

## The SPS Agreement and Climate Change

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### I. INTRODUCTION

Climate change negatively affects income inequality of countries around the globe. These negative effects can arise in unlikely ways, such as through the Sanitary and Phytosanitary Measure (“SPS”) Agreement. Increasing income disparity between “developed” and “undeveloped” countries is an unintended consequence of the inconsistent application of SPS Agreement’s restrictions on animal/animal product trade. This leads developed countries to generate more wealth. Even more, this causes developing countries to struggle with the effect of climate change. Inconsistent application of the SPS Agreement leads to several questions. Does the World Trade Organization (“WTO”) restrict imports from certain countries based on the World Health Organization’s (“WHO”) recommendation to protect the national health of states?<sup>2</sup> Do countries apply Sanitary and Phytosanitary Measure (“SPS”) agreements<sup>3</sup> that make their decisions justifiable and reasonable to prohibit specific animal products that significantly jeopardize the health of states? To be more precise, when it comes to prohibiting animal products, can countries rely on WHO recommendations regarding the health of the state as has occurred during the pandemic restriction? Many countries put many restrictions based on the WHO recommendations based on public health as stated in international Health Regulations that adopted by WHO in which articulate the criteria of restrictions on goods (which includes animal products), and containers

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<sup>2</sup> Trade Practitioner, *Coronavirus and Trade*, SCQUIRE PATTON BLOGS, <https://www.tradepractitioner.com/2020/02/coronavirus-and-trade/> (last visited April 21, 2022).

<sup>3</sup> Agreement of the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS]. This was signed in Marrakesh on April 15, 1994 and became binding on the world on January 1st 1995.

etc.<sup>4</sup> Can we predict the same here when it comes to prohibiting animal production? Can countries refer to the WHO recommendation when applying the SPS measure to justify their action regarding prohibiting importing animals' products? Or do countries use their measures to restrict animal products and interpret the SPS agreement based on their standards to make their action justifiable? As observed in the cases below, there is no precise mechanism of the SPS agreement that countries could rely on to make the SPS measures consistent and reasonable.

To answer these questions, I will first explain what the SPS Agreement entails. Then, I will discuss climate change alongside the inconsistent application of the SPS Agreement by sharing the impacts the SPS Agreement has had on agricultural commodities, including plants and animals. I argue that three critical aspects need to be addressed when it comes to illustrating the policies behind the SPS, and the objective standard that the WTO adopted and implemented in the SPS agreement. First, the SPS agreement needs to revise to make it more compatible with the current challenge of climate change that impacts all of us. Second, developed countries should share their resources that help developing countries combat the challenge of climate change. Third, the application of the SPS agreement needs to be consistent among nations to avoid any arbitrary and capricious application, as it broadens the gap of income inequality. We all live on one planet. Climate change affects all of us in one way or another. Hence, nations need to cooperate to make a better life for their next generations for the next decade to come. To avoid the tragedy of climate change, I urge cooperation among the nations to reach a deal that benefits all peoples and environments.

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<sup>4</sup> WHO recommendations are based on the public health of the state as regulated in International Health Regulations that were adopted by the WHO in 2005, amended in 2014 and went into force in 2016. *See* WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS, (2005).

## II. BACKGROUND

### A. The SPS Agreement

The Sanitary and Phytosanitary Measures (“SPS”) has a key role in trade negotiations around the world.<sup>5</sup> The SPS Agreement is an agreement between nations that “concerns the application of food safety and animal and plant health regulations.”<sup>6</sup> The key features of the SPS Agreement is that “all countries maintain measures to ensure that food is safe for consumer, and to prevent the spread of pests or diseases among animals and plants.”<sup>7</sup> One scholar, Denise Prévost, says that nations “realized that, aside from those SPS measures that are based on legitimate health concerns, many SPS measures exist with more questionable bases. Clearly many governments, under the influence of domestic industry pressure groups, misuse SPS measures as disguised trade barriers for protectionist purposes.”<sup>8</sup> She believes that the SPS measures were essential to liberalize the agriculture trade.<sup>9</sup> As she mentions “The Punta Del Este Declaration”<sup>10</sup> that carved out the Uruguay Round’s<sup>11</sup> agenda solicited the agricultural products to be liberalized.<sup>12</sup> The notion

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<sup>5</sup> Denise Prévost, *The Japan-Apples Dispute: Implications for African Agricultural Trade* (September 2004). Tralac Trade Brief Agri-Conference, 2004, Available at SSRN: <https://ssrn.com/abstract=1162797>.

<sup>6</sup> Understanding the WTO Agreement on Sanitary and Phytosanitary Measure, WTO , [https://www.wto.org/english/tratop\\_e/sps\\_e/spsund\\_e.htm](https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm) (last visited April 23, 2022).

<sup>7</sup> *Id.*

<sup>8</sup> Prévost, *supra* note 5.

<sup>9</sup> *Id.*

<sup>10</sup> The Punta Del Este Declaration, “Ministers, meeting on the occasion of the Special Session of the CONTRACTING PARTIES at Punta del Este, have decided to launch Multilateral Trade Negotiations (The Uruguay Round).” See GATT-PUNTA DEL ESTE DECLARATION, [http://www.sice.oas.org/trade/Punta\\_e.asp](http://www.sice.oas.org/trade/Punta_e.asp) (last visited April 21, 2022).

<sup>11</sup> The Uruguay Round “took seven and a half years,” to form, and by “the end, 123 countries were taking part. It covered almost all trade, from toothbrushes to pleasure boats, from banking to telecommunication, from the genes of wild rice to AIDS treatments. It was quite simply the largest trade negotiation ever, and most probably the largest negotiation of any kind in history.” “The seeds of the Uruguay Round were sown in November 1982 at a ministerial meeting of GATT members in Geneva, ... the work programme that the ministers agreed formed the basis for what was to become the Uruguay Round negotiations agenda...., The talk were going to extend the trading system into several new areas, notably trade in services and intellectual property, and to reform trade in sensitive sectors of agricultural and textiles.” *Understanding the WTO - The Uruguay Round*, WORLD TRADE CENTER, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm) (last visited April 21, 2022).

<sup>12</sup> Prévost, *supra* note 5.

of “agriculture liberation” was meant to liberalize the rules of the “Tokyo Round Agreement”<sup>13</sup> on Technical Barriers to Trade with regard to the SPS measures.<sup>14</sup> Nonetheless, the SPS measures were apart from technical barriers to trade.<sup>15</sup> Consequently,

two separate agreements on technical barriers to trade emerged from in the Uruguay Round: first, the Agreement on Technical Barriers to Trade (“TBT Agreement”) applicable to technical regulations, standards and conformity assessment producers other than sanitary or phytosanitary measures; and second, the Agreement on the Application of Sanitary and Phytosanitary Measure (“SPS Agreement”).<sup>16</sup>

## **B. Climate Change**

Human activity plays a huge role in causing climate change, and, in turn, climate change causes a massive danger to food security around the globe. Greenhouse gas admissions, caused by humans’ everyday activities, leads to increased temperature.<sup>17</sup> According to a report published by the State of Agricultural Commodity markets, (“COMO”), greenhouse gas emission between 1951 to 2010 caused a temperature increase of 0.5 Celsius to 1.3 Celsius.<sup>18</sup> As shown by the SOCO report<sup>19</sup> as well as in the map<sup>20</sup> shown below, the increasing temperature shows that the leaders of the world must take action to protect and prevent damage that results from climate change, including but not limited to harm to plants and animals.

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<sup>13</sup> The Tokyo Round Agreement, “(1973-1979) developed agreements on anti-dumping measures, government procurement, technical barriers to trade and other non-tariff measures which were known as “codes.” See WORLD TRADE ORGANIZATION, WTO, [https://www.wto.org/english/docs\\_e/legal\\_e/prewto\\_legal\\_e.htm](https://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm) (last visited April 21, 2022).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

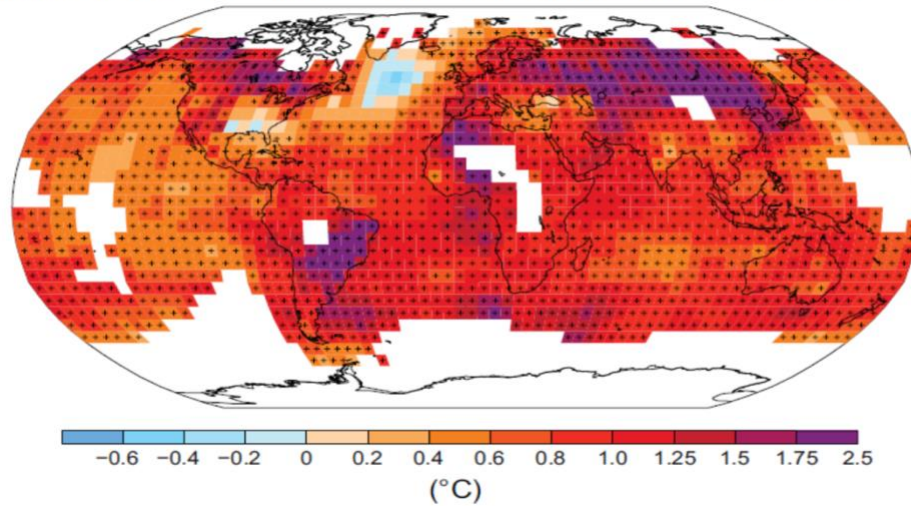
<sup>17</sup> RALF LOPIAN, CLIMATE CHANGE, SANITARY AND PHYTOSANITARY MEASURES AND AGRICULTURAL TRADE. THE STATE OF AGRICULTURAL COMMODITY MARKETS (SOCO) 2018: BACKGROUND PAPER 3 (Rome, FAO 2018).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

**Fig.2: Map of the observed surface temperature change from 1901 to 2012**



Climate change affects our lives, including all species living on Earth.<sup>21</sup> By default, any change in climate will affect all species, including humans, animals, and plant products. Climate change indirectly impacts all lives by harming the quality of food, water and oxygen.<sup>22</sup> We need to protect the plants as plants are extremely susceptible to the variations of climate change.<sup>23</sup> Consequently, this fact will affect animal production as the animal feeds from the plants. As Earth faces dramatic changes in climate, so, too, will flora and fauna experience dramatic threats to their biological makeup. Therefore, countries will hesitate to import animal productions from countries that struggle with disasters that result from climate change. Truly, climate change can greatly affect developing countries. Those who do not have resources, like reliable infrastructure, to combat the effects of climate change are the most vulnerable in terms of agriculture commodities. The following chart<sup>24</sup> shows how climate change has impacted the crop yields so heavily.

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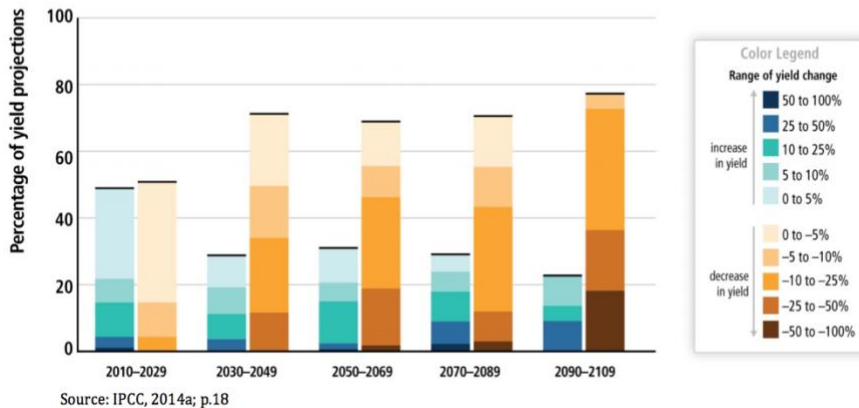
<sup>21</sup> *Id.* at 11.

<sup>22</sup> *Id.*

<sup>23</sup> “[I]t is well known that beneficial plant-associated microorganisms may stimulate plant growth and enhance resistance to disease and abiotic stresses. The effects of climate change factors such as CO<sub>2</sub>, drought and warming on beneficial plant-microorganism interaction are increasingly being explored.” Stéphane Compant, Marcel G.A. van der Heijden and Angela Sessitsch, *Climate Change Effects on beneficial plant-microorganism*, Federation of European Microbiological Societies, Blackwell Publishing Ltd (2010).

<sup>24</sup> LOPIAN, *supra* note 17.

**Fig.:3: Summary of projected changes in crop yields, due to climate change over the 21st century**



We all rely heavily on plants and their products, and need to pay more attention to the health of plants<sup>25</sup> that provide the necessities of life. Pests greatly affect plant health. The International Plant Protection Convention (“IPPC”) defines a pest as “any species, strain biotype of plant, animal or pathogenic agent injurious to plants or plant products.”<sup>26</sup> The climate impacts plants and their pests both directly and indirectly.<sup>27</sup> Changes in temperatures, water accessibility, carbon dioxide, outrageous climate occasions, precipitation, and ozone levels do influence plants and pests and may prompt organic associations, which would not occur under stable conditions.<sup>28</sup> Likewise, climate change directly affects animals and their products, and their primary source of food either directly or indirectly comes from plants.<sup>29</sup> Animals are also deeply impacted by climate

<sup>25</sup> “In 2016, the International Plant Protection Convention (IPPC) states that; plant health.... is usually considered the discipline that uses a range of measures to control and prevent pests, weeds and disease causing organisms to spread into new areas, especially through human interaction such as international trade.” *Id.* at 13.

<sup>26</sup> *Id.* at 13.

<sup>27</sup> *Id.* at 14.

<sup>28</sup> *Id.* “The warming temperate areas may lead to the situation that pests extend their distribution into previously inhospitable areas. An example of this is the Old World bollworm (*Helicoverpa armigera*), which considerably increased its distribution in the United Kingdom from 1969-2004 and at the northern edge of its range in Europe (FAO, 2008a). Another example is the oak processionary moth (*Thaumetopoea praecectionea*), which has extended northward from central and southern Europe into Belgium, Netherlands and Denmark (FAO, 2008a).”

<sup>29</sup> *Id.* at 17. “The negative effects on plant production are likely to directly affect animal production systems; impairing animal growth, meat, milk and egg yield and quality, as well as reproductive performance, metabolic and health status, and immune response.”

change. There are three ways to view the impact of climate change on animals: effects in physiology, distribution, and adaption.<sup>30</sup>

### III. CLIMATE CHANGE AND THE SPS AGREEMENT

#### A. Consistent application of the SPS Agreement can help with the harmful effects of climate change.

“The SPS agreement explicitly recognizes the scientific and technical competence of three international standard-setting organizations to do so: The World Organization for Animal Health (OIE) for animal health, the International Plant Protection Convention (IPPC)<sup>31</sup> for plant health, and the Codex Alimentarius Commission (Codex) for food and safety issues.”<sup>32</sup> All of these organizations are linked to the WTO.

There are several steps that countries must take in order to establish harmonized SPS Agreements around the globe. The WTO defines SPS measures as follows:

- (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;

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<sup>30</sup> *Id.*

<sup>31</sup> “In 2014, the contribution of Working Group II of the Intergovernmental Panel on Climate Change (IPCC) to the Fifth Assessment Report stated that ‘human interference with the climate system is occurring, and climate change poses risks for human and natural systems.’ Risks are extremely likely to occur in rural agricultural systems, in particular. They are unevenly distributed and are generally greater for disadvantaged people and communities in countries at all levels of development (IPCC, 2014b). There is a high confidence by the IPCC that major future rural impacts are expected in the near term and beyond. These impacts will particularly affect water availability and supply, food security, and agricultural incomes, including shifts in production areas of food and non-food crops across the world (IPCC 2014a). In addition, the IPCC predicts that the continued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems (IPCC, 2014b). The impact of climate change on agricultural production is generally considered to be negative, with countries in lower latitudes suffering the most from changes in climate (IPCC 2014a). The IPCC estimated that for major staple crops such as wheat, rice and maize in tropical and temperate regions, climate change without adaptation is projected to negatively impact aggregate production (IPCC, 2014a). This is estimated for local temperature increases of 2°C or more above late-20th-century levels. However, some individual areas may benefit from climate change in terms of agricultural production. These increases, however, are not believed to be sufficient to compensate for the yield losses anticipated on a world-wide scale” *Id.*

<sup>32</sup> *Id.*

- (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.<sup>33</sup>

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 labeling requirements directly related to food safety.”<sup>34</sup> Moreover, Article 2 of the Agreement highlights clearly that all members should make SPS measurements without any unjustifiable or arbitrary discrimination between members.<sup>35</sup>

For a decade, many disputes have arisen between nations regarding the application of the SPS on prohibiting food and agriculture between nations. Most application of the SPS is capricious and arbitrary. For example,<sup>36</sup> in 1998, discriminatory treatment occurred between European countries and certain African countries. The European Communities (“EC”) imposed a blockade on imports of fish from some African countries. Since then, the European Communities have

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<sup>33</sup> Agreement of the Application of Sanitary and Phytosanitary Measures, *supra* note 3.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* “Article 2: Basic Rights and Obligations: 1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement; 2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5; 3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.”

<sup>36</sup> Trade Practitioner, *supra* note 2.



resumed trade on the grounds that WHO provided evidence that the fish was not a problem.<sup>37</sup> In this case, we find that there was no issue to ban animal products from certain African countries. The EC did not provide legitimate, and reasonable reason that supports their decisions or measures that the EC needs to be taking into their account must be based on risk assessment.<sup>38</sup> Moreover, the SPS agreement emphasizes “the principles of transparency and equivalence.”<sup>39</sup> Due to the lack of measurements of risk assessments as well as the lack of transparency and equivalence in our case, the restrictions were lifted by the WTO. In the following cases, the reader can realize how countries interpret and apply the application of the SPS in different ways in various circumstances. Therefore, the SPS application continues to be capricious and arbitrary among nations. The following cases show the unique application of the SPS Agreement. Consequently, issues arise when uniformity is lacking.

#### **IV. THE SPS AGREEMENT AS APPLIED IN JAPAN, AUSTRALIA, AND THE EUROPEAN UNION.**

##### **A. Japan Apples Case**

The Japan Apples case arose on March 1, 2002 due to the restrictions that Japan imposed on imports of apples from the United States.<sup>40</sup> However, the United States claimed that the maintenance that Japan imposed on the apples, which Japan articulated to be necessary to protect against introduction of fire blight in which the restrictions are too cautious and harsh.<sup>41</sup> Among other things that the United States claimed,

the prohibition of imported apples from orchards in which any fire blight was detected, the requirement that export orchards be inspected three times yearly for

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<sup>37</sup> World Trade Organization: Committee on Sanitary and Phytosanitary Measures., *Summary of the Meeting Held on (10-11 June 1998)*, WTO Doc. G/SPS/R/11 (1998).

<sup>38</sup> S.A. Neeliah, D. Goburdhun, *Complying with the clauses of the SPS Agreement: Case of a developing country*, ELSEVIER at 902 (Dec. 10, 2009).

<sup>39</sup> *Id.*

<sup>40</sup> Panel Report, *Japan – Apples Affecting the Importation of Apples*, WTO Doc. WT/DS245/R, (adopted Dec. 10, 2003).

<sup>41</sup> *Id.*

the presence of fire blight and the disqualification of any orchard from exporting to Japan should fire blight be detected within a 500 meter buffer zone surrounding such orchard.<sup>42</sup>

By imposing the aforementioned measures, the United States claimed that Japan violated Articles 2.2, 2.3, 5.1, 5.3, 5.6, 5.6, 6.1 and 7 and Annex B of the SPS Agreement.<sup>43</sup>

The SPS Agreement Article 2.2 emphasizes the idea of food and animal protection.<sup>44</sup> Japan failed to provide scientific evidence to justify their measure. The Appellate Body<sup>45</sup> of the WTO found that “the measure was maintained without sufficient evidence with Art. 2.2, as there was a clear disproportionate (and thus no rational or objective relations) between Japan’s measure and the ‘negligible risk’ identified on the basis of the scientific evidence.”<sup>46</sup> The second issue is that Japan violated Article 5.1, which requires taken by international organizations to protect human, animal or plant life or health to be appropriate.<sup>47</sup> To this end, the Appellate Body found there is no basis that could be justifiable and applicable to Article 5.1.<sup>48</sup> Therefore, the measures taken by Japan are capricious and arbitrary. Third, Japan violated Article 5.6, which emphasizes the concept of alternative measures.<sup>49</sup> With regard to this issue, the Appellate Body found that Japan “acted inconsistently Art. 5.6 because the alleged compliance measure was “more trade restrictive than

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> The Appellate Body “was established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).” *See* Dispute Settlement – Appellate Body, WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm) (last visited May 10, 2021).

<sup>46</sup> Panel Report, *supra* note 40.

<sup>47</sup> Article 5.1 “Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risk to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organization,” Agreement of the Application of Sanitary and Phytosanitary Measures, *supra* note 3.

<sup>48</sup> Panel Report, *supra* note 40.

<sup>49</sup> Article 5.6 “Without prejudice to paragraph 2 of Article 3, when establishing of maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary of phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.” Agreement of the Application of Sanitary and Phytosanitary Measures, *supra* note 3.

required to achieve their appropriate level of sanitary or phytosanitary protection” within the meaning of Art. 5.6.”<sup>50</sup>

Ultimately, Japan did not provide any justifications for the measures, other than citing that the restrictions were applied for the trade protection. In citing these protectionary measures, Japan argued that the language of the Articles 2, 3, 4, 5 is broad. Every country interprets the language of the articles based on their interest, not the standards of the SPS measures.

### **B. Australian Salmon Case:**

Another dispute was the Australia Salmon Case. On October 5, 1995, Australia’s government decided to prohibit any salmon imports from Canada on the ground of quarantine regulation in Australia.<sup>51</sup> Canada complained that the prohibition was inconsistent with the SPS Agreement.<sup>52</sup> On June 12, 1998 the Dispute Settlement Body within World Trade Organization<sup>53</sup> Panel found that Australia’s decision regarding the prohibition of the Canadian’s salmon was inconsistent with Articles 2.2, 2.3, 5.1, 5.5, and 5.6 of the SPS measures.<sup>54</sup> Therefore, Australia’s decision was nullified under the SPS Agreement.<sup>55</sup>

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<sup>50</sup> Panel Report, *supra* note 40.

<sup>51</sup> Appellate Body Report, *Australian - Measures Affecting Importation of Salmon*, WTO Doc. WT/DS18/AB/R (Adopted Oct. 20, 1998).

<sup>52</sup> *Id.*

<sup>53</sup> DSB is “the General Council convenes as the Dispute Settlement Body (DSB) to deal with disputes between WTO members. Such disputes may arise with respect to any agreement contained in the Final Act of the Uruguay Round that is subject to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSB has authority to establish dispute settlements panels, after matters to arbitration, adopt panel, Appellate Body an arbitration reports, maintain surveillance over the implementation of recommendations and rulings contained in such reports, and authorize suspension of concessions in the event of non-compliance with those recommendations and rulings. *See*, WORLD TRADE ORGANIZATION, *Dispute Settlement Body*, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm) (last visited April 23, 2022).

<sup>54</sup> Appellate Body Report, *supra* note 51.

<sup>55</sup> *Id.*

On July 22, 1998 Australian's government appealed the Panel's decision on the ground that there were incorrect interpretations of Article 5.1, Article 5.5 and Article 5.6 of the SPS Agreement.<sup>56</sup> The Appellate Body found the following:

- **Article 5.1 of the SPS: Risk Assessment:** “The Appellate Body, although reversing the Panel’s finding because the Panel has examined the wrong measures (i.e. heat-treatment requirement), still found that the correct measure at issue – Australia’s import prohibition – violated Art. 5.1 (and, by implication, Art.2.2) because it was not based on “risk assessment” requirement under Art. 5.1”<sup>57</sup>
- **Article 5.5 of the SPS: Prohibition on Discrimination and Disguised Restriction on International Trade:** “The Appellate Body upheld the Panel’s finding that the import prohibition violated Art 5.5 (and, by implication Art 2.3) as “arbitrary and unjustifiable” levels of protection were applied to several different yet comparable situation so as to result in “discrimination or a disguised restriction”(e.i. more strict restriction) on imports of salmon, compared to imports of other fish and fish products such as herring and finfish.”<sup>58</sup>
- **Article 5.5 of the SPS: Appropriate Level of Protection:** “The Appellate Body reversed the Panels’ finding that the heat-treatment violated Art. 5.6 by being “more trade-restrictive that required”, because heat treatment was the wrong measure. The Appellate Body, however, could not complete the Panel’s analysis of this issue under Art. 5.6 due to insufficient facts on the record. (In this regard, the Appellate body said that it would complete the Panel’s analysis in a situation like this “to extent possible basis of the factual findings of the Panel and/or of undisputed facts in the Panel record”).”<sup>59</sup>
- **False Judicial Economy:** “The Appellate Body found that the Panel in this case exercised “false judicial economy” by not making findings for all the products at issue, in particular, findings in respect of Art. 5.5 and 5.6 for other Canadian salmon. The Appellate Body clarified that, in applying the principle of judicial economy, panels must address those claims on which a finding is necessary to secure a positive solution to the dispute. Providing only a partial resolution of the matter at issue would be ‘false judicial economy’”<sup>60</sup>

As we can observe, the application of the SPS still not clear enough to justify any restrictions on agriculture and food products between nations around the globe.

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

### C. European Union Beef Case

Another dispute that arises under the SPS Agreement is the European Union's ban on hormone beef from the United States. The United States and European Union disputed the ban for nearly a decade. The dispute has exposed legitimate substantive and procedural issues, just as the logical proof and agreement concerning the safety of chemical treated meat.<sup>61</sup> Until Renee Johnson's<sup>62</sup> report regarding the U.S.-European Union Beef Hormone Dispute that was published by the Congressional Research Service in 2015, the European Union kept on prohibiting imports of chemical treated beef meat and confined most meat exports to beef imports produced without the utilization of chemicals.<sup>63</sup> In 1981, the European Union decided to restrict livestock production subjected to chemical hormone treatment.<sup>64</sup> In 1989, the European Union fully banned importation of meat products treated with growth promotants.<sup>65</sup> The ban includes "six growth promotants that are approved for use and administered in the United States."<sup>66</sup> As a result of this dispute, the United States imposed tariff sanctions on the European Union products.<sup>67</sup> The first tariff imposed on the European Union products was on 1989 in which lasted until 1996. The second tariff was imposed in 1999.<sup>68</sup>

On July 2, 1996, the United States requested to establish a panel of the DSB in consultation with the European Union to settle the dispute within the WTO organization.<sup>69</sup> The panel found that the European ban on meat treated with chemical hormone from the United States was inconsistent

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<sup>61</sup> Renée Johnson, *The U.S- European Union Beef Hormone Dispute*, Congressional Research Service (2015), <https://fas.org/sgp/crs/row/R40449.pdf> (January 14, 2015).

<sup>62</sup> Renée Johnson is a Specialist in Agricultural Policy.

<sup>63</sup> Johnson, *supra* note 61.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO. Doc. WT/DS26/R/USA (adopted Feb. 13, 1997).

with Articles 3.1, 5.1 and 5.5. of the SPA Agreement.<sup>70</sup> The European Union appealed the decision of the panel.<sup>71</sup> The Appellate Body found the following:

- **Article 3.1 of the SPA: (International Standards):** “The Appellate Body rejected the Panel’s interpretation and said that the requirement that SPS measures be “based on” international standards, guidelines or recommendations under Art. 3.1 does not mean that SPS measures must ‘conform to’ such standards.”<sup>72</sup>
- **Article 3.1 and 3.2 of the SPS (Harmonization):** “The Appellate Body rejected the Panel’s interpretation that Art. 3.3 is the exception to Arts. 3.1 and 3.2 assimilated together and found that Arts. 3.1, 3.2 and 3.3 apply together, each addressing a separate situation. Accordingly, it reversed the Panel’s finding that the burden of proof for the violation under Art. 3.3, as a provision providing the exception, shifts to the responding party.”<sup>73</sup>
- **Article 5.1 of the SPA: (Risk Assessment):** “While upholding the Panel’s ultimate conclusion that the EC measure violated Art. 5.1 (and thus Art. 3.3) because it was not based on a risk assessment, the Appellate Body reversed the Panel’s interpretation, considering that Art 5.1 requires that there be a ‘rational relationship’ between the measure at issue and the risk assessment.”<sup>74</sup>
- **Article 5.5 of the SPS (Prohibition on discrimination and disguised restriction on international trade):** “The Appellate Body reversed the Panel’s finding that the EC measure, through arbitrary or unjustifiable distinction, resulted in ‘discrimination or a disguised restriction of international trade’ in violation of Art. 5.5, noting: (i) the evidence showed that there were genuine anxieties concerning the safety of the hormones: (ii) the necessity for harmonizing measures was part of the effort to establish a common internal market for beef; and (iii) the Panel’s finding was not supported by the ‘architecture and structure’ of the measures.”<sup>75</sup>
- **Standard’s Review:** The Appellate Body discussed the issue of whether the European Communities<sup>76</sup> assess the risk based on the objective assessment that subject to the Standard of review stated in Article (11) of the SPS Agreement. Article (11) “is a ‘legal question’ that falls within the scope of appellate review under DSU Art. 17.6.” The Appellate Body found that the panel complied with Article (11).<sup>77</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS48/AB/R (adopted Feb. 13, 1998).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> European Communities is the European Union. I use the European Community interchangeably with European Union.

<sup>77</sup> Appellate Body Report, *supra* note 71.

## V. MOVING FORWARD

To avoid an arbitrary application of the international standard, nations must cooperate in utilizing SPS measurements, in order to flourish the global economy as well as the domestic economy. In addition, the SPS Agreement needs to be applied equally between countries to prevent discrimination and income inequality that cause excessive challenges between countries. If a country claims that an animal, and therefore the animal products, are affected by climate change, but the country lacks SPS measurements, and the animal products threaten the health of their citizens, they have to be clear to articulate the reasons or refer the case to the WTO dispute settlement. There, the WTO may scrutinize the claim and make final decisions whether or not the affected animal products impose a massive threat to their citizens in terms of health otherwise the decision would be unjustifiable and arbitrary. Additionally, besides the WHO recommendations regarding animal productions, countries should take into consideration how climate change affects animals' physiology, distribution and adaptation. The reasons for prohibiting animal products from any country or region must be reasonable and scientific, otherwise, it will be unreasonable and discriminatory.

After studying the above cases objectively, I can say that the SPS Agreement needs to be addressed globally to reach out to monolithic standard that all nations can rely on when they decide to import agriculture products from other nation, otherwise the application of the SPS will continue to be disputed unabated. Countries need to restrict the import of agricultural products through the development of SPS measures to ensure that they are free from such dangers.<sup>78</sup> The SPS Agreement sets out various principles that strive to exclude discriminatory and unreasonable

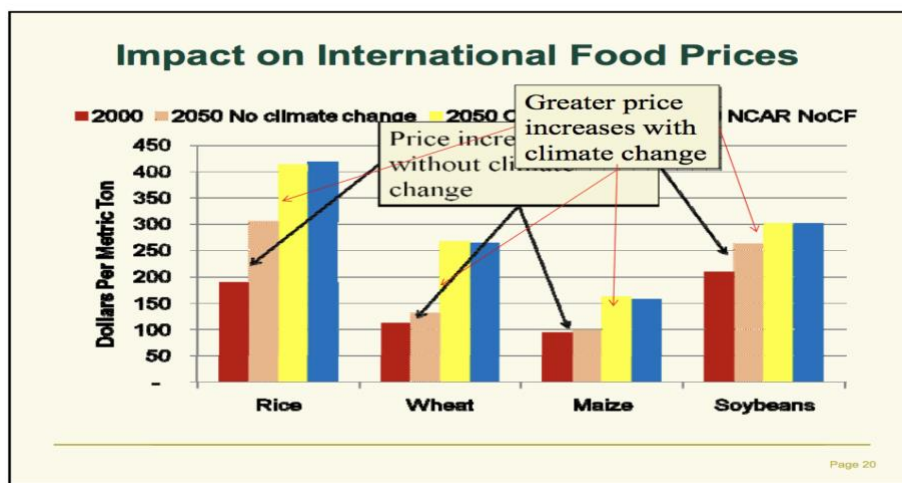
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<sup>78</sup> *Id.*

measures that risk becoming a protectionist tool.<sup>79</sup> The SPS Agreement requires that SPS measures depend on logical standards and scientific measures.<sup>80</sup> However, the measures should be encouraged to be a framework for international standards of “harmonization”<sup>81</sup>

As a result of the arbitrary application of the SPS, developed countries could raise their income and become richer. In addition to that they could carve out a strong infrastructure that could adopt any changes that result from climate change. Climate change’s impact the prices of the international food, rice production, and maize production.<sup>82</sup>

The first chart<sup>83</sup> shows the impact on international food prices.



The second chart<sup>84</sup> demonstrates the climate change’s impact on rice production

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

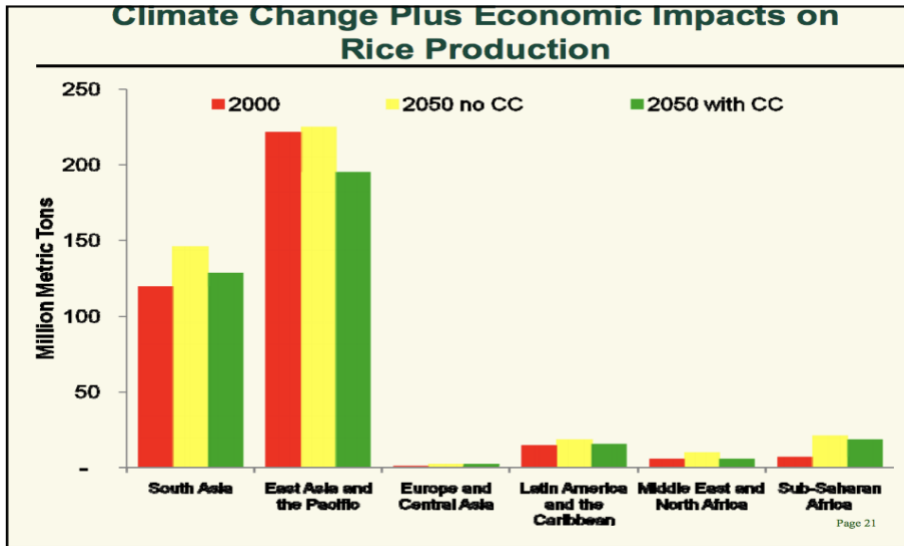
<sup>82</sup> Gerald C. Nelson presented his paper in the World Bank Seminar about Climate Change and SPS risks in Washington D.C. on September 22-23, 2009.

<sup>83</sup> Gerald C. Nelson, CLIMATE CHANGE AND AGRICULTURAL TRADE: HOW EFFECTIVE IS REFORM AS AN ADAPTION MEASURE? (2009),

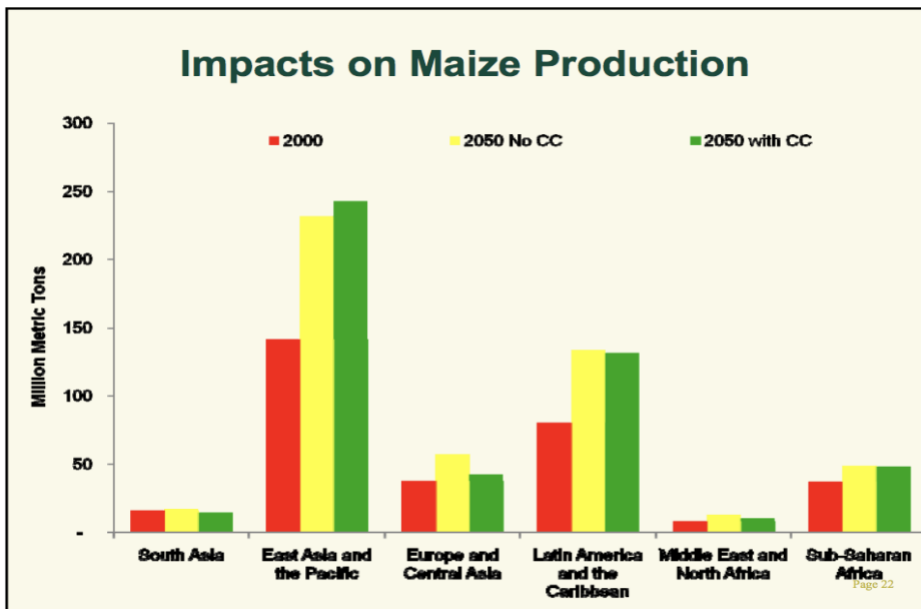
[https://www.standardsfacility.org/sites/default/files/STDF\\_Coord\\_292\\_Day1\\_GeraldNelson\\_Sep09.pdf](https://www.standardsfacility.org/sites/default/files/STDF_Coord_292_Day1_GeraldNelson_Sep09.pdf) (last visited April 23, 2022).

<sup>84</sup> *Id.*





The third chart<sup>85</sup> illustrates the climate change's impact on maize production



Last, many developing countries are struggling with the SPS measurements and their application due to the lack of infrastructure and experts in both SPS measurements and climate change affecting plant and animal products. Developing countries need assistance from developed countries in providing experts in food safety, plant health and control, hygiene control, training,

<sup>85</sup> *Id.*

and teaching capability.<sup>86</sup> For instance, in Mauritius<sup>87</sup> “there were not enough experts in surveillance, toxicology, risk assessment, and legal knowledge in the SPS area.”<sup>88</sup> As we see, the aid that is provided by developed countries to developing countries is insufficient.

Instead of taking advantage of developed countries that lack the SPS measurements and banning their plant and animal products affected by climate change, developed countries should provide more help to developing countries to overcome the challenge and difficulty caused by climate change to their plant and animals products as well as help them to increase their income. Consequently, the inequality will be reduced. The SPS Committee has to meet every three months to discuss the issue of the SPS requirements of the trading system.<sup>89</sup> They should raise the issue of inequality and climate change, which affect animal and plant products worldwide.

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<sup>86</sup> *Id.*

<sup>87</sup> Mauritius island is an island nation in the Indian Ocean about 2,000 kilometers (1,200) of the south-east coast of the African continent.

<sup>88</sup> Neeliah, *supra* note 38.

<sup>89</sup> Gretchen H. Stanton, *The SPS Agreement, WTO Agreement on the Application of Sanitary and Phytosanitary Measure*, INTERNATIONAL TRADE FORUM; GENEVA, at 24.