

A COMPARATIVE PERSPECTIVE ON THE INTERNATIONAL HEALTH REGULATIONS AND THE WORLD TRADE ORGANIZATION'S AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

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ABSTRACT

The IHR and SPS Agreement are two of the major international legal instruments that deal with public health matters relevant to international trade. However, the IHR is a treaty adopted under the WHO and will enter into force in 2007. The SPS Agreement is one of the multilateral trade agreements of the WTO. The WHO's objective is the attainment by all peoples of the highest possible level of health, whereas the WTO deals with the global rules of trade between nations so as to improve the welfare of the people of the Member countries. These differences in the objectives of the WHO and WTO mean that the provisions of the IHR and SPS Agreement developed differently. These differences can be observed in the scopes of the targeted public health risks as well as the mechanisms to adopt health measures to cope with such risks, and may bring conflicts between these two international regimes. This paper does not intend to solely introduce and compare the features of the IHR and SPS Agreement, it also seeks to identify the provisions which may be the sources of conflicts between the two mechanisms in addition to suggesting possible means

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to reconcile the conflicts. In the final section of this paper, attention will mainly be drawn to two issues relevant to scientific evidence. The first is to examine whether verified information concerning a public health risk, of which the WHO informs States Parties, constitutes scientific evidence or international recommendations under Articles 2.2 and 3.1 of the SPS Agreement? The second is when no sufficient scientific evidence is available, can an additional health measure based on Article 43 of the IHR be challenged by WTO Members, provided there are potential conflicts between the mechanisms of Article 5.7 of the SPS Agreement and Article 43.2(b) of the IHR.

KEYWORDS: *IHR; SPS Agreement; scientific evidence; additional health measures; provisional measures*

I. INTRODUCTION

As former Director-General of the World Health Organization (WHO), Dr Lee Jong-wook, indicated in 2005, international health risks have changed drastically in the past 30 years, and new diseases have emerged and shown their capacity to spread globally in a matter of days, and they continue to emerge. These public health threats have increasingly weakened the effectiveness of the International Health Regulations (IHR), adopted in 1969, in controlling the international spread of diseases. The original IHR was therefore revised at the end of 2004, and adopted by the World Health Assembly (WHA) in May 2005.

In 1998, as part of the IHR revision process, the WHO Secretariat approached the Members of the Committee on Sanitary and Phytosanitary Measures (SPS Committee) of the World Trade Organization (WTO) to determine if it was possible to minimize the effect of any conflict in the application of measures under the Agreement on the Application of Sanitary and Phytosanitary Measure (SPS Agreement)¹ and the IHR² A comparison that looks at the respective roles and functions of the two agreements, including the legal basis, purpose, core principles, governing bodies, key

¹ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, in WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULT OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 59-72 (1999) [hereinafter SPS Agreement].

² World Health Organization [WHO], *Public Health and Trade: Comparing the Roles of 3 International Organizations* 3 (1999), <http://www.who.int/csr/ihr/en/IHRtrade.pdf>.