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國際學碩士學位論文

**Effectiveness of
International Food Safety Governance:
Focusing on the SPS Agreement
and SPS-Plus Arrangements**

국제 식품 안전 거버넌스의 효과성 분석:
“SPS협정”과 SPS플러스 장치를 중심으로

2015年 2月

서울대학교 國際大學院
國際學科 國際通商專攻
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**Effectiveness of
International Food Safety
Governance:
Focusing on the SPS Agreement
and SPS-Plus Arrangements**

A thesis presented

by

Haejin Lee

to

Graduate Program in International Commerce
For the degree of Master of International Studies

**Graduate School of International Studies
Seoul National University
Seoul, Korea**

February, 2015

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이 論文을 國際學碩士 學位論文으로 提出함

2015年 2月

서울대학교 國際大學院

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李惠珍의 國際學 碩士學位論文을 認准함

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ABSTRACT

**Effectiveness of
International Food Safety Governance:
Focusing on the SPS Agreement
and SPS-Plus Arrangements**

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The regulation of food safety is more deeply related to international trade than ever before. However, the nature of food safety law invites various actors with different goals and perspectives creating significant complexity. Given the fact that markets are integrated on a global scale, the complexity of health and food safety regulations often conflicts with the current market-liberalizing trends. Moreover, the fragmentation of the food safety regime creates conflicts among various levels of organizations, scientific expert groups, and governments participating in the area of international food safety lawmaking or management.

Within the framework of international food safety regulations, it can be said that there generally exist two distinct levels of actors, at the multilateral and regional levels. According to a famous theory on global governance, the management of an international issue under the multilateral scheme works to increase compliance and

result effectiveness, as it provides a useful forum for inclusive discussions, representing the “international community.” However, seen from the current multilateral arrangement of food safety management, this theory may not fit well for food safety issues, as uncertainties remain concerning interpretations and controversies about the governments’ regulatory autonomy.

The paper begins by presenting an introduction to the current international food safety regime, followed by a comprehensive description of the international regime from different perspectives. The second part of this paper provides the overviews and weaknesses of the multilateral food safety regimes with a focus on the SPS Agreement, established by the World Trade Organization. More specifically, the structural limits of this agreement are discussed based on specific provisions including considerations of risk assessment and harmonization. In the fourth part of the presented research, the focus is turned toward regional arrangements in addressing food safety issues. Emphasis is placed on the recent SPS-Plus arrangements set out in the free trade agreements, thus partly proving the flexibility and effectiveness of such an approach. The remaining section of this paper suggests an optimal design for future international food safety governance, providing meaningful suggestions to supplement the shortcomings of the SPS Agreement and to establish effective food safety governance.

Keywords: Food Safety, SPS Agreement, Multilateralism, Regionalism, SPS-Plus, Risk Assessment

Student Number: 2013-22042

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LIST OF ABBREVIATIONS

AB	Appellate Body
AWSIQ	General Administration of Quality Supervision, Inspection and Quarantine
CODEX	Codex Alimentarius Commission
EU	European Union
FTA	Free Trade Agreement
FVO	Federal Veterinary Office
GATT	General Agreement on Tariffs and Trade
GMO	Genetically Modified Organisms
IPPC	International Plant Protection Convention
ISO	International Organization for Standardization
NGO	Non-Governmental Organization
OIE	World Organization for Animal Health
RTA	Regional Trade Agreement

SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TWG	Technical Working Group
UNCTAD	United Nations Conference on Trade and Development
WHO	World Health Organization
WTO	World Trade Organization

COUNTRIES / REGION

AUS	Australia
CA	Central America
CHI	Chile
CHN	China
COL	Colombia
EU	European Union
KOR	South Korea
MEX	Mexico
NZL	New Zealand
SUI	Switzerland
UKR	Ukraine
US	United States

I. INTRODUCTION

The 2011 nuclear disaster in Fukushima has raised a number of concerns over the last few years on environmental issues as well as worries about uncertain futures on human, animal, and plant life and health. The incident was politically challenging and attention-grabbing on a large scale, because the impact of the hazard was not only limited to domestic concerns. Regarding the food safety issue, in particular, the fishery near the Fukushima region has recently been a popular topic at the international tables for risk debates. With Japan being an active exporter of fishery products, the release of radioactivity has indeed become a concern for domestic and foreign fish-lovers, with unknown long-term health risks associated with consuming these products. This single example implies that the food safety-related issue not only worries domestic consumers, but also causes serious concerns in importers and consumers of the neighboring countries. Likewise, the impacts of avian flu and bovine spongiform encephalopathy, commonly known as mad cow disease, have also caught the world's attention in a significant way, among other subjects addressed within the framework of international trade. These food safety issues are directly related to human life and health, which doubtlessly are of the greatest concern to consumers.

Noting that the Fukushima accident itself has been covered by more than a thousand newspapers worldwide, it is difficult to pick up a newspaper anywhere in the world that does not carry a report of food safety issues.¹ The current food safety

¹ Joanne Scott (2007). The WTO Agreement on Sanitary and Phytosanitary Measures.

issues very often address the government's regulations on a certain food and health issue, as well as those of other governments in the global marketplace. With the conflicting interests of producers and consumers, and states' different cultural and social backgrounds, it is almost impossible to achieve an agreeable solution to general and specific food safety concerns under the current international food safety governance.

Moreover, although people have long witnessed the importance of regulating harmful substances from being imported from a hazardous environment, regulating suspicious imports has never been a simple task, as it entails substantial limitations. With the introduction of the World Trade Organization (hereinafter "WTO") to the world trade order, trade liberalization in the global economy has been extraordinarily successful. Other than mere eliminations of tariffs, it has been necessary for the organization to prohibit member nations from substituting them with other protectionist devices.² Therefore, the individual state's restrictions on imports are required to meet the necessary conditions suggested, which, for food imports, are generally 'scientific evidence requirements.' This has created hurdles for regulators in managing internal food safety and risks, imposing significant challenges on international food safety management efforts.

The management of international food safety poses a number of questions including: "Which entity should be accountable for the food safety standards in the

² Alan O. Sykes, Domestic Regulation, Sovereignty and Scientific Evidence Requirements, in Bermann and Mavroidis (eds.) *Trade and Human Health and Safety*, Cambridge University Press(2006), Ch. 9: 257.

global sphere?”, “How should the ‘scientific-evidence’ or ‘risk-assessment’ requirements be defined and interpreted?”, and “Is it right to grant legitimacy to a specific international organization to have predominant status over national regulatory sovereignty?” Accordingly, a number of doubts and criticisms have been cast on the current international food safety governing mechanism.

1. INTERNATIONAL FOOD SAFETY REGIME

Food exports accounted for approximately 9.2% of total merchandise exports worldwide in 2013, which was increased from its value of 8.9% in 2012. The figures constitute a substantial portion of global trade flows, and the importance of food trade is continuously being emphasized.³ Thus, having safe and reliable food safety management is an essential part of stabilizing the food trade and protecting human health. Nevertheless, due to the nature of complicated food safety policy, which has to encompass a wide variety of issues such as disease prevention, food hygiene, the use of additives and flavorings, residues of pesticides, food contaminations, and labeling, designing a comprehensive and effective food safety regime has been a challenging task at the international level.

Divergent national and regional food safety regulations often impede trade in food products. Under the framework of the WTO, these type of issues are mainly addressed based on the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, “SPS Agreement”). For the last 20 years, there have been 42

³ Data from ‘International Trade Statistics (2013)’, WTO

SPS-cited cases requested for consultations under the Dispute Settlement Body of the WTO.⁴ The first SPS case, addressed in 1995, involved South Korea's measures on testing and inspecting agricultural products. Some rigorously disputed cases have included Australia's measures on salmon, EC's import restriction on hormone-treated beef, Japan's measures on apples, Korea's measures on bovine meat, and EC's measures on biotechnology products. As these disputes entail complex social, legal, and cultural elements, there have been many case studies elaborating these specific SPS-related disputes. The fact that the reasoning and Panel or Appellate Body findings of these cases have frequently been a topic for debates and research shows that SPS-related disputes handled under the WTO's legal system have drawn a number of discontents from WTO member states, creating internal discord. Also, some scholars and researchers have demonstrated that handling international food safety issues under the WTO's legal system entails some systematic problems.⁵

The aim of the international regime for food safety is to harmonize substantive food standards in order to facilitate global trade in food products and simultaneously ensure levels of food safety acceptable for all trading regions and countries.⁶ Under the current institutional settings for balancing non-discriminatory free trade and regulating harmful substances for national food safety and health, individual states

⁴ Refer to WTO homepage, 'List of disputes citing the SPS Agreement'

⁵ See Wagner (2000), Aginam (2008), Naiki (2009), Lin (2011)

Miller (1995) revealed the difficulties in dealing environmental protection matters, especially the use of pesticide, under the GATT system

⁶ Vessela Hristova (2014). Food safety: The resilient resistance of the EU. in *G.Falkner, P. Muller (eds.) EC Policies in a Global Perspective: Shaping or Taking International Regimes?*, New York: Routledge: 58-59.

have challenged and are currently challenging in order to obtain specific interests. However, under the current institutional framework, which is basically the SPS Agreement, the process of reconciling the dual objectives of free trade and food safety was often contested.

Moreover, the roles of the WTO in handling contemporary food-related issues were somewhat limited, as there have been efforts in multiple dimensions at the global, regional, and individual state levels. First of all, the WTO is not the only international organization responsible for international food safety. There are other international organizations such as the World Health Organization (WHO), the Codex Alimentarius Commission (Codex), and some other bodies participating in the management of global food safety. The current mechanisms of such organizations' coexistence to assume roles in solving complex food safety problems have left considerable regulatory gaps in the area,⁷ which will be discussed further in the later part of this paper.

Along with the efforts of international organizations in the context of multilateral solutions, there have also been some regional efforts to address food safety in the form of bilateral or regional treaties. For example, when countries negotiate on free trade agreements (FTAs), they include an SPS-related Chapter in many cases. Also, owing to practical needs, some countries have concluded independent arrangements in the form of food safety pacts. These bilateral settings

⁷ Y. Motarjemi et al. (2001). Future challenges in global harmonization of food-safety legislation," *Food Control* 12: 339-340.

are very often incident-driven and problem-specific.⁸ By the nature of multilateral agreements, negotiating and concluding a comprehensive treaty based on the single-undertaking rule, achieving a meaningful depth of cooperation and reasonable effectiveness of outcomes can be extremely time-consuming and politically challenging.⁹ The member countries, being aware of these limits, have turned to bilateral or regional cooperation on food safety and trade in order to partially appease domestic political pressures.

Noting that multiple main actors and approaches exist in addressing a single international problem, the current system of global food safety management invites a number of questions and criticisms. The popular debates include the legitimacy debates in food safety governance and those between universalists (advocates of multilateralism) and unilateralists (advocates of bilateralism). With respect to legitimacy debates, whether domestic regulatory sovereignty can be challenged at the international level is the core issue. This paper aims to elaborate on problems of the current food-safety governance, especially its vagueness and complexity. It can be said that there is no crystal clear definition of the international food safety regime as of now. Based upon the comprehensive and objective assessment of the current status, an adequate effective mechanism to manage future international food safety issues remains to be established.

⁸ Ching-Fu Lin (2012), SPS-plus and bilateral treaty network: A “Global” solution to the global food-safety problem?, *Wisconsin Int'l Law Journal*, 704-705.

⁹ “This “fast-food approach” to treaty-making seems to be a pragmatic reaction that enables governments, especially after a salient food scare, to demonstrate to the public their commitment to tackling threats to imported food.... We can observe several important trends in the development of recent food-safety regulations related to bilateral agreements” Id. 714.

2. PURPOSE AND SCOPE OF STUDY

This study focuses on analyzing the strengths and weaknesses of both multilateral and regional food safety arrangements, as well as discovering the systemic problems of the current food safety governance. Previous studies have proven the need for comprehensive research on global food safety governance. Gillman (2011) has pointed out that in addressing SPS-related disputes, panels and the Appellate have to confront functional difficulties that arise in each case, which often involve cultural norms and ethical standards. Guzman (2004) looked closely into the GMO cases addressed under the WTO dispute settlement system and concluded that the WTO's engagement in health and safety measures brought conflicts with domestic decisions in areas that have traditionally been within the exclusive domain of sovereign governments, and raised sensitive issues of sovereignty and the treatment of non-trade concerns at the WTO.

While much research has been conducted on the issues related with SPS Agreements, the WTO's role in international food safety governance, and on separate SPS-dispute case studies, there has not yet been a comprehensive study conducted on the effectiveness of various approaches in dealing with international food safety issues. Rather than assessing various approaches, many scholars have focused on universalists' approach, a multilateral method of problem solving under the WTO's SPS regime. Relatively little attention has been given to bilateral approaches until recently, when Lin (2011) analyzed the problems of unilateral

approaches in managing global food safety crisis and tried to identify key elements that will improve the international governance strategy for food safety. However, a thorough study is still needed on strengths and weaknesses of multilateral and bilateral or regional arrangements. Accordingly, this paper aims to deeply navigate regional efforts to overcome the weaknesses of the SPS Agreement. Whether the trends of regional approaches should remain independent as an alternative to the multilateral approach or serve as a stepping stone for better multilateral harmonization will need to be discussed based on the comprehensive analysis of both approaches. In this light, the study ultimately aims at proposing the optimal institutional design for an international food safe governing mechanism.

The coverage of this paper includes the fundamental tensions and debates between “multilateralism” and “bilateralism”, with a focus on the management of food safety. The introduction of two approaches will clearly display distinct preferences for the form of international regulation that countries perceive as the best.¹⁰ The debates of the universalists and unilateralists regarding global governance, elaborated by Blum (2008), is partially useful to apply in the discussion of food safety governance. It is unlikely that there is a single theory that best fits into the optimal management of food safety. However, by offering a comprehensive and systematic analysis comparing the pros and cons of multilateral versus bilateral legal instruments, a more favorable mechanism may be identified.

Chapter II introduces the SPS Agreement on the stage. The definition, roles,

¹⁰ Gabriella Blum (2008), *Bilateralism, Multilateralism, and the Architecture of International Law.* *Harvard International Law Journal*: 323

and structures of the SPS Agreement, as well as the functions of the SPS Committee, are provided. Chapter III addresses the comprehensive assessment of the multilateral approach emphasizing the clash of international food safety law with multiple international organizations playing crucial roles on the scene. Because the WTO is an organization not specializing in food safety or human, animal, and plant health, but one aiming to liberalize trade in a non-disputable way, having other organizations to cooperate with it and help to build up a food safety regime might be essential. However, granting some quasi-legislative powers or even unclear authorities to certain organizations may lead to disparities of interpretation. These kinds of authority issues involving entities like the Codex are to be elaborated with the wordings of relevant articles of the SPS Agreement. Also, the accountability of the SPS Committee and issues involving infringement on domestic regulatory sovereignty are discussed. Chapter IV, in contrast, touches upon the regional and bilateral arrangements of SPS measures. Confronted with difficulties in reaching solutions based on the state's interests at the multilateral level, many countries have chosen to turn to regional or bilateral approaches in solving food safety issues. To understand these trends, some of the SPS Chapters within RTAs are addressed.

Based on the above comprehensive analysis of both multilateral and regional approaches in regulating food safety, Chapter V provides suggestions for the current system to work toward a promising accountability mechanism and effective food safety governance structure.

3. RESEARCH METHODS

A number of methods of research have been used for this study, including literature review, case analysis, and interpretations of the texts of both multilateral agreement and bilateral treaties. In order to adapt the international food safety governance to international relations theory, relevant international relations studies have been introduced. The SPS Agreement and regional trade agreements with the incorporation of the SPS Chapter in the agreement text are the objects of assessment. With the multi-dimensional study, I seek to assess how the elaborations of food safety treaties prove their effectiveness and ensure compliance. In summary, the effectiveness of food safety regimes is assessed with a combined theoretical and empirical examination.

II. OVERVIEW OF THE SPS AGREEMENT

1. PURPOSE AND STRUCTURE

The SPS Agreement forms part of the Agreement establishing the World Trade Organization, the umbrella agreement regulating the relations of international trade among the 160 Member States.¹¹ The SPS Agreement was negotiated during the Uruguay Round to provide a basis for an innovative system for managing regulations related with trade and food safety, as well as animal and plant health.¹² The Agreement, effective as of 1995, was designed to encourage the legitimate use of SPS measures rather than protectionist use. While pursuing the goal of trade liberalization, GATT recognized some limits to its general requirements during the negotiations, thus implemented exception clauses. One of the exceptions involved actions required to protect health, under which parties to the agreement may adopt domestic measures “necessary to protect human, animal, or plant health and life” as long as they are “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between member countries where the same conditions prevail, or a disguised restriction on international trade.”¹³ The SPS Agreement is in some way a reiteration of the commitment to GATT’s health and food safety exceptions, born as an elaboration of Article XX and developed into a formal agreement under the WTO system. The SPS Agreement seeks to provide

¹¹ Although the SPS Agreement includes only the 160 WTO member states as parties, it is regarded as ‘multilateral mechanism’ because the size of membership has increased prominently from 128 to 160 states since its establishment. Also, accession to the system is relatively easier than to other international regime-establishing organization. (although the accession has been challenging for huge economies like China and Russia).

¹² Refer to Scott (2007): 2.

¹³ GATT, Article XX.

greater certainty about when national sanitary and phytosanitary laws comply with GATT and to reduce the negative impact on trade by promoting harmonization among the member states.

More specifically, the SPS Agreement was concluded as a concordance among member states “to ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health”¹⁴ and that measures are “based on scientific principles” and supported by “sufficient scientific evidence.”¹⁵ It includes the MFN clause stating that SPS measures by a member state may not “arbitrarily or unjustifiably discriminate between members” where “identical or similar conditions prevail.”¹⁶ The agreement also illustrates that SPS measures may not be made more trade-restrictive than needed to achieve the member state’s acceptable level of risk.¹⁷ The preface of the legal text of the SPS Agreement includes that this multilateral framework of rules and disciplines is established as a guide to develop, adopt, and enforce sanitary and phytosanitary measures in order to minimize negative effects on trade.¹⁸

The legal text of the SPS Agreement consists of 14 Articles followed by Annexes A, B, and C.¹⁹

¹⁴ Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement), 1995, Art 3(1).

¹⁵ Id, Art 2(2).

¹⁶ Id, Art 2(3).

¹⁷ Id, Art 2(6).

¹⁸ Id, Preface.

¹⁹ Art. 1 on General Provisions, Art.2 on Basic Rights and Obligations, Art.3 on Harmonization, Art.4 on Equivalence, Art.5 on Assessment of Risk and Determination of the Appropriate Level of SPS Protection, Art.6 on Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas, and Areas of Low Pest or Disease Prevalence, Art.7 on

2. WTO/SPS COMMITTEE

The SPS Agreement established a Committee on Sanitary and Phytosanitary Measures (the “SPS Committee”) to ensure the implementation of the SPS Agreement as well as to provide a forum for the member states to discuss food safety, and animal and plant health, measures that affect trade.²⁰ The main players in the SPS Committee are all member countries. The representatives of some intergovernmental organizations including Codex, OIE, IPPC, and WHO are allowed to participate in the meetings of the SPS Committee as observers. The formal meetings are usually held three times a year, but including informal and special meetings or workshops, they meet more often to address particular timely issues.²¹ The members present different agendas for each meeting which generally include information on relevant activities, specific trade concerns, operation of transparency provisions, implementation of special and differential treatments, review of the operation and implementation of the SPS Agreement, and monitoring of the use of international standards.²²

Regarding the committee’s monitoring function, certain aspects should be

Transparency, Art.8 on Control, Inspection, and Approval Procedures, Art.9 on Technical Assistance, Art.10 on Special and Differential Treatment, Art.11 on Consultations and Dispute Settlement, Art.12 on Administration, Art.13 on Implementation, and Art.14 on Final Provisions. Annex A contains definitions for certain terms, including the elaboration on features of the SPS measure.

²⁰ Id, Art 12(1), (2).

²¹ *WTO Agreements Series, Sanitary and Phytosanitary Measures (revised in 2010)*, World Trade Organization: 23.

²² Refer, for example, to “*Agenda on October 2014 SPS Committee Meeting (61st Meeting)*”, available at WTO homepage.

discussed. The distinguishing feature of the SPS Committee compared with the dispute settlement mechanism of the WTO is that there are various bodies of that are granted observers' status, which include Codex, OIE, IPPC, WHO, UNCTAD, and ISO as well as regional governmental bodies working on SPS issues. Conflicts in interests and roles exist among different organizations, especially when a monitoring process is conducted. Discussion regarding the SPS Committee's monitoring process is elaborated in the second part of Chapter III.

3. THEORETICAL DEBATES

Despite the shared understanding that the SPS Agreement provides a comprehensive framework for balancing free trade and food safety, there exist different voices regarding how much weight to be put on the SPS Agreement itself. Some international relations theories can be introduced as useful tools for the discussion of the necessity and effectiveness of the SPS Agreement.

Some scholars argue that the role of international organizations during the establishment of a specific regime is critical for successful regime formation. They provide that multilateral efforts guided by an international organization have proven effectiveness in international cooperation and have induced a shift away from interest-based and limited alliances since the second half of the nineteenth century.²³ Such uniform regulation on the behaviors of the state was thought to be the ideal setting in achieving democracy and liberalism. Specifically, universalists maintain

²³ Blum (2008).

that multilateralism, which is argued to be best equipped to solve global problems effectively, promotes an international rule of law and serves to promote the construction of an international constitution.

Breitmeier observed that the functions displayed by international organizations during regime formation can be described as information functions, offering a forum for the articulation of interests and the aggregation of interest groups, and contributing to the development of normative statements and rules in the specific issue area. In establishing a global food safety regime, the WTO seems to take a substantial role in most of these aspects provided by Breitmeier. The SPS Agreement fulfills its informative functions by providing the objectives, terms, and basic rules for food safety, as well as animal and plant health requirements. In addition, continuous notification by members on newly-implemented SPS measures contributes to the active sharing of information. Within the SPS Committee, the members' opinions and interests are articulated and aggregated in its regular forums. Specific provisions set out in the SPS Agreement, including transparency, risk assessment, and harmonization principles, build up essential norms and rules in the international food safety realm. In addition, the resolution of SPS-related debates under the dispute settlement mechanism of the WTO represents the enforcement mechanism. In this sense, the multilateral approach is used in similar contexts with the universalism of international law.

Not only universalists but also neo-liberalists have optimistic views on the multilateral approach in managing international food safety issue, thus also

emphasizing the role of the SPS Agreement. The basic support for international cooperation originates from the Kantian tradition, and the modern regime theory grows out of an analysis of cooperation in international affairs.²⁴ Keohane argues that states are rational actors that are concerned with the management of the international economy thus would establish international regimes that bring them to a point of Pareto optimality. This argument is based on the premise that international cooperation is largely concerned with absolute gains.²⁵

In opposition to the insistences of the universalists and neo-liberal institutionalists, some concerns and doubts have been raised about the multilateral mechanism of global governance, which partly originates from the Hobbesian tradition of realism. As realism places much emphasis on power struggle, anarchy, and competitions among the states rather than the states' willingness to cooperate, the ideal of a multilateral objective is difficult to achieve in the real world.²⁶

When there are irrecoverable shortcomings of the current multilateral framework of the food safety regime and irreconcilable interests of the member states, the effectiveness of the current regime will be compromised. In particular, in the areas in which the development of the international food safety regime is perceived to be limited under the multilateral setting or the structural shortcomings

²⁴ Winham (2003), International regime conflict in trade and environment: The Biosafety Protocol and the WTO", *World Trade Review* 2: 152.

²⁵ Robert Keohane(1984), *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton University Press.

²⁶ Gregory Shaffer (2005), Power, Governance, and the WTO: A Comparative Institutional Approach, in Barnett and Duvall (eds.), *Power in Global Governance*. Cambridge University Press:130-160, Robert Gilpin(2002), A Realist Perspective on International Governance, in McGew and Held (eds.), *Governing Globalization: Power, Authority, and Global Governance*, Cambridge: Polity Press: Ch. 11

of the SPS Agreement are revealed and recognized by the members, the internalization of the international rules and norms on food safety is hardly possible in the future. In the views of constructivists, countries will then resort to regional arrangements in establishing effective and satisfying food safety managing mechanisms. In order to securely develop effective food safety governance, a comprehensive preliminary assessment of the current framework is essential.

III. ASSESSMENT OF A MULTILATERAL FOOD SAFETY APPROACH

1. FRAGMENTATION OF INTERNATIONAL FOOD SAFETY LAW

A number of issues concerned with the SPS Agreement's role in addressing both free trade and the protection of human, animal and plant health have widely captured the attention of society, including the legal, economic, and scientific spheres. It is often argued that health and safety concerns are central to notions of domestic sovereignty. With regard to the fact that the risk regulation is conducted under a multilateral power mechanism, there are some views that caution that the regulatory sovereignty of an independent nation can be violated.

Along with the regulatory sovereignty issue, the ineffectiveness and complexity of the current multilateral food safety governance emerge as its fundamental limitations. The existence of many engaged entities, including all member states, different organizations such as the WTO, WHO, IPPC, and some NGOs creates too many conflicts in interests and complexities of food safety governing mechanisms. The challenges of the multilateral problem-solving mechanisms on food safety issues can also be observed from the long duration of settling the recent SPS-related disputes under the WTO dispute settlement mechanisms, which usually have taken more than three years to complete, partly due to the existing disparities in interpretations of the text.

When settling SPS disputes, the central points in question are the matters related

to the assessment of risk, referring to the provisions set out in Article 5 of the SPS Agreement. The issues of harmonization of SPS measures²⁷ are also frequently noted. The unclear wordings of these specific provisions are sometimes subject to fierce debates for their interpretation. More detailed features of these articles are elaborated in this chapter.

1.1 RISK ASSESSMENT

There is an important requirement in Article 5 of the SPS Agreement that the members have to base their measures on risk assessment as appropriate to the circumstances of the risks to human, animal or plant life or health.²⁸ In particular, when a certain SPS measure is alleged to result in a “higher level of protection” than would be achieved by measures conforming to international standards, the state is required to base its measure on “risk assessment.” In assessing the risk, the members also have to take relevant economic factors²⁹ into account, as well as the objective of minimizing negative trade effects.³⁰ Any arbitrary or unjustifiable distinctions in the level it considers to be appropriate in different situations should be avoided, to prevent resulting in discrimination or a disguised restriction on international trade.³¹

The definition of “risk assessment” is laid out in paragraph 4 of Annex A. Risk assessment is defined as “(i) the evaluation of the likelihood of entry, establishment

²⁷ Art. 3 ‘Harmonization’, Art. 5 ‘Risk Assessment and Determination of the Appropriate Level of SPS Protection’, SPS Agreement.

²⁸ Art. 5.1, SPS Agreement.

²⁹ Id, Art 5.3

³⁰ Id, Art 5.4

³¹ Id, Art 5.5

or spread of a pest or disease within the territory of an importing member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences.” It is further illustrated that risk assessment is the “(ii) evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.” The definitions encompass the evaluation of risk associated with pests or diseases, as well as risk to human or animal health that arise from the food, beverages or feedstuffs.³²

In *Australia-Salmon*, the term “risk assessment” was defined as “(i) to identify the disease whose entry, establishment, or spread is being addressed as well as the biological and economic consequences of such entry, establishment, or spread, and (ii) to evaluate the likelihood of entry, establishment, or spread of these diseases..., as well as (iii) to evaluate the likelihood of entry, establishment, or spread according to the SPS measures that might be applied.³³ For provisional measures, it is suggested that there must be some potential for harm present at the point of conducting risk assessment.³⁴

In assessing the SPS measures, the interpretation of the specific wordings of the risk assessment provision is important to clarify. With respect to provisional measures, the matter of conducting risk assessment becomes even more complicated, and thus requires sophisticated risk assessment provisions. However, the previous

³² Id, Annex A (4).

³³ AB report, *Australia – Salmon*, supra note 34.

³⁴ Gillman (2011), *Making WTO SPS Dispute Settlement Work: Challenges and Practical Solutions*. *Northwestern University School of Law*: 447.

legal proceedings on several provisional SPS measures demonstrated fundamental weaknesses in multilaterally coordinating how to assess the risks. Moreover, the WTO has often failed to mediate discord in interpreting risk assessment provisions. The case laws that are compatible with the basis of the Risk Assessment provision under the SPS Agreement are expected to display practical features of the assessment of risk. Among many disputed cases, some findings in *EC-Hormone* and *Japan-Apple* are noteworthy for this discussion.

Before tapping into the real cases, the relationship between scientific evidence and the SPS measure is to be noted. In applying or maintaining certain SPS measures, the state must consider the relevant scientific evidence, as Article 2.2 suggests.³⁵ Thus, it is the relationship between SPS measures and relevant scientific evidence that ultimately drives the evaluation of those measures.

CASE 1. EC-Hormone

The relationship between the SPS measures and relevant scientific evidence was requested to be rational, as the panel of *EC-Hormone*³⁶ suggested. The country implementing the SPS measure, therefore, is entitled to determine the appropriate level of protection subject to ‘rational

³⁵ Article 5.7 forms an integral part of Article 2.2. It also is noted that Article 5.7 is given a “qualified exemption” to Article 2. Article 2.2 reads as follows: *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.*

³⁶ AB report, EC-Measures Concerning Meat and Meat Products, Report of the Appellate Body, WT/DS26/AB/R&WT,1998, para 193 (hereafter, ‘EC-Hormones’).

relationship constraint.’³⁷ The AB interpreted ‘based on’ risk assessment as “the members adopting SPS measures are not required to have carried out the risk assessment if there are relevant risk assessment conducted in advance by other WTO member or an international organization.”³⁸ Although conducting separate risk assessment is not necessary, an objective or rational relationship between the measure and existing risk assessment has to be demonstrated by the imposing country.

This ‘rational relationship constraint’ developed by the EC-Hormone case law may become a problem for two reasons. Firstly, to meet the requirements to prove a rational relationship, sufficient technical capability is needed. Thus, this is not only burdensome but can also be even more complicated than carrying out a risk assessment. Peel (2004) noted that “it is doubtful whether this requirement imposes any less significant burden on countries wishing to adopt SPS measures than a procedural standard,” and “the country will need to have sufficient technical capacity to be able to verify that there is an objective link between the scientific findings of a risk assessment and the measures it wishes to adopt.”³⁹ The process entails a number of complicated elements, including the requirement that it is a “probability” that is to be evaluated and not a mere “possibility” of the

³⁷ Andrew T. Guzman (2004), Food Fears: Health and Safety at the WTO. *Virginia Journal of International Law*: 6-8.

³⁸ EC-Hormone, para 190.

³⁹ Jacqueline Peel (2004), Risk Regulation under the WTO SPS Agreement: Science as an International Normative Yardstick? *Jean Monnet Working Paper*: 59.

risk.⁴⁰

Secondly, the stringent requirement of an objective relationship between the measure and the risk assessment may work to deny and ignore relevant scientific evidence. First of all, the meaning of “rational relationship” is unclear, and it is defined using a case-by-case approach.⁴¹ This can result in inviting arbitrary definitions for each specific case and subjective reasoning in judging whether the relationship is rational or not. The arrangement that focuses on certifying the existence of an objective relationship is somewhat awkward where there is no clear guidance of what has to be done nor a simple definition of the ‘rational relationship.’

CASE 2. Japan-Apple

In assessing the sufficiency of scientific evidence, the meanings of ‘sufficiency’ and ‘scientific’ must be made clear. But again, it is up to the panel to define them. The same concern applies to the definition of “rational or objective relationship between the SPS measure and the risk assessment.” In *Japan-Apple*, the scientific evidences provided by Japan to the panel only suggests the identification of “negligible risk” of possible transmission of fire blight through apple fruit.⁴² It was found that there is no rational relationship between the measure and the scientific evidence, in

⁴⁰ EC-Hormone, para 184.

⁴¹ Lukasz Gruszczynski (2006), Science in the Process of Risk Regulation under the WTO Agreement on Sanitary and Phytosanitary Measures. *German Law Journal*, Vol. 7, No.4: 386.

⁴² Panel Report, Japan-Measures Affecting the Importation of Apples, WT/DS245, 2003, (hereafter, ‘Japan-Apple’).

the sense that Japan's measure was "disproportionate" to the "negligible risk." The panel found that the likelihood of the risk occurring is between zero and one in a million. With respect to the panel's finding, Japan argued that "the fact that other countries do not impose SPS measures in response to unresolved uncertainty regarding fire blight does not necessarily mean that such uncertainty does not exist or is negligible." Gruszczynski (2006) noted that "both concepts of proportionality and negligible risks reflect rather the political considerations, which are reserved to the Member States."

After the AB recommended Japan to bring its measures into conformity with the Agreement, the measure was revised, but Japan still maintained a "fire blight-free orchard" requirement for apple imports.⁴³ The US argued that the revised measures were again not supported by the scientific evidence. In response to the US complaint, Japan alleged that there are four recently completed studies that support the introduction of revised measures.⁴⁴ The panel, after gathering various opinions from experts, found that Japan's new studies "are not supported by the published record,"⁴⁵ and thus concluded that the study does not provide sufficient scientific support.

What seems odd is that the panel's conclusion automatically justifies that

⁴³ Panel Report, Japan-Measures Affecting the Importation of Apples, Recourse to Article 21.5, WT/DS245/RW, June, 2005: para 4.72 (hereafter, 'Japan-Apple, Recourse to Art.21.5').

⁴⁴ Japan-Apple, Recourse to Art.21.5: para 4.22.

⁴⁵ Japan-Apple, Recourse to Art.21.5: para 8.69.

in order for information to be judged as sufficient scientific evidence, it has to be supported by the majority of scientific research available. When it comes to “science,” it is important to be novel and creative to achieve valuable discoveries. Therefore, a different method of evaluating risk should be sought. The Appellate Body of *EC-Hormone* also mentioned that “the risk assessment could set out both the prevailing view representing the “mainstream” of scientific opinion, as well as the opinions of scientists taking divergent view.” However, recognizing divergent scientific evidence did not appear to be simple in the majority of cases.

The type of legal findings shown in *Japan-Apple* will serve to impair the rights of the member states to establish a level of protection they deem to be appropriate with relevant scientific evidence.

There are some demanding aspects for Article 5.7 that members are required to seek to obtain additional pertinent information and to review the measure within a reasonable period of time. By its nature, Article 5.7 promotes more information and reflexivity on the members as they fulfill their obligations to revisit measures.⁴⁶ In such circumstances, the capacity of the members to obtain sufficient information sources and to enhance understanding of the existence of the risk becomes very important. However, the provisions of the SPS Agreement lack methodological explanation, both qualitatively and quantitatively. Moreover, the application of provisional measures is subject to subsequent review, as Article 5.7 illustrates. The

⁴⁶ Scott (2007): Ch. 3, 118-119.

review should take place within a reasonable period of time,⁴⁷ which leaves considerable discretion to a panel and can be a critical element in altering the legal findings and judgment.⁴⁸

The development of risk assessment jurisprudence under the WTO system has created problems and fundamental discontent. The problem is exacerbated by legal tests that require a panel to delve into the evidence presented by parties to make science-related determinations. The lack of a clearly formulated system for evaluating risk assessment, coupled with legal tests that pushed panels and the AB fairly deeply into the scientific elements of the disputes, had created a problematic process for resolving SPS cases, which has left member states discontented with the SPS Agreement and the WTO.⁴⁹

1.2 “THREE SISTER” ORGANIZATIONS

It is not only the SPS Agreement and the SPS Committee that are responsible for global health and food safety governance: there are other organizations outside the WTO regime that establish standards without specific binding force. The interrelationship between the WTO and the relevant international standard-setting organizations is interesting in a number of important respects. It represents an example of established cooperation between international organizations with some overlapping functions. Along with the establishment of the WTO and the SPS Agreement, the significance of related international standards has increased, as the

⁴⁷ Art. 5.7, SPS Agreement.

⁴⁸ Gruszczynski (2006): 392.

⁴⁹ Gillman (2011): 444.

international standards set by some international organizations have a ‘quasi-legislative’ character.⁵⁰

For the purpose of harmonizing the SPS measures among the member states and partly to prove objectivity, the SPS Agreement requires the members to base measures on international standards, where they exist. Annex A (3) of the SPS Agreement explicitly refers to three specific international organizations that set out the standards for food safety or animal and plant health.⁵¹ The three organizations, Codex, OIE, and IPPC, are referred to as the three sister organizations to the SPS Committee. The three sister organizations take part in distinct sectors of food safety, animal health, and plant health issues. While establishing international standards for separate sectors is their basic function, they also play a considerable role in SPS Committee meetings and often provide expertise and opinion in the courses of SPS-related dispute settlements. While conducting various functions, the limits and fundamental weaknesses of these international organizations’ activities have been revealed.

Firstly, concerns have been raised with regard to the standard-setting function of these organizations. Codex, for example, basically serves the functions of protecting the health of consumers, and ensuring fair practices in the food trade. With this relevant aim, Codex produces food safety standards relating to maximum levels of pesticide residues, additives, and contaminants, and provides guidelines on

⁵⁰ Yoshiko Naiki (2009), Accountability and Legitimacy in Global Health and Safety Governance: The World Trade Organization, the SPS Committee, and International Standard-Setting Organizations. *Journal of World Trade*, Vol. 43, no 6.

⁵¹ SPS Agreement, Annex A(3).

processes, procedures, and quality descriptors. In achieving its goal, the Codex grants observer status to various levels of institutions including international intergovernmental organizations, NGOs, consumer groups, and industry groups. However, the functioning of Codex has been much criticized recently. Concerns have been expressed about the quality and speed of data collection and decision making, the limited participation of developing country members, and the role of experts and scientific evidence.⁵² One of the key criticisms of Codex is that despite its dual mandate, public health protection has taken a back seat to trade interests. Many have observed that “Codex’s infrastructure is designed in such a way to disfavor food safety standards and rather encourage international trade.”⁵³ Also, rather than working as a stubborn standard setter, it has seemed to be excessively influenced by the industries that it is supposed to regulate.⁵⁴

Secondly, it is significant to note that there is some overlap between the OIE and Codex’s activities. While Codex seems to be responsible for food safety standards, OIE is also concerned with food safety that is specifically related to animal production. Thus, a variety of issues fall within the mandate of both organizations. In this situation, when the institutions overlap in scope at the horizontal level, the issue of international regime complexity can be raised and the members engaged in the debate may enjoy forum-shopping.

Finally, the levels of authority of the international organizations can be

⁵² Scott (2007): 246-248.

⁵³ Id: 248.

⁵⁴ Id: 248.

excessive, which has made many individual states uncomfortable. The significance of the three sister organizations increased when the standards set by them were given ‘quasi-legislative’ status.⁵⁵ The practices or procedures of the international organizations in creating and adopting the standards were not scrutinized by the WTO. This indicates that the authorities of international standards were automatically introduced in the WTO. The underlying problem is that the member states’ regulatory autonomy can be denied, concealed by the international regulations. The appropriate degree of authority conferred upon the international organizations is far from reaching consensus among the WTO member countries. Permitting specific international organizations to explicitly grant certain authority is only seen in the SPS Agreement, as the TBT Agreement does not allow such standard setters. Thus, Codex, OIE, and IPPC are extraordinary intergovernmental organizations, monopolizing the work of international standard setting upon SPS measures.

These factors, when considered together, seem to prove the members’ dissatisfaction with the current organizational framework and the relationship between the WTO and other standard-setting organizations.

1.3 CLASH OF REGULATORY REGIMES

Seen from the regulatory complex among the three-sister international bodies and the WTO SPS regime, the conflict of different standards is a critical issue in assessing the effectiveness of the food safety regime under the multilateral system.

⁵⁵ Naiki(2009).

If different institutions at the horizontal level work favorably and effectively in an organized way, the phenomenon will be evaluated as ‘institutional interplay’ or ‘regime interactions.’⁵⁶ However, many perceive that such international regime complexity generates several negative consequences, one of which is forum-shopping or regime shifting. The outcomes of the clash of such regulatory regimes grant the need to reassess the global food safety governance as a whole.

The international regime complexity on food safety provides two distinct features of the current global governance. Firstly, the complex in food safety regime can encourage powerful states to enjoy the regime shifting according to their specific preferences. For example, an unsuccessful settlement in the SPS Committee might lead the member state turning to another regime such as a body of Codex, hoping to alter the outcome.⁵⁷ Moreover, the regime complex makes it more difficult to locate which institution or actor is responsible for an issue, thus undermining accountability. The uncertainty of which institution, the SPS regime or international standard-setting organizations, should hold entities accountable to quarantine issues poses great challenges to the effectiveness of the current system. Thus, it becomes more important to establish a framework that ensures a legitimate standard-setting process.⁵⁸

The discussion of regime conflicts can be furthered down to account for the trade regime and environmental regime. In the trade regime, SPS measures are

⁵⁶ Naiki (2009).

⁵⁷ Naiki (2009):1274-1277; Also, see Japan- Official Control Restrictions on Citrus and Other Fresh Fruits and Vegetables, and Japan-Restriction on Beef Imports, WTO.

⁵⁸ Naiki (2009).

subject to mainly the US-backed principle of ‘scientific risk assessment’ established in the WTO’s SPS Agreement, while in the environmental regime, matters would likely be addressed through the more politically-based ‘precautionary principle’ promoted by the EU and represented in the Cartagena Protocol on Biosafety.⁵⁹ Some conflicts driven by food safety and health issues have been extremely sensitive in the domestic and international spheres. In particular, the different weights placed on the trade regime and the environment regime by the US and by European countries caused the *EC-biotech* and *EC-hormone* cases to be highly politicized domestically and internationally. Both the trade and environmental regimes are rule-based frameworks; however long-lasting conflicts between them diminish the force of precision and obligation that is required to make rules effective.

1.4 FUNDAMENTAL CHALLENGE ON HARMONIZATION

Paragraph 2 of Annex A provides a definition of harmonization under the SPS Agreement. It is stated that harmonization is *the establishment, recognition and application of ‘common sanitary and phytosanitary measures’ by different Members.*⁶⁰ The elaborated arrangement on harmonization of the measures is set out in Art. 3 of the agreement. It requires the member states to essentially base their SPS measures on international standards, guidelines or recommendations.⁶¹

⁵⁹ Gibert R. Winham (2003), International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO. *World Trade Review*, 2:2: p.7.

⁶⁰ SPS Agreement, Annex A(2).

⁶¹ Id, Art. 3(1).

However, some questions can be raised regarding the appropriateness of forcing domestic measures to follow the international standards. In answering the fundamental question, the regulatory autonomy of individual nations can again be at issue. Each state will have to confront various challenges. As observed from numerous controversies on SPS cases under the multilateral framework, it is not difficult to notice that countries simply do not have a common understanding regarding proper level of protections, scientific evidence, precautionary approaches, or even the most basic approaches to food safety itself.⁶² In this situation, achieving harmonization is almost impossible, as the members will not be able to reach multilateral consensus, nor to be able to deeply negotiate on the issues required to sign such comprehensive treaties. While there is the need to have a comprehensive regulatory strategy at the international level, the existing SPS Agreement has, in various aspects, failed to establish a satisfactory setting for the international food safety governance of many of its member states. Thus, there exists no international legal instrument aimed at addressing food safety issues in a comprehensive and effective manner.⁶³ Also, noting the fact that the WTO is an organization with an aim of trade liberalization rather than of developing global food safety, it seems more difficult to attract and persuade members to rely on the multilateral regime for the improvement of food safety management. In some respect, the challenges in harmonization reinforce the inevitability of regime conflicts.

⁶² Lin (2012): 724.

⁶³ Id: 700-703.

2. SPS COMMITTEE

The establishment of the SPS Committee is set out under Article 12. The committee is established to provide a regular forum for consultations. Several functions listed under the provision are intended to implement the provisions of the agreement and further the objectives, in particular with respect to harmonization. Also, the committee is charged with encouraging and facilitating ad hoc consultations or negotiations among members on specific SPS issues.⁶⁴ Other essential functions to be carried out by the committee are elaborated in the following paragraphs of Article 12, which include encouraging the use of international standards by all members, maintaining close contact with the three-sister organizations with the objective of securing the best available scientific and technical advice, and developing a procedure to monitor the process of harmonization. Activating its various functions, the WTO aims to construct a non-judicial, cooperative mechanism to boost external accountability, as well as to achieve its goal of transparency.

2.1 MONITORING FUNCTION OF SPS COMMITTEE

The committee's monitoring function, among various other functions, is very important to note. Article 3.5, under the harmonization principle, requires the committee to develop a procedure to monitor the process of international harmonization and to coordinate efforts with the relevant international organizations.

⁶⁴ SPS Agreement, Art. 12.1 and 12.2.

This role is further set out in Article 12.4.⁶⁵

The underlying purpose of developing the monitoring procedure is stated as identifying where there is a major impact on trade resulting from the non-use of international standards, and determining the reasons for the non-use of such standards. The committee should also help to identify where a standard was needed, or not appropriate for its purpose or use.⁶⁶ The institutionalized monitoring mechanism on the basis of cooperation might be seen as adding credence to a constructivist account, and makes the members better informed about the consequences for their trading partners of their regulatory preferences.⁶⁷ Many scholars including Scott have maintained that the SPS Committee is very effective in this way.

However, it seems that the committee's monitoring process is not in substantive use by its members. Approximately once every four months, the SPS Committee

⁶⁵ SPS Agreement, Article 12.4 reads as follows: *The committee shall develop a procedure to monitor the process of international harmonization and the use of international standards, guidelines or recommendations. For this purpose, the Committee should, in conjunction with the relevant international organizations, establish a list of international standards, guidelines or recommendations relating to sanitary or phytosanitary measures which the Committee determines to have a major trade impact. The list should include an indication by a Member of those international standards, guidelines or recommendations which they apply as conditions for import or on the basis of which imported products conforming to these standards can enjoy access to their markets. For those cases in which a Member does not apply an international standard, guideline or recommendation as a condition for import, the Member should provide an indication of the reason therefore, and, in particular, whether it considers that the standard is not stringent enough to provide the appropriate level of sanitary or phytosanitary protection. If a Member revises its position, following its indication of the use of a standard, guideline or recommendation as a condition for import, it should provide an explanation for its change and so inform the Secretariat as well as the relevant international organizations, unless such notification and explanation is given according to the procedures of Annex B.*

⁶⁶ Scott (2007): 65-68.

⁶⁷ Id: 74-75.

holds its official meeting. However, it only addresses a few issues which are typically related to developed countries. The underlying reason for this malfunctioning is related to the absence of the member states' common interest to monitor how international standards are applied. Rather, a majority of members are only interested in whether its trading partner is following international standards regarding merely the products of the individual states' concern.⁶⁸ Many countries often find it more effective and efficient to establish bilateral or regional understanding with respect to the appropriate SPS measure and food safety standards. This functions to result in arranging a bilateral SPS Joint-Committee among some members. Almost all of the recent free trade agreement obviously stipulates the establishment of a Joint-Committee and of cooperative relationships in harmonizing SPS measures in its text. It appears that the absence of common interest at the multilateral level, along with the attentions turned to the SPS Joint-Committees of smaller groupings, had led to the malfunctioning of the monitoring process of the SPS Committee.

2.2 ACCOUNTABILITY OF SPS COMMITTEE

Without common interests to cooperate with each other for the harmonization of regulatory standards, no one can confirm with certainty that there exists an effective systemic mechanism available to monitor the use of international standards. For this reason, the accountability of the SPS Committee is often challenged. Also, to date, the procedure of utilizing this special discussion opportunity, the SPS Committee

⁶⁸ Naiki (2009): 1274-1275.

meeting, has never been easy for developing countries. Even identifying difficulties with a newly-introduced measure poses significant challenges for developing countries.⁶⁹

Generally, they lack political power and are often constrained by financial resources and legal knowledge.⁷⁰ Although they participate in the process of monitoring in regular forums of the SPS Committee, the outcome has not yet been successful from the perspective of developing countries. While a number of concerns have been raised by the developing countries against developed countries, only a few of them have actually been resolved under the SPS Committee setup. Lack of experience and relevant knowledge of some members can impair the accountability of the committee. Therefore, the need to reinforce the committee's as well as the WTO's accountability has to be emphasized. Ensuring accountability is crucial for the SPS Committee to function effectively, which will also grant legitimacy to the WTO mechanism of the multilateral approach to addressing food safety issues.

3. MULTILATERALISM TO REGIONALISM

The multilateral approach to the management of food safety and trade has developed since the establishment of the SPS Agreement, but in many aspects has failed to demonstrate its legitimacy and accountability even after 20 years. The challenging nature of SPS measures, especially on newly-emerging food safety

⁶⁹ Naiki (2009): 1265-1266

⁷⁰ Shaffer(2006), The challenges of WTO Law: Strategies for Developing country adaptation. *World trade review* vol.5, issue 2: 177-198

debates and precautionary measures, makes it difficult to achieve multilateral consensus.

Realists would argue that the multilateral setting for the food safety regime under the SPS Agreement has a history of promoting conflicts rather than cooperation, particularly because great powers involve themselves in most of the agenda as major decision makers. Although joining as a member of WTO to comply with the SPS Agreement is not difficult for the member countries, the benefit of substantial impact on setting rules and norms is limited only to a few powerful countries. The power dynamics of the state lead to deadlock or even failure of the global governance, as the cooperation game is more a relative gain than an absolute one. In other words, not all member countries benefit from the multilateral arrangements, and the fact that states are concerned mainly about their own interest impedes the possibility of achieving the ideal of international cooperation. The irreconcilable national interest of each state's food safety measures would then lead to conflicts between the member states⁷¹ and an alternative method of solution would be sought, which can involve the adoption of regional agreements.

The movement from the multilateral SPS Agreement to regional arrangement in managing food safety matters can also be explained with the change in the process of global governance.⁷² The idea of social constructivism supports that the changing

⁷¹ Gilpin (2003): 237-238.

⁷² Mathew J. Hoffmann (2005), "What's Global About Global Governance? A Constructivist Account," *Abingdon: Routledge*.

Yakub Halabi (2004), "The Expansion of Global Governance into the Third World: Altruism, Realism, or Constructivism?" *International Studies Review* Vol. 6, Issue 1

dynamics of the reality, along with the members' increased perception of the structural problems and limits of the SPS Agreement, will cause them to search for some alternatives to the multilateral approach. When countries perceive that the global solution to food safety is not going to benefit them, further internal institutionalization of the international food safety norms and rules will no longer occur.⁷³ The facilitation of regional settings of the food safety regime is likely to be realized if the development of the international food safety regime is perceived to be limited under the SPS Agreement or structural shortcomings of the SPS Agreement are revealed and recognized by the members.

This chapter has revealed a number of drawbacks of the current SPS Agreement that include the complicated autonomy issue, authorities given to more than one international standard-setting organization, difficulties in cooperatively assessing risks, and ineffective monitoring by the SPS Committee. Acknowledging these challenging features in overcoming the Agreement's fundamental drawbacks, some countries have already opted to expend less effort in improving the SPS Agreement and rather have sought alternatives, such as separate regional or bilateral agreements,⁷⁴ to directly engage in solving their own food safety concerns.

The regional or bilateral approach, beyond the arrangement set out in the SPS Agreement, is commonly referred to as an 'SPS-plus' arrangement between the

⁷³ *"The creation of internal institutions compatible with global governance is achieved only when developing countries become convinced that global intervention will benefit them, not just the more developed states"*, Halabi (2004): 21

⁷⁴ In this paper, the difference between regionalism and bilateralism is not clearly defined. The term 'regionalism' is rather used to encompass bilateralism, as the main focus of the debate is between multilateralism and other finer groupings.

countries, as the matters addressed under such settings extend beyond the baseline of the SPS Agreement and are thought to address additional commitments or regulations that are more specific to the participants' main interests.

IV. SPS-PLUS ARRANGEMENTS

The current multilateral approach in food safety management based on the SPS Agreement tends to be less effective in solving the conflicting natures of health protection and trade liberalization. This conflict has not only extended the settlement of some food safety disputes, but has also created increasing disagreement among members, especially between developing and developed countries. Having failed to complete the Doha Development Agenda over the course of almost 15 years, reaching a multilateral agreement in the food safety sector also seems to have a rather dim future. For these reasons, many WTO members prefer to resort to flexible arrangements, under the regional approach.

1. SPS CHAPTERS WITHIN RTAs

Recently, “SPS-plus” arrangements among the regional groups have emerged as a common feature of the members to address issues related to food safety and trade. The main aim of these agreements is to address highly specific food safety problems with increasingly rigorous cooperative tools, rights and obligations that extend beyond the baseline of the SPS Agreement.

Almost all of the FTAs that entered into force recently contain an SPS Chapter in the Agreement text. The 20 most recent FTAs that entered into force all contained an SPS Chapter and some have worked hard to introduce sophisticated SPS provisions. This suggests that it obviously is an integral part of regional trade

agreements.⁷⁵ Among various FTAs, the main features of SPS provisions in eight representative FTAs are reviewed below.

1.1 US-AUSTRALIA

The AUSFTA, which entered into force in 2005, is one of a few FTAs that was concluded between two like-minded developed countries. In addressing SPS issues, both countries agreed to accept the SPS Agreement as the basis for their standards and obligations. Additionally, the joint SPS committee was established with a mandate of facilitating information exchange and boosting technical cooperation. The Technical Working Group supplements the work of the joint committee by engaging in the development of specific work plans and sharing knowledge on risk assessment for animal and plant health measures.

1.2 US-KOREA

Since its entry into force in 2012, the joint SPS Committee has been the bilateral forum to tackle issues that emerge in food safety and trade. Although Korea's health requirements on US beef imports were relatively strict, the beef trade issue was not addressed under a specific SPS provision. There is no commodity-specific provision included in the agreement. The SPS text of KORUS FTA is only two pages in length, and apart from the provision that stipulates the establishment of a bilateral committee, it does not contain any further SPS-plus provisions or commitments. The

⁷⁵ Data updated on Jan 10th, 2015.

text specifically states that neither Party can has recourse to pursue dispute settlement under the bilateral system to address SPS issues.

1.3 US-COLOMBIA

The US-Colombia FTA, which entered into force in May 2012, features some SPS-plus aspects, especially with respect to its issue-oriented arrangements. The SPS-plus elements appear in separate letters signed ahead of the FTA implementation. These three letters confirm the SPS deals on poultry, beef, and paddy rice between the countries, and deals are separately but fully implemented in the FTA. The US and Colombia also agreed to recognize each other's inspection system with the mutual development in risk assessment.

1.4 CHINA-SWITZERLAND

The FTA between China and Switzerland entered into force in 2014. The SPS Chapter demonstrates its detailed features in a number of provisions. Especially, the parties agreed to have further cooperation on SPS measures by enhancing capacity building, improving their SPS system, and strengthening technical cooperation. With respect to the inspection and certification system, the parties further agreed to enhance their cooperation and to justify the need to perform on-site inspections. The side agreement between FAO and AWSIQ, competent authorities for SPS issues for Switzerland and China, respectively, worked to carry out capacity building to further strengthen bilateral SPS cooperation.

1.5 CHINA-NEW ZEALAND

The FTA between China and New Zealand has been effective since 2009. For both China and New Zealand, SPS measures were an important trade concern; thus, a number of SPS-plus provisions were set out. In addition to the formation of a joint-committee, the countries agreed to accept the other party's measure as equivalent, recognize regional conditions, and have detailed arrangements on verification, certification, and import check procedures.

1.6 EU-CHILE

The EU-Chile FTA contains very detailed provisions on SPS measures in the areas of equivalence, verification, and trade conditions. This Agreement also has detailed coverage for the recognition of each other's competent authorities. In order to regionally boost animal welfare, a specific working group was established in 2003, and it has developed activities on the basis of an annual joint action plan that included practices relating to the stunning and slaughter of animals, as well as animal transport. Also, with the establishment of operational funds, mutual recognition of testing standards, harmonization of SPS regulations, and requirement of standards and conformity assessment in the EU market became possible.⁷⁶ The provision on the 'wine' trade is separately stipulated.

⁷⁶ Stoler (2011): 222

1.7 EU-UKRAINE

The FTA between EU and Ukraine became effective in June 2012. In the SPS Chapter, the EU and Ukraine reiterated their commitments under SPS Agreements as well as further agreeing on SPS-plus elements. Areas addressed in considerable detail include harmonization and mutual recognition principles. The transition period for the harmonization was established, and the modes of notification, consultation, and verification were arranged in detail. Furthermore, Ukraine has agreed to progressively adapt its regulations and standards to those of the EU.

1.8 MEXICO-CENTRAL AMERICA

The FTA between Mexico and five Central American countries entered into force in September 2012. Being an arrangement among developing countries, it contains SPS-plus arrangements in risk assessment provision. The parties explicitly agree on factors to be assessed and the period within which to conduct risk assessment. Under the terms of the SPS Chapter, the parties may request to inform the reasons for the measures that adversely affect its export, within a period not exceeding 30 days. In various provisions, the detailed commitment was developed from the SPS Chapter set out in the Mexico-Nicaragua FTA which was developed more than 10 years prior to the conclusion of the FTA between Mexico and Central America.

In above-mentioned bilateral free trade agreements, some of the provisions that were part of the SPS Agreement were reconfirmed, as Table 1 displays. Further

arrangements beyond what was agreed multilaterally are also viewed in the SPS Chapters of these FTAs. Table 2 illustrates the SPS-plus features.

Table 1. SPS Chapters under FTAs: Confirmation of the Provisions of the SPS Agreement

	US-AUS	US-KOR	US-COL	CHN-SUI	CHN-NZL	EU-CHI	EU-UKR	MEX-CA
Reaffirmation of WTO SPS AGREEMENT	O	O	O	O	O	O	O	O
Objective & Scope	O	X	O	O	O	O	O	O
Harmonization	X	X	X	O	O	X	O (SPS-plus)	O
Cooperation on SPS measures	X	X	X	O (SPS-plus)	O	X	O	X
Regionalization	X	X	X	O	O (SPS-plus)	O (SPS-plus)	O	O
Equivalence	X	X	X	X	O	O (SPS-plus)	O	O
Transparency	X	X	X	X	O	O	O	O

Table 2. SPS Chapters under FTAs: SPS-plus arrangements

	US-AUS	US-KOR	US-COL	CHN-SUI	CHN-NZL	EU-CHI	EU-UKR	MEX-CA
Establishment of a Joint-Committee	O (+TWG)	O	O	O	O	O (+TWG)	O (+TWG)	O (+TWG)
Inspection, certification system	X	X	X	O	O (detailed)	O (detailed)	O	O
Technical consultation	X	X	X	O	O	X	X	O

Contact points (competent authority)	X	X	X	O	O	O	O	X
Safeguard measure	X	X	X	X	X	O	O	O
Trade Condition	X	X	X	X	X	O (detailed)	O	X
Risk analysis	(under TWG)	X	X	X	O	X	X	O

*TWG: Technical Working Group

2. COMPARISON

Some features of the SPS Chapters in FTAs are interesting to analyze. Distinct preferences for specific characteristics are apparent in the SPS-plus provisions among different countries. Some have actively tried to bring relatively sophisticated provisions to discuss issue-specific matters between themselves, while others merely agreed on a reiteration of some of the provisions of the SPS Agreement.

The FTAs between the US and Australia, as well as the US and Korea, have illustrated few SPS-plus features, and not much emphasis has been placed on bilateral tools of settlements. Although the US has complaints about the overly restrictive nature of Australian quarantine measures, it is preferred by the US to have recourse to the SPS Agreement under the WTO. During the period when the Korea-US FTA was being agreed, importation of US beef was a serious concern to Koreans due to their fear of mad cow disease. Even in the situation when Korea's health requirements for US beef imports were a debatable food safety issue between

two countries, the SPS issue was not addressed nor considered in finalizing the SPS Chapter.

With respect to FTAs between China and its trade partners, more SPS-plus elements are apparent. It seems that China tends to favor agreement on each other's recognition of regional conditions. Due to its vast territory, China tends to ask trading partners to adapt their SPS measures to regional conditions, recognizing pest- or disease-free areas within their continent. Moreover, the competent authorities in both countries, FVO and AWSIQ developed the Side-Agreement on cooperation in the area of SPS measures, to share knowledge and experience as well as to carry out joint research and share the results of such research. China also agreed with New Zealand to tackle issue-specific matters and proceed to have bilateral joint-testing. For example, they developed an official assurance program for the export of pears from China to New Zealand.

The bilateral issue-specific arrangements also include three letters signed with regard to the beef and rice trades between the US and Colombia. Reviewing the SPS Chapter between EU and Ukraine, the issue-specific arrangements involved the comprehensive strategy to include the timetable for approximation of the Ukraine GMO legislation to the EU. It is found in the relationship between EU and Chile that they have defined the priority sectors for which equivalence may be recognized. Moreover, the parties agreed to establish an operational fund in order to adequately address the issue-specific SPS matters.

Also to be noted is the enforceability of the SPS Chapters. It means that the

arrangements under the SPS Chapters are effective and enforceable, if the food safety debates can have recourse to the dispute-settling mechanism of the regional agreement. The SPS Chapters in FTAs in which the US was involved, however, are not practically utilized. In US-Australia, it is stipulated that “Neither Party may have recourse to dispute settlement under this Agreement for any matter under this Chapter.”⁷⁷ A similar provision is also seen in the text of the US-Korea FTA. Not granting enforceability to the bilateral SPS agreement means that the US finds it preferable to settle food safety disputes under the multilateral setting.

Table 3. Classification of SPS Chapters with Distinct Characteristics

Categories	FTAs	Characteristics	Enforceability
EMPHASIS ON THE ROLE OF JOINT COMMITTEE	US-AUSTRALIA	SPS-plus in terms of Standing Technical Working Group’s supplement to bilateral SPS Committee’s work	NO
	US-KOREA	Even Korea’s health requirement on the US beef import was a serious issue, the issue was not addressed, nor considered in SPS arrangement	NO
EMPHASIS ON REGIONAL CONDITIONS	CHINA-SWITZERLAND	Side-Agreement on cooperation in the area of SPS measures (between FVO and AWSIQ)	YES
	CHINA-NEWZEALAND	SPS-plus in various aspects	YES

⁷⁷ Art.7.2(2), Chapter 7 on SPS Measures, Australia-US FTA.

		(incl. Harmonization, mutual recognition, risk analysis) Issue-specific, Joint-testing (Ex. Official Assurance Program for the Export of Pears from China to NZ)	
ISSUE-SPECIFIC	US-COLOMBIA	3 Letters (issue-oriented: on beef, poultry, rice)	NO
	EU-UKRAINE	SPS-plus in Verification Approximation of the Ukraine GMO legislation to the EU	YES
	EU-CHILE	Operational fund established (SPS plus in harmonization, mutual recognition, animal welfare) Provision on 'wine' separately stipulated	YES
	MEXICO-CENTRAL AMERICA	SPS plus in "risk assessment"	YES

For a more general assessment of the regional approach, the FTAs are categorized into three types: two North-North arrangements, five North-South arrangements, and one South-South arrangement. The classification was made in order to determine how developed and developing countries differ in incorporating SPS-plus provisions in their bilateral agreements. The North-South distinction was made based on GDP per capita of \$10,700. The North is represented by the US, Australia, Switzerland, EU, Korea, and New Zealand, while Colombia, Ukraine,

Chile, Mexico, China, and five Central American countries⁷⁸ fall into the category of the South in this section addressing the North-South discussion.

Table 4. Distinctions According to the North and the South

<p>1. North-North (US-Australia, US-Korea)</p>	<ul style="list-style-type: none"> - Developed countries accept the provisions of the SPS Agreement as the basis for their obligations - Establish bilateral committee to facilitate information exchange - Entire SPS Chapter is off-limit with respect to dispute settlement
<p>2. North-South (US-Colombia, EU-Chile, EU-Ukraine, New Zealand-China, Switzerland-China)</p>	<ul style="list-style-type: none"> - Harmonization, Mutual recognition principles are emphasized - Partial Arrangement, provisions more favorable to developed partner (Ex) Ukraine commitment to align its SPS measures and animal welfare legislation to the EU's. - Little efforts in technical consultation and cooperation - Some have created a stronger compliance pull but absence in enforcement mechanism in US-Colombia makes details less effective
<p>3. South-South (Mexico-Central America)</p>	<ul style="list-style-type: none"> - SPS Provisions appear in provisions on 'risk assessment,' 'transparency,' and 'regulatory cooperation.' (Ex) may request the Party to inform the reasons for the measures which adversely affect its export, within a period not exceeding 30 days

The North-North arrangement showed few SPS-plus features, but rather the mere establishment of a bilateral committee to facilitate information exchange. It is notable that the entire SPS Chapter is off-limits with respect to bilateral dispute settlement. The US, in particular, is more in favor of bringing the SPS dispute to the WTO dispute settlement body than to having recourse to the bilateral dispute settlement mechanism. If there is no enforcement, this consequently makes the entire bilateral SPS arrangement lose its effectiveness.

⁷⁸ Five Central American countries involved in the FTA with Mexico are Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

The SPS Chapters between the North and the South illustrate that harmonization and mutual recognition principles are emphasized between the trading partners. Ukraine's commitment to align its SPS and animal welfare legislation to that of the EU⁷⁹ seemed a partial adjustment, a provision more favorable to the EU. Moreover, minimal effort was observed to expand technical cooperation from the developed countries, especially the US and EU. For example, there's no provision related to technical aid in the SPS Chapter between the US and Colombia.

In the SPS Chapter between Mexico and Central America, some detailed procedures for risk assessment and regulatory cooperation were stipulated. For example, "the country may request the party to inform the reasons for the measures which adversely affect its export, within a period not exceeding 30 days." There were not many FTAs successfully concluded between the South countries. With a single sample, the FTA between Mexico and Central America, it is difficult to generalize the characteristics of the SPS Chapter between the South and the South.

⁷⁹ Article 64. Regulatory Approximation, Chapter 4 SPS Measures, Title IV. Trade and Trade-Related Matters, EU-Ukraine Association Agreement.

V. OPTIMAL INSTITUTIONAL DESIGN FOR THE FUTURE GLOBAL FOOD SAFETY GOVERNANCE

Many theories of global governance have tried to prove that a multilateral approach is the best solution to address global issues. When it comes to the global food safety problem, however, the multilateral mode of solution does not appear to be the sole solution. The current multilateral mechanism led by various actors including the WTO, WHO, and three sister organizations entails several systemic and effectiveness problems, which are often exacerbated by the limits incurred during the processes of risk assessment and harmonization. Some countries, recognizing these limits, have tried to approach food safety issues bilaterally or regionally. However, no revolutionary development has been made with respect to SPS-plus arrangements. To ensure that regional SPS-plus arrangements fill the gaps of the multilateral setting and support the system, the introduction of bilateral agreements with clear objectives and SPS-plus features is necessary. For the further development of international food safety governance, three suggestions are provided below for better revision of the SPS Chapters.

First, technical consultation and aid provisions should be actively introduced, especially in SPS arrangements between developing and developed countries. It was viewed in North-South Agreements that regulatory approximation was required, without sufficient help from the partner with more resources and without the capacity to undertake risk assessment. In the standard-setting process, the developing countries' opinions can be taken into consideration only after the development in their capacity building, with the initial assistance from developed

countries. In this sense, capacity building is an essential element for developing countries to actively participate in the multilateral framework. Capacity building can initially be promoted with some efforts at the regional and bilateral levels.

Second, a number of issue-specific provisions should be learned and included in future FTAs. The bilateral food safety agreement is a relatively flexible and open tool that the countries can employ to solve certain issues that are time-consuming to settle under the multilateral framework. In concluding the development of their FTA, the US and Colombia exchanged letters to tackle issues related to the beef and rice trades, and agreed to make these separate arrangements effective. In contrast, the delicate issue of beef import to Korea was not mentioned in the text of the Korea-US FTA. More countries are requested to make better use of the FTA to manage the issues of direct interest and relevance.

Finally, regional enforcement mechanism is required in order to make the SPS Chapter effective. Some developed countries, especially the US, tends to favor having recourse to the dispute settlement mechanism under the WTO when it comes to SPS-related disputes. It is specified that neither party may have recourse to dispute settlement under the bilateral agreement for any matter under the SPS Chapter. However, not having enforceability entails that the entire SPS Chapter is made ineffective and is practically in no use by the FTA members.

The efforts under both multilateral and bilateral frameworks must maintain harmony with each other, despite the presence of distinct objectives, in order to establish an internationally cooperative safe-food environment.

VI. CONCLUSION

It can be stated that the enhancement of food safety is a “public good.”⁸⁰ Therefore, the management of food safety requires wide participation from the international community. However, the nature of the SPS Agreement contains various structural weaknesses including regime complexity, lack of common understanding among members, vagueness of the text and risk assessment procedure, and regulatory autonomy disputes. The existence of these fundamental weaknesses in the multilateral mechanism of food safety management has made it difficult for the member states to rely solely on the multilateral regime for food safety management.

Some countries, acknowledging the challenging nature of the multilateral setting, have opted to directly engage in solving their own food safety concerns, within bilateral or regional settings. A majority of SPS Chapters incorporated in many FTAs, however, go no further than recognizing the objectives of the SPS Agreement. In other words, there have not been many notable developments of SPS-plus features.

The list of elements presented in eight SPS Chapters of the FTA can never be deemed a thorough description of the bilateral food safety management system. This article merely highlights the trends within the bilateral and regional framework of adopting food safety regulations by comparing the SPS Chapters among the North and the South. In this respect, further study needs to be conducted in order to more

⁸⁰ Ching-Fu Lin (2012): 721-722.

clearly characterize the bilateral efforts.

Still, based on this assessment, it can be concluded that some regional arrangements, featuring flexibility and specific topic-centered discussions, can alleviate some of the fundamental weaknesses of the WTO-led food safety governance. To achieve regulatory harmony in the future, the first step to be taken will involve regional or bilateral cooperation, which will enhance the approximation of the SPS regulations among regional groups. The current bilateral setting requires further development in its elaboration of arrangements. Beyond mere confirmation of the SPS Agreement, additional commitments or regulations that are more specific to the participants' main interests should further be agreed.

Such efforts will allow the regional groups to have a more significant voice at the multilateral level. Also, active experimentation and application at the bilateral level in pursuit of the optimal structure for food safety regulation will definitely promote the achievement of effective global food safety governance.

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국 문 초 록

벨라민 분유 파동, 광우병 소 수입, 일본의 방사능 유출로 인한 식품 오염 등의 사건들이 시사하듯, 오늘날 식품안전의 중요성은 국내외적으로 많은 식품, 법률, 경제 전문가뿐 아니라 일반 소비자들에게도 큰 관심사로 자리잡았다. 하지만 식품 안전에 대한 규정 수립은 연루된 이해관계자가 다양하고 각자가 추구하는 목적이 매우 상이할 때가 많은 만큼, 복잡하고 다방면의 이익을 고려해야 하는 분야이다. 특히, 국제무역기구(WTO) 체제하의 무역 자유화 패러다임은 효과적인 식품 안전 관리의 목적을 달성하는데 적지 않은 제약을 가한다. 무역 자유화와 식품 안전이라는 두 가지의 중요한 목적과 방향이 상충하는 상황에서 효과적이고 균형 있는 국제 식품 안전 거버넌스 구축은 매우 중요한 과제이다.

본 연구는 현재의 국제 식품 안전 거버넌스의 현황을 두 가지 접근법으로 나누어 살펴보았다. 논문의 전반부에서는 다자적 접근법인 국제무역기구 체제 하에서 이루어지고 있는 검역 및 위생 조치에 관한 협정(SPS 협정문)을 분석하였다. 특히 위해평가 조항 등의 해석에서 나타나는 한계를 살펴봄을 통해

다자적 접근에 관한 구조적인 문제점을 파악하였다.

논문의 중반부에서는 관점을 지역적 접근법으로 전환하여, 국가들이 양자간 마련한 식품 안전 규정의 틀과 내용을 분석하고자 임의의 국가를 선정하여 FTA 협정문 내의 SPS 장을 비교하였다. 후반부에서는 다자간협정과 지역간 도입한 식품 위생 및 검역 조치를 종합적으로 분석한 결과를 토대로 SPS 협정의 구조적 문제점을 보완하고 효과적인 국제 식품 안전 거버넌스 구축할 것을 제안한다.

주요어 : 식품안전, 위생 및 검역 협정, SPS플러스,

위해평가, 다자주의, 지역주의

학 번 : 2013-22042