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국제학석사학위논문

**China's SPS & TBT Measures and its  
Consistency with International Trade Regime:  
Focusing on Food Import Restriction**

중국의 SPS 및 TBT 조치와 국제무역규범과의 합치성:  
식품 수입규제를 중심으로

2017년 8월

서울대학교 국제대학원

국제학과 국제협력전공

홍 세 진

Master's Thesis

**China's SPS & TBT Measures and its  
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Focusing on Food Import Restriction**

August 2017

**Graduate School of Seoul National University  
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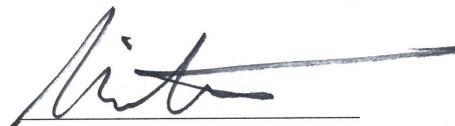
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## **China's SPS & TBT Measures and its Consistency with International Trade Regime: Focusing on Food Import Restriction**

Presented by **Sejin HONG**, candidate for the degree of Master of Art in  
International Studies and hereby certify that it is worthy of acceptance

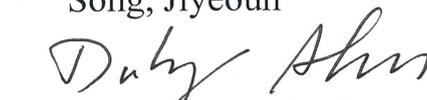
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## **ABSTRACT**

Since its accession to the WTO in 2001, China has actively made the use of sanitary and phytosanitary measures and technical barriers to trade in the WTO system. Among China's SPS measures on food importation, 29 Specific Trade Concerns have been raised so far; food safety accounted a majority by recording 14 STCs, and animal health, plant health and other concerns followed accounting for 11, 3 and 1 STCs respectively. Scientific justification and regionalization concerns have occupied the largest portion for members' criticism. This paper examines China's regulations and their consistency with the WTO SPS and TBT Agreement based upon two previous Panel reports and standards of relevant international organizations to suggest that China has been uncooperative in solving food import restriction issues. Furthermore, it proposes two strategic decisions for dealing with these matters. First, it advocates the use of collective litigation in the WTO dispute settlement system, for they have proved to be effective in previous disputes. Second, specific chapters seem to be necessary to promote objectives of both agreements through detailed mechanism.

*Keywords: Food Import, SPS Measures, TBT Measures, WTO, Dispute Settlement System, STCs, WTO Panel Reports*

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## **I. Introduction**

After the establishment of the World Trade Organization (hereinafter “WTO”) in 1995, members of the WTO had to find ways to protect their domestic market from competitive foreign products by precluding tariff measures, which had long been used. One of the main objectives of launching the GATT in 1948 was to encourage trade among members by gradually reducing tariffs on products, and this constant exertion led members to go even further in terms of trade facilitation by creating the WTO.

Member countries are adopting such non-tariff measures as Sanitary and Phytosanitary (hereinafter “SPS”) and Technical Barriers to Trade (hereinafter “TBT”) in the way of trade barriers so as to protect their domestic industries. However, it is not until recently that non-tariff measures, especially SPS and TBT measures, have been actively utilized by the members in the WTO system. According to MAST<sup>1</sup> analyzed by several international organizations such as the United Nations Conference on Trade and Development (hereinafter “UNCTAD”), WTO, International Monetary Fund (hereinafter “IMF”), etc., since 2003, the number of SPS and TBT measures which have gone into effect has increased tremendously, and the number of these measures are far more

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<sup>1</sup> MAST (Multiple Agency Support Team) is comprised of FAO, IMF, ITC, OECD, UNCTAD, UNIDO, World Bank, WTO.

than that of other non-tariff measures.<sup>2</sup> This recently growing issue accounts for why SPS and TBT measures have not been researched as much as other such trade barriers like tariffs, quotas, trade remedies, etc.

The Agreement on the Application of SPS Measures sets out the fundamental instructions for food safety, animal health and plant health standards. It also lets members adopt their own legislation, but at the same time, it must be based on available scientific justification in order not to arbitrarily or unjustifiably discriminate between countries where similar or identical conditions prevail. Although it emphasizes the importance of harmonization by encouraging members to adopt international standards, guidelines and recommendations, members are allowed to adopt higher standards only if there is scientific justification. The SPS agreement still does not prevent members from using different standards and means regarding the inspection of products.<sup>3</sup> It may lead members to make an arbitrary decision.

The TBT Agreement's goal is to guarantee that importing countries' technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade. As there are various forms of standards across the member countries, they play a major role as a trade barrier for exporters. Just as the SPS Agreement allows members

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<sup>2</sup> Choi et al.(2015)

<sup>3</sup> Wang and Cho (2013) p.304

to implement their own measures, the TBT Agreement recognizes members' rights in terms of human health, safety and environmental protection. Thus, in the pretext of human health, safety and protection of the environment, importing countries have been imposing a number of measures.

## II. Research Objectives

Having notified SPS and TBT measures frequently to the WTO, members engaged in trade relationships have been raising Specific Trade Concerns<sup>4</sup> (hereinafter “STCs”). Among the notified measures, some of them lack scientific justification and transparency, and they are considered to be either discriminatory or more trade restrictive than necessary. China is one of the most active SPS and TBT notifying members, which results in serious trade disruption.

The United States claimed that China is one of the least transparent major markets for agricultural products in the worldwide, due to the fact that China’s regulatory authorities unevenly enforce regulations and selectively intervene in the market. Questionable scientific evidence or an opaque regulatory administration regarding SPS measures has caused difficulties and doubt for exporters in agricultural commodities. Due to its new regulations, *2015 Food Safety Law*, burdensome and needless requirements for official documentation of low-risk food exports have increased.<sup>5</sup>

In 2016, beef and poultry products were blocked by SPS measures approved

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<sup>4</sup> STCs refer to any objections raised against technical regulations (SPS and TBT) of members of the WTO.

<sup>5</sup> the USTR (2017) p.91.

by China's regulatory authorities. The Chinese government continued to prevent U.S. beef and beef products from being imported to China, even though the U.S. had not only declared them safe to export under international scientific guidelines established by the World Organization for Animal Health (hereinafter "OIE")<sup>6</sup>, but also received the lowest risk status from the OIE. Also, China continued to suspend importation of U.S. poultry products by arguing the U.S. outbreak of Avian Influenza (hereinafter "AI") that was eliminated in the U.S.' territory. This action was seen to be both unwarranted and as unscientific suspension.<sup>7</sup>

In addition, South Korea has been negatively affected by China's SPS measure on Kimchi since 2013. Shortly after Korean Kimchi occupied China's domestic market, China applied its own *colon bacillus*<sup>8</sup> standard to Korean Kimchi which must go through the fermentation process unlike Chinese version of Kimchi, Paochai.<sup>9</sup> As a result, in 2013, the actual export amount to China in

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<sup>6</sup> OIE, founded in 1924, is the world organization for animal health and it is recognized by the SPS Agreement with six missions; ensuring transparency, analyzing scientific information, encouraging international cohesion in controlling animal diseases, publishing health standards to facilitate international trade, enhancing the legal framework of national veterinary services and improving overall welfare of animal via a science-based approach.

<sup>7</sup> Ibid, p.92

<sup>8</sup> It is also referred as Escherichia Coli (E. Coli)

<sup>9</sup> China applied its own colon bacillus standard which must be less than 30MPN/100g.

terms of Kimchi was zero.<sup>10</sup>

Exporters have been negatively affected by Chinese SPS and TBT measures on food importation due to opaque regulations with lack of scientific justification and non-compliance with the OIE standard. The purpose of this study is to analyze and categorize China's SPS and TBT measures, and then evaluate its consistency with the WTO SPS and TBT Agreement based on previous Panel report findings. After evaluating China's food import measures on the basis of the international trade regime, policy implications are to be provided for the future countermeasures.

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<sup>10</sup> Lee (2015)

### **III. SPS and TBT Measures and obligations**

Both SPS and TBT measures are under the obligation of transparency in that members must notify changes in their SPS and TBT measures and provide information on those measures. This is a profound provision which provides exporters an adjustable period of time for the altered legislation. So as to minimize the trade barriers due to the measures, the SPS and TBT Agreement require that each member have an enquiry point which can answer all reasonable enquiries from other members and interested parties in other members as well as provide the relevant documents.<sup>11</sup> Not only does this chapter deal with the overview of notifications and STCs in terms of SPS and TBT measures, but it also specifies SPS measures in China's food import restriction with the categorization of China's food importation restrictions.

#### **1. Overview of the SPS and the TBT Notifications**

As shown in Table 1, the number of regular, emergency and corrigenda notifications was 14,233, 1,913 and 5,132 respectively. Regular notification was the most frequent, and then corrigenda, and emergency notifications followed. Among the total notifications that added up to 21,278, 416 STCs were raised.

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<sup>11</sup> Article 10.1 of the TBT Agreement

**<Table 1> The Number of SPS Notifications and STCs as of 05/04/2017**

Notification Types	Number
Regular	14233
Emergency	1913
Corrigenda	5132
STCs	416

Source: <http://spsims.wto.org/>

Table 2 shows that the number of regular, revisions and corrigenda notifications was 22,398, 211 and 6,061 respectively. Regular notification was the most frequent, and it was followed by corrigenda and revisions notifications as it was in Table 1. Among the total notifications that added up to 28,670, the number of STCs raised was 521.

**<Table 2> The Number of TBT Notifications and STCs from 01/01/1995 to 05/04/2017**

Notification Types	Number
Regular	22398
Emergency	211
Corrigenda	6061
STCs	521

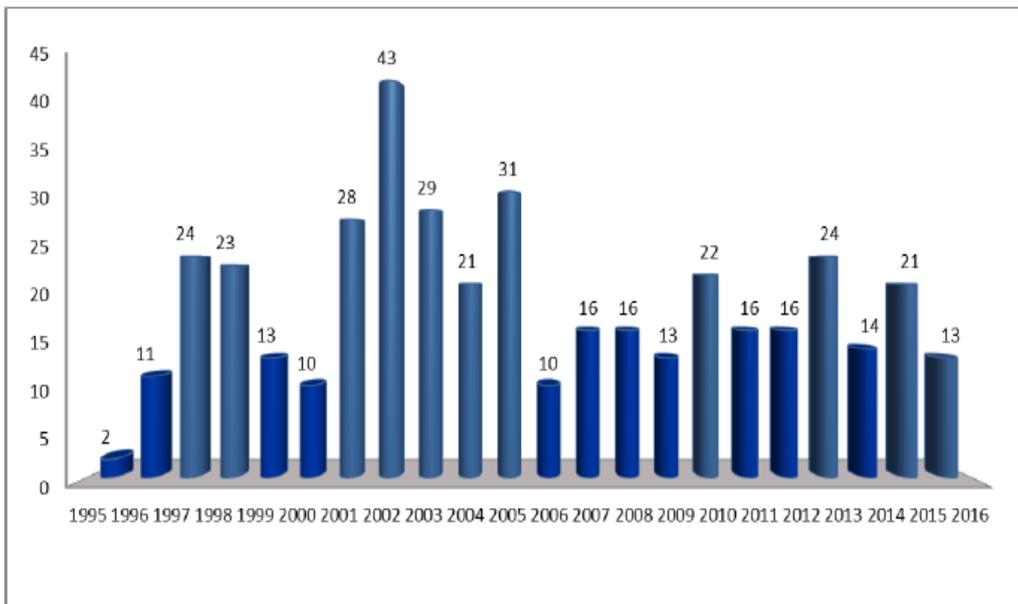
Source: <http://tbtims.wto.org/>

### **1) Overview of the STCs Raised on the SPS Measures**

In total, as of today, 416 STCs have been raised for 22 years since the establishment of the WTO. Chart 1 shows the number of new STCs raised each

year between 1995 and the end of 2016.<sup>12</sup> Although there is some fluctuation, more than 10 new STCs have been raised every year except for 1995.

*<Chart 1> The Number of Newly Raised STCs.<sup>13</sup>*



Source: G/SPS/GEN/204/Rev.17

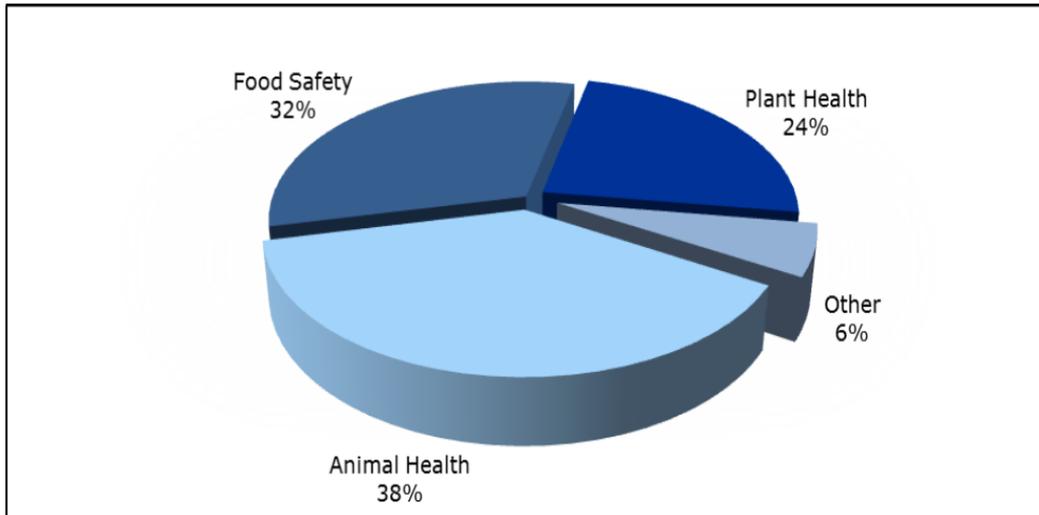
Chart 2 categorizes the 416 STCs raised by subject since 1995 into food safety, plant health and animal health. 38%, 32%, 24% and 6% was related to animal health, food safety, plant health and other concerns respectively.<sup>14</sup>

<sup>12</sup> G/SPS/GEN/204/Rev.17, para. 1.1.

<sup>13</sup> Newly raised STCs refer to the objections that have not been raised before.

<sup>14</sup> STCs related to animal health are divided into food-and-mouth disease (FMD), transmissible

*<Chart 2> STCs by Subject (1995-2016)*



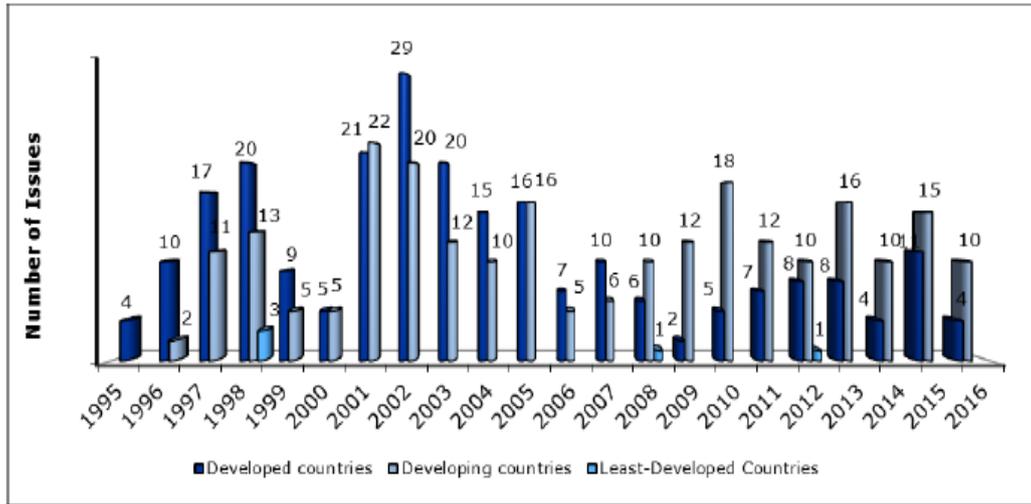
Source: G/SPS/GEN/204/Rev.17

Chart 3 shows the numbers of new issues raised since 1995 by each category of member: developed, developing and least-developed. Before 2005, developed countries raised more new issues than developing and least-developed countries. Since 2006, however, developing countries have raised more new issues than any other member, which shows that developing countries seem to be more actively making full use of SPS measures in terms of domestic industry protection.

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spongiform encephalopathies (TSEs), avian influenza (AI) and other animal concerns.

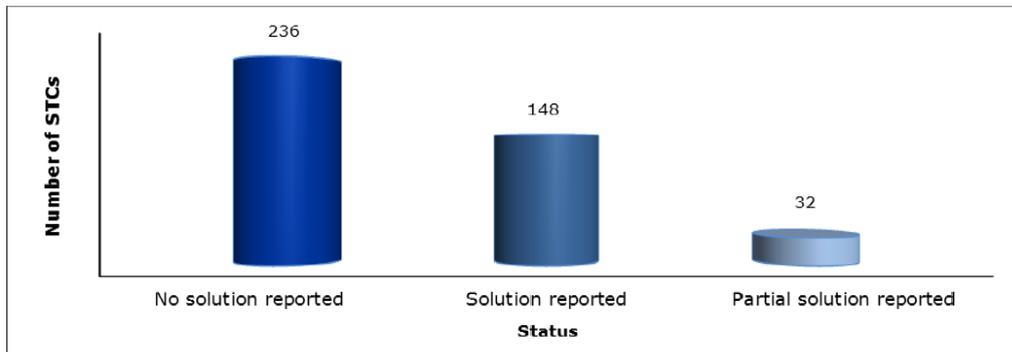
<Chart 3> Number of New Issues Raised by Members



Source: G/SPS/GEN/204/Rev.17

As shown in the chart below, most of the STCs raised by members have not been reported. 236 STCs were not reported, 148 STCs were resolved, and 32 STCs were partially resolved. Chart 4 shows that members maintaining STCs are not actively engaged in solving the issues raised, or bilateral negotiation between the members in the issues does not compromise well.

**<Chart 4> The Current Status of STCs Resolution as of 2016**



Source: G/SPS/GEN/204/Rev.17

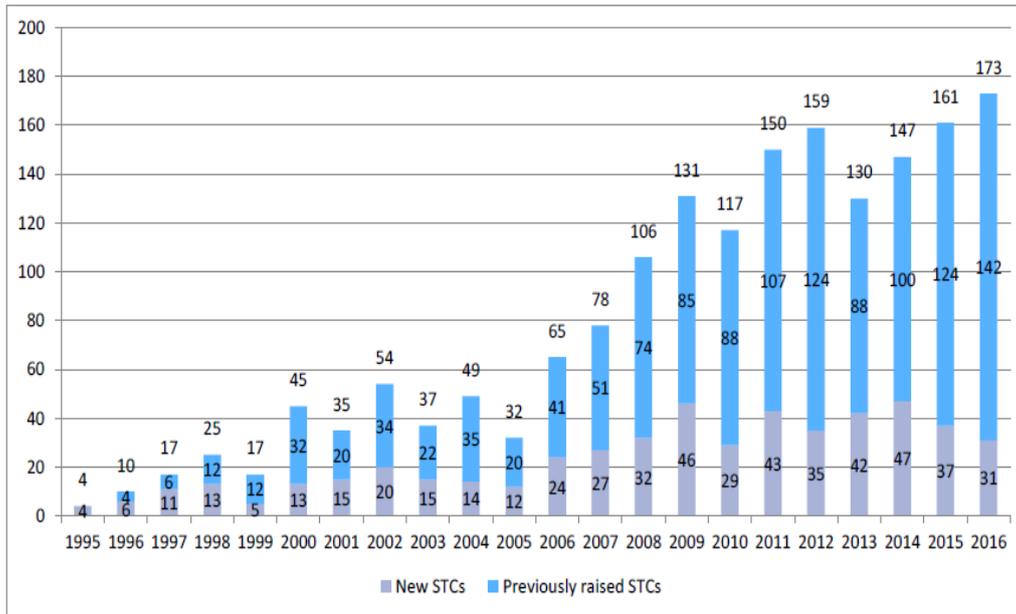
## **2) Overview of the STCs Raised on the TBT Measures**

In 2016, members raised a total of 173 STCs, the highest number in history of the WTO. However, the number of new STCs decreased to 31, which was 6 fewer than the previous year. This trend also shows in the period between 2014 and 2015. In 2014, the number of new concerns was 47, and then it dropped to 37. Unlike the case of new STCs, the number of previously raised STCs intermittently has increased since 1995. In 2016, it recorded 142, the highest number.<sup>15</sup>

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<sup>15</sup> G/TBT/39, para.3.19.

<Chart 5> STCs Raised (1995-2016)

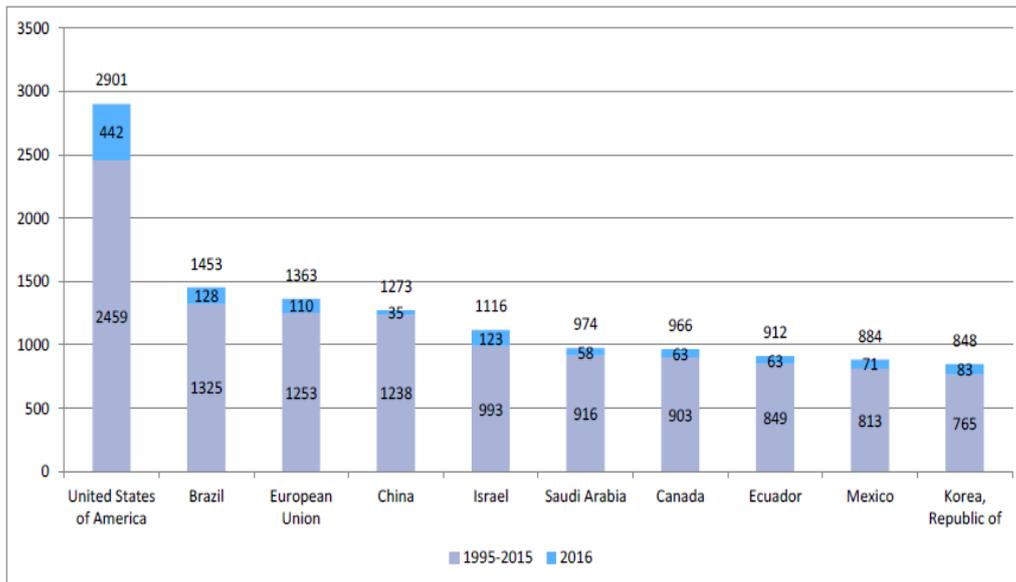


Source: G/TBT/39

Of all members, the U.S. has notified the most TBT measures, recording a total number of 2901, and it is followed by Brazil, the EU and China. Considering the WTO accession time of the members, China has notified more actively than Brazil, the EU and Israel.<sup>16</sup>

<sup>16</sup> The U.S., the EU, Brazil and Israel have been a member of the WTO since 1995, but China earned a membership of the WTO on 11 December, 2001.

**<Chart 6> Top Ten Notifying Members (new notifications, addenda, corrigenda, and revisions) 1995-2015, and 2016**

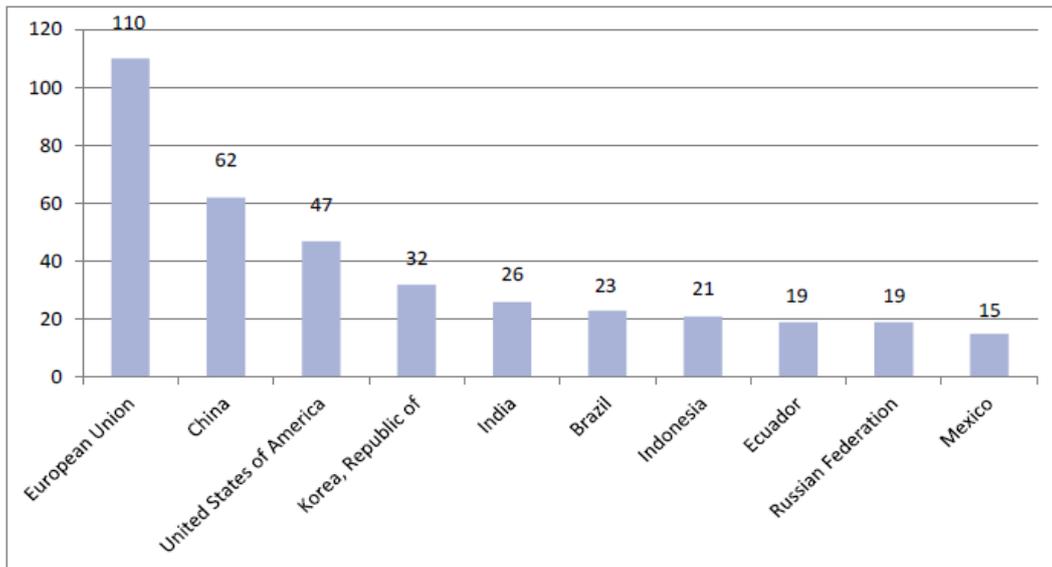


Source: G/TBT/39

Chart 7 shows that the EU, subject to 110 STCs, was the member most frequently subject to new STCs, followed by China and the U.S. that recorded 62 and 47 STCs, respectively. South Korea ranked fourth with 32 TBT notifications subject to new STCs, and India followed next by recording 26 notifications being subjected to new STCs by the members. Indonesia, Ecuador, Russia and Mexico followed by recording 21, 19, 19, and 15, respectively. Just as it was in the case of top ten notifying members above, considering that China’s accession to the WTO came 7 years after other members, China’s TBT

measures seem to have been somewhat negatively influencing exporters.

**<Chart 7> Members Most Frequently Subject to New STCs, 1995-2016**



Source: G/TBT/39

## **2. STCs Raised on China's Food Importation Restrictions**

### **1) Categorization of STCs in terms of SPS Measures**

Table 3 shows that among 29 STCs raised on China's SPS measures that directly or indirectly relate to food import restriction, the number of food safety concerns was 14, most of them being contamination and chemical residue reasons. With the exception of one case, animal health concerns followed next

with 11 due to disease prevalence.<sup>17</sup> However, the number of plant health concerns was 3 due to such insect problems like fire blight. Lastly, the number of other animal health concerns was 1 in 2003 due to quarantine for aquatic animals raised by the EU. Seemingly most of the STCs brought in the committee meetings did not come up with reasonable solutions in that only four of them were resolved, one was partially resolved, and rest of the STCs have not been reported.

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<sup>17</sup> G/SPS/GEN/204/Rev.17., p.8-27.

**<Table 3> Categorization of STCs Raised on China's Food Importation Restriction, 2002-2016**

Categorization	STC No.	Year	Reason for Notifications	Status <sup>18</sup>
Food Safety	114	2002	Others	NR
	142	2002	Contamination	NR
	127	2002	Residue	R
	246	2007	Contamination	R
	251	2007	Contamination	NR
	278	2009	Classification	NR
	319	2011	Residue	NR
	324	2011	Others	NR
	329	2012	Others	NR
	345	2013	Others	NR
	354	2013	Residue	NR
	360	2013	Others	NR
	389	2015	None	NR
	416	2016	Contamination	NR
Animal Health	128	2002	Disease	NR
	196	2004	Disease	R
	193	2004	Disease	PR
	255	2007	Disease	NR
	259	2007	Disease	NR
	363	2013	Disease	NR
	383	2015	Disease	NR
	392	2015	Disease	NR
	395	2015	Biotechnology	NR
	405	2016	Disease	NR
406	2016	Disease	NR	
Plant Health	143	2002	Insect	NR
	115	2002	Insect	R
	261	2007	Insect	NR
Other Concerns	157	2003	quarantine for aquatic animals	R

Source: Committee on SPS Measures from 26 March 2003 to 7 March 2017<sup>19</sup>

<sup>18</sup> Not Reported (NR), Resolved (R), Partially Resolved (PR)

<sup>19</sup> Organized into chart by author.

According to the *2017 National Trade Estimate Report on Foreign Trade Barriers* published by the Office of the United States Trade Representative (USTR), unpredictable practices by Chinese customs and quarantine agencies delay or halt shipments of agricultural products into China. SPS measures without justifiable scientific evidence or a non-transparent regulatory regime have frequently been creating trade disruptions.<sup>20</sup> As shown in Table 4, among the 29 STCs raised on China's SPS measures on food import, both scientific justification and regionalization aspects each had 8 cases. STC numbers 246, 251, 278, 319, 128, 259, 363 and 261 are the lists that were brought to the committee meeting in terms of China's SPS measures lacking scientific justification. Also, STC numbers 128, 196, 193, 255, 259, 392, 405, and 406 are the lists for non-compliance of regionalization recommended by the OIE standard.<sup>21</sup>

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<sup>20</sup> the USTR (2017) p.91.

<sup>21</sup> STC number 128, 259 and 392 are under both lack of scientific justification and non-compliance of regionalization.

**<Table 4> Summary of Arguments from Members Raising STCs**

Categorization	STC No.	Arguments from Members Raising STCs
Food Safety	114	not notified
	142	risk assessment
	127	more trade restrictive, deliberately delaying
	246	lacked scientific justification
	251	lacked scientific justification
	278	lacked scientific justification
	319	lacked scientific justification,
	324	not in line with the requirements of the SPS Agreement
	329	lack of clarification for the purpose of the testing
	345	only country developing standard for phthalates
	354	N/A
	360	not legally released to the market
	389	non-transparent, discriminatory
416	not complied Art. 2.3, 5.6, 7, 8 of the SPS Agreement	
Animal Health	128	not-complied OIE, lacked scientific justification
	196	not complied with OIE standard (Regionalization)
	193	not complied OIE Recommendation
	255	not complied with OIE standard (Regionalization)
	259	lacked scientific justification, not complied OIE guidelines
	363	infringed Art. 2, 3, 5, 8, 13 of the SPS Agreement
	383	N/A
	392	not complied OIE standard (Regionalization)
	395	not used by other countries,
405	the disease is not listed by the OIE	
406	not complied OIE standard (Regionalization)	
Plant Health	143	IPPC (ISPM 15) contradicts Chinese legislation
	115	risk assessment
	261	lacked scientific justification
Other Concerns	157	not notified.

Source: Committee on SPS Measures from 26 March 2003 to 7 March 2017<sup>22</sup>

<sup>22</sup> Organized into chart by author.

Since China's accession to the WTO on 11 December, 2001, it seems to have been criticized in terms of SPS measures due to lack of scientific evidence, non-compliance with the OIE standards, opaque risk assessment and infringement of certain provision of the SPS Agreement. Among the arguments from the member countries, scientific evidence and regionalization concerns are the most frequently raised. The next chapter analyzes in detail a couple of China's SPS measures that were considered to be lack scientific justification and have regionalization concerns based upon Panel reports so as to evaluate whether or not China's SPS measures have been consistent with the international trade regime.

## **2) China's TBT Measures on Food Importation**

As shown in Table 5, 4 STCs have been raised by members with respect to China's TBT measures on food importation since 2002. ID 68 is about regulations on agricultural GMOs safety, which requires mandatory labeling on GMO products. ID 141 concerns the adoption of a decentralized system that requires different application at the local level for imports of alcoholic beverages and cosmetic products. ID 326 specifies import and export of food additives inspection, quarantine and supervision with disclosure of formulas for imported food additives. This measure was an issue at stake because of the mandatory disclosing of suppliers' formulas on product labels, which allegedly

could disclose business confidential information. ID 493 is a new legislation that implements formula registration regulation for infant and follow-up formula, and is the most fiercely ongoing issue of disagreement in respect of China's TBT measures on food importation due to the repeated submission of data and on-site inspection, duplicative on-site inspection and the limitation on the number of product and brand registration.

**<Table 5> Summary of Arguments from Members Raising STCs on  
China's TBT Measures**

ID Number	Year	Arguments from Members Raising STCs	Status
68	2002	Unnecessary labelling requirements	NR
141	2006	Replacement of mandatory labelling requirement by a decentralized system	NR
326	2011	Not notified, time to adapt, "reasonable interval", disclose business confidential information	NR
493	2016	Lacked scientific evidence on brand limitation, unnecessary repeated on-site inspection	NR

Source: TBT Committee Meeting of Minutes (G/TBT/M/26, G/TBT/M/39, G/TBT/M/55,56,57, G/TBT/M/68,69,70)<sup>23</sup>

Compared to the case of STCs raised with regards to China's SPS measures, STCs raised in terms of TBT are much fewer in terms of number. Among the 4

<sup>23</sup> Organized into chart by author.

TBT measures on food imports by the Chinese government, ID 493 is highly expected to cause serious trade disruptions in that the limitation on the number of infant formula registration would damage numerous exporters from members such as the EU, the U.S., South Korea and Japan. The EU claimed that without modification of Article 12, the number of brands on the Chinese market would be reduced by an estimated 80%.<sup>24</sup> The next chapter will assess ID 493 to evaluate if China has complied with the WTO TBT agreement.

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<sup>24</sup> G/TBT/M/68, paras. 2.4-2.8

#### **IV. Evaluation on China's Food Import Restrictions**

In the case of China's SPS measures on food import, concerns regarding scientific justification and OIE standards of regionalization concerns were the main reason for the STCs raised by members. The STCs raised due to scientific justification shared a similar trend in that China did not clearly provide available scientific evidence. Similarly, the STCs raised because of the OIE standard said that China did not take into account exporting members' efforts to abide by OIE guidelines and regionalization efforts. Among 9 and 8 STCs on scientific justification and OIE standards concerns respectively, STC numbers 261<sup>25</sup> and 406<sup>26</sup> were referred to similar cases that were brought to the WTO dispute settlement system, which are DS245<sup>27</sup> and DS430<sup>28</sup>. The two cases were analyzed and applied to each STC so as to assess whether China's SPS measures were in line with the SPS Agreement. Similarly among China's 4 TBT measures on food imports as briefly explained above in Table 3, ID number

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<sup>25</sup> STC 406, "China's import restrictions due to Highly Pathogenic Avian Influenza (STC 406)"

<sup>26</sup> STC 261, "China's varietal restrictions on US apples (STC 261)"

<sup>27</sup> DS245, Japan – Measures Affecting the Importation of Apples

<sup>28</sup> DS430, India – Measures Concerning the Importation of Certain Agricultural Products

493<sup>29</sup> which has been regarded as causing serious trade disruption, was also examined on the basis of the TBT Agreement.

## **1. Evaluation on China's SPS Measures**

### **1) China's Varietal Restrictions on US Apples and its Scientific**

#### **Justification (STC 261)**

During the SPS committee meeting held in October 2007, the U.S. raised a STC against China's SPS measures on the limitation of US apples of two varieties, Golden Delicious and Red Delicious. The U.S. government had called for China to allow the export of all varieties of U.S. apples. However, the Chinese government requested that the U.S. provide information related to fire blight and added the comment that U.S. apples were at issue of primary fire blight.<sup>30</sup> China claimed that the two varieties, Golden Delicious and Red Delicious, were not resistant to fire blight, so they had demanded information for risk analysis.<sup>31</sup>

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<sup>29</sup> ID 493, "China – Formula Registration Regulation for Infant and Follow-up Formula (ID 493)"

<sup>30</sup> G/SPS/R/46, para. 18.

<sup>31</sup> Ibid, para. 19

## **(1) Analysis on the Panel Report (DS245)**

### **① Article 2.2 of the SPS Agreement**

Part IIIIV Section D of the Panel report for *Japan - Measures Affecting the Importation of Apples (DS245)* exclusively deals with Article 2.2 of the SPS Agreement. Article 2 is agreed by member states in terms of “Basic Rights and Obligations”. Article 2.2 stipulates: “Members shall ensure that any sanitary or phytosanitary measure 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.” It is clear that members must ensure that the SPS measure must be applied with sufficient scientific evidence except for the case of Article 5.7

### **② Arguments from the U.S. and Japan**

The U.S. argued that Japan’s domestic fire blight measure was inconsistent with Article 2.2 of the SPS Agreement. The U.S. contended that there was no scientific evidence that mature, symptomless apples produced in the U.S. territory have ever spread fire blight to the territory of Japan.<sup>32</sup> Moreover, the U.S. government pointed out the fact that over the 35 years, there had been no case in which U.S. apples transmitted the disease to outside of the U.S.

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<sup>32</sup> WT/DS245/R, para. 8.69

territory.<sup>33</sup> The U.S. added that mature, symptomless apples are not the vectors for disseminating the fire blight.<sup>34</sup> The U.S. kept the steady position that it would not be fair treatment if the U.S. mature, symptomless apples were discriminated against other similar apples.

The Japanese government revealed that the measure in concern, “*Detailed Rules for Plant Quarantine Enforcement Regulation Concerning Fresh Fruit of Apple Produced in the United States of America*” dated 1 April 1997, could be rationally backed up by scientific evidence.<sup>35</sup> Besides, Japan argued that *E. amylovora*<sup>36</sup> can live for an extensive period due to the incubation period. Hence apple fruits were said not to be exempted from the probability of being a pathway for the disease by Japan.<sup>37</sup> Furthermore, the Japanese government expressed concerns regarding the fact that the U.S. government only did emphasize “direct evidence” in assessing risk assessment. Thus, they argued that there is possibility of “indirect evidence” which could possibly trigger the spread of fire blight over Japan’s territory. Lastly, they argued that the U.S. criteria of mature, symptomless apple fruit seemed to be vague in that, according to Japan, fruits’ ripening should be considered as “continuous

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<sup>33</sup> Ibid, para. 8.70

<sup>34</sup> WT/DS245/R, para. 8.71

<sup>35</sup> Ibid, para. 8.72

<sup>36</sup> *E. amylovora* is a scientific name of the fire blight disease.

<sup>37</sup> Ibid, para. 8.73

process.”<sup>38</sup>

### ③ Definition of Sufficient Scientific Evidence

The Panel drew a conclusion that the meaning of scientific evidence in Article 2.2 of the SPS Agreement is “evidence gathered through scientific means.” In that context, the Panel made the decision to include indirect evidence, if the evidence was collected via scientific process.<sup>39</sup>

In addition, the Panel referred to the Appellate Body’s decision on the *Japan-Agricultural Products II* case in order to define the term, “sufficient”. According to the Appellate Body, the general definition of sufficient is “of a quantity, extent, or scope adequate to a certain purpose or object.” Thus, the Panel pointed that “sufficiency demands the existence of a sufficient or adequate relationship between two elements, *in casu*, between the SPS measure and the scientific evidence.”<sup>40</sup> The Panel additionally made a conclusion that the cause and effect relationship between the SPS measure and scientific evidence must be based upon both quality and quantity of the scientific evidence.<sup>41</sup>

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<sup>38</sup> WT/DS245/R, para. 8.74

<sup>39</sup> *Ibid*, para. 8.90

<sup>40</sup> WT/DS245/R, para. 8.101

<sup>41</sup> *Ibid*, para. 8.103

#### ④ Elements of Assessment

##### *A. Notion of Mature, Symptomless Apple*

Dr. Hale mentioned that there are accepted definitions for determining whether an apple fruit is physiologically and commercially mature; “an apple is physiologically mature when it is at the phase of growth where still it continues to grow and ripen even when it is separated from the tree.”<sup>42</sup> Furthermore, Dr. Smith and Dr. Geider argued that even if very young apples are vulnerable to the disease at issue, once they ripe enough to be sold, they are not any more. Moreover, with respect to the development of the apple fruit, the infected ones have very little chance or negligible<sup>43</sup> to become ones with healthy appearance. Regarding the experts’ findings, the Panel referred to the concept that “mature and immature” is associated with vulnerability, and “symptomless” is pertinent in terms of science. Thus, the Panel concluded that the distinction between mature and immature apples is applicable regarding the risk of infection of the fruit.<sup>44</sup>

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<sup>42</sup> *Ibid*, para. 8.113

<sup>43</sup> In scientific reports, the definition of “negligible” is the uncertainty that theoretically always remains that an event may occur. It is because science is never be able to provide absolute certainty, and terms, “unlikely”, “very remote”, “insignificant”, “extremely low” or “extremely unlikely”, have the same meaning. (EC-Hormone AB report, 1998)

<sup>44</sup> WT/DS245/R, para. 8.115.

### *B. Infection of Mature Apple Fruit*

Not just did Dr. Geider reveal that fruits with natural infection would be smaller, show lesions and also have the possibility of developing into a mature one, but also he mentioned that when an infection happens in a natural way at an advanced growth stage in apples, then the infected ones start to decay.<sup>45</sup> Dormant persistence of the fire blight disease was said not to be harmful by the experts. The rationale behind this was that scientific evidence or case up to the present time had not been found. Experiments were initiated so as to see whether or not the bacteria remaining surface of the fruit could invade through the pedicel of the apple fruit and cause infection on the inside of the apple only to fail to prove it.<sup>46</sup> Thus, the Panel concluded the existence of the bacteria on the surface of the apple fruit is not a threat in terms of inside infection.

### *C. Endophytic Bacteria in Mature Apple Fruit*

The U.S. mentioned that there are a number of research findings which can show mature, symptomless apple fruit do not harbor endophytic bacteria.<sup>47</sup> On the other hand, Japan raised objection to it by saying it seemed that the U.S. only showed the risk which may not be visible in certain circumstances.<sup>48</sup>

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<sup>45</sup> *Ibid*, para. 8.116

<sup>46</sup> *Ibid*, para. 8.117

<sup>47</sup> WT/DS245/R, para. 8.123.

<sup>48</sup> *Ibid*, para. 8.124.

With respect to this matter, experts explained that no scientific proof that mature apple fruit would harbor endophytic bacteria had been found.<sup>49</sup> Eventually, the Panel rejected Japan's argument which was based on Zwet's study. It is largely because the study not only failed to identify the development level of ripeness of the fruit but also it did not recognize whether or not it had been symptomless.<sup>50</sup> Accordingly, based on available scientific evidence, the Panel came up concluded that there was no sufficient scientific evidence to determine that mature, symptomless apples would contain endophytic bacteria.<sup>51</sup>

#### *D. Epiphytic Bacteria on Mature Apple Fruit*

The U.S. argued that the previous studies proved that the external presence of the bacteria on mature, symptomless apple fruit was extremely rare at harvest. On top of that, the U.S. indicated that bacteria on the surface of fruits are not able to survive for a long period of time.<sup>52</sup> However, Japan disagreed with the U.S.'s argument claiming that bacteria may be present at harvest under certain conditions based on scientific studies done by Sholberg in 1988.<sup>53</sup>

Dr. Hayward remarked that Sholberg's study was an exceptional case in that

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<sup>49</sup> *Ibid*, para. 8.125.

<sup>50</sup> *Ibid*, para. 8.127.

<sup>51</sup> *Ibid*, para. 8.128

<sup>52</sup> WT/DS245/R, paras. 8.129, 8.130.

<sup>53</sup> *Ibid*, para. 8.131.

there showed vulnerability only when seriously infected pear trees were inter-planted.<sup>54</sup> According to Dr. Hayward, the inter-planting of the two crops is almost impossible in reality. The experts admitted the fact that bacteria could be found on the surface of apples in heavily infected orchards; nevertheless some doubted that the number of bacteria is too small to transmit actual fire blight.<sup>55</sup> Hence, the Panel concluded that Japan's argument that "mature, symptomless apples are likely to harbor epiphytic populations of bacteria capable of transmitting fire blight" is lack of sufficient scientific evidence.<sup>56</sup>

*E. Infected or Infested Apple as Pathway*

It has been reported by the experts that there is no evidence which can prove mature, symptomless apple fruit is a pathway introducing the fire blight disease. Besides, they mentioned that the possibility of fruit being a pathway was negligible.<sup>57</sup> They further elaborated that if the fire blight were introduced to a nation, it would be coming from travelers smuggling activities.<sup>58</sup> Due to the fact that Japan did not submit "sufficient scientific evidence" that can support the idea of the U.S.' that mature, symptomless apple could be the completed

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<sup>54</sup> *Ibid*, para. 8.132.

<sup>55</sup> *Ibid*, para. 8.134

<sup>56</sup> *Ibid*, para. 8.136.

<sup>57</sup> WT/DS245/R, para. 8.144.

<sup>58</sup> *Ibid*, para. 8.174.

pathway<sup>59</sup>, the Panel made a decision that the mature, symptomless apples do not spread the fire blight disease.<sup>60</sup>

## **(2) Evaluation on China's Import Restriction due to Fire Blight**

Considering all the five elements analyzed, the Panel mentioned that the Japan's SPS measure in concern was obviously inconsistent with the risk revealed based upon the scientific evidence available. Each requirement in the measure, individually or cumulatively, was not supported by "sufficient scientific evidence". Thus, the Panel upheld the U.S.'s argument that Japan violated Article 2.2 of the SPS agreement and then later found out that the Japanese measures in concern are not justified under the Article 5.7 of the SPS Agreement. The Appellate Body upheld the decision made by the Panel.<sup>61</sup>

China blocked the importation of the U.S.' two varieties of apples, Golden Delicious and Red Delicious, on the basis of the argument that mature and symptomless apples had the potential to serve as a pathway for the disease.<sup>62</sup> As analyzed in the above Panel report of DS245, mature and symptomless apple fruit regardless of varieties cannot be infected by fire blight, and endophytic bacteria are not detected in mature apple fruit. On top of that,

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<sup>59</sup> For the matter above, 'The burden of proof' was on Japan.

<sup>60</sup> WT/DS245/R, paras. 8.176.

<sup>61</sup> Ibid, paras. 8.198, 8.199, 8.200, 8.201, 8.202.

<sup>62</sup> G/SPS/R/46, para. 19

mature apple fruit are unlikely to harbor epiphytic bacteria and even infested or infected apples are not able to complete the fire blight transmission pathway. China's argument that mature and symptomless apples have the potential to serve as a pathway could not be justified unless China provided available scientific evidence that mature and symptomless apple fruits originated from the U.S. territory not only can harbor fire blight, but also complete the transmission pathway of the disease. Therefore it appears that China's import restriction on the U.S.' two varieties of apples is inconsistent with Article 2.2 of the SPS Agreement due to the lack of available scientific justification.

## **2) China's Import Restrictions due to HPAI and OIE Standard**

### **(STC 406)**

In March 2016, the EU and the U.S. expressed their concerns over China's import restrictions on HPAI.<sup>63</sup> Although the EU had applied a stamping out policy for the disease in concern, China did not lift its bans. Most importantly, the EU criticized the China's country-wide ban on several EU members and considered China's SPS measure on poultry import to be more restrictive than necessary due to the fact that it did not recognize the concept of pest or disease

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<sup>63</sup> G/SPS/R/82, para. 3.9

free areas.<sup>64</sup> The EU further mentioned that it had given China all of the evidence necessary to demonstrate that it had complied with the OIE Code.<sup>65</sup>

*India – Measures concerning the importation of certain agricultural products* (DS430)’s Panel report was analyzed so as to evaluate China’s import restrictions due to HPAI. DS430 shows a very similar case in that the Dispute Settlement Body (DSB) established a Panel on the request of the U.S. in accordance with Article 6 of the SPS Agreement. The analysis of the Panel report deals with India’s AI measures in terms of Article 6 of the SPS Agreement.

#### **(1) Analysis on the Panel Report (DS430)**

##### **① Article 6 of the SPS Agreement**

The Findings part of the Panel report, *India – Measures concerning the importation of certain agricultural products* (DS430), partly deals with Article 6 of the SPS Agreement. Article 6 is agreed by member states in terms of “adaptation to regional conditions, including pest or disease free areas and areas of low pest or disease prevalence.” Article 6.1 stipulates that members are obligated to ensure their SPS measures are adapted to the SPS characteristics of the area where the product is originated and where it is destined. Article 6.2 is

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<sup>64</sup> G/SPS/R/83, para. 4.1

<sup>65</sup> G/SPS/R/84, para. 3.35

about the members' duty to recognize the concepts of disease or pest free areas. Lastly, Article 6.3 prescribes that exporting members must provide evidence that can prove such areas are likely to remain safe from a disease.

## ② Arguments from the U.S. and India

The U.S. appealed that India's AI measures are inconsistent with Article 6.1 and 6.2.<sup>66</sup> The U.S. filed a complaint against India's country-wide ban measures at any time when notifiable avian influenza (NAI) is detected anywhere in that territory of the country. The U.S. criticized India for being silent since 2007 even though the U.S. had not acted inconsistently with *Terrestrial Code*<sup>67</sup> of the OIE and Article 6 of the SPS Agreement.<sup>68</sup> Moreover, the U.S. stated that Article 6.1 and 6.2 impose independent obligations from Article 6.3 with respect to recognizing any specific pest or pest-free areas. Also the U.S. claimed that the 1898 Livestock Act of India itself does not reflect the concept of pest or disease-free areas.<sup>69</sup>

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<sup>66</sup> WT/DS430/R, para. 7.618

<sup>67</sup> The OIE Terrestrial Code establishes standards for the enhancement of animal health, welfare and veterinary public health worldwide, and also it has been used as a reference material by trade services, veterinary authorities and any other institutions related to international trade. See <http://www.oie.int/international-standard-setting/terrestrial-code/> for more information.

<sup>68</sup> Ibid, 7.619

<sup>69</sup> WT/DS430/R, para. 7.629

India, however, argued that the provision of the *Terrestrial Code* clearly does not regulate whether an importing country must recognize either the zone or compartment.<sup>70</sup> Also, India argued that Article 6.1 and 6.2 do not operate independently in that, as stated in the Article 6.3, the exporting country must prove that the area from which products are originated is likely to be a pest or disease free area. In other words, India argued that the language of the Article 6.3 does support the exporting country to begin the proposal to recognize zoning or compartmentalization.<sup>71</sup>

### ③ Panel's Analysis on the Relationship between the Paragraphs of

#### Article 6

The U.S. stated that a breach happens when the importing country fails to recognize the concepts of pest or disease free areas and areas of low pest or disease prevalence as stated in Article 6.2 of the SPS Agreement.<sup>72</sup> However, India mentioned that the obligation of an importing member under the Article 6.1 and 6.2 comes after the exporting member provides scientific evidence and objectively proves that the area where the product is originated is likely to be an

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<sup>70</sup> *Ibid*, para. 7.632

<sup>71</sup> *Ibid*, para. 7.633

<sup>72</sup> *Ibid*, para. 7.650

area of low pest or disease prevalence as allegedly stated in Article 6.3 to the importing member.<sup>73</sup>

The Panel made observations in view of what they considered as a rational continuum that supports the way a member develops and continues its SPS measures. The Panel assumed that any SPS measures cannot be “adapted” to the SPS characteristics of the area before an importing member has first recognized the concept of such regions. Therefore, the Panel concluded that it is difficult for an importing country to ensure that its SPS measures are adapted to the SPS characteristics of such areas within the connotation of the first sentence of Article 6.1, if the member having not “recognized” the “concepts” of specific types of areas written in Article 6.2 in the first place.

In respect of India’s argument that an importing member’s duty to “adapt” its SPS measure would commence only after the measure has entered into force and an exporting member makes a fully-documented request under Article 6.3, the Panel admitted that Article 6.3 puts the responsibility on exporting members to prove such areas are safe from disease to importing members.<sup>74</sup> However, the Panel mentioned that Article 6.3 is not directly linked to Article 6.1 and 6.2 in that the pure interpretation of the first sentence of Article 6.1 does make

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<sup>73</sup> Ibid, para. 7.651

<sup>74</sup> WT/DS430/R, paras. 7.673-7.674

obvious that it has a free-standing commitment. The Panel further elaborated that there is no conditional language in Article 6.1 that links to compulsion to Article 6.3 or to irrelevant occasion, the request of an exporting member to recognize an area. Lastly, the Panel noted that the language of Article 6.1 is written in the present tense (“are adapted”), which makes the Panel reflect that the adaptation of the measure to the SPS characteristics of the area is a requisite of the SPS measure that the member that implements the measure shall guarantee. Therefore, the Panel overruled India’s claim that adaptation includes an *ex post facto* modification.<sup>75</sup>

## **(2) Evaluation on China’s Import Restriction due to HPAI**

Ever since the imposition of China’s SPS measure, the EU and the U.S. claimed that they had provided the Chinese government with all the required evidence. The EU had applied the stamping-out policy in accordance with the OIE guidelines.<sup>76</sup> According to the *Aquatic Animal Health Code*<sup>77</sup> of the OIE, the SPS Agreement of the WTO officially recognizes the role of the OIE as international standards for animal health and zoonotic diseases.<sup>78</sup> The U.S.’

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<sup>75</sup> Ibid, paras. 7.674-7.675

<sup>76</sup> G/SPS/GEN/204/Rev.17, paras. 2.83-2.84

<sup>77</sup> The Aquatic Animal Health Code of the OIE establishes standards for the enhancement of aquatic animal health and safe international trade of aquatic animals. See <http://www.oie.int/international-standard-setting/aquatic-code/> for more information.

<sup>78</sup> <http://www.oie.int/en/international-standard-setting/aquatic-code/>

poultry export to China was still blocked, although it had well resolved the entire HPAI situation in accordance with OIE guidelines and had been free of HPAI since June 2016.<sup>79</sup> The EU and the U.S.’ adjustments, in line with the OIE guidelines, made to China’s SPS measures seem to have complied with Article 6.3 in that they provided the necessary evidence proving that the two countries managed regionalization. As the Panel’s decision showed in DS430, China not only should have ensured that their SPS measures are “adapted” to the SPS characteristics of the area but also it seemed to have failed to recognize concepts of disease free areas. This is because China could not have adapted to the SPS characteristics without recognizing the concept. It seems clear that China has not complied with the OIE standard of regionalization and Article 6 of the SPS Agreement. As the three countries are members of the OIE, the U.S. stated that membership is a transparent indication of commitment to the scientific principles in its SPS decision framework.<sup>80</sup>

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<sup>79</sup> G/SPS/GEN/204/Rev.17, para. 2.84

<sup>80</sup> Nigh (2013)

## **2. Evaluation on China's TBT Measure**

### **1) China's Restrictions on Importing Infant Formula Milk (ID 493)**

China's TBT measure, *China – Formula Registration Regulation for Infant and Follow-up Formula (ID 493)*, which was notified on January 7, 2016 evoked concerns by the EU, the U.S., Japan, New Zealand and South Korea.<sup>81</sup> The new regulation revealed by the China Food and Drug Administration (CFDA) specifies that applicants must submit formula composition data, are required on-site inspection and each company can register only 3 series of products and 9 product formulas.<sup>82</sup> Among the three regulations, the U.S., the EU, Japan and Korea raised STCs against the limitation on the products allowed to be registered. Regarding the 3 series, 9 formulations policy, it is mandatory for manufacturers to apply significantly different recipes for the same stage<sup>83</sup> by each company.<sup>84</sup>

### **2) Arguments from the Members**

Firstly, the South Korean government stated that international standard-setting bodies such as the Codex Alimentarius Commission (CAC)<sup>85</sup>

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<sup>81</sup> G/TBT/M/68, para. 2.4

<sup>82</sup> Ibid.

<sup>83</sup> Every series must include infant formula (1st stage, 0-6months), (2nd stage, 6-12months), (3rd stage, 12-36months)

<sup>84</sup> Erex (2016)

<sup>85</sup> The Codex Alimentarius Commission is a collection of standards, guidelines and codes of

also provide requirements for ingredients but did not limit the number of brands and formulas. Also, they viewed the measure as a restriction of Chinese customers' rights and freedom for choosing products they want.<sup>86</sup> Second, the EU shared the concern with South Korea especially on the limitation on the number of recipes within product lines, which would negatively impact the market share of infant formula in China. They added that they did not find any scientific justification to the limitation.<sup>87</sup> Moreover, Japan associated with both South Korea and the EU's concern by arguing that the measure seemed unnecessarily more trade restrictive because of decreasing producers' sales opportunities.<sup>88</sup> Furthermore, the U.S. expressed concerns about the late-reply from China regarding the limitations on the production of different brands.<sup>89</sup>

China, however, made the counter argument that they had carried out research for infant formula milk powder, and they claimed that theoretically, the purpose of infant formula milk powder should simply be to provide extra nutrition for breastfeeding. Considering the research, China asserted that the

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practice adopted by the CAC and it was founded by both FAO and WHO not only protect health of consumers but also enhances fair food practices. See <http://www.fao.org/fao-who-codexalimentarius/en/> for more information

<sup>86</sup> G/TBT/M/68, para. 2.4

<sup>87</sup> *Ibid*, para. 2.6

<sup>88</sup> *Ibid*, para. 2.6

<sup>89</sup> G/TBT/M/69, para. 3.335

composition of infant formula milk powder requires a similar composition of breast milk, so too many formulas should not be allowed in the market.<sup>90</sup>

### **3) Restrictions on Infant Formula and its Scientific Justification**

According to the CAC, the objective of the “Code of Hygienic Practice for Powdered Formulae for Infant and Young Children” is to suggest useful guidance and recommendations with regards to the hygienic and appropriate manufacture of powdered formula for governments and the industry.<sup>91</sup> Among a number of guidelines in respect of the primary production<sup>92</sup>, there is no statement limiting the number of brands and formulas. Although CAC’s recommendations are under voluntary compliance for the members, it is recognized as a relevant international organization under the SPS Agreement for harmonization among the members. China, as a member of the CAC since 1984, for the sake of minimizing trade disruptions, must use the CAC standards,

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<sup>90</sup> Ibid, para. 3.336

<sup>91</sup> CAC/RCP 66 – 2008, p.3

<sup>92</sup> The primary production section of the “Code of Hygienic Practice for Powdered Formulae for Infant and Young Children” is based on “General Principles of Food Hygiene CAC/RCP 1-1969”. Refer to [http://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FStandards%252FCAC%2BRCP%2B1-1969%252FCXP\\_001e.pdf](http://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FStandards%252FCAC%2BRCP%2B1-1969%252FCXP_001e.pdf), for more information.

guidelines and recommendations as a basis for their technical regulations as stated in Article 2.4<sup>93</sup> of the TBT Agreement.

Moreover, the U.S. stated that China has not shown the basis for the measure at issue. Also, the U.S. has been skeptical whether the CFDA had determined any health or food safety risk which could be alleviated by limiting the number of infant formula registration.<sup>94</sup> Even if the CFDA came up with the idea that limiting the number of infant formula registration mitigates health and food safety risk, it is necessary for China to substantiate on what basis and evidence the determination had been made. China made a decision on the 30<sup>th</sup> of September 2016 to give a 15-month transition period of distributing the products either manufactured in China or imported to China in the Chinese market before 1<sup>st</sup> of January 2018 until the production expiration dates.<sup>95</sup> Unless China proves that the determination is scientifically justifiable, the TBT

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<sup>93</sup> Article 2.4 of the TBT Agreement is states as: Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

<sup>94</sup> G/TBT/M/70, para. 2.252

<sup>95</sup> Ibid, para. 2.253

measure would be regarded as more trade-restrictive than necessary. It would constitute non-compliance with Article 2.2<sup>96</sup> of the TBT Agreement.

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<sup>96</sup> Article 2.2 of the TBT Agreement is states as: Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

## **V. Policy Recommendation**

China's aggressive SPS and TBT measures on food import have resulted in huge trade disruptions. This chapter suggests policy recommendations for the members. The first is applying the WTO dispute settlement body to resolve serious food trade disruptions. The second suggests the addition of supplementary chapters to the WTO TBT Agreement for certain products.

### **1. Application of the WTO Dispute Settlement Body**

Since the establishment of the WTO in 1995, member countries have been resolving unnecessary trade restrictions through the WTO dispute settlement body. Considering the consistency of the China's SPS and TBT measures on food importation based upon the SPS and TBT provisions, members have a high chance of winning the cases. However, it would be unrealistic particularly for such small countries as South Korea to file a complaint against China upon the WTO, which could result in negative impact on diplomatic and economic relations between the members.

One of the most effective ways for small countries would be filing a complaint with members, such as the EU, the U.S. and Japan, actively raising STCs against the Chinese government. Collective Action seems to have been

worked effectively especially for cases where China was the respondent.<sup>97</sup> For example, in the case ‘*China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*’, the U.S., the EU and Canada successfully reached a mutual agreement through collective action. Moreover, the three countries prohibited certain provisions of ‘*China’s Automobile Industry Development Policy*’, which had negatively impacted them.<sup>98</sup>

China has been cooperative with the decision made by the Panel and Appellate body.<sup>99</sup> Thus, it is expected that some of the critical food import restrictions by the Chinese government would be resolved provided that decisions are made under the WTO dispute settlement body. Collective action

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<sup>97</sup> 1) China - Measures Affecting Imports of Automobile Parts, DS339/EC, DS340/US, DS342/Canada.

2) China - Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments, DS358/US, DS359/Mexico.

3) China - Measures Affecting Financial Information Services and Foreign Financial Information Suppliers, DS372/EC, DS373/US, DS378/Canada.

4) China - Grants, Loans and Other Incentives, DS387/US, DS388/Mexico, DS390/Guatemala.

5) China - Measures Related to the Exportation of Various Raw Materials, DS394/US, DS395/EC, DS398/Mexico.

6) China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, DS431/US, DS432/EU, DS433/Japan.

7) China - Measures Imposing Anti-Dumping Duties on High-Performance Stainless-Steel Seamless Tubes (“HP-SSST”) from Japan, DS454/Japan, DS460/EU.

<sup>98</sup> ‘China – Measures Affecting Imports of Automobile Parts’

<sup>99</sup> Qi (2012) p.164

would alleviate a variety of food import restrictions, which will gradually dismantle the invisible trade wall between the members and China. On top of that, it will definitely create a 'Buffer Zone' for relatively small countries from China's political and economic pressure.

However, there is a limitation for small countries to initiate collective litigation under the WTO DSB. The commonality of the previous collective complaint filed against the Chinese government is that developed countries such as the U.S., the EU and Japan that have enough political and economic power took the initiative. In other words, small countries do not have the leverage to take the lead in filing a litigation under the WTO DSB. It is because collective action requires active communication and cooperation among the complainants. Thus, small countries would have no option but to go through difficulties in actively taking the lead of a litigation against the Chinese government.<sup>100</sup>

## **2. Addition of a Specific Chapter in the Agreements**

Both the SPS and TBT Agreements' objectives are trade facilitation through recognizing parties' risk analysis or risk assessment. However, they do not specifically say how to they are to be achieved. Sometimes, the absence of a

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<sup>100</sup> Hong and Lee (2016) p.150-152

clear mechanism to facilitate the acceptance of provisions of SPS and TBT Agreement has tied both hands of some party members. Moreover, The China-Korea FTA TBT Agreements is still claimed to be in the primitive stage in terms of mediation process.<sup>101</sup> Thus, it seems that China is reluctant to specify administrative procedures which could help members to resolve matters even in bilateral agreements. As a long term solution, some specific provisions of the Trans-Pacific Partnership (TPP) Agreement, a mega trade bloc among a dozen Pacific Rim countries, could be one of the solutions.

The SPS Measures in the TPP contains Article 7.17, “Cooperative Technical Consultations” provisions, which is absent in the WTO SPS Agreement.<sup>102</sup> This article states relatively clear mechanisms in that establishing Cooperative Technical Consultations (CTC) when an administrative procedure or bilateral mechanisms would not resolve a matter. This article not only states a way to deliver requests but also sets a specific time limit for the acknowledgement of the requests, meeting date and the aim of resolving the concern. Inclusion of this advanced mechanism would help members regardless of economic and diplomatic power to resolve any trade matters that adversely affect them. It

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<sup>101</sup> Choi (2016) p.392

<sup>102</sup> The SPS Agreement in the WTO states that the Panel may establish an technical expert group at the request of either party but it neither further specify time limits for consultations nor confidentiality of the communications between the consulting parties.

would be a long process to add any provisions into the chapter. However, members should keep raising issues on unjustifiable trade disruptions and work on adding the above provisions by including a specific chapter in the WTO SPS Agreement.

The TPP obligates members to strengthen their exchange in the TBT area and to present other provisions so as to attempt to develop on the WTO TBT Agreement. One of the important contributions of the TPP is the inclusion of annexes on such certain products, such as cosmetics, medical devices, distilled spirits, wine, proprietary formulas for prepackaged foods and food additives covering specific terms on the preparation, adoption and application technical regulations, standards and conformity assessment procedures.<sup>103</sup> Specifically, annex 8-F applies to formulas for prepackaged foods and food additives, and it requires national treatment, the limitation of information requirements in terms of legitimate objectives, CODEX standards as a basis for definition of “food”, “food additive” and “requirement of ingredients to be listed on labels”. Just as the TPP TBT Agreement contains annexes on several products, it appears imperative that the WTO TBT Agreements include certain products that have been considered to be very controversial in the annexes.

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<sup>103</sup> Dadush and Leycegui (2016)

Although the TPP did not come into effect after the Trump administration came into office, SPS and TBT texts in TPP appear more advanced than those of the WTO in terms of trade liberalization and legal enforcement. It would be a long process to update or revise the agreements. However, without specific mechanisms, it would be extremely difficult to bring trade a disrupting party to the table and resolve matters.

## **VI. Conclusion**

This study thoroughly categorized the reasons for STCs raised by members and evaluated whether China's SPS and TBT measures have been consistent with the international trade regime. Regarding the scientific justification issue, the Chinese government showed the tendency of not providing available scientific evidence. As the Panel report of DS245 already concluded, mature and symptomless apple fruits originated from the territory of the U.S. regardless of varieties are neither susceptible to fire blight nor do they play a pathway for transmission of the disease. Thus, China's SPS measures regarding the two new varieties of apple fruits seem to constitute a lack of available scientific evidence. Secondly, with regards to the issue of regionalization, the Chinese government showed an uncooperative attitude towards international standards in that they did not take stamping-out efforts of members into account. Just as India's faulty SPS measures that lacked consideration of regionalization efforts by exporting members as concluded in the Panel report of DS430, it seems that China's import ban on the U.S. poultry products, which were allegedly due to HPAI, were not adapted to the SPS conditions of the region. Lastly, China's import restriction on infant formulas by limiting the number of brands and products to be registered is expected to cause huge trade disruptions. It does appear that

China, a member of CAC, has not only has been uncooperative with CAC, but also has not provided available scientific evidence to justify the measure in concern.

It is highly expected that the Chinese government will keep taking SPS and TBT measures to protect its domestic industry in the pretext of food safety, animal health and plant health without providing sufficient scientific evidence and without adaptation to regional conditions. Members' efforts to alleviate any further trade disruptions are necessary to minimize the damage that can be caused by SPS and TBT measures of China. First, collective action, filing a complaint to the DSB, would be one of the solutions as it worked out quite well before. Second, in the long run, the TPP mechanisms seem necessary to achieve the objectives of both the SPS and TBT Agreements. All in all, whether China would cooperate or not, it will be up to members' efforts by actively coping with the China's SPS and TBT measures on food importation.

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## ABSTRACT IN KOREAN

국문초록

중국의 SPS 및 TBT 조치와 국제무역규범과의 합치성: 식품 수입규제를 중심으로

중국은 2001년 세계무역기구(WTO) 가입 이래 SPS 및 TBT 조치를 적극적으로 사용해왔다. 특히, 식품 관련 SPS 조치의 경우 29개의 특정 무역현안(STC)이 제기되었다. 중국은 식품에 관련 SPS 조치를 식품안전, 동물건강, 식물건강 및 기타를 그 사유로 들었으며, 각각 14건, 11건, 3건, 1건의 STC를 기록하였다. 특히, WTO 회원국들은 중국 정부에게 과학적 정당성(Scientific Justification)과 지역화(Regionalization)에 입각하여 SPS 조치를 취할 것을 요구하고 있다. 이 논문은 중국의 식품 수입규제를 기존 패널리포트 및 관련국제기구의 기준에 의거하여 WTO SPS와 TBT협정서와의 합치성을 판단 후, 식품 수입규제 해결에 대한 중국의 소극적인 태도를 살펴보고자 한다. 그리고, 해당 문제를 완화시킬 두 가지 방법을 제시하고자 한다. 첫째, 기존의 사례들에서 효과적이었다고 판단된 중국으로 상대로 한 집단 소송을 통한 해결,

둘째, 환태평양 전략적 경제동반자협약(TPP) 협정서에서 볼 수 있듯이 구체적인 챕터를 추가함으로써 보다 자세한 매커니즘의 도입을 통한 해결책을 제시한다.

주제어: 식품수입, SPS 조치, TBT 조치, WTO, 분쟁해결제도, 특정무역  
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