IMPLEMENTATION OF THE *INTERNATIONAL PLANT PROTECTION CONVENTION* (IPPC) IN THE REGULATION OF THE *AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES* (SPS AGREEMENT) IN THE *WORLD TRADE ORGANIZATION* (WTO): NOTES TO INDONESIA

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Abstract

World Trade Organization (WTO) is an international organization which has an important role in ensuring that the flow of global trade can run with as few barriers as possible. However, according to Article XX (b) of GATT, the WTO members may apply trade measures in order to protect human, animal or plants life or health. Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) is an elaboration of the provision of Article XX (b) of GATT. According to the SPSA greement, the WTO members have the right to apply measures necessary to protect human, animal or plant life or health, based on sufficient scientific principles and scientific evidences, as well as not constituting arbitrary discrimination or a disguised restriction on international trade. Fulfilment of the scientific and technical needs in the application of the SPS Agreement, the SPS Agreement refers to International Plant Protection Convention (IPPC) as the relevant international organization for promoting the harmonization of phytosanitary measures based on international standards adopted by IPPC. This article discusses the application of the SPS Agreement and IPPC in three WTO cases, i.e. Japan – Agricultural Products II (2001), Japan – Apples (2005) and Australia – Apples (2011).

Key Word: WTO, international trade, SPS, IPPC

A. INTRODUCTION

In increasing of the international trade in the agricultural sector, the protection of products in agricultural sectors, particularly plant products, it is very important to ensure that everyone's right to a standard of living adequate for the health and well-being of himself is fulfilled, including in relation to food materials (Article 25 of the Universal Declaration of Human Rights, 1948). The protection of human, animal or plant life or health has been considered as one of the main responsibilities of the national government of a nation (Catherine Button, 2004:1). The growth of international trade, health protection issues - previously regarded as national issues of a nation–have become an international concern

(Catherine Button, 2004:1). Based on the framework of the world trade organization (WTO), there are several general agreements related to the protection of environment as well as human health, i.e. the Agreement on Technical Barries to Trade (TBT *Agreement*) and Sanitary and Phytosanitary Agreement (SPS Agreement). More specifically, the SPS Agreement functions are to ensure that consumers of member state obtaining food supplies that are safe to consume based on the appropriate standards (Directorate of Trade, Industry, Investment and Intellectual Property Rights Directorate General of Multilateral Foreign Ministry of Republic of Indonesia, 2008:4). At the same time, the SPS Agreement ensures that the strict regulations on human, animal or plant life or health will never be used as an excuse to protect the interests of domestic products as well.

The SPS Agreement recognizes the existence of the scientific and technical needs to apply the agreement. These needs can be achieved by the recognition of standard setting bodies that facilitate the harmonization of SPS measures by the WTO members in the food safety, plant health and animal health sectors, i.e.: the Codex Alimentarius Commission (CAC), the International Office of Epizootics (OIE) and the International Plant Protection Convention (IPPC). These three organizations are often called as 'three sisters' because of their relationship under the SPS Agreement. Although these three organizations have the same relations under the SPS Agreement, however, each agreement is recognized as a different and standalone agreement with different scope~~s~~, purpose~~s~~, function and membership.

However, in the dispute resolution processes in WTO, both the Panel and the Appellate Body do not make reference to the reference international organization particularly IPPC – as the primary consideration in *Japan Agricultural Products II; Japan – Apples*; and *Australia – Apples* cases. These three cases, the Panel and the Appellate Body have worked consistently by referring only to the regulation of the SPS Agreement, although each respondent country states that its phytosanitary measures have been taken based on IPPC. While the Panel and the Appellate Body do not primarily consider scientific and technical reference from IPPC, IPPC is still worth to be maintained as the reference international organization of the SPS Agreement because the provisions of IPPC are consistent and complements of the SPS Agreement. Moreover, IPPC has adopted the International Standards for Phytosanitary Measures (ISPMs) that help the WTO member states and IPPC parties harmonize their phytosanitary measures against these pests. Referring to the application of

the SPS Agreement and IPPC in these three cases, if Indonesia intends to take phytosanitary measures against several food products from abroad, it is expected to comprehensively subject to the SPS Agreement as well as not to primarily and specifically refer to provisions of IPPC. The title of this research is "Implementation of the International Plant Protection Convention (IPPC) in the regulation of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) in the World Trade Organization (WTO): Notes To Indonesia".

B. PROBLEM STATEMENT

In accordance with the above introduction, this article aimed to observe how the implementation of the International Plant Protection Convention (IPPC) in the regulation of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) in the World Trade Organization (WTO) is?

C. RESEARCH METHODS

This method uses secondary data types. Secondary data is data obtained from literatures. Literature materials used include conventions or the related international agreements and literatures in the form of books, journals, as well as other supporting materials including dictionary, encyclopedia and other materials that provide instructions about the materials used as previous data.

D. RESEARCH RESULT AND DISCUSSION

1. The Regulatory Framework of Sanitary and Phytosanitary Measures in The SPS Agreement

Since WTO was established in 1995, there are two additional agreements in which are relevant to health regulations as well, i.e . the SPS Agreement and the TBT Agreement (Elli Louka, 2006:383). The SPS Agreement firmly identifies itself as the elaboration of Article XX (b) of GATT, while it is not the case for the TBT Agreement. However, these two agreements are related to the scope of Article XX (b) of GATT, that is, the protection of human, animal or plant life or health.

To justify whether a health measure is consistent with GATT according to Article XX (b), the WTO member must prove that (i) the policy purposes are for the protection of human, animal or plant life or health; (ii) the measure is 'necessary' to achieve the policy purpose; and (iii) the conditions on the chapeauof Article XX of GATT are fulfilled (US – Gasoline Case, 1995). Regarding the first condition, Panel, in EC– Asbestos Case, also follows the approach used by Panel in US-Gasoline Case, that is, it has to be decided first whether the policy is related to measures included in the stipulation of Article XX (b) of GATT which have the purpose to protect human life or health (European Communities – Asbestos Case, 2000). Then, regarding the second condition, the issue is whether the measure in question is 'necessary' to achieve the policy purposes and to provide the desired level of protection (Peter van den Bossce *et al*., 2010:56). The health measure is not consistent with GATT according to Article XX (b) if the conditions on the chapeau of Article XX of GATT is not fulfilled. The purposes of this chapeau are to prevent the abuse of the exceptional provision and that the measure taken must not be: (i) an abitrary measure; (ii) discrimination; and (iii) a disguised restriction on trade (*United States – Shrimp* Case, 1998).

The SPS Agreement is drafted to solve health threats from plant-borneorganisms(Ronald A. Reis, 2009:84). Generally, the SPS Agreement shall ensure the government's rights to protect food sources for its citizens, either derived from plants or animals (Ronald A. Reis, 2009:84). The SPS Agreement is formulated to protect sovereign rights of each country in providing the appropriate health protection level (Ronald A. Reis, 2009:84). SPS measures are necessary to achieve theSPS Agreement purposes, such as: (i) to protect human or animal health from the risks arising from addictive substances, contamination, toxins or organisms causing diseases in food; (ii) to protect human life from plants or animalscarrying diseases; (iii) to protect animal or plant life from pests, diseases or diseases caused by organisms; (iv) to prevent orlimit the impact of any other damages to other countries as well as the spread or establisment of pests (WTO, 2016). These purposes include the sanitary and phytosanitary measures taken to protect the fish and wild animal health, as well as forests and wild floras.

The Members of SPS Agreement have the right to apply necessary measures to protect human, animal or plant life or health, provided that the measures do not depart from the provisions in this agreement (Article 2.1. of the SPS Agreement, 1995). According to Article 2.2 of the SPS Agreement, the Members also have to ensure that each provision applied is necessary to protect human, animal or plant life or health, based on scientific principles and is not applied without sufficient scientific evidences (*United States – Poultry* (China) Case,

2010), except as provided in Article 5 and Article 7 of the SPS Agreement (Article 2.2. of the SPS Agreement, 1995). These protection provisions shall not be applied in a manner that would constitute a disguised restriction on international trade. The protection provisions which conform to the provisions in the SPS Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994, particularly Article XX(b) of GATT (Article 2.4. of the SPS Agreement, 1995).

Furthermore, the important role of the SPS Agreement is the harmonization of SPS measures which is accepted across member countries*(European Communities Hormones* Case, 1998). The Appellate Body, in the case of *US/Canada – Continued Suspension*, stated that in the preamble of the SPS Agreement, one of the important purpose of the SPS Agreement is to further the use of harmonized SPS measures between Members, based on recommendations, guidelines and international standards developed by the relevant international organizations (*US/Canada – Continues Suspension*Case, 2008). This purpose is reflected in Article 3 of the SPS Agreement, which promotes the harmonization of SPS measures based on international standards, while at the same time recognizing the rights of the WTO members to determine the appropriate protection level (*US/Canada – Continues Suspension* Case, 2008) .

SPS measures that are not appropriate or are not based on international standards should be based on a risk assesment as appropriate to the circumstances (Article 2.1. and 5.1. of the SPS Agreement, 1995). Furthermore, Article 5.1 of the SPS Agreement stipulates that:

> "Member shall ensure that their sanitary or phytosanitary measures are based on 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 organizations".

The Appellate Body in the *Australia – Salmon* case stated that the risk assesment in Article 5.1 should: (i) identify the entry of a disease, the spread of the disease as well as the potential biological and economic consequences related to the entry of the disease; (ii) evaluate the possibility of the entry and spread of this disease, as well as the potential biological and economic consequences; and (iii) evalute the possibility of the entry and spread of this disease in accordance with the SPS measures applied. (*Australia – Salmon* Case, 1998) Furthermore, the Appellate Body, in the *EC – Hormones* case, maintains that SPS measures 'based' on a risk assesment is a substantive requirement that there is a rational

relationship between the measures taken with the risk assesment conducted (*European Communities – Hormones* Case, 1998). In Article 5.1 of the SPS Agreement, it is stipulated that the risk assesment conducted by taking into account risk assesment techniques developed by the relevant international organizations. the Appellate Body, in the *Australia – Apples* case, notes that it does not mean that a risk assesment must be based on or conform to such techniques (*Australia – Apples* Case, 2010). The Appellate Body also considers that the compliance with such techniques alone is not sufficient to demonstrate the compliance of a Member's obligations under the SPS Agreement (*Australia – Apples* Case, 2010).

The SPS Agreement also emphasizes the importance of transparency and notification between the WTO member states in applying its SPS measures. Annex B, first paragraph, of the SPS Agreement requires the publication of all SPS regulations that have been adopted so that the interested Members may be aware of them. Meanwhile,the second paragraph of Annex B provides a reasonable period of time between the publication of SPS regulations with the enactment of the regulations in order to allow time for producers in the exporting Members to adapt the products and production methods to the requirements of the importing Members.

2. The International Plant Protection Convention (IPPC): Reference Organization of The SPS Agreement Related to Phytosanitary Measures.

The concept of international protection of plants has been started since 1881 when 5 (five) countries signed the agreement to control the spread of *phylloxera* of vines, a pest from North America that was unintentionally spread to Europe in around 1865 and destroyed many vineyards in Europe (IPPC 2016). After having the World War II, countries attempt to establish an international cooperation of plant protection at the intergovernmental level (Christina Devorshak, 2005: 24). The next big step the establishment of the International Plant Protection Convention (IPPC), followeds by the adoption of IPPC by FAO in the Sixth Session of FAO Conference on December 6, 1951 by Resolution Number 85/51. IPPC exists as an international agreement administered by FAO and is implemented through the cooperation of the regional and national plant protection organizations (FAO 2016)

According to the International Plant Protection Convention, a national plant protection organization has several obligations (Article IV (2) of the International Plant

Protetion Convention, 1951), i.e. the issuance of certificates relating to the phytosanitary regulations of the importing country for the consigments of plants and plant products; the inspection of consigments of plants and plant products moving in international traffic; the disinfection of consigments of plants and plant products moving in international traffic to fulfill the phytosanitary requirements; the protection of endangered areas as well as designation, maintenance and surveillance of pest-free areas; the conduct of pest risk analyses; to ensure the security of phytosanitary as well as certification processes prior to export. Each party must also make provisions concerning the dissemination of information within the teritory of the party regarding regulated pests as well as the means of prevention and control facilitation of the pests; research and investigation in the field of plant protection; and the issuance of phytosanitary regulations (Article IV (3) of the International Plant Protection Convention, 1951). In relation to standards, according to Article X (1) of IPPC, the parties agree to cooperate in the development of international standards in accordance with the procedures adopted by the Comission. Moreover, regional standards must be consistent with the principles in this convention as well. According to Article X (4), the parties, in conducting activities related to this convention, must consider the appropriate international standards.

Requirements regarding to import measure, according toArticle VII (1) IPPC, The Parties have as sovereign right to regulate, based on the international agreement occured, the entry of plants and plant product. The Parties may determine and adopted the phytosanitary measureregarding to the plant import or plant product, for example inspection, import prohibition and the treatment of imported product (Article VII (1)*International Plant Protetion Convention*, 1951). The Parties may also refuse the entry or holding plant or plant products which are not related to phytosanitary measure in which has been adopted according to international standard (Article VII (1)International Plant Protetion Convention, 1951). Moreover, The Members may prohibit or restrict the movement of pests that have been regulated into their area.

To minimize the interference with international trade, each party in carrying out its power according to Article VII (1) IPPC, must proceed to serve based on, including, i.e.: (i)the parties do not take the measure determined by Article VII (1) IPPC, expect the measure considered necessary with consideration phytosanitary and technically justified; (ii) The parties should publish and transmit the phytosanitary, restriction and its prohibiton

requirements to the other parties that may directly affected by that measure; (iii) If the parties need a shipment from a certain plant that only can import by certain entry points, so the related party shall publish the list of that enter points as well as communicate to the Secretary and plant protection regional organization; (iv)the parties shall institutionalize phytosanitary measure which has been justified technically, consistent with the analysis risk and generate minimum barriers to the international movement of people, commodities and conveyances; (v)the parties must ensure that phytosanitary measure will soon be modified or deleted if consider no longer needed as the change of condition; (vi)the parties must update the list of regulated pests and to ensure the list is available at the Secretariat IPPC (Article VII (2)International Plant Protetion Convention, 1951).

Then, regarding to the international cooperation, the parties shall cooperate to achieve the purpose of the formation of the IPPC. The cooperation is in the form of information exchange of plant pests; participation in the campaign to eradicate pests; and providing technical and biological information necessary for pest risk analysis (Article VIII (1)letter a-c International Plant Protetion Convention, 1951).

In the framework of international regulations, the SPS Agreement is an agreement on trade, while the IPPC is an international convention on the protection of plant. However, both that international agreement overlap to achieve no trade barrier condition other than required. SPS Agreement states that the members have the right to take SPS measure required for the protection of, such as, the life or health of plant (Article 2.1. SPS Agreement, 1995). In the IPPC, the rights set forth in the related import requirements. According to Article VII IPPC, the parties must have the sovereign right to regulate, based on the applicable international agreement, the entry of plant or plant product. Therefore, these both agreements admitted that the country actually has the right to regulate its phytosanitary measurens (Article VII (1)International Plant Protection Convention).

Regarding to the harmonization of SPS measure, IPPC appointed to play a major role in the process of harmonization of SPS measure in the SPS Agreement (Annex A SPS Agreement, 1995). The real organization list is not limited so that SPS Committee is obliged to recognize the standards of other international organizations. There are two requirements that must be met if the SPS Committee wanted to acknowledge the new international standard, i.e. (I) the standard-setting organizations should open its membership to all

members of the SPS and (ii) those standards should include things that are not contained in the IPPC (Marina Foltea, 2012: 134). SPS harmonization measure According to international standards provide some benefits (United Nations Conference on Trade and Development, 2005: 6), i.e .: (i) uniform export requirements; (Ii) reduce the possible objections by trading partners; (Iii) assist countries experiencing financial problems in carrying out its risk assesment.

International Standards for Phytosanitary Measures(ISPMs) is a standard adopted by Phytosanitary measure comission. These standards is known as the basis for phytosanitary measure applicable to WTO members trade under the SPS Agreement. The parties, in carrying out measure related to IPPC, take into account the appropriate international standards (Article X (7)International Plant Protection Convention, 1951). Until now, there are 37 ISPMs that has been adopted by IPPC (ipc 2016). IPPC is an agreement that is legally binding, while standards are developed and adopted by IPPC are not legally binding (Food and Agriculture Organization, 2000: 63). However, measures based on international standard do not require the justification support under the SPS Agreement.

3. Analysis of The Cases in World Trade Organization (WTO) Related to The Policy of Phytosanitary Measure

SPS Agreement regarding the application, there are three cases at the WTO needs to be seen to be related to the implementation of IPPC in the regulation of the SPS Agreement. These three cases i.e. Japan – Agricultural Products II, Japan – Apples and Australia – Apples cases.

(i) Japan – Agricultural Products II Case

This case started from the enactment of prohibition of eight imported products from US by Japan according to Ordonance of the minister on June 30, 1950 – this time, *Plant Protection Law Enforcement* (Japan – Agricultural Products II Case, 1998). These eight products i.e: areapricots, plums, pears, quince, apple, walnuts, peaches including nectarines and cherries. These products are banned because they have the potential to become a nest for *codling moth* (Japan – Agricultural Products II Case, 1998). However, it is possible to get an exemption from the ban on these imports. Exceptions are granted based on varieties per varieties. Since 1969, a series of specific types of products, which originate from a particular region, have

been freed from this import ban. Moreover, since 1978, import ban has been revoked for certain varieties from US products that being issued (Japan – Agricultural Products II Case, 1998). Japan imposes an absolute ban on imports of all products that could potentially be a nest against quarantine pests such as codling moth. Moreover, Japan also imposed testing requirements of the eight varieties of US agricultural products. Terms test these varieties are based on codling moth pest risk assessment year 1996 (1996 Pest Risk Assessment of Codling Moth / 1996 Risk Assessment) (Japan – Agricultural Products II Case, 1998).

United States claims that Japan varieties test requirements as they apply to quarantine measures for codling moth is a trade barrier. This measure also consider to be inconsistent with SPS Agreement because Japan effectively blocking the access to the market of the USA varieties that compete with a number of Japan's varieties product of the same product(Japan – Agricultural Products II Case, 1998). US claims that varieties test measures Japan has failed to meet a number of obligations in SPS Agreement.

Meanwhile, Japan stated that risk assesment done has been done to ensure the plant quarantine measures and the import ban at the time, which can be scientifically justified (Japan – Agricultural Products II Case, 1998). Japan claims that the risk assessment has been fully consistent with ISPM 2, which was adopted by the IPPC. In this risk assessment process, Japan has been evaluating the possibility of entry, formed or spread of pests in the area of Japan, as well as the biological and economic impact, in accordance with paragraph 4 of Annex A of the SPS Agreement. Furthermore, Japan also emphasized that the risk assessment of the individual against a particular plant is done whenever the exporting country requested the lifting of the ban on imports of products or other quarantine modification measure (Japan – Agricultural Products II Case, 1998).

In its decision, the Panel stated that the requirement of test varieties of Japan - which apply to the import of apples, cherries, nectarines and walnuts - is not maintained without sufficient scientific evidence, as in Article 2.2 of the SPS Agreement and is not a temporary measure, as the first sentence of Article 5.7 of the SPS Agreement, so that the terms of the variety trials violated Article 2.2 of the SPS Agreement. With the conclusion Panel related to Article 2.2 of the SPS Agreement, the Panel saw no need to further examine whether the terms of the variety of test is based on the risk assessment in accordance Article

5.1 of the SPS Agreement. Appellate Body, in conclusion, also stated that the test requirements of this variety are inconsistent with Article 5.1 of the SPS Agreement.

As a country which has been a member of the WTO and ratified the IPPC, Japan is legally bound to the SPS Agreement and the IPPC as a convention. To that, Japan must not impose SPS measure which may be a non-tariff barriers for other nations in international trade while ensuring the SPS measure is needed to accomplish the implementation of the SPS measure, as mentioned in the first paragraph of Annex A of the SPS Agreement

."*Sanitary or phytosanitary measures – any measures applied:*

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

Meanwhile, through the provision on IPPC, Japan may prove that its phytosanitary measure has been justified technically, transparant and not enforced in a way that can lead to discrimination or disguise restriction especially on international trade (The Opening Section of International Plant Protection Convention, 1951).

With the purpose to prevent the entry and spread of regulated pest into the territory of a country, according to Article VII IPPC, Japan as the party in IPPC has a sovereign right to regulate the entry of plant and plant product into its territory (Article VII (1)*International Plant Protection Convention*). Japan may determine and adopt phytosanitary measure relating to the import of plant and/or plant product, include the inspection and import bans for example According to Article VII paragraph (1) letter c IPPC, Japan also prohibit or restrict the regulated movement of pest that enter into its territory. Therefore, according to that conditions, Japan has justification to impose various phytosanitary measures required to prevent the entry and spreading *codling moth*pest into Japan territory.

And then, Article IV paragraph (2) letter f regulate that:

"The responsibilites on an official national plant protection organization shall include:
f) the conduct of pest risk analyses

Because of that condition, Ministry of Agriculture, Forestry and Fisheries (MAFF) Japan, as a National Plant Protection Organization (NPPO) Japan, responsible conduct of pest risk analysis. Specifically, against the pest regulated, according to Article VI IPPC, country party may require phytosanitary measure for pest quarantined. *Codling moth* is a regulated quarantine pest in Japan, (Japan – Agricultural Products II Case, 1998)so that, Japan is able to do phytosanitary measure of plant or plant product potential means of entry or spreading this pest.

Concerning the measure of risk assesment, according to Article 5.1. SPS Agreement, the country must ensure that the phytosanitary measures are based on arisk assesment, according to the condition of human, animal or plant health life or health, by concerning the risk assesment technique developed by the relevant international organization (Article 5.1. SPS Agreement, 1995). More specifically, according to Article X IPPC, in conducting the activities related to IPPC, The parties must consider the relevant international standards. SPS Agreement make reference, in a number of conditions, related to recommendation, guidance and the relevant international standard. Annex A third paragraph SPS Agreement stated that recommendation, guidance and the relevant international standard for plant health is a standard developed under the shade of Secretariat of IPPC in cooperation with regional organization within the framework of IPPC (Annex 3 SPS Agreement, 1995).

In the arguments stated by Japan, Japan claimed that the risk assessment is done - 1996 Pest Risk Assessment - in accordance with the procedures ISPM 2, which adopted by the IPPC (Case Japan-Agricultural Products II, 1998).Japan also stated that import ban imposed only for the host plant pest quarantine is the result of the risk assessment, which is conducted based on ISPM 2(Japan-Agricultural Products II Case, 1998). In general, arguing that Japan has analyzed the risks of large-scale in 1996 to ensure that the action of plant quarantine and a ban on imports when it is scientifically justified and fully consistent with ISPM 2(Japan-Agricultural Products II Case, 1998).

ISPM Number 2. provides a conceptual reference and the main procedures of the phytosanitary risk analysis. According to ISPM Number. 2, pest risk analysis consists of three

stages, i.e. initiation of a process to analyze the pest; pest risk assessment; and managing pest risk (IPPC Secretariat, 2006:12). The first stage includes the identification of imported product lines to allow the introduction and / or spread of quarantine pests (IPPC Secretariat, 2006: 14); and identification of pests Dapa qualified as quarantine pests (IPPC Secretariat, 2006: 15).At the end of the first stage, the pest has been identified as a quarantine pest potentially as track the spread of pests. Furthermore, the second stage i.e. consideration to meet the quarantine pests identified as quarantine pests that potentially harming specific area economically. If the pest is identified so, experts should decide whether the pest risk sufficient to justify phytosanitary measure to be taken (IPPC Secretariat, 2006: 18). Lastly, if the experts decide that the risk of such pests justify phytosanitary measure to be taken, then the third stage is to determine the appropriate phytosanitary measure to be applied (IPPC Secretariat, 2006: 18).

Although Japan, during his arguments, stated to have done its phytosanitary measure - in the form of risk assessment - According to ISPM 2, however the Panel and Appellate Body, in its conclusion, stating that the requirements of the test varieties imposed on imports of products of agricultural United States does not refer to the risk assessment as stipulated in Article 5.1 of the SPS Agreement. These conclusions are based on the interpretation of Article 5.1 of the SPS Agreement, i.e. that a risk assessment within the meaning of Article 5.1 of the SPS Agreement, must: (i) identifies disease to be prevented from entering, formed or spreading in the region members, as well as biological and economic potential associated with entry, formed or spread the disease; (Ii) evaluate the possible entrance, formed or spreading of disease; and (iii) evaluate the possibility of entry, formed or spread of diseases according to the SPS measure that may be imposed
(Australia – Salmon Case, 1998).

According to the above description, even though Japan basing its phytosanitary measure on international standard issued by the IPPC, it can not necessarily justify the risk assessment is based on the Japan Article 5.1 of the SPS Agreement. Panel and Appellate Body, in the dispute resolution process, only to review whether the risk assessment Japan has been in accordance with the interpretation of Article 5.1 of the SPS Agreement. Neither the Panel nor the Appellate Body did not make the argumentation of Japan measures has taken into account of international standards IPPC as a consideration in the decision.

(ii) Japan – Apples Case

On March 1, 2002, the United States sought the consultation with Japan According to Article 1 and Article 4 DSU, Article XXIII GATT and Article 11 concerning the Agreement SPS ban imposed by Japan on imports of apples from the United States (**Japan – Apple**s **Case**, 2003). US stated that since 1994, Japan has imposed a ban on imports of apples, but the apples that produced, treated and imported in accordance with the entry of fire blight restrictive measures (Japan - Apples Case, 2003) (Erwina amylovora).The measure being applied by Japan on imports of apples from the United States, among others, i.e. a ban on imports of apples from orchards detected fire blight; the requirement that an orchard for export of fire blight inspected three times per year; any garden disqualification of exports to Japan detected fire blight within 500 meters of the buffer zone around the garden; and post-harvest treatment of apple exports of chlorine (Japan – Apples Case, 2003).

The United States does not question the issue of fire blight as dangerous plant diseases that seriously impact the biological and economic or Japan attempt to introduce measures to protect the risks arising from the spread of fire blight disease in its territory. However, in line with the obligations of Japan under the SPS Agreement, Japan could not restrict the importation of apples without scientific evidence that apple exports transmit disease. United States stated that mature symptomless apples, as a commodity exported by the United States, will never transmit fire blight (Japan - Apples Case, 2003). Japan phytosanitary measure related to fire blight can not be applied to the apples imported from the United States.

The United States stated that that the actions of US apple import ban unless the product is produced, harvested and imported in accordance with the ban on Japan-related fire blight inconsistent with the obligations of Japan under the SPS Agreement. United States claims that Japan has failed to ensure that its actions related to fire blight is not maintained without sufficient scientific evidence, so that these measures are inconsistent with Article 2.2 of the SPS Agreement (Japan - Apples Case, 2003). Moreover, Japan also has failed to ensure that the actions were related to fire blight is not based on a risk assessment for the life or health of the plant, so that the measures are inconsistent with Article 5.1 of the SPS Agreement.

The United States considers that Japan enacted a number of measures that are not supported by sufficient scientific evidence, as set out in Article 2.2 of the SPS Agreement.

Regarding to Japan actions to implement the ban on imports of apples from the orchards were detected fire blight, the United States claimed that the condition of the formation of the area is free of pests at the place of production is not relevant to ensuring that imported fruits are free of pests and do not transmit fire blight (Japan - Apples Case, 2003). Then, measures prohibiting Japan imported apples from any orchard is fire blight is detected within 500 meters of the buffer zone around the farm are also considered irrelevant by the contamination of mature apple fruit (Japan - Apples Case, 2003).The United States also argued that the requirement of inspection of the gardens is done three times per year, has no rational or objective relationship to the scientific evidence (Japan - Apples Case, 2003). There is no scientific evidence that indicated that the presence of fire blight on fruiting stage will affect the possibility of the discovery of fire blight in apple fruit to mature without symptoms (Japan - Apples Case, 2003). The above arguments, the United States claimed that Japan had violated its obligations under Article 2.2 of the SPS Agreement.

Regarding Article 5.1 of the SPS Agreement, the United States considers that the requirements of Japan on US apples are inconsistent with the Article because the result of pest risk analysis (*Pest Risk Analysis*/PRA) conducted by the Japan does not support the SPS measure. United States claims that Japan measure related to *fire blight* are not based on a risk assessment within the meaning of Article 5.1 of the SPS Agreement.

Furthermore, Regarding the claim filed by the United States, Japan, as a respondent, Japan argued that any requirements imposed on imported US apples to prevent the introduction of fire blight is reasonably supported by scientific evidence (Japan - Apples Case, 2003). Japan stated that there is a rational or objective relationship between the measure with scientific evidence.

The terms of the ban on imports apples from the orchard detected by fire blight, Japan argued that such a requirement is in line with that adopted by IPPC ISPM, i.e. ISPM 10 (Japan - Apples Case, 2003). Furthermore, the requirements concerning the ban on imports of apples from any orchard is fire blight is detected within 500 meters of the buffer zone around the farm, Japan stated that the needs of establishing a buffer zone is recognized in ISPM Number 10 (Japan - Apples Case, 2003).Based on the guidelines of the IPPC, Japan States that the width of the buffer zone must be determined on the basis of which the pests tend to spread naturally during the growing season. Japan claims that the terms of the 500-

meter buffer zone is supported by the scientific evidence. Then, about the terms of the inspection of the garden as much as three times per year, Japan claimed that the field inspections are necessary to ensure the benefits of a systemic approach. Japan considers that this requirement is also consistent with ISPM Number 10 which stated that a pest-free status verification done by members of the NPPO with monitoring survey on adequate periods of time in one or more growing seasons (Japan – Apples Case, 2003).

Regarding risk assessment, Japan stated that Japan has been in line with its obligations under Article 5.1 of the SPS Agreement (Japan – Apples Case, 2003). Japan has been conducting pest risk analysis conducted specifically on US apples and fully consistent with ISPM 2 (Japan – Apples Case, 2003).

In its decision, the Panel decided that the Japanese action related to the import of apples from the United States has violated its obligations under Article 2.2 of the SPS Agreement. (Japan – Apples Case, 2003).) The Panel concluded that Japan's phytosanitary actions, overall, maintained without sufficient scientific evidence in the sense of Article 2.2 SPS Agreement. In addition, the Panel also found that the PRA conducted by Japan not to take into account the risk assessment in the sense of Article 5.1 approval of the SPS (Japan – Apples Case, 2003).

Regarding the risk assessment, the Panel concluded that Japan's PRA does not evaluate the possibility of admission, formed or widespread fire blight through the import of apples as required by article 5.1 and Annex A of the SPS Agreement. In particular, PRA also does not address the possibility of contamination of apple harvesting activities (Japan – Apples Case, 2003). This is also corroborated by the Appellate Body, which stated that the Japanese PRA did not meet the definition of risk assessment as specified in Annex A of the SPS Agreement because PRA failed to evaluate the possibility of entry, formed or spread of plant diseases; and failed to evaluate appropriate SPS measures which may be applied (Japan – Apples Case, 2003). As a result, the Japanese phytosanitary measures are not based on a risk assessment as required by Article 5.1 of the SPS Agreement.

Regarding Article 2.2 SPS Agreement, the Panel stated that the requirements of Japan, such as the ban on imports of apples from the garden detected fire blight within 500 meters of the buffer zone around the farm and inspection of the garden exports three times per year, does not bear a rational relationship to available scientific evidence (Japan – Appels Case, 2003). The Panel concluded that Japan's phytosanitary measures are not comparable to

the risks identified on the basis of the available scientific evidence (Japan – Apples Case, 2003). In particular, some of the requirements imposed by Japan, either individually or cumulatively with other terms, is not supported by sufficient scientific evidence (Japan – Apples Case, 2003). Appellate Body confirmed the findings of Panel about Japan's phytosanitary measures were maintained without sufficient scientific evidence in accordance with Article 2.2 of the SPS Agreement (Japan – Apples Case, 2003).

According with the above description, in conducting its SPS measures, Japan should ensure that such measures are applied to achieve the objectives in the SPS Agreement, as stated in the first paragraph Annex A of the SPS Agreement. Meanwhile, the provisions of the IPPC, is the justification for a country to perform phytosanitary measures with the aim of preventing the entry and / or spread of regulated pests into the territory of the country (Article VII paragraph 1 of the International Plant Protection Convention, 1951).

Pursuant to Article VII paragraph (1) IPPC, the country has the sovereign right to regulate the entry of plants and plant products into its territory. More specifically, under Article VII paragraph (1) letter a IPPC, country may also determine and adopt phytosanitary measures relating to the import of plants and / or plant products, including for example a ban on imports. A country may also prohibit or restrict the movement of regulated pests into the territory (Article VII, paragraph 1 letter c of the International Plant Protection Convention, 1951). Thus, based on the provisions of, the Japanese actually have a justification to determine phytosanitary measures that necessary to prevent the entry and spread of fire blight into Japan.

Japanese phytosanitary actions related to fire blight, as set forth in MAFF Notification Number 354 and the Detailed Rules, implemented by first doing a risk assessment. In his argument,Japan specifically stating has done a pest risk analysis in 1999 (PRA 1999) against the US apple, which is fully consistent with ISPM 2 on Guidelines for Pest Risk Analysis (Japan –Apples Case, 2003).

ISPM 2 is an international standard that adopted by IPCC. This standard provides a conceptual reference and the main procedures of the phytosanitary risk analysis. Based on ISPM 2, pest risk analysis consists of three phases, namely the initiation of a process to analyze the pest; pest risk assessment; and manage the risks of pests (IPPC Secretariat, 2006: 12). The first phase includes the identification of imported product lines to allow the introduction and / or spread of quarantine pests (IPPC Secretariat, 2006: 14); and

identification of pests which can be qualified as a quarantined pests (IPPC Secretariat, 2006: 15). At the end of the first stage, the pest has been identified as a potential quarantine pest as the spread of pests. Next, the second stage i.e. do considerations against the pests are identified as quarantine pests and meet the quarantine that could potentially harm specific area economically. If the pest is identified so, experts should decide whether the pest risk enough to justify phytosanitary measures to be taken (IPPC Secretariat, 2006: 18). Lastly, if the expert decides that the pest risk may justify phytosanitary measures to be taken, then the third stage of determining the appropriate action to be applied phytosanitary (IPPC Secretariat, 2006: 18).

United States claimed that Japan's phytosanitary measures related to fire blight is not based on a risk assessment within the meaning of Article 5.1 and Annex A of the SPS Agreement. Article 5.1. SPS Agreement provides that:

> "Member shall ensure that their sanitary or phytosanitary measure 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."

Appellate Body, in the case of Australia-Salmon, states that to be consistent with Article 5.1. SPS Agreement, a risk assessment should identify incoming diseases, established or spread in the territory of a Member who was about to prevent potential due to a biologically and economically with regard to entry, the formation or spread disease; evaluate the possibility of entry, establishment or spread of these diseases, as well as the potential biological and economic result related; and evaluate the possibility of entry, the formation or spread of a disease according to the SPS measures are applied (Australia – Salmon Case 1998). Appellate Body in the case Australia-Salmon also concluded that the second requirement of a risk assessment under Article 5.1. SPS Agreement namely, that the risk assessment is not made from the general statements and vague, causing uncertainty, both qualitatively and quantitatively (Australia – Salmon Case, 1998).

Then, regarding the risk assessment techniques developed by relevant international organizations, the Panel stated that - which is an interpretation of the SPS Agreement - the expression "taking into account" in Article 5.1 SPS Agreement does not state that a risk assessment under Article 5.1 SPS Agreement was "based on" or " in accordance "with the risk assessment techniques developed by relevant international organizations (Japan – Apples Case, 2003).

Although Japan, in his argument, stating has acted phytosanitary - restrictions on imports of US apples - based on risk analysis in ISPM 2, but the Panel stated that the PRA 1999 Japan did not evaluate the possibility of entry, the formation or spread of fire blight via imported apples (Japan – Apples Case, 2003). Thus, based on the interpretation of Article 5.1 of the SPS Agreement, although Japan has conducted a risk assessment that is claimed by considering risk assessment techniques by IPPC, this does not necessarily justify Japan's phytosanitary measures consistent with Article 5.1 of the SPS Agreement. The use of ISPM 2 by Japan was not taken into consideration for the Panel and Appellate Body in making a decision on whether the action in accordance with Article 5.1 of the SPS Agreement. Japanese risk assessment that refer to ISPM Number 2 will only provide guidance for the Panel whether the risk assessment in question is a proper risk assessment within the meaning of Article 5.1 of the SPS Agreement. In addition, the risk assessment does not evaluate the possibility of Japan formed or spread of fire blight through the importation of apples, as well as the interpretation of Article 5.1 of the SPS Agreement, so that Japan's risk assessment measures are inconsistent with Article 5.1 of the SPS Agreement.

Then, regarding Article 2.2 of the SPS Agreement, Japan in the argument stating that the phytosanitary measures in line with international standards of phytosanitary measures adopted by IPPC. Terms of the import ban on apple that detected by fire blight, for example, claimed by Japan which has been in line with ISPM Number 10. This standard defines 'pest-free production site' as:

> "A place of production in which a specific pest does not occur as demonstrated by scientific evidence and in which, where appropriate, this condition is being officialy maintained for a defined period".(ISPM 10)

The IPPC requirements, it further states that:

> "The pest free place of production provides a means for an exporting country, if so required by an importing country, to ensure that consignments of plants, plant products or other regulated article produced on, and/or moved from, the place of production are free from the pest concerned". (ISPM 10)

Furthermore, Japan also claimed that the act of inspection of the garden as much as three times per year have been in line with international standards of phytosanitary measures. ISPM Number 10 states that:

> "The verification of pest free status is done by NPPO personnel...who undertake specific surveys to assess the pest free status of the place of production...(and the

buffer zone, if required)...Monitoring surveys should be conducted at adequate frequency over one or more growing seasons" (ISPM 10)

However, the Panel decided that these requirements did not produce a rational relationship with the available scientific evidence. The panel stated that the requirements are not supported by sufficient scientific evidence. Thus, the Japanese phytosanitary measures, that the argument had been in line with the standards relevant international organizations, can not necessarily justify such action. In addition to the standard in line with the relevant international organizations, the Japanese phytosanitary measures should also conform to the interpretation of the SPS Agreement.

(iii) Cases Australia – Apple

On August 31, 2007, New Zealand sought the consultations with Australia under Article XXII of the GATT, Article 4 of the DSU and Article 11 of the SPS Agreement on measures imposed by Australia on the importation of apples from New Zealand (Case Australia - Apples 2010). Earlier, Australia's first to ban imports of apples from New Zealand in 1921 to prevent the spread of 'fire blight' (Case Australia - Apples 2010). In 1999, at the request of the New Zealand access to the Australian market, the authority of inspection and quarantine Australia (the Australian Quarantine and Inspection Service / AQIS) started a risk analysis of imports (Case Australia - Apples 2010) to assess the risks associated with imports apples from New Zealand, including the risks associated with the three quarantined pests: fire blight, European canker and apple leafcurling midge (ALCM) (Case Australia - apples 2010). Then, in November 2006, Australia issued a Final Report Risk Analysis Import Apples from New Zealand (Final Import Risk Analysis Report for Apples from New Zealand / IRA), which contains the steps that must be applied to the import of apples New Zealand to cope with pests and diseases , in particular fire blight, Europan canker and ALCM. These actions continue to exclude Australia New Zealand apples from the Australian market (Australia - Apples Case 2010).

In March 2007, Australia agreed to lift a ban on the import of New Zealand apples, but Australia insists on applying strict quarantine measures to prevent the spread of disease. Director of Animal and Plant Quarantine of Australia, on March 27, 2007, confirming the position of Australia in connection with the importation of apples from New Zealand, which states:

> "Importation of apples can be permitted subject to the Quarantine Act 1908, and the application of phytosanitary measures as specified in the final import risk analysis report for apples from New Zealand, November 2006".

Australia considers that the quarantine approach has been based on science and in accordance with WTO rules. However, in this case, the government of New Zealand argues that Australia's quarantine approach, as specified in the Quarantine Act 1908, in violation of Australia's obligations under the SPS Agreement.

Thus, imports of New Zealand apples is the trading action that is limited is related to the fire blight, European cankerdan apple leafcurling midge (ALCM) (Australia - Apples Case 2010), as set out in the Final Import Risk Analysis Report for Apples from New Zealand / IRA (Australia - Apples Case 2010). This action effectively inhibits New Zealand Australian apple market.

New Zealand stated that the actions of Australia is not maintained without sufficient scientific evidence. There is no rational or objective relationship between the measures imposed by Australia and the available scientific evidence, so that the Australian action was inconsistent against to Article 2.2 of the SPS Agreement (Australia - Apples Case 2010). In addition, New Zealand also claimed that Australia phytosanitary measures are not based on 'risk assessment' within the meaning of Article 5.1. and Annex A of the SPS Agreement, that such actions are inconsistent with Article 5.1 of the SPS Agreement.

Regarding the claims of Australia related to New Zealand measures are inconsistent with Article 2.2 of the SPS Agreement, New Zealand argued that all actions related to fire blight Australia relies on the assumption that mature apple fruit carry disease transmission lines (Australia - Apples Case 2010). However, there is no evidence that mature symptomless apples exported from New Zealand bear one of these lines, on the contrary scientific evidence stating that mature symptomless apples do not transmit fire blight disease (Australia - Apples Case 2010).

Similarly, the actions related to European canker charged based on the assumption that mature symptomless apples carry disease transmission lines (Australia - Apples Case 2010). In particular, there is no scientific evidence that New Zealand mature apples latently infected with N.galligena (Australia - Apples Case 2010). At the end, there is no scientific evidence that European canker may develop and spread in the Australian climate. Australia action related to ALCM also maintained without sufficient scientific evidence (Australia - Apples

Case 2010). Similarly, general measures imposed by Australia on the importation of apples from New Zealand maintained without sufficient scientific evidence (Australia – Apples Case 2010).

Then, regarding claims of New Zealand related to the Australia measure that is not based on a risk assessment within the scope of Article 5.1 and Annex A of the SPS Agreement, New Zealand stated that Australia has not evaluated the possibility of entry, the formation or spread of pests in accordance with SPS measures that may be imposed (Australia - Apples Case 2010). IRA Australia does not evaluate the possibility of the entry of fire blight; IRA Australia only speculate on the possible entry of these pests, so this is not in accordance with Article 5.1 of the SPS Agreement. IRA Analysis has also failed to evaluate the possibility of the formation or spread of European canker on Australian soil. In addition, the IRA also has failed to evaluate the possible entry of ALCM (CAustralia - Apples Case 2010).

However, Australia, as a respondent, responded that the IRA is worth the risk assessment under Article 5.1 of the SPS Agreement (Australia - Apples Case 2010). Australia rejected the notion of New Zealand that the IRA had not properly evaluate the possibility of entry, the formation or spread of pests associated three in this case and also incompatible with the SPS measures that might be imposed. Australia argued that the IRA has been established with an estimate quantitatively or qualitatively for each step in this risk assessment (Australia - Apples Case 2010). In the end, Australia argues that the IRA had made an objective and credible evaluation of the possibility of entry, the three formed and spread of pests associated with New Zealand had failed to prove the contrary (Australia - Apples Case 2010). Australia concluded that the phytosanitary measures which the implementation has been consistent with Article 5.1 and Article 2.2 of the SPS Agreement.

Furthermore, the Panel decided that the actions of Australia related fire blight, European can consider ALCM, is inconsistent with article 5.1 and the SPS Agreement, by implication, those requirements are also inconsistent with article 2.2 Agreement SPS (Australia – Apples Case 2010).

The panel found that, in connection with the analysis of the likelihood entrance, formed and spread of fire blight and potential consequences associated with the entry, the formation or spread of fire blight into Australia, IRA is not a proper assessment of risk in the sense of Article 5.1 and Annex A of the SPS Agreement (Australia – Apples Case 2010). Due to these

requirements can not be based on a risk assessment as embodied in Article 5.1 of the SPS Agreement, the Australian phytosanitary measures can be considered generally not based on scientific principles in the sense of Article 2.2 of the SPS Agreement. Accordingly, the Panel found that Australia's requirements regarding fire blight in New Zealand apples are inconsistent with Article 2.2 of the SPS Agreement.

Regarding European canker, the Panel found that the estimation of the IRA about the possible entry of fruit orchards is infected with European canker not sufficiently supported by scientific evidence (Australia – Apples Case, 2010). The Panel also found that the IRA over the possibility of estimation net fruit contaminated by European canker during harvesting and transportation to the place of the packaging are not sufficiently supported by scientific evidence (Australia – Apples Case, 2010). Furthermore, the subject ALCM, the Panel found that the reason the IRA about the viability of ALCM does not objectively proven (Australia – Apples Case, 2010). The Panel also found that the reason the IRA related possibility is formed and spreads in Australia, with the ALCM postulate climatic conditions and geographic reasons, it is not objectively justified.

The Panel opinion corroborated by the Appellate Body. Appellate Body stated that the Panel is not wrong in his findings that the IRA is not a risk assessment in the sense of Article 5.1 and Annex A of the SPS Agreement (Australia – Apples Case, 2010). Appellate Body also strengthens the findings of a Panel that SPS related Australia fire blight, European canker and ALCM is inconsistent with article 5.2 approval of SPS,SPS actions so that they are also inconsistent with article 2.2 Agreement SPS.

As a member of the WTO and the parties to the IPPC, Australia tied to a provision in the Agreement the SPS and the IPPC regarding phytosanitary measures. Phytosanitary action is any official rules or procedures that aim to prevent the introduction and/or spread of pests-pest (Australia – Apples Case, 2010). Phytosanitry actions applied by Australia shall be applied with the intention of protecting life or human health from the risks posed by diseases brought by the plant or its products.

Furthermore, the related requirements of import, under article VII, paragraph (1) of the IPPC, the parties have the right to regulate the entry of sovereign of plants and plant products, with the aim to prevent the introduction and/or spread of pests-pest which

is set into its territory. Based on this provision, Australia may determine and adopt actions related phytosanitary import plants or plant products, such as inspections, prohibition of imports and other treatments.

This case, Australia implemented a number of phytosanitary measures against imports of apples from New Zealand. This is done because of the risk of the three quarantine pests i.e. fire blight, European canker and ALCM against imported apples fr om New Zealand (Australia – Apples Case 2010). Australia phytosanitary action is based on the Final Report Risk Analysis for Apples from New Zealand (Final Import Risk Analysis Report for Appels from New Zealand / IRA) issued by the Biosecurity Australia in 2006. IRA is an import risk analysis report conducted to assess the risks in connection with the importation of apples from New Zealand, including the risks associated with the three quarantine pests: fire blight, European canker and ALCM (Australia – Apples Case, 2010).

The fourth paragraph of the Annex A of the SPS Agreement defines risk assessment as the assessment to the possibility of the entry, establishment, or widespread pestor disease within the territory of the importing Member in accordance with sanitary measures or phytosanitary that may be applied, as well as potential impacts to biological and economical. Meanwhile, the IPPC uses the terminology of 'pest risk analysis' in setting related risk assessment actions. IPPC defines a pest risk analysis as a process of evaluating biological or other scientific evidence to determine whether a pest should be regulated and phytosanitary measures that need to be taken to address them (Australia – Apples Case, 2010).

Then, based on Article IV paragraph (2) letter f, one of the responsibilities of the NPPO conduct pest risk analysis. In performing the risk assessment, based on Article 5.1 approval of the SPS, all members are obliged to ensure that the phytosanitary actions are based on risk assessment, in accordance with conditions against the life or health of humans, animals or plants with attention to risk assessment techniques developed by the relevant international organizations. Referring to the provisions of the Biosecurity Australia as part of the Australian NPPO is responsible for the conduct of pest risk analysis as the basis for phytosanitary measures Australia. Appellate Body in the case Australia - Salmon, states that for otherwise consistent with Article 5.1 of the SPS Agreement, a risk assessment must: (i) identify the disease to be prevented by a State relating to entry, the formation or spread of a disease; (Ii) evaluate the possible entry, the formation or spread of diseases, which are

associated with potential economic and biological impacts; (Iii) evaluate the possibility of entry, formed or spread of diseases according to the SPS measures that may be imposed (Australia – Salmon Case, 1998). In addition, the interpretation of Article 5.1 of the SPS Agreement states that compliance with risk assessment techniques in international organizations referral is not sufficient to show compliance with state obligations under the SPS Agreement.

Regarding the risk assessment is done by observing the technical development by the relevant international organizations, the IRA Australia carry out pest risk analysis in four stages related i.e. categorization of pests; the assessment of the likelihood of entry, formed and spreads pests; the assessment result; and the combination of the likelihood of entry, formed and spreads pests with estimated impact (Australia – Apples Case, 2010). Stage categorization of pests are conducted to identify whether a pest can be considered as quarantine pests, thus reducing the number of pests that must be examined in the risk assessment (Australia – Apples Case, 2010). Based on ISPM 11 – international standard for phytosantary action adopted by IPPC - the IRA carry out the categorization stage pests in six stages. As a result of the pest categorization, IRA concluded, among other things, fire blight, European canker and ALCM as pests requires the full attention in Australia. Furthermore, the impact assessment phase of the IRA also carried out with reference to the ISPM 11. IRA cites criteria pest direct consequence assessment, as stated in ISPM 11, namely a direct impact on plant life or health; animal life or health; and other aspects. In essence, pest risk analysis carried out by the Australian has been done taking into account the risk assessment techniques developed by the IPPC as the relevant international organizations, as provided for in Article 5.1 of the SPS Agreement.

However, the Panel found, with the help of scientific experts, that the relevant Australian action of fire blight, European canker and ALCM are inconsistent with the SPS Agreement Pasla 5.1 and, by implication, these requirements are also inconsistent with Article 2.2 of the SPS Agreement. This is confirmed in the Appellate Body ruling that the Panel was not wrong in finding that the IRA is not a proper risk assessment within the meaning of Article 5.1 and Annex A of the SPS Agreement (Australia – Apples Case, 2010). Appellate Body also corroborate the findings of the Panel that the relevant Australian SPS measures three pests are inconsistent with Article 5.1 of the SPS Agreement and, by implication, these actions are also not consistent with Article 2.2 of the SPS Agreement.

Based on the above, although Australia has conducted a risk assessment taking into account risk assessment techniques developed by IPPC, this does not necessarily justify phytosanitary measures Australia is consistent with Article 5.1 of the SPS Agreement and free from claims of other countries. Moreover, the Panel in the case of Japan - Apples states that the term "taking into account" a valuation technique the risks of which are developed by the relevant international organizations, does not mean that a risk assessment under Article 5.1 SPS Agreement "based on" or "fit" analysis techniques such risks (Japan – Apples Case, 2003). Nevertheless, the reference against this risk assessment techniques can provide a very useful guide to whether risk assessment in question is a proper risk assessment in the sense of Article 5.1 Approval SPS (Australia – Apples Case, 2010). In addition, the existence of other scientific factors that also determine whether Australia had actedin accordance with the provisions of the SPS Agreement, actions that risk assessment must also meet the interpretation of article 5.1 approval of SPS. The ruling of the Panel and Appellate Body interpretations of justification against this Article 5.1 that the SPS Agreement compliance with risk assessment techniques on international organization reference is not sufficient to show compliance with the country's obligations under the SPS Agreement.

E. CLOSING

Based on the description in the previous sections can be concluded that the actions of the sanitary arrangements and phytosanitary within the framework of international trade at the World Trade Organization/WTO is contained in the SPS Agreement (*Agreement on the Application of Sanitary and Phytosanitary Measures*/SPS Agreement). SPS Agreement is the elaboration of the provisions of Article XX (b) of the General Agreement on Tariffs and Trade / GATT, which justifies a country to commit an act of trade needs to be done to protect the life or health of humans, animals or plants , Based on the SPS Agreement, WTO members are entitled to apply the provisions necessary to protect the health or life of humans, animals or plants, based on scientific principles and sufficient scientific evidence, and not create discrimination summary or arbitrary or disguised restriction on trade international.

SPS Agreement recognizes the scientific and technical needs in the implementation of the agreement. This requirement can be achieved by recognition of standards forming bodies that facilitate the harmonization of SPS measures by WTO members in the areas of food

protection, plant health and animal health. There are three international organizations that become the reference in the SPS Agreement (Agreement on the Application of Sanitary and Phytosanitary Measures / SPS Agreement), the Codex Alimentarius Commission / CAC, the World Organization for Animal Health (International Office of Epizootics / OIE) and International Plant Protection Convention / IPPC. The three organizations are often referred to as the 'three sisters' because of its relationship under the SPS Agreement. SPS Agreement encourages member countries to establish sanitary actions and phytosanitary a manner consistent with the standards, guidelines and recommendations relevant international organizations.

The IPPC is an international treaty administered by FAO and implemented through a partnership between governments and regional. Under the provisions of the IPPC, the parties are entitled to regulate phytosanitary actions are required, such as inspection, an import ban and certain other treatment to imports-exports. IPPC is also was instrumental in the process of harmonization of standards, guidelines or recommendations, as set out in the SPS Agreement. International Standard for Phytosanitary Measure / ISPM are standards adopted by the IPPC. Until now there are 36 ISPM that has been adopted by IPPC. IPPC encourage the parties, in doing any activities related to this Convention, shall take into consideration international standards deemed appropriate, namely ISPM.

The development of the application of SPS measures issues associated with the settings of the SPS Agreement and the IPPC, both as a basic measure of a country as well as in the phytosanitary dispute resolution process, characterized by the existence of cases relating to it. These cases, namely: the case of Japan - Agricultural Products II, the case of Japan - Apples and cases Australia - Apples. In all three cases, each country respondent wearing phytosanitary measures which are considered as a trade barrier to the claimant countries.Each respondent state argued that the phytosanitary measures have been based on a risk assessment carried out by considering ISPM, which was adopted by the IPPC. However, both the Panel and the Appellate Body, in three cases, stating that each country respondent has acted inconsistently with the SPS Agreement.

Although, the SPS Agreement and the IPPC equally encourages member states to base their phytosanitary measures on international standards is relevant, but the use of international standards related to technical risk assessment not be a primary consideration for the Panel or Appellate Body in deciding the case. In particular, this is in accordance with the

interpretation of Article 5.1 of the SPS Agreement that compliance with risk assessment techniques in international organizations referral is not sufficient to show compliance with state obligations under the SPS Agreement. Both the Panel and the Appellate Body, IPPC related references does not make a technical related risk assessment as a primary consideration in all three cases. Accordingly, the Panel and Appellate Body, in three cases, has acted consistently with only refers to the arrangement of the SPS Agreement, although each country respondent claimed to have done with the phytosanitary measures are based on IPPC.

Although the Panel and Appellate Body did not consider major scientific and technical reference of the IPPC, IPPC still ought to be retained as the SPS Agreement reference international organization because the rights and obligations under the IPPC, such as the issuance of certificates relating to phytosanitary regulations; inspection of plants; liability scientific risk analysis; and the right to determine and adopt the necessary sanitary measures related to the import of plants, consistent and is a complement to the SPS Agreement. In addition, although ISPM all three cases - ISPM 2 on Pest Risk Analysis - in the previous chapter not be a primary consideration for the Panel and Appellate Body, ISPM 2 they remain useful in assessing the consistency of the risk assessment of the provisions of the SPS Agreement. Furthermore, IPPC have another ISPM - which contains settings of phyto sanitary treatment against certain pests. It helped WTO member states and parties to the IPPC uniform phytosanitary treatment against these pests.

Finally, for Indonesia, as a Member State of the WTO, if the intention of performing phytasanitory actions against some food products from abroad, are expected in a comprehensive manner to submit to pay more attention to the SPS Agreement as well as not focus in the main and specific reference to the provision of the IPPC.

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