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The Harmonisation and Regionalisation Obligations of The SPS Agreement and The Issues Facing These Obligations

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1 Introduction:

1.1 Analysing a Dispute: DS506: Indonesia – Measures Concerning the Importation of Bovine Meat

On the 4th April 2016 Brazil requested consultations with Indonesia regarding certain measures imposed by Indonesia on the importation of meat from cattle belonging to the species *Bos Taurus*. Brazil claims that the measures are inconsistent with several provisions of the GATT 1994¹; the SPS Agreement²; and the TBT Agreement³. Should this dispute come before the Panel (and perhaps even the Appellate Body) it will present the Dispute Settlement Body with an opportunity to clear up some of the interpretational issues with the SPS Agreement. It will further present the Body with an opportunity to demonstrate that it is alive to the numerous and cumbersome burdens faced by many developing country Members in the implementation of the SPS Agreement and rule accordingly. For the purposes of this discussion the focus shall solely be on the SPS Agreement.

What Brazil is arguing, briefly stated, is that Indonesia applied restrictive rules and procedures to Brazil's exports of bovine meat (hereafter beef), which have the effect of prohibiting Brazil from accessing Indonesia's market. Brazil have claimed that Indonesia has discriminated against Brazil's beef when compared to its treatment of other importing countries.

In its request, Brazil explains that they have failed to obtain approval for the importation of Brazilian beef into Indonesia's territory. They explain that this is as a result of Indonesia's maintenance and adoption of restrictive rules and procedures which have the effect of prohibiting or restricting Brazilian beef from entering the Indonesian market. Brazil pointed to both a general measure as well as specific measures which they alleged violated the above-mentioned provisions of the GATT 1994; the SPS Agreement and the TBT Agreement. In terms of the general measure Brazil argued that Indonesia's restrictive measures are imposed through a combination of legal instruments, administrative actions and omissions that result in an import ban on certain bovine meat products; in a quantitative restriction on other bovine meats; and in an evidenced discrimination between Brazil and other suppliers of these

¹ Articles I:1, II:1, III:4, III:9, VIII:1(c), VIII:3, X:3(a) and XI:1.

² Articles 2.1, 2.2, 2.3, 3.1, 3.2, 3.3, 5.1, 5.2, 5.4, 5.6, 5.7, 6.1, 6.2, 6.3, 7, 8.

³ Articles 2.1, 2.2, 2.3, 2.4, 5.1 and 5.2.

products.⁴ Brazil also explained that they have reason to believe that in connection with these restrictions there are other measures and regulations adopted by Indonesia which appear to further constrain Brazilian beef exports. These include the prohibition of importation of bovine meat when domestic production is deemed to be sufficient to fulfil domestic demand; the prohibition or restriction of imports of certain animal products when the prices of these products fall below certain reference prices; importation being allowed only to certain types of use; and the trade restrictive rules regarding shipping, warehousing and transportation.⁵

Brazil explains that they take specific issue with the fact that Indonesia only accepts imports of bovine meat from countries that have entire territory declared as free of Foot and Mouth Disease (FMD), regardless of the fact that bovine meat from disease-free states or regions, with or without vaccination, holds the same sanitary status. Brazil argues that by failing to adopt the principle of regionalisation, Indonesia imposes a *de facto* prohibition on the importation of Brazilian bovine meat into its territory, by means of a sanitary measure that is against the relevant international standard and guideline governing the issue, without any sort of scientific justification or without being based on a proper risk assessment. Brazil also argues that the measure is more trade restrictive than necessary to achieve the appropriate level of protection.

Brazil further specifically states that while it has no issue in what concerns the international standard for halal products in itself, it is concerned with the different treatment bestowed on beef from different origins.

Brazil alleges that Indonesia unduly restricts market access of bovine meat through a non-transparent and intricate import-licensing regime. This regime requires at least 5 formal steps, the effort of these numerous complicated steps results in a significant obstacle to the acquisition of such license.⁶ These licenses and recommendations, all with strict deadlines, may restrict the ports of entry of the imports, and are (as Brazil argues) are not administered in a transparent manner. Brazil understands that Indonesia has failed to comply with notification

⁴ Indonesia – Measures Concerning the Importation of Bovine Meath. Request for Consultations by Brazil. WT/DS506/1.G/L/1145 G G/SPS/GEN/1486, G/LIC/D/50, G/TBT/D/49, G/AG/GEN/130. (7 April 2016).

⁵ Indonesia – Bovine Meat (2016).

⁶ This process requires at least five formal steps: (i) "Trade Operation Permit" (SIUP), as foreseen in MoT Regulation 36/2007; (ii) "Certificate of Customs Registration" (SRP), established by the Decree of the Minister of Finance number 454/KMK.04/2002, as amended by Decree of Minister of Finance number 549/KMK.04/2002; (iii) "Importer Identification Number" (API), defined in MoT Regulation 48/2015; (iv) "Recommendation from the Minister of Agriculture", as provided for in MoA Regulation 58/2015, according to Article 10 of Regulation 05/2016; and (v) "Import Approval from the Minister of Trade", according to Article 9 of MoT Regulation 05/2016.

obligations and publication requirements under the GATT 1994 (and the Import and Licensing Agreement), thus creating trade restrictive and distortive effects on imports of bovine meat. Brazil argues that this adds to the inconsistencies with WTO obligations held by Indonesia.

1.2 Harmonisation and Regionalisation within the Dispute

This paper will not seek to resolve the whole dispute, but instead seeks to identify certain specific questions regarding the SPS Agreement and examine these issues in the same manner a Dispute Settlement Body would. The first line of questioning will relate to whether Indonesia's conduct (as set out by Brazil) amounted to a violation of the Harmonization obligations imposed by Art 3.1; 3.2 and 3.3 of the SPS Agreement? In other words, has Indonesia failed to harmonize their sanitary and phytosanitary measures on as wide a basis as possible, or have they failed to base their measures on international standards, guidelines or recommendations? If this is the case, are such non-conforming measures necessary to protect human, animal or plant life or health? Are such measures consistent with the provisions of the SPS Agreement? Related to this question, in relation to the measures which do not comply with international standards, guideline or recommendation, is there a scientific justification behind these measures?

The second line of questioning centres around the issue of whether or not Indonesia has adapted their SPS measures to regional conditions? In other words, do Indonesia's measures taken in regards to Foot and Mouth Disease recognise the concept of pest or disease free areas and areas of low pest or disease prevalence? Of specific relevance here is the fact that Indonesia has adopted a practice of accepting imports of beef from countries that have had their entire territory declared as free of FMD, regardless of the fact that beef from disease-free states or regions, with or without vaccination, holds the same sanitary status. (Art 6.1; 6.2 and 6.3 are all relevant here).

Due to the fact that Indonesia is yet to answer these claims, as the dispute is still currently in the process of consultations, I am forced to test the strength of Brazil's arguments without Indonesia's comments, arguments or evidence to the contrary.

1.3 Background Information to the Dispute

It makes sense that Brazil has raised issues relating to Article 6 (regionalisation) as the WTO explains that it is geographically larger Members that voice objections to blanket bans on all their exports when a disease only exists in some regions. Furthermore, Brazil is the second

largest commercial beef producer in the world, with the United States being the first.⁷ Brazil is taking active steps to intensify their beef production sector, gaining access into the Indonesian market would be a step in the right direction of this objective.⁸ This is aimed to push their beef industry into high-value export markets.⁹ Renato Rasmussen (Rabobank) has explained that Brazil is well placed to fulfil the needs of developing countries which are experiencing a dietary shift towards higher protein content.¹⁰ Rasmussen has explained that this is due to the country's potential and ability to expand corn and soybean production.¹¹ (Corn and Soybeans are commonly used in animal feed.)

The number of countries 'eligible' to export beef to Indonesia is limited to Australia, New Zealand and the United States of America., with Australia being largest export of beef to Indonesia.¹² Factors such as low import quotas, the high price of Australian exports and the shortage in domestic production have all contributed to high beef product prices. This has, to the advantage of Brazil, placed pressure on the Indonesian government to consider Brazilian beef products.¹³ This pressure is relevant in the context of this dispute as it as an illustration of how Indonesia's strict SPS measures in relation to the importation of beef have had an effect on the price that Indonesian citizens pay. It illustrates how the SPS measures have resulted in a significant trade barrier and how such has directly impacted consumers.

The Foot and Mouth Disease, which can be introduced through the importation of fresh meat as well as frozen meat, is an obvious biosecurity risk. This risk, however, is not only a concern for local industry, but also for exporters of beef to Indonesia. Here, Australia would

⁷ "The Brazilian Beef Industry: Just how Big Is It?" < <https://www.agriland.ie/farming-news/the-brazilian-beef-industry-just-how-big-is-it/>> (accessed 15-12-2018).

⁸ Georgi Gyton "Brazil looks to ramp up beef product as global demand hots up" <https://www.globalmeatnews.com/Article/2014/10/20/Brazil-looks-to-ramp-up-beef-production-as-global-demand-hots-up>> (accessed 15-12-2018).

⁹ Georgi Gyton "Brazil looks to ramp up beef product as global demand hots up" <https://www.globalmeatnews.com/Article/2014/10/20/Brazil-looks-to-ramp-up-beef-production-as-global-demand-hots-up>> (accessed 15-12-2018).

¹⁰ Georgi Gyton "Brazil looks to ramp up beef product as global demand hots up" <https://www.globalmeatnews.com/Article/2014/10/20/Brazil-looks-to-ramp-up-beef-production-as-global-demand-hots-up>> (accessed 15-12-2018).

¹¹ Georgi Gyton "Brazil looks to ramp up beef product as global demand hots up" <https://www.globalmeatnews.com/Article/2014/10/20/Brazil-looks-to-ramp-up-beef-production-as-global-demand-hots-up>> (accessed 15-12-2018).

¹² Georgi Gyton "Brazil perseveres with efforts to open Indonesian market" <https://www.globalmeatnews.com/Article/2014/08/29/Brazil-initiates-WTO-dispute-with-Indonesia-over-beef-imports> (accessed 15-12-2018).

¹³ Adelaide Knowles "High Price of Beef Driving Indonesian Shift on Imports" < <http://www.futuredirections.org.au/publication/high-price-beef-driving-indonesian-shift-imports/>> (accessed on 15-12-2018).

identify itself as being at risk.¹⁴ This is because of its proximity and exposure through trade, with Indonesia. This risk is increased by the fact that Australia does not immunise against foot and mouth disease (as FMD has been declared non-existent in Australia). This means that if there was to be an out-break it would spread rapidly among Australian livestock.¹⁵ The impact of FMD can be devastating. These impacts can be divided into two different groups; direct losses, which occur as a result of reduced production and changes in herd structures¹⁶ and indirect losses, caused by the expense of FMD control, poor access to markets (as has been illustrated by Brazil) and the limited usage of improved production technologies.¹⁷ The disease is severe and highly contagious. It is therefore understandable that Indonesia would want to protect against the manifestation of the risks that FMD carries.

An example of the risk that FMD carries, and the problems which occur when such risk materialises: A recent outbreak of FMD in our own borders, South Africa, has already had a devastating effect on trade. FMD was identified in cattle in the Province of Limpopo. This has had the result of South Africa's status as an FMD-free country to be suspended. This will have a further impact in that exports where an FMD-free zone attestation is required will not be able to get such. As a result, a provincial ban on importing meat products from South Africa has been announced by several of our trading partners as a precautionary action to avoid the risk of outbreak in their territories. Therefore, not only will there be the cost associated with managing and controlling this outbreak, but we will suffer great losses in trade. Can one blame Indonesia for taking active steps to avoid such loss?

2 Background

Both the Agreement of the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) and the Agreement on Technical Barriers to Trade (the TBT Agreement) grant certain rights and create certain obligations for WTO Member States, with their overall purpose being the protection of human, plant and animal health and the ensuring of product quality and

¹⁴Adelaide Knowles "High Price of Beef Driving Indonesian Shift on Imports" <<http://www.futuredirections.org.au/publication/high-price-beef-driving-indonesian-shift-imports/>> (accessed on 15-12-2018).

¹⁵Adelaide Knowles "High Price of Beef Driving Indonesian Shift on Imports" <<http://www.futuredirections.org.au/publication/high-price-beef-driving-indonesian-shift-imports/>> (accessed on 15-12-2018).

¹⁶ T J D Kight-Jones and J Rushton "The Economic Impacts of Foot and Mouth Disease – What are they are they and where do they occur?" (2013) 112(3-4) Prev. Vet. Med. 161 161.

¹⁷ Knight-Jones & Rushton (2013) Prev. Vet. Med. 161.

safety respectively.¹⁸ The SPS Agreement, generally speaking, has two major objectives: the first being to protect and improve current human health, animal health and the phytosanitary situation of all Member countries; and the second: the protection of Members from arbitrary or unjustifiable discrimination which can take the form of sanitary and phytosanitary standards or measures.¹⁹

2.1 SPS Measures and the Practical Effects They Often Have

The practical effect which SPS measures have can be grouped into three categories: (1) they can, and often do, act as a barrier to trade by imposing an import ban, or by increasing product and marketing costs, thereby making it more expensive to trade; (2) they divert trade from one trading partner to another by setting regulations that discriminate across potential suppliers; and (3) they can have the effect of reducing overall trade flows by increasing costs or raising barriers for all potential suppliers.²⁰ Unfortunately, the impacts that SPS measures have has mostly been acknowledged and illustrated within a developed country context.²¹ This is unfortunate when we consider the fact that SPS measures are most likely to be a more prominent issue for the developing country, and LDC, Members.²² Members have identified certain issues and concerns they have in regards to the SPS Agreement, and its implementation. The areas of concern raised in the review of the SPS Agreement which shall be examined further in this paper relate to two issues. Firstly, the issue which (some) Members have expressed regarding Article 3. Article 3 concerns harmonisation of SPS measures around international standards. Article 3 does not create an obligation in this regard but is instead aimed at encouraging such harmonisation. Secondly, the issues raised in connection to Article 6 of the SPS Agreement, which creates obligations concerning the adaptation of SPS measures to regional conditions. This issue is often referred to as the ‘regionalisation issue’.

In relation to the issues, which have been raised by Members as well as by academics, certain proposals have been put forward in an attempt to address these issues. These proposals have taken many forms, such as guidelines, procedures or amendments to the Agreements. If these proposals are accepted by the WTO the Dispute Settlement Body (DSB) would be able to use such in the interpretation of Article 3 and 6. These proposals are useful in that they help

¹⁸ J W Kang and D Ramizo “Impact of Sanitary and Phytosanitary Measures and Technical Barriers on International Trade” (2017) 4 *JWT* 539 539.

¹⁹ S Henson, R Loader, A Swinbank & M Bredahl “The Impact of Sanitary and Phytosanitary Measures on Developing Country Exports of Agricultural and Food Products” (1999) 3.

²⁰ Henson et al (1999) 3.

²¹ Henson et al (1999) 3.

²² Henson et al (1999) 3.

identify the issues which Members have specific problem with. Whether these proposals which have been adopted will in fact have a positive effect on addressing these issues is something which must be questioned. It cannot be taken as a given that they will be successful, they need to be critical examined as to whether they fall short of making any real change in terms of the interpretation of Article 3 and Article 6. Throughout this paper, the focus will mainly be on the issues and concerns voiced by developing country Members.

2.2 The History and Significance of the SPS Agreement

Article XX of the General Agreement on Tariffs and Trade (the GATT) enables Members to enact trade measures designed to protect human, animal and plant life and/or health, on the condition that such measures do not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.²³ The SPS Agreement (and TBT Agreement) gives more substance to this general objective and both seek to regulate when such measures can be enacted, how they are to be enacted (i.e. processes and procedures required for a measure to be considered legal) and how they are to be implemented. SPS and TBT measures have become very significant in the context of international trade. Some attribute this growth in significance to factors such as increased consumer demand for safe, high-quality goods and growing concerns relating to issues of water, air and soil pollution.²⁴ Some have attributed the rise in use of SPS and TBT measures to the global decreasing use of tariffs. In a paper presented at The Conference on Agriculture and the New Trade Agenda in the WTO 2000 Negotiations Henson et al state that with the liberalisation of tariff and quantitative restrictions on trade, specifically in agricultural and food products, attention has increasingly been placed on technical regulations, labelling requirements and quality and compositional standards.²⁵ Debroy is of the view that protectionist pressures exist in every country and that the traditional tools for such protectionism has always been the use of tariffs. Due to WTO negotiations that have led to commitments to reduce the use of tariffs, this protectionism surfaces in the form of (among other non-tariff barriers) SPS and TBT measures.²⁶ Henson et al quoted a range of academics²⁷

²³ Art XX of the GATT 1994.

²⁴ A L Stoler "TBT & SPS Measures, in Practice" in J Maur & J Chauffour (eds) *Preferential Trade Agreement Policies for Development: A Handbook* (2011) 217.

²⁵ Henson et al (1999) 1.

²⁶ B Debroy "The SPS and TBT Agreements – Implications for Indian Policy" in *Indian Council for research on International Economic Relations, New Delhi Working Papers 163* (2005) 1.

²⁷ Petrey & Johnson (1993); Ndayisenga and Kinsey (1994); Thimany and Barret (1997); Hillman (1997); Skyes (1995); National Research Council (1995), Unnevehr 1999; Digges et al (1997).

when they stated that it is widely acknowledged that SPS measures can act to impede trade in agricultural and food products.²⁸

An illustration of the importance that SPS and TBT measures have come to play in international trade was illustrated in the negotiations proceeding Russia's accession to the WTO where the existence of certain Russian SPS measures on US exports of beef and pork created an obstacle to their accession.²⁹ Upon accession to the WTO a member state is obligated to adhere to the provisions of the SPS Agreement (as well as the TBT Agreement).³⁰ A challenging aspect of Russia's accession into the WTO was reaching an agreement on how it would implement the SPS Agreement and bring its regulations and practices into compliance with the Agreement.³¹ Russia had a practice of using rigid SPS requirements for imported animal and plant products, which had an adverse effect for US exporters of poultry, pork, dairy products, grains and oilseeds.³² A crucial and large part of the negotiations surrounding Russia's accession into the WTO centred around ensuring that Russia would introduce and implement laws and resolutions requiring their agencies to follow international SPS standards.³³ In a Report on Russia's Implementation of the WTO Agreement, written by the Executive Office of the President of the United States in December of 2013, it was stated that Russia's use of SPS measures were of specific concern during the accession negotiations. It was stated, rather vaguely, that questions concerning Russia's application of the SPS Agreement and Russia's specific commitments with regard to its applications of SPS measures still remained.³⁴ This can be used as illustration as to how SPS and TBT measures are significant not only in the context of international trade but furthermore have a practical effect on negotiations and policy making within the WTO.

When the SPS Agreement was entered into force with the Establishment of the WTO it was reaffirmed that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life³⁵. These Agreements (being the SPS Agreement and the TBT Agreement) were also introduced with the desire to improve human

²⁸ Henson et al (1999) 3.

²⁹ S Y Deodhar "WTO Agreements on SPS and TBT: Implications for Food Quality Issues IIM-A Working Paper # 2001-04-05" for *Indian Institute of Management Ahmedabad, Research and Publication Department* (2001) 3

³⁰ W H Cooper "Russia's Accession to the WTO and its Implications for the United States" June 2012. 8

³¹ W H Cooper "Russia's Accession to the WTO and its Implications for the United States" June 2012. 8

³² W H Cooper "Russia's Accession to the WTO and its Implications for the United States" June 2012. 8

³³ W H Cooper "Russia's Accession to the WTO and its Implications for the United States" June 2012. 8

³⁴ USA EXECUTIVE REPORT

³⁵ Subject to the condition that these measures are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail; or a disguised restriction on international trade.

health, animal health and phytosanitary in all Members. The protection and improvement of human, animal and plant life is undoubtedly of importance.

2.3 Questioning the success of the SPS Agreement

There are commentators who doubt that the SPS and TBT Agreements are actively achieving such objectives. The SPS and TBT Agreements are not universally accepted and celebrated, this is true both in an academic sense and a practical sense. Numerous commentators have expressed concerns about various aspects of the SPS Agreement. The first being Satish Y Deodhar, who holds the view that the SPS and TBT Agreements have not been consulted as much as they should be by certain industries and researchers.³⁶ He expresses further concern regarding the confusion that exists in the understanding of the difference between the SPS Agreement and the TBT Agreement.³⁷

The second, which is shared by many, is that governments may (and often do) exaggerate the requirements of health and consumer safety and effectively use SPS and TBT measures to protect domestic producers or domestic industry from fair competition.³⁸ This does not only adversely affect international trade interests, but it also has the potential to restrict the choice of goods available to consumers, thereby negatively affecting consumer welfare.³⁹ Kang and Ramizo, for example, caution that while the motivations behind the implementation of SPS and TBT measures is to ensure the quality and standard of imported goods, these measures are often excessive.⁴⁰ They explain that where these measures are excessive they can depress trade flows.⁴¹ More concerning, is where these measures are motivated by vested interests of domestic businesses or are created to benefit national self-interests they often work against the welfare of the people as costs are driven up and both consumers and importers are left unable to benefit from cheaper imported products in variety.⁴²

A third concern raised by Kang and Ramizo is the fact that while SPS and TBT measures are rising in significance in our international trading system, due to their increased

³⁶ S Y Deodhar “WTO Agreements on SPS and TBT: Implications for Food Quality Issues IIM-A Working Paper # 2001-04-05” for *Indian Institute of Management Ahmedabad, Research and Publication Department* (2001) 3.

³⁷ Deodhar (2001) *Indian Institute of Management Ahmedabad, Research and Publication Department* 13.

³⁸ J W Kang and D Ramizo “Impact of Sanitary and Phytosanitary Measures and Technical Barriers on International Trade” (2017) 4 *JWT* 539 539.

³⁹ Kang & Ramizo (2017) *JWT* 539.

⁴⁰ Kang & Ramizo (2017) *JWT* 540.

⁴¹ Kang & Ramizo (2017) *JWT* 540.

⁴² Kang & Ramizo (2017) *JWT* 540.

use, the impact that they have on trade is not yet well known.⁴³ The economic theory provides no straightforward insights on how these measures affect international flows of goods.⁴⁴

A further commonly shared concern centres around developing and least developed countries and whether SPS and TBT measures and their implementation are working to their (unfair) disadvantage. In the conclusion of their paper Kang and Ramizo conclude that the positive impact on trade derived from SPS and TBT measures and their implementation are mostly derived from ‘advanced economies’, while ‘less developed economies’ gain less or are even hurt by such measures.⁴⁵ They explain that while SPS and TBT measures can be said to be contributing to North-North trade, developing countries are largely being excluded from the gains.⁴⁶ They are not alone in this conclusion. Deodhar expresses the view that many provisions of the SPS Agreement are written in a manner that favours the Western nations.⁴⁷ In his paper Mayeda sets out way in which the SPS and TBT Agreements place greater burdens on developing countries.⁴⁸

Thus, while it is true that SPS measures are of utmost importance in international trade and serve very important functions, they were not without their problems. These problems can manifest in the interpretation and understanding of the Agreements, as they are difficult to understand, interpret and implement. This difficulty leads to problems regarding their practical effect on trade and the potential they hold to work to the disadvantage of developing and least developing member states.

3 Research Aim and Objectives

The first aim of this paper to establish a clear, coherent and accepted interpretation of the Article 3 and Article 6 of the SPS Agreement. This will be done using the legal reasoning of Reports by the Panel and the Appellate Body that have been adopted by the Dispute Settlement Body in addition to the SPS Committee Meeting Reports and academic commentaries on these works. While this paper does not purport to establish a new interpretation of the Agreements, it seeks to use existing authority to identify the interpretation of the Agreements that have been accepted as correct. Once such an interpretation has been established it shall be practically

⁴³ Kang & Ramizo (2017) *JWT* 541.

⁴⁴ Kang & Ramizo (2017) *JWT* 541.

⁴⁵ Kang & Ramizo (2017) *JWT* 561.

⁴⁶ Kang & Ramizo (2017) *JWT* 561.

⁴⁷ S Y Deodhar “WTO Agreements on SPS and TBT: Implications for Food Quality Issues IIM-A Working Paper # 2001-04-05” for *Indian Institute of Management Ahmedabad, Research and Publication Department* (2001) 6.

⁴⁸ G Mayeda “Developing Disharmony: The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries” (2004) 4 *JEL* 737 751.

applied to the legal questions surrounding Article 3 and Article 6 arising from the above discussed dispute between Brazil and Indonesia.⁴⁹ This dispute has not yet gone to the Panel, the interpretation of the Agreements shall be applied to the identified legal issues in order to predict the most probable outcome of the dispute, should it go before the Panel.

Articles 3 and 6 have given rise to disagreements amongst member states regarding the rights and obligations to which they give rise. The second aim of this dissertation is to provide an overview of the disputed interpretations. The primary sources of information regarding the contested views is the Fifth Review of the Agreement on Sanitary and Phytosanitary Measures, which was conducted at a SPS Committee Meeting on the 12 and 13 July 2018 together with the relevant Panel and AB Reports dealing with these disputed interpretations.

The third and final aim is to illustrate how these issues manifest in reality for the developing Members of the WTO and to demonstrate that these are not merely academic or theoretical problems. Here it is intended to demonstrate that the WTO Dispute Settlement Body has in fact had the opportunity to hand down findings and reports that are alive to the challenges that are specific to the developing world and are therefore adjusted accordingly. Here, while a rewording of the text so as to accommodate the developing Members' interests in a more effective manner would be the first prize, the likelihood of such is extremely minimal. Therefore, this paper shall seek, as its third aim, to demonstrate why it is important that the Dispute Settlement Body ensures that the interests of the developing Members are paid enough attention and given the necessary thought when making binding findings which impose obligations on these Members.

Here it is important to note that when speaking about the interpretation and application of the Agreements in the context of this paper, what is meant is the interpretation and application by the Dispute Settlement Body. Furthermore, where there is a reference to 'practical effect' it is not a reference to the practical effects that these Agreements have on trade as between members. Assessing the effects and implications for trade that these Agreements have is an empirical issue. What is meant, when referring to the 'practical effects', is what are the legal implications of a certain interpretation of these Agreements, and how such interpretations could and will influence the findings of the Dispute Settlement Body. It is

⁴⁹ ⁴⁹ DS506: Indonesia – Measures Concerning the Importation of Bovine Meat (Still in Consultations).

important to remember throughout this paper that this is a discussion centring around the legal aspects of the interpretation and application of the SPS Agreement.

The purpose of this discussion is therefore threefold. Firstly to examine and analyse reports which have been accepted by the Dispute Settlement Body in order to find accepted and working interpretations of the specified Articles of the SPS Agreement.⁵⁰ Linked to this objective, this interpretation (of these specific Articles) shall be applied to the legal questions arising in the Indonesia- Bovine Meat dispute where such legal questions involve these specific Articles. The second objective is to examine the issues and concerns which Members have raised in regard to these specific Articles. Here the paper shall examine what gives rise to these issues and concerns. This shall be done by examining their own submissions within Committee meetings as well as the arguments they have put forward within the Dispute Settlement proceedings. Thirdly, the proposals that have been forward by parties in resolution of these issues and concerns shall be examined. The purpose of such being to determine whether these proposals, if they were to be accepted and implemented, would have a practical effect on the interpretation of these Articles. Thus the third objective seeks to determine whether the proposals will have the effect of altering the manner in which these Articles are interpreted and applied by the Dispute Settlement Body. In order to illustrate this, it shall be determined whether or not, should the proposals be accepted and implemented by Members (and accordingly by the DSU) the outcome concerning the Indonesia – Bovine Meat Case’s predicted outcome (concerning the specific Articles) as identified in the course of the first objective would be any different.

4 The SPS Agreement

4 1 Breaking Down the Relevant Sections of the SPS Agreement

Before going further, it is necessary to expressly state that there is a difference in scope of application between the SPS Agreement and the TBT Agreement. As identified above, certain commentators have expressed concern over the fact that a lot of confusion still exists as to the difference of these two Agreements. As expressed by Dukgeun Ahn, “the jurisdictional delineation between the SPS Agreement and the TBT Agreement is often obscure”.⁵¹ In the course of this paper only provisions from the SPS Agreement, specifically Article 3 and Article

⁵⁰ Article 3.1; 3.2; 3.3 and Article 6.1; 6.2; 6.3.

⁵¹ Ahn, Dukgeun. (2001). Comparative Analysis of the SPS and the TBT Agreements 1.

6, shall be examined. It is, however, important to note that the issues arising from the SPS Agreement and the TBT Agreement often occur together, this has caused some confusion and has often led to Members citing both Agreements when raising an issue instead of identifying a specific Agreement. This paper does not seek to create a comparison between the two Agreements and therefore it is unnecessary to deal with the TBT Agreement further.

4.2 The Scope of the SPS Agreement

The WTO website introduces the SPS Agreement by posing the question of how [a Member] can ensure their country's consumers are being supplied with food that is safe to eat, while at the same time that health and safety regulations or standards (i.e. SPS measures) are not being used as an alternative for protecting domestic producers. It goes on to explain that the SPS Agreement deals with the issue of how governments can apply food safety and animal and plant health measures (in other words, SPS measures) in compliance with their WTO obligations and commitments. For a more legal understanding of the scope of the SPS Agreement we can turn to the text of the Agreement itself.

Article 1.1 of the SPS sets out the scope of the Agreement:

“This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.”

A sanitary or phytosanitary measure (“SPS” measure) is defined in para 1 of Annex to the SPS Agreement:

Sanitary or phytosanitary measure - Any measure applied:

- (a) 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;
- (b) to protect 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;
- (c) to protect 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; or
- (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all 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

In order for the SPS to be applicable it has to be proven that there is an SPS measure, which affects international trade. It is the first requirement (i.e. has to be an SPS measure) that gives rise to most of the interpretational issues. In this regard and there are a few Reports which have had to deal with this issue⁵² and for the purposes of this discussion the following shall suffice regarding the interpretation of “SPS measure”: a SPS measure is a measure which has one of three aims. Firstly, the aim of protection of human, plant, or animal life and/or health from food-borne risks; or, secondly, a measure which aims at protecting human, plant, or animal life and/or health from risks from pests or disease, or thirdly aims to prevent or limit other damage from risks from pests.⁵³ SPS measures are specifically applicable to the safety measures taken with concern to pests, diseases and food borne illness. The second requirement (that the measure affects international trade) is not one which gives rise to much interpretative problems, as any measure which has an effect on imports will meet this requirement.⁵⁴

Briefly stated, the SPS Agreement applies to all SPS measures of a WTO Member which are broadly defined as those measures which affect human, animal or plant life and health.⁵⁵

5 Unpacking the Existing Interpretation

As stated above this paper does not seek to discuss every Article of these Agreements. Instead, it has identified certain Articles through which the rest of the discussion shall be facilitated. In other words, going forth the context of the discussion shall be Article 3 and Article 6.

6 Unpacking the Existing Interpretation: Article 3 of the SPS Agreement

The following Articles of the SPS Agreement shall be examined: Art 3.1; 3.2 and 3.3 (Harmonisation); Article 6.1; 6.2; and 6.3 (Adaption to Regional Conditions); and Article 7 Transparency. Here it is once again stressed that the fact that the other Articles of the

⁵² Appellate Body Report. *Australia – Apples (2010)* Panel Reports, EC – *Approval and Marketing of Biotech Products (2006)*; Panel Reports, *US – Poultry (China) (2010)*.

⁵³ P Van den Bossche & W Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* 4 ed (2017) 938.

⁵⁴ Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 941.

⁵⁵ Jurgen Kurtz, *A Look behind the Mirror: Standardisation, Institutions and the WTO SPS and TBT Agreements*, 30 U.N.S.W.L.J. 504 (2007) 513

Agreement are not discussed herein does not mean that they are free from interpretational issues or implementation problems. I have selected Articles 3 and 6 as the subject of my dissertation because of the concerns that numerous Members of the WTO have expressed regarding their proper interpretation and application.

It is of no surprise that there are differences in SPS measures in different countries. This is due to the different factors that regulators consider when adopting SPS measures – to name but a few: consumer preferences; industry interests; geographic and climatic conditions; lobby efforts etc.⁵⁶ The difference in SPS measures among countries has been said by some to be an inhibitor to international trade, as this difference creates problems in the context of market access for exporting countries, as they have to adjust their products to conform to differing SPS measures.⁵⁷ Article 3 of the SPS Agreement seeks to address this issue. It does so by encouraging the harmonisation of Members' SPS measures. This Article encourages harmonisation, it does not place an obligation on Members to harmonise their SPS measures because there is no common standard that would enable them to do so. Article 3 gives Members three 'options' with regard to international standards, each option resulting in its own consequences.⁵⁸ These options are equally available to Members and there are no instances where one a Member will be forced to use one of the options and prohibited from making use of another.⁵⁹ The three options are that Members can either base their own SPS measures on international standards⁶⁰; conform their own SPS measures to international standards⁶¹; or where there is scientific justification to do so a Member may introduce sanitary or phytosanitary measures resulting in a higher level of SPS protection than measures based on international standards⁶².

⁵⁶ P Van den Bossche & W Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* 4 ed (2017) 951.

⁵⁷ Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 951.

⁵⁸ Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 952.

⁵⁹ Appellate Body Report, *EC Hormones* (1998), para. 104.

⁶⁰ Article 3.1: *To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.*

⁶¹ Article 3.2: *Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.*

⁶² Article 3.3: *Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.2 Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures*

6.1 Harmonisation according to Article 3.1

The ‘international standards’ in the Context of Art 3.1 refers to standards that have been set by international organisations.⁶³ The Appellate Body in the *EC – Hormones case* (1998) explained that, in order to fall within the scope of Article 3.1 a Member needs only to prove that a national standard exists, it does not need to be established how such a standard was adopted (i.e. consensus, majority vote etc).⁶⁴ A measure will be found to be based on an international standard where a measure is ‘founded’ on, ‘based’ on, or ‘built’ upon an international standard. The measure at issue in this case was a prohibition that the EC had enacted on the importation (and placing on the market) of meat and meat products treated with certain hormones for growth purposes. This dispute was brought to the DSB by the United States. The Panel found that the EC had acted inconsistently with Articles 3.1 (as well as with Article 5.1 and 5.5) of the SPS Agreement when they enacted the ban on import of meat and meat products from cattle that had been treated with certain growth hormones.⁶⁵ The EC took the matter further, to the Appellate Body. The AB agreed that the EC had acted inconsistently with Article 5.1 of the SPS Agreement. It, however, reversed the finding that the EC import was inconsistent with Articles 3.1 and 5.5 of the SPS Agreement.⁶⁶

The measure adopted by a Member, to fall under Art 3.1, need not incorporate all the elements of an international standard.⁶⁷ It will suffice if the measure comprises certain elements of such international standard and does not contradict the standard.⁶⁸ The Appellate Body in the *EC – Hormones (1998)* expressly stated that Article 3.1 does not make these international standards binding.

6.2 Harmonisation according to Article 3.2

Conforming a Member’s SPS measures to international standards, as provided in the option given by Art 3.2, is a more onerous task than simply basing SPS measures upon international

based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

⁶³ The three main organisations are: Codex Alimentarius Commission; World Organisation for Animal Health; International Plant Protection Convention.

⁶⁴ Panel Report, *EC-Hormones (Canada)* (1998). Para 8.72

⁶⁵“European Communities — Measures Concerning Meat and Meat Products (Hormones)” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm (accessed on 17-12-2018).

⁶⁶“European Communities — Measures Concerning Meat and Meat Products (Hormones)” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm (accessed on 17-12-2018).

⁶⁷ Appellate Body Report, *EC – Hormones* (1998), Para 165.

⁶⁸ P Van den Bossche & W Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* 4 ed (2017) 953

standards. The distinction between “based on” and “conforming to” is critical. The phrase “based on” has been interpreted to mean “stand on”, “founded on”, “built upon”; or “supported by”.⁶⁹ The phrase “conform to” suggests that this option requires a stricter, more rigid test. The Appellate Body, in the EC – Hormone (1998) case, has interpreted this to mean that the SPS measure has to ‘embody’ the international standard completely, and effectively converts it into a municipal standard.⁷⁰ While SPS measures which conform to international standards are presumed to be consistent with the SPS Agreement this assumption is in fact rebuttable.⁷¹ This (rebuttable) presumption of consistency exists in order to try provide Members’ with an incentive to utilise international standards and/or bring their measures into conformity with international standards.⁷² The distinction, between Article 3.1 and 3.2 is therefore important. Where a country’s SPS measures have been conformed to international standards they are less open to challenges brought under the SPS Agreement.⁷³ In other words, it would be easier for one Member State to challenge the SPS Measures of another Member State if such measures are merely “based on” international standards. In the case of such a challenge (i.e. a challenge under Art 3.1), the Member State alleging that a SPS measure has not been based on the international standard bears the burden of proving such.⁷⁴ This burden, however, is much less of a burden to bear than the burden of proof in terms of a challenge under Art 3.2. This because the Member State alleging inconsistency with Article 3.2 will also have to rebut the presumption of consistency that is created.⁷⁵

6.3 Harmonisation According to Article 3.3

The third option made available by Art 3.3 allows Member States to depart from international standards and enforce a measure which results in a higher level of protection than that which is achieved by the applicable international standards.⁷⁶ This needs to be understood as a right of a Member to choose the level of protection which they deem necessary or appropriate in their own territories.⁷⁷ This higher level of protection constitutes a greater obstacle to trade than the SPS measures which comply with either Article 3.1 or 3.2. This right is not an absolute right. This was confirmed by the Appellate Body in *EC – Hormones (1998)*. Here, if a Member

⁶⁹ Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 953.

⁷⁰ Appellate Body Report, *EC Hormones (1998)*, para 170.

⁷¹ Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 954.

⁷² Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 954.

⁷³ Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 954.

⁷⁴ Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 953.

⁷⁵ Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 954.

⁷⁶ Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 954.

⁷⁷ Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 954.

wants to rely on this option, they have to satisfy one of the two conditions: (1) there is scientific justification for their higher level protection; or (2) the measure is a result of the level of protection chosen by the Member in accordance with Articles 5.1 – 5.8.⁷⁸ Article 3.3 has been criticised and has been described as an Article which “is clearly not a model of clarity in drafting and communication”.⁷⁹

The SPS provisions relating to harmonisation can be summarised as follows: Members are encouraged to participate in a number of international standards-setting organisations (Codex Alimentarius the International Office of Epizotics (OIE) and the International Plant Protection Convention (IPPC)).⁸⁰ Members are expected to use international standards, guidelines or recommendations set out by the above organisations as a basis for their own SPS measures, although they are entitled to adopt measures amounting to a higher level of protection where there is scientific justification for such.⁸¹ While the Agreement does not prevent Members from choosing their own level of (SPS) regulatory protection, it does oblige Members to use international standards as (at least) a reference point for their own domestic regulations.⁸² By using international standards, when setting domestic standards, the SPS Agreement creates a presumption of compliance (with Article 3 of the SPS Agreement).⁸³

It is not surprising, considering the 151 WTO members that the concept of harmonisation has not been perceived or received in the same manner.

7 Issues with Article 3 of the SPS Agreement

It is important to remember that the SPS Agreement does not operate in the context of international trade law in a vacuum but rather interacts with a number of Agreements, Conventions and the like. Thus, very often when academics speak of harmonisation within international trade law they do not provide commentary solely on one Agreement or one piece of WTO law, but instead use the framework of international trade law as a whole. Here, we shall include these commentaries surrounding harmonisation in our discussion of harmonisation as so required by Article 3 of the SPS Agreement.

⁷⁸ Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 955.

⁷⁹ Appellate Body Report, *EC-Hormones* (1998), para 176.

⁸⁰ Spencer Henson, Rupert Loader, Alan Swinbank and Maury Bredahl *The Impact of Sanitary and Phytosanitary Measures on Developing Country Exports of Agricultural and Food Products* 6

⁸¹ Henson et al (1999) 6.

⁸² Jurgen Kurtz, *A Look behind the Mirror: Standardisation, Institutions and the WTO SPS and TBT Agreements*, 30 U.N.S.W.L.J. 504 (2007) 513.

⁸³ Article 3.2 of the SPS Agreement

There is not much agreement when it comes to harmonisation. Some argue that valid domestic legislative priorities (valid meaning that they are not disguised protectionist measures) should be seen as a the legitimate exercise of a State's sovereignty.⁸⁴ There is the argument that 'policy diversity' is important as it promotes 'competitive governments'.⁸⁵ Despite there being such prevalent debate around the possible benefits of harmonisation as well as the value of harmonisation, there is an increased drive towards harmonisation in the field of international trade law.⁸⁶

7.1 What Degree of Harmonisation does the SPS Agreement Envisage?

Some commentators are of the opinion that the Article 3 has not been correctly applied and implemented. They argue that the obligation it creates (the obligation on Members to base their sanitary and phytosanitary measures on international standards, guidelines or recommendations where they exist) was intended to be the main provision of the SPS Agreement.⁸⁷ Their view is that the SPS Agreement was adopted and enacted with the objective of achieving more harmonisation between Member States' SPS measures. These commentators argue that there needs to be **more** harmonisation. They contend that the provisions of the Agreement which allow for differences in country Members' SPS measures allow such difference only in instances where the difference is a minor difference in international standards; where there is scientific justification for a higher level of sanitary or phytosanitary protection; or in instances where the relevant international organisation has not recently reviewed the standard at issue and in the interim new information has shown that the matter in question may pose a greater health risk than the organisations' standards reflect.⁸⁸ Their view defines the circumstances where differentiation between SPS measures is acceptable very narrowly. It seems that they argue that where there are differences (in international standards) which are not caused by their narrow list of circumstances, these would be against the 'mandate' of the SPS Agreement. Accordingly, where they create different SPS standards and measures such should be found to be inconsistent with the SPS Agreement.

These commentators argue that the Appellate Body's finding in the Beef Hormone Case weakened the impact (of harmonisation) envisioned by the negotiators of the SPS Agreement.

⁸⁴ 739

⁸⁵ 739.

⁸⁶ 738

⁸⁷ R Neugebauer *Fine-Tuning WTO Jurisprudence and the SPS Agreement: Lessons from the Beef Hormone Case* (2000) 31 *Law & Pol'y Int'l Bus.* 1255-1260.

⁸⁸ Neugebauer (2000) *Law & Pol'y Int'l Bus.* 1259.

These commentators are specifically referring to the Appellate Body's finding in which they found that the SPS Agreement, and specifically Article 3.1, does not have the intention to transform international standards, guidelines and recommendations into binding norms and thus, that Article 3.1 does **not** require Member States to harmonise their SPS measures by conforming those measures with international standards.⁸⁹ The Appellate Body found that these international standards, guidelines and recommendations do not have obligatory force and effect.⁹⁰ In support for this argument they cite one commentator who stated:⁹¹

[T]he Appellate Body's interpretation of Article 3.1 ... gutted the mandatory language that members "shall base" their sanitary or phytosanitary measures on existing international standards.... As a consequence, it would appear that one of the central features of the SPS Agreement-the obligation to base SPS measures on existing international standards-has been converted into an idealistic but wholly unenforceable objective.

Regine Neugebauer express the view that this effect is worsened by the Appellate Body's stated view of the relationship between Articles 3.1; 3.2 and 3.3.⁹² The Appellate Body, in this decision, made it clear that these options are equally available to Member States. It also held that there is no 'rule-exception' relationship between these Articles. This was a significant departure from the Panel's interpretation of these three Articles. The panel expressed its view that Article 3.1's "based on" was intended to mean the same thing as Article 3.2's "conform to".⁹³ This informed the Panel's further view that Articles 3.1 and 3.2 were the rule (or the 'mandate'), while Article 3.3 provided an exception to such rule. Neugebauer expresses dissatisfaction with the fact that the Appellate Body accorded equal weight to the two mandates (found in Article 3) and the finding that these mandates apply in different circumstances.⁹⁴ Neugebauer expresses hope that a future Panel (or Appellate Body) will interpret Article 3 as strictly as possible.⁹⁵ In other words, his hope is that the Panel, and the Appellate Body, will, in the future, interpret Article 3 in such a way that it creates a stronger obligation on the Member States to harmonise their SPS measures with international standards. This would, in his opinion, have the effect of reducing divergence amongst Member States' SPS measures, and thus reduce obstacles to trade. Neugebauer also seems to take issue with the fact that the

⁸⁹ EC-Hormones (1998) para 165.

⁹⁰ EC-Hormones (1998) para 165.

⁹¹ Neugebauer (2000) *Law & Pol'y Int'l Bus.* 1263.

⁹² Neugebauer (2000) *Law & Pol'y Int'l Bus.* 1263

⁹³ Neugebauer (2000) *Law & Pol'y Int'l Bus.* 1262

⁹⁴ Neugebauer (2000) *Law & Pol'y Int'l Bus.* 1263.

⁹⁵ Neugebauer (2000) *Law & Pol'y Int'l Bus.* 1263.

Appellate Body found that Article 3.3 requires measures not based on international standards to require scientific justification and compliance with Article 5.⁹⁶ This issue is not elaborated on much further in his commentaries.

In criticising the Appellate Body in the *Beef Hormone*⁹⁷ dispute Neugebauer expressed the view that it was “short-sighted and unfortunate” to not make a strong statement explaining that SPS measures must be “based on scientific principles” and “not maintained without scientific evidence”, regardless of the existence or nature of any risk assessment performed.⁹⁸

Neugebauer, quite dramatically, states that the ‘creators’ of the SPS Agreement intended to impose a serious obligation on Member countries to base their SPS measures on international standards, but that the Appellate Bodies findings reduced this effort to stimulate harmonisation (on the part of the negotiators) to “little more than wishful thinking”.⁹⁹ In the course of this argument Neugebauer contends that the Appellate Body should have upheld the Panel’s finding in regards to the ‘rule-exception relationship’ between Article 3.1 and Article 3.3. He further contends that the Panel’s interpretation of the phrase “based on” in Article 3.1 should have been endorsed by the Appellate Body. The authors argue that while the Appellate Body explained its interpretation of “based on” as a less-than-identical relationship between a measure and a standard, they hope to see further Panels translate this general guideline into ‘hard numbers’.¹⁰⁰ These authors contend that the current position, created by the Appellate Body’s decision, leaves Member States lacking guidance.¹⁰¹ They argue that the guidelines given by the Appellate Body should be translated into actual tangible rules and standards. They advocate for, in such translation, the inclusion of cut-off levels, which would determine when divergence is minor enough to leave the “based on” holding intact, and when it (the divergence) has become too great to find that a measure was “based on” the standard.¹⁰² Simply put, they call for two ‘levels’ of divergence to be created, one level which can be regarded as minor and thus relatively inconsequential, and another level, which would be regarded as significant enough to find that there has been a departure from the international standard. They argue that the inclusion of such cut off levels will leave a “vast grey area in between” and thus there will

⁹⁶ Neugebauer (2000) *Law & Pol’y Int’l Bus.* 1263.

⁹⁷ Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R, WT/DS48/AB/R.

⁹⁸ Neugebauer (2000) *Law & Pol’y Int’l Bus.* 1286.

⁹⁹ Neugebauer (2000) *Law & Pol’y Int’l Bus.* 1271.

¹⁰⁰ Neugebauer (2000) *Law & Pol’y Int’l Bus.* 1273.

¹⁰¹ Neugebauer (2000) *Law & Pol’y Int’l Bus.* 1263.

¹⁰² Neugebauer (2000) *Law & Pol’y Int’l Bus.* 1273.

be “ample room for case-by-case determinations”.¹⁰³ It is clear that Neugebauer advocates for harmonisation, specifically in the context of Article 3 of the SPS Agreement. Furthermore, she seems to call for strict harmonisation, without much room for flexibility.

7.2 Harmonisation and Development

Graham Mayeda provides another line of commentary relevant to this discussion. He explains that he is of the view that harmonisation is an ineffective tool for dealing with development issues.¹⁰⁴ He explains that there are two main debates regarding harmonising domestic regulatory policies: Firstly, the debate between advocates of trade liberalisation and consumer and environmental groups.¹⁰⁵ Here the argument surrounds possible impediments to (free) trade versus the restriction on political sovereignty enjoyed over domestic regulatory standards in areas such as environmental protection and food health and safety.¹⁰⁶ The second debate exists between developed countries and developing (least developed) countries. Developed countries express concern that harmonisation will force them to adopt lower standards, while developing countries express concern that the higher standards of developed countries will act as barriers to developed countries markets.¹⁰⁷ There are also concerns in developed countries that they might have to give up their higher labour and environmental standards in order to compete with developing countries, while developing countries fear that harmonisation will force them out of their sources of comparative advantage.¹⁰⁸ One needs to remember that within this discussion, for Developing Country Members this issue of harmonisation of the SPS measures (within the context of Article 3) is only one aspect of the numerous challenges they face in carrying out their WTO obligations.¹⁰⁹

When considering whether harmonisation is in fact beneficial, especially for developing countries, the following arguments in favour of harmonisation are often brought. It has been argued that harmonisation of international standards provides efficiency gains, as exporters will only have to adapt a single international standard, instead of a multiplicity of standards.¹¹⁰ It is further contended that harmonisation can ensure that jurisdictions internalise

¹⁰³ Neugebauer (2000) *Law & Pol'y Int'l Bus.* 1273.

¹⁰⁴ G Mayeda “Developing Disharmony? The SPS and TBT Agreements and the impact of Harmonisation on Developing Countries” (2004) *JIEL* 737 737.

¹⁰⁵ Mayeda (2004) *JIEL* 737.

¹⁰⁶ Mayeda (2004) *JIEL* 738.

¹⁰⁷ Mayeda (2004) *JIEL* 738.

¹⁰⁸ Mayeda (2004) *JIEL* 738.

¹⁰⁹ E C Ezeani “Implementing the SPS Agreement: An Inversely Proportional Developing Country Obligation” 6 *Manchester J. Int'l Econ. L.* (2009) 59.

¹¹⁰ Mayeda (2004) *JIEL* 742.

the cost of the externalities that result from policy differences.¹¹¹ Some further argue that economies of scale can be realised through harmonised standards as manufacturers and service providers will be able to distribute their goods and services more readily beyond their own domestic markets when standards are harmonised.¹¹² There is of course also the benefit of transparency, as if standards are harmonised the difficulty of determining whether domestic standards are disguised trade barriers or legitimate regulatory initiatives.¹¹³

7.2.1 Developing Countries and Harmonisation

One, however, needs to stop and consider the possible issues which arise for developing countries in the context of institutional capacity and the costs which would be imposed on them by the demands of trade harmonisation.¹¹⁴ The issues centred on developing country Members and capacity under the SPS Agreement have long been and continue to be an issue.¹¹⁵ In this regard developing country Members have struggled to find a balance between limitations in their ability and capacity to implement their obligations under the SPS Agreement and the necessity for the protection of public health.¹¹⁶ The Agreement itself only requires a limited level of institutional capacity to be provided. This takes the form of enquiry points to deal with enquiries regarding adopted standards.¹¹⁷ These costs, however, are just the beginning. The implementation costs arising from harmonised standards involve more than merely adopting legislation, they involve the creation of the necessary infrastructure and development of institutions that enable exporters from developing countries to meet the applicable international standard.¹¹⁸ A further cost of compliance is the reoccurring cost of maintained of (regular) surveillance and testing programs as well as certain non-reoccurring costs such as development of laboratory infrastructure and processing facilities.¹¹⁹ Some question whether this cumbersome institutional investment is the cost of engaging in the global economy? Or can developing countries invest in other areas or sectors instead? While this question is indeed an interesting one and could help facilitate the discussion regarding harmonisation of standards it is not the purpose of this paper to find an answer to this question.

¹¹¹ Mayeda (2004) *JIEL* 742.

¹¹² Mayeda (2004) *JIEL* 742.

¹¹³ Mayeda (2004) *JIEL* 742.

¹¹⁴ Mayeda (2004) *JIEL* 744.

¹¹⁵ Ezeani (2009) *Manchester J. Int'l Econ.* L 59.

¹¹⁶ Ezeani (2009) *Manchester J. Int'l Econ.* L 59.

¹¹⁷ Kurtz (2007) *UNSWLJ* 514.

¹¹⁸ Kurtz (2007) *UNSWLJ* 514.

¹¹⁹ Kurtz (2007) *UNSWLJ* 515.

The SPS Agreement itself seems to deal with the issue of institutional investment as a responsibility (and thus burden) of the individual WTO Member.¹²⁰ Article 9.1 does, however, demonstrate a consensus amongst the developed country Members, to “facilitate the provision of technical assistance” especially to Developing Country Members.¹²¹ Article 9.2 further recognises that ‘substantial investments’ might be required for an exporting developing country to meet SPS measures. This Article, however, merely creates a non-binding obligation to “consider providing technical assistance” in these cases. There is a huge imbalance between the cumbersome institutional commitments that the SPS Agreement requires from developing countries and the largely non-binding commitments to provide such countries with technical assistance.¹²² Thus while the Agreement seems to understand that there are great cost implications for Developing Country Members it does little to help these Developing Members to carry this burden in practice.

In the specific context of the SPS Agreement, Mayeda explains that harmonisation has been one of the key motivating factors for the Agreement.¹²³ Here he questions, when considering that most of the disputes surrounding the SPS Agreement and SPS measures have involved developed countries, how the trend towards the harmonisation of SPS measures has served developing countries.¹²⁴ Mayeda also explains that the SPS Agreement has the possibility of supporting both policy convergence and policy divergence.¹²⁵ He explains that judicial interpretation of these Agreements recognises the prerogative of Members to determine the acceptable level of risk for their domestic environment while, on the other hand, the promotion of international standards seems to encourage harmonisation.¹²⁶ Without discussing this issue in depth it can be said that the SPS Agreement does allow for some flexibility within the regime, to make allowance for the recognition of developing countries’ differing capacities.¹²⁷ This flexibility’s significance, has, however, been called into question after the Appellate Body’s Decision in *Japan - Apples*^{128, 129}. In this case the United States alleged that Japan’s barietal testing requirement, which had the effect of prohibiting the import of certain

¹²⁰ Kurtz (2007) *UNSWLJ* 515.

¹²¹ Kurtz (2007) *UNSWLJ* 515.

¹²² Kurtz (2007) *UNSWLJ* 515.

¹²³ Mayeda (2004) *JIEL* 746.

¹²⁴ Mayeda (2004) *JIEL* 746.

¹²⁵ Mayeda (2004) *JIEL* 746.

¹²⁶ Mayeda (2004) *JIEL* 746.

¹²⁷ Mayeda (2004) *JIEL* 747.

¹²⁸ The Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/D245/AB/R, adopted 10 December 2003.

¹²⁹ Mayeda (2004) *JIEL* 747.

plants due to their potential as hosts of the coding moths, was inconsistent with Japan's obligations under the SPS Agreement. The Appellate Body found in favour of the United States on the basis of their finding that Japan's measure was inconsistent with Article 5.1.¹³⁰ This Appellate Body has been interpreted to have had the effect of taking away a significant discretion on the part of the regulating country to implement SPS measures based on its own scientific assessment.¹³¹ A certain degree of flexibility is still possible, however, as long as international standards are set broadly enough to recognise differences existing between different Member States, and as long as standard setting bodies ensure that developed countries participate in the process of setting these standards.¹³²

While it is true that harmonisation of SPS standards would reduce compliance costs of developing countries by reducing the number of standards with which developing countries would have to comply, the practical reality is that harmonisation has the potential to place disproportionate burdens on developing countries.¹³³ This is done in the following ways: firstly, most standards, other than those set by international bodies, are set by developed nations. This means that developing countries are made to comply with standards as set by industrialised countries.¹³⁴ Second, international standards are primarily set by developed countries.¹³⁵ The SPS Agreement relies to a large extent on international standards and, thus by extension, on the international bodies setting such standards.¹³⁶ The representational make-up of bodies which are tasked with setting these standards tend to oversee, ignore or exclude the interests of developing countries.¹³⁷ It is crucial for developing countries to take part in the setting of international standards in order to ensure that their specific needs and special circumstances are taken into account.¹³⁸ Thirdly, compliance with SPS (and TBT) measures necessarily entails a cost to the exporting nation, this has a disparate impact on developing countries.¹³⁹ This impact is further worsened by the fact that most developing countries lack adequate institutional framework or financial resources at their disposal to monitor and access compliance.¹⁴⁰ Fourth, and finally: the cost and technical capacity required to demonstrate the

¹³⁰ Japan – apples.

¹³¹ Mayeda (2004) *JIEL* 747

¹³² Mayeda (2004) *JIEL* 747.

¹³³ Mayeda (2004) *JIEL* 751.

¹³⁴ Mayeda (2004) *JIEL* 751.

¹³⁵ Mayeda (2004) *JIEL* 751.

¹³⁶ Kurtz (2007) *UNSWLJ* 517.

¹³⁷ Kurtz (2007) *UNSWLJ* 516.

¹³⁸ Henson et al (1999) 8

¹³⁹ Mayeda (2004) *JIEL* 752.

¹⁴⁰ Mayeda (2004) *JIEL* 752.

equivalence of domestic standards set by developing countries to those of importing nations.¹⁴¹ These costs take various forms: the costs incurred through participation in international standard setting bodies; the costs of improving the capacity of developing countries to participate in international standard-setting; costs of developing domestic risk-assessment capacity; as well as the costs that come with challenging SPS measures set by developed countries that represent standards higher than those set by international bodies and the costs of using the WTO dispute settlement mechanism.¹⁴² Finger and Schuler summarise some of the costs arising from compliance programmes undertaken by the World Bank between 1980 and 2000: the range of the costs incurred was USD 3.3 million spent in Turkey for the modernisation of laboratories in Turkey for the purpose of residue control to USD 108 million for a disease control project for livestock in Brazil.¹⁴³ Argentina spent over USD 80 million in an effort to improve levels of plant and animal sanitation for the purpose of improving the level of export acceptance.¹⁴⁴ These costs were incurred by these Member States in an effort to enable them to be able to harmonise their SPS standards with international standards. In order to be able to harmonise their standards with the international standards they had upgrade their infrastructure, this is a costly exercise. While I do not contend that these countries will not draw benefits from these efforts to harmonise, I aim to point out that the cost to harmonisation might act as hindrance to certain developing Member States and especially to LDC Member States. If there is going to be an instance that a stronger obligation to harmonise is enforced, they need to show that they are alive to the obstacles that a lot of the Member States will face. I argue that they need to go further than merely demonstrating that they are alive to such. I argue that should offer practical solutions and means to overcome these obstacles. I am not questioning whether harmonisation of SPS measures across the globe will be beneficial to trade. What I am arguing is that harmonisation across the globe faces many challenges. One challenge surrounds the question of what exactly Member States should be using to harmonise their standards and measures. Here the answer given seems to be international standards, guidelines and recommendations. Harmonisation would only be effective and beneficial to all WTO Member States if they all participate in setting these international standards, guidelines and recommendations. A second glaring challenge is the cost of harmonisation. This cost manifests in infrastructure; know-how; technology and capacity. A lot of the WTO Members are in fact

¹⁴¹ Mayeda (2004) *JIEL* 752.

¹⁴² Mayeda (2004) *JIEL* 752

¹⁴³ Mayeda (2004) *JIEL* 753.

¹⁴⁴ Mayeda (2004) *JIEL* 753.

developing countries and many are LDCs. Some of these Members are not in a position to be able to carry these costs. For effective and fair harmonisation to be released, commitments to provide aid need to be given.

7.2.2 Effective Participation in Negotiations and Harmonisation

A number of developing countries have raised concerns about their ability to effectively participate in negotiations on the SPS Agreement and have any real influence on its outcomes of such negotiations, this results in them having an inconsequential influence on its interpretation, application and implementation by both the DSB and other WTO Members.¹⁴⁵ These countries are not concerned with attending SPS Committee meetings or meetings of the international organisations which set international standards but rather with their ability and capacity to understand and contribute to the discussions which take place within these organisations and committees.¹⁴⁶ In this context technical and scientific know-how is a major constraint for developing countries.¹⁴⁷ Lack of (effective) participation in the SPS Agreement leads to concerns of an inability of developing country member to benefit from the Agreement.¹⁴⁸ While at face value these countries are able to participate in the discussions, negotiations and drafting of the SPS Agreement this does not translate to an ability to participate in the Agreement. This is because their participation is extremely limited, mostly by their lack of technical and scientific know-how. Their participation is not able to yield them any real influence, accordingly they find themselves unable to voice their specific concerns or enact any real change. This is an obvious concern, as a lack of an ability to effectively participate in the Agreement results in the workings of the Agreement¹⁴⁹ being driven towards the priorities held by developed country Members.¹⁵⁰ An illustration of what can happen when developing countries are not represented in the bodies which set international standards is what happened when the Codex Alimentarius Commission tried to develop a standard for couscous. In this process couscous was defined as a product made exclusively from wheat despite the fact that in sub-Saharan Africa couscous is made from other crops.¹⁵¹ If such standard had in fact been accepted and implemented by importing countries it would have had

¹⁴⁵ Henson et al (1999) 8

¹⁴⁶ Henson et al (1999) 8.

¹⁴⁷ Henson et al (1999) 8.

¹⁴⁸ Henson et al (1999) 9

¹⁴⁹ Developing countries have voiced their inability to implement and/or respond to key elements of the SPS Agreement which includes risk assessment, development and implementation of international standards, demonstrating equivalency and dispute settlement. (Henson et al (1999) 9)

¹⁵⁰ 9.

¹⁵¹ Kurtz (2007) *UNSWLJ* 519.

disastrous effects on exports of couscous made by some of the poorest countries in the world.¹⁵² The definition was altered in this case at a later stage all thanks to the intervention of a single representative from sub-Saharan Africa.¹⁵³ It is thus evident that more attention needs to be paid to the internal deliberative process of particular international standardisation bodies.¹⁵⁴ This is even more true when one considers that the SPS Agreement has accorded a significant degree of weight to the work of outside organisations, which do not operate on the same basis of consensus as the WTO does and often operate in such a manner that marginalises and excludes the interests of Developing Country Members.¹⁵⁵

The solution to the problem of participation is, unfortunately, not as straightforward as one would think. While amendments to formal rules and processes regarding participation will not affect some of the more practical barriers to participation by poorer countries such as the cost of transportation, language and expertise.¹⁵⁶ Some developed country Members have shown that they are alive to this challenge faced by developing country members and in an effort to provide aid for their developing counterparts a few of them have donated financial resources to this cause. The Japanese Government donated USD 49 470.00 to the Standards and Trade Development Facility (STDF) (2015); The German Government donated EUR 15 000.00 to the STDF, with the specific objective of helping developing countries and least developed countries establish and implemented SPS standards and expand their ability to gain or maintain access to international markets (2015). The US donated USD 300 000.00 to the STDF, which were to be allocated to help developing countries comply with international SPS measures and to gain access to markets (2015). Ireland donated EUR 350 000.00 to technical assistance programmes for developing countries, with the general aim of helping developing countries play a more active role in the multilateral trading system (2015). Sweden pledged to donate SEK 40 million to the STDF during the period of 2015 – 2018 with the aim of helping developed countries comply with international SPS standards and as a result gain access to more international markets. However, it can be noted that most of these donations were made in 2015 and it seems that the enthusiasm to help the developing countries has seen a slowdown. This is hardly surprising in the current global climate we see today, with the rise of policies such as Trump’s Administration’s “America First”.

¹⁵² Kurtz (2007) *UNSWLJ* 519.

¹⁵³ Kurtz (2007) *UNSWLJ* 519.

¹⁵⁴ Kurtz (2007) *UNSWLJ* 523.

¹⁵⁵ Kurtz (2007) *UNSWLJ* 523.

¹⁵⁶ Kurtz (2007) *UNSWLJ* 523.

In essence: it is clear, that in many cases developing countries lack the capacity to contributing international standards. This lack of capacity can (and does) result in an under-representation in international standard-setting bodies.¹⁵⁷ This can call the legitimacy of the standards set by such bodies into question.¹⁵⁸ The rules applied globally need to be perceived as being fair in both application and outcome. A way in which the WTO has attempted to achieve this perception is to adopt a consensus-based approach when adopting new laws, rules, regulations and the like. In this context, the legitimacy of the standards can be called into question on two fronts. Firstly, where there is a drive to use international standards the task of setting these standards is allocated outside of the WTO, this means that the consensus-based approach to the setting of new rules, laws and standards is not applied to the setting of these standards. Secondly, the representation of developing countries (and LDCs) in the bodies which set these international standards is severely lacking. Thus, the standards they set will inherently lack insight into the specific circumstances and challenges that the developing Member States face. The standards are only being set by the Developed Member States but are expected to be adapted by the Developing Member States and LDC Member States. The legitimacy of this expectation is questionable. Adding to this is the fact that there is not set procedure on how these bodies set international standards. The lack of transparency adds to questions surrounding these standards' already questionable legitimacy.

It is clear that the obligation, which has been created in Article 3, to base a regulatory standard on an internationally harmonised benchmark (where such benchmark) exists is of particular concern to the developing country members.¹⁵⁹

7.3 Harmonisation of Rules vs Harmonisation of Standards

There is the further issue of whether rules or standards is best for the developing country Members to adopt. Rules are more rigid and severe. While standards provide a certain level of flexibility. Put differently, on the one hand an application of a rule to certain facts decides the issue at hand. On the other hand, standards are used to guide a decision-maker in his or her determination and provide such decision maker with a framework in which he or she is to consider the relevant factors. Kevin E. Davis articulates the difference between rules and standards quite elegantly when he explains that in his view rules (a definition of conduct) restrict the role of the adjudicator (or decision maker) to simply applying the permissible rules

¹⁵⁷ Mayeda (2004) *JIEL* 753.

¹⁵⁸ Mayeda (2004) *JIEL* 753.

¹⁵⁹ Kurtz (2007) *UNSWLJ* 505.

of conduct to the facts of a case before him or her. This is in contrast to the role that the adjudicator has when applying standards. This is due to the fact that standards leave the specification of the permissible conduct and the application of such to the facts up to the adjudicator.¹⁶⁰ A very simple example is given by Kaplow:

“A rule [would] prohibit “driving in excess of 55 miles per hour on expressways” ... [while] a standard [would] prohibit “driving at an excessive speed on expressway”.”¹⁶¹

This is an important decision and developing countries should carefully analyse the difference between these standards and rules and determine which would be more advantageous for their interests within the context of development and harmonisation. There is some room for debate regarding whether developing countries should adopt (bright line) rules rather than standards (that lend themselves to interpretation by adjudicators).¹⁶² Here Mayeda suggests that when recognising the contextual nature of law, one should favour the adoption of standards instead of rules. Posner, on the other hand, advocates for developing countries to adopt rules, for two reasons. Firstly, rules are easier to apply, which ultimately means that using rules is cheaper and more likely to be accurate in their application.¹⁶³ This is because of the fact that the adjudicator/decision-maker’s role is limited to merely applying the given rule to the facts of the matter. Secondly, when rules are used it becomes easier to monitor judges and thus the likelihood of bribery as well as the influence of politics in the judicial process is reduced.¹⁶⁴ Hay et al add that another benefit of using rules instead of standards is that rules can immediately be used by courts as well as private parties. In contrast to standards which often require complex forms of legal regulation which require a shift in legal and political culture before they can be effectively put in place.¹⁶⁵ This view is not free from criticism. Davies argues that small jurisdictions should rather prefer standards, explaining that determining an appropriate set of rules that correspond to the specific requirements of the domestic situation in any given developing countries will involve significant fixed costs, resulting from research and communication costs.¹⁶⁶ Mayeda explains that the adoption of standards will be better for developing countries on the basis of institutional capacity.¹⁶⁷ This is because the costs of

¹⁶⁰ L Kaplow “Rules Versus Standards: an Economic Analysis”(1992) 42 *Duke Law Journal* 559.

¹⁶¹ Kaplow 560.

¹⁶² Mayeda (2004) *JIEL* 749.

¹⁶³ Mayeda (2004) *JIEL* 750.

¹⁶⁴ Mayeda (2004) *JIEL* 750

¹⁶⁵ Mayeda (2004) *JIEL* 750.

¹⁶⁶ Mayeda (2004) *JIEL* 750.

¹⁶⁷ Mayeda (2004) *JIEL* 750.

developing a highly specific rule based regulatory system (in terms of financial recourses and economic and legal expertise) is a big burden for developing countries.¹⁶⁸ He therefore explains that it would make sense for international bodies to adopt standards instead of rules when considering the harmonisation of legal standards in the area of SPS measures, as such would require less investment from developing countries for evaluating the suitability of the regulations for their domestic context.¹⁶⁹ Put differently adopting standards would lower the costs necessary to ensure participation of developing countries in international standard setting.¹⁷⁰ Lastly, in this regard, the legitimacy of international regulations will be increased where they are broad enough to accommodate the different domestic needs of developed and developing countries.¹⁷¹

8 Developing an accepted interpretation: Article 6 of the SPS Agreement

Article 6 creates obligations upon Members within the context of the issue of regionalisation. More specifically the obligation to adapt SPS measures to regional conditions.¹⁷² This obligation has also been worded as the obligation to adapt SPS measures to SPS characteristics of the area from which the product originated and to which the product is destined.¹⁷³ This obligation exists due to the fact that sanitary and phytosanitary conditions (more specifically pest and disease prevalence) are independent of territorial boundaries and thus will differ within a country.¹⁷⁴ These differences exist due to variations in climate, environment, geographic conditions and the regulatory systems in place to control or eradicate pests or diseases within a country's borders.¹⁷⁵ It is therefore desirable for SPS measures to be adapted to the conditions which exist in the region of origin of the product, where such adaptation is not done it can constitute a severe obstacle to trade.¹⁷⁶ Members have been further encouraged to recognise the concepts of pest-or disease-free areas and areas of low pest or disease prevalence.¹⁷⁷ Article 6 places a burden on exporting Members to provide evidence to demonstrate a claim that areas/regions within their territories are compliant with this concept.¹⁷⁸

¹⁶⁸ Mayeda (2004) *JIEL* 750.

¹⁶⁹ Mayeda (2004) *JIEL* 751.

¹⁷⁰ Mayeda (2004) *JIEL* 751.

¹⁷¹ Mayeda (2004) *JIEL* 751.

¹⁷² Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 975.

¹⁷³ Ezeani (2009) *Manchester J. Int'l Econ.* L 67.

¹⁷⁴ Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 974.

¹⁷⁵ Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 974.

¹⁷⁶ Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 974.

¹⁷⁷ Ezeani (2009) *Manchester J. Int'l Econ.* L 67.

¹⁷⁸ Ezeani (2009) *Manchester J. Int'l Econ.* L 67.

Article 6.1 creates the general obligation on Members to ensure that their SPS measures are adapted according to the SPS characteristics of both the region of origin and the destination¹⁷⁹, while Article 6.2 concerns the obligation to recognise the concept of pest – or disease- free areas, and areas of low pest – or disease- prevalence¹⁸⁰. The Appellate Body has expressed that Members have a “degree of latitude” in the determination of how to ensure the adaption (of SPS measures) required by Article 6.1, or how to implement the recognition of pest – or disease-free areas and areas of low prevalence as so required by Article 6.2.¹⁸¹ Article 6.3 is applicable specifically when an exporting Member Country asserts that an area or zone within its territory is pest-or disease free or an area if low pest or disease prevalence.¹⁸²

Article 6 is often recognised as a set of regionalisation requirements which attempt to respond to the need to minimise the negative effects that SPS measures can have¹⁸³ by requiring Members to adapt their SPS measures to regional SPS characteristics.¹⁸⁴ What is meant by SPS characteristics is the level of prevalence of specific diseases or pests, the existence of eradication or control programs and the appropriate criteria or guidelines which may be developed by the relevant international organisations.¹⁸⁵ Thus, where Article 6 is implemented properly and fairly it can have the effect of facilitating trade.

Article 6 can be said to face two conflicting interests: exporting Members’ interest in having a mechanism to ensure that their exports are not unduly affected by an outbreak of diseases/pests and the interests of Members in implementing sufficient SPS measures necessary to prevent entry, establishment, or spread of pests or diseases.¹⁸⁶ It is critical that institutions, especially the WTO Dispute Settlement Body find a balance between these two interests. If, on the one hand, too strong a mechanism is given to exporting Members, importing Members will be forced to face unreasonably high risks of having unwanted pests or diseases

¹⁷⁹ Article 6.1: *Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, inter alia, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.*

¹⁸⁰ Article 6.2: *Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.*

¹⁸¹ Appellate Body Report, *India – Agricultural Products* (2015), para 5.137.

¹⁸² Van den Bossche & Zdouc *The Law and Policy of the World Trade Organization* 975.

¹⁸³ SPS measures are often seen and used as trade barriers for agricultural goods.

¹⁸⁴ N N Saika “Seeds, Trade, Trust: Regionalization Commitments under the SPS Agreement” (2017) 20 *Journal Of International Economic Law* 855.

¹⁸⁵ Saika (2017) *JIEL* 864.

¹⁸⁶ Saika (2017) *JIEL* 855.

spread within their territory.¹⁸⁷ While on the other hand, if the mechanism is too strong, in favour of the importing Members, they would be able to impose nationwide measures which are unnecessary and hinder the export of goods which have a zero SPS risk.¹⁸⁸

Until quite recently the legal issues surrounding Article 6 had not been brought before the WTO Dispute Settlement Body. The first panels which have provided legal analyses of Article 6 were those in the *India – Agricultural Products*¹⁸⁹ dispute; *US – Animals*¹⁹⁰ dispute; and *Russia – Pigs (EU)*¹⁹¹. Only the *India – Agricultural Products* dispute and the *Russia – Pigs (EU)* went before the Appellate Body.¹⁹² There is currently the Brazil-Indonesia dispute (regarding the prohibition on the importation of bovine meat). This dispute is still in the consultations phase, however, should these consultations fail this will only be the fourth dispute which rises the issue of regionalisation (Article 6) before the Panel.

8.1 Interpretation found in the *India – Agricultural Products (2015)* dispute

In *India – Agricultural Products (2015)* the US had claimed that India's measures operated to explicitly ban poultry from all parts of a country in which Avian Influenza (AI) was detected anywhere in that country.

The United States argued that this precluded the application of AI restrictions on a regionalised basis as provided for in the Terrestrial Code (which contained the relevant international standard applicable in the context of AI) and as required by Article 6.1 of the SPS Agreement.¹⁹³ In other words, the US argued that these measures were inconsistent with India's Article 6.1 and 6.2 obligations due to the fact that (a) India had failed to adapt their SPS measure to the regional conditions, and (b) had failed to recognise disease (IA) free areas/zones or areas/zones of low disease (IA) prevalence. India, on the other hand, argued that the OIE's Terrestrial Code together with Article 6.1 of the SPS Agreement allowed importing country Members to decide whether or not to recognise disease free areas/or areas of low disease

¹⁸⁷ Saika (2017) *JIEL* 856.

¹⁸⁸ Saika (2017) *JIEL* 856.

¹⁸⁹ WTO Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R and Add.1, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R.

¹⁹⁰ WTO Panel Report, *United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina*, WT/DS447/R and Add.1, adopted 31 August 2015.

¹⁹¹ WTO Panel Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/R, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R.

¹⁹² Saika (2017) *JIEL* 856.

¹⁹³ Panel Report *India – Agricultural Products* 7.619

prevalence, based on factors such as the level of prevalence of a specific pest or disease, and the relevance of such areas.¹⁹⁴

The Panel found in favour of the US, and held that India's AI measures failed to recognise the concepts of disease-free areas and areas of low disease prevalence and further were not adapted to the SPS characteristics of these areas. Accordingly, the Panel found that India were in fact in breach of Article 6.1 and Article 6.2.¹⁹⁵ India appealed against the Panel's understanding of the relationship between Article 6.1 and Article 6.3.¹⁹⁶

The Appellate Body considered not only the text, but also the structure and content of Article 6, including the relationship between each provision.¹⁹⁷ In the context of Article 6.1 the Appellate Body noted, firstly, that the first sentence refers to the requirement to 'adapt' SPS measures to certain regional conditions and imposes a specific obligation on Members to ensure that their SPS measures are 'adapted' to the 'sanitary or phytosanitary characteristics' of the areas from which the product is originated and to which the product is destined.¹⁹⁸ Here the Appellate Body clarified that the a Member's obligation (to ensure adaptation) applies generally and in connection with each specific SPS measure maintained by each Member.¹⁹⁹ The Appellate Body noted, in terms of 'adaptation' as required by Article 6.1 (first sentence), the fact that Article 6 does not specify a particular or specific manner in which a Member is to ensure adaptation of its SPS measures.²⁰⁰ The Appellate Body also noted that Article 6.1 specifies the non-exhaustive elements that Members must take into account when assessing the SPS characteristics of a region.²⁰¹ Article 6.1 therefore contains the basic obligation of regional adaptation, delimits it geographically, covers SPS measures generally as well as specifically, and non-exhaustively states the considerations for assessing the SPS characteristics of relevant areas.²⁰² The Appellate Body importantly clarified pest- or disease-free areas and areas of low pest or disease prevalence (which are addressed in Article 6.2 and 6.3) are 'subsets of all the SPS characteristics of an area' that needs to be considered under Article 6.1.²⁰³ The Appellate

¹⁹⁴ Panel Report *India – Agricultural Products* 7.623

¹⁹⁵ Panel Report *India – Agricultural Products* 7.713 and 7.714.

¹⁹⁶ R Pratap "The First WTO Appellate Body Report on Regional Adaptation under the SPS Agreement" (2016) 13 *Manchester J. Int'l Econ. L.* 84.

¹⁹⁷ Pratap (2016) "*Manchester J. Int'l Econ. L.* 84.

¹⁹⁸ Appellate Body Report, *India – Agricultural Products* (2015), para 5.131.

¹⁹⁹ Appellate Body Report, *India – Agricultural Products* (2015), 5.131.

²⁰⁰ N N Saika "Seeds, Trade, Trust: Regionalization Commitments under the SPS Agreement" (2017) 20 *JIEL* 864.

²⁰¹ Appellate Body Report, *India – Agricultural Products* (2015), 5.135.

²⁰² Pratap (2016) "*Manchester J. Int'l Econ. L.* 86.

²⁰³ Saika (2017) *JIEL* 863.

Body explained that Article 6.3 is one possible manner in which a Member can ensure its compliance with Article 6.1.²⁰⁴ The Appellate Body further noted that where a SPS measure, or SPS regulatory scheme, explicitly forecloses the possibility of the recognition of the concepts of a pest- or disease-free area and areas of low pest or disease prevalence in cases where these concepts are relevant to the specific disease addressed by the SPS measure at question, then this SPS measure will be inconsistent with Article 6.2.²⁰⁵

8.2 Interpretation found in the Russia – Pigs (EU) Dispute

In *Russia – Pigs (EU)* the dispute concerned certain SPS measures imposed by Russia on imports of pigs, pork and other pig products from the EU as a result of African swine fever (ASF) outbreaks within the EU. Russia had reacted to such outbreaks by imposing an EU-wide import ban, as well as individual import bans in respect of pig, pork and other pig products from 4 EU member states.²⁰⁶ The EU challenged both these bans, one of the challenges being that they were inconsistent with Articles 6.1; 6.2; and 6.3. The Appellate Body explains that the relevant regional SPS characteristics are the specific risk as to the likelihood of entry, establishment or spread of pests or diseases at issue within the territory of an importing Member and the associated potential biological and economic consequences.²⁰⁷ If the SPS characteristics in question are relevant to the existence of pest- or disease-free areas and areas of low pest or disease prevalence, an importing Member will have to (as part of its assessment of the SPS characteristics) make a determination as to the pest/disease status of the given area pursuant to Article 6.2.²⁰⁸

In regards to Article 6.2 of the SPS Agreement the Appellate Body, in the *India – Agricultural Product [2015]* dispute confirmed that “pest- or disease-free areas” as well as “areas of low pest or disease prevalence” are a subset of all the SPS characteristics of an area/region that may call for the adaptation of an SPS measure.²⁰⁹ This is significant as it means that “pest- or disease-free areas” and “areas of low pest or disease prevalence” are not exhaustive of the SPS characteristics of an area/region that may require the adaptation of an

²⁰⁴ Appellate Body Report, *India – Agricultural Products [2015]* para 5.133.

²⁰⁵ Appellate Body Report, *India – Agricultural Products [2015]* para 5.138.

²⁰⁶ World Trade Organisation “DS475: Russian Federation — Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds475_e.htm (accessed on 16-12-2018).

²⁰⁷ Saika (2017) *JIEL* 864.

²⁰⁸ Saika (2017) *JIEL* 864.

²⁰⁹ Appellate Body Report, *India – Agricultural Products (2015)*, 5.133.

SPS measure.²¹⁰ The first sentence of Article 6.2 creates the obligation on WTO Members to recognise the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, while the second sentences provides a non-exhaustive list of factors that the determination of such areas must be based on.²¹¹ These factors include: geography; ecosystems; epidemiological surveillance; and the effectiveness of SPS controls.²¹² There are some commentators that have raised the issue that wording of Article 6.2 is ambiguous in terms of its duration and actions required thereby.²¹³

The Appellate Body's findings, in the *Russia – Pigs (EU)* dispute, offers some clarity in this regard. Firstly, it rejected the notion that Article 6.2 merely requires an acknowledgment of the concept of regionalisation in the form of 'abstract ideas' and in doing so imposes a less stringent obligation than Article 6.1.²¹⁴ When providing its interpretation of Article 6.2 the Appellate Body started off with 2 premises: firstly, the obligation to recognise the concepts of pest- or disease-free areas and areas of low pest or disease prevalence is part of the overarching obligation to ensure adaptation of SPS measures (as prescribed by Article 6.1) as an ongoing obligation; and secondly: the obligation created by Article 6.2 must be interpreted in light of the fact that Article 6.3 envisages that exporting Members may make the claims that areas within their territories are pest- or disease-free areas and areas of low pest or disease prevalence.²¹⁵ With these two points in mind the Appellate Body held that the obligation created by Article 6.2 requires the importing Member to provide the exporting Member with an "effective opportunity" to make such claim and, by doing so, render the concepts of pest- or disease-free areas and areas of low pest or disease prevalence operational.²¹⁶ The Appellate Body also explained that the circumstances of the case and the particular instrument at issue will (or should) be the panel's focus (when hearing a dispute surrounding Article 6 of the SPS Agreement).²¹⁷ While this has indeed provided clarification on Article 6.2 there are still some unanswered questions: such as what would constitute an 'effective opportunity' for the exporting Member to make the required claim?²¹⁸ This question is important in practice, as if one fails to provide an effective opportunity it would amount to a failure to comply with the

²¹⁰ Prata (2016) "*Manchester J. Int'l Econ. L* 86.

²¹¹ Saika (2017) *JIEL* 865.

²¹² Saika (2017) *JIEL* 865.

²¹³ Saika (2017) *JIEL* 865.

²¹⁴ Saika (2017) *JIEL* 865.

²¹⁵ Saika (2017) *JIEL* 865.

²¹⁶ Saika (2017) *JIEL* 865.

²¹⁷ Saika (2017) *JIEL* 865.

²¹⁸ Saika (2017) *JIEL* 865.

obligation created in Article 6.2. While the Appellate Body failed to answer what exactly constitutes an effective opportunity it did explain that the following elements, of the SPS measure at hand, were insufficient to constitute an ‘effective opportunity’: (1) the fact that the relevant legislation included the definition of ‘regionalization’; and (2) the fact that the relevant regulation made a general reference to Chapter 4.3 of the Terrestrial Code (an international standard relevant to the SPS measure at hand).²¹⁹ The Appellate Body further rejected the consideration that the regulation stipulated the permission of import from areas free of ASF and a relevant condition to recognise a given areas as free of ASF as an ‘effective opportunity’ in this regard.²²⁰

8.3 Interpretation of Article 6.3

Finally, in regards to Article 6.3, the Appellate Body found that this Article specifies what must be demonstrated by a Member which seeks recognition of a specific area within its territory as a pest- or disease-free area (or an area of low pest or disease prevalence).²²¹ Put differently, while Article 6.1 and 6.2 sets out the requirements that importing Members have to meet to ensure compliance, Article 6.3 creates the obligations that exporting Members have in this regard.²²² The first sentence of Article 6.3 explains that exporting Members claiming the existence of pest- or disease-free areas and areas of low pest or disease prevalence within their territories must provide the evidence necessary to objectively demonstrate that the specified areas are, and will remain, pest- or disease-free areas and areas of low pest or disease prevalence.²²³ The second sentence of Article 6.3 creates the obligation on exporting Members to give reasonable access to the importing Member for inspection, testing and any other relevant procedures.²²⁴ The Appellate Body, in *Russia – Pigs (EU)* provides some answers to the question of what kinds of evidence an exporting Member needs to provide: “particularized evidence with respect to the pest or disease and the area concerned”²²⁵; which is ‘sufficient to enable the importing Member ultimately to make an objective “determination” ... within the meaning of the second sentence of Article 6.2’^{226, 227} It is therefore clear that generic information or unsubstantiated assertions would not be enough to comply with this

²¹⁹ Saika (2017) *JIEL* 866.

²²⁰ Saika (2017) *JIEL* 866.

²²¹ Appellate Body Report, *India – Agricultural Products (2015)* para 5.140.

²²² Saika (2017) *JIEL* 867.

²²³ Saika (2017) *JIEL* 867.

²²⁴ Saika (2017) *JIEL* 867.

²²⁵ Appellate Body, *Russia – Pigs (EU)* para 5.63.

²²⁶ Appellate Body, *Russia – Pigs (EU)* para 5.64.

²²⁷ Saika (2017) *JIEL* 868.

obligation.²²⁸ The Appellate Body found that, based on the inclusion of the word ‘necessary’, exporting Members cannot be expected to provide evidence that is excessive or not relevant to a determination (by the importing Member) in this regard.²²⁹ It is important for the exporting Member to remember that it has to prove that area/region at issue is a PDFA or ALPDP not only at the point of time in question but are likely to remain so.²³⁰ An illustration of the significance of this can be found in the *Russia – Pigs (EU)* dispute: here the EU had established protection and surveillance zones along with implementing protective measures upon the first outbreak of ASF in Latvia, however, within a month new outbreaks outside the designated buffered or infected areas in Latvia were reported.²³¹ The Panel found (this finding was not appealed in front of the Appellate Body) that the EU had failed to provide evidence relating to “the implementation or modification of control measures following the first outbreak in the territory at issue”²³².²³³ The Panel concluded, based on the failure to provide this evidence, that the EU had not provided the evidence necessary to objectively demonstrate that the areas at issue were likely to remain free of ASF.²³⁴

8.4 The Relationship between the Article 6.1; 6.2; and 6.3

As to the relationship between the three provisions the Appellate Body noted that it is its understanding that the main and overarching obligation of Article 6 is for Members to ensure that their SPS measures are adapted to regional SPS characteristics, as set out in Article 6.1.²³⁵ The Appellate Body held that the remainder of Article 6 operates so as to elaborate on certain specific aspects of this obligation, as well as the respective duties that apply to importing and exporting Members in connection with this.²³⁶ The Panel, in *US – Animals* explained that “Article 6 contemplates an interaction in good faith between the two Members, ultimately aimed at the ‘adaptation’ of a measure under Article 6.1)”²³⁷ It is important that this main objective behind these provisions is not lost in the language of adjudication and that Members do not lose sight of the fact that Article 6 (along with its corresponding guidelines) is there to facilitate trade between each other. Another important aspect of the relationship between the

²²⁸ Saika (2017) *JIEL* 868.

²²⁹ Saika (2017) *JIEL* 868.

²³⁰ Saika (2017) *JIEL* 868.

²³¹ Saika (2017) *JIEL* 688.

²³² Appellate Body Report, *Russia – Pigs (EU)* para 5.63.

²³³ Saika (2017) *JIEL* 868.

²³⁴ Saika (2017) *JIEL* 868.

²³⁵ Appellate Body Report, *India – Agricultural Products (2015)*, 5.140.

²³⁶ Appellate Body Report, *India – Agricultural Products (2015)*, 5141.

²³⁷ Panel Report, *US – Animals* para 7.655.

three provisions is the fact that the Appellate Body has specifically and clearly stated that ‘the obligations in Articles 6.1 and 6.2 are not triggered by an invocation of Article 6.3’.²³⁸ This aspect of the relationship between the different provisions of Article 6 is important when one is asked to make a determination as to whether a Member Country’s SPS measures are consistent with Article 6.

8 5 Characteristics of the Regional Adaptation Obligation

Upon reading the Appellate Body report from the *India – Agricultural Products* dispute one can identify at least three important characteristics of the this regional adaptation obligation: (1) The obligation a Member Country to ensure adaptation of their SPS Measures in accordance with Article 6.1 is an ongoing continuing obligation; (2) Member Countries’ freedom in its implementation; and (3) its case-specific nature.²³⁹ These three characteristics shall be further examined as they are useful to understand when attempting to interpreted this specific obligation in the course of its application.

The Appellate Body found the obligation created by Article 6.1 is not static, but rather ongoing, requiring SPS measures to be adjusted so that they maintain their compliance with Article 6.1.²⁴⁰ The Appellate Body foresaw that its interpretation required that a regionally-adapted SPS measures be changed when the regional conditions changed.²⁴¹ This change can be effected by both human and natural factors.²⁴² This dynamic and fluctuating nature of the this obligation has the potential to pose continual challenges for Members.²⁴³

The Appellate Body held that, due to no indication to the contrary, Article 6 infers degree of freedom on to Members in determining how to ‘ensure’ adaption of their SPS measures, or ‘recognise’ the relevant concepts within their own domestic SPS framework.²⁴⁴ In doing so, the Appellate Body prescribed no form to Members to ensure adaption of their SPS measures, or for recognising the relevant concepts.²⁴⁵ Whichever method is chosen by a Member has to be capable of continually adapting their SPS measures to the relevant and applicable SPS characteristics.²⁴⁶ The method also has to have a sound legal basis (in their domestic law),

²³⁸ Appellate Body Report, *India – Agricultural Products* (2015), 5.157

²³⁹ Pratap (2016) *Manchester J. Int'l Econ. L.* 87.

²⁴⁰ Pratap (2016) *Manchester J. Int'l Econ. L.* 87.

²⁴¹ Appellate Body Report, *India – Agricultural Products* (2015), 5.123; 5.154.

²⁴² Appellate Body Report, *India – Agricultural Products* (2015), 5.123; 5.154.

²⁴³ Pratap (2016) *Manchester J. Int'l Econ. L.* 87.

²⁴⁴ Appellate Body Report, *India – Agricultural Products* (2015), 5.137.

²⁴⁵ Pratap (2016) *Manchester J. Int'l Econ. L.* 89.

²⁴⁶ Pratap (2016) *Manchester J. Int'l Econ. L.* 89.

meaning that they must not contradict any mandatory legislation.²⁴⁷ This interpretation and finding of the Appellate Body complies to the required deference to State sovereignty, and ensures that Members are allowed maximum autonomy in ensuring conformity with this obligation, provided it is achievable in a ‘lawful way’.²⁴⁸

In context of the last characteristic noted above, when interpreting and applying the obligation relating to regionalisation that the obligation created by Article 6.2 is case-specific. Article 6.1 expressly requires WTO members to take the criteria or guidelines of relevant international organisations into account when discharging their regionalisation obligation.²⁴⁹ In the *India - Agricultural Products (2015)* case the Appellate Body underscored this case-specific nature by referring to the fact that while the Terrestrial code does not recommend regionalisation for certain pests and diseases, it does have a chapter (Chapter 10.4) which is specifically devoted to ‘infection with viruses of notifiable avian influenza’.²⁵⁰ This effectively means that where a relevant organisation has determined that the concepts of pest- or disease-free areas and areas of low pest or disease prevalence are relevant with respect to a specific pest or disease, a Member is required to recognise these concepts.²⁵¹ In other words, if the OIE Terrestrial Code, for example, has recommended regionalisation for a disease, an SPS measure which is addressing such disease is required to take such recommendation into account for its adaptation to regional SPS characteristics.²⁵² What this translates to in practice is that the relevant or applicable international standards set by these international organisations are effectively treated as WTO law, and that measures which meet with these standards enjoy ‘substantial immunity’ from a WTO challenge.²⁵³ This practical effect is important for developing country Members in the sense that these countries are often underrepresented in international standard-setting bodies or lack the resources to effectively promote their interests.²⁵⁴

8 6 Article 6 Interpretation and Order of Analysis

²⁴⁷ Pratap (2016) *Manchester J. Int'l Econ. L.* 89.

²⁴⁸ Pratap (2016) *Manchester J. Int'l Econ. L.* 89.

²⁴⁹ Pratap (2016) *Manchester J. Int'l Econ. L.* 90.

²⁵⁰ Pratap (2016) *Manchester J. Int'l Econ. L.* 91.

²⁵¹ Pratap (2016) *Manchester J. Int'l Econ. L.* 91.

²⁵² Pratap (2016) *Manchester J. Int'l Econ. L.* 91.

²⁵³ Pratap (2016) *Manchester J. Int'l Econ. L.* 91.

²⁵⁴ Pratap (2016) *Manchester J. Int'l Econ. L.* 91.

In determining a dispute based on Article 6, the order of analysis becomes important to the outcome of such dispute.²⁵⁵ This has been addressed by the Appellate Body in the *India – Agricultural Products (2015)* dispute which stated that “what constitutes an appropriate order of analysis and approach by a panel examining a claim under Article 6 may, at least in part, be a function of the nature of the claim and the circumstances of the case.”²⁵⁶

8 7 Appellate Body’s Report (India – Agricultural Products (2015))

Since the adoption of the Appellate Body’s Report handed down in the *India – Agricultural Products (2015)* dispute three issues have emerged in relation to the AB’s finding on regional adaption of SPS measures: (1) whether the importing Member’s obligation is independent of or contingent on the fulfilment of the exporting Member’s obligation; (2) whether the importing Member’s obligation of recognition (of pest- or disease-free areas and areas of low pest or disease prevalence) includes the implementation of such recognition; and (3) whether the statement of an individual official of the importing Member may be preferred to one of its measures at issue.²⁵⁷ These three issues shall be examined further:

8 7 1 Article 6.1: Independent or Continent Obligation?

While there is no explicit conditional language in Article 6.1 that links it Article 6.3, the Appellate Body emphasised that Article 6.1 and the rest of Article 6 need to be read together.²⁵⁸ Here the Appellate Body explained that an exporting Member will have difficulties with succeeding in a claim that the importing Member has acted inconsistently with Articles 6.1 and/or 6.2 unless that exporting Member can demonstrate its own compliance with Article 6.3.²⁵⁹ The Appellate Body, however, explicitly noted that an importing Member may act inconsistently with its obligation under the first sentence of Article 6.1 even without the objective demonstration by an exporting Member under Article 6.3, and thus found that the obligations in Articles 6.2 and 6.3 are not triggered by an invocation of Article 6.3.²⁶⁰ It thus seems to be that while the obligations under Article 6.1 and 6.2 are not triggered by (and are independent from) compliance with Article 6.3, the relationship between the obligations of exporting and importing Members under Article 6 are evidentiary and relative.²⁶¹

²⁵⁵ Saika (2017) *JIEL* 863.

²⁵⁶ Appellate Body Report, *India – Agricultural Products (2015)* para 5.142.

²⁵⁷ Pratap (2016) *Manchester J. Int’l Econ. L.* 92.

²⁵⁸ Appellate Body Report, *India – Agricultural Products (2015)*, para 5.155.

²⁵⁹ Appellate Body Report, *India – Agricultural Products (2015)*, para 5.156.

²⁶⁰ Appellate Body Report, *India – Agricultural Products (2015)*, para 5.157.

²⁶¹ Pratap (2016) *Manchester J. Int’l Econ. L.* 93.

8 7 2 Article 6.2: Recognition vs Implementation

Does Article 6 require the implementation of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence and not merely the recognition of such concepts? The terms of Article 6 expressly state that the obligation is an obligation to ‘recognise’ and not an obligation to ‘implement’ the relevant concepts.²⁶² The inclusion of “recognise” and exclusion of “implementation” can be reconciled by looking at the Appellate Body’s interpretation of the words ‘ensure’; ‘adaptation’; and ‘recognise’.²⁶³ They draw the conclusion that the word ‘recognition’ encompasses the word ‘implementation’.²⁶⁴

8 7 3 The Effectiveness of a Statement made in terms of the Recognition Obligation

India tried to argue that a statement which had been made by one of its DAHD officials in a letter to the US amounted to fulfilment of its regional recognition obligation as it demonstrated that India had exercised its legislation’s discretion to recognise the relevant concepts.²⁶⁵ India argued that in this statement given to the US in 2010 it had informed the US that it was willing to consider the issue of compartmentalisation.²⁶⁶ India contended that despite this statement given to the US, the US never submitted a proper proposal to India under Article 6.3 of the SPS Agreement.²⁶⁷ The US argued against this, stating that the statement did not demonstrate that India had recognised the concepts of disease-free areas or areas of low disease prevalence with respect to AI.²⁶⁸ The Appellate Body found in favour of the US on this matter. There are two important take away points from this: firstly, the evidentiary weight of an individual officer’s statement against a regulatory instrument, and secondly: the acceptability of a statement as a means of a fulfilment of the recognition obligation which was made before the adoption of the regulatory instrument.²⁶⁹

8 8 Conclusion of Article 6 Interpretation

The regional adaptation obligation is a continuing obligation, in terms of which Members enjoy a degree of latitude in determining how to ‘ensure’ adaptation of their SPS measures (or ‘recognise’ the relevant concepts within their domestic SPS regime); and further that this

²⁶² Pratap (2016) *Manchester J. Int’l Econ. L.* 93.

²⁶³ Pratap (2016) *Manchester J. Int’l Econ. L.* 93.

²⁶⁴ Pratap (2016) *Manchester J. Int’l Econ. L.* 93.

²⁶⁵ Appellate Body Report, *India – Agricultural Products* (2015), para 5 .180.

²⁶⁶ Appellate Body Report, *India – Agricultural Products* (2015)5.180.

²⁶⁷ Appellate Body Report, *India – Agricultural Products* (2015)5.180.

²⁶⁸ Appellate Body Report, *India – Agricultural Products* (2015), para 5.181.

²⁶⁹ Pratap (2016) *Manchester J. Int’l Econ. L.* 95.

obligation is context or case specific.²⁷⁰ Furthermore, it is now accepted that an importing Member's regional adaptation obligation is independent to a proposal by an exporting Member.²⁷¹ Further significant findings are: that a statement by an individual official of an importing Member cannot be understood as recognition of the concepts of disease-free areas and areas of low disease prevalence in preferences to its regulatory instrument which does not recognise these concepts.²⁷²

It is true that, based on the above discussed disputes, the Appellate Body and Panel seem to be satisfied that Article 6 successfully balances the conflicting interests of importing Members and exporting Members.²⁷³ While achieving this balance is a great success in international trade law and is sure to have positive effects it needs to be remembered that this balance is a fragile one, and the manner in which Article 6 (specifically the legal test found under Article 6.2) is interpreted and applied in future cases to come could very easily disrupt this balance.²⁷⁴ It is important that the preservation of this necessary balance is kept in mind when Panels and Appellate Bodies interact with Article 6 in practice. Panels within the DSB need to be alive to the fact that developing country Members bear a heavy burden in terms of the obligation to recognise pest- or disease-free areas and areas of low pest or disease prevalence. This burden is worsened in instances where the measure at hand concerns a disease or pest which is not well known. Another factor which worsens such burden is where there are no recommendations given by international organisations as to the recognition of these areas.²⁷⁵ These Panels also need to be alive to the administrative practices between importing and exporting Members when making decisions in relation to Article 6.²⁷⁶

9 Issues with Article 6 of the SPS Agreement

While Article 6 allows for the recognition of pest-or disease-free regions within a particular exporting country, many developing countries lack the resources necessary to take advantage of this provision.²⁷⁷ The lack of resources relates to the financial and institutional capacity to fight disease and pests, to evaluate the existence of pest-or disease-free regions, and to evaluate

²⁷⁰ Pratap (2016) *Manchester J. Int'l Econ. L.* 96.

²⁷¹ Pratap (2016) *Manchester J. Int'l Econ. L.* 96.

²⁷² Pratap (2016) *Manchester J. Int'l Econ. L.* 96.

²⁷³ Saika (2017) *JIEL* 869.

²⁷⁴ Saika (2017) *JIEL* 869.

²⁷⁵ Saika (2017) *JIEL* 880.

²⁷⁶ Saika (2017) *JIEL* 880.

²⁷⁷ Mayeda (2004) *JIEL* 757.

the potential economic benefits of undertaking regional pest and disease eradication.²⁷⁸ Financial and institutional support from developed countries in its own will not be sufficient. There needs to be an active simplification of procedures for proving the existence of these disease- an pest-free zones in order for developing countries to be able to take advantage of Article 6 of the SPS Agreement.

When Members comply with the obligations set out in Article 6 they are effectively acknowledging that certain regions of an exporting country are disease-free.²⁷⁹ This operates not only as a control on disease, but also facilitates trade.²⁸⁰ The benefit of disease control will most commonly be more prevalent to importing Country. It has been argued that the implementation of regionalisation can be expected to involve a combination of attributes: the strengthening of procedural rules, risk analysis, comparative advantage, investments in public sector-regulatory infrastructures, elimination of delays in the process of recognising disease-free areas and certain costs.²⁸¹

The challenges created by Article 6 have given rise to issues that have come before the SPS Committee. These issues include: the difficulties created by procedures and guidelines for the implementation of recognition of the concept of regionalisation including procedures for ensuring that areas in an exporting country are risk free; the unpredictable element in obtaining a time frame for recognition of risk free areas by an importing country; the adoption of new measures or changes in old ones demand transparency in both exporting and importing countries so that relevant information on procedures for recognising an area as risk free are immediately available; and general difficulties faced in the recognition of regions by international setting standards bodies and by Members.²⁸² Developing country Members have to meet long established standards which have been in practice in most developed country Members for some time.²⁸³ As a result developing country Members start off at a disadvantage. These issues have been identified and addressed (or at least attempted) by the SPS Committee.²⁸⁴

²⁷⁸ Mayeda (2004) *JIEL* 757.

²⁷⁹ Pratap (2016) *Manchester J. Int'l Econ. L.* 82.

²⁸⁰ Pratap (2016) *Manchester J. Int'l Econ. L.* 82.

²⁸¹ Pratap (2016) *Manchester J. Int'l Econ. L.* 83.

²⁸² Ezeani (2009) *Manchester J. Int'l Econ. L.* 67.

²⁸³ Ezeani (2009) *Manchester J. Int'l Econ. L.* 68.

²⁸⁴ Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures G/SPS/W/218, 25 Feb 2008.

9 1 Article 6 and the Balancing of Interests

There have been some commentators who have questioned whether Article 6 has successfully found the balance between the interests of exporting Members' concerns, of unduly wide SPS measures which have the potential to block the exportation of goods which face zero SPS risk and importing Members interests of preventing the spread of pests and disease within their territories. For example, does Indonesia block imports of beef from Brazil which have a zero risk of being infected with FMD? It is true that FMD is extremely contagious and thus it is understandable that Indonesia would only import beef from territories which have been granted FMD free status. It, however, also needs to be considered that this import ban on **all** Brazil's beef and beef products fails to recognise the fact that there are areas within Brazil's territory which are free from FMD and hold the same sanitary standards as beef and beef products from FMD free countries. There is, therefore, the possibility that by failing to adopt the principle of regionalisation, Indonesia is blocking beef and beef products from certain areas of Brazil which have a zero risk of FMD infection. Members have voiced their concerns regarding importing Members' slow, complex and non-transparent administrative procedures which have the effect of undermining efforts and investments to establish.²⁸⁵ Here importing Members have argued that a careful assessment, pertaining to the recognition of pest- or disease-free areas and areas of low pest or disease prevalence, is necessary so as to ensure prevention of entry and spread of pests and diseases.²⁸⁶ As a result the Guidelines to Further Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures²⁸⁷ was produced. These guidelines, however, clarify that they 'do not provide any legal interpretation or modification to the [SPS] Agreement itself'; but instead set out general disciplines and administrative steps with the main focus on the recognition of PDFAs.²⁸⁸ While these Guidelines are a welcomed step towards efficiency in terms of Article 6 they are not without their problematic aspects. The main problem is the assumption of a certain level of capacity, in terms of knowledge; know-how; and recourses on the part of importing Members.²⁸⁹ An illustration of this assumption: importing Members are required to explain their requirements and procedures required for the recognition of pest- or disease-free

²⁸⁵ Saika (2017) *JIEL* 858.

²⁸⁶ Saika (2017) *JIEL* 858.

²⁸⁷ WTO, Committee on Sanitary and Phytosanitary Measures, Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures (Article 6 Guidelines), 16 May 2008, G/SPS/48.

²⁸⁸ Saika (2017) *JIEL* 859.

²⁸⁹ Saika (2017) *JIEL* 859.

areas and areas of low pest or disease prevalence²⁹⁰.²⁹¹ This requirement is problematic because unless the importing Member is familiar with the specific pests/diseases it is obviously problematic for them to articulate what types of information would be regarded as sufficient to enable itself to determine the status of the specific pest/diseases in given areas.²⁹²

9.2 The Role of International Organisations

This is a similar issue to that of the issue of the role of international organisations within the context of harmonisation and Article 3 of the SPS Agreement. Article 6 refers to the roles of relevant of international organisations in a very brief manner. Article 6.1 specifies certain factors for consideration when assessing the SPS characteristics of a region, one of them being ‘... *appropriate criteria or guidelines which may be developed by the international organisations ...*’. Saika explains that because we are dealing with the control of pests and disease, the relevant international organisations would be the World Organisation for Animal Health (OIE) and the International Plant Protection Convention (IPPC), amongst others²⁹³. There are two main problems in this regard: firstly, the under representation of the developing world in these organisations which create these obligations; and the outsourcing of the responsibility of setting such standards to a body outside of the WTO and thus that does not have to subscribe to the consensus basis of all WTO law. These two issues have been discussed in length in regard to the harmonisation obligation created by Article 3 of the SPS Agreement and therefore shall for efficiency purposes not be repeated. It suffices to know that there is a similar problem faced when looking at regionalisation and Article 6. The issue of underrepresentation and lack of ability to properly participate in international organisations and Committees cannot be understated. In a joint publication issued by the UN’s Food and Agriculture Organization and the World Trade Organisation it was stated that “the participation in the development of international food standards for trade is essential if countries are to reap the benefits of booming global trade and prepare for imminent technological changes”.²⁹⁴ The Report advises developing country to invest in their capacity and skills so as to achieve effective engagement in institutions (and organisations) such as the WTO and the Codex Alimentarius. This Report further makes the statement that effective engagement has the

²⁹⁰ See Paragraphs 4 and 22 of the Article 6 Guidelines G/SPS/48.

²⁹¹ Saika (2017) *JIEL* 859.

²⁹² Saika (2017) *JIEL* 859.

²⁹³ Saika (2017) *JIEL* 859.

²⁹⁴ World Trade Organisation “Countries urged to reap benefits of food trade by engaging in standards setting” https://www.wto.org/english/news_e/news17_e/publ_12jul17_e.htm (accessed on 19-12-2018).

potential to make the USD 1.7 trillion international market (in agriculture) more inclusive, by allowing small-scale food producers and processors to enter into large scale value chains.

This Report, concerningly so, goes on to illustrate some of the newer challenges which developing countries must gear up to face in the future digitalisation, new production and processing technologies and e-commerce, as well as labelling trends, new trade deals and changing dietary and consumer preferences. All these occurrences have the effect of changing the food trade and food safety landscape. Developing countries must try take effective steps in ensuring that they do not get left behind.

The problems that Developing Countries face, both in relation to Article 3 and Article 6, cannot be divorced from one another. Often, by finding a solution to one of these problems, or at least helping to elevate one of the burdens carried by developing countries in implementing their WTO obligations, a ‘trickledown effect’ will be felt by developing country members. The benefit will be experienced in more areas than the original focus of the aid. For example, where developing countries are given aid in the sense of resource capacity, i.e. financial aid, they will not only be able to bear the costs of harmonisation and regionalisation more effectively, but they will also find themselves in a better position to effectively participate within the committee meetings and international organisations. In other words, by receiving resource capacity (financial aid) they will be able to ensure better representation in the international organisations which set standards for harmonisations (as well as for regionalisation) and advocate for their interests in the SPS Committee Meetings more effectively. This is also true for the transfer of know-how and technical expertise.

10 Policy suggestions and possible solutions for developing countries

10.1 Developed Countries’ Role

SPS measures are a major factor which influences the ability of developing countries to exploit export opportunities for agricultural and food products in developed Members’ markets.²⁹⁵ While it is true that the international community has attempted to overcome trade distortive effects of SPS measures through the adoption and implementation of the SPS Agreements it seems to be slightly inconsiderate to developing countries’ lack of resources, which are necessary to exploit these opportunities offered by the Agreement.²⁹⁶ The numerous concerns which have been raised by the developing country Members’ illustrates a need to facilitate the

²⁹⁵ Henson et al (1999) 10.

²⁹⁶ Henson et al (1999) 10.

better inclusion of developing countries in the operation of the SPS Agreement.²⁹⁷ I do not suggest that it is the Developed Countries' sole responsibility to ensure the Developing Countries (and LDCs) overcome the many obstacles which they face. Neither do I expect Developed Countries to expose their markets, consumers or environments to SPS risks in order to promote exports from Developing Countries. This would be too much to ask of Developed Countries and would not be fair. What is fair, is to ask the Developed Countries to remain alive to the specific challenges that Developing Countries face. One manner in which the Developed Countries can achieve this is to initiate regular communication with their Developing Country counterparts. In such communications they should actively inquire as what Developing Countries' specific concerns are and the challenges they are facing in the context of the interpretation, application and interpretation of SPS measures. Developed Countries should go further than this and use the information derived from such communication to ensure that their actions in the context of their SPS measures do not add to such challenges, and where possible act to alleviate such challenges.

Mayeda gives three possible solutions to the burdens felt by developing countries in context of international standard-setting. The first solution is to transfer both funds and expertise from developed countries to developing countries to help the latter to conduct domestic risk assessments and undertake scientific assessments of suggested international standards.²⁹⁸ The second is for developing countries to share scientific research and risk assessment information's with one another.²⁹⁹ The third solution is to promote co-operation among developing countries so that they are able to develop a cross country network or formal body to conduct such evaluations.³⁰⁰ I suggest a combination of these three solutions, with a bigger emphasis on the last two as they will have a more long term beneficial effect for the developing Members.

10 2 Mutual Recognition Agreements

There is also a possibility that there is a solution to be found in Mutual Recognition Agreements (MRAs)? The SPS Agreement, itself, encourages countries to enter into MRAs.³⁰¹ While this might seem to be an easy, straightforward and therefore obvious solution this is not the reality. Offering this as a solution to the multiple problems faced by developing countries in the face

²⁹⁷ Henson et al (1999) 10.

²⁹⁸ Mayeda (2004) *JIEL* 754.

²⁹⁹ Mayeda (2004) *JIEL* 754.

³⁰⁰ Mayeda (2004) *JIEL* 754.

³⁰¹ Art 4.2 of the SPS Agreement.

of the SPS Agreements would not be a real solution. This is due to the costs involved in the negotiation and ensuring compliance with these agreements. In practice only, a small number of MRAs involve developing countries.³⁰² Facilitating developing countries participation in MRAs requires capacity building incentives similar to those necessary in the context of international standard-setting.³⁰³

Aside from this issue, MRAs are not free from their own problems. Some voice concerns that MTA promote discrimination between states that are participating in MRAs and those that are not.³⁰⁴ While MRAs come with their own unique issues, where Developing Countries are placed in a position where they are able to effectively negotiate, MRAs can offer individual countries specific and tailor-made solutions to the unique and specific challenges they face.

10.3 The Benefits of Transparency

While the SPS Agreement (as well as the TBT Agreement) encourages members to use international standards (Article 3 of the SPS Agreement) it does not set out a specific procedure for how these standards are to be established.³⁰⁵ Placing the legislative function for determining and setting SPS standards outside of the WTO avoids the consensus required in the WTO system. Here some commentators suggest, in order to provide greater transparency, the establishment of a harmonised procedure for SPS standard-setting bodies.³⁰⁶ They further suggest that these procedures should attempt to set standards on the basis of consensus, and that the standards set ensure adequate representation by developing countries.³⁰⁷ I suggest that the WTO acts to create a set of procedures that are to be followed, by both Members and International Organisations, when setting SPS Standards. This will create more transparency within the process of the SPS Standard Setting. In the creation and adoption of such it is of critical importance that Developing Countries are given an opportunity to effectively participate.

It must be noted, however, that while transparency in the standard setting process is helpful, it does little to ensure that developing countries have the requisite institutional capacity and financial resources necessary to effectively represent their interests before such

³⁰² Mayeda (2004) *JIEL* 755.

³⁰³ Mayeda (2004) *JIEL* 755.

³⁰⁴ Mayeda (2004) *JIEL* 755.

³⁰⁵ Mayeda (2004) *JIEL* 753.

³⁰⁶ Mayeda (2004) *JIEL* 753

³⁰⁷ Mayeda (2004) *JIEL* 753.

institutional bodies.³⁰⁸ The problem in this regard is that developing countries often lack both the technical ability to conduct risk-assessment as well as the organisational structures to effectively respond to proposed regulations.³⁰⁹

10.4 The Role of the SPS Committee

Lastly, the SPS Committee has the potential to act as a forum for the exchange of information with regards to the implementation of the SPS Agreement.³¹⁰ This potential is, however, not being reached and developing members are finding themselves unable to make full use of these bodies.³¹¹ The SPS Committee is not doing enough aid Developing Members. This is (once again) due to the challenges in conforming with the SPS measures of various countries, the difficulties arising in setting domestic standards and the task of challenging the standards set by importing countries.³¹² The SPS Committee should prioritise the objective of aiding Developing Countries fulfil the obligations created by the SPS Agreement. The SPS Committee should take up a more direct mandate focusing on helping, guiding and supporting the Developing Countries fulfil their SPS Obligations.

11 Resolving the Dispute Between Indonesia and Brazil DS506

The outcome of this dispute would not only affect Indonesia and Brazil. A number of WTO Members have requested to join the consultations, thereby illustrating the interest that the rest of the WTO has in the solution and outcome of this case. The European Union; Australia; the United States; New Zealand; the Chinese Taipei all requested to join the consultations requested Brazil, pursuant to Article 4.11 of the Dispute Settlement Understanding. Indonesia has informed the Dispute Settlement Body that it had accepted these requests to join the consultations. There are big trading nations which have expressed their interest in the outcome of this dispute, their input given during the consultations will most likely be valuable insight into the way in which they view the obligations of harmonisation (Article 3) and regionalisation (Article 6). However, it is worth noting this will be a developed country view on these obligations and it is therefore important for the WTO Dispute Settlement Body not to lose sight of the original parties to the dispute and the special interests and concerns that the developing

³⁰⁸ Mayeda (2004) *JIEL* 754

³⁰⁹ Mayeda (2004) *JIEL* 754.

³¹⁰ Mayeda (2004) *JIEL* 756.

³¹¹ Mayeda (2004) *JIEL* 756.

³¹² Mayeda (2004) *JIEL* 756.

country Members have been expressing for a while. Using the entire above discussion, we can speculate on the most likely outcome concerning the disputes on the following facts.

The two main allegations relating to the conversation held in this paper is (a) that Indonesia have affected and implemented sanitary measures which are not based on international standards, guidelines or recommendations and further are not scientifically justified and more restrictive than necessary for achieving an appropriate level of protection. And (b) the fact that Indonesia only accepts imports of bovine meat from countries that have their entire territory declared free of Foot and Mouth Disease (FMD), regardless of the fact that bovine meat disease-free states or regions (with or without vacation) holds the same sanitary status.

11.1 Resolution of the First Allegation – Harmonisation

As to the first allegation, Brazil is essentially arguing that Indonesia is in breach with the obligations imposed upon them by Article 3.1; 3.2; and 3.3 of the SPS Agreement. For Brazil to be successful with this claim they will have to prove the basic elements of it first: i.e. that the measure(s) that they have identified is in fact an SPS measure. Here they have to establish that the measure(s) at issue is a measure which has one of three aims: either the aim of protection of human, plant, or animal life and/or health from food borne risks; or it must be a measure that has the aim of protection of human, plant or animal life/health from risks occurring from pests and diseases, or a measure which aims to prevent or limit other damage caused by risks resulting from the presence of pests. Secondly, they will have to establish that the measure affects international trade. This will obviously be an easy task as the measure clearly has an effect on the import of bovine meat and thus as a result can be said to have an effect on international trade.

Can Indonesia defend the claim that its measures are in conflict with Article 3 of the SPS Agreement? In requiring harmonisation of SPS measures, Article 3 creates three distinct manners in which a Member can comply with the obligation to harmonise their SPS measures – therefore a Member does not need to show compliance with all three provisions found in Article 3, showing compliance with one of them will suffice. Brazil, however, argues that Indonesia has failed to comply with any of the methods of harmonisation as found in Article 3. Indonesia will be found to be in violation of Article 3.3 if it is shown that their measure(s) constitutes a higher level of protection. However, if Indonesia can demonstrate that their measure(s), which results in a higher level of protection, has scientific justification and is the

result of a level of protection chosen in a manner consistent with Articles 5.1 – 5.8. Thus, if Brazil proves that Indonesia's measure is a result of a higher level of protection than that created by the international standards it is not the end for the discussion for Indonesia. They can still bring themselves into compliance with Article 3.3 if they can provide the scientific justification for such higher level of protection; and that the level of protection was chosen in accordance with the provisions set out in Article 5.1 to 5.8.

If, however, Indonesia fails to bring themselves into compliance with Article 3.3 they still have Article 3.2 and 3.1 at their disposal and can thus be in compliance with Article 3. To follow Article 3.2 Indonesia will be faced with the task of demonstrating that their SPS measure(s) embody an international standard. Indonesia will be assisted in this regard, by the fact that the SPS Agreement creates a presumption of compliance. I.e. if Indonesia can prove that their measure(s) conform to the international standard (or embody the international standard) their measures will be assumed to be consistent with the SPS Agreement, and accordingly to comply with the Article 3 obligation. This presumption can, of course be rebutted.

Should Indonesia fail to prove compliance with Article 3.3 and Article 3.2 they can still establish compliance with Article 3. Establishing that a measure complies with Article 3.1 was made relatively easier by the Appellate Body in the *EC – Hormone case*.³¹³ Here all Indonesia will have to allege and prove is that their measure is 'founded', 'based', or 'built' upon an international standard. Here they do not need to prove that the measure incorporates all elements of the international standard, it will suffice to illustrate that their measure merely does not conflict the standard and incorporates certain elements of the international standard.

This demonstrates that the SPS's obligation to harmonise SPS measures is worded in such a way that it does not create a very strong or strict obligation. It gives Members a lot of leeway in how they comply with these obligations and further on how strictly they wish to comply. Brazil will effectively have to establish that Indonesia's SPS measures cannot be reconciled with the international standard and therefore that Indonesia's SPS measures constitute a departure from the international standard. Should the WTO and/or the SPS Committee wish to create a stricter obligation resulting in more 'across the board' harmonisation they will first have to ensure that the developing country Members are adequately and proportionately represented in the bodies which set the international standards.

³¹³ Appellate Body Report, *EC – Hormones (1998)*.

If they fail to do so, they will in effect be creating a barrier to trade that disproportionately more difficult for developing countries to overcome when trying to trade within the international market. Creating disproportionately more obstacles for Members of the WTO that are developing countries acts against the WTO's goal of improving the welfare of the citizens of WTO Members. The WTO has many developing Members, in fact most of its Members are in fact Developing Members, the WTO, it therefore needs to ensure that their interests are actively protected.

Indonesia's SPS measures regarding the importation of bovine meat and bovine meat products do appear to constitute a higher level of protection than the level of protection created by the international standard. Unless Indonesia can provide scientific justification for this, or that this is justified within their specific circumstances Indonesia will be unable to rely on Article 3.3. Brazil therefore will have the burden of proving that Indonesia's SPS measure is not "based on" nor "embodies" the international standard relevant to FMD. If Brazil can prove that it is not even based on the international standard, it will be able to prove that Indonesia's SPS measure is in fact inconsistent with Article 3. If Brazil can establish that Indonesia's SPS creates a level of protection significantly higher than the international standard the Panel could possibly find that this constitutes a departure from the international standard. This would negate any finding that Indonesia's SPS measure is in fact based on or embodies the national standard.

The inclusion of cut-off levels (of allowed divergence), as advocated for in the paper quoted above written by Neugebauer, would be useful in this dispute. It would mean that it would be easier for Indonesia to determine whether their SPS measure departs too greatly from the international standard and therefore whether they need to provide scientific justification for such deviation. It would also be beneficial to Brazil as it would provide them with the evidence required to argue that Indonesia's SPS measure is in fact inconsistent with Article 3. The inclusion of these levels would mean that the determination of whether a measure is "based on" or "embodies" an international standard is based on something concrete and accessible to Members. At the moment this determination seems to be based on abstract interpretation of the words "based on" and "embodies". This has created confusion and frustration with the text of the SPS Agreement.

11 2 Resolution of the Second Allegation – Regionalisation

The second related allegation made, that is relevant in the context of this paper, the allegation that Indonesia only accepts imports of bovine meat from countries that have their entire territory declared as free of FMD, regardless of the fact that bovine meat from disease-free states or regions, with or without vaccination, holds the same sanitary status. Brazil alleges that this measure amounts to a failure to adopt the principle of regionalisation. In this regard, Article 6.1 and 6.2 create the obligation of adaptation for Indonesia, while Article 6.3 of the SPS Agreement creates an obligation for Brazil. Article 6.1 creates the general obligation for Indonesia to adapt its SPS measures, in this regard the measures specific to FMD, to sanitary and phytosanitary characteristics of the origin and destination of bovine meat products. Here Indonesia will have to pay specific attention to factors listed in Article 6.1 but could be obliged to pay attention to other (unlisted) factors if the facts so require. This obligation is case-specific, what is required from Indonesia in the fulfilment of Article 6.1 (and 6.2) is therefore dependent on the specific circumstances. Here it should be noted that Indonesia will have to take heed of any relevant criteria or guidelines given by international organisations when fulfilling their regionalisation obligations. Article 6.2 creates the specific obligation on Indonesia to recognise the concept of pest- or disease-free areas and areas of low pest or disease prevalence based on the existence of certain factors have been proven or established. The recognition of these areas cannot be a mere abstract recognition. The obligation to recognise these areas or regions is not a separate obligation of regionalisation or adaptation, but instead is part of the overall obligation of regionalisation. An element of this obligation has been said to give an exporting Member (in this case Brazil) an (effective) opportunity to make a claim that there are certain regions or areas within its territory that would qualify as pest- or disease-free areas and areas of low pest or disease prevalence in the context of FMD. Here it is unclear what exactly will qualify as an 'effective opportunity'. What is clear, however, is that if a Panel is to find that this effective opportunity was denied to Brazil then Indonesia will be found to be in breach of Article 6.2 and therefore with the regionalisation obligations as a whole. Indonesia will have to do more than point to legislation that introduces and defines the concept of 'regionalisation'; or to regulations that contain a mere reference to the Terrestrial Code.

For Brazil to be successful in these allegations, they will however have to prove that the specific region(s) within their territory are in fact, and will remain, pest- or disease-free areas and areas of low pest or disease prevalence. Here Brazil will have to adduce evidence attesting to this claim. Proving such regions exist is not the extent of their obligations. They will further have to provide reasonable access to Indonesia to allow for inspection, testing and any other relevant

proceedings so that they are can satisfy, in the form of an objective determination, themselves that these areas or regions are in fact pest- or disease-free areas and areas of low pest or disease prevalence.

11.3 The Panel

If this issue does go before a Panel, such Panel has to be aware to the fact that the order in which the analysis is conducted is important and will have an outcome on the case. Here, the panel has to decide on such order by considering the nature of the claim along with the circumstances of the case.

The challenges which are faced in the implementation of the recognition of these pest- or disease-free areas and areas of low pest or disease prevalence, specifically in terms of the procedures to be followed; the issue of an unpredictable timeframe; and the implementation of new SPS measures or changes to existing measures are issues which both Brazil and Indonesia face. Thus, if this matter is to go before a Panel, it is important that the Panel bears these challenges in mind when it imposes obligations onto these nations. The fact that both these Members are developing countries presents an opportunity for the Panel to make a finding which is alive to the special needs of such Members and to accommodate their shortcomings and aid them in their attempts to participate, implement and effect the SPS Agreement. The needs of (and challenging faces) Developing Countries are most certainly not identical to each. I do not expect the Panel to identify each and every unique problem faced by a Developing Country. I do however think it is reasonable to expect a Panel to be mindful of the status of a party to a dispute as either developed or developing. Where it is hearing a matter involving a Developing Country Panels (and Appellate Bodies) need to precaution not to overlook the specific obstacles and challenges that Developing Countries face. The Members which have requested to join these consultations should also be careful not to drown out the voices of the developing countries in the course of the discussion.

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