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THE IMPLEMENTATION OF THE AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES (SPS): THE CASE OF MALAYSIA

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Abstract: *The objective of this study is to explore the application of the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) in Malaysia. This agreement is an environmental provision enforced by the WTO which allows members to invoke a trade measure that can protect human, animal or plant life, as long as such measure is necessary and will not discriminate among the members of the WTO. As a member of the WTO, Malaysia is compelled to apply and implement the terms of the SPS agreement. However, the ability to fully apply the terms of the said agreement need to be determined. In this study, the analysis will be on the role of the WTO in the trade and environment relationship, the application of the terms of the SPS agreement and the Malaysian government endeavor in applying the terms of the said agreement domestically. In order to analyse the application of the terms of the SPS agreement, it is necessary to look into the decision made by the WTO Dispute Settlement Panel in certain disputes which occurred due to the non-compliance of the said agreement. These disputes are European Communities - Measures Concerning Meat and Meat Products (Hormones), European Communities - Measures Affecting Asbestos and Products Containing Asbestos and European Communities - Measures Affecting the Approval and Marketing of Biotech Products. This paper could signify that there are an effort and determination by the Malaysian government in complying with the terms of the SPS agreement and that the effort may assist the government in finding balance in the trade and environment conflict.*

***Keywords**: International Economic Law, International Trade, Environment, Malaysia, Agreement on the Application of Sanitary and Phytosanitary Measures*

Introduction

The World Trade Organization (WTO) is acquiring the balance between international trade and environmental protection. The 1994 General Agreement on Tariff and Trade (GATT) has

brought about the establishment of the World Trade Organization (WTO). The preamble of the Marakesh Agreement Establishing the World Trade Organization (WTO) states that:

> " Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development ,seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development..."

Environmental protection measure will have an impact on international trade. The measure will be upon the trading of goods that are affecting human, animal and plant health and it is evident that goods which were produced through a technological process would affect the health of human, animal and plant. Although it is necessary to protect the environment, sometime an environment protection measure invoked could be a disguised restriction to trade and could be an act of protectionism by a country. In view of finding the balance between these two issues, the WTO has laws which contained environmental provisions and these laws are the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the Agreement of Technical Barrier to Trade (TBT) and Article XX of the GATT. However, this study will only look into the law of the SPS Agreement and its application in Malaysia and thus, the objective is to explore the application of the SPS Agreement. The analysis will be on the role of the WTO in the trade and environment relationship, the application of the terms of the SPS Agreement in Malaysia and the Malaysian government effort in applying the terms of the said agreement domestically.

So far the WTO Dispute Settlement Bodies has made rulings in the European Communities- Measures Concerning Meat and Meat Products (Hormones) dispute which concerned hormone-treated meat; the European Communities- Measures Affecting Asbestos and Asbestos-Containing Product dispute where the French government banned asbestos and products containing asbestos; and the European Communities- Measures Affecting the Approval and Marketing of Biotech Products dispute where the European Communities had restrained activities on the trading of agricultural biotechnology products. These cases involved the trading of goods which were produced with material and substance that might have serious health effect on human, animal and plant. The decisions made by the WTO Dispute Settlement Bodies signified that a party which intends to invoke an environmental protection measure must provide a high standard of proof that the measure is necessary through scientific justification and risk assessment. The party must also prove that their measure will not discriminate between members of the WTO and a disguised restriction to trade.

The Application of The Terms of The Agreement on The Application of Sanitary and Phytosanitary Measures (SPS)

The preamble of Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) states that:

> " No Member should be prevented from adopting or enforcing measures necessary to protect human , animal or plant life or health , subject to the requirement that these measures are not applied in a manner which would

> constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade;"

This Agreement allows members to take out measure in order to protect human, animal or plant life or health as long as the measure is not a discrimination between members and a disguised restriction on international trade. In order to prove these two requirements, members need to show that:

i) the measure is necessary;
ii) the standard of measure which has been invoked is high;
iii) that they have strong scientific evidence to prove that the measure is necessary;
iv) proper risk assessment has been carried out in order to substantiate scientific justification;

The Agreements applies to "all sanitary and phytosanitary measures which may directly or indirectly affect international trade". Annex A1 of the SPS Agreement states out what constitutes a sanitary and phytosanitary measure. Annex A1 specifically mentions four purposes that satisfy this requirement:

(a) to protect animal or plant life or health…from risks arising from…pests, diseases, disease-carrying organisms or disease-causing organisms;
(b) to protect human or animal life or health…from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
(c) to protect human life or health…from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
(d) to prevent or limit other damage…from the entry, establishment or spread of pests.

According to Eggers (2005), SPS Agreement applies to regulations which made to protect human, animal, or plant life or health from "certain well defined 'food borne' or 'pest-or-disease-related' risks". But Annex A1 of the SPS Agreement mentioned that whether a measure prohibiting trade is a sanitary or phytosanitary measure depends on its purpose (Thayer, 2005). Thayer (2005) further claims that the SPS Agreement has two main goals. Firstly, to allow Members "to maintain the level of health protection they consider appropriate" and secondly, to ensure that sanitary and phytosanitary measures are not unnecessary, arbitrary, or scientifically unjustifiable". Therefore under this agreement, members have the right to apply any measure as long as it is necessary and it is to be maintained based on strong scientific evidence. Further, the form of the measure is not important in determining whether it is a sanitary and phytosanitary measure or not. For example, sanitary and phytosanitary measures include technical measures, such as labeling requirements, if they are created to protect human life from the risks arising from toxins (Thayer, 2005).

In order to invoke a sanitary and phytosanitary measure, a party needs to provide scientific justification that the measure is necessary. Therefore, a government who intended to invoke such measure must ensure that they have scientific justification to do so and that a proper risk assessment has been carried out (Hudec,2003). This is pursuant to Article 2 of the SPS Agreement. Article 2.2 of the SPS agreement states:

> "Members shall ensure that any sanitary and phytosanitary measures is applied only to the extent necessary to protect human, animal or plant life or health, is

based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5".

In addition to providing strong scientific evidence, the party invoking a measure has to make an assessment of the risks which deemed to have an effect on health and the environment. If a sanitary and phytosanitary measure is not based on an international standard, the member must show it is based on a risk assessment (Thayer, 2005). Article 5.1 of the SPS Agreement states:

> "Members shall ensure that their sanitary or phytosanitary measures are based on an assessment , as appropriate to the circumstances , of the risks to human, animal or plant life or health , taking into account risk assessment techniques developed by the relevant international organization."

Green & Epps (2007) states that the WTO and the rulings of Dispute Settlement Bodies subjected 'health' measures to stricter scientific evidentiary requirements than environmental measures.

According to Hudec (2003), a country needs only to base the measure on scientific assessment of the risks and only apply it if it is necessary and when the goal of the measure has been met. However, he further contended that in order to decide whether a measure is justified or not, we need to look at the regulatory goal of the measure not the policy instrument. For example, in the European Communities Measures Concerning Meat and Meat Products (Hormones) Dispute, the Appellate Body finds that there is a violation of Article 5.1 of the SPS Agreement as the European Communities had failed to base its hormone restrictions on a proper risks assessment. The Appellate Body states that the absence of a risk assessment is a violation of the Agreement even though there is no trade discrimination. Hudec (2003) further claims that any measure, whether it discriminates or not, which is not based on strong scientific evidence would be a violation of Article 2 of the SPS agreement.

The application of the sanitary and phytosanitary provisions by the WTO can be found in these decided disputes. In the European Communities- Measures Concerning Meat and Meat Products (Hormones) dispute, the action was taken out by Canada and United States (US) against the European Communities (EC) for imposing a ban on the sale of hormone-fed beef due to the potential carcinogenic effect of growth hormones in food. Article 3 of the SPS Agreement was analyzed in this dispute. In 1997, the WTO Dispute Settlement Panel found that the EC ban on beef treated with hormones for growth – promotion purposes was inconsistent with its obligations under the SPS Agreement. The Panel found that the measure was not based on a risk assessment which should be based on existing international standards. The EC had not provided a sufficient scientific justification for the ban. Plus the protection was arbitrarily and unjustifiable different from the level of protection provided by other EC measures and this level of protection had resulted in a "disguised restriction on trade" in contravention of Article 5.5 of the SPS Agreement. The Panel found that those studies which had specifically evaluated the potential toxic effects of hormone used to promote growth in cattle concurred that, at present there was no indication that these substances posed public health risks when properly used and that the EC by informing their regulatory decision did not qualify as risk assessment.

Further, in the European Communities- Measures Affecting the Approval and Marketing of Biotech Products dispute, the US seek WTO consultations to end an alleged EC moratorium on

the approval for commercialization of agricultural biotechnology products that had restricted the imports of agricultural and food products from their country. The US claimed that the alleged moratorium violated provisions of the WTO agricultural, technical barrier to trade and sanitary and phytosanitary agreements as well as the GATT. The WTO Panel found that the EC had violated Article 5.1 and 2.2 of the SPS Agreement. They found that the EC had not based their measure on a proper risk assessment in accordance to the requirement of the SPS Agreement.

The SPS Agreement also provides for the prohibition of product standards that could create "an unnecessary obstacle to international trade" The Article 2.3 of SPS Agreement expressly states that sanitary and phytosanitary measures are allowed if there will be no trade discrimination. Its purpose is to contain the use of SPS measures as a disguised restriction to trade (Torres, 2003). Article 2.3 of the SPS Agreement states:

> "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members, sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction to trade."

A measure could be regarded as a discriminatory or non-discriminatory depending on whether it was made under the justification of non-trade purpose and that the measure is real and necessary (Hudec, 2003). It should be apparent that a measure's legality by reference to that test often depends on the scientific validity of the claim of non-trade purpose and that the risks is real and necessary.

The rules in respect to international trade procedure are stated in Annex B and Annex C of the SPS agreement. Annex B is in respect to the transparency of sanitary and phytosanitary regulations especially on the publication, enquiries and notification procedure of sanitary and phytosanitary measures. In regards to publication of regulations, it states that "Members shall ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them." As for enquiry points, it is stated that "Each Member shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents regarding:

(a) any sanitary or phytosanitary regulations adopted or proposed within its territory;
(b) any control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures, which are operated within its territory;
(c) risk assessment procedures, factors taken into consideration, as well as the determination of the appropriate level of sanitary or phytosanitary protection;
(d) the membership and participation of the Member, or of relevant bodies within its territory, in international and regional sanitary and phytosanitary organizations and systems, as well as in bilateral and multilateral agreements and arrangements within the scope of this Agreement, and the texts of such agreements and arrangements."

For notification procedures, it is stated that "Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard,

guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

(a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;
(b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;
(c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;
(d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments;"

Annex C requirements are in respect to the control, inspection and approval procedures. It states that "Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:

(a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products; and that
(b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs; the confidentiality of information about imported products arising from or supplied in connection with control, inspection and approval is respected in a way no less favourable than for domestic products and in such a manner that legitimate commercial."

Therefore, member countries have to ensure that the requirements in Annex B and Annex C of the SPS Agreement are to be complied with in order for the regulations to comply with the requirements of the WTO rules.

Malaysia Application of The Agreement on The Application of Sanitary and Phytosanitary Measures (SPS Agreement)

In respect to the compliance to international treaty by a member country, even though a treaty binds the member country under international law, the treaty has no legal effect domestically unless the local government passed a legislation to give effect to the treaty concerned. A rule of international law will become a part of domestic law only after the transformation of it into domestic law by means of statute or an act of parliament. (Shuaib, 2008).

Malaysia has the following laws that complies with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). These laws are the Plant Quarantine Act 1976, Plant Quarantine Regulations 1981, Animal Act 1953 (Revised 2006), Fisheries Act 1985, Food Act 1983 and Food Regulations 1985. Due to the country's obligation under the SPS Agreement, any environmental measures invoked under these laws should be within the ambit of the SPS Agreement.

This study will be on how the government applies the sanitary and phytosanitary provisions. Since the provisions of sanitary and phytosanitary in Malaysia are applied for the handling of food and agricultural products, the focus of this study will be on the regulations which governed these two subjects. The regulations are the Plant Quarantine Act 1976, Food Act 1983 and the Fisheries Act 1985. In the introduction to the Plant Quarantine Act 1976, it is stated that it is "an Act to amend and consolidate the laws relating to the control, prevention and eradication of agricultural pests, noxious plants and plant diseases and to extend co-operation in the control of the movement of pests in international trade and for matters connected therewith."

Section 6 (1) states that if it appears to the Inspecting Officer any plant is diseased and might endangered other plants, he may serve a notice to the owner or the occupier of the land whenever the plant is found and direct the owner or occupier to eradicate or destruct, remove the plant or treat the plant in the manner specified in the notice so as to prevent the spread of the pest. Section 6 (2) further states that if it appears to the Inspecting Officer that any land or plant is in a condition favourable to the introduction or spread of any pest, he may serve a notice to the owner or the occupier of the land directing the owner to eradicate or destruct, remove the plant or treat the plant in the manner specified in the said notice so as to prevent the spread of the pest.

Section 12 give the power to take action against a dangerous pest to the Menteri Besar or Chief Minister of a State of a Minister in charged with the responsibility of agriculture in Malaysia. They have the power to serve notice to the owner or the occupier of the land requiring the owner or the occupier to eradicate, destruct or treat any diseased plant which is affected by dangerous pest or of any plant liable to become so affected in a matter of necessity and urgency or if the safety of any plant growing in such region is endangered by the existence of a dangerous pest.

Section 14 forbid any person except the Director General of Agriculture or the Director of Agriculture to import any noxious plant, possess or keep any noxious plant or allow the same to grow in or on any land of which he is the owner or occupier or import or keep any pest. Section 15 then required the owner or the occupier to destroy the diseased plant by fire as soon as possible if they found it growing on their land. Section 19 further forbids any person without lawful excuse to move or convey or caused to be moved or conveyed within Malaysia any dangerous pest or noxious plant.

As for the Food Act 1983, its preamble describes that it is "an Act to protect the public against health hazards and fraud in the preparation, sale and use of food and for matters incidental thereto or connected therewith". This Act describes the administration and enforcement; offences and evidence, importation, warranty and offences of handling of food in Malaysia. Section 5 allows an officer to take samples of the food for the purpose of analysis. Section 10 provides that a Director or an officer authorized can order that a premises or appliances be put into a hygienic and sanitary condition if they found that the premises fail to comply with requirements provided. Section 14 prohibits any sale of food which is not of the nature, substance and quality demanded. Section 15 requires any person who prepares packages, labels or advertises any food to comply with standards prescribed. Section 29 provides that the importation of any food which does not comply with this Act and any regulation thereunder is prohibited. If any food which is imported does not comply with this act in respect to labelling, processing and conditioning, it needs to be relabelled, reprocess and reconditioning.

The Fisheries Act 1985 is an act which "is relating to fisheries, including the conservation, management and development of maritime and estuarine fishing and fisheries, in Malaysian fisheries water, to turtles and riverine fishing in Malaysia and to matters connected therewith or incidental thereto". Section 6 of the Act is about the preparation of fisheries plan. It states that "The director general shall prepare and keep under continual review fisheries plans based on the best scientific information available and designed to ensure optimum utilization of fishery resources, consistent with sound conservation and management principles and with avoidance of overfishing".

Section 27(1) further states "No person shall fish for, disturb, harass, catch or take any aquatic mammal or turtle which is found beyond the jurisdiction of any state in Malaysia". Section 40 is in regards to control of life fish. It states that any person who imports or exports out of Malaysia or transport fishes within Malaysia without a permit or in breach of any condition in a permit issued by the Director General under this Section shall be guilty of an offence.

All the provisions in the Plant Quarantine Act 1976, Food Act 1983 and the Fisheries Act 1985 give powers to the authority to take out actions against those who have violated these regulations. However, there are no provisions in respect to providing scientific evidence to ensure a measure is necessary in the Plant Quarantine Act and Food Act. Moreover, there is no provision in all the legislations in respect to ensure that the measure invoked should not discriminate and that there should not be any restriction to international trade. If they are to comply with the provisions of the SPS Agreement, the authorities concerned need to show that the actions taken are necessary. They need to provide scientific justification and that proper risk assessment have been carried out before they could take action against domestic producers, exporters and even importers. It is believed that scientific justification and risk assessment only need to be proved when there is an issue raised by other parties as to why certain measures are taken out.

The aims of the WTO environmental provisions i.e. the SPS Agreement has been carried out through the Malaysian abovementioned domestic laws. Malaysia has applied the environmental provisions of the WTO in their domestic legislations and implemented them accordingly through various ministries and departments. The regulations which are enacted due to Malaysia's obligation under the SPS Agreement are the Plant Quarantine Act 1976, Plant Quarantine Regulations 1981, Food Act 1983 and Food Regulations 1985, and these laws are implemented by the Ministry of Agriculture and Agro - Based Industry and the Ministry of Health respectively. These laws was made to protect the environment such as protection from consuming food which are bad for human health and to contain and manage the importing and exporting of food and food products. However, these laws are mainly for the protection of human health and plant.

The regulations which are in respect to international trading are stated in the Annex B and Annex C of the SPS Agreement. Here, the rules on import and export procedure can be taken out by the Malaysian Quarantine and Inspection Services (MAQIS). Thus, in respect to international trade, the body which can take out the measures on export and import of goods in Malaysia is the Malaysian Quarantine and Inspection Services (MAQIS). The Malaysian Quarantine and Inspection Services (MAQIS) is the department which are responsible in dealing with the procedure of quarantine, importation and exportation of plant, animal, food, fish and others such as soil and microorganism for international trading for the country. This department will be responsible for enforcing the regulation in respect to the trade- related environmental measures. They will carry out the procedure as required and regulated by the

respective law and regulation. For example, in carrying out the action necessary for the imports and exports of plants, the department will carry the measures in accordance to the Plants Quarantine Act 1981.

The enforcement taken out by MAQIS is also regulated by the Malaysian Quarantine and Inspection Services Act 2011. The Malaysian Quarantine and Inspection Services Act 2011 states in its introduction that the purpose of the Act is "to provide for the Malaysian quarantine and inspection services for the purpose of providing integrated services relating to quarantine, inspection and enforcement at the entry points, quarantine stations and quarantine premises and certification for import and export of plants, animals, carcasses, fish, agricultural produce, soils and microorganisms and includes inspection of and enforcement relating to food and for matters connected to it." These Act gives power to MAQIS to proceed with all the import and export procedure as required by the SPS Agreement.

As an example in regards to notification, in order to avoid any restriction or any rules become a technical barrier to trade, Malaysian government had given notification to all its trading partners in respect to all its trade-related environmental protection provisions. For example, one of the new plant protection provisions is the implementation of new import requirement for fresh fruits of mangosteen into Malaysia. Notification on the new import requirement for fresh fruits of mangosteen from all countries was dated 30th March 2015. The new import requirement was implemented starting 1st of July 2015 with a grace period of four months until 31st October 2015. Therefore, full implementation shall commence from 1st November 2015. This information is a notice to domestic stakeholders and other business players. (https://docs.wto.org/dol2fe/Pages/FE_S_S009-DP.aspx).

Under Malaysian food standards and regulations, domestic and imported food products must be processed, stored and handled in a sanitary manner. The authorities have worked to harmonize food standards with those applied internationally and also contributed to the development of Codex Alimentarius standards. Thus nutritional labelling requirements are imposed for certain food products, including cereals, breads, milk, various canned foods and fruit juices, soft drinks and salad dressings (WT/TPR/S/156).This can also be the evidence that measures are invoked on both domestic and imported food products and that there is no discrimination as required by the WTO rules.

Further, as to measures affecting production and trade, Malaysia applies sanitary and phytosanitary (SPS) measures to trade in plants, forest products, food and animal and seafood products. In the case of plants, the SPS measures implemented on plants are under the Plant Quarantine Act 1976 and the Rules of Plant Quarantine 1981 and the international standard that need to be based on are Codex Alimentarius Commission and the International Plant Protection Convention (IPPC) which aimed at protecting Malaysia's agriculture from foreign plant diseases, pets and infection. The Codex Alimentarius also covers the measures taken out in regards to food consumption and the import and export of food and food product in Malaysia. International standard should be referred to if a country need to justify its action in taking out a certain environmental protection measure which might affect trade. (WT/TPR/S/156)

Conclusion

As the member of the WTO, Malaysia has the obligation to comply with the SPS Agreement and Malaysia has complied with the WTO rules by applying the rules through its domestic regulations. The issue for future study could be on the enforcement stage of the SPS Agreement in Malaysia. For example, the Plant Quarantine Act 1976 is been implemented by the

Department of Agriculture. They have faced some problems with importing countries in international trading. Some of the WTO member countries do not observe the SPS Agreement provisions and when they decided to do so, they will changed their laws adruptedly and did not give time to other countries to adjust their goods (Wan Ismail &Yong, 2004).

In view of the above, it is not difficult for a country to apply international law domestically but could find it difficult when implementing them. In order to conform to the international trade law provisions, Malaysian government should make a good sanitary and phytosanitary regulations that could serve all the parties concerned. In order to do this, the government should ensure that the type of the sanitary and phytosanitary regulation and the goal of the regulation need to be profound.

The significance of this study is to recognize Malaysia's effort in dealing with international trade rules especially the WTO environmental measures. As a member of the WTO, Malaysia has complied with the WTO rules by applying them in its domestic laws. Malaysia also has tried to comply with the environmental measures taken out by other states however, much more efforts need to be done in respect to this. Malaysia as a developing country should be given more flexibilities to implement the WTO rules. Further, Malaysia should put in place a good trade regulations that would take into account the effect of trade on the environment and vice versa. This would help the country's plight for economic growth.

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