to implement risk management systems. Developing countries typically lack veterinary experts, laboratories and coordinations and indeed, gaining technical assistance, particularly with capacity building, is crucial for the successful implementation of the regionalisation principle. Regionally, the selected countries should strengthen cooperation and collaboration in the ASEAN fora, through such activities as the eradication of pests and

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<sup>129</sup> OECD, *Guiding Principles for Regulatory Quality and Performance*, 1  
<<http://www.oecd.org/fr/reformereg/34976533.pdf>>.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Appellate Body Report, *Chile-Price Band System*, WT/DS207/AB/R [234].

diseases, improving capacity building programs for SPS staff and business actors, and undertaking public partnership programs to foster infrastructure development.

With regard to private standards, it is recommended that the selected countries should handle issues regarding private standards by continuing their efforts to adopt private standards into their national SPS regulations. Thus, the private standards setting initiative be replaced with more publicly accountable standards setting initiative, the government standards setting initiative, since this would be usually more respected and obeyed by exporters. This can be started by undertaking dialogues with private standards institutions, then establishing working groups to discuss the elements to be adopted and finally processing the adoption of the private standards into the national SPS regulation. The experience of the selected countries with regard to private standards should also be communicated and might be applied within ASEAN framework, as the standards of the Philippine, Malaysia along with those of Singapore and Thailand have become the basis for the establishment of ASEAN GAP. The participation of the selected countries in the discussion of the emerging issues of private standards in the WTO and other international fora needs also be improved.

Internationally, the selected countries should more actively participate in the agendas of the SPS Committee and 'Three Sisters'. They also need to strengthen their cooperations with international organisations, such as STDF, World Bank, FAO and WHO to gain technical assistance.

## F Conclusion

The selected countries have similar experiences in the adoption and application of the SPS Agreement, including the difficulties and underlying reasons, and each has undertaken efforts to address these issues. Each of the selected countries may learn from one another with regard to efforts undertaken to date. For example, Indonesia and Malaysia may learn from the Philippines' remarkable experiences in providing SPS notifications to the SPS Committee, while Indonesia and the Philippines may learn from Malaysia's experiences in developing SPS infrastructures. The Philippines and Malaysia may also learn from Indonesia's efforts to implement the regionalisation principle, as undertaken by amending its *Law on Animal Husbandry and Animal Health* by adopting zone-based imports. The underlying recommendation for the selected countries is that they should aim to improve their SPS implementation by undertaking legislative amendments to provide a solid legal basis for the implementation of the SPS Agreement. As a supplement to this, the selected countries should strengthen the legal enforcement of these regulations.

## CHAPTER 8

### VIII CONCLUSION

#### A Overview

There are issues of balance in the implementation of the WTO SPS Agreement by WTO Members. This thesis addressed this issue of implementation in selected developing countries in Southeast Asia, namely, Indonesia, the Philippines, and Malaysia, and was a timely study of the WTO SPS Agreement in these countries. This thesis researched, in particular, the degree to which the selected countries' SPS measures conform to the SPS Agreement, as well as the impediments they face, the underlying reasons for these impediments and provided proposed recommendations for improvement to create a balance of their SPS implementation, including legal remedies.

In contrast to previous studies, this thesis provided a distinct perspective that the imbalance of SPS implementation in the selected countries is impacted by both internal and external factors. A predominant view of the SPS implementation difficulties faced by selected countries is that they are primarily caused by factors internal to the developing countries, such as a lack of resources. The WTO states that SPS implementation issues for developing countries are usually due to the natural impediments they face.<sup>1</sup> Trebilcock and Howse agree with the WTO approach stating that the difficulties in applying the SPS Agreement are mainly caused by factors internal to developing countries.<sup>2</sup> This implies that developing countries accept and respect the position taken by the WTO, but nevertheless experience difficulties in implementation.

However, in practice, particular provisions and their implementation, such as guidelines, procedures and decisions contain weaknesses and are in need of improvement. SPS-related private standards (private standards), which contain uncertainties as to whether or not they are within the operation of the SPS system, hamper Members' trade, particularly for small enterprises in the selected countries.<sup>3</sup> Thus, external factors contribute to the difficulties faced by the developing countries.<sup>4</sup> For this reasons, this thesis argued that despite recognition of existing practices undertaken by the WTO with regard to the difficulties faced by developing countries, the developing countries continue to struggle with implementation and these difficulties exist along

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<sup>1</sup> WTO, The WTO Agreement Series: Sanitary Phytosanitary Measures, 25  
<[https://www.wto.org/english/res\\_e/booksp\\_e/agrmtseries4\\_sps\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/agrmtseries4_sps_e.pdf)>.

<sup>2</sup> Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, (Routledge, 3<sup>rd</sup> ed, 2005), 23.  
<sup>3</sup> *Ad Hoc Working Group on Private Standards*, WTO Doc G/SPS/W/256 (3 March 2011) 5.

<sup>4</sup> See, e.g., Asian Development Bank Institute (ADBI), *ADBI Year in Review 2008*, 29-30  
<<http://www.adbi.org/files/2009.04.16.keydocs.2008.year.in.review.pdf>>; Office of the Chief Plant Protection Officer Australian Government Department of Agriculture Fisheries and Forestry-DAFF (Canberra), *Mid-Term Review of Australia's Regional 'Sanitary Phytosanitary Capacity Building Program' (SPSCBP)*, *Final Report of the mid-Term Review Team*, May 28<sup>th</sup> 2008 <[www.ausaid.gov.au/Publications/Documents/ardcp-ipr.doc](http://www.ausaid.gov.au/Publications/Documents/ardcp-ipr.doc)> 6.

with other external factors. Indeed, it is inequitable to place so much responsibility on developing countries alone.

As discussed in Chapter 2, the Preamble of the SPS Agreement recognises that developing country Members may encounter special difficulties in complying with the SPS measures of importing Members, as well as in the formulation and application of SPS measures in their own territories.<sup>5</sup> Moreover, SPS measures have the potential to be significant non-tariff barriers to trade, creating certain trade restrictions.<sup>6</sup> In practice, the SPS measures of particular importing countries impede trade exports from developing countries.<sup>7</sup> As identified in this thesis, the implementation issues arising out of the SPS Agreement for developing countries have been identified as including discrimination, scientific evidence, transparency, regionalisation, equivalence, technical assistance, SPS international standards setting and private standards. Attempts have been made to address these implementation issues through guidelines, procedures and decisions, such as technical assistance and Special and Differential (S&D) treatment, 2008 Transparency Procedure, Equivalence Decision, Regionalisation Guidelines, and proposed actions regarding private standards. Notwithstanding these attempts, difficulties in the implementation of the SPS Agreement remain. It is crucial that these issues realise the intended benefits of the SPS Agreement, namely improvements in human and animal health and the phytosanitary situation of all Members in their international trade.

As elucidated in Chapters 3 to 5, the selected countries do not satisfactorily comply with the SPS principles. They continue to face challenges in balancing their SPS implementation, although the specifics vary, as comparatively analysed in Chapter 6. Difficulties occurred for the selected countries in both the importation and exportation dimensions. The research indicates that the underlying reasons for the implementation issues comprise both internal and external factors, and include particular provisions of the SPS Agreement, for example the scientific principle and private standards, as discussed in Chapter 7.

This chapter will provide conclusions with regard to the research questions raised in the thesis, as well as the findings. Further, this chapter will summarise the proposed recommendations, including legal remedies to create a balance of the application by the selected countries, in particular, and other developing countries in general. The following part demonstrates the main thesis findings concisely.

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<sup>5</sup> 'Agreement on the Application of Sanitary and Phytosanitary Measures'), the Preamble [7.1].

<sup>6</sup> Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organisation – Text, Cases and Materials*, Third Edition, (Cambridge University Press, New York, 2013), 498.

<sup>7</sup> See STC 39 on the EU's measure of the maximum level of certain contaminants (aflatoxins) in foodstuffs, where the selected countries were among the complainants.

1 *SPS Implementation in the Selected Countries*

(a) *Importation Dimension*

Indonesia has generally complied with the SPS Agreement in formulating and applying its SPS regulations, but not in a satisfactory manner. On the basis of WTO Specific Trade Concern (STC), Indonesia has had issues of imbalance of SPS implementation, its SPS regulations lack scientific justification; there is a lack of transparency, particularly in providing SPS measures notifications in a timely manner; a lack of recognition of the regionalisation principle; and a lack of harmonisation. Several importing countries have raised concerns regarding these issues of non-compliance,<sup>8</sup> such as Brazil, who brought disputes against two of Indonesia's SPS measures to the WTO Dispute Settlement Body (DSB) in October 2014<sup>9</sup> and in April 2016.<sup>10</sup>

The Philippines has much better compliance with the SPS principles obligations, achieving an outstanding record of transparency through notifications.<sup>11</sup> Nevertheless, the Philippines has not satisfactorily implemented SPS principles, for example the WTO STC recorded that the Philippines faced claims regarding insufficient scientific justification, non-compliance with the transparency principle, particularly the notification obligation regarding AO22, a lack of recognition of the regionalisation principle and a lack of harmonisation to international standards.

Malaysia's SPS regulations have generally complied with the SPS Agreement, and the country has a remarkable achievement, particularly in setting the SPS standard concerning the MRL of tropical products. Malaysia has involved in the international standards meeting of Codex and has influenced the development of international standards particularly of filled milk and milk substitutes of vegetable nuts made of palm oil.<sup>12</sup> However, issues of imbalance of SPS implementation remain, such as only partially compliance with the scientific principle, a lack of transparency particularly regarding the notification obligation,<sup>13</sup> a lack of harmonisation to the SPS international standards and a lack of recognition of the regionalisation principle.

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<sup>8</sup> Hitherto there are fourteen STC on Indonesia's SPS measures.

<sup>9</sup> See DS484, *Measures Concerning the Importation of Chicken Meat and Chicken Products*.

<sup>10</sup> See DS506, *Measures Concerning the Importation of Bovine Meat*, WTO Doc WT/DS506/1, G/L/1145, G/SPS/GEN/1486, G/LIC/D/50, G/TBT/D/49, G/AG/GEN/130 (7 April 2016) (Request for Consultation by Brazil) 1-4.

<sup>11</sup> WTO Trade Policy Review Body, *Trade Policy Review Report by the Secretariat the Philippines (Revision)*, WT/TPR/S/261, 9 May 2012, vii and 67.

<sup>12</sup> International Trade Forum (16 August 2014) 2-3 <<http://www.tradeforum.org/Quality---A-Prerequisite-for-Exports-Increasing-Complexity-of-Technical-Requirements-in-Export-Markets/#sthash.A2ycMRLO.dpuf>>.

<sup>13</sup> Malaysia did not notify MAQIS Act 2011.

## (b) *Exportation Dimension*

Indonesia has been able to meet many importing Members' SPS regulations, for example the regulation relating to the export of bird's nests to China.<sup>14</sup> However, there have also been SPS measures that they have failed to meet, for example Indonesia's fishery commodities were not permitted in the EU markets.<sup>15</sup>

On occasions, the Philippines have not satisfactorily met some importing countries' SPS standards, resulting in the ban of export commodities, for example fresh fruits and vegetables,<sup>16</sup> pineapple,<sup>17</sup> deboned pig meat and poultry meat<sup>18</sup> to Australia, which resulted in a dispute settlement under the WTO DSB.

Relatively speaking, Malaysia has been able to meet the importing countries' SPS measures, however the country has faced challenges in accessing markets, which has resulted in a refusal of its export commodities by importing countries, such as refusal of seafood commodities by the UK and Australia in 2002 due to the presence of aflatoxins and being contaminated with microbiological agents.<sup>19</sup>

## 2 *Impediments in Formulating and Applying SPS Regulations*

### (a) *Internal Factors, Similarities and Dissimilarities*

The selected countries have faced difficulties in formulating and applying SPS regulations and to some extent, share the following key difficulties and internal underlying reasons.

All selected countries faced challenges in fulfilling the notification obligation under the transparency principle.<sup>20</sup> For Indonesia and Malaysia, the reason for non-compliance was due to a lack of management of SPS work load for the high volume of documents related to SPS regulations.<sup>21</sup> Unlike Indonesia and Malaysia, the reason for the Philippines' non-compliance was due to its different perspective on the measures that must be notified. With regard to AO22, the

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<sup>14</sup> IAQA, *Eksportasi Perdana Sarang Walet, Asal Semarang Tujuan Tiongkok* (The First Export of Bird Nests from Semarang to China) [15 January 2015]

<[http://www.karantina.deptan.go.id/?page=quarantine\\_detail&&id=688](http://www.karantina.deptan.go.id/?page=quarantine_detail&&id=688)>.

<sup>15</sup> An example is the refusal of particular Indonesian fisheries products by Germany, Italy, France, Spain, Canada, South Korea, and Russia in 2013. See BKIPM, *Capaian Kinerja dan Sasaran BKIPM Tahun 2013* (The FQIA Performance and Target Achievement 2013) <<http://www.bkipm.kkp.go.id/bkipm/news/read/962/capaian-kinerja-dan-sasaran-bkipm-tahun-2013.html>>.

<sup>16</sup> DS270, *Certain Measures Affecting the Importation of Fresh Fruit and Vegetables*.

<sup>17</sup> DS271, *Certain Measures Affecting the Importation of Fresh Pineapple*.

<sup>18</sup> DS286, *Australia-Quarantine Regime for Imports*.

<sup>19</sup> FAO-the UN, *Food Safety Legislation-Science and Risk-based Approaches to Harmonisation: Food Safety Legislation in Malaysia* (Malaysia) FAO/WHO Regional Conference on Food Safety for Asia and the Pacific, Malaysia 24-25 March 2004, 32 <<http://ftp.fao.org/docrep/fao/meeting/006/ad698e.pdf>>.

<sup>20</sup> For example, Indonesia did not notify its SPS regulations in a timely manner, the Philippines did not notify AO22 and Malaysia did not notify MAQIS Act 2011.

<sup>21</sup> Most experienced by Indonesia and Malaysia. See Chapters 4 and 6.

Philippines believed it did not need to be notified because it did not affect international trade.<sup>22</sup> However, based on the 2008 Transparency Procedure,<sup>23</sup> AO22 is likely to affect international trade, as evidenced by the number of exporting countries raising concerns.<sup>24</sup> Further, the Philippines has faced challenges in adopting provisional measures, because it failed to provide the additional information required and failed to review its SPS measures within a reasonable period of time.<sup>25</sup>

The lack of SPS management in Indonesia is due in part to the lack of coordination among its SPS agencies, as well as a lack of awareness by some SPS officials. Both the Philippines and Indonesia have communication difficulties among their SPS agencies, including duplication in management areas.

The selected countries faced problems recognising the regionalisation principle, particularly in the area of imports, because the governments have established and applied country-based import policies rather policies that are region or zone-based.<sup>26</sup> The lack of recognition of regionalisation in Indonesia was affected by the Indonesian *Constitutional Court Decision*, which annulled the provision on the recognition of import from Pest Free Areas for the maximum health of the people.<sup>27</sup>

Based on STC, the selected countries share similar experiences with respect to the harmonisation principle; all three countries have implemented their own policies in establishing SPS standards. Indonesia combines international standards with its national standards,<sup>28</sup> the Philippines, in the *Food Safety Act 2013*, stipulates that it will adopt Codex when there is no conflict with consumer protection measures and when no scientific justification exists for the measures taken<sup>29</sup> and Malaysia has applied international standards only when they are appropriate in developing standards in the agricultural sector as required by the stakeholders.<sup>30</sup>

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<sup>22</sup> WT/TPR/S/261/Rev.2 in particular S261R2-03.Pdf., 26  
<[https://docs.wto.org/dol2fe/Pages/FE\\_Search/MultiDDFDdocuments/110146/Q/WT/TPR/S261R2-01.pdf;Q/WT/TPR/S261R2-02.pdf;Q/WT/TPR/S261R2-03.pdf;Q/WT/TPR/S261R2-04.pdf;Q/WT/TPR/S261R2-05.pdf;Q/WT/TPR/S261R2-06.pdf](https://docs.wto.org/dol2fe/Pages/FE_Search/MultiDDFDdocuments/110146/Q/WT/TPR/S261R2-01.pdf;Q/WT/TPR/S261R2-02.pdf;Q/WT/TPR/S261R2-03.pdf;Q/WT/TPR/S261R2-04.pdf;Q/WT/TPR/S261R2-05.pdf;Q/WT/TPR/S261R2-06.pdf/)>.

<sup>23</sup> WTO, G/SPS/7/Rev.3, 20 June 2008, Committee on SPS Measures, *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)*, as of 1 December 2008, Revision, 2-3 [8-10].

<sup>24</sup> WTO, Committee on SPS Measures, *Specific Trade Concerns (Note by the Secretariat-Revision)*, G/SPS/GEN/204/Rev.12, 2 March 2012 (12-1182), 49.  
G/SPS/7/Rev.3, 3-4 [8-10].

<sup>25</sup> See Chapter 3 for Indonesia, 4 for the Philippines, Chapter 5 for Malaysia.

<sup>26</sup> *Mahkamah Konstitusi* [Indonesian Constitutional Court], No 137/PUU-VII/2009, 27 August 2010. The *recognition of importation of fresh animal products 'from a zone within a country'* in Law No. 18 of 2009 on Animal Husbandry and Animal Health, art 59 sec 2 *was declared* does not have a legal binding anymore.

<sup>27</sup> IAQA, *Selayang Pandang Pusat Karantina Tumbuhan dan Keamanan Hayati Nabati* (Plants Quarantine Centre and Plant Food Safety at A Glance)

<<http://www.karantina.deptan.go.id/?page=action&&c=subsubcat&&idcat=2&&idsubcat=9&&idsubsubcat=13>>  
<sup>28</sup> Ibid, art IV sec 9(b), 12.

<sup>29</sup> Ibid, art IV sec 9(b), 12.

<sup>30</sup> *Trade Policy Review*, WTO Doc WT/TPR/M/292/Add.1.



(b) *Role of SPS Provisions*

The selected countries have taken different approaches to formulating and implementing their SPS measures. The preamble of the SPS Agreement recognises the difficulties that developing country Members may face in applying the SPS Agreement<sup>31</sup> by providing for technical assistance,<sup>32</sup> S&D treatment<sup>33</sup> and procedures, decisions and guidelines for further implementation of some provisions. However, there are particular provisions that are indicated as playing a role in the SPS application issues of the selected countries. These provisions are scientific evidence and risk assessment, transparency, equivalence, harmonisation, regionalisation principle, technical assistance and the S&D treatment provision.

The transparency provisions, particularly Annex B and the 2008 Transparency Procedure are more concerned with procedures than the outcome and the detailed and rigid approach to transparency makes the obligation much more burdensome for Members than it needs to be.<sup>34</sup> The procedures set out are often ineffective, such as procedures to voluntarily attach an electronic copy of the regulations to each notification<sup>35</sup> and procedures to notify the determination of the equivalence recognition of SPS measures of particular Members.<sup>36</sup> Furthermore, these provisions, particularly the notification procedure are broad and unclear. An example is the criteria that it must 'have a significant effect on trade'.<sup>37</sup> Another example of the lack of clarity is illustrated in the Philippines' interpretation that it did not need to notify its SPS measure, AO22, while exporting partners disagreed.

The Equivalence Decision<sup>38</sup> lacks predictability with regard to the period of time required for the entire process of equivalence recognition. Instead of governing the time period, the Equivalence Decision authorises Members involved in the process to do so,<sup>39</sup> which brings about legal uncertainty in the process.<sup>40</sup> Consequently, Members usually take years to achieve recognition of equivalence, Malaysia needs two to five years<sup>41</sup> and Indonesia needs roughly five years.

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<sup>31</sup> SPS Agreement, the Preamble [7].

<sup>32</sup> SPS Agreement, art 9.

<sup>33</sup> SPS Agreement, art 10.

<sup>34</sup> Developing Members view the transparency principle is 'excessive, burdensome and costly'. See L. Biukovic, 'Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan' (2008) 11 JIEL 803, 811 in L. Biukovic, 'International Law Interrupted-A Case of Selective Adaptation' 60 U.N.B.L.J 161, 171 <<http://international.westlaw.com>>.

<sup>35</sup> G/SPS/7/Rev.3, 4[19].

<sup>36</sup> G/SPS/7/Rev.3, 7[H.44].

<sup>37</sup> SPS Agreement, Annex B[5].

<sup>38</sup> *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Doc G/SPS/19/Rev. 2 (23 July 2004).

<sup>39</sup> G/SPS/19/Rev. 2, 3.

<sup>40</sup> Oliver Landwehr, Article 4 SPS, in Rudiger Wolfrum, Peter-Tobias Stoll, and Anja Seibert-Fohr (Eds), *WTO-Technical Barriers and SPS Measures* (Martinus Nijhoff, 2007), 434.

<sup>41</sup> DoA, *Crops and Quarantine, Market Access of Malaysian Agriculture Produce* [18 December 2014] <<http://www.doa.gov.my/363>>.

The Regionalisation Guideline<sup>42</sup> plays a role in the difficulties faced by the selected countries. Similar to the transparency principle, the Guideline is more concerned with procedures than the outcome. It details procedures containing general considerations, discussions and steps required, however it does not provide an estimated time for the whole process. The Guideline only stipulates the period of time for discussion, which is normally 90 days, but this may be changed by Members involved,<sup>43</sup> and postponed for a reasonable period of time with particular considerations.<sup>44</sup> Consequently, the recognition of regionalisation process is lengthy.

The harmonisation provision is also a cause for concern for the selected countries. Harmonisation, as recommended in Article 3.1, is impacted and possibly hindered by Article 3.3, which allows for a deviation from international standards.<sup>45</sup> Harmonisation is more difficult, for developing countries, since the international standards are usually set higher than those of developing countries.<sup>46</sup> However, it is unlikely that harmonisation provides significant advantages to Members,<sup>47</sup> because compliance to international standards is only rewarded by a ‘presumption of consistency’<sup>48</sup> and can still be challenged by other Members. Thus, harmonisation does not guarantee that the measures will be secure from challenges from other Members.

### (c) *Technical Assistance*

The selected countries’ view is that technical assistance provided by the WTO Secretariat, other WTO Members and international organisations are adequate for assisting them in applying SPS measures. Technical assistance has come in the form of capacity building, seminars, workshops and training, and has been particularly helpful in improving the knowledge, understanding and competence of officials of SPS institutions, exporters and business actors. Technical assistance in the form of laboratories and other equipment has also been useful in assisting the selected countries in undertaking research, examinations and investigation regarding SPS works. For example, the Philippines received technical assistance from Japan, which enabled them to successfully establish laboratories in a number of SPS agencies and, technical assistance from the US to undertake research to study particular diseases.<sup>49</sup> Malaysia received technical assistance from Australia regarding the development of e-phytosanitary certifications, which has improved the efficiency in

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<sup>42</sup> WTO, G/SPS/48, 16 May 2008, Committee on Sanitary and Phytosanitary Measures, *Guideline to Further the Practical of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures*

<sup>43</sup> Ibid 3 [15].

<sup>44</sup> Ibid 3 [17].

<sup>45</sup> SPS Agreement, art 3.3.

<sup>46</sup> WTO, Committee on SPS Measures, *Relationship with Codex, IPPC and OIE*, G/SPS/GEN/775.

<sup>47</sup> Oliver Landwehr, Article 3 SPS, in Rudiger Wolfrum, Peter-Tobias Stoll, and Anja Seibert-Fohr (Eds), *WTO-Technical Barriers and SPS Measures* (Martinus Nijhoff, 2007), 421.

<sup>48</sup> Ibid 414; SPS Agreement, art 3.2.

<sup>49</sup> See Chapter 4.

providing certification.<sup>50</sup> Indonesia has also received technical assistance, but it has faced challenges with the management and implementation of these programs. A number of reasons contribute to these difficulties, such as different political wills of the leaders, lack of infrastructure<sup>51</sup> and lack of coordination among the SPS institutions. However, according to Shaffer, technical assistance is sometimes ineffective due to fact that the approval assistance usually follows a ‘donor-driven’ approach.<sup>52</sup>

SPS international standards-setting, also influences and affects the application of the SPS measures set up by developed countries. The standards-setting system does not provide balanced opportunities for developing countries to participate.<sup>53</sup> For example, Codex *Alimentarius* does not provide adequate opportunity for developing countries to participate in the standards setting committee, but only in the general meeting committee. As a result, the SPS standards do not appropriately address the needs, approach and experience of developing countries.

### 3 *Difficulties in Penetrating Market Access*

#### (a) *National Factors, Similarities and Dissimilarities*

The selected countries have challenges in meeting the SPS measures of importing countries and expanding market access for their products, due to the low quality of their exports resulting from insufficient capacity, compliance and awareness of the exporters. This is in line with Bossche’s and Zdouc’s argument that, SPS measures can be and are used as a trade barrier.<sup>54</sup>

#### (d) *External Factors*

Importing Members tend to require high SPS standards, including private standards, which results in greater difficulties for developing Members to achieve equivalence recognition. The high level of SPS standards of importing Members often hampers the selected countries’ trade. Private standards have become a new challenge, particularly for small and medium enterprises due to the strictness of the requirements and the high cost of implementation. Unfortunately, the existence of private standards is uncertain due to the silence or unclear provisions regarding these in the SPS Agreement.

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<sup>50</sup> MITI, *Malaysia-Australia* [12 February 2014] <[http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_55b684ea-c0a8156f-2af82af8-5b2b191e](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_55b684ea-c0a8156f-2af82af8-5b2b191e)>.

<sup>51</sup> IAQA, *SPS News Letter*, Edisi 22 (July-September 2012), 3 <[http://www.mediafire.com/view/7v4ufscwrft9u2b/Edisi\\_Juli-September\\_2012.pdf](http://www.mediafire.com/view/7v4ufscwrft9u2b/Edisi_Juli-September_2012.pdf)>.

<sup>52</sup> Gregory Shaffer, ‘Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?’ (Fall 2005) LexisNexis, 23 *Wis. Int’l L.J.* 643, 4.

<sup>53</sup> See Chapter 7, 150-151.

<sup>54</sup> Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organisation – Text, Cases and Materials*, Third Edition, (Cambridge University Press, New York, 2013), 498.

#### 4 *Lesson Learned and Proposed Proposals to Improve Balance of SPS Implementation*

##### *(a) Current Approach*

Each of the selected countries has different strengths and each should strive to achieve best practice within the region given their respective resources, culture and capabilities. The selected countries have undertaken various steps to both implement and improve compliance with the SPS Agreement. For example, Indonesia,<sup>55</sup> the Philippines<sup>56</sup> and Malaysia<sup>57</sup> established their own SPS teams to improve communication and coordination among their SPS institutions within their territories. However, the efforts have not always been successful.

The selected countries have also undergone efforts to expand market exports by holding capacity building programs to improve the proficiency of their farmers, exporters and business actors. At the regional and international levels the selected countries have engaged in cooperation, both bilaterally and multilaterally, to enhance market access with importing countries. However, the process of negotiation to reach an agreement among the involved countries is often a difficult and lengthy process.<sup>58</sup>

##### *(b) Recommendations*

###### *(i) Selected Countries' SPS Implementation Improvement*

From the information available, such as laws, reports and STC, each of the selected countries need to learn from the others. Given the area of non-compliance, the selected countries should make SPS regulatory reforms to improve the adoption of SPS principles for the improvement of SPS implementation. They may utilise the Organisation for Economic Co-operation and Development (OECD) guidelines for this reform.<sup>59</sup>

Indonesia and Malaysia need to learn from the prominent transparency experiences of the Philippines in notifying SPS measures.<sup>60</sup> The selected countries need to improve the transparency and accessibility of information, as well as improve the proficiency of their delegations in negotiation to expedite the process of equivalence recognition. Where there is doubt whether such measures need to be notified, the selected countries should undertake notification in any event to

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<sup>55</sup> The IAQA established a Coordination Team, while the FQIA established the SPS inter-agency to improve coordination among the SPS institutions. See Decree of the Minister of Agriculture No. 300/Kpts/KP.150/6/2003 regarding the Establishment of Coordination Team of SPS.

<sup>56</sup> The Philippines established SPS Focal Group based on DA Special Order No. 19, s 2013.

<sup>57</sup> Malaysia established Coordination Committee for Quarantine and Inspection.

<sup>58</sup> See Chapter 7 page 132-133.

<sup>59</sup> OECD, *Guiding Principles for Regulatory Quality and Performance*, 1 <<http://www.oecd.org/fr/reformereg/34976533.pdf>>.

<sup>60</sup> The Philippines has the second greatest number of emergency notification since 1995 and the most emergency notifications in the period of September 2012 to September 2013.

increase transparency.<sup>61</sup> It is recommended that the selected countries maintain the role of the SPS coordination teams and vigilantly maintain good communication and coordination to establish, improve and maintain credible SPS institutions.

Malaysia and the Philippines need to learn from Indonesia's experience of amending its SPS measures by changing country-based import policy to be zone-based through the Government Regulation No 4 of 2016,<sup>62</sup> as well as learn from Indonesia's efforts in developing its national animal health system through the establishment of quarantine islands in their territories.<sup>63</sup>

Indonesia and the Philippines should learn from Malaysia in developing its own standards<sup>64</sup> and SPS infrastructures, such as modern and integrated port and laboratories to perform research and quarantine examinations.<sup>65</sup> These updated infrastructures will significantly assist the SPS system in performing its routine activities.

Further technical assistance from other Members, the WTO and relevant international organisations to the selected countries is highly needed and should be welcomed. This should be in the form of capacity building and financial assistance, as these programs are essential to improve the capacity of the selected countries. However, these should be based on 'recipient-driven approach' in order that they are more effective.

#### *(ii) SPS Provisions and Other External Factors Improvement*

Given that an amendment to the SPS provisions as part of the WTO Agreements is difficult to undertake, amendments to further implementation, procedures, guidelines or recommendations of the SPS provisions should be considered, as follows.

An amendment to the 2008 Transparency Procedures is recommended, particularly regarding the attachment of the SPS regulations in the notification, the notification of equivalence recognition determination and transparency enhancement on the S&D treatment. The objective should be more outcome-oriented by enforcing the procedure strictly, for example by using stricter legal imperatives and more binding language, such as use of the proscriptive 'shall'. This approach

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<sup>61</sup> WTO E-Learning, *Sanitary and Phytosanitary Measures*, 238.

<sup>62</sup> *Peraturan Pemerintah Nomor 4 Tahun 2016 tentang Pemasukan Ternak Dan/Atau Produk Hewan dalam Hal Tertentu Yang Berasal Dari Negara Atau Zona Dalam Suatu Negara Asal Pemasukan* [Government Regulation No 4 of 2016 on Importation of Cattle and/Or Animal Products In Certain Conditions From Exporting Country Or Country Zone] (Indonesia), Art 2 sec (1).

<sup>63</sup> IAQA, *Quarantine Island and Challenges for Disease* (3 November 2014) <[http://www.karantina.deptan.go.id/?page=quarantine\\_detail&&id=60](http://www.karantina.deptan.go.id/?page=quarantine_detail&&id=60)>.

<sup>64</sup> Malaysia has influenced the development of international standards particularly of filled milk and milk substitutes of vegetable nuts made of palm oil.

<sup>65</sup> Malaysia's Port Klang, in 2012, was placed 12th in the world for logistical efficiency and smooth for the flow of the unloading goods by implementing an automatic system for quarantine inspections. In 2010, Port Klang was the top 13<sup>th</sup> container port in the world and received a number of awards for its excellence in trajectory, business, logistic and IT applications in port management..

should assist Members in accessing the notified regulations, allocating time for Members to provide a response, and improving the quality of transparency.

It is also suggested that the Equivalence Decision be amended to cover a schedule of outcomes, thus providing an estimation of time for the whole process of equivalence recognition. This will improve the predictability and legal certainty of the equivalence recognition arrangement.

An amendment to the Regionalisation Guideline is recommended in order to provide a time limit for the process. It is recommended to set out an estimated time for the whole process of regionalisation recognition rather than leave the issue at the discretion of Members. It is also suggested that the Guideline be strictly adhered to, requiring developed Members involved to provide technical assistance to the developing Members in the process of regionalisation recognition.

It is also recommended that the approach to technical assistance be demand-driven. In this regard, technical assistance should be tailored to the recipient countries' circumstances. It is necessary for donor countries to appreciate and understand the needs of the recipient countries before entering into a technical assistance program with them. This can be achieved by putting in place a process and structure for the recipient countries to propose the programs or assistance they desire and need.

### *(c) Private Standards Applicability*

The proliferation of the use of private standards in trade is likely to impede developing countries' trade.<sup>66</sup> Unfortunately, private standards are becoming mandatory standards in practice. Debates regarding private standards are due to the boundaries of the WTO SPS law with regard to private standards,<sup>67</sup> neither under Articles 1.1 nor 13 of the SPS Agreement.

Thus, there should be a continuous negotiation with regard to private standards' 'meta-regulation' as well as their rule and representative in international trade fora.<sup>68</sup> It is recommended that the SPS Committee continue encouraging Members and other relevant stakeholders to work on the five agreed actions<sup>69</sup> in responding to private standards. Due to divergent views on private standards among Members within the SPS Committee meeting, after more than ten years of

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<sup>66</sup> WTO, G/SPS/W/256, 3 March 2011, *Report of the Ad Hoc Working Group on SPS Related Private Standards to the SPS Committee*, 5.

<sup>67</sup> Petros C. Mavroidis and Robert Wolfe, 'Private Standards and the WTO: Reclusive No More' *World Trade Review* (2017), 16:1, 1-24, 12.

<sup>68</sup> Vera Thorstenson and Andreia Costa Vieira, *Private Standards or Market Standards: in search for legitimacy and accountability in the international trading system*, 21  
<[http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/16370/Private%20Standards%20or%20Market%20Standards\\_%20in%20search%20for%20legitimacy%20in%20the%20International%20Trading%20System.pdf?sequence=1](http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/16370/Private%20Standards%20or%20Market%20Standards_%20in%20search%20for%20legitimacy%20in%20the%20International%20Trading%20System.pdf?sequence=1)>.

<sup>69</sup> *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Doc G/SPS/19/Rev. 2 (23 July 2004).

discussion on private standards, since 2005, the SPS Committee has still not finished discussions and a conclusion in the near future remains questionable.

Therefore, cooperation among stakeholders at the national, regional, and international levels is crucial to achieve a consensus with regard to the use of private standards without infringing the SPS Agreement. It is also recommended that the selected countries should boost their dialogues with private standards bodies and continue their efforts to adopt private standards into their national SPS regulations. Thus, the private standards setting initiative be replaced with more publicly accountable standards setting initiative, the government standards setting initiative, since this would be usually more respected and obeyed by exporters. The experience of the selected countries with regard to private standards should also be communicated and might be applied within ASEAN framework, as the standards of the Philippine, Malaysia along with those of Singapore and Thailand have become the basis for the establishment of ASEAN GAP.

Since there is a preference of Members, including the selected countries, to make dialogue with private standards, as well as adopt private standards into their regulations,<sup>70</sup> it is recommended that there should be a set of guidelines for Members regarding how they should treat private standards bodies in their territories as well as adopt them into their regulation.

### C *Concluding Remark*

This thesis addresses issues of balance with regard to the implementation of the SPS Agreement in the selected countries. Implementation must be balanced to ensure the protection of health, as well as the promotion of trade liberalisation. Both internal and external factors contribute to the difficulties faced by the selected countries in the implementation of the SPS Agreement, thus it is recommended that the selected countries take steps to address their shortcomings and learn from the experiences of one another, to improve the balance of their SPS implementation. Furthermore, clearer and stricter guidelines, procedures and decisions are required to be undertaken and utilised with regard to the SPS provisions, namely Transparency Procedures, Equivalence Decisions, Regionalisation Guidelines, and the proposal for private standards. Additionally, technical assistance that is in line with the recipient countries' need is crucial for the improvement of the balance of implementation in the selected countries. It is suggested that the implementation of these recommendations would vastly assist in the realisation of the SPS objectives, to improve human and animal health, as well as phytosanitary situation for Members and their international trade.

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<sup>70</sup> Spencer Henson and John Humphrey, 'Understanding The Complexities Of Private Standards In Global AgriFood Chains', *the Journal of Development Studies*, 46: 9, 1628-1646, 17.

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## APPENDIX

### QUESTIONNAIRE

#### SPS REGULATORS / CHIEF EXECUTIVE OFFICERS

##### Interview Guide for semi-structured interview

#### A. Experience in Enacting SPS Measures

1. Which institutions in your country are responsible for enacting SPS measures?
2. Does your institution coordinate with other institutions with respect to enacting SPS measures? If so, what is the form of the coordination?
3. How is the process of the SPS measures incorporated into law and regulation?
4. In what circumstances does your institution write or enact SPS measures?
5. What are the skills and qualifications, including prior experience of staff in your institution who take a part in establishing SPS measures?
6. What kind of infrastructure does your institution have to support the scientific justification of SPS measures?
7. How does your institution ensure that the SPS measures it has made comply with the SPS Agreement requirements?
8. Are there any complaints raised by other countries with regard to SPS measures made by your institution? If so, can you provide details and examples?

#### B. Harmonisation to the SPS International Standards

1. Is your institution a member of SPS international standards body (*Codex Alimentarius* Commission, International Plant Protection Commission/IPPC, or World Organisation for Animal Health/OIE)?
2. Which SPS international standard does your institution adopt?
3. How does your institution harmonise SPS measures with the SPS international standards?
4. Are there any obstacles in harmonising your SPS measures to the SPS international standards? If so, what are the obstacles?
5. How often does your institution participate in the meeting of SPS international standards?
6. Do your institution's representatives contribute to the development of SPS international standards?

C. Technical Assistance

1. Is your institution able to develop SPS measures without technical assistance from other institutions? Can you provide details and examples?
2. Has your institution received SPS technical assistance?
3. If so, what technical assistance did your institution receive, what are the types of the technical assistance, and how long did it take?
4. Which institutions or organisations have provided technical assistance to your institution?
5. How does your institution gain the technical assistance?
6. What are the skills and qualifications, including prior experience of staff in your institution who takes a part in the technical assistance?
7. Do you have any additional comments to make regarding the technical assistance, whether or not it benefited your institution? If any, what was the benefit or detriment of the technical assistance for your institution?