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THE GOVERNMENT OF VIETNAM'S IMPLEMENTATION OF THE WTO AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

RAISE SPS COUNTRY DIAGNOSTIC REPORT # 26

MARCH 2007

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Funded by USAID's Bureau of Economic Growth, Agriculture and Trade (EGAT) and implemented by Development Alternatives Inc. (DAI), the RAISE SPS Project ("Assistance for Trade Capacity Building in Relation to the Application of Sanitary and Phytosanitary Measures") is Task Order 14 under the RAISE ("Rural and Agricultural Incomes with a Sustainable Environment") Indefinite Quantity Contract with DAI as Prime Contractor (Michigan State University, Abt Associates, Winrock International, and Fintrac Inc. are subcontractors). RAISE SPS assists farmers, processors, exporters, retailers and other participants in agribusiness supply chains enhance their competitiveness through achievement of international market standards. Concurrently, RAISE SPS assists regulatory, scientific, technical, and donor institutions better understand the effect of SPS issues and private sector-driven standards on economic growth and poverty reduction. USAID Missions and Bureaus can seek assistance from RAISE SPS by contacting Jim Yazman, USAID/EGAT Cognizant Technical Officer, at jyazman@usaid.gov.

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ABBREVIATIONS AND ACRONYMS

BTA	US-Vietnam Bilateral Trade Agreement
DAH	Department of Animal Health
GAP	Good Agriculture Practice
GATT	General Agreement on Tariffs and Trade
GMO	genetically-modified organism
GMP	Good Manufacturing Practice
HACCP	Hazard Analysis and Critical Control Points
IPPC	International Plant Protection Convention
ISO	International Organization for Standardization
ISPM	International Standard for Phytosanitary Measures
OIE	International Organization for Epizootics
MARD	Ministry of Agriculture and Rural Development
MFN	most favored nation
MOH	Ministry of Health
MOI	Ministry of Industry
MRA	mutual recognition agreement
MRL	maximum residue level
MOST	Ministry of Science and Technology
NAFIQAVED	National Fisheries Quality Assurance and Veterinary Directorate
SPS	sanitary and phytosanitary
SPS agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
STAMEQ	Standards and Quality Directorate, Ministry of Science and Technology
TA	technical assistance
TBT	technical barriers to trade
VASEP	Vietnam Association of Seafood Exporters & Producers

VFA Vietnam Food Administration
WTO World Trade Organization

EXECUTIVE SUMMARY

From March 13-23, 2007, Professor Kevin Kennedy, Michigan State University College of Law, was invited to Hanoi to meet with representatives of the Vietnamese ministries responsible for SPS regulation and to provide a legal analysis of Vietnam's food safety and animal and plant health legislation vis-à-vis the WTO SPS Agreement. Professor Kennedy and a representative of the STAR-Vietnam office, Ms. Do Hoang Anh, met with representatives of the Ministries of Agriculture and Rural Development, Health, Industry, Trade, Fisheries, and Science and Technology.

The SPS-related laws and regulations of Vietnam number in the hundreds. Given the scope of work of this project and the resources committed to it, it would be unrealistic to expect a comprehensive survey of the entire corpus of Vietnam's SPS laws and regulations. Instead, approximately twenty core ordinances, decrees, and decisions across the spectrum of SPS subject areas (animal and plant health, food safety) were reviewed for consistency with the SPS Agreement.

Two decrees, Labeling Decree No. 89/2006/ND-CP and Article 6.2 of Food Safety and Hygiene Decree No. 163/2004/ND-CP concerning the shelf-life of imported raw materials and food additives, raise concerns about consistency with the SPS Agreement. The Labeling Decree requires information on food labels that is inconsistent with the Codex standard on food labeling. However, implementing decisions and circulars are being drafted that may address these concerns. Article 6.2 of the Food Safety and Hygiene Decree arguably violates GATT Article XI on import prohibitions and/or GATT Article III on national treatment. The shelf-life decree is currently being reviewed by the Ministry of Health.

Vietnam is undertaking a comprehensive review of all its SPS-related laws and revising them to bring them into conformity with international standards. The Prime Minister has made adoption of international SPS standards a high priority, as evidenced by a January 2007 draft decision that will establish a National SPS Action Plan. Under that Plan each ministry with SPS responsibility is to submit a list of decrees and decisions to be revised or repealed, and a timetable for adopting and implementing relevant international SPS standards. A completion date of 2010 has been set, with adoption and implementation of the most technically demanding standards being backloaded.

Vietnamese officials with responsibility for SPS-related issues are knowledgeable about and conversant with the WTO SPS Agreement and the associated international agreements on food safety and plant and animal health. They are keenly aware of how Vietnamese SPS-related laws measure up against international standards. Each Ministry that was visited showed a commitment to revising and amending their SPS regulations to comply with the SPS Agreement and international SPS standards.

The WTO SPS Agreement covers six core subjects related to food safety and animal and plant health: (1) transparency of SPS-related laws, (2) standards harmonization, (3) equivalency of standards, (4) risk assessment, (5) import inspection and approval procedures, and (6) technical assistance.

- **Transparency.** On the subject of transparency, WTO members are required to designate an SPS enquiry point and national notification authority. The enquiry point is responsible for answering relevant questions in the SPS area. The national notification authority is responsible for ensuring

that new or amended SPS laws and regulations are notified to the WTO. Vietnam has combined the two functions into a single office, the SPS National Office located in the Ministry of Agriculture and Rural Development. That Office provides information on SPS regulations and notifies the WTO of new SPS laws and regulations or amendments to existing laws and regulations.

- The Prime Minister has issued a draft decision (pending comment from the responsible ministries before it becomes final) that proposes the creation of an inter-ministerial SPS network. If the decision goes into effect, ministries with SPS responsibility will be required to post on the SPS National Office’s website not only final SPS-related regulations, but also draft regulations for public comment. This is an extremely important development for improving transparency and the quality of Vietnam’s SPS regulations.
- The SPS National Office is currently staffed with a director and two assistants. Two more staff members will join the Office in April 2007. The Director has requested two additional staff members. Whether the Office has adequate staff to respond to inquiries in a timely manner is an open question. Encouraging the rapid growth of e-government will help to relieve some of the pressure on the SPS National Office from information requests that can be expected to build over time.
- Related to the issue of transparency, the quality of the drafting of Vietnam’s SPS legislation – ordinances, decrees, and decisions – is low. Legal documents lack clarity, at times contain internally inconsistent provisions, and are often ambiguous. Clear laws and regulations are an important because they provide predictability and serve as a check against arbitrary and capricious administrative agency action.
- ***Harmonization of Standards.*** On the subject of standards harmonization, the SPS Agreement provides that WTO members’ SPS measures are to be “based on” international standards. The Agreement further provides that if national standards “conform to” international standards, then they are presumptively WTO-consistent. The WTO Appellate Body has noted that harmonization of SPS standards is a future goal, not a present obligation.
 - It is Vietnam’s near-term goal to *adopt* international SPS standards, not merely to *base* its SPS laws on such standards. Pursuant to a draft Prime Minister’s Decision issued in January 2007 to launch a National SPS Action Plan, each Ministry with SPS responsibility will prepare an action plan and timetable for adopting all relevant standards and guidelines issued by the three international standards setting bodies recognized by the WTO: the Codex Alimentarius Commission (food safety), the World Animal Health Organization (the International Epizootics Organization or OIE on animal health), and the Secretariat of the International Plant Protection Convention (the IPPC on plant health).
 - *Food Safety and Hygiene Standards.* The Ministry of Health estimates that approximately 60 percent of all Codex standards and guidelines have been adopted to date. The most important Codex standards are the those establishing maximum residue levels of pesticides, veterinary drugs, and contaminants in food. The difficulty Vietnam faces in bringing national standards up to Codex standards is the large number of smallholders farming in the country, making the adoption, implementation, and enforcement of higher international standards problematic.

- *Plant Health Standards.* On the subject of plant protection, the Plant Protection Department has adopted two IPPC standards and is in the process of adopting five more by the end of 2007. It plans to adopt the balance (27 in total) by 2010. The Department has requested technical assistance in conducting pest risk analyses.
- *Animal Health Standards.* On the subject of animal health, MARD and the Ministry of Fisheries generally observe the standards set out in the OIE Terrestrial Animal Health Code and Manual and the OIE Aquatic Animal Health Code and Manual. Both Ministries are revising their quarantine and inspection regulations to more closely conform to OIE standards on animal quarantine and inspection. Both Ministries have in place a process for prompt identification and notification of listed (notifiable) diseases. This is especially important not only from an economic standpoint (preventing the spread of contagious diseases within Vietnam and globally), but also from a public health perspective in the case of zoonotic diseases, such as avian influenza.
- As the process of adopting international standards progresses within Vietnam, there is a concern that a double standard could emerge, i.e., products for export will meet either a higher international standard or an even a higher standard set by the importing country, but that the same product when imported or produced in Vietnam will be subject to a lower national standard. The SPS Agreement is silent on this phenomenon.
- ***Equivalence.*** On the subject of equivalence, the SPS Agreement requires that importing countries accept the SPS measures of exporting countries as equivalent to those of the importing country, even when they are different, if the exporting country demonstrates that its SPS measures achieve the importing country's level of SPS protection. What has developed in practice is that WTO members negotiate equivalency agreements or mutual recognition agreements. A representative of the Ministry of Fisheries believes that Vietnam's negotiators lack effective negotiating skills to secure equivalence agreements that are beneficial to Vietnam.
- ***Risk Assessments.*** On the subject of risk assessment, risk assessments are an indispensable SPS tool that all WTO members must be able to conduct. For example, an importing country may maintain SPS standards that are higher than international standards when the international standard does not meet the importing country's level of SPS protection, provided the importing country has conducted a risk assessment that evaluates the likelihood of entry or spread of a pest or disease, and further evaluates the associated biological and economic consequences. In addition, when international standards don't exist, an importing country must either conduct its own risk assessment to support its national standard or borrow one conducted by another country and adopt that country's standard as Vietnam's own. Finally, even when international standards do exist, risk assessments have to be conducted in plant and animal quarantine situations to establish that the risk has either passed (so that trade may resume) or is still present (so that an import ban may remain in place). Risk assessments are technically complex and require human capacity (e.g., highly-trained scientists) and technical capacity (e.g., labs and databases). Every Ministry that was visited requested technical assistance in conducting risk assessments.
- ***Control, Inspection, and Approval Procedures.*** On the subject of control, inspection, and approval procedures, the SPS Agreement calls for prompt and uniform import procedures, which are especially important in the case of perishable agricultural products. The Agreement also requires

that import documentary and quarantine requirements be published. MARD and the Ministry of Fisheries generally observe OIE standards on these procedures, including the use of model forms that the OIE has published on veterinary export and import certificates. OIE quarantine protocols can vary depending on the animal and the disease in question. Both Ministries are in the process of adopting the OIE quarantine and inspection protocols. A representative of the Ministry of Fisheries has requested technical assistance in this regard.

- The SPS Agreement also requires that a domestic procedure exist to review complaints that might arise during quarantine, inspection, and approval procedures. When representatives of the Department of Animal Health were asked how an importer could challenge a departmental quarantine or approval decision, the response was that the importer could use the dispute settlement mechanisms established by the OIE and WTO. This response shows a lack of appreciation that the SPS Agreement requires importing countries to provide “a procedure . . . to review complaints concerning the operation of [inspection and quarantine] procedures and to take corrective action when a complaint is justified.”

CONCLUSIONS

- Vietnam is in the process of undertaking a systematic and comprehensive review of its entire SPS legal regime. It will be a top to bottom review of all of its SPS laws with the goal of bringing its national SPS standards up to international standards on food safety and animal and plant health. For at least the next three years Vietnam’s SPS legal regime will be in a state of flux.
- Vietnam is just entering the first phase of bringing its SPS legal regime up to international standards. It is too early to say whether or not it will succeed, but the political will to fully implement the SPS Agreement seems to exist.
- Vietnam’s proposed timetable is ambitious: to revise and amend all of its SPS laws to bring them into conformity with international standards by 2010. Without generous technical assistance from donor countries and organizations, especially in conducting risk assessments, Vietnam’s timetable may be unrealistic.
- Although Vietnam is focusing a tremendous amount of attention on SPS measures *per se*, insufficient attention is being devoted to the process of rulemaking and the process of making legal challenges to agency determinations.
- Whether the SPS National Office is being adequately staffed is an open question.
- Vietnam is not at risk of violating the SPS Agreement to the extent its national SPS standards on food safety and animal and plant health are lower than or equal to international standards, which basically describes the current situation in Vietnam. In other words, if a country maintains national SPS standards that are lower than or equal to international standards, then there are no SPS barriers to import trade from countries with SPS standards higher than or equal to Vietnamese or international standards, and thus no grounds for a WTO complaint. Of course, maintaining comparatively low national SPS standards will not lead to an improvement in the living standards of the Vietnamese people. The Government of Vietnam appears committed to raising Vietnamese SPS standards to match those set by the international SPS standards setting bodies recognized by the WTO.

RECOMMENDATIONS

The resources of the USAID mission in Hanoi are not sufficient to support most of the following recommendations on technical assistance. Nevertheless, alternative sources of donor support should be sought to implement the following training and technical assistance programs.

- *Provide training on negotiating.* In order to fully participate in the WTO SPS Committee and in the work of the international standards setting bodies, Vietnam's representatives must have strong negotiating skills.
- *Provide training on legislative drafting.* The quality of Vietnam's legal documents is low. Most US law schools offer specialized drafting courses on a variety of subjects, including wills, contracts, business agreements, and legislation. It should be possible to design an intensive legal drafting course with the assistance of a US law school, perhaps in partnership with a law school in Vietnam.
- *Provide training on administrative tribunals and adjudication.* As trade with Vietnam increases, so too will trade disputes. Vietnam has a WTO obligation to establish independent administrative tribunals to review agency determinations and to issue reasoned opinions.
- *Provide training on notice-and-comment rulemaking.* A model for rulemaking is that of the United States under the Administrative Procedures Act. Vietnam's rule makers should become familiar with it, perhaps in conjunction with training on administrative adjudication.
- *Support the growth of e-government, including the development of an e-Official Gazette in Vietnam.*
- *Provide training on conducting risk assessments and pest risk analyses, including financial support for equipping labs and creating databases.*
- *Provide STAMEQ with a database on international labeling laws and regulations.*
- *Review the operation of the SPS National Office at least annually.*

Conduct a follow-up review of Vietnam's SPS legal regime in late 2008-early 2009. A second review of Vietnam's SPS legal regime should be undertaken with a focus on a single product through the entire food chain ("from farm to fork"). Such a review should include an assessment of SPS rulemaking procedures and dispute settlement processes.

SCOPE OF WORK

In 2006 the Ministry of Agriculture and Rural Development (MARD) sent a request to the U.S. Agricultural Attaché in Hanoi requesting, among other things, a legal review of Vietnam's legislation on sanitary and phytosanitary (SPS) measures for consistency with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement). In response to the MARD request, the Country Director of the USAID Office in Vietnam requested that the Washington-based RAISE SPS Project work closely with the STAR-Vietnam Project to carry out this activity.

Kevin Kennedy, a professor of international trade law at Michigan State University College of Law, was asked to serve as the SPS legal expert and to play the lead role in preparing an analysis of the legal framework for implementing SPS procedures in Vietnam. Specifically, Professor Kennedy was asked to provide the following technical assistance:

- Review Vietnam's current ordinances and implementing regulations for consistency with the following: (1) the WTO SPS Agreement, including the standards, guidelines, and recommendations of the three international standards setting bodies recognized by the WTO, namely, FAO/Codex Alimentarius Commission, the World Animal Health Organization (OIE), and the Secretariat of the International Plant Protection Convention, (2) the US-Vietnam Bilateral Trade Agreement, and (3) international best practice, including practice in the United States.¹
- Provide a written legal analysis of Vietnam's SPS legal regime, including the strengths and weaknesses of the system and recommendations for improving it.
- Participate in discussions with and interview officials from MARD and other Government of Vietnam Ministries responsible for SPS issues to share views on the strengths and weaknesses of the legal underpinning for SPS matters and how that system can be improved.

The SPS-related laws and regulations of Vietnam number in the hundreds. Given the scope of work of this project and the resources committed to it, it would be unrealistic to expect a comprehensive survey of the entire corpus of Vietnam's SPS laws and regulations. Instead, approximately twenty core ordinances, decrees, and decisions across the spectrum of SPS subject areas (animal and plant health and food safety) were reviewed for consistency with the SPS Agreement.

Professor Kennedy visited Vietnam for two weeks from March 12-23, 2007. Prior to his visit STAR-Vietnam provided him with the following ordinances and decrees on the subject of SPS measures:

- Veterinary Ordinance No. 06/2004/L/CTN
- Decree No. 33/2005/ND-CP on Implementation of the Veterinary Ordinance

¹ Article 2.2(A) of the US-Vietnam BTA provides that the Parties shall "ensure that any sanitary or phytosanitary measure which is not inconsistent with the provisions of the GATT 1994, 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 evidence (i.e., a risk assessment), taking into account the availability of relevant scientific information and regional conditions, such as pest free zones" With Vietnam's accession to the WTO in January 2007, the modest SPS commitments of the US-Vietnam BTA have been eclipsed by the WTO SPS Agreement.

- Decision No. 10/2006/QĐ-BNN on the Regulation of Veterinary Drugs
- Ordinance No. 36/2001/PL-UBTVQH10 on Plant Protection and Quarantine
- Decree No. 58/2002/ND-CP on the Regulation on Plant Quarantine, Plant Protection, and Management of Plant Protection Drugs
- Ordinance No. 12/2003/PL-UBTVQH11 on Food Hygiene and Safety
- Decree No. 163/2004/ND-CP on the Implementation of the Ordinance on Food Hygiene and Safety

During his visit Professor Kennedy made a request to the SPS National Office to provide an additional thirty Vietnamese laws, decrees, decisions, and circulars on SPS measures. Some of these documents were provided.

SUMMARY OF IN-COUNTRY ACTIVITIES

From March 13-23, 2007, Professor Kennedy was invited to Hanoi to meet with representatives of the Vietnamese ministries responsible for SPS regulation and to provide a legal analysis of Vietnam's food safety and animal and plant health legislation vis-à-vis the WTO SPS Agreement. A schedule of meetings was prepared by MARD in consultation with STAR-Vietnam. (The meeting schedule is attached as Exhibit A.)

Professor Kennedy and an attorney from the STAR-Vietnam office, Ms. Do Hoang Anh, met with representatives of the six Ministries with primary or lead responsibility for food safety and hygiene and animal and plant health: the Ministry of Agriculture and Rural Development (Plant Protection Department, Department of Animal Health, and the National SPS Office), the Ministry of Fisheries (National Fisheries Quality Assurance and Veterinary Directorate), the Ministry of Industry (Department of Science and Technology), the Ministry of Health, the Ministry of Trade, and the Ministry of Science and Technology (Standards, Measurements, and Quality Directorate).

Within Vietnam three other ministries play a less significant role in the SPS area and were not visited: the Ministry of Culture and Information (responsible for disseminating information on food hygiene and safety), the Ministry of Finance (responsible for fee setting, assessment, and collection), and the Ministry of Environment and Natural Resources (responsible for monitoring and assessing genetically-modified organisms in coordination with the Ministry of Health).

A summary of the discussions at each of those meetings follows.

MEETING WITH SPS NATIONAL OFFICE

On the first day of his visit, March 13, Professor Kennedy met representatives of the USAID mission in Hanoi to discuss the purpose of his visit. He then met with representatives of the USDA office in Hanoi to discuss specific SPS issues of concern to them. Later that day Professor Kennedy met with MARD officials responsible for the operation of Vietnam's SPS Enquiry Point (MARD has been designated as Vietnam's SPS enquiry point and the national notification authority pursuant to Annex B of the SPS Agreement). An exit interview was also held with the Director of the SPS National Office on March 22, at which Professor Kennedy's findings, conclusions, and recommendations were discussed.

MEETING WITH MINISTRY OF TRADE

On March 14, a meeting was held with the Multilateral Trade Department of the Ministry of Trade. Ms. Nguyen Hai Yen, WTO Desk Officer, represented the Ministry at that meeting. She explained that a draft Prime Minister's Decision on creating an inter-ministry SPS network had been circulated to the six ministries with SPS responsibility, giving the ministries one month for comment. The goal of the draft decision is to ensure that the transparency obligation of Annex B of the SPS Agreement is

fulfilled. To that end, the draft decision obligates the six ministries to send all draft and final documents that create SPS legal norms to the SPS National Office. Her office is well aware of WTO transparency obligations and is committed to working closely with the SPS National Office to establish the SPS national system.

MEETING WITH DEPARTMENT OF SCIENCE AND TECHNOLOGY, MINISTRY OF INDUSTRY

On March 15, Professor Kennedy met with Nguyen Phu Cuong, Deputy Director General, and Le Viet Nga, Senior Official, of the Department of Science and Technology, Ministry of Industry. Within the area of SPS measures, the Ministry of Industry is responsible for ensuring that food hygiene and safety standards set by the Ministry of Health are not compromised in the course of food processing. Thus, MOI has oversight responsibility for ensuring that food processors observe Good Manufacturing Practices and HACCP principles (Hazard Analysis and Critical Control Points). Codex follows HACCP in its Food Hygiene Principles, its Code on Hygienic Practice for Fresh Fruits and Vegetables, and its Code of Practice for Fish & Fishery Products. The U.S. Food & Drug Administration also uses HACCP in its regulation, *Good Manufacturing Practice in Manufacturing, Packing and Holding Human Food*, and for inspection of seafood and aquaculture imports.

The Ministry of Industry does not itself certify food processors for compliance with HACCP, Codex, or Organization for International Standardization (ISO) food processing standards, but rather relies on the independent certification of organizations that have been approved by certifying bodies such as the ISO. Although independent certification is expensive, it avoids conflicts of interest that can arise when the body that sets the standards (Ministry of Industry) is also the certifier. Where food safety and hygiene are at stake, such potential for conflicts needs to be avoided.

Mr. Cuong explained that MOI is in the process of adopting a compulsory National Action Plan for HACCP that will require all food processors of so-called “high risk” foods to comply with HACCP principles by 2010.² Small and medium-size processors will receive government support to achieve this goal.

MEETING WITH PLANT PROTECTION DEPARTMENT, MARD

On March 16, Professor Kennedy met with a delegation of representatives from the Plant Protection Department, led by Hoang Van Thong, Chief of Planning, Science and International Relations Division. The Department appears committed to harmonizing its current regulations with international standards. An ambitious work plan has been launched pursuant to which most, if not all, plant quarantine and pesticide decrees and decisions in effect prior to Vietnam’s WTO accession will be amended or repealed as part of the international standards adoption process. Pursuant to its proposed roadmap for implementing the National SPS Action Plan by 2010, the Department plans to

² Vietnam identifies 10 food items as high risk: meat and meat products, milk and milk products, eggs and products processed from eggs, seafood products, ice cream, nutritional food, fast food, frozen food, soya milk and soya milk products, and fresh fruits and vegetables for instant consumption.

simultaneously pursue the goals of regulatory transparency, harmonize department regulations with international standards, and develop the capacity to conduct proper risk assessments.

In connection with risk assessments, Department representatives commented on the difficulty Vietnam is having with the USDA Agriculture and Plant Health Inspection Service in resolving the fruit fly issue associated with imports of Vietnamese dragon fruit and litchi. Vietnam believes that it has conducted a proper risk assessment that should satisfy APHIS. In May 2007 APHIS will be conducting a workshop for Department employees on pest risk analysis and quarantine.

MEETING WITH FOOD ADMINISTRATION, MINISTRY OF HEALTH

On March 19, a meeting was held with the Vietnam Food Administration (VFA), Ministry of Health. The VFA is responsible for promulgating food safety and hygiene standards, including establishing maximum residue levels for plant pesticides, veterinary drugs, and microorganisms, such as mycotoxins. In attendance from the Vietnam Food Administration were Dr. Nguyen Hung Long, Deputy Director General, and Ms. Tran Viet Nga, Integration & Development Division. As is the case with the other ministries and departments visited, the VFA is revising, repealing, and amending several SPS regulations with the goal of bringing them into conformity with international standards.

The VFA representatives explained that pursuant to the Prime Minister's draft decision of January 2007, the VFA was conducting a comprehensive review of its decisions related to the SPS Agreement. A timetable has been established for amending existing ministerial regulations. Most amendments are to occur within 2007. Among them include changes to food packaging and labeling decisions, as well as a revised Food Law that will amend the so-called "2/3 shelf life" import restriction. That import ban prohibits the importation of unprocessed raw food materials and food additives if the remaining useful life of such imports is less than two-thirds as measured from the date of importation. This import restriction was raised and criticized in the Working Party Report on Vietnam's WTO accession.³ On its face it violates GATT Article XI as a ban on imports. (The rationale for the import restriction proffered by Vietnam during its accession negotiations is discussed below in the section on Findings, Conclusions, and Recommendations.)

A VFA regulation on the SPS Enquiry Point inter-ministerial network is in the process of being implemented. Ms. Nga confirmed that draft VFA decisions would be made publicly available for comment by interested persons, including the private sector. She also stated that the list of permitted food additives and maximum residue levels (MRLs) was being revised and is close to completion. In an encouraging sign of improved transparency, a draft revised list had been circulated to and comments received from several persons, including the food industry.

Dr. Long stated that Codex MRLs generally were being adopted, but that in export markets where relevant MRLs are lower, such as in the EU and US markets, the MRL of the export market would be adopted. He also noted that regional MRLs on mycotoxins that reflected the climatic conditions of southeast Asia were being considered. Dr. Long acknowledged that these regional standards would set MRLs at levels higher than those permitted in the EU.

³ See Report of the Working Party on the Accession of Vietnam, WT/ACC/VNM/48, 314-316 (Oct. 27, 2006).

On the subject of biotechnology and genetically modified (GM) food, Dr. Long stated that the current labeling requirement is that food containing 5 percent GM content or greater must be labeled as containing GM inputs. That labeling requirement is under review, in consultation with the Ministry of Environment and Natural Resources. At the present time Vietnam follows the EU guidelines for monitoring and assessing GMOs. Dr. Long added that technical assistance is needed to support labs for monitoring GM products and foods. Later in the year APEC will be hosting a workshop on GM foods.

There appears to be some disconnect between GM labeling as contemplated by the Food Administration and GM labeling as reflected in the recent Labeling Decree promulgated by Ministry of Science and Technology (MOST). The MOST labeling decree defers to international agreements on the subject of GM labeling, of which there are none. The MOST labeling decree is discussed in greater detail below.

In explaining the jurisdictional lines of the various ministries that have an oversight role in enforcing food safety and hygiene regulations, Dr. Long explained that imported unprocessed food products derived from plants (e.g., bulk agricultural commodities) are inspected by the Plant Protection Department for compliance with standards set by MOH on MRLs for plant pesticides and other contaminants, and that imported unprocessed meat products are examined by the Department of Animal Health for compliance with standards set by MOH on MRLs for veterinary drugs and other contaminants. Imported, fully-processed food products and beverages are inspected by MOH. In the case of fish and fish products, pursuant to an inter-ministerial circular issued by MOH and the Ministry of Fisheries, the Fisheries Ministry is responsible for issuing export and import certificates for compliance with food safety and hygiene requirements for all fish and seafood products. Dr. Long conceded that in certain instances, the line dividing jurisdictional responsibilities between the various ministries is not always a bright one. For example, there occasionally has been some confusion over which ministry is responsible for enforcing food safety and hygiene laws once an animal carcass has left a slaughterhouse and from there has been subject to further processing short of being butchered into consumer-size cuts of meat. There has been some dispute whether the responsibility rests with the Ministry of Health or MARD.

Finally, Dr. Long noted that pursuant to an inter-ministerial circular issued by the Ministries of Health and Fisheries, the Ministry of Fisheries is responsible for ensuring compliance with food safety and hygiene standards within the fisheries and aquaculture industries. The Ministry of Fisheries also issues hygiene export certificates for fish and seafood.

MEETING WITH DEPARTMENT OF ANIMAL HEALTH, MARD

On March 20, Professor Kennedy met with a delegation of six representatives of the Department of Animal Health, led by Dr. Bui Thi Cuc, Vice Chief of Planning, International Cooperation and Science Division, and Dr. Dau Ngoc Hao, Department Vice Director. The subjects of animal quarantine, disease control, and veterinary drugs were discussed.

Vietnam's animal quarantine procedures are generally in conformity with OIE standards. DAH uses the veterinary export certificate forms prescribed by OIE.

However, the OIE Terrestrial Animal Health Code sets out disease-specific protocols to be observed during animal quarantine, rather than a “one-size-fits-all” procedure. DAH is in the process of amending its regulations to conform to OIE’s disease-specific quarantine protocols.

On the subject of prompt reporting of listed diseases to the OIE and other responsible international bodies, such as the World Health Organization in the case of animal diseases transmissible to humans, DAH uses the web-based global reporting information system set up by the OIE for reporting listed diseases. The OIE requires that listed diseases be reported within 24 hours of the first occurrence. To meet this reporting obligation DAH requires provincial authorities to notify Ministry officials in Hanoi of the occurrence as soon as possible. In practice this means a three-day delay from suspicion to confirmation that a listed disease exists. DAH has set up an “early warning” system to detect disease outbreaks that includes both passive surveillance (regular reporting by farmers and detection by officials during non-disease related visits to farms) and active surveillance (random, unannounced visits to farms by animal health authorities). When asked about compensation paid to farmers who have diseased livestock destroyed, DAH reported that farmers are compensated (or “subsidized,” as DAH prefers to call it) approximately 50 percent of the market value of the destroyed animal.

Regarding the production and importation of veterinary drugs, the subject of requiring the retrieval of drugs that are imported into Vietnam for the first time was discussed. This was a subject raised in the Working Party Report where a WTO member complained that such retrievals were unwarranted.⁴ DAH’s position, which is supported by Article 4 of the SPS Agreement on equivalence, is that all new vet drugs must be retried in Vietnam before they may be sold in the country, absent a protocol or mutual recognition agreement with the country of manufacture. Concerning the requirement that vet drug manufacturers within Vietnam be certified as following Good Manufacturing Practice, manufacturers must be certified either by DAH or by an independent certifying company, at the option of the manufacturer. Government certification is less expensive but slower.

Finally, DAH reported that it was receiving meat inspection training from USDA in October 2007, training from the EU on MRLs for vet drugs and heavy metals, and training from the Swiss government on conducting risk assessments.

MEETING WITH NATIONAL FISHERIES QUALITY ASSURANCE AND VETERINARY DIRECTORATE, MINISTRY OF FISHERIES

On March 21, Professor Kennedy met with a delegation of four officials from the National Fisheries Quality Assurance and Veterinary Directorate (NAFIQAVED), Ministry of Fisheries. The NAFIQAVED delegation was led by Dr. Nguyen Nhu Tiep, Head, Aquatic Animal Health Division. NAFIQAVED has responsibility for human health and food safety issues in fish processing, and for aquatic animal and plant health matters. Dr. Tiep explained that Vietnamese laws or ordinances are essentially framework laws enacted by the National Assembly that assign functions and responsibilities to one or more ministries. The responsible ministries in turn are expected to draft implementing decrees and decisions. Because of the large volume of regulations that need to be drafted, there is a delay of anywhere from three to four years between the time the National Assembly enacts an ordinance and the time a responsible ministry adopts implementing decrees and decisions.

⁴ See Working Party Report on Vietnam’s WTO Accession, ¶ 322.

An additional explanation for the delay in preparing implementing regulations is limited human resources and capacity. NAFIQAVED employs technical personnel who do not have a legal background or strong legal document drafting skills.

NAFIQAVED has identified 43 Fisheries Ministry documents that relate to SPS requirements. At least 19 of those documents have to be revised either because of the SPS Agreement or because they are outdated and inconsistent with current national law.

Dr. Tiep explained that the Ministry of Fisheries is responsible for certifying fish and seafood processing plants for compliance with HACCP and Good Manufacturing Practice. NAFIQAVED will not only certify such processing plants for compliance with Vietnamese standards, but also as being in compliance with EU standards. The EU will accept NAFIQAVED certification for products shipped from these plants. Private certification is also available for processing plants that desire it, but such certification is in addition to, and not in lieu of, NAFIQAVED certification.

With regard to MRLs for veterinary drugs, pesticides, and other contaminants, Dr. Tiep confirmed that NAFIQAVED follows Codex standards. However, the list of substances that Vietnam has banned is not as inclusive as the comparable lists maintained by the WTO's Quad members (Canada, the EU, Japan, and the US).

In a related context, Dr. Tiep referred to the problem that Vietnam had about five years ago involving the unauthorized use of the broad spectrum antibiotic chloramphenicol by shrimp farmers. Chloramphenicol is known to cause aplastic anemia in humans, and its use is banned in the US and the EU. Shrimp farmers in Vietnam were using it because it is cheap and effective. NAFIQAVED adopted a three-pronged approach that successfully stopped the use of chloramphenicol: (1) law enforcement, with heavy fines being imposed for detected use of the drug; (2) education through the use of (a) print media, (b) radio and television broadcasts at the provincial level, and (c) "at pond" and "at factory" training, all of which were designed to educate farmers and processors about the economic consequences of using chloramphenicol; and (3) research to find alternatives to the drug. The research found that by using GAP (Good Agriculture Practices), such as maintaining clean water in shrimp ponds, the need for any antibiotics could be eliminated. Dr. Tiep summed up by noting that all trade disputes with the EU, the US, and Japan involving fish and seafood products have been successfully resolved and that trade with them resumed. He added that less than 0.1 percent of all export consignments have an SPS problem after they reach their destination.

On the subject of meeting private standards, Dr. Tiep commented that processors must, of course, in all events meet national SPS standards and then are free to meet private standards if they conclude that it is in their economic interest to do so. He noted that private distributors might be interested in selling a seafood product that, for example, could be marketed with an eco-friendly "green" label. The question is whether such a product can command a premium price that is sufficiently high to warrant the additional expense of meeting the standards for the eco-friendly label.

In the area of technical assistance, Dr. Tiep identified three areas where such assistance is needed: (1) conducting risk assessments, (2) developing world-class negotiating skills, and (3) developing high quality document drafting skills. TA on building capacity to conduct risk assessments is needed in general, and specifically to meet OIE animal quarantine and inspection standards.

Regarding improved negotiating skills, Article 6 of the SPS Agreement calls for countries to negotiate non-reciprocal equivalence agreements and reciprocal mutual recognition agreements. For example, in the bilateral negotiations between the US and Vietnam on Vietnam's WTO accession, Vietnam agreed to recognize US food safety and hygiene inspections for beef, pork, and poultry as equivalent to Vietnam's inspection systems. However, this agreement was not a mutual recognition agreement where the US agreed in return to recognize Vietnam's food safety inspections for meat as equivalent to those of the US. Negotiating SPS equivalence and mutual recognition agreements will be an on-going exercise for all WTO members. Dr. Tiep believes that although Vietnam's representatives in such negotiations have the technical knowledge, they lack the negotiation skills to conclude agreements that benefit Vietnam.

Finally, Dr. Tiep noted how poorly drafted SPS legal documents are. Poorly written documents lack clarity and contain ambiguities. They are, in a word, non-transparent. They are a reflection of documents written by persons with solid scientific backgrounds, but who have no particular expertise or skill at document drafting. NAFIQAVED anticipates having to re-draft between ten to fifteen 10-15 SPS documents through 2010 as part of its National SPS Action Plan.

MEETING WITH DIRECTORATE FOR STANDARDS AND QUALITY (STAMEQ), MINISTRY OF SCIENCE AND TECHNOLOGY

By way of background, Vietnam's Codex Committee, which is an inter-ministerial committee, is headquartered within the Ministry of Standards and Technology (MOST). STAMEQ takes lead responsibility for Vietnam's labeling laws. Because product labeling covers not only food items but also industrial products, there is a good deal of cross-over between the WTO Agreement on Technical Barriers to Trade (the TBT Agreement) and the SPS Agreement. MOST defers to MARD on labeling issues related to food.

On March 23, a meeting was held with a delegation of six representatives of STAMEQ to discuss Labeling Decree No. 89/2006/ND-CP that went into effect March 13, 2007. A STAMEQ representative explained that the March 13, 2007 Labeling Decree is a comprehensive decree that covers labeling of all products, both industrial and agricultural. He also explained that during the drafting of the labeling decree, the Codex labeling standard and the labeling laws of ASEAN countries, China, Canada, and the US were consulted. In connection with the Labeling Decree, a STAMEQ spokesperson explained that a Minister's decision implementing the decree is in draft stage. Thus, many of the details on how the decree will work in specific cases must await the Minister's decision.

Four specific issues were raised and discussed during the meeting concerning the Labeling Decree: (1) Article 16 concerning product dating, (2) Article 15 on listing the quantity of ingredients, (3) Article 19.4 on irradiated foods, and (4) Article 19.4 on genetically-modified foods or foods containing genetically-modified ingredients.

Product label dating. Regarding product dating of imported food items, a May 31, 2006 understanding reached between the US and Vietnam confirms that processed food items will only require a "best-if-used-by" date on the label. Pursuant to that understanding, the STAMEQ representative acknowledged that for all but raw food materials and food additives, Vietnam would accept imported food products bearing a "best-if-used-by" date. A circular is being drafted to reflect

this bilateral understanding. Under the MFN obligation, this US-Vietnam understanding will be generalized and applied to all imported processed food items from other WTO member countries.

Another issue concerning product dating is the requirement in Article 12 of the Decree requiring that food labels include both the product's date of manufacture and the expiration date. Codex Standard 1-1985 provides that a country may require that a food label contain the following items of information: (1) the name of the food, (2) a list of ingredients, (3) the net contents and weight, (4) the name and address of the manufacturer or distributor of the food, (5) lot identification, and (6) a date marking of "best before" with the date indicated. The Codex standard has no other requirement regarding dates, including the date of manufacture, on food labels. When questioned, the STAMEQ representative stated that other countries require both dates. He added that the rationale for requiring both dates was for consumer protection and enhanced consumer choice. For example, if a canned meat item has a shelf life of three years, by including the date of manufacture the consumer might decide to buy the canned meat item that was more recently manufactured, even though the "best before" date was still months away. He further stated that preservation conditions vary from country to country, so by requiring both dates on a label a consumer can decide to buy the fresher of two identical food items.

List of quantities of ingredients. Regarding the requirement that the quantity of ingredients be listed on a label, it was explained that for foodstuffs the requirement that "ingredients or ingredient quantities" be identified on the label is at the manufacturer's option. In other words, Article 12.2(d) of the Decree on foodstuffs labeling is stated in the disjunctive, and the manufacturer or distributor has the option of whether to state the ingredients only or the quantity of ingredients. Codex Standard 1-1985 does allow countries to require quantity labeling when a claim is made that a food product is high or low in a particular ingredient.

Irradiated and GM food. Regarding irradiated food, Article 19.4 of the Decree provides that "[f]or goods or goods ingredients which have been x-rayed or genetically modified, their labels shall be presented in accordance with treaties to which Vietnam is a contracting party." In the case of irradiated food, it was pointed out that Codex is a treaty, that Codex permits countries to require an irradiation label on food that has been irradiated, and that Vietnam is a party to Codex. The STAMEQ representative stated that a Minister's decision is being drafted that will identify which types of food will have to bear a label stating that the food item has been irradiated.

Finally, with regard to GM food, although Vietnam is not currently a party to any bilateral, regional, or multilateral treaty on GM food labeling, the STAMEQ representative stated that a Minister's Decision on GM labeling was in draft stage. He offered that this Decision would supersede Minister's Decision No. 212/2005 on GM labeling which now requires products with 5-percent GM content to be labeled as such. He also stated that Vietnam was headed in the direction of the EU on GM food labeling, and that whatever the Vietnamese standard turned out to be, that it would not be stricter than that of the EU.

At the conclusion of the meeting the STAMEQ representative noted that his department could benefit from an international food labeling database on countries' labeling requirements for specific types of foods and food groups. Professor Kennedy offered to supply STAMEQ with information on FDA food labeling requirements.

MEETINGS WITH OTHER PERSONS AND ORGANIZATIONS

On March 13, Professor Kennedy met with the former Vice Minister of Fisheries, Dr. Nguyen Thi Hong Minh, who provided an overview of the successes and difficulties that the Vietnamese seafood industry has had in developing an export-oriented industry. Dr. Minh explained the important role played by the Denmark International Development Agency (DANIDA) in bringing the Vietnamese seafood industry up to international SPS standards.

On March 15, Professor Kennedy met with Dr. Nguyen Huu Dung, General Secretary, and Nguyen Hoai Nam, Director, of the Vietnam Association of Seafood Exporters & Producers (VASEP). Dr. Dung explained the history of VASEP, its development, and the success of the Vietnamese fish and seafood industry in global markets. He noted the growing challenge of meeting private industry standards in developed country markets. The abuse of antibiotics by the shrimp aquaculture industry and the misuse of preservatives in the fishing industry are two of the more recent problems that VASEP has had to address.

FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

Without question the most encouraging developments in Vietnam following its WTO accession are (1) the commitment spearheaded by the Prime Minister's office in the area of SPS transparency, and (2) the National Action Plan to bring Vietnam's SPS legal regime up to international standards by 2010 (discussed below in connection with harmonization).

The Prime Minister's transparency decision is still in draft form as of this writing. It has been distributed to all of the affected ministries for their comment before it goes into effect next month. The final decision will create an inter-ministerial SPS network that will obligate each ministry with SPS responsibility to post on the SPS Enquiry Point's website final decisions in advance of their effective, as well as draft decisions for comment by interested parties. The obligation to make available all laws with trade effects to interested persons in advance of the date when they enter into effect is a core WTO obligation found in GATT Article X and the US-Vietnam BTA.⁵

The WTO SPS Agreement has six main components: (1) transparency, (2) harmonization of SPS-related laws and regulations, (3) equivalence, (4) risk assessment, (5) control, inspection, and approval procedures, and (6) technical assistance. Vietnam's commitment to implementing the provisions of the SPS Agreement, including bringing its sanitary and phytosanitary laws into conformity with international standards, appears to be strong. Vietnam's progress and needs in each of these six areas is discussed next.

TRANSPARENCY

On the subject of transparency, Annex B of the SPS Agreement requires WTO members to designate an SPS enquiry point and national notification authority. The enquiry point is responsible for answering relevant questions on national SPS-related laws. The notification authority is responsible for ensuring that new or changed national SPS-related measures are notified to the WTO. Vietnam has combined the two functions into a single office, the SPS National Office that is part of the International Cooperation Department of the Ministry of Agriculture and Rural Development.

⁵ GATT Article X:2 provides: "No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published." To the same effect is Chapter VI, Article 1 of the BTA which provides that "Each Party shall publish on a regular and prompt basis all laws, regulations and administrative procedures of general application pertaining to any matter covered by this Agreement. Publication of such information and measures will be in a manner which enables governmental agencies, enterprises and persons engaged in commercial activity to become acquainted with them before they come into effect and to apply them in accordance with their terms. Each such publication shall include the effective date of the measure, the products (by tariff line) or services affected by the measure, and all authorities that must approve or be consulted in the implementation of the measure, and provide a contact point within each authority from which relevant information can be obtained."

With financial support from the EU, a database, software, two dedicated servers, and new computers have been delivered and will be installed shortly in the SPS National Office. During the meeting with representatives from the SPS National Office, a concern was expressed that the Office might not be adequately staffed. Five full-time employees have been assigned to the Office, which includes the Office Director and an IT person. There is an outstanding request for two more staff employees. The staff will be English-Vietnamese bilingual, and a request has been made that one staff member be French-Vietnamese bilingual. The plan is to assign to a specific staff member responsibility for one of the three SPS subject matter areas, i.e., food safety, animal health, and plant health. Paying compensation adequate to attract qualified persons was identified as a problem.

A draft Prime Minister's Decision was issued in March 2007 that if promulgated will establish an inter-ministry network to ensure that all SPS measures issued by the respective ministries and departments are posted on the SPS National Office's website. The draft Decision has been distributed to the ministries with responsibility for SPS measures for their comment before the draft Decision is finalized and promulgated. The draft Decision calls for web posting of both final decisions and regulations and draft SPS-related documents. The current informal practice is for ministries and departments to make draft documents available to outside parties for their comment, but it is the ministry or department that decides to whom to send the drafts. Under such an ad hoc practice draft documents will reach some, but not necessarily all, persons with an interest in the document. Posting draft documents on the SPS National Office's website will ensure that such documents will reach a wider audience. If implemented, not only will this new practice boost transparency, but it will also improve the quality and promote the WTO-consistency of new SPS-related laws and regulations.

Vietnam's decision to publish draft legislation for comment goes an important step beyond any WTO commitment and reflects best practice. Its decision to publish draft ministerial SPS regulations fulfills a commitment that Vietnam made in the US-Vietnam BTA to "allow, to the extent possible, the other Party and its nationals the opportunity to comment on the formulation of laws, regulations and administrative procedures of general application that may affect the conduct of business activities covered by this Agreement."⁶ Clearly, it is impossible to comment on draft regulations unless one knows of them. If such a procedural mechanism had been in place when MOST was in the drafting phase of the recent Labeling Decree that went into effect on March 13, 2007, misunderstandings with interested outside parties might have been avoided and clarifications made to the Decree.

What Vietnam is in the process of creating approaches the notice-and-comment provisions of the Administrative Procedures Act governing proposed rulemaking by U.S. federal agencies. If such draft regulations were to be published in advance in the Official Gazette and then followed by an opportunity for comment, then we would have the functional equivalent to U.S. agency rulemaking practice where notice of proposed rulemaking is published in the Federal Register. In the interests of greater transparency Vietnam should move to a practice where all draft ministerial decisions are published in the Official Gazette for comment. Until such time, however, what it is in the process of

⁶ US-Vietnam BTA, Ch. VI, Art. 3.

implementing is a significant development. Knowing that its draft regulations will be subject to public scrutiny should lead to more careful drafting by the responsible departments and ministries. At the same time, Vietnam will benefit from the comments that it receives because such comments will be a form of free technical assistance.

Areas of greatest concern regarding transparency include the quality of Vietnam legal documents, prompt notification of animal diseases and plant pest outbreaks, Vietnam's rule making process, and the potential for conflicting legal requirements in view of Vietnam's complex institutional structure for managing its SPS legal regime.

Low Quality of Vietnam's SPS-Related Legal Documents. A general criticism of Vietnamese legal documents is the poor quality of their drafting. Ordinances and decrees are not well organized, lack clarity and internal consistency, and are rife with ambiguities. With perhaps the exception of the Ministry of Justice, the qualifications and background of the SPS legislative and regulatory drafters are not in law. This obviously raises an important issue of transparency at two levels: first, unclear laws make it difficult for importers and others subject to SPS legislation to know what their rights and obligations are; and second, unclear and ambiguous laws give ill-intentioned administrators an opportunity to engage in arbitrary and capricious acts.

As Vietnam adopts international standards (discussed immediately below), greater clarity should be brought to SPS legal documents as international definitions and the texts of international standards are incorporated into Vietnam's SPS legal documents. A representative of NAFIQAVED requested technical assistance in the area of legal document drafting, noting that the drafters are scientists and persons with technical backgrounds with no particular expertise in preparing legal documents. The same representative pointed out that Vietnam's inability to draft high quality legal documents impairs its ability to participate effectively in the work of the international standards setting bodies. Article 10.4 of the SPS Agreement calls upon WTO members to facilitate the active participation of developing countries in these bodies. However, rather than spend resources on improving the legal drafting skills of department scientists and technicians, it would be more efficient to hire and/or train persons with experience in legal drafting to perform the role of legal document drafter.

Prompt Notification of Animal Disease and Plant Pest and Disease Outbreaks. Turning to the subject of notifiable animal and plant diseases and plant pests, prompt notification of plant pest and animal disease outbreaks to responsible international bodies is critical, first to protect human health and life in the case of animal diseases that are zoonotic, such as avian flu, and second, to minimize the negative economic impacts that can follow either kind of outbreak.

Within 24 hours of the first occurrence of a listed disease, such as avian flu, the OIE Terrestrial Animal Health Code requires notification to its Central Bureau (a parallel notification obligation exists under the IPPC for notifiable plant pests). Establishing an early response and notification system between the provincial and national levels in the event of a disease outbreak is essential to the maintenance of an internationally credible SPS system.

In the Working Party Report on Vietnam's Accession to the WTO, Vietnam committed to promptly report any animal or plant disease that is notifiable.⁷ However, Vietnam legislation does not have a

⁷ See Working Party Report on Vietnam's WTO Accession, ¶ 325.

clear requirement that such notification be given by the responsible ministry. Indeed, under the Vietnam Veterinary Ordinance and the implementing Decree, outbreaks of animal epidemics that are zoonotic (i.e., transmissible to humans from animals) are handled first at the provincial level. Only when such epidemics occur in two provinces is control and responsibility formally transferred to the ministerial level.

Equally troubling is a concern that affected farmers may have an economic disincentive to promptly report disease outbreaks because of the low compensation provided them when their livestock are destroyed (approximately 50 percent the value of the animal destroyed, according to representatives of the Department of Animal Health). A tension may also exist between ministries with conflicting demands. For example, MARD's international mandate to report promptly an outbreak may be at odds with the desire of the Ministry of Culture and Information to promote tourism and, therefore, to delay reporting a purported outbreak. Nevertheless, while promptly reporting a disease outbreak will undoubtedly have short-term, negative economic consequences, the failure to promptly report the outbreak of such diseases can have an even greater long-term negative impact for a country's future exports of such products. Trust and confidence in the integrity of a country's animal and plant health authorities can be destroyed that may take years to restore.

A case study commissioned by the WTO on an avian influenza outbreak in Chile and Chile's response to it provides a good example of best practice in this area. The case demonstrates that it is possible for a developing country to handle complex SPS emergencies which, if not controlled within days, can have potentially drastic consequences. It also demonstrates that by being transparent with importers the necessary confidence that the case has been resolved can be developed. The importance of this last point cannot be overstated in the case of an exporting country that does not enjoy a reputation for openness. The WTO case study can be downloaded from the WTO's website at www.wto.org/english/res_e/booksp_e/casestudies_e/case10_e.htm.

Inadequate Transparency in the Rule-Making Process. On the subject of regulatory rulemaking, improvements have been made and are planned that will foster an environment of greater transparency by providing an opportunity for comment on draft regulations. With the use of the Official Gazette and the creation of an e-Gazette for publishing agency regulations, Vietnam is moving closer to a US model. However, at the present time concerned departments or ministries solicit input on draft documents directly from persons and organizations that they consider to be "interested," instead of making it generally known that certain regulations are being drafted. Publishing draft documents will give persons or organizations an opportunity to self-identify as being "interested," and thereby allowing them to comment. As a best practice, the rulemaking process in the United States under the Administrative Procedures Act is a model that Vietnamese ministries might want to emulate.

Potential for Conflicting Legal Requirements. Finally, MARD had made an inquiry as to how other countries manage their SPS legal regime. There seems to be some sense or at least a view that Vietnam has too many "cooks" in its SPS "kitchen". In other words, with more than six ministries assigned responsibility in the SPS area, jurisdictional lines can become blurred.

With six Vietnamese ministries having major responsibility for SPS-related matters, the potential exists for conflicting legal requirements. In its *Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems*, Codex warns that “[w]here different authorities in the same country have jurisdiction over different parts of the food chain, conflicting requirements must be avoided to prevent legal and commercial problems and obstacles to trade.”⁸ The situation that Codex warns of -- different authorities in the same country having jurisdiction over different parts of the food chain -- is precisely the situation that exists in Vietnam.

Given the number of ministries vested with jurisdiction in regulating the SPS area, two risks are present: (1) conflicts of jurisdiction in cases where responsibilities overlap, and (2) conflicts of interest, where the ministry responsible for promulgating SPS standards is also the ministry responsible for enforcing them. Nevertheless, having met with representatives of the ministries with core SPS responsibilities, jurisdictional lines are clear in the minds of the responsible ministries. MARD has asked what the best practice is in this regard and has made a request to conduct future training or a workshop on alternatives to its current system. While the Vietnamese SPS institutional structure might be complex, it is not clear that the structure of Vietnam’s SPS institutional regime is broken and thus in need of repair.

HARMONIZATION OF STANDARDS

In its Protocol of Accession to the WTO, Vietnam agreed to apply the Agreement on the Application of Sanitary and Phytosanitary Measures from the date of accession (January 11, 2007) without recourse to any transition period.⁹ Pursuant to a January 2007 draft decision issued by the Prime Minister, all Vietnamese SPS-related laws are to conform to international standards, and all ministries with SPS responsibility are to submit an action plan or “roadmap” describing how the relevant ministry will fully implement all international obligations in the area of SPS by 2010. Each department and ministry visited referred to their SPS Action Plan which they were in the process of finalizing and submitting to the Prime Minister’s office. (Because the Prime Minister’s Decision and the action plans are in draft form, copies were not made available.)

Article 3 of the SPS Agreement contains a harmonization obligation. Harmonization is the process of bringing the various national laws of a group of countries on a particular subject into close approximation with one another using a uniform international standard as a benchmark or guide. However, it is important to understand exactly what the SPS Agreement requires in the way of harmonization.

The WTO SPS Agreement does not obligate WTO members to maintain high standards or even to adopt international standards (the benchmark for international standards are those developed by Codex, OIE, and IPPC). If a country wants to have national standards that are lower than international standards, it is free to do so, provided it applies such standards in a non-discriminatory manner

⁸ CAC/GL 26-1997, Section 6(19).

⁹ See Working Party Report on Vietnam’s WTO Accession, ¶ 328. None of the countries to accede to the WTO immediately prior to Vietnam – Armenia, Macedonia, Taiwan, and China – had an SPS transition period.

relative to the like domestic product (the national treatment obligation) and in a non-discriminatory manner with regard to imports of the like product from different countries (the MFN obligation).

Next, the SPS Agreement encourages harmonization of members' national standards by creating an incentive for adopting international standards. Thus, if a country does adopt SPS standards that are higher than existing national standards, such standards are presumptively consistent with the SPS Agreement, provided they conform to the international standards set by the three international standards setting bodies recognized by the WTO.

Third, a WTO member may adopt a standard that is higher than a relevant international standard if there is a scientific justification for it, or if the international standard does not achieve the importing country's appropriate level of SPS protection based on a risk assessment conducted by the importing country. Thus, in order for a country to adopt standards higher than international standards or to develop its own standard when no international standard exists, it must either (1) have in place the technical infrastructure to conduct WTO-consistent risk assessments that can withstand scrutiny under the SPS Agreement, or (2) borrow higher standards set by other countries that have conducted their own risk assessment, and trust that a technically sound risk assessment was conducted or be in a position to critically review and assess another party's risk assessment for consistency with the SPS Agreement.

In the case of Vietnam, in its Protocol of WTO Accession it did not request a transition period for adopting the SPS Agreement basically because its national SPS standards are lower than or equal to international standards at the time of its accession. While the SPS Agreement is silent on the question of maintaining SPS standards that are lower than international standards (provided such standards are applied in a non-discriminatory manner), the maintenance of low standards is not necessarily in the best interests of humans, animals, or plants within the country. Vietnam's decision to adopt international standards is welcome news for the people of Vietnam.

At the same time, however, there is a risk that a system of double standards might develop, with one set being higher in the case of exports and the other set being lower in the case of imports and products produced within the country for domestic consumption. This is a phenomenon that has occurred, for example, in sub-Saharan Africa. On more than one occasion when asked what Vietnam does when exporting to a country with an SPS standard higher than its own, the answer was always that "the buyer's standard is met." While that does not necessarily mean that what is sold in the Vietnamese market is unsafe, it does suggest that what is sold in Vietnam could be of lower quality than what is sold abroad. In that case the living standards of the Vietnamese are not improved. Again, the SPS Agreement is silent on such a development.

Many persons incorrectly believe that the SPS Agreement mandates immediate adoption of international standards upon accession to the WTO, when it does not. Article 3.1 of the SPS Agreement provides that WTO members are to "base" their SPS measures on international standards, whereas Article 3.2 states that if a member's SPS measures "conform to" international standards, such national standards then enjoy a presumption of consistency with the SPS Agreement. The two obligations are different. The WTO dispute settlement panel in the *EC -- Beef Hormone* dispute incorrectly equated the two terms, and thus would have imposed a present obligation on WTO members to adopt immediately all international standards if they exist. The WTO Appellate Body reversed, stating that the ordinary meaning of "based on" is different from "conform to." The

Appellate Body explained that “based on” requires simply that a thing “is supported” by another thing, a looser standard than “conform to.” In addition, the fact that the term “conform to” is explicitly used in Article 3.2 suggests that the drafters chose these different terms in order to convey different meanings. Finally, and most importantly, the Appellate Body held that the object and purpose of Article 3 anticipate harmonization of standards as a future goal, not as a present obligation. The Appellate Body stated that “[w]e cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations.” Moreover, Article 12.1 of the SPS Agreement creates a Committee on Sanitary and Phytosanitary Measures and gives it the task, *inter alia*, of “furtherance of its objectives, in particular with respect to harmonization,” and in Article 12.2 to “encourage the use of international standards, guidelines and recommendations by all Members.” The Appellate Body summed up by observing that harmonization of SPS measures of Members on the basis of international standards is projected in the Agreement, as a *goal*, yet to be realized *in the future*. To read Article 3.1 as requiring Members to harmonize their SPS measures *by conforming those measures with international standards*, guidelines and recommendations, *in the here and now*, is, in effect, to vest such international standards, guidelines and recommendations (which are by the terms of the Codex *recommendatory* in form and nature) with *obligatory* force and effect. The Panel’s interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding *norms*. But, as already noted, the *SPS Agreement* itself sets out no indication of any intent on the part of the Members to do so.

So, for example, a national law that “conforms to” and incorporates a Codex standard is, of course, “based on” that standard. On the other hand, a national law that is based on that same standard might not conform to it, as where only some, but not all, of the elements of the international standard are incorporated into the national law.

In short, Vietnam does not have a present obligation to “base” its national SPS laws on international SPS standards immediately upon accession, let alone “conform” its national SPS laws to international standards. Nevertheless, as confirmed in the meetings with ministry representatives, in the proposed National SPS Action Plan for adopting international SPS-related standards, it is Vietnam’s near-term goal to *adopt* international SPS standards, not merely to *base* its SPS laws on such standards. Pursuant to a draft Prime Minister’s Decision issued in January 2007 to launch a National SPS Action Plan, each Ministry with SPS responsibility will be asked to prepare an action plan and establish a timetable for adopting all relevant standards and guidelines issued by the three international standards setting bodies recognized by the WTO: the Codex Alimentarius Commission (food safety), the World Animal Health Organization (formerly known as the International Epizootics Organization or OIE on animal health), and the Secretariat of the International Plant Protection Convention (the IPPC on plant health).

Vietnam’s proposed National SPS Action Plan thus envisions the adoption of international standards by 2010, that is, that national SPS laws will “conform to” international standards, not simply be “based on” them. Vietnam has made the following progress to date:

- *Food Safety and Hygiene Standards*. The Ministry of Health estimates that approximately 60 percent of all Codex standards and guidelines have been adopted to date. The most important

standards are those setting maximum residue levels of pesticides, veterinary drugs, and contaminants in food. The challenge Vietnam faces in bringing its national standards up to Codex standards is the large number of smallholders farming in the country. This makes the adoption, implementation, and enforcement of higher international standards difficult.

- *Plant Health Standards.* On the subject of plant protection, the Plant Protection Department of MARD has amended its laws on pest risk analysis to conform to two of the 27 international standards for phytosanitary measures (ISPMs) promulgated pursuant to the IPPC: (1) ISPM No. 2, *Guidelines for pest risk analysis*, and (2) ISPM No. 11, *Pest risk analysis for quarantine pests, including analysis of environmental risks and living modified organisms*. Vietnam will have completed adoption of five more ISPMs by the end of 2007: (1) ISPM No. 5, *Glossary of phytosanitary terms*, (2) ISPM No. 10, *Requirements for the establishment of pest free places of production and pest free production sites*, (3) ISPM No. 20, *Guidelines for a phytosanitary import regulatory system*, (4) ISPM No. 21, *Pest risk analysis for regulated non-quarantine pests*, and (5) ISPM No. 23, *Guidelines for inspection*. Pursuant to its draft SPS Action Plan, the Plant Protection Department intends to adopt the balance of the IPPC's twenty-seven ISPMs by 2010. The Department has requested technical assistance in conducting pest risk analyses.¹⁰
- *Animal Health Standards.* On the subject of animal health, MARD and the Ministry of Fisheries generally observe the standards set out in the OIE Terrestrial Animal Health Code and Aquatic Animal Health Code. Both Ministries are revising their quarantine and inspection regulations to more closely conform to OIE standards on animal quarantine and inspection. Both Ministries have in place a process for prompt identification and notification of listed (notifiable) diseases. This is especially important not only from an economic standpoint (preventing the spread of contagious diseases), but also from a public health perspective in the case of zoonotic diseases, such as avian influenza.

Vietnamese SPS Legislation That Raises Concerns of WTO Inconsistency. Two decrees, Labeling Decree No. 89/2006/ND-CP and Article 6.2 of Food Safety and Hygiene Decree No. 163/2004/ND-CP concerning the shelf-life of imported raw materials and food additives, raise concerns about consistency with the SPS Agreement.

The Labeling Decree that went into effect March 13, 2007 requires information on food labels that is inconsistent with the Codex standard on food labeling. Specifically, it requires that the label contain the date of manufacture *and* the expiration or "use-by" date. The applicable Codex standard on food labeling, *Codex Standard for the Labelling of Prepackaged Foods*, Stan. 1-1085 (Rev. 1-1991), only requires the latter. This issue was raised in the Working Party Report on Vietnam's WTO accession in the context of Article 35 of Food Safety Ordinance No. 12/2003/PL-UBTVQH11. Article 35(f) of that Ordinance provides that food labels must include, *inter alia*, "Date of production, use duration, food preservation duration". The Vietnamese representative stated that only one of the three items of information had to be included on the label, not all three.¹¹ In addition, the Codex standard only

¹⁰ A "pest risk analysis" is defined as "[t]he process of evaluating biological or other scientific and economic evidence to determine whether a pest should be regulated and the strength of any phytosanitary measures to be taken against it." ISPM No. 5, *Glossary of phytosanitary terms*.

¹¹ Working Party Report, ¶ 314. This provision is also an example of poor document drafting. Without the insertion of the word "or" after the term "use duration", the natural reading of this provision is in the conjunctive, not the disjunctive, i.e., that all three dates are required on a food label.

requires that the contents of the food item be listed, but not the quantities, unless a claim is made that the product is high or low in some ingredient.

As noted above in connection with the meeting with STAMEQ representatives, the new Labeling Decree has not yet been fully implemented and awaits the promulgation of a ministerial decision and a circular. Although concerns have been raised about the consistency of the Labeling Decree with international obligations, STAMEQ representatives responded that a circular is being drafted that will only require a “best-if-used-by” date on food labels of imported goods, pursuant to the May 31, 2006 understanding reached between the US and Vietnam. This circular will have general application to all imported food as a result of the generalizing effect of the most-favored-nation obligation of GATT Article I. Consequently, it appears as though Vietnam will end up with a double standard regarding dates that are required on food labels: (1) for imported processed food, a “best by” date only, pursuant to the circular that will implement the May 31, 2006 US-Vietnam understanding; and (2) for food processed in Vietnam, both a date of manufacture and an expiration date, pursuant to the March 13, 2007 Labeling Decree.

Regarding listing the ingredients or quantity of ingredient on a food label, a STAMEQ representative confirmed that a manufacturer or distributor had the option of identifying one or the other, but did not have to list both, on its labels.

Turning to the “2/3 shelf life” import ban for raw food materials and food additives, Article 6.2 of the Food Safety and Hygiene Decree bans the importation of raw food materials and food additives if the “use by” or “best by” date is less than two-thirds of the product’s useful life as measured from the date of importation. This matter was raised in the WTO Working Party Report. Vietnam’s rationale for this import restriction is “to avoid the importation of raw food materials and food additives close to expiration and thereby limit the risk that expired material and food additives be used in the production of food products as had been revealed by some on-site inspections.”¹²

Without launching into an extended legal analysis, Article 6.2 of the Food Safety and Hygiene Decree on its face violates GATT Article XI on import prohibitions. That GATT Article prohibits importing countries from banning the importation of goods generally, subject to narrow exceptions. One of those GATT exceptions is an import ban for human health reasons under GATT Article XX(b). If Vietnam is relying on that exception as the legal basis for its “2/3 shelf life” import ban, then the burden is on Vietnam to justify it as a measure “necessary” to protect human health and safety under GATT Article XX(b). Although Vietnam has raised a legitimate concern, its regulation arguably exceeds what is “necessary”, i.e., what is the least trade restrictive alternative, because at the time of importation the imported items are not intrinsically deleterious to human health. Less trade restrictive alternatives are available, including better law enforcement at the food processing stage.

In addition, if this restriction were extended to prohibit the internal sale of such products, then there would also be a GATT Article III national treatment violation, unless the same restriction was imposed on the sale of the domestic like product.

¹² Working Party Report, ¶ 314.

As reported in the Working Party Report on Vietnam's WTO accession, the Vietnamese representative stated that Vietnam "was in the process of implementing technical regulations on shelf life for raw food materials and food additives."¹³ In the March 20th meeting with representatives of the Ministry of Health, it was reported that the shelf-life decree is currently being reviewed by MOH.

Other Areas of Concern as Vietnam's Harmonization Process Progresses. As the process of adopting international standards progresses, there are two areas of concern.

First, a double standard could emerge, that is, products of Vietnamese origin that are exported will meet either a higher international standard or an even higher standard set by the country of importation, but the same product when destined for domestic consumption within Vietnam might be subject to a comparatively lower national standard. The SPS Agreement is silent on this phenomenon. This concern was raised during the meetings with the various government ministries, and each Ministry insisted that a legal regime of double standards would never be allowed to develop within Vietnam.

Second, maintaining national standards that are lower than international standards will, of course, postpone Vietnam's entry into export markets for its fruit, vegetable, and meat products. But even where Vietnam has adopted Codex standards, those standards might still be lower than the applicable national standards adopted by the European Union and the United States (e.g., in the area of maximum residue levels for certain plant pesticides), both of which are major export markets for Vietnam.

EQUIVALENCE

On the subject of equivalence, Article 4 of the SPS Agreement requires that importing countries accept the SPS measures of exporting countries as equivalent to those of the importing country, even when they are different, if the exporting country demonstrates that its SPS measures achieve the importing country's level of SPS protection. What has developed in practice is that WTO members negotiate equivalency agreements (non-reciprocal, as in the case of the US-Vietnam WTO Accession Agreement where Vietnam agreed to recognize USDA food safety inspections for beef, pork, and poultry as equivalent to its inspections systems) or mutual recognition agreements (reciprocal, e.g., the Canada-EU MRA on Good Manufacturing Practice in veterinary drug production where Canada and the EU recognize each other's GMP certifications for vet drug manufacturers within their respective jurisdictions). A representative of the Ministry of Fisheries believes that Vietnam's negotiators lack effective negotiating skills to secure equivalence agreements that are beneficial to Vietnam. He has requested technical assistance in this regard.

RISK ASSESSMENTS

On the subject of risk assessments, importing countries may maintain standards that are higher than international standards when the international standard does not meet the importing country's level of SPS protection, provided the importing country has conducted a risk assessment that evaluates the

¹³ Working Party Report, ¶ 315.

likelihood of entry or spread of a pest or disease, and further evaluates the associated biological and economic consequences. In addition, when international standards don't exist, an importing country must either conduct its own risk assessment to support its national standard or borrow one conducted by another country and adopt that country's standard as Vietnam's own. Finally, even when international standards do exist, risk assessments have to be conducted in plant and animal quarantine situations to establish that the risk has either passed (so that trade may resume) or is still present (so that an import ban may remain in place).

Legal challenges to an importing country's risk assessment is the only SPS-related matter that has resulted in WTO dispute settlement proceedings (four completed to date, two pending). With one exception, all of these SPS disputes have been between developed countries. The US has complained against Japan twice; the US and Canada have complained against the EU once; the US, Canada, and Argentina have complained against the EU once; Canada has complained against Australia once; and the EU has complained against the US and Canada for their continued imposition of retaliatory tariffs in the *Beef Hormone* dispute. The responding countries have lost in the four completed cases, largely due to reliance on improper risk assessments.

Risk assessments are technically complex and require human capacity (e.g., highly-trained scientists) and technical capacity (e.g., labs and databases). Their complexity is illustrated in Exhibit B, which is the table of contents for the risk assessment completed by the USDA in October 2006 on the risk of mad cow disease from cattle imported from Canada.

Every Ministry that was visited requested technical assistance in conducting risk assessments.

CONTROL, INSPECTION, AND APPROVAL PROCEDURES

On the subject of control, inspection, and approval procedures, Article 8 of the SPS Agreement calls for prompt and uniform import procedures, which are especially important in the case of perishable agricultural products. The Agreement also requires that import documentary and quarantine requirements be published. MARD and the Ministry of Fisheries generally observe OIE standards on these procedures, including the use of model forms that the OIE has published on veterinary export and import certificates. OIE quarantine protocols can vary depending on the animal and the disease in question. Both Ministries are in the process of adopting the OIE quarantine and inspection protocols. A representative of the Ministry of Fisheries has requested technical assistance in this regard.

In addition, the SPS Agreement requires that a domestic procedure be in place to review complaints that might arise during quarantine, inspection, and approval procedures. When representatives of the Department of Animal Health were asked how an importer could challenge a departmental quarantine or approval decision, the response was that the importer could use the dispute settlement mechanisms established by the OIE and WTO. This response shows a lack of understanding of the obligation in Annex C(1)(i) of the SPS Agreement that an importing WTO member provide "a procedure . . . to review complaints concerning the operation of [inspection and quarantine] procedures and to take corrective action when a complaint is justified."

Finally, although the subject of judicial review of administrative agency action is beyond the scope of this report, another facet of transparency involves the process for challenging agency determinations in administrative tribunals or courts. Both GATT and the BTA require countries to maintain administrative or judicial tribunals for reviewing challenges to administrative agency action.¹⁴ That is another development that should be closely followed.

TECHNICAL ASSISTANCE

Article 10 of SPS Agreement directs developed countries to provide technical assistance to developing countries so that developing countries may fully assume their obligations under the SPS Agreement. In the area of additional technical assistance, Vietnam needs such assistance in several areas.

First, technical assistance is needed in order to build capacity to conduct proper risk assessments. It was made abundantly clear during the meetings with the relevant ministries that all departments responsible for conducting risk assessments require additional donor support.¹⁵ Conducting a valid risk assessment is complex and requires both sophisticated human and technical capacity. Consequently, they are expensive and difficult to conduct. (For readers unfamiliar with what a risk assessment involves, attached as Exhibit B is the table of contents of the risk assessment that the USDA completed in October 2006 assessing the risk of the introduction of mad cow disease from cattle imported from Canada. It should provide some sense of the complexity of a risk assessment.) The capacity to conduct proper risk assessments is needed not only to support national SPS standards that are higher than international standards, but also to satisfy countries which import Vietnamese agricultural products that its products are pest-free and disease-free (on the export side) and, on the import side of the equation, to justify import bans on products from countries that are not free of pests or diseases of quarantine significance. It is preferable for Vietnam to develop its own risk analysis capacity than to rely on outside capacity.

¹⁴ GATT Article X:3(b) provides:

Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

In a parallel provision, Chapter VI, Article 7 of the US-Vietnam BTA provides:

The Parties will maintain administrative and judicial tribunals and procedures for the purpose, *inter alia*, of the prompt review and correction (upon the request of an affected person) of administrative action relating to matters covered by this Agreement. These procedures shall include the opportunity for appeal, without penalty, by persons affected by the relevant decision. If the initial right of appeal is to an administrative body, there shall also be the opportunity for appeal of the decision to a judicial body. Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of the right to any further appeal.

¹⁵ Annex A of the SPS Agreement defines the term "risk assessment" as "[t]he evaluation of the likelihood of entry, establishment 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; or the 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."

Second, technical assistance is needed to promote Vietnam's agricultural exports. This calls for a multidisciplinary approach that integrates the talents of sociologists, agriculture economists, food processing and food industry experts, and to a very limited extent, the talents and expertise of lawyers. The Vietnamese fish and seafood industry is a good example. As explained by Dr. Dung, VASEP's General Secretary, shrimp farmers were using the antibiotic chloramphenicol that is banned both in Vietnam and the EU and that is being smuggled from China and sold in local shops. Dr. Dung further explained that the shrimp aquaculture industry consists of many smallholders. Ensuring that they not only follow best aquaculture practices but that they also obey the law is problematic, given their numbers. While this presents a law enforcement problem both at the border and at local shops, educating shrimp farmers is probably a better approach to ensuring law observance. This observation suggests a role for the Ministry of Culture and Information.

Similarly, Dr. Dung explained how fishermen were using a preservative in lieu of ice, resulting in excessive levels of the preservative that resulted in Japan closing its market to Vietnamese fish imports. Policing the Vietnamese fishing fleet when it is out to sea is, of course, impossible. Educating them when they return to port seems to be the only effective approach.

A third problem, unrelated to the two just mentioned, is the one that the catfish industry is facing in meeting private industry standards that are set in export markets. Private industry standards fall into a WTO gray area or gap. Generally speaking, the WTO only regulates government conduct, not private party behavior (an exception would be where a government has delegated responsibility to a private body to set national TBT or SPS standards). The advantage that catfish production has over shrimp farming in Vietnam is that catfish production is on an industrial scale with far fewer producers, making quality control a more manageable task. The private standards phenomenon has mushroomed across the food industry.

Technical assistance provided through programs such as the USAID-supported Partnerships for Food Industry Development have helped food producers in developing countries raise the quality of their products so that food wholesalers and supermarket chains in developed countries will buy their products.¹⁶ There are three USAID-funded PFID programs: one for fruits and vegetables at Michigan State University (PFID-F&V), one for meat, seafood, and poultry at Louisiana State University (PFID-MSP), and one for herbs and natural products at Rutgers University. PFID collaborates with public and private partners to increase the competitiveness of small and medium scale producers in local, regional, and international markets. Its methodological approach is cross-disciplinary and taps the expertise of persons knowledgeable about food industry grades and standards. PFID's approach of building business partnerships throughout the supply chain and on a global basis is one that Vietnam's food industry might find worth pursuing. In a related vein, a need for technical assistance has been identified in connection with genetically-modified crops and food. The Ministry of Health will be monitoring and assessing the safety of GM products in coordination with the Ministry of Environment and Natural Resources.

Third, making sure that the SPS National Office becomes fully operational is critical. The EU has provided servers, computer equipment, and a database that are in the process of being installed. There

¹⁶ More information on PFID's services is available at <http://www.pfid.msu.edu/services.php>.

is a lingering concern about adequately staffing the Office to ensure that outside inquiries receive prompt attention. A related concern is with implementing the obligation to notify the WTO of all SPS laws and SPS trade measures. The inter-ministerial SPS network that the Prime Minister plans to establish and that is designed to provide notification of all draft and final SPS laws, decrees, and decisions should be monitored for effectiveness. The operation of the SPS National Office should be reviewed at least annually.

Fourth, in order to fully participate in the WTO SPS Committee and in the work of the international standards setting bodies, Vietnam's representatives must have strong negotiating skills. Therefore, providing training on negotiating should be considered.

Fifth, as noted, the quality of Vietnam's legal documents is low. Ministries should either hire staff who are trained in drafting legal documents or provide training on legislative drafting to current staff. Most US law schools offer specialized drafting courses on a variety of subjects, including wills, contracts, business agreements, and legislation. It should be possible to design an intensive legal drafting course with the assistance of a US law school, perhaps in partnership with a law school in Vietnam or with the Ministry of Justice.

Sixth, as trade with Vietnam increases, so too will trade disputes. Vietnam has a WTO obligation to establish independent administrative tribunals to review agency determinations and to issue reasoned opinions. Training on running administrative tribunals and establishing an adjudication mechanism that is transparent are critical.

Seventh, Vietnam is moving closer to having an open and transparent rulemaking process. Training on notice-and-comment rulemaking should be offered. A model for the process of rulemaking is that of the United States under the Administrative Procedures Act. Vietnam's rule makers should become familiar with it, perhaps in conjunction with training on administrative adjudication. In this connection, support for the growth of e-government, including the development of an e-Official Gazette in Vietnam, should be provided.

SUMMARY

Vietnam is in the process of undertaking a systematic and comprehensive review of its entire SPS legal regime. It will be a top to bottom review of all of its SPS laws with the goal of bringing its national SPS standards up to international standards on food safety and animal and plant health.

For at least the next three years Vietnam's SPS legal regime will be in a state of flux. Vietnam is just entering the first phase of bringing its SPS legal regime up to international standards. It is too early to say whether or not it will succeed, but the political will to fully implement the SPS Agreement seems to exist. Its proposed timetable is ambitious: to revise and amend all of its SPS laws to bring them into conformity with international standards by 2010.

Without generous technical assistance from donor countries and organizations, especially in conducting risk assessments, Vietnam's timetable may be unrealistic. Although Vietnam is focusing a tremendous amount of attention on SPS measures *per se*, insufficient attention is being devoted to the process of rulemaking and the process of making legal challenges to agency determinations.

A follow-up review of Vietnam's SPS legal regime should be conducted in late 2008-early 2009, with a focus on a single product through the entire food chain ("from farm to fork"). Such a review should include an assessment of SPS rulemaking procedures and trade dispute settlement processes.

EXHIBIT A: MEETING SCHEDULE AND PERSONS CONTACTED IN HANOI

Date	Agencies	Persons Contacted
March 13, 2007	U.S. AID	David Brunell Dennis Zvinakis
	Foreign Agricultural Service, USDA	John Wade Valerie Ralph
	SPS National Office, Ministry of Agriculture and Rural Development	Hoang Thi Dzung, Deputy Director General, International Cooperation Department Le Thanh Hoa, Director, SPS National Office
March 14, 2007	Multilateral Trade Department, Ministry of Trade	Nguyen Hai Yen, WTO Desk Officer
March 15, 2007	Department of Science and Technology, Ministry of Industry	Nguyen Phu Cuong, Deputy Director General Le Viet Nga, Senior Official
	Vietnam Association of Seafood Exporters & Producers	Dr. Nguyen Huu Dung, General Secretary Nguyen Hoai Nam, Director
March 16, 2007	Plant Protection Department, MARD	Hoang Van Thong, Chief of Planning, Science and International Relations Division
March 19, 2007	Vietnam Food Administration, Ministry of Health	Nguyen Hung Long, Deputy Director General, Vietnam Food Administration Tran Viet Nga, Integration & Development Div., Vietnam Food Administration
March 20, 2007	Department of Animal Health, MARD	Dr. Bui Thi Cuc, Vice Chief of Planning, International Cooperation and Science Division Dr. Dau Ngoc Hao, Department Vice Director
March 21, 2007	National Fisheries Quality Assurance and Veterinary Directorate (NAFIQAVED), Ministry of Fisheries	Dr. Nguyen Nhu Tiep, Head, Aquatic Animal Health Division
March 22, 2007	SPS National Office, MARD	Le Thanh Hoa, Director, SPS National Office
	U.S. AID Mission	David Brunell Dennis Zvinakis
March 23, 2007	Directorate for Standards and Quality (STAMEQ), Ministry of Science and Technology	Mr. Luong Van Phan, Deputy Director

EXHIBIT B: USDA BSE RISK ASSESSMENT CONCERNING CATTLE IMPORTS FROM CANADA



Assessment of Bovine Spongiform Encephalopathy (BSE) risks associated with the importation of certain commodities from BSE minimal risk regions (Canada)

Veterinary Services

Animal and Plant Health Inspection Service
United States Department of Agriculture

October 27, 2006

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