

ROLE OF THE SPS COMMITTEE AND THE THREE SISTERS (CODEX, OIE AND IPPC) UNDER THE SPS AGREEMENT: OPPORTUNITIES AND CHALLENGES

Archana Pandita* & Rohin Koul**

*Assistant Professor, School of Biotechnology, Sharda University, Greater Noida (U.P).

**Advocate, Chamber no. Y-74, Civil Wing, Tis Hazari Court, New Delhi.

Received: July 06, 2018

Accepted: August 23, 2018

ABSTRACT

The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) has allowed the member countries to establish SPS measures to protect human, animal and plant health and has ensured that such measures should not create unreasonable barriers to the international trade. The Committee on Sanitary and Phytosanitary Measures (SPS Committee) is responsible for implementation of the SPS Agreement and the international standard setting organizations namely the Codex Alimentarius Commission (CODEX), the Office International des Epizootics (OIE) and international and regional organizations operating within the framework of the International Plant Protection Convention (IPPC) assists in attaining the objective of harmonization enshrined in the SPS Agreement. This paper has attempted to analyze the role of the SPS Committee and these international standard setting organizations under the SPS Agreement. The SPS Committee is a forum for consultation and negotiations between the member countries. It coordinates with the international standard setting organizations for obtaining advanced scientific information and establishes provisional procedures to enhance harmonization. In addition to this, it is also responsible for the review of the SPS Agreement. Till date, the SPS Committee has provided the member countries with opportunity to facilitate transparency and develop good regulatory practices for sanitary and phytosanitary measures. The sanitary and phytosanitary protection is stronger among the CODEX, the OIE and the IPPC which provide scientific basis for sanitary and phytosanitary regulations and assists in harmonization of these regulations. In addition to this, these organizations are responsible for identification of hazards, determination of risk, establishment of level of protection and encouraging coordination between the member countries. Though the SPS Agreement has expanded their scope, their working should be improved by enhancing transparency, efficiency and fairness. This can be done by allowing private entities such as non-governmental organizations and public interest groups to participate as observers in their proceedings. The Appellate Body in EC-Hormones dispute has interpreted and clarified rules and principles involving harmonization which runs through the entire framework of the SPS Agreement.

Keywords: SPS Agreement, SPS Committee, CODEX, OIE, IPPC, EC-Hormones

I. Introduction

Globalized world is characterized by administrative density, specialization and intrusion and also includes unprecedented levels of civil servants, high administrative budgets and increasing departmental specialization.¹ Similarly, the trade regime under the World Trade Organization (WTO) consists of non-judicial mechanism for accountability such as Ministerial Conference, General Council, Secretariat, Council for Trade in Goods, Council for Trade in Services, Council for Trade Related Aspects of Intellectual Property, Committee on Trade and Development, Committee on Balance of Payment Restrictions and Committee on Budget, Finance and Administration.² In addition to this, it also includes specialized committees and working groups which are responsible for individual WTO agreements and particularly important in this respect is the committee system which is a forum for elaboration of rules and a common platform for the member countries to share knowledge regarding each other policy measures.³

The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) was developed during the Uruguay Round and came into force in the year 1994. The SPS Agreement puts obligation on the member countries to act so as to protect human, animal and plant health or life. It regulates the process by which sanitary and phytosanitary (SPS) standards are developed and also defines

¹ Damian Chalmers, "Administrative Globalization and Curbing the Excesses of the State" in Christian Joerges, Ernst Ulrich Petersmann *et.al.* (eds.), *Constitutionalism, Multilevel Trade Governance and International Economic Law* 351-352 (Hart Publishing, Oregon, 2011).

² Agreement Establishing the World Trade Organization, Articles IV, VI, VII, IX and X.

³ S. R. Myneni, *International Trade Law* 47-75 (Allahabad Law Agency, Faridabad, 2008).

the manner by which a member country can set risk regulation standard.⁴ The Committee on Sanitary and Phytosanitary Measures (SPS Committee) and the three sister organizations namely, the Codex Alimentarius Commission (CODEX), the Office International des Epizootics (OIE) and international and regional organizations operating within the framework of the International Plant Protection Convention (IPPC) are responsible for the proper functioning of the SPS Agreement.⁵

The SPS Committee oversees the implementation of the SPS Agreement and provides a forum for consultation and discussion on sanitary and phytosanitary measures affecting international trade. The representatives of several international intergovernmental organizations and officials of governments of the member states participate in its meetings.⁶ The CODEX, the OIE and the IPPC are essential for attaining harmonization of sanitary and phytosanitary standards.⁷ These three organizations are responsible for establishing international standards, guidelines and recommendations with respect to sanitary and phytosanitary measures. The provisions of the SPS Agreement provide important incentives for the member countries to base their national standards on international standards although compliance with such standards is not required.⁸

Till date, the SPS Committee has strengthened its attention on the following matters (a) transaction costs involved in implementing sanitary and phytosanitary measures by the member countries; (b) good practice in modalities for the implementation of sanitary and phytosanitary measures; and (c) control, inspection and approval procedures covered in Annex C of the SPS Agreement. Further, with respect to the review of the SPS Agreement, the Committee has developed guidance on implementation of sanitary and phytosanitary measures.⁹ The regulatory measures which are used to achieve a particular level of SPS protection require a sound scientific base.¹⁰ The CODEX, the OIE and the IPPC through their standards has provided scientific basis for sanitary and phytosanitary regulations.¹¹ Due to the fact that these three international standard setting organizations are scientific bodies and the standards promoted by them are advisory and not legally binding, these standards has rarely received significant attention outside scientific circle.¹²

The SPS Committee together with these three international organizations has established a new regime for sanitary and phytosanitary protection. However, such a new form of governance has given rise to complicated issues. It is therefore important to examine the role of the SPS Committee, the CODEX, the OIE and the IPPC in the administration and implementation of the SPS Agreement.

⁴ Elizabeth Fisher, "Beyond the Science/Democracy Dichotomy: The World Trade Organization Sanitary and Phytosanitary Agreement and Administrative Constitutionalism" in Christian Joerges, Ernst Ulrich Petersmann *et.al.* (eds.), *Constitutionalism, Multilevel Trade Governance and International Economic Law* 328-329 (Hart Publishing, Oregon, 2011). SPS Agreement, Articles 2.2, 3.3, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 7, 9, 12 and Annex B.

⁵ SPS Agreement, paras 4, 5 and 6, of Preamble and Articles 2.2, 3.1, 3.3, 3.4, 3.5, 5.1, 5.5, 5.7, 5.8, 6.1, 7, 9.1, 12, Annex A Item 3 (a) (b) (c) (d), Annex B Item 3 (d) and Annex C Item 1.

⁶ Arun Goyal and Noor Mohd, *WTO in the New Millennium* 325 (Academy of Business Studies, New Delhi, 2001).

⁷ Eun Sup Lee, *World Trade Regulation: International Trade under the WTO Mechanism* 77 (Springer, New York, 2012).

⁸ Gabrielle Marceau and Joel P. Trachtman, "The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods" in Spencer Henson, John S. Wilson *et.al.* (eds.), *The WTO and Technical Barriers to Trade* 429-430 (Edward Elgar Publishing, Cheltenham, 2005). Article 3.1 of the SPS Agreement provides that members should base their SPS measures on international standards, guidelines or recommendations where they exist, except as otherwise provided for in this agreement and in particular in paragraph 3. Article 3.2 states that the SPS measures of members that are in conformity with international standards, guidelines or recommendations are presumed to be consistent with relevant provisions of this agreement. Article 3.3 states that members can always adopt norms above international standards as long they comply with the SPS Agreement including Article 5 on the risk assesement.

⁹ Kees Van der Meer, "Implementing SPS Measures to Facilitate Safe Trade: Principles and Practice in Cambodia, Lao PDR, Philippines and Thailand" Standards and Trade Development Facility (STDF) initiated research work on the implementation of the sanitary and phytosanitary measures in the context of trade facilitation in Africa and Asia (In the Asian region Cambodia, Lao PDR, Philippines and Thailand participated) at 54 (2014).

¹⁰ Linda Calvin and Barry Krissoff, "The Technical Barriers to Trade: A Case Study of Phytosanitary Barriers and US Japanese Apple Trade" 23 *Journal of Agricultural and Resource Economics* 2, 351-352 (1998).

¹¹ *Supra* note 9 at 51.

¹² Panel Report on *EC-Hormones (Canada)*, WT/DS48/R/CAN, para. 8.62 and Panel Report on *EC-Hormones (US)*, WT/DS26/R/USA, para. 8.59.

II. The SPS Committee

The Committee on Sanitary and Phytosanitary Measures is a subsidiary body of the Council for Trade in Goods.¹³ It oversees the implementation and functioning of the SPS Agreement.¹⁴ As a part of this function, it is responsible for the following matters (a) acts as a forum to exchange information on all aspects of implementation of sanitary and phytosanitary measures; (b) encourages the use of international standards; and (c) maintains a close contact with international standard setting organizations.¹⁵

Provisions Relating to the SPS Committee

The SPS Committee was established with the purpose of providing regular forum for consultations and negotiations among the member countries on specific sanitary and phytosanitary issues.¹⁶ It also carries out functions necessary to fulfil its objective with respect to harmonization by encouraging international standards and maintaining contact with international organizations.¹⁷

With respect to monitoring of harmonization, the SPS Committee has established a list of international standards in consultation with the international organizations and the representatives of these organizations are invited as observers at its meetings which are held thrice in a year.¹⁸ The SPS Agreement has directed the Committee to develop guidelines to further the practical implementation of the risk assessment techniques.¹⁹ It has also empowered the Committee to use the information generated for notification which are in operation in the relevant international organizations.²⁰

Generally, the functions of the SPS Committee can be categorized in the following headings (a) it constitutes a forum for information exchange; (b) it performs a norm elaboration function; and (c) it is responsible for review of the SPS Agreement.²¹

Consultation and use of International Standards

The SPS Committee as a forum for Ad Hoc consultation and negotiations encourages the member countries to take specific trade concerns in the meetings for providing an effective means of resolving issues. Specific trade concerns are specific notifications or trade measures which in certain cases serve as a warning for potential disputes.

The summary of all specific trade concerns raised in the SPS Committee together with an indication of the resolution of the issue is provided by the Secretariat.²² According to the Secretariat, 328 specific trade concerns were raised during the period 1995-2011 in which the developing countries have raised 173 trade concerns compared to 201 raised by the developed countries. Out of the 328 trade concerns raised, approximately one-third has been reported as resolved or partially resolved.²³

¹³ Agreement Establishing the World Trade Organization, Article IV.5.

¹⁴ SPS Agreement, Article 12.

¹⁵ Konstantinos Adamantopoulos (ed.), *An Anatomy of the World Trade Organization* 39 (Kluwer Law International, London, 1997).

¹⁶ SPS Agreement, Article 12.1.

¹⁷ SPS Agreement, Articles 12.1, 12.2 and 12.3.

¹⁸ SPS Agreement, Articles 12.4 and 12.6.

¹⁹ SPS Agreement, Article 5.5. Also refer SPS Agreement, Article 3.5 and Annex A Item 3 (d).

²⁰ SPS Agreement, Article 12.5.

²¹ Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures A Commentary* 48-49 (Oxford University Press, Oxford, 2007).

²² Rudiger Wolfrum, Peter Tobias Stoll, et.al. (eds.), *WTO Technical Barriers and SPS Measures* 532 (Martinus Nijhoff Publishers, Boston, 2007). In one case, Venezuela claimed that Colombia had failed to grant sanitary certificates for its potatoes, mushroom, tomatoes, eggs and meat products and in other case, EC presented a list of substances which had been excluded from a list of products by Japan, thus presenting a barrier to the importation of food products, Tracey Epps, *International Trade and Health Protection A Critical Assessment of the WTO's SPS Agreement* 14-15 (Edward Elgar Publishing, Cheltenham, 2008). At a meeting of the SPS Committee, Canada expressed that negotiations on Bio-safety Protocol could affect the SPS Agreement and United States stated that certain countries are not coordinating with the SPS Committee, Sara Pardo Quintillan, "Free Trade, Public Health Protection and Consumer Information in the European and WTO Context Hormone- Treated Beef and Genetically Modified Organisms" 33 *Journal of World Trade* 6, 186 (1999).

²³ Veronique Fraser, "Horizontal Mechanism Proposal for the Resolution of Non-tariff Barrier Disputes at the WTO: An Analysis" 15 *Journal of World Trade* 4, 1036-1037 (2012). WTO SPS Committee, *Specific Trade Concerns*, G/SPS/GEN/204/Rev.12.

According to Article 12.2 of the SPS Agreement, the SPS Committee should encourage the member countries to base their SPS measures on international standards and recommendations and this provision has advocated integration of international standards and national systems.

Contact with International Organizations

The SPS Committee has coordinated with the CODEX, the OIE and the IPPC and has discussed about scientific and technical matters for obtaining best scientific information.²⁴

The SPS Agreement has provided that the Committee should establish a procedure to follow the progress of international harmonization. With respect to this, the Committee has adopted provisional procedures to monitor international standards and has also agreed to review the operation of the provisional monitoring procedure.²⁵ If a particular member country fails to apply international standard as a condition for importation then it is required to furnish an explanation to the SPS Committee.²⁶ The SPS Committee can ask an international organization to examine matters concerning sanitary and phytosanitary standards and it can do so only on the basis of an initiative from one of its members but not on its own motion.²⁷

Notification Procedure

The SPS Agreement has specified that the SPS Committee should use the information that the member countries generate for the administration of the Agreement. Therefore, Article 12.5 has mentioned notification procedures instituted by several international organizations.²⁸ Annex B Item 5 (b) of the SPS Agreement has provided following requirements for notification of sanitary and phytosanitary measures (a) non existence of international standards; (b) inconsistencies with international standards; and (c) a significant effect of the regulation on trade of other member countries.²⁹

A notification is in practice a one or two page document that reflects forth coming regulations affecting trade and for the SPS Agreement during the period 1995-2012, 11275 measures have been notified by 108 member countries.³⁰ The World Trade Organization in October 2011, announced notification of the 10,000th sanitary and phytosanitary measure. This 10,000th notification clearly points to the fact that the member countries are committed to the principles and practices established by the SPS Agreement.³¹

Review of the SPS Agreement

The SPS Committee is responsible for the review of operation and implementation of the SPS Agreement and in case of any amendments, the Committee has to submit it to the Council for Trade in Goods.³²

²⁴ International Intergovernmental Organizations having observer status on regular basis- FAO, WHO, International Monetary Fund (IMF), International Organization of Standardization (ISO), International Trade Centre, United Nations Conference on Trade and Development (UNCTAD) and World Bank. International Intergovernmental Organizations having observer status on Ad Hoc basis- African Caribbean and Pacific Group of States, European Free Trade Association (EFTA), Inter-American Institute for Agricultural Cooperation (IICA), Organization for Economic Cooperation and Development (OECD), Regional International Organization for Plant Protection and Animal Health (OIRSA) and Latin American Economic System (SELA). SPS Agreement, Article 12.3.

²⁵ *WTO Analytical Index Guide to WTO Law and Practice* 529 (World Trade Organization Publication, Geneva, 2003). The SPS Committee has adopted 'Procedure to Monitor the Process of International Harmonization and use of International Standards'.

²⁶ Alexia Herwig, "The Precautionary Principle in Support of Practical Reason: An Argument Against Formalistic Interpretation of the Precautionary Principle" in Christian Joerges, Ernst Ulrich Petersmann *et.al.* (eds.), *Constitutionalism, Multilevel Trade Governance and International Economic Law* 323 (Hart Publishing, Oregon, 2011).

²⁷ SPS Agreement, Article 12.6.

²⁸ Rudiger Wolfrum, Peter Tobias Stoll, *et.al.* (eds.), *WTO Technical Barriers and SPS Measures* 535 (Martinus Nijhoff Publishers, Boston, 2007).

²⁹ Yoshiko Naiki, "Accountability and Legitimacy in Global Health and Safety Governance: The World Trade Organization, the SPS Committee and International Standard- Setting Organizations" 43 *Journal of World Trade* 6, 1263 (2009).

³⁰ Henrik Horn and Petros C. Mavroidis, "In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees" 47 *Journal of World Trade* 4, 733-734 (2013).

³¹ Chris Downes, "The Impact of WTO Transparency Rules: Is the 10,000th SPS Notification a Cause for Celebration? A Case Study of EU Practice" 15 *Journal of World Trade* 2, 503,523 (2012).

³² SPS Agreement, Article 12.7. Also refer, Anneke Hamilton, "SPS Committee" Agriculture and Commodities Division, 12 September 2013 SADC Workshop South Africa, available at: http://www.extranet.sadc.int/files/2113/8190/6056/4_SPS_committee_Anneke_Hamilton.pdf (visited on

With respect to the first review (1999) of the SPS Agreement, the SPS Committee did not recommend any modification in the text but issues involving transparency, notification process, special needs of the developing countries and technical assistance were considered.³³ Since the review was not regarded exhaustive, it was decided that the member countries can raise issues for consideration by the Committee as provided in Article 12.7 of the SPS Agreement.³⁴ The Committee in the second review (2005) developed a procedure for facilitating the use of Ad Hoc consultations for resolving trade problems. The report of the fourth review (2014) has not been adopted due to the disagreement between the member countries with respect to the role of the SPS Committee as far as private standards are concerned. The Doha Ministerial Decision on Implementation instructed the SPS Committee to review the SPS Agreement at least once every four years.³⁵

The SPS Committee is transparent in its operation and the information on the activities of the Committee is readily available. A good overview about the functioning of the Committee is provided by its annual reports which contain summary of the activities and decisions of the Committee.³⁶ In 1995, the SPS Committee conducted a joint meeting with Committee on Technical Barriers to Trade (TBT Committee) to consider the implementation of the transparency provisions.

The definition of 'international standards' appoints the Codex Alimentarius Commission, the International Office of Epizootics and the International Plant Protection Convention as legislators of these standards in relevant areas and for technical assistance.³⁷

III. The Codex Alimentarius Commission

The domestic and international food safety regulations have global effect and the Codex Alimentarius Commission is a global regulatory body responsible for the international standards for food and food stuff.³⁸

Background of the CODEX

The Codex Alimentarius Commission was established in 1961 within the United Nations system as a joint partnership between the World Health Organization (WHO) and the Food and Agriculture Organization (FAO).³⁹

September 15, 2018) and Michael Friis Jensen, "Reviewing the SPS Agreement: A developing Country Perspective" Working Paper Series on Globalisation and Economic Restructuring in Africa (Centre for Development Research, Copenhagen, 2002).

³³ Simonetta Zarrilli, "WTO Sanitary and Phytosanitary Agreement: Issues for Developing Countries" Trade-Related Agenda Development and Equity Working Paper, at 11, South Centre (1999), available at: https://iatp.org/files/WTO_Sanitary_and_Phytosanitary_Agreement_Issue.pdf (visited on September 1, 2017). SPS Committee, *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures*, G/SPS/12, March 1999.

³⁴ Mohammed Saquib, "The SPS Agreement and Developing Countries: Is It a Lost Cause?" in Bibek Debroy, Mohammed Saquib *et.al.* (eds.), *WTO at Ten Looking Back to Look Beyond* 379 (Konark Publishers, New Delhi, 2005).

³⁵ Ministerial Conference, Doha, 9-14 November 2001, WT/MIN (01)/17, 20 November 2001.

³⁶ *Supra* note 21 at 50. Refer 2010 Report on Sanitary and Phytosanitary Measures available at: [http://www.ustr.gov/sits/default/files/sps%20report%20Final\(2\).pdf](http://www.ustr.gov/sits/default/files/sps%20report%20Final(2).pdf) (visited on September 12, 2018). During the years 1995-2005, 235 specific trade concerns were raised before the SPS Committee. The break-down of subjects are as follows: (a) 27 percent food safety; (b) 29 percent plant health; (c) 40 percent animal health and zoonoses; and (d) 4 percent other issues. In the largest category- animal health and zoonoses – 40 percent of the concerns raised relate to transmissible spongiform encephalopathy (TSEs), and 22 percent to food and mouth diseases (FMD), 37 percent relate to other animal health concerns and avian influenza, this information is available in Joann Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures A Commentary* 52 (Edward Elgar Publishing, Cheltenham, 2008).

³⁷ SPS Agreement, Annex A, Item 3. For technical assistance of the CODEX, the OIE and the IPPC, refer Marc Iynedjian, "The Case of Incorporating Scientists and Technicians into WTO Panels" 42 *Journal of World Trade* 2, 279-297 (2008).

³⁸ History of Food Safety: A Commentary, available at: <http://www.food-safety-and-you.com/historyofFoodSafety.html> (visited on October 3, 2017).

³⁹ Available at: <http://www.codexalimentarius.org/about-codex/codex-timeline/en/> (visited on September 1, 2017).

The contribution of the CODEX to the protection of public and fair practices in the food trade is immense. It sets standards to protect health of consumers and also ensures fair practices in the food trade. Though these standards are recommendations for voluntary application by the member countries, they serve as a basis for national legislation.⁴⁰ The membership of the CODEX is open to all states which are member of either the WHO or the FAO.⁴¹ The standards, guidelines and codes of practice of the Codex Alimentarius Commission have reference in the provisions of the SPS Agreement.⁴²

Provisions Relating to the CODEX

The SPS Agreement has given immense importance to the Codex Alimentarius Commission and was selected as a principal relevant international organization due to its technical and scientific expertise.⁴³

The preamble of the SPS Agreement provides for harmonization of sanitary measures for the protection of human health between the member states on the basis of international standards.⁴⁴ These international standards established by the CODEX for food safety are related to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling and guidelines of hygienic practice.⁴⁵ While the SPS Agreement has advocated harmonization of sanitary measures, the CODEX has provided the level of protection to be reflected in the measure is similar throughout the world.

Role of the CODEX

The standards set by the CODEX for food safety are based on the principle of sound scientific analysis and involves a thorough review of all relevant information so that they can assure quality and safety of the food stuff.⁴⁶

The standard setting activity is triggered by proposals coming from the national governments or subsidiary committees. The CODEX has power to fix priority according to which proposals for standards are to be implemented and decides which subsidiary committees must draft the standards. The draft standards are then circulated among the members and submitted to the CODEX for approval. After approval the standards are published and included in the Codex Alimentarius.⁴⁷ These standards are mere reference standards for the member countries and they are not under obligation to accept them.⁴⁸ The purpose of such standard setting activity is twofold (a) protecting the health of the consumers; and (b) ensuring fair practices in trade. Its function is thus to provide global norms aimed at reaching a high level of health protection without damaging commercial transactions.

The function of the CODEX also includes (a) identification of hazards; (b) determination of risks and development of the appropriate response to such risks; (c) establishment of levels of protection based on recommendations from scientists and experts; (d) promoting coordination of food standards work and guiding the preparation of draft standards; and (e) adopting levels of protection for food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling and guidelines for hygienic practice.⁴⁹ The CODEX has considered the issue of biotechnology in food. It has developed

⁴⁰ Available at: <http://www.codexalimentarius.org/about-codex/understanding-codex/en/> (visited on September 2, 2017).

⁴¹ Currently the CODEX has: 189 CODEX members (188 member countries and 1 member organisation- EU) 240 CODEX observers, available at: <http://www.fao.org/fao-who-codexalimentarius/members-observers/en/?no-cache=1> (visited on October 1, 2018). According to the Rules of Procedure of the CODEX Alimentarius Commission, the CODEX has one chairperson and three vice chairpersons to be elected at each annual session, a secretary appointed by the FAO and the WHO and some regional coordinators. The full text of the CODEX Rules of Procedure is available at: <http://www.fao.org/docrep/005/y2200e/y2200e03.htm> (visited on October 2, 2018).

⁴² *Supra* note 40.

⁴³ Marsha A. Echols, *Food Safety and the WTO the Interplay of Culture, Science and Technology* 100 (Kluwer Law International, Hague, 2001).

⁴⁴ SPS Agreement, para 6, of Preamble. Also refer SPS Agreement, Annex C Item 1, Annex B Item 3 (d), Articles 2.2, 3.4, 5.1, 5.7, 6.1, 7, 8, 9.1 and 10.

⁴⁵ SPS Agreement, Annex A, Item 3 (a).

⁴⁶ Sumedhya Upadhyay, "The SPS Agreement and Harmonization: A Challenge" 8 *Amity Law Review* 2, 68 (2012).

⁴⁷ Filippo Fontanelli, "ISO and CODEX Standards and International Trade Law: What Gets Said is not What's Heard" 60 *International and Comparative Law Quarterly* 4, 898 (2011).

⁴⁸ *Supra* note 46.

⁴⁹ *Supra* note 43 at 100, 101. In 1993 the CODEX defined hazard as the potential to cause harm from biological, chemical or physical source. It defined risk as a function of the probability of an adverse health effect and the severity of that effect. It has issued guidelines for all the food processing companies to install Hazard Analysis Critical Control Points. Though the SPS Agreement does not define the process of evaluation of risk assessment, it refers to the risk assessment techniques by the CODEX.

appropriate international standards with respect to food derived from biotechnology through the Ad Hoc International Task Force on Foods Derived from Biotechnology.⁵⁰ It has also considered the issue of labelling of genetically modified foods and in 2000, the Codex Committee on Food Labelling agreed to continue the process for amending the General Standard for the Labelling of Pre-packaged Foods.⁵¹

The CODEX has played a central role in setting internationally acceptable standards in the food trade. While governments through it have made progress in harmonizing standards but its consensus on key international food safety standards is lacking.⁵² Though it has created a voluminous body of international food safety regulations, its performance has fallen short of ideals. This is clear from the following points (a) state participation and influence is still unequal; (b) societal participation is biased in the favour of wealthy nations; and (c) lacks democratic credentials for not granting adequate access to different stakeholders particularly to public interest groups.⁵³ In spite of these shortcomings, the CODEX is a global regulatory regime which produces international food standards that have a strong impact on food policies of the member countries.

In addition to the broader public concern for food quality and safety, animal welfare has also emerged as an important issue in many countries.⁵⁴

IV. The International Office of Epizootics

The World Trade Organization has recognized the International Office of Epizootics as a reference organization for animal health and animal products.⁵⁵ It is also called the World Health Organization for Animal Health and sets standards for trade in animals and animal products.⁵⁶

Background of the OIE

The OIE was created in 1924. It is different from the CODEX and the International Plant Protection Convention (IPPC) as it does not operate under the auspices of the Food and Agriculture Organization of the United Nations.⁵⁷ It has an International Committee which approves new standards and meets once in a year. In addition to this, it has five regional commissions that encourage cooperation on animal health issues in their respective regions.⁵⁸

Provisions Relating to the OIE

The SPS Agreement has given immense importance to the OIE in the field of animal health protection. The preamble of the SPS Agreement has provided for harmonization of sanitary measures for the protection of animal health on the basis of international standards developed by the International Office of Epizootics.⁵⁹

Role of the OIE

The International Office of Epizootics coordinates studies on animal diseases, informs governments about spread of animal diseases and assists in the harmonization of regulations involving trade of animals and animal products.⁶⁰ It is the oldest veterinary association in the world and provides for advisory international standards. These standards are found in the two OIE's Code (Terrestrial and Aquatic) and two

⁵⁰ Fiona Macmillan, *WTO and the Environment* 145-146 (Sweet & Maxwell, London, 2001). The Medium- Term plan of the CODEX for 1998 to 2002 was the consideration of standards, guidelines and recommendations with respect to food derived from biotechnology.

⁵¹ *Id.* at 146.

⁵² John S. Wilson and Tsunehiro Otsuki, "Food Safety and Trade: Winners and Losers in a Non Harmonized World" 18 *Journal of Economic Integration* 2, 285 (2003).

⁵³ Thorsten Huller and Matthias Leonhard Maier, "Fixing the Codex ? Global Food Safety Governance under Review" in Christian Joerges, Ernst Ulrich Petersmann *et.al.* (eds.), *Constitutionalism, Multilevel Trade Governance and International Economic Law* 297 (Hart Publishing, Oregon, 2011).

⁵⁴ Jean C. Bureau and Wayne Jones, "Issues in Demand for Quality and Trade" in Barry Krissoff, Mary Bohmann *et.al.* (eds.), *Global Food Trade and Consumer Demand for Quality* 10 (Kluwer Academic/Plenum Publishers, New York, 2002).

⁵⁵ Alan Swinbank, "Like Products Animal Welfare and World Trade" 40 *Journal of World Trade* 4, 691 (2006).

⁵⁶ Laura J. Coppacher and William A. Kerr, "The Efficacy of World Trade Organization Rules on Sanitary Barriers: Bovine Spongiform Encephalopathy in North America" 39 *Journal of World Trade* 3, 430 (2005).

⁵⁷ Available at: <http://www.oie.int/about-us/> (visited on September 2, 2018).

⁵⁸ Available at: <http://www.oie.int/about-us/wo/regional-commissions/> (visited on September 1, 2018).

⁵⁹ SPS Agreement, para 6, of Preamble. Also refer SPS Agreement, Annex A Item 3 (b), Annex B Item 3 (d), Annex C Item 1, Articles 2.2, 3.4, 5.1, 5.7, 6.1, 7, 8, 9.1 and 10.

⁶⁰ Available at: <http://www.oie.int> (visited on September 6, 2018).

Manual (Terrestrial and Aquatic), which provides standard diagnostic procedure for animal diseases as well as vaccine standards related to international trade. The Fish Diseases Commission of the OIE has issued a separate code and manual pertaining to aquatic fish.⁶¹

The OIE has developed detailed procedure by which countries can be recognized as free from the outbreak of the most contagious and economically damaging animal diseases. It is the only international organization which can confer a disease free status on countries or their regions. Such recognition has a great significance for international trade and is essential for countries which indulge in exporting livestock products.⁶² The OIE collects, analyzes and disseminates scientific veterinary information, provides expertise and encourages international solidarity in the control of animal diseases. It also manages the World Animal Health Information System based on the information furnished by the member countries regarding animal diseases and also provides for rapid alert system for notification to the member countries in case of an outbreak of a disease.⁶³ In case of outbreak of any disease, it provides expert advice on sanitation programme to counter such emergency.⁶⁴

The International Office of Epizootics has undergone relatively few changes since implementation of the SPS Agreement. It has not experienced significant controversy while creating standards due to the fact that people actually are very much concerned about standards which relate to human health as compared to those which involve animal health. The most significant action was the formation of the relation between the OIE and the World Trade Organization by exchange of letters. These letters has provided for mutual consultations between the two organizations in the following manner (a) to participate in relevant meetings held by one another; (b) to exchange information on a regular basis; and (c) to assist in providing technical assistance to the developing countries.⁶⁵

V. The International Plant Protection Convention

The International Plant Protection Convention a multilateral treaty is a subsidiary body of the Food and Agriculture Organization. It is responsible for plant health issues and its main purpose is to reduce the spread of plant diseases.⁶⁶

Background of the IPPC

The International Plant Protection Convention came into force in 1952. Its Secretariat was established in the year 1989 by the FAO Conference and it is situated in Rome. The staff of the IPPC

⁶¹ Available at: <http://www.oie.int/international-standard-setting/overview/> (visited on September 2, 2018).

⁶² The OIE has developed an official list of disease free countries for following animal diseases (a) foot and mouth disease; (b) rinderpest; (c) contagious bovine pleura-pneumonia; and (d) bovine spongiform encephalopathy. Melaku Geboye Desta and Moshe Hirsch, "African Countries in the World Trading System: International Trade, Domestic Institutions and the Role of International Law" 61 *International and Comparative Law Quarterly* 1, 147 (2012).

⁶³ Claudia Orozco, "The SPS Agreement and Crisis Management: the Chile- EU Avian Influenza Experience" in Peter Gallagher, Patrick Low *et.al.* (eds.), *World Trade Organization Managing the Challenges of WTO Participation 45 Case Studies* 155 (Cambridge University Press, Cambridge, 2005).

⁶⁴ *Id.* at 156. Two Italian experts Dr. Ilaria Capua (virologist) and Dr. Stefano Marangon (epidemiologist) were recommended by the OIE to counter the avian influenza outbreak in Chile in the year 2002. Following the outbreak Chile's avian influenza free status was affected and access to export markets was closed. The Chilean authorities adopted an extensive and rigorous sanitary program aimed at controlling the spread of the disease and eradicating it. The visit of the OIE experts coupled with active participation of Chile in the World Trade Organization and the OIE resulted in a fair understanding of outbreak. The International Office of Epizootics together with the Chilean authorities successfully managed this sanitary crisis. For detailed study of avian influenza outbreak in Chile refer to Claudia Orozco, "The SPS Agreement and Crisis Management: the Chile- EU Avian Influenza Experience" in Peter Gallagher, Patrick Low *et.al.* (eds.), *World Trade Organization Managing the Challenges of WTO Participation 45 Case Studies* 150-166 (Cambridge University Press, Cambridge, 2005).

⁶⁵ Terence P. Stewart and David S. Johanson, "The SPS Agreement of the World Trade Organization: The Role of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics" in Spencer Henson, John S. Wilson *et.al.* (eds.), *The WTO and Technical Barriers to Trade* 370 (Edward Elgar Publishing Limited, Cheltenham, 2005). The agreement proposed in letters was approved by the OIE's International Committee in May 1997 and by the General Council of the World Trade Organization in October 1997.

⁶⁶ Michael R. Reed, *International Trade in Agricultural Products* 70 (Prentice Hall, New Jersey, 2001). Pascal Lamy, "The Place of the WTO and Its Law in the International Legal Order" in Charlotte Ku, Paul F. Diel *et.al.* (eds.), *International Law Classic and Contemporary Readings* 231 (Viva Books Private Limited, New Delhi, 2010).

Secretariat consists of a secretary, a coordinator and several professional officers and administrative staff. The Secretariat is also complemented by the contracting parties providing staff resources through various contributions.⁶⁷

Provisions Relating to the IPPC

The SPS Agreement has given immense importance to the IPPC in the field of plant health protection. The preamble of the SPS Agreement has provided for harmonization of phytosanitary measures between the member countries.⁶⁸ The Secretariat of the IPPC in cooperation with regional organizations operating within the framework of the International Plant Protection Convention is responsible for international standards, guidelines and recommendations for phytosanitary protection.⁶⁹

Role of the IPPC

The objective of the IPPC is to take specific actions pertaining to the prevention and spread of plant diseases and to promote measures for pest control which also includes information exchange. It has developed list of the following entities (a) plant pests on regional basis; (b) international plant import health standards; (c) glossary of phytosanitary terms; (d) basic principles governing phytosanitary laws; and (e) harmonized plant quarantine procedures. It has also developed guidelines for pest risk assessment which has provided scientific means for evaluating risks before governments determine the appropriate level of plant protection.⁷⁰

The IPPC puts obligation on the member countries to identify and manage risks to plants from diseases and pests. It has developed 'Guidelines for Pest Risk Analysis' which provides information relating to assessment and management of risks caused by pests. It has also advocated for the establishment of official plant protection organization in respective countries to inspect, research and provide information on phytosanitary issues.⁷¹

The core activities of the IPPC include governance, standard setting, information exchange, dispute settlement, capacity building and reviewing the global status of the plant protection.⁷² With these objectives in mind the IPPC Secretariat plays an important role and carries following functions (a) coordinate international efforts concerning plant quarantine issues; (b) compiles information concerning plant pest outbreaks; (c) provide technical assistance on phytosanitary issues; and (d) coordinate the implementation of the IPPC through its nine regional organizations.⁷³

Revision of the IPPC

In 1995, the FAO Conference decided to amend the IPPC in accordance with the SPS Agreement. The expert consultation in 1996 proposed a revised draft of the IPPC which was distributed to the contracting member countries for comments. After reviews of the member countries, the proposed revised convention was presented to the IPPC Conference in Rome in November 1997.⁷⁴ The Revised Text of the IPPC came into force on 2 October, 2005 and has adopted the principles of harmonization, risk assessment and pest- free areas of the SPS Agreement.⁷⁵

⁶⁷ Available at: <http://www.ippc.int/about/secretariat> (visited on October 4, 2018). At present there are 183 signatories to the IPPC.

⁶⁸ SPS Agreement, para 6, of Preamble. Also refer SPS Agreement, Annex C Item 1, Annex B Item 3 (d), Articles 2.2, 3.4, 5.1, 5.7, 6.1, 7, 8, 9.1 and 10.

⁶⁹ SPS Agreement, Annex A, Item 3 (c).

⁷⁰ *Supra* note 7 at 77.

⁷¹ A. K. Koul, *The General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO) Law Economics and Politics* 409-410 (Satyam Books Co, New Delhi, 2005).

⁷² Available at: <http://www.ippc.int/core-activities> (visited on September 4, 2018). International standards for phytosanitary measures (ISPMs) are available at: <http://www.fao.org/docrep/009/a0450e/a0450e00.htm> (visited on September 1, 2018).

⁷³ These nine international organizations are: Asia and Pacific Plant Protection Commission, Caribbean Plant Protection Commission, European and Mediterranean Plant Protection Organization, Inter-African Phytosanitary Council, North American Plant Protection Organization, Pacific Plant Protection Organization, Comité Regional de Sanidad Vegetal para el Cono Sur, Junta del Acuerdo de Cartagena and Organismo Internacional Regional de Sanidad Agropecuaria.

⁷⁴ *Supra* note 65 at 367.

⁷⁵ The IPPC was amended in 1979 and amended text became operative in 1991.

The Revised Text has provided that it is essential for all phytosanitary measures to be justified scientifically on the basis of risk assessment which is done by pest risk analysis.⁷⁶ It has also introduced following concepts in international framework involving phytosanitary protection (a) due importance is given to regional plant protection organizations in coordinating and harmonizing national phytosanitary services on regional basis; (b) specific provisions for surveillance and pest free areas; (c) strengthened arrangements for international cooperation; and (d) pest risk analysis to justify quarantine pests and import requirements.⁷⁷

In spite of the fact that the IPPC has contributed immensely to the plant protection and quarantine, it has not resorted to detailed standard setting as in the case of the CODEX and the OIE.⁷⁸ Secondly, the regional organizations have more actively participated in establishing international phytosanitary standards than the IPPC.⁷⁹

The jurisprudence developed by the Dispute Settlement Body in *EC-Hormones* dispute has a wide ranging application with respect to harmonization of sanitary and phytosanitary standards.

VI. *EC-Hormones Dispute*

The United States (US) confronted the European Union (EU) legislation imposing ban on hormones for promoting growth in livestock. The WTO Panel was set up to assess the conformity of these measures with provisions of the SPS Agreement. The Panel ruled that the measures imposed by EU are not in conformity with the provisions of the SPS Agreement.

The EU objected to the conclusion of the Panel and submitted for review to the Appellate Body. The Appellate Body upheld the Panel's ruling and interpreted and clarified rules and principles involving harmonization which runs through the entire framework of the SPS Agreement.

Definition of Harmonization

Article 3 of the SPS Agreement has promoted the use of international standards as the basis for development and adoption of domestic sanitary and phytosanitary measures. The Appellate Body stated that the object and purpose of Article 3 is to promote harmonization of sanitary and phytosanitary measures of the member countries while at the same time recognizing their right and duty involving protection of human, animal and plant health or life.⁸⁰ The Appellate Body also explained that under Article 3.1, the term 'based on' is a looser standard than 'conform to', which is provided in Article 3.2. It rejected the Panel's view that Article 3.3 is an exception to Article 3.1 and concluded that Articles 3.1, 3.2 and 3.3 apply together each addressing a separate situation.⁸¹

Measures based on International Standards

The SPS Agreement under Article 3.1 has provided obligation on the member countries to base their sanitary and phytosanitary measures on international standards except as provided in Article 3.3. With regard to the meaning of 'based on', the Appellate Body has stated that one thing is commonly said to be based on another, if the former stands or is founded upon or supported by the latter. Further, it stated that SPS measure based on a standard does not necessarily conform to that standard, such as where only some but not all the elements of the standard are incorporated into the measure.⁸² The Panel's finding that the term 'based on' was equivalent to the term 'conform to' was reversed by the Appellate Body.

⁷⁶ Irina Kireeva and Robert Black, "International Trade and Plant Protection Issues: Example of Plant Quarantine Law of the Russian Federation" 44 *Journal of World Trade* 3, 594 (2010). Pest risk analysis is concerned with regulated pests. Regulated pests means pests that can be legitimately be subjected to phytosanitary regulations without creating a potential trade barrier. Regulated pest are of two types (a) Quarantine pest; and (b) Regulated non-quarantine pest. Quarantine pest is defined as a pest of potential economic importance to the area endangered thereby and not yet present there, or present but not widely distributed and being officially controlled (Article II 'Use of Terms' of the IPPC). Regulated non-quarantine pest is in fact a plant pathogen whose presence affects the quality of seeds and other planting material. Phytosanitary measures are required for quarantine pests and regulated non-quarantine pests (Article VI.1 of the IPPC) and not for non-regulated pests (Article VI.2 of the IPPC).

⁷⁷ *Id.* at 593, 608.

⁷⁸ *Supra* note 71 at 410.

⁷⁹ *Supra* note 65 at 367.

⁸⁰ Appellate Body Report on *EC-Hormones*, WT/DS26/AB/R WT/DS48/AB/R, para. 177.

⁸¹ Simon Lester, Bryan Mercurio, *et.al.*, *World Trade Law Text Materials and Commentary* 561 (Hart Publishing, Oregon, 2008).

⁸² Appellate Body Report on *EC-Hormones*, WT/DS26/AB/R WT/DS48/AB/R, para. 163.

The obligation of the member countries to base their sanitary or phytosanitary measures on international standards in accordance with Article 3.1 depends only on the condition whether such international standards exist. The following three conditions namely (a) whether the standards reflect levels of protection or SPS measures or the type of SPS measures they recommend; (b) whether these standards have adopted by consensus or by a wide or narrow majority; and (c) whether the period during which they have been discussed or the date of their adoption was before or after entry into force of the SPS Agreement, are not to be considered.⁸³

Measures Conforming to International Standards

Article 3.2 of the SPS Agreement has made it clear that if a member country adopts SPS measure which conforms to particular international standard, then the measure is consistent with the provisions of the Agreement.⁸⁴ The Appellate Body stated that for a sanitary and phytosanitary measure to 'conform to' international standard, it is required that such a measure should embody the international standard completely and convert it into a municipal standard.⁸⁵ It has thus provided that the national measure must be identical to international standard both in structure and level of protection it embodies.

Measures Resulting in a Higher Level of Protection

The SPS Agreement under Article 3.3 has stated that the member countries can introduce sanitary and phytosanitary measures which results in a higher level of sanitary or phytosanitary protection that would be achieved by measures based on international standards, if there is a scientific justification or as a consequence of the level of sanitary and phytosanitary protection the member country determines to be appropriate in accordance with the provisions of paragraph 1 through 8 of Article 5 of the Agreement. This provision is significant in the sense that it gives the member countries, right to choose their own level of sanitary and phytosanitary protection.

The right to choose a measure providing a higher level of protection than international standards is not an 'absolute or unqualified right' and is subjected to the requirements laid down in Article 3.3 of the Agreement. The Appellate Body stated that the right of a member country to establish its own level of sanitary protection under Article 3.3 is an autonomous right and not an 'exception' from a 'general obligation' under Article 3.1⁸⁶ The requirements involves that there should either be a scientific justification for SPS measure or that SPS measure be result of higher level of protection chosen by the member country in accordance with the provisions of Articles 5 of the Agreement. In both cases, the SPS measure must be consistent with all other provisions of the SPS Agreement.

With respect to 'scientific justification' within the meaning of Article 3.3, the Appellate Body in *Japan-Agricultural Products II* dispute stated that there is a 'scientific justification' for SPS measure within the meaning of Article 3.3, if there is a relationship between sanitary or phytosanitary measure at issue and available scientific information.⁸⁷

The Appellate Body in *EC-Hormones* dispute and the Panel in the *Japan-Agricultural Products II* dispute has demonstrated that the major international trade disputes can be influenced on the basis of international standards. The importance of harmonization has been related to the frequent complaints presented by the exporters about divergent sanitary and phytosanitary measures that substantially increase the transaction costs of the trade. The use of this principle to facilitate trade has not been as intensive as desired since it has been subject to much confusion due to unclear phrasing of Article 3.⁸⁸

⁸³ Appellate Body Report on *EC-Hormones*, WT/DS26/AB/R WT/DS48/AB/R, para. 168.

⁸⁴ Michael Friis Jensen, "Reviewing the SPS Agreement: A developing Country Perspective" Working Paper Series on Globalisation and Economic Restructuring in Africa, at 6 (Centre for Development Research, Copenhagen, 2002).

⁸⁵ Appellate Body Report on *EC-Hormones*, WT/DS26/AB/R WT/DS48/AB/R, para. 170.

⁸⁶ Appellate Body Report on *EC-Hormones*, WT/DS26/AB/R WT/DS48/AB/R, para. 172.

⁸⁷ Appellate Body Report on *Japan-Agricultural Products II*, WT/DS76/AB/R, para. 79.

⁸⁸ Geraldo S. de Camargo Barros, "SPS in Agricultural Trade: Issues and Options for a Research Agenda" *Paper presented at the International Seminar "Agricultural Liberalization and Integration: What to expect from the FTAA and the WTO?" hosted by the Special Initiative on Integration and Trade, Integration and Regional Programs Department, Inter-American Development Bank, Washington DC, at 7 (2002).*

VII. Conclusion

The Role of the SPS Committee, the CODEX, the OIE and the IPPC is important for better sanitary and phytosanitary protection and for harmonization of sanitary and phytosanitary measures. In spite of this significance, their working has received little attention in the legal scholarship.⁸⁹

The SPS Committee has provided the member states with opportunity to facilitate participation and transparency and has emphasized for developing good regulatory practice for legislation involving sanitary and phytosanitary protection. It has also facilitated coordination with the CODEX, the OIE and the IPPC for obtaining advanced scientific information. The SPS Agreement has also given due importance to the participation of the CODEX, the OIE and the IPPC and has expanded their scope in the international sanitary and phytosanitary regime.

Since, SPS Agreement has expanded the scope of these international organizations, their working should be improved and the standard setting procedure should be made more transparent and fair by allowing participation of public interest groups, private entities and non-governmental organizations as observers. The standards developed by the CODEX, the OIE and the IPPC are non-binding in nature. These standards should be made mandatory at least for the developed countries, where their sanitary and phytosanitary measures create barriers to products originating from the developing countries. They should also provide scientific and technical assistance to the developing countries so that they can cope with risk assessment and scientific considerations engrossed in the SPS Agreement. This will in turn facilitate effective participation of the developing countries in the international standard setting procedure.

⁸⁹ Jeffrey L. Dunoff, “Reflections on the Varietals Dispute the SPS Agreement and WTO Dispute Resolution” in George A. Bermann, Petros C. Mavroidis *et.al.* (eds.), *Trade and Human Health and Safety* 174 (Cambridge University Press, Cambridge, 2006).