

INTERPRETATION OF INTERNATIONAL STANDARDS IN THE SPS AGREEMENT

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Abstract

The Agreement on Sanitary and Phytosanitary Measures (“SPS Agreement”) explicitly refers to international standards, guidelines or recommendations. First, it states that the WTO Members shall “base” their SPS measures on international standards and; second, that the SPS measures which “conform to” international standards, guidelines or recommendations enjoy the benefit of presumption of consistency with the SPS Agreement and the GATT. However, two recent cases, viz, *India- Agricultural Products* and *Russia- Pigs (EU)* highlight the difficulties in choosing the appropriate adjudicative approach in resolving the ambiguities or differing interpretations of the international standards. This paper seeks to examine this issue in the backdrop of these two WTO disputes and provide some suggestions in discerning the meaning and content of these international standards in the SPS disputes. More importantly, this paper examines how such international standards can serve as the benchmarks for determining whether the SPS measures are based on the relevant international standards or not.

Introduction

SPS disputes are intrinsically complex and involve a certain amount of intrusion into a WTO member’s sovereign space in adopting health or food safety regulations. National governments often maintain sanitary or phytosanitary measures to protect human, animal or plant life or health. However, the SPS measure states unambiguously that SPS measures shall not be maintained without “sufficient scientific evidence”. The SPS Agreement also seeks the use of harmonized sanitary or phytosanitary measures based on the use of international standards, recommendations or guidelines.¹ These international standards are not, however, prepared or developed by the WTO. The SPS Agreement in particular has made specific references to three international organizations. The Codex Alimentarius Commission (“Codex”) is the agency in respect of human health; the International Office of Epizootics (“OIE”), or commonly known as the World Organization of Animal Health is the relevant organization for matters of animal health and zoonoses, and; the Secretariat of the International Plant Protection Convention (“IPPC”) and other regional organizations operating within the framework of the IPPC is responsible for plant health.

¹ WTO Agreement on Sanitary and Phytosanitary Measures, Recital 6.

The SPS Agreement unambiguously states that a WTO Member has the ability to choose its appropriate level of sanitary protection.² However, it is also mandated that the appropriate level of sanitary or phytosanitary protection is based on a risk assessment by taking into account the risk assessment techniques developed by relevant international organizations. However, in the risk assessment the WTO Members are required to take into account, among others, available scientific evidence, applicable process and production methods and relevant inspection, sampling and testing methods.

India- Agricultural Products was a complex case and the science was not entirely clear on several issues in that dispute. However, this case has provided some new thinking on several issues under the SPS Agreement. This case has brought into focus the interpretative approaches needed for establishing the meaning and content of international standards which are specifically mentioned in Article 3 of the SPS Agreement. Likewise, *Russia- Pigs (EU)*³ raised similar issues in relation to the interpretation of international standards in relation to African Swine Flu.

Discerning the true meaning of international standards in relation to SPS measures have not been easy. Most international standards are descriptive documents and ascertaining their meaning and content may require techniques or approaches which are generally applied in the case of international treaties. However, both in *India- Agricultural Products* and *Russia- Pigs (EU)*, the WTO Panels have used techniques which are similar to fact discovery. The Panels have used direct written consultations with the OIE experts in these two cases. The panels chose to use their powers under Article 11.2 of the SPS Agreement to seek advice from experts in matters involving “scientific or technical issues” or to “seek” information and technical advice from “any individual or body” as permitted under Article 13 of the Dispute Settlement Understanding (“DSU”). While the Appellate Body upheld⁴ the discretionary authority of the panel to determine the need for information and technical advice, this approach has led to some concerns that the panels, through this process, could undermine their judicial functions and be influenced by the subjective opinions of scientific or technical experts. At least both these cases under discussion involved a straightforward literal interpretation of the product specific recommendations of the OIE Code. Even if there is ambiguity in the wording of these documents, the lack of drafting rigour in preparing them cannot be substituted by ex post rationalization and post-adoption elaboration. Many could argue that the best way to understanding the meaning of these international standards is to adopt the time tested rules of interpretation which look at the ordinary meaning of the text, in the light of its context, object and purpose. This could be indirectly bringing into application the customary principles of treaty interpretation codified in the Vienna Convention of the Law of Treaties (“VCLT”).

² Ibid.

³ Panel Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/R.

⁴ Appellate Body Report, Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, para. 5.86, WT/DS430/AB/R [hereinafter *India- Agricultural Products*]

The following sections discuss the provisions of the SPS Agreement that relate to the use of international standards, recommendations or guidelines. Article 3.1 establish a WTO Member's obligations concerning harmonization of SPS measures with relevant international organizations.

Article 3 of the SPS Agreement:

Harmonization

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

3.2 Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect humans, animals or plant life or health, and presumed to be consistent with the relevant paragraphs of this Agreement and of GATT 1994.

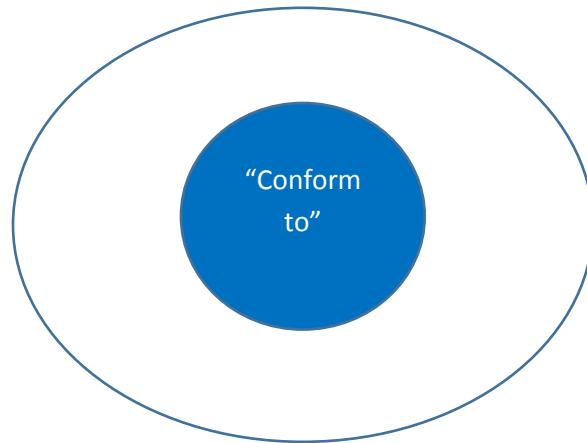
3.3. Members may introduce or maintain sanitary or phytosanitary measures which result in higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which results in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provisions of this Agreement.

The above provisions clearly indicate that the international standards, guidelines or recommendations could serve as the benchmark for checking the consistency of a Member's SPS measures with the SPS Agreement. The two terms which are important in the connection are "based on" and "conform to". In *EC- Sardines*, a dispute under the Technical Barriers to Trade (TBT), the Appellate Body noted that "there must be a very strong and very close relationship between the two things in order to be able to say that one is "the basis for" the other.⁵

In *EC- Hormones*, the first SPS dispute under the WTO, a WTO panel sought to define the meaning of "based on" and "conform to". The panel gave almost identical treatment to these words. The Appellate Body noted that a WTO Member's measures that "conforms" to and incorporates an international standard is "based on" that standard. However, the Appellate Body carved out some difference in the interpretation of "based on" and "conform to". The Appellate Body noted that the terms "conform to" and "based on" form concentric circles. A measures can be "based on" on an

⁵ Appellate Body Report, *European Communities – Trade Description of Sardines*, para. 245, WT/DS231/AB/R [hereinafter *EC- Sardines*]

international standard even if it has adopted only some elements of the standard; on the other hand, if a measure has to “conform to” an international standard, it will have to embody the international standard completely. In the Appellate Body’s wording, “much more is required before one thing may be regarded as ‘conform[ing]’ to another”.⁶ This difference is sought to be explained in the diagram below.



The exact meaning of these terms the role of international standards came into focus in *India-Agricultural Products* and *Russia- Pigs* disputes. A detailed discussion of the relevant discussion is provided below.

India- Agriculture Products: Interpretation of International Standards

Avian Influenza (AI) is an infectious disease that often affects birds, especially wild water fowl such as ducks and geese. AI viruses have been reported to cause diseases or subclinical infections in humans and animals and can be transmitted through direct contact between the infected and the susceptible birds and through a number of other means.

The global response to the AI disease has not been uniform. In fact, many countries still have self-imposed bans on poultry and poultry products from AI infected countries. The international standards developed by the World Organization for Animal Health (OIE) are, to an extent, expected to bring a certain amount of consistency in approaches in responding to AI. The international standards are embodied in the Terrestrial Code (hereinafter “OIE Code” or “Terrestrial Code”).

AI is classified into two groups depending on their pathogenicity. High Pathogenic Avian Influenza (HPAI) is an extremely infectious, systemic viral disease in poultry that produces high mortality. AI viruses that are less virulent and that do not meet the criteria for HPAI are known as

⁶ Appellate Body Report, *EC- Hormones*, para. 163.

Low Pathogenic Avian Influenza (LPAI). The term Notifiable Avian Influenza (NAI) includes both HPAI and low pathogenic notifiable avian influenza (LPAI).

The measure at the heart of this dispute is S.O. 1663 (E)—a notification issued by the Indian Government in 2011 pursuant to Sections 3 and 3A of the Livestock Act prohibiting the imports of agricultural products and, in particular, poultry and poultry meat from countries reporting both high pathogenic notifiable avian influenza (HPNAI) and low pathogenicity avian influenza (LPNAI). While the notification was silent on the duration of the prohibitions, its applicability was restricted until the time the exporting country in question notified NAI-freedom to the OIE.

The United States challenged India’s measures before the WTO in 2012. One of the key issues was the approach to be taken by a WTO panel in examining the consistency of a Member’s SPS measures with the relevant international standards. A WTO panel was established and the panel gave its ruling in October 2014. India challenged several aspects of the ruling before the Appellate Body in January 2015 and the Appellate Body gave its finding in June 2015.

International Standards and the India- Agricultural Products case

In *India- Agricultural Products*, the United States challenge was mainly against the countrywide restriction on imports of poultry and related products imposed by India. The United States argued that OIE Code does not envisage an import ban, but, on the contrary, required that restrictions be imposed at the zone or compartment level when appropriate biosecurity or surveillance control measures are in place.

The key question was whether India’s AI measures “conform to” an international standard or not. If they conform to international standards, the entire U.S. challenge is bound to fail. This was all the more important since India had not conducted a “risk assessment” within the meaning of Article 5.1 and 5.2 of the SPS Agreement. There was also no dispute that the product specific recommendations, especially the recommendations in Chapter 10.4 of the OIE Code were the appropriate international standard. The OIE Code applied to most products mentioned in India’s S.O. 1663 (E), except two categories, viz. (i) live pigs, and(ii) pathological material and biological products from birds. However, this dispute was more about import restrictions on poultry meat and related products. According to the United States, Chapter 10.4 of the OIE Code permitted imports of products from countries reporting LPNAI.⁷ India, on the other hand, argued that the recommendations in Chapter 10.4 involved a “condition of entry”⁸. According to this view, an importing country had the freedom to choose between NAI-freedom or HPNAI-freedom and the choice to extend such requirement to an entire exporting country, zones or compartments, as it deems fit. The terms “import ban” as such were not mentioned in Chapter 10.4 of the OIE Code,

⁷ Panel Report, *India- Agricultural Products*, WT/DS 430, para. 7.231.

⁸ *Ibid*, para. 7.233.

but one of the provisions, namely, Article 10.4.1.10 referred to the imposition of a ban.⁹ Article 10.4.1.10 stated as follows:

“A Member should not impose immediate bans on the trade in poultry commodities in response to a notification, according to Article 1.1.3 of the Terrestrial Code of infection with HPNAI and LPNAI virus in birds other than poultry, including wild birds.” (emphasis supplied)

India suggested an *a contrario* interpretation to Article 10.4.1.10. According to this interpretation, if there is an infection of HPNAI and/or LPNAI in poultry in another country, India can impose import restrictions, till the time the country declares itself free from NAI to OIE. This language, in India’s view, is just an exhortation not to impose bans in the commercially important segment of poultry if there is an occurrence of HPNAI and/or LPAI in birds other than poultry, including wild birds. However, the Panel decided to seek advice through a written consultation with the OIE on the interpretation of the OIE Code.¹⁰ India challenged the authority of the Panel to consult experts on an issue which is not strictly scientific and technical.¹¹ Interpretation of language is not a scientific or technical matter, India argued. The panel stated that the explanations provided by the OIE “resonate with the argument of the United States” that where the OIE Code has recommended prohibitions, it has explicitly provided so.¹² However, this statement is not free from doubt. The OIE itself states that there are several provisions in the OIE Code that permit trade from countries that are free from HPNAI (but not free from NAI)—the implication being that safe trade is not always envisaged from countries reporting LPNAI. The Panel’s reliance on the explanations provided by the OIE and the Appellate Body’s affirmation of this position may seem a reasonable interpretation of the SPS Agreement. However, there are some concerns. The interpretative matter is the text of the international standard itself. In this case India argued that the interpretation of Article 10.4.1.10 should have relied upon the customary rule of interpretation codified in Article 31-33 of the VCLT. But the Panel did not deem it important to mention the VCLT. The Appellate Body is ambivalent here, but adds that a Panel may be guided by any “relevant interpretative principles, including relevant customary rules of interpretation of public international law”¹³.

The Panel and the Appellate Body held that India’s AI measures were not “based on” or “conforming to” to the OIE standards and India was not entitled to get the benefit of presumption of consistency of the India’s AI measures with the relevant provisions of the SPS Agreement and GATT 1994. The matter rests here, but Russia- Pigs, another WTO panel was tasked with

⁹ Panel Report, para. 7.251.

¹⁰ Panel Report, para. 1.23

¹¹ Appellate Body Report, para. 5.82; see also India’s Appellate Submission, para. 95.

¹² Panel Report, para. 7.238.

¹³ Appellate Body Report, para. 5.79.

interpreting an ambiguous provision of the same Terrestrial Code in relation to some import bans on pig and pig products.

Russia- Pigs (EU) and the Interpretation of the OIE Code

This dispute arose in the wake of African Swine Fever (ASF) which was detected in certain EU countries such as Estonia, Latvia, Lithuania and Poland around 2014. ASF is a highly contagious hemorrhagic disease of pigs and European wild boar caused by the ASF virus. Russia imposed an EU-wide import ban, as well as individual import bans in respect of pig and related products in respect of the above four countries.

The EU was of the view that Russia did not comply with the science-based rules of the SPS Agreement. The EU also contended that Russia's SPS measures were not "based on" the OIE standards and are thus inconsistent with Russia's obligation to "base" its SPS measures on international standards, pursuant to Article 3.1 of the SPS Agreement. Russia imposed these measures without conducting any risk assessment.

The WTO Panel referred to the provisions of the Terrestrial Code, which relates to the ASF status of the exporting country. Articles 15.1.2, 15.1.3 and 15.1.4 of the Terrestrial Code each provide reference to an ASF-free "country", "zone" or "compartment" without imposing any sequence, preference or hierarchy among the three terms.

While both the European and Russia agreed that the Terrestrial Code contains the relevant international standards, the parties had differing views and understanding on the precise provisions of the Terrestrial Code that were relevant to the dispute and in particular the hierarchy and interrelationship between and among the Terrestrial Code's zoning and regionalization requirements and its provisions dealing with the ASF. According to the OIE, all the various combinations of testing, treatment and certification listed in Article 15.1 provide for safe trade of animals and animal products.¹⁴ In this regard, there was a fair amount of similarity between the facts of this case and the India- Agricultural Products case.

The WTO Panel ruled that "[g]iven that the relevant provisions of the Terrestrial Code call upon OIE members to allow for the possibility of recognition of ASF-free status... on a country or 'zone' basis, the failure of Russia to even allow for the possibility for imports from the unaffected EU member States... amounts, in our view, to a 'fundamental departure' from the provisions of the Terrestrial Code...."¹⁵ The Panel also ruled that the EU-wide ban on non-treated products contradicted the relevant international standards and therefore it could not be considered to be 'based on' international standards for the purposes of the SPS Agreement.¹⁶

¹⁴ OIE responses to Panel's questions N0,19, cited in Panel Report, *Russia- Pigs(EU)*, para. 7.287.

¹⁵ Panel Report, *Russia- Pigs (EU)*, Para. 7.493

¹⁶ Ibid.

The Legal Status of International Standards

India- Agricultural Products and *Russia—Pigs* disputes, raise certain complex issues in establishing the conformity of Member's SPS measures with international standards. The defending countries in both these cases argued that their measures should enjoy the benefit of presumption of conformity under Article 3.2 of the SPS Agreement. However, conformity, within the meaning of the Appellate Body's interpretation in the *EC- Hormones*, require almost 'complete' alignment between the international standard and the concerned SPS measure.

In both *India- Agricultural Products* and *Russia—Pigs (EU)*, the SPS measure required interpretation of the OIE Terrestrial Animal Health Code or the Terrestrial Code. The Terrestrial Code sets out standards for the improvement of animal health and welfare and veterinary public health worldwide, including through standards for safe international trade in terrestrial animals (mammals, reptiles, birds and bees) and their products. It is important to recall that the Office International des Epizooties was established way back in 1924. Around 28 States signed an Agreement to create the OIE and it currently has some 178 Members. However, what is being interpreted in these SPS disputes is not the OIE treaty itself. The interpretation is related to the product specific recommendations of the OIE Code.

An important question is whether it is possible to characterize the OIE product specification as an international treaty. If it is a treaty, interpretation of its terms will have to follow the principles embodied in Articles 31- 33 of the VCLT. Article 2(1)(a) of the VCLT defines a treaty as an "international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

The Terrestrial Code requires a closer examination for a determination of its legal status. It has a preamble and the product specific recommendations have mandatory language at various places. Further, the health measures under the Terrestrial Code have been formally adopted by the World Assembly of OIE delegates, which forms the highest decision making body of the agency. The OIE delegates are drawn from the Member governments. However, most of the recommendations are prepared by the OIE experts with the help of some officials.

There is no compelling evidence available, as of now, to treat the Terrestrial Code as a treaty. The *India- Agricultural Products* and *Russia- Pigs (EU)* did not examine this issue at depth. In fact, the WTO panel in the *Russia- Pigs (EU)* noted that the "Terrestrial Code is a set of international standards and not a treaty."¹⁷ Therefore, if the Terrestrial Code may not itself be a treaty, the issue is how the adjudicating agencies should interpret the elements of the international standards. Strictly speaking, the provisions of Article 31, 32 and 33 of the VCLT are applicable only if the underlying term or word pertains to a treaty. Although, the *Russia- Pigs (EU)* Panel provide some

¹⁷ Panel Report, *Russia- Pigs (EU)*, para. 7.278.

observation on the status of the Terrestrial Code, this observation is not based on any detailed reasoning.

The Panel in *Russia- Pigs (EU)*, however, noted that the rules of interpretation in the VCLT may serve a useful guidance in the examination of the provisions of the Terrestrial Code. To understand the contours of the operation of the rules of the VCLT, some discussion of Articles 31, 32 and 33 of the VCLT are in order. Article 31.1 requires the adjudicating body to interpret the treaty based on the ordinary meaning of the text, read in context, and in light of its object and purpose. Article 31.2 explains as to what can be considered as “context”. Article 31.3 speaks about certain “additional contexts”. Prominent among which is Article 31.3 (c) which requires consideration of “any relevant rules of international law”.

In the context of WTO dispute settlement, a WTO panel is required to provide an objective interpretation of the concerned covered agreement based on the general principles of international law, other legal instruments or acts. These supporting documents, instruments or any general principles of law could be the following:

1. Any agreement relating to the WTO treaty which was made between all the parties in connection with the conclusion of the WTO treaty (Article 31(2) (a) of the VCLT).
2. Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty (Article 31(2) (b)).
3. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, which needs to be taken into account together with its context (Article 31(3) (a)).
4. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation, which needs to be taken into account together with its context (Article 31(3) (b)).
5. Any relevant rules of international law applicable in the relations between the parties, which needs to be taken into account together with its context (Article 31(3) (a)).
6. In addition to the above, if the interpretation is still ambiguous or obscure, any other supplementary means of treaty interpretation such as the preparatory work of the treaty or a legal instrument constituting the “circumstances of the conclusion of the treaty” (Article 32 of the VCLT).

The WTO panels and the Appellate Body have been extensively using the canons of treaty interpretation enlisted in Article 31-33 of the VCLT. For example, even for interpretation of

common terms such as “salted”¹⁸, “sporting”¹⁹ “discriminatory”²⁰, “public body”²¹, the panels and the Appellate Body have used the VCLT tools regularly and, often, effectively. However, there has been only limited discussions on the use of the VCLT tools in the interpretation of international standards. To revert to the Terrestrial Code in the two WTO disputes in question, what was ambiguous were the terms of the Terrestrial Code itself. In *India- Agricultural Products*, the contentious issues was the interpretation of Chapter 10.4 of the Terrestrial Code itself. In the *Russia—Pigs (EU)* case, the dispute related to the interpretation of Chapter 15 of the Terrestrial Code. To that extent, these SPS disputes are different from almost all other WTO disputes where the use Article 31-33 of the VCLT *EC- Computer Equipment* was in question. More specifically the three leading case on this issue, namely²², *US- Gambling*²³, and *EC- Chicken Cuts*²⁴ related to the schedules of concessions of the WTO Members in question. The WTO treaty text and the jurisprudence have in uncertain terms clarified that the schedules of concessions are integral parts of the WTO treaty.

The relevance of the VCLT in relation to international standards is substantively a different issue. There is not even a faint suggestion that they are part of the covered agreements and are indeed not prepared or concluded as part of the WTO treaty.²⁵ They are non-WTO related instruments, or more appropriately, documents. In other words, the discussion in this case is related to the interpretation of non-WTO sources which are relevant or, in some cases, critical to the assessment of the WTO consistency of a defending Member’s obligations under the covered agreement. In the case of the SPS Agreement, Article 3.1, 3.2 and Annex 1(3) refer to “international standards, guidelines or recommendations”. The treaty interpreter is not looking at the plain meaning of these terms *per se*. But the interpretation relates to something more substantive—the contents, scope and meaning of the international standard themselves.

As this discussion highlighted earlier, the international standards are complex and their wordings are similar to treaty instruments. A WTO Member is required to examine these standards based on commonly understood hermeneutical tools of which a useful toolset is the VCLT itself. It is not clear, based on my limited research, whether the Uruguay Round negotiators paid much attention

¹⁸ Panel Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, as modified by Appellate Body Report WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R.

¹⁹ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R

²⁰ Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS246/AB/R

²¹ Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R

²² *Supra*, footnote 20.

²³ *Supra*, footnote 21.

²⁴ Panel Reports, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R (*Brazil*) / WT/DS286/R (*Thailand*), adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R

²⁵ Gabrielle Marceau, *WTO Agreements Cannot be Read in Clinical Isolation from Public International Law* (AB Report in *US- Gasoline*).215, 220.

as to how the contentious element of an international standard in relation to the SPS Agreement should be examined by a WTO panel. The following discussion provides some constructive suggestion for resolving this interpretative problem.

Alternative I: Treating International Standards as “Integral parts” of the SPS Agreement

Since conformity to an international standard is a matter of critical importance for a WTO Member defending an SPS measure, there is a very good argument that the international standards under the SPS Agreement should be treated on the same pedestal as the agreement itself. To take forward this argument, the terms of the international standard should be given the most rigorous analysis based on the plain meaning of its terms. If the international standards are expressed in certain terminology, symbols, packaging, marking or labeling requirements, the more appropriate method of discerning or interpreting their meaning is by necessarily taking recourse to the tools available under Article 31-33 of the VCLT. While this approach has certain advantages, the whole concept of treating the international standards as part of or on par with the WTO covered agreements is likely to be met with stiff opposition, at least among the WTO Membership. For example, in *EC-Hormones*, the WTO Panel provided an interpretation of Article 3.1 of the SPS Agreement as requiring Members to harmonize their SPS measures by conforming these measures to international standards, guidelines or recommendations. The Appellate Body while rejecting this interpretation noted as follows:

The Panel’s interpretation of Article 3.1 would, in other words, transform these standards, guidelines or recommendations to binding norms. But, as already noted, the SPS Agreement itself sets out no indication of any intent on the part of the Members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards, guidelines or recommendations.²⁶

In other words, there is no requirement on the WTO Members to harmonize their SPS measures by adopting identical or exactly similar standards, as embodied in the international standards. This view is further supported by Article 12.2 of the SPS Agreement which merely encourages the WTO Members to use of international standards, guidelines or recommendations. In other words, unless a Member seeks the benefit of presumption under Article 3.2 of the SPS Agreement for its SPS measures, there is no need to conform its SPS measures to international standards. *A fortiori*, the international standards cannot be assumed to be an integral part of the SPS Agreement in the absence of a more specific or more compelling language in the SPS Agreement.

This conclusion, however, will not resolve the problem highlighted in this paper—namely, how to interpret the international standards referred to in the SPS Agreement. The following section will consider an alternative approach.

²⁶ Appellate Body Report, *EC- Hormones*, para.165.

Alternative II: Treating International Standards as a “Context” under VCLT

If the international standards, guidelines or recommendations are neither part of the WTO agreements nor separate treaties in themselves, what is the best method to interpret them? An important question is whether it is possible to treat the terms “international standards, guidelines or recommendations” mentioned in the SPS Agreement as the subject matter of interpretation and consider the international standard in question (for example the Terrestrial Code) as the “context” under the VCLT? This approach could be criticized at the outset that the WTO treaty terms “international standards, guidelines or recommendations” referred to in various places of the SPS Agreement contain no interpretative ambiguity as such; rather, any such ambiguity could only be part of the international standards or guidelines or recommendations in question which could vary depending upon the subject matter of the dispute.

Despite this valid criticism, the avoidance of the VCLT tools could be potentially damaging to the integrity of WTO legal system. A WTO Member complying with the elements and requirements of international standards for the purpose of harmonization of its SPS measures is only expected to closely follow and abide by the terms and terminology of the international standard, guidelines or recommendations. In fact, the international standards which are developed by the concerned international organization represent the common intention of the members of that organization that has developed a particular standard, and by some logical extension the common intention of the WTO Members concerning a specific sanitary or phytosanitary protection. It does not matter whether these standards are directly incorporated in the WTO or not, but the conformity with the international standard is crucial to establishing its SPS compliance. In the absence of application of the rules of treaty interpretation, there is a grave danger that the subjective opinions of technical or scientific experts could influence the interpretation of the international standards, in preference to and in precedence over the agreed texts of these standards.

Furthermore, there is no apparent mischaracterization in treating the relevant international standard prepared by the Codex, OIE or the IPCC as a “context”. The terms which are subject to interpretation are the specific terms in the SPS Agreement. While examining the elements of the VCLT in the *US- Gambling* dispute, the Appellate Body noted that certain documents can be characterized as context for the WTO treaty “only where there is sufficient evidence of their constituting an “agreement relating to the treaty” between the parties or of their “accept[ance by the parties] as an instrument related to the treaty”²⁷. Considering the specific references given to the Codex, OIE and the IPCC in the SPS Agreement, it is plausible to treat these international standards as “contexts” in specific relation to Article 3.1 and 3.2 of the SPS Agreement.

By treating the concerned international standards (Codex, OIE or PPCC standard or guidelines, as the case may be) as a “context”, it is possible to refer to other legal instruments, agreements, subsequent practices prevailing among the WTO members or the principles of international law in discerning their meaning. This menu of options is desirable especially when the terms of the

²⁷ Appellate Body Report, *US- Gambling*, para. 175.

international standards are badly worded or inconclusive. For example, a consistent and concordant practice among the signatories to the international standard, guidelines or recommendations in the application of the relevant international standard could shed some light on the interpretation of the standards. However, the most discernible advantage of this approach is that the WTO panels will no longer be able to consider the exercise of finding out the meaning and content of the international standards as a purely a factual or fact finding matter. There is at least some precedents in WTO jurisprudence for adopting this type of an approach in examining non-WTO law in the context of WTO dispute settlement. In fact, in *EC- Bananas*, one of the earliest WTO cases, the panel and later the Appellate Body had to grapple with the role of non-WTO legal instruments in the interpretation of WTO law.

A non-WTO obligation may be explicitly referred to define, clarify or delimit an obligation specified in one of the WTO covered agreements. For example, this may happen in the case of a WTO waiver where the Members may refer an outside treaty to explain or lay out the scope of a WTO waiver. In *EC- Bananas*, both the Panel and the Appellate Body referred to the Lomé Convention to examine the scope and nature of the Lomé waiver granted to the European Communities concerning some of its obligations under the GATT. The Appellate Body while affirming the findings of the Panel extracted a key finding from the Panel report:

...since the GATT CONTRACTING PARTIES incorporated a reference to the Lomé Convention to the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé Waiver.

The Panel in this case had to determine what the European Communities were “required” to do under the Lomé Convention in relation to trade in bananas. The Lomé Convention apparently required the European Communities to accord some preferences to trade in bananas from the African- Caribbean and Pacific Group of States (ACP). The panel closely examined several provisions of the Lomé Convention. This was important to understand as to what was covered by the Lomé waiver.

In the above backdrop, while treating these international standards as “contexts”, the necessary consequence is to encourage the panels to use the various canons and aids of interpretation provided in Article 31-33 of the VCLT itself. Evidently, the WTO panels in *India- Agricultural Products* and *Russia- Pigs (EU)* have not followed an order of analysis which the strict requirements of VCLT would have entailed. In particular, the *Russia- Pigs (EU)* has observed that “the rules of interpretation in the Vienna Convention would not be directly applicable to the interpretation of standards set out in the Terrestrial Code in the same manner as they would apply to a treaty.”²⁸

²⁸ Panel Report- Russia- Pigs (EU), para. 7.278.

Conclusion

The covered agreements under the WTO have incorporated or referred to other external treaties or agreements at various places. Illustrations include the reference to the Paris and the Berne Conventions under the TRIPS Agreement.²⁹ Another illustration is the reference to the OECD Arrangement on Export Credit under Item (k) of Annex I of the SCM Agreement. However, the application and interpretation of international standards developed by other international organization is a matter of critical importance for Members in assessing the consistency of their SPS measures with the WTO covered agreements. Since these international standards are neither integral parts of the SPS Agreement nor international treaties in themselves, the adjudicative approach to be used for examining the conformity of these standards is rather uncertain or unclear. This paper has argued that that the WTO adjudicating bodies should treat these standards as “contexts” in the interpretation of “international standards, guidelines or recommendations” as specified in Article 3.1 and 3.2 of the SPS Agreement and apply the rules of VCLT in nearly all cases. Such an approach is necessitated by the fact that most international standards are detailed written documents and closely mirror international treaties although they have not necessarily gone through the rigours of treaty making. It is also argued that this approach would limit the discretionary authority of the panels to consult scientific and technical experts especially when a more textual interpretation is required for discerning the meaning of the international standards.

²⁹ Articles 2.1 and 9.1 of the TRIPS Agreement respectively.