

**THE SPS AGREEMENT OF THE WORLD TRADE ORGANIZATION AND INTERNATIONAL ORGANIZATIONS:
THE ROLES OF THE CODEX ALIMENTARIUS COMMISSION, THE INTERNATIONAL PLANT PROTECTION CONVENTION, AND THE INTERNATIONAL OFFICE OF EPIZOOTICS***

By Terence P. Stewart & David S. Johanson*****

The proper functioning of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) of the World Trade Organization (WTO) depends in part upon three international organizations, the Codex Alimentarius Commission (Codex), the International Plant Protection Convention (IPPC), and the International Office of Epizootics (OIE). The SPS Agreement states that the sanitary and phytosanitary (SPS) standards of these organizations are the benchmark international standards for WTO members, and recent WTO decisions demonstrate the importance of international standards in the settlement of WTO disputes involving SPS measures. The Codex, IPPC, and OIE also provide valuable services that benefit the WTO, such as advising developing countries on technical matters concerning SPS issues.

This article describes the roles of these international organizations in the SPS Agreement. It also examines how the new responsibilities given to the Codex, IPPC, and OIE in the SPS Agreement might change these international bodies.

I. INTRODUCTION.

The Agreement on the Application of Sanitary and Phytosanitary Measures¹ (SPS Agreement) of the World Trade Organization (WTO), which emerged out of the eight years of negotiations of the Uruguay Round, has the potential to liberalize greatly agricultural trade. One ob-

* Stewart and Stewart retains the copyright to this article. An earlier version of it appeared in the Agricultural Sanitary & Phytosanitary and Standards Report (March 1998), a publication by Stewart and Stewart.

** Managing Partner, Stewart and Stewart, Washington D.C. B.A., College of the Holy Cross; M.B.A., Harvard University, J.D.; Georgetown University.

*** Associate Attorney, Stewart and Stewart, Washington D.C. B.A., Stanford University; M.Phil., Cambridge University; J.D., University of Texas.

1. Agreement on the Application of Sanitary and Phytosanitary Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS URUGUAY ROUND, vol. 31 [hereinafter SPS Agreement].

jective of the drafters of the SPS Agreement was to harmonize the sanitary and phytosanitary (SPS) measures² of the members of the WTO. To achieve this goal, the SPS Agreement encourages WTO members when creating or maintaining SPS measures to rely upon the SPS standards established by three international organizations: the Codex Alimentarius Commission (Codex), the International Plant Protection Convention (IPPC), and the International Office of Epizootics (OIE).³ These organizations address, respectively, issues concerning human, plant, and animal life and health.

These three organizations are recognized by the world's food and agricultural communities as the premier international bodies for the establishment of SPS standards and for the coordination of information concerning SPS issues.⁴ The standards they set are voted upon by the delegates of each member country to these organizations; these delegates are generally scientists employed by their respective national governments. While the participation of their numerous members has ensured that these organizations have never been immune to politics, the Codex, IPPC, and OIE are scientific bodies whose decisions have traditionally not been the subject of great political concern. The standards they promulgate are advisory and thus not legally binding, so their standards rarely receive significant attention outside of scientific circles.⁵

The Codex, IPPC, and OIE were created well prior to the adoption of the Uruguay Round Agreements, and they are now adjusting to the new role in the international trading system that was established for them through the SPS Agreement. The reliance on these three organizations within the SPS Agreement has already brought changes to these international bodies. As shown by the first three, and presently only,

2. Sanitary measures concern human and animal health. Phytosanitary measures apply to plants. The SPS Agreement provides a definition of *sanitary or phytosanitary measure* at Annex 1A.

3. As the International Office of Epizootics is based in Paris, it is most often referred to by the acronym "OIE"; this organization's title in French is the "Office International des Epizooties."

4. The acceptance of these organizations as the leading international bodies in their fields is demonstrated by their prominence in the SPS Agreement. Further, the U.S. Department of Agriculture noted that the General Agreement on Tariffs and Trade (GATT) "officially recognized the Office of International Epizootics (OIE) as the forum for global standards in animal health, Codex Alimentarius (Codex) for food safety standards, and the International Plant Protection Convention (IPPC) for plant health standards." U.S. DEPARTMENT OF AGRICULTURE, ANIMAL AND PLANT HEALTH INSPECTION SERVICE (APHIS) TRADE SUPPORT TEAM, NAFTA AND GATT IMPLICATIONS FOR U.S. AGRICULTURE 4 (November 2, 1995).

5. World Trade Organization, *Report of the Panel: EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada*, WT/DS48/R/CAN (Aug. 18, 1997), at ¶ 8.62 [hereinafter *Beef Hormone - Canada Panel*]; World Trade Organization, *Report of the Panel: EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States*, WT/DS26/R/USA (Aug. 18, 1997), at ¶ 8.59 [hereinafter *Beef Hormone - U.S. Panel*].

WTO disputes resolved under the SPS Agreement, the European Communities (EC)-beef hormone dispute,⁶ the Australian-salmon dispute,⁷ and the Japan – agricultural products dispute,⁸ the adjudication of major international trade conflicts can now turn at least in part upon the standards of the Codex, IPPC, and OIE. Even if these standards remain solely advisory, the stakes for WTO members in international SPS standards have become higher, and the potential exists for an increased politicization of the Codex, IPPC, and OIE processes when new standards are being set. Questions have also arisen within these organizations as to their structural capabilities to fulfill their new roles.

This article examines the provisions of the SPS Agreement that relate to the Codex, IPPC, and OIE. It describes the importance of the international standards of these organizations in the outcome of disputes involving SPS measures resolved through the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding) of the WTO.⁹ The article then discusses the Codex, IPPC, and OIE themselves, how they have changed since the implementation of the SPS Agreement, and how they might change in the future.

II. THE SPS AGREEMENT.

References to the Codex, IPPC, and OIE are made directly and indirectly in various articles located throughout the SPS Agreement. These three bodies are the only international organizations mentioned by name in the SPS Agreement. Accordingly, whenever the SPS Agreement refers to the “relevant” or “appropriate” international organizations, it is presumably referring to the Codex, IPPC, and OIE among possibly others.¹⁰

6. World Trade Organization, *Report of the Appellate Body: EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (Jan. 16, 1998) [hereinafter *Beef Hormone - Appellate Report*]; See *Beef Hormone – Canada Panel*, *supra* note 5; see also, *Beef Hormone – U.S. Panel*, *supra* note 5.

7. World Trade Organization, *Report of the Panel: Australia - Measures Affecting Importation of Salmon*, WT/DS18/R (Jun. 12, 1998) [hereinafter *Australia – Salmon Panel*]; World Trade Organization, *Report of the Appellate Body: Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, AB-1998-5 (Oct. 20, 1998) [hereinafter *Australia – Salmon Appellate Report*].

8. World Trade Organization, *Report of the Panel: Japan – Measures Affecting Agricultural Products*, WT/DS76/R (Oct. 27, 1998) [hereinafter *Japan – Agricultural Products*].

9. Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 114 (1994) [hereinafter *Dispute Settlement Understanding*].

10. Although the Codex, IPPC, and OIE are the only international organizations listed in the SPS Agreement, other international bodies concerned with SPS issues are affiliated with the WTO. The following, along with the Codex, IPPC, and OIE have regular observer status at the

A. Harmonization.

The Codex, IPPC, and OIE are designated to play a major role in the harmonization process of SPS measures envisioned in the SPS Agreement. Article 3.1 obligates members to base their SPS measures on international standards, guidelines, and recommendations “where they exist.” The SPS Agreement at Annex A specifically defines “international standards, guidelines or recommendations” as the standards, guidelines, or recommendations established by the Codex, IPPC, or OIE.

However, Article 3.3 permits members to maintain higher standards than the international norm as established by international standards, guidelines, and recommendations if a member’s measures are based upon science or if such measures are the “consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with paragraphs 1 through 8 of Article 5.” Article 5 requires WTO members to base their SPS measures upon risk assessments.

In regard to disputes arising under the SPS Agreement, Article 3.2 provides perhaps the most important provision pertaining to the roles of the Codex, IPPC, and OIE. It states that SPS measures of WTO members that are in conformity with international standards, guidelines, or recommendations shall be “presumed to be consistent with the relevant provisions of this Agreement.” Therefore, in an SPS dispute adjudicated through the WTO’s dispute settlement process, if a member adopts measures that are identical or similar to the standards promulgated by the Codex, IPPC, or OIE, the member’s measures will presumably be found consistent with its obligations under the SPS Agreement.

Article 3.4 states that WTO members must participate “within the limits of their resources” in the relevant international bodies, and “in particular” the Codex, IPPC, and OIE. Accordingly, members are expected to promote the development of standards within these international organizations. Under Article 3.5, the WTO Committee on Sanitary and Phytosanitary Measures (SPS Committee) will monitor international harmonization activities and will coordinate this effort with the “relevant international organizations,” which presumably include the Codex, IPPC, and OIE.

WTO: the World Health Organization (WHO), the Food and Agriculture Organization (FAO) of the United Nations, the United Nations Conference on Trade and Development (UNCTAD), the International Trade Centre (ITC), and the International Standards Organization (ISO). World Trade Organization, *The Committee* (visited Aug. 11, 1998) <http://www.wto.org/eol/e/wto03/wto3_36.html>.

B. Risk Assessment.

Article 5 of the SPS Agreement, which requires risk assessments for the establishment and maintenance of SPS measures, creates a role for the Codex, IPPC, and OIE. Article 5.1 states that in developing risk assessments for SPS measures, members must take into consideration the risk assessment processes developed by the “relevant international organizations,” which can be assumed to include the Codex, IPPC, and OIE. If scientific evidence is lacking concerning an SPS measure, Article 5.7 provides that members are permitted to adopt provisional measures based upon available information, such as that developed by the “relevant international organizations.” Under Article 5.8, in situations where a member believes that a measure of another member does not conform with the “relevant international standards, guidelines or recommendations,” and the measure either interferes with or has the potential to interfere with that country’s exports, that member can request that the other member provide it with explanations for the measure, and the other member will be obligated to respond.

C. Differing Regional Conditions.

Article 6 requires WTO members to recognize that pests and diseases occur in distinct regions and do not necessarily inflict all areas of a country. For example, a member would most likely violate its WTO obligations if it prevented imports of all fruit from the United States due to the presence of the Mediterranean fruit fly in only one state, Hawaii.¹¹ According to Article 6.1, members should take into consideration the guidelines of the “relevant international organizations” in determining pest- and disease-free areas.

D. Provisions Related to Developing Countries.

The SPS Agreement at Article 9.1 obligates members to agree to provide technical assistance to developing countries to help them adjust to the requirements of the SPS Agreement; members may contribute this assistance through the “appropriate international organizations.” Under Article 10.4, members should encourage developing countries to take part in the “relevant international organizations.”

The Codex, IPPC, and OIE have traditionally provided technical assistance to developing countries to help them address SPS threats, so these international organizations are well prepared to fulfill these provi-

11. U.S. Department of Agriculture, APHIS, Plant Protection and Quarantine, *The Mediterranean Fruit Fly* (visited Aug. 11, 1998) <<http://www.aphis.usda.gov/oa/pubs/fsmedfly.html>>.

sions of the SPS Agreement.¹² However, with increased technical assistance demands being made upon them since the end of the Uruguay Round, the Codex, IPPC, and OIE might in the future find it difficult to respond to these requests.¹³

E. Dispute Settlement.

Article 11.3 states that the SPS Agreement does not impair the rights of members to utilize the dispute settlement procedures of other international organizations. For example, two members of both the WTO and IPPC could choose to settle a dispute through either the Dispute Settlement Understanding (DSU) of the WTO or through the non-binding and seldom used dispute settlement mechanism of the IPPC. Under Article 11.2 of the SPS Agreement, dispute settlement panels should in disputes involving technical or scientific issues consult with experts in the relevant fields. In doing so, a panel may create a technical experts group or consult with the "relevant international organizations."

The DSU, which is a separate instrument from the SPS Agreement, restates in Article 13 the provisions of the SPS Agreement that dispute settlement panels can obtain information from experts in the relevant fields. Article 13.2 of the DSU goes on to provide that "a panel may request an advisory report in writing from an expert review group." Appendix 4 of the DSU elaborates upon the establishment and functions of expert review groups.

The panels in the EC-beef hormone, the Australia-salmon, and the Japan-agricultural products disputes declined to form expert review groups.¹⁴ The beef hormone panels expressed concerns that expert review groups would have to find consensus on certain matters, which would complicate the groups' processes.¹⁵ Instead of forming expert groups, the EC-beef hormone, Australia-salmon, and Japan-agricultural products panels sought scientific information from individual experts.¹⁶

12. FOOD AND AGRICULTURAL ORGANIZATION (FAO) OF THE UNITED NATIONS, FAO TECHNICAL ASSISTANCE AND THE URUGUAY ROUND AGREEMENTS 6 (1997); International Office of Epizootics, (visited Dec. 15, 1997) <http://www.oie.org/press/a_960911.htm>.

13. FOOD AND AGRICULTURAL ORGANIZATION (FAO) OF THE UNITED NATIONS, FAO TECHNICAL ASSISTANCE AND THE URUGUAY ROUND AGREEMENTS 6 (1997).

14. See Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.7; see Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.7; see Australia - Salmon Panel, *supra* note 7, at ¶ 6.3; see also Japan - Agricultural Products, *supra* note 8, at ¶ 6.2.

15. See Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.7; see Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.7.

16. See Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.7; see Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.7; see Australia - Salmon Panel, *supra* note 7, at ¶ 6.3, 6.4; see also Japan - Agricultural Products, *supra* note 8, at ¶ 6.2.

The WTO Appellate Body in the beef hormone appellate decision upheld the ability of panels to request opinions of individual scientists rather than form expert review groups.¹⁷ Further, in the beef hormone disputes, the Codex provided the panels with names of possible nominees to serve as experts, and a scientist from the Secretariat of the Codex became an expert for the panel.¹⁸ The panels in the Australia-salmon and Japan-agricultural products disputes asked the advice of the OIE and IPPC, respectively, when selecting experts.¹⁹ Whether or not future panels establish expert review groups, the Codex, IPPC, and OIE will likely be substantially involved in providing scientific assistance to panels.

F. *The SPS Committee.*

The functioning of the SPS Committee, which is established in Article 12, relies heavily upon the Codex, IPPC, and OIE. Article 12.2 states that the SPS Committee is required to encourage WTO members to base their measures upon international standards, guidelines, or recommendations. The SPS Committee under Article 12.3 should discuss scientific and technical matters with international SPS organizations, and in particular the Codex, IPPC, and OIE, with the aim of obtaining the best scientific information. Article 12.6 provides that the SPS Committee may also ask these organizations to examine matters concerning certain SPS standards.

Article 12.4 requires the SPS Committee to establish a procedure to follow the progress of international harmonization efforts and the utilization of international standards, guidelines, and recommendations. The SPS Committee is expected to work with the “relevant international organizations” to develop a list of international standards, guidelines, and recommendations that affect international trade. Members should indicate which of these standards they require for the importation of products. If a member does not use an international standard, guideline, or recommendation, the member should explain why its policies vary from the international standard. When a member ceases using an international standard, guideline, or recommendation, it should either explain its action to the Secretariat of the WTO and to the “relevant international organizations” or through the procedures elaborated in Annex B of the SPS Agreement, which concerns transparency.

17. See Beef Hormone - Appellate Report, *supra* note 6, at ¶ 149.

18. See Beef Hormone - U.S. Panel, *supra* note 5, at ¶¶ 6.6, 6.10.

19. See Australia - Salmon Panel, *supra* note 7, at ¶ 6.2; see also Japan-Agricultural Products, *supra* note 8, at ¶ 6.2.

The SPS Committee is in the process of monitoring the international harmonization of SPS measures, and it implemented a provisional procedure for this purpose at its meeting in October 1997.²⁰ The SPS Committee plans to review the success of this provisional procedure eighteen months after the procedure's adoption.

G. Transparency.

Annex B of the SPS Agreement states that if a member's proposed SPS measure deviates from an international standard, guideline, or recommendation, or if no such international standard exists, and if the measure has a major impact on trade, the member must notify other countries of this proposed measure "at an early stage." If requested, the member must explain to other members how the proposed measure varies from international standards, guidelines, or recommendations.

III. INTERNATIONAL STANDARDS AND WTO DISPUTE SETTLEMENT DECISIONS.

At present, three disputes involving SPS measures have been resolved through the DSU of the WTO. The existence of international SPS standards played a role, directly or indirectly, in each of these disputes. As demonstrated by the EC-beef hormone panel and appellate body decisions, the Australia-salmon panel and appellate body decisions, and the panel decision in the Japan-agricultural products dispute, now that major international trade disputes can be influenced on the basis of international standards, the members of the WTO have incentives to see that the new standards of the Codex, IPPC, and OIE conform with current or possible future national SPS measures.

A. The Beef Hormone Dispute.

In 1988, the European Communities prohibited the use of growth promoting hormones in beef production, and an import ban on hormone treated meat was implemented in 1989.²¹ The United States and Canada claimed that the use of hormones for growth promotion purposes in beef cattle was safe and posed no threat to human health. They contended that the European Communities' policy was scientifically unfounded and

20. World Trade Organization, Committee on Sanitary and Phytosanitary Measures, *Procedure to Monitor the Process of International Harmonization*, G/SPS/11 (Oct. 22, 1997).

21. U.S. Trade Representative, *1996 National Trade Estimate Report on Foreign Trade Barriers* (1996), at 98.

was designed to protect EC beef producers from competition.²² The European Communities countered by stating that beef hormones might threaten human health and claimed that science supported its policy.

1. *The WTO Panel Decisions.*

WTO-based consultations regarding the beef hormone controversy were held in 1996 between the European Communities and Canada, and the European Communities and the United States, but these talks did not result in mutually satisfactory solutions for the parties, and WTO dispute settlement panels were subsequently formed.²³ The two panels released their final reports on August 18, 1997.

Included among their arguments before the panels, the United States and Canada contended that the European Communities' prohibition on the importation of hormone-treated beef violated the European Communities' obligations under Article 3.1 of the SPS Agreement as the European Communities failed to base its measure upon international standards.²⁴ The Codex maintains standards for five of the six hormones under dispute.²⁵ According to the Codex, these five hormones, when used according to sound veterinary practices for purposes of growth promotion in beef cattle, do not pose risks to human health.²⁶ The panels determined that the European Communities' measures varied from the international standards of the Codex and thus were not in conformity with Article 3.1.²⁷

Article 3.3 makes it clear that a WTO member is not required to base its SPS measures upon international standards. Article 3.3 provides that a member may maintain higher standards than the international norm, but only if such measures are based upon science or if they operate "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." Article 5 requires that members base their measures upon risk assessments.

22. See Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.242; see Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.239.

23. See Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 1.3.

24. See Beef Hormone - Canada Panel, *supra* note 5, at ¶¶ 8.46, 8.47; see Beef Hormone - U.S. Panel, *supra* note 5, at ¶¶ 8.43, 8.44.

25. See Beef Hormone - Canada Panel, *supra* note 5, at ¶¶ 8.61, 8.62; see Beef Hormone - U.S. Panel, *supra* note 5, at ¶¶ 8.58, 8.59.

26. See Beef Hormone - Canada Panel, *supra* note 5, at ¶¶ 8.63, 8.73; see Beef Hormone - U.S. Panel, *supra* note 5, at ¶¶ 8.60, 8.70.

27. See Beef Hormone - Canada Panel, *supra* note 5, at ¶ 9.1; see Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 9.1.

The European Communities claimed that risk assessments supported its position.²⁸ The panels determined, however, that the European Communities failed to demonstrate that its measures were indeed based upon risk assessments as required in Article 3.3.²⁹ Therefore, the panels held that the European Communities' policy on beef hormones contravened the European Communities' obligations under the SPS Agreement.

2. *The WTO Appellate Body Decision.*

The European Communities appealed the findings of the panels, and the WTO Appellate Body released its report on January 16, 1998. While the Appellate Body's decision rejected a number of arguments put forward by the panels, it affirmed the panels' conclusions that the European Communities' beef hormone policy violated Article 3.3 as it was not based upon a risk assessment.³⁰ In its report, the Appellate Body emphasized that voluntary standards of international organizations such as the Codex are not transformed into mandatory standards for WTO members.³¹ Rather, members are permitted under Article 3.3 to maintain SPS measures that are higher than the international norm (*i.e.*, higher than the standards of the relevant international organizations), but such measures must be based upon risk assessments as described in Article 5.³²

B. *The Australia-Salmon Dispute.*

On October 5, 1995, Canada requested WTO-based consultations with Australia regarding Australia's ban on the importation of fresh, chilled, and frozen salmon from Canada.³³ Australia contended that its prohibition of such imports, which became operative in 1975,³⁴ was necessary to protect Australian fish from up to 24 diseases that could enter the country through imported salmon from Canada.³⁵ The establishment of these diseases could have damaging economic and biological consequences for Australia's fisheries.³⁶

28. See Beef Hormone - Canada Panel, *supra* note 5, at ¶¶ 8.111, 8.112, 8.114, 8.152; see Beef Hormone - U.S. Panel, *supra* note 5, at ¶¶ 8.108, 8.109, 8.111, 8.149.

29. See Beef Hormone - Canada Panel, *supra* note 5, at ¶¶ 8.158, 8.261, 9.1, 8.82; see Beef Hormone - U.S. Panel, *supra* note 5, at ¶¶ 8.156, 8.261, 9.1, 8.79.

30. See Beef Hormone - Appellate Report, *supra* note 6, at ¶¶ 208, 209.

31. *Id.* at ¶ 165.

32. *Id.* at ¶ 177.

33. See Australia - Salmon Panel, *supra* note 7, at ¶ 1.1.

34. See Australia - Salmon Panel, *supra* note 7, at ¶¶ 2.14, 2.15.

35. See Australia - Salmon Panel, *supra* note 7, at ¶¶ 4.34, 4.35.

36. See Australia - Salmon Panel, *supra* note 7, at ¶ 4.35.

1. *The WTO Panel Decision.*

A WTO panel was formed on April 10, 1997.³⁷ Canada claimed that Australia's policy was not founded upon science and was a disguised restriction to international trade.³⁸ Canada also contended that Australia violated Article 3.1 of the SPS Agreement as the disputed measure was not based upon an international standard of the relevant international organization, the OIE, and the measure did not meet the requirements of Article 3.3 of the SPS Agreement.³⁹ Article 3.3 permits WTO members to maintain standards that are higher than international standards, but only if they are based upon science or are a "consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate" and are based upon risk assessments.

Australia countered that it did not claim that its measure on salmon imports was based upon OIE standards.⁴⁰ After all, OIE standards did not exist for all of the 24 diseases from which Australia was seeking protection, and the OIE had no guidelines for salmon as a specific product.⁴¹ Australia contended that the lack of OIE guidelines for all of the 24 diseases meant in effect that no appropriate OIE guideline existed upon which Australia could base its measure.⁴²

The panel's report, which was released on June 12, 1998, did not address Canada's claims concerning Australia's failure to base its measure upon OIE standards. Rather, the panel found that Australia was in violation of the SPS Agreement as it (1) did not base its salmon import regulation upon a risk assessment (in violation of Article 5.1 and thus by extension Article 2.2, which requires that SPS measures be based upon scientific principles); (2) was applying arbitrary or unjustifiable distinctions in the levels of SPS protection for measures for different situations, *i.e.*, was applying more restrictive measures to imports of salmon than to imports of ornamental live fish although the latter posed higher risks,⁴³ which resulted in a disguised restriction on international trade (in violation of Articles 5.5 and 2.3); and (3) was maintaining an SPS measure

37. See *Australia - Salmon Panel*, *supra* note 7, at ¶ 1.4.

38. See *Australia - Salmon Panel*, *supra* note 7, at ¶¶ 4.52 and 4.209.

39. See *Australia - Salmon Panel*, *supra* note 7, at ¶ 3.2.

40. See *Australia - Salmon Panel*, *supra* note 7, at ¶ 8.45.

41. See *Australia - Salmon Panel*, *supra* note 7, at ¶ 8.46. Of the 24 diseases from which Australia contended it sought protection, two were included on the OIE's list of "Notifiable Diseases" and four were on the OIE's "Other Diseases" list. See also *Australia - Salmon Panel*, *supra* note 7, at ¶ 2.24.

42. See *Australia - Salmon Panel*, *supra* note 7, at ¶ 4.104. The panel stated that lack of OIE guidelines for *all* of the 24 diseases did not make irrelevant the existence of OIE guidelines for *some* of the diseases. See also *Australia - Salmon Panel*, *supra* note 7, at ¶ 8.46.

43. See *Australia - Salmon Panel*, *supra* note 7, at ¶¶ 8.137 and 8.160.

that was more trade-restrictive than necessary to reach Australia's appropriate level of SPS protection (in violation of Article 5.6).⁴⁴ As the panel found that Australia was violating these provisions, the panel stated that it "[saw] no need to further examine Canada's other claims under . . . Article 3."⁴⁵

While the Australia-salmon panel decision did not turn directly upon an international standard, the OIE's guidelines figured prominently in the arguments of both Canada and Australia. In addition, the panelists looked to the OIE for guidance when addressing other issues, such as whether Australia presented the panelists with a risk assessment.⁴⁶

2. *The WTO Appellate Body Decision.*

Australia announced on July 22, 1998, that it would appeal the panel's decision,⁴⁷ and the Appellate Body of the WTO released its report on the salmon dispute on October 20, 1998. While the Appellate Body struck down some of the findings contained in the panel's report, the Appellate Body upheld the panel's decision that Australia's policy regarding the importation of salmon violated that country's obligations under the SPS Agreement. Namely, the Appellate Body, like the panel, found that Australia's policy as applied to ocean-caught salmon contravened Australia's obligations under Article 5.1 as the relevant measure was not based upon a risk assessment, and therefore, Australia's policy also violated Article 2.2, which requires that SPS measures be based upon scientific evidence.⁴⁸ The Appellate Body upheld the panel's finding that Australia, by maintaining unjustifiable distinctions in levels of SPS protection in different situations, was imposing a disguised restriction on international trade in violation of Articles 5.5 and 2.3.⁴⁹ The Appellate Body reversed the panel's finding that Australia's measure as applied to ocean-caught salmon was more trade restrictive than necessary, and thus in violation of Article 5.6, as the panel premised its finding upon the wrong SPS measure; *i.e.*, the panel addressed Australia's heat treatment for salmon as opposed to Australia's ban on the importation of salmon.⁵⁰ Further, due to a lack of adequate facts in the record,

44. See Australia - Salmon Panel, *supra* note 7, at ¶¶ 9.1, 8.52.

45. See Australia - Salmon Panel, *supra* note 7, at ¶ 8.184.

46. See Australia - Salmon Panel, *supra* note 7, at ¶¶ 8.70, 8.71, 8.78, and 8.80.

47. See World Trade Organization, *Overview of the State-of-play of WTO Disputes*, at 5 (visited Aug. 25, 1998) <<http://www.wto.org/wto/dispute/bulletin.htm>>.

48. See Australia - Salmon Appellate Report, *supra* note 7, at 123-24

49. See Australia - Salmon Appellate Report, *supra* note 7, at 85-86, 93, and 124.

50. See Australia - Salmon Appellate Report, *supra* note 7, at 124.

the Appellate Body was unable to determine whether Australia's import prohibition was inconsistent with Article 5.6.⁵¹

The Appellate Body limited its examination to the findings of the panel, and as the measures of the OIE did not play a prominent role in the panel's decision, the Appellate Body did not examine issues directly related to the OIE. However, as with the panel, the Appellate Body looked to the OIE's guidelines when determining whether Australia's measure was based upon a risk assessment.⁵²

C. *The Japan – Agricultural Products WTO Panel Report.*

The panel's decision in the Japan-agricultural products dispute did not rely directly upon the international standards, guidelines, or recommendations of the Codex, OIE, or IPPC, and none of these organizations were named in the findings or conclusions of the panel. However, the IPPC's risk assessment guidelines were discussed in the factual section of the panel report, in the arguments of the parties, and in the panel's consultation with its scientific experts.

1. *Background of Dispute.*

On April 7, 1997, the United States requested consultations with Japan regarding Japan's approval process for the importation of certain agricultural products.⁵³ The United States alleged that Japan prohibited the importation of individual varieties of some agricultural products until each variety had been tested for the required quarantine treatment.⁵⁴ For example, instead of requiring that apples imported from the United States meet Japan's quarantine requirements concerning a certain plant pest, the codling moth, Japan mandated that testing be conducted on each *variety* of apple before different varieties could be imported.⁵⁵ Thus, even though Japan had approved the importation of certain "red delicious" apples as the United States had proven that apples of this variety could be effectively treated for the codling moth, the United States was unable to export other varieties, such as "Fujis" or "Braeburns."⁵⁶ The United States claimed that it took from two to four years to conduct the necessary tests, these tests were expensive, and that Japan's policy adversely impacted U.S. agricultural exports and vio-

51. See Australia - Salmon Appellate Report, *supra* note 7, at 124.

52. See Australia - Salmon Appellate Report, *supra* note 7, at 74.

53. See Japan – Agricultural Products, *supra* note 8, at ¶¶ 1.1, 4.23.

54. See Japan – Agricultural Products, *supra* note 8, at ¶ 1.2.

55. See Japan – Agricultural Products, *supra* note 8, at ¶¶ 1.2, 4.23.

56. See Japan – Agricultural Products, *supra* note 8, at Table 2, p. 15.

lated Japan's obligations under the SPS Agreement.⁵⁷ Japan claimed that its policies were consistent with the requirements of the SPS Agreement.⁵⁸

2. Findings of the Panel.

The panel determined that Japan's policy contravened that country's obligations under the SPS Agreement as Japan's measure, as applied to apples, cherries, nectarines, and walnuts, was not based upon scientific evidence, in violation of Article 2.2, and was more trade restrictive than necessary in violation of Article 5.6.⁵⁹ In addition, as Japan's measure was not published, the panel held that Japan was in violation of Article 7 and Annex B.1, both of which concern transparency.⁶⁰ According to press reports, Japan intends to appeal the findings of the panel.⁶¹

3. The IPPC and the Panel Report.

The United States contended that Japan had failed to base its policy upon risk assessments and that Japan was thus in violation of Article 5.1.⁶² Japan claimed, however, that it had conducted such assessments under the procedures set forth in the risk assessment guidelines of the IPPC.⁶³ The panel provided a detailed description of the IPPC's guidelines,⁶⁴ and these guidelines figured prominently in the arguments of both the United States and Japan concerning the issue of risk assessments.⁶⁵ In the end, the panel decided not to address the issue of whether Japan's policy was based upon risk assessments as required in Article 5.1 as the panel had already found that Japan was in violation of Article 2.2 as its measure was not based upon scientific evidence.⁶⁶

IV. THE CODEX ALIMENTARIUS COMMISSION.

Of the standards established by the three international organizations named in the SPS Agreement, those of the Codex have perhaps the greatest potential to lead to conflicts among WTO members.

57. See Japan – Agricultural Products, *supra* note 8, at ¶¶ 1.2, 4.23.

58. See Japan – Agricultural Products, *supra* note 8, at ¶ 3.3.

59. See Japan – Agricultural Products, *supra* note 8, at ¶ 9.1.

60. See Japan – Agricultural Products, *supra* note 8, at ¶ 9.1.

61. Doug Carder, *Ruling may open market*, THE PACKER, Nov. 2, 1998, at 1A, col. 2.

62. See Japan – Agricultural Products, *supra* note 8, at ¶ 3.1.

63. See Japan – Agricultural Products, *supra* note 8, at ¶ 4.144.

64. See Japan – Agricultural Products, *supra* note 8, at ¶¶ 2.29-2.33.

65. See Japan – Agricultural Products, *supra* note 8, at ¶¶ 4.143-4.169.

66. See Japan – Agricultural Products, *supra* note 8, at ¶ 8.63.

A. *Background on the Codex.*

The Codex establishes standards relating to human health, and its standards can concern additives, contaminants, and veterinary drug and pesticide residues in foods.⁶⁷ The Codex was founded in 1962 by the Food and Agricultural Organization (FAO) of the United Nations and the World Health Organization (WHO).⁶⁸ It currently has 162 member countries and is based in Rome.⁶⁹ The stated goal of the Codex is “to guide and promote the elaboration and establishment of definitions and requirements for foods, to assist in their harmonization and, in doing so, to facilitate international trade.”⁷⁰

Most of the work of the Codex is conducted through its various committees, which consist of delegates from its member states. Examples of these committees are the Committee on Food Additives and Contaminants and the Committee on Processed Fruits and Vegetables.⁷¹ Standards of the Codex are established through a lengthy eight step process that provides members with the opportunity to comment on the proposed standards.⁷² Throughout the Codex’s history, most of its standards have been adopted by consensus.⁷³ The Codex’s standards, guidelines, and principles fill 28 volumes, and the Codex has established 3200 maximum residue levels for pesticides alone since 1962.⁷⁴

B. *Recent Controversial Codex Decisions.*

As the standards established by the Codex relate to human health, they have caused more concerns for the populations of members of the WTO than have the standards of the IPPC and OIE, which deal respectively with plant and animal health. Controversy increasingly surrounds

67. See generally Codex Alimentarius Commission, *Report of the 21st Session, List of Standards and Related Texts Adopted by the 21st Session of the Codex Alimentarius Commission*, ALINORM 95/37 (July 8, 1995) [hereinafter Codex 21st Report].

68. U.S. Department of Agriculture, Food Safety and Inspection Service, U.S. Codex Office, *Codex Home Page*, (visited Dec. 18, 1997) <<http://www.usda.gov/fsis/codex/index.htm>>.

69. Codex Alimentarius Commission, *Latest News*, (visited Aug. 4, 1998) <<http://www.fao.org/WAICENT/FAOINFO/ECONOMIC/ESN/codex/lnews.htm>>.

70. See Codex Alimentarius Commission, *This is Codex Alimentarius* 2 (2d ed.).

71. See Codex Alimentarius Commission, *Report of the 22nd Session, Appendix V: Confirmation of Chairmanship of Codex Committees*, ALINORM 97/37 (June 28, 1997) [hereinafter Codex 22nd Report].

72. Codex Alimentarius Commission, *Procedures for the Elaboration of Codex Standards and Related Texts (The Codex “Step Procedure”)*, (visited Aug. 11, 1998) <<http://www.fao.org/waicent/faoinfo/economic/esn/codex/proced1.htm>>

73. See Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.69, see Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.66.

74. *Supra* note 70, at 2.

the establishment of certain Codex standards, and the adoption of Codex standards through consensus can no longer be assumed.

1. *Beef Hormones.*

The first indication of such controversy following the conclusion of the Uruguay Round occurred with the non-consensus approval of maximum residue levels for five growth promoting hormones, which would become the focus of the beef hormone disputes at the WTO, at the Twenty-First Session of the Codex in July 1995, just seven months after the implementation of the SPS Agreement. At the request of the United States, a secret vote was held on these standards, and they were approved with 33 delegates favoring their adoption, 29 opposing them, and 7 delegates abstaining from the vote.⁷⁵

Following the vote, the Observer of the European Communities stated that the secret vote was unfortunate as it deviated from the Codex's goal to operate transparently.⁷⁶ The Observer also said that the vote brought into question the validity of the Codex's standards and that the European Communities might reconsider its participation in this body.⁷⁷ The delegations of the Netherlands, Sweden, Finland, Spain, and the United Kingdom dissociated themselves from parts or all of these remarks.⁷⁸

The European Communities would later argue before the WTO panels in the beef hormone disputes that the failure of the Codex to adopt the beef hormone maximum residue levels through consensus demonstrated the very controversy of using these standards.⁷⁹ The European Communities also stated that Codex members were accustomed to adopting non-binding measures and were unaware that these standards for beef hormones would in effect become mandatory for the member states of the European Communities through the operation of the SPS Agreement and the DSU.⁸⁰ The panels held, however, that nothing in the SPS Agreement requires that votes on the measures of the relevant

75. See *Codex 21st Report*, *supra* note 67, at ¶ 45.

76. *Id.* at ¶ 46.

77. *Id.*

78. *Id.*

79. Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.69, *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.66.

80. See Beef Hormone - Canada Panel, *supra* note 5, at ¶ 8.71, *see* Beef Hormone - U.S. Panel, *supra* note 5, at ¶ 8.68. The Appellate Body in the beef hormone dispute held that the voluntary standards of the relevant international organizations have not become mandatory standards for WTO members through the operation of the SPS Agreement. Members may maintain SPS measures that are higher than international standards if these measures are based upon risk assessments. See Beef Hormone - Appellate Report, *supra* note 6, at ¶¶ 165, 177.

international organizations be by consensus, so the European Communities' argument was irrelevant.⁸¹

2. *Twenty-Second Session of the Codex.*

The Twenty-Second Session of the Codex was held in Geneva in June 1997 and provided further examples of disagreements over the adoption of new standards. The release of the interim panel reports in the beef hormone disputes only one month before this session most likely influenced the decisions that were made there.⁸²

a. *Bovine Somatotropin.*

Bovine somatotropin (BST) is injected into dairy cows and increases their milk production.⁸³ Its use is common in some major dairy producing countries, such as the United States.⁸⁴ At the Twenty-Second Session of the Codex, a vote was held on a draft standard for maximum residue levels for BST. In the debates preceding the vote, the Codex was divided into two groups: those who sought to adopt the draft standard at Step 8 of the Codex's standard-setting process and those who favored postponing consideration of its adoption pending the reevaluation of scientific information.⁸⁵

The delegations that favored adopting the BST standard contended that thorough scientific evaluations of BST had already been conducted by the Joint FAO/WHO Expert Committee on Food Additives and Contaminants (JECFA) and the Committee on Residues of Veterinary Drugs in Foods (CCRVDF), no new scientific evidence had been presented at the Codex meeting, and therefore a reevaluation was not needed.⁸⁶ These delegations contended that the adoption of the draft standard would logically follow the conclusions of the JECFA and CCRVDF while also liberalizing trade by preventing the adoption of unfounded trade barriers.⁸⁷

Those delegations opposing the adoption of the standard, as well as an observer from a non-governmental organization, Consumers Interna-

81. See *Beef Hormone - Canada Panel*, *supra* note 5, at ¶ 8.72, see *Beef Hormone - U.S. Panel*, *supra* note 5, at ¶ 8.69. The Appellate Body did not address the issue of non-consensus decisions by the relevant international organizations in its report for the beef hormone dispute.

82. See *Beef Hormone - U.S. Panel*, *supra* note 5, at ¶ 1.10.

83. H. Allen Tucker, Michigan State University, Department of Animal Science, *Safety of Bovine Somatotropin (BST)*, at 1, (visited Aug. 11, 1998) <<http://www.canr.msu.edu/dept/ans/mdrx224.html>>.

84. *Id.*

85. See *Codex 22nd Report*, *supra* note 71.

86. *Id.*

87. *Id.*

tional, claimed that new evidence demonstrated that the administration of BST can increase the likelihood of viral and bacterial infections and mastitis in cattle, which could lead to the further usage of antibiotics in dairy cattle.⁸⁸ Delegations also argued that factors besides science should be taken into consideration, and the delegation of the Netherlands, representing the views of the European Communities' member countries, as well as the observer from Consumers International, claimed that consumers were opposed to the use of BST.⁸⁹

Upon a motion of the Netherlands, a vote was held to postpone the consideration of the adoption of the proposed BST maximum residue level pending the reevaluation of the scientific information and an examination of other factors, most likely including consumer preferences.⁹⁰ This resolution passed with 38 members voting for it, 21 delegations against it, and 13 countries abstaining.⁹¹ The member states of the European Communities, as well as most countries seeking admission to the European Communities, voted in favor of the resolution while the United States, Canada, Australia, and New Zealand were among the countries opposing its adoption.⁹²

b. Natural Mineral Waters.

Discussions on a draft standard for natural mineral waters at the Twenty-Second Session of the Codex were also controversial and resulted in a close vote. As reported out of the Codex Committee on Natural Mineral Waters in October 1996, this draft standard did not permit microbial treatments of natural mineral water.⁹³ Instead, the draft standard comported with the traditional means of producing natural mineral waters in Europe, a process which protects the purity of water by bottling it at its source.⁹⁴ Some delegations supporting the adoption of the standard stated that they would not oppose the creation of another standard for bottled waters besides "natural mineral waters."⁹⁵ Countries opposing the adoption of the draft natural mineral water standard, such as Japan, expressed concerns about an international standard that would prohibit the use of microbial treatments as certain conditions, presumably including water quality, vary throughout the world.⁹⁶

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

Perhaps recognizing the influence of the European Communities over countries seeking admission to it, Japan requested that secret ballots be used when a roll call vote was proposed for this draft standard, but Japan's proposal was rejected by a show of hands.⁹⁷ In the actual vote on the adoption of the proposed standard, some 33 countries voted for the resolution while 31 voted against it, and 10 delegations abstained.⁹⁸ The member states of the European Communities and most other European countries voted in favor of the draft standard.⁹⁹

Following the vote, the delegates of 16 countries expressed their reservations about this new standard.¹⁰⁰ The United States issued a statement denouncing it as a possible threat to public health and a non-tariff trade barrier as it imposes restrictive requirements on the bottling of water.¹⁰¹ The vote on natural mineral waters also caused several delegations to reiterate that the Codex should attempt to reach major decisions through consensus.¹⁰²

After the adoption of the standard for natural mineral waters, the Codex assigned the Committee on Natural Mineral Waters with the task of developing a draft standard for packaged water other than natural mineral waters.¹⁰³

C. Future Codex Standards.

It is likely that non-consensus decisions will become more common in the standard-setting process of the Codex.¹⁰⁴ With the heightened importance of Codex standards, the circle of those who follow this body closely has grown beyond scientists and select government officials and now includes others, most notably environmentalists and consumer advocates. The Codex is in the process of formulating draft standards on genetically modified organisms (GMOs), and GMOs will almost cer-

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* While the panels in the beef hormone disputes found no requirement for standards to be consensually agreed upon, a future WTO panel may or may not be asked to consider the consistency of standards decided by simple majority voting in these non-WTO entities with Articles IX and X of the Agreement Establishing the World Trade Organization.

103. See *Codex 22nd Report*, *supra* note 71.

104. Further examples of non-consensus decisions of this international body might be provided at the next Codex session. The Twenty-Third Session of the Codex will begin in Rome on June 28, 1999. Source: Codex Alimentarius Commission, *Timetable of Codex Sessions 1998-1999*, (visited Aug. 4, 1998) <<http://www.fao.org/WAICENT/FAOINFO/ECONOMIC/ESN/codex/timetab.htm>>.

tainly become one of the next areas of controversy in the Codex.¹⁰⁵ Proponents and opponents of foods obtained through biotechnology are likely examining how they might be able to attain their goals through the Codex process.

V. THE INTERNATIONAL PLANT PROTECTION CONVENTION.

While the Codex has experienced controversy surrounding the adoption of some of its standards since the implementation of the SPS Agreement, the IPPC is undergoing a major structural change to prepare it for its new responsibilities in the world's trading system as a result of the SPS Agreement.

A. Background on the IPPC.

The IPPC came into force in 1952, and some 105 countries were contracting parties to it as of November 1997.¹⁰⁶ According to Article I of the IPPC, the purpose of this organization is to secure "common and effective action to prevent the spread and introduction of pests of plants and plant products and to promote measures for their control."¹⁰⁷ The IPPC was amended in 1979, and the amended text became operative in 1991.¹⁰⁸

A Secretariat was established for the IPPC in 1989 by the FAO Conference, but the Secretariat did not begin functioning until 1993 during the Uruguay Round.¹⁰⁹ The purpose of the Secretariat is to coordinate international efforts concerning plant quarantine issues, to compile information concerning plant pest outbreaks, and to provide technical assistance to members on phytosanitary issues.¹¹⁰ Like the Codex, the

105. See *Codex 22nd Report*, *supra* note 71. See also U.S. Department of Agriculture, Food Safety and Inspection Service, U.S. Codex Office, *Draft United States Comments, Proposed Draft Recommendations on the Labeling of Foods Obtained through Biotechnology*, (visited Dec. 18, 1997) <<http://www.usda.gov/fsis/codex/biotech.htm>>.

106. Food and Agricultural Organization of the United Nations, Conference, 29th Session, *Revision of the International Plant Protection Convention*, C 97/17 at 1 (Nov. 18, 1997).

107. With a minor exception, a comma between "plant products" and "and to promote," the purpose of the IPPC as proposed in the 1997 text is identical to the one found in the 1979 text.

108. Food and Agricultural Organization of the United Nations, *Secretariat of the International Plant Protection Convention*, (visited Aug. 11, 1998) <<http://www.fao.org/ag/agp/agpp/pq/secretar.htm>>.

109. *Id.*

110. Food and Agricultural Organization of the United Nations, *FAO technical assistance and the Uruguay Round Agreements* 14-15 (1997); Food and Agricultural Organization of the United Nations, *Activities* (visited Aug. 11, 1998) <<http://www.fao.org/ag/agp/agpp/pq/Activit.htm>>.

IPPC Secretariat is located in Rome and operates under the aegis of the FAO.¹¹¹

Another major function of the IPPC Secretariat is to coordinate the implementation of the IPPC through its nine regional organizations.¹¹² These organizations are the Asia and Pacific Plant Protection Commission, the Caribbean Plant Protection Commission, the Comité Regional de Sanidad Vegetal para el Cono Sur, the European and Mediterranean Plant Protection Organization, the Inter-African Phytosanitary Council, the Junta del Acuerdo de Cartagena, the North American Plant Protection Organization, the Organismo Internacional Regional de Sanidad Agropecuaria, and the Pacific Plant Protection Organization.¹¹³ Some of the regional organizations of the IPPC have traditionally been more active in establishing international phytosanitary standards, albeit regional ones, than the IPPC Secretariat itself.¹¹⁴

B. Revision of the IPPC.

Of the three international organizations named in the SPS Agreement, the IPPC is currently the least prepared to fulfill the role envisioned by the WTO. Recognizing this, the FAO Conference decided in 1995 to amend the IPPC to adapt it to the new responsibilities anticipated for it in the SPS Agreement.¹¹⁵ In 1996, an Expert Consultation proposed a revised draft of the IPPC, which was distributed to contracting parties for comments.¹¹⁶ After a review by members of the IPPC, a proposed revised convention was presented to the IPPC Conference in Rome in November 1997.¹¹⁷ The revised IPPC will go into ef-

111. Food and Agricultural Organization of the United Nations, *Secretariat of the International Plant Protection Convention*, (visited Aug. 11, 1998) <<http://www.fao.org/ag/agp/agpp/pq/secretar.htm>>.

112. Food and Agricultural Organization of the United Nations, *Regional Cooperation*, (visited Aug. 11, 1998) <<http://www.fao.org/ag/agp/agpp/pq/RegCoop.htm>>.

113. *Id.*

114. For example, the North American Plant Protection Organization, which was founded in 1976 and is comprised of plant quarantine officials of Mexico, Canada, and the United States, has traditionally been active in creating non-binding phytosanitary standards, such as risk assessment and export certification standards. Comments of Jean Hollebene, Executive Committee Member for Canada to the North American Plant Protection Organization (NAPPO), North American Plant Protection Organization: *Abstracts of the 21st Annual Meeting and Colloquium on Quarantine Security*, Bulletin No. 15, at 3 (Oct. 24, 1997); See also NAPPO, *NAPPO – The North American Plant Protection Organization: Its Purpose, Goals, Projects, and Policies*, (visited Aug. 11, 1998) <http://www.napppo.org/brochure_E.htm>.

115. See *Revision of the International Plant Protection Convention*, *supra* note 106, at 1.

116. Food and Agricultural Organization of the United Nations, *News and Events*, (visited Aug. 11, 1998) <<http://www.fao.org/ag/agp/agpp/pq/News.htm>>.

117. See *generally Revision of the International Plant Protection Convention*, *supra* note 106, at 1.

fect after two-thirds of the IPPC's contracting parties approve it.¹¹⁸ Amendments that are deemed to create new obligations for members will go into force for each contracting party upon acceptance of such amendments.¹¹⁹

The most significant change proposed in the amendments is the creation a new standard-setting focus for the IPPC.¹²⁰ The IPPC itself does not contain provisions relating to the establishment of standards. Instead, an ad hoc standard-setting process, which is viewed by many as unsatisfactory, was developed in 1993 for the IPPC and was approved by the FAO Conference.¹²¹ Consequently, unlike the Codex and the OIE, the IPPC does not have an extensive history of establishing new standards. The revisions will provide the IPPC with the structure and the capability to become a major standard-setting organization like the Codex and the OIE.

The amendments propose other notable changes to the IPPC. While the provisions of the current IPPC do not mention a Secretariat, the suggested revisions do.¹²² The proposed revisions also codify within the IPPC some of the principles of the SPS Agreement, such as the use of risk assessments, pest free areas, and harmonization.¹²³ Both the current and proposed amended conventions contain non-binding dispute settlement mechanisms.¹²⁴

With its new standard-setting focus, the decisions of the IPPC could possibly become more controversial as has occurred with some Codex decisions. Indeed, the Secretariat of the IPPC expressed concerns during the IPPC revision process that trade matters were possibly being viewed as more important than plant health issues.¹²⁵ However, block voting within the revised IPPC might be less effective than within the Codex. Under Article X.5 of the proposed revised IPPC, if consensus cannot be reached on a matter that comes before the IPPC's Commission on Phytosanitary Measures, decisions will be made by a two-thirds majority, not by a simple majority.¹²⁶

118. See *Revision of the International Plant Protection Convention*, *supra* note 106, at 2.

119. *Id.*

120. *Id.* at 12.

121. *Id.* at 1, 3.

122. *Id.* at 14.

123. *Id.* at 6.

124. *Id.* at 14.

125. World Trade Organization, Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 8-9 October 1996: Note by the Secretariat*, at 10, G/SPS/R/6 (Nov. 14, 1996).

126. See *Revision of the International Plant Protection Convention*, *supra* note 106, at 13.

VI. THE INTERNATIONAL OFFICE OF EPIZOOTICS.

Unlike the Codex and IPPC, the OIE has not experienced major changes in either its standard-setting process or its structure since the implementation of the SPS Agreement in 1995.

A. *Background on the OIE.*

The OIE coordinates studies of animal diseases, informs governments of animal diseases, and assists in the harmonization of regulations involving the trade of animals and animal products.¹²⁷ It was created in 1924 and is based in Paris.¹²⁸ As of May 1998, some 151 countries were members of this organization.¹²⁹ The OIE differs from the Codex and IPPC in that it does not operate under the auspices of the FAO of the United Nations.

The International Committee of the OIE meets at a minimum once a year.¹³⁰ This committee, which is comprised of all delegates, approves new standards of the OIE.¹³¹ The OIE has five regional commissions that encourage cooperation on animal health issues in their respective geographical areas.¹³²

The OIE is the oldest veterinary association in the world and is similar to the Codex in that it too has a long history of establishing advisory international standards.¹³³ OIE standards are found in the OIE's *Code*, which lists standards for international trade, and *Manual*, which provides the standard diagnostic procedures for animal diseases as well as vaccine standards related to international trade.¹³⁴ The Fish Diseases Commission of the OIE issues a separate *Code* and *Manual* pertaining to aquatic life.¹³⁵

127. International Office of Epizootics, *The OIE: The World Organization for Animal Health* (visited Aug. 11, 1998) <http://www.oie.int/overview/a_oie.htm>.

128. *Id.*

129. *Id.*

130. International Office of Epizootics, *Structure of the OIE* (visited Aug. 11, 1998) <http://www.oie.int/overview/a_struct.htm>.

131. *Id.*

132. *Id.*

133. U.S. DEPARTMENT OF AGRICULTURE, ANIMAL AND PLANT HEALTH INSPECTION SERVICE, ORGANIZATIONAL AND PROFESSIONAL DEVELOPMENT, INTERNATIONAL SERVICES - TRADE SUPPORT TEAM (1997).

134. International Office of Epizootics, *International Standards* (visited Aug. 11, 1998) <http://www.oie.int/Norms/A_norms.htm>.

135. *Id.*

B. The OIE Since Implementation of the SPS Agreement.

The OIE has undergone relatively few changes since the implementation of the SPS Agreement in 1995. Unlike the Codex, the OIE has not to date experienced significant controversy when creating standards. This lack of controversy can be attributed in part to the nature of the risks which the OIE addresses; the establishment of standards for animals and animal products does not evoke the same concerns for most people as do the standards of the Codex, which relate to human health.¹³⁶ And in contrast to the IPPC, the OIE prior to the Uruguay Round Agreements was well suited to establish new standards, so the OIE was not in need of revision.

Perhaps the most significant action of the OIE since 1995 has been the formalization of the relationship of the WTO and the OIE through an exchange of letters.¹³⁷ These letters state in part that the OIE and WTO agree to consult regularly on matters of mutual interest; to be invited to and to participate in relevant meetings held by one another; to exchange information on a regular basis; and to assist in providing technical assistance to developing countries.¹³⁸ The agreement proposed in these letters was approved by the OIE's International Committee in May 1997¹³⁹ and by the General Council of the WTO in October 1997.¹⁴⁰

C. The OIE and Impending Disputes.

While the profile of the OIE is possibly lower than those of the Codex and IPPC when considering changes to these organizations since the implementation of the SPS Agreement, the function of the OIE in the WTO system was demonstrated in the Australia-salmon dispute. The prominence of this international organization in resolving trade disputes will most likely increase in the near future. Bovine spongiform en-

136. Although the OIE monitors and establishes standards for animal health, its standards can also indirectly impact humans. For example, the OIE monitors for bovine spongiform encephalopathy (BSE) as this disease is carried by cattle. At the same time, however, the OIE's regulations concerning BSE also affect humans as its regulations apply to cattle products, which are ultimately consumed by humans.

137. World Trade Organization, Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 29-30 May 1996: Note by Secretariat*, at 2-3, G/SPS/R/5 (July 9, 1996).

138. See World Trade Organization, Committee on Sanitary and Phytosanitary Measures, *Draft Agreement Between the World Trade Organization and the Office International des Epizooties*, G/SPS/W/61 (May 22, 1996).

139. World Trade Organization, Committee on Sanitary and Phytosanitary Measures, *Decisions Relevant to the SPS Agreement Taken by the OIE International Committee at the 65th General Session*, at 1, G/SPS/GEN/24 (July 9, 1997).

140. World Trade Organization, Committee on Sanitary and Phytosanitary Measures, *Report (1997) of the Committee on Sanitary and Phytosanitary Measures*, at 1, G/L/197 (Oct. 27, 1997).

cephalopathy (BSE), also known as “mad cow disease,”¹⁴¹ has significantly impacted the international trade of live cattle and beef products, and this disease could lead to conflicts involving the WTO.

One such dispute that could result in WTO challenges concerns the European Communities’ proposal to ban the use of “specified risk materials” (SRMs) that might pose risks regarding transmissible spongiform encephalopathies.¹⁴² The European Communities has based its proposal in part upon OIE standards which state that certain materials, such as bovine brains and spinal cords originating from countries with cases of BSE, should not be traded internationally.¹⁴³ Such a ban by the European Communities could restrict billions of dollars worth of U.S. pharmaceutical exports to Europe as many pharmaceutical products are encased in gelatin capsules composed partly of SRMs.¹⁴⁴ U.S. officials have claimed that the European Communities’ prohibition of such products from the United States is not scientifically justified, and thus violates the European Communities’ obligations under the SPS Agreement, as the United States regularly monitors for BSE according to OIE guidelines.¹⁴⁵ The future of the European Communities’ proposed ban is in doubt due to questions of EC member states regarding the risks of BSE in SRM products.¹⁴⁶ As a result of concerns of EC member states, as well as those of the United States, the European Communities has delayed the implementation of its SRM proposal, and a decision on the proposal might be made in 1999.¹⁴⁷ The OIE is in the process of examining such risks, and any new EC policy on SRMs would likely reflect the OIE’s opinion.¹⁴⁸

European countries might take issue with the U.S. policy of restricting the importation of live cattle, meat, and meat products from European countries where BSE might be present, yet has not been detected.¹⁴⁹ The United States implemented such a policy in 1998 as it contended that some European states either have less restrictive import

141. International Office of Epizootics, *65th Annual General Session of the International Committee of the Office International des Epizooties* (May 30, 1997).

142. *Barshefsky Letter on SRM Ban*, INSIDE U.S. TRADE, Sep. 19, 1997.

143. *European Commission Decision on Animal Products*, INSIDE U.S. TRADE, August 15, 1997.

144. *Barshefsky Letter on SRM Ban*, INSIDE U.S. TRADE, Sep. 19, 1997.

145. *Id.*

146. *Unanimous EU Council Vote Means End to SRM Ban in Short Term*, INSIDE U.S. TRADE, Apr. 3, 1998.

147. *EU Likely to Delay SRM Ban Again to Continue Preparing New Regime*, INSIDE U.S. TRADE, Nov. 6, 1998.

148. *Id.*

149. *See Restrictions on the Importation of Ruminants, Meat and Meat Products From Ruminants, and Certain Other Ruminant Products*, 63 Fed. Reg. 406 (1998).

laws than the United States or fail to monitor adequately for this disease. OIE standards concerning BSE could potentially become an issue in such a dispute.

VII. CONCLUSION.

The SPS Agreement of the WTO has expanded the visibility of the Codex, IPPC, and OIE in the international trading system. The SPS Agreement encourages WTO members to base their SPS measures upon the standards of these organizations. The Codex and OIE are currently well situated to perform the roles provided for them in the SPS Agreement. Although the IPPC in its present form is capable of fulfilling the responsibilities given to it in the SPS Agreement, the IPPC's proposed revisions, if approved, would facilitate the IPPC's ability to support the WTO system.

As demonstrated by the EC-beef hormone, Australia-salmon, and Japan-agricultural products decisions of the WTO, the settlement of major international trade disputes can turn at least in part upon the standards of the Codex, IPPC, and OIE as these organizations' standards are viewed as international benchmark standards under the SPS Agreement. With the heightened importance of international standards, the standard-setting process of the Codex has become more controversial, and consensus on its new standards can no longer be assumed. The establishment of standards by the IPPC and OIE in the future might also become more political, and possibly less scientific, as an indirect result of the SPS Agreement. Such a trend might ultimately damage the credibility of the Codex, IPPC, and OIE.

It is unclear how great a role the specific trade agendas of member countries, as opposed to scientific evidence, might affect the development of future standards. All three organizations have lengthy approval processes for new standards, which should prevent the adoption of numerous scientifically questionable standards. In addition, although delegates to these organizations are government officials, they are scientists as well, and their professional integrity as well as the goodwill that has developed among them when working together might also limit the potential of the Codex, IPPC, and OIE to create standards that are scientifically unsound.

Although the possible increased politicization of the standard-setting processes of these organizations is regrettable, it is perhaps inevitable. Under the SPS Agreement, the outcome of international trade disputes can be influenced by the conformity of a WTO member's SPS measures with international standards. Therefore, one can expect that

many governments, to the extent they can, will try to protect their current or possible future SPS measures. This will likely lead to less consensus within the Codex, IPPC, and OIE than existed during the time prior to the implementation of the SPS Agreement. If lack of consensus becomes the norm, the harmonization objective will likely be harmed. Such a development may lead to increased calls for consensus standard-setting within the three entities.