



**Legal Study on the Regulations on the Application of Sanitary and  
Phytosanitary Measures of the  
Common Market for Eastern and Southern Africa**

*The National Legal Implications of the COMESA Green Pass Certification Scheme*

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<sup>1</sup> The designations employed and the presentation of the material in this document do not imply the expression of any opinion whatsoever on the part of the United Nations or the Food and Agriculture Organization of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

The positions and opinions presented are those of the author, and do not necessarily represent the views of the Food and Agriculture Organization of the United Nations.

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## **Introduction**

In December 2009, the Council of Ministers of the Common Market for Eastern and Southern Africa adopted the Regulations on the Application of Sanitary and Phytosanitary Measures (the COMESA SPS Regulations). With reference to the WTO Agreement on Sanitary and Phytosanitary Measures, these Regulations provide rules and principles for the harmonized application of sanitary and phytosanitary measures within the Common Market and practical mechanisms for the implementation of these rules and principles, such as the COMESA Green Pass Certification Scheme.

This legal review was commissioned in response to concerns that were raised about the legal feasibility of the COMESA Green Pass Certification Scheme, specifically its consistency with the existing international legal obligations to which the COMESA Member States have committed. It assesses the potential legal impact of the COMESA SPS Regulations and the COMESA Green Pass at the national level and analyses their compatibility with the international legal instruments assumed by COMESA members, specifically those under the WTO SPS Agreement and the international reference standards to which it refers.

This legal review starts by analysing the international legal context in which the COMESA SPS Regulations are intended to be implemented as well as the international legal references to which the COMESA SPS Regulations refer. A review of the WTO SPS Agreement and the International Plant Protection Convention as well as their respective national legal implications is provided in the first part.

The second part of the review initially addresses the structure, the regulatory instruments and the regional integration objectives of the COMESA. Next, it provides an analysis of the COMESA SPS Regulations, by attempting to understand their substantive contents and the Green Pass Certification Scheme mechanism. This is achieved through the examination of the ordinary meaning given to the terms of the Regulations. Consideration is given to the explicit objectives stated in the Regulations, and reference is also made to discussions during meetings among drafters of the Regulations. The review tries to draw out the legal implications of the COMESA SPS Regulations on COMESA Member States' national legal obligations, with regards both to intra-community trade and their trade with Third countries and provides a set of recommendations towards the harmonized application of international legal instruments related to SPS matters in COMESA Member States.

## **Part 1 - The International Context: An introduction to the WTO Agreement on Sanitary and Phytosanitary Measures (WTO SPS Agreement)**

### **A - A Brief History of the WTO SPS Agreement**

National governments have always put in place regulatory measures for the protection of their territories against health risks contained in food and agricultural products.<sup>2</sup> In recent years, these measures have proliferated, creating an important impact on trade.<sup>3</sup> The increased liberalization of tariffs in trade in food and agricultural products caused a sharper focus on non-tariffs barriers, such as SPS measures, as obstacles to market access. Whereas many SPS measures are based on legitimate health concerns, the rationale for others might be more questionable. Indeed, governments may misuse SPS measures as disguised trade barriers for protectionist purposes.

In 1989, a separate Working Group on Sanitary and Phytosanitary Regulations and Barriers was commissioned to work on revising and strengthening the 'Standards Code' which was negotiated during the Tokyo rounds. Two separate agreements on technical barriers: the Agreement on Technical Barriers to Trade (TBT) applicable to technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards and the Agreement on Sanitary and Phytosanitary Measures emerged upon the conclusion of the Uruguay rounds in 1995.

### **B - The Scope and Objectives of the WTO SPS Agreement**

The intent of WTO Members under the WTO SPS Agreement is found in the Preamble of the Agreement. The WTO SPS Agreement aims at 'improving human health, animal health and phytosanitary situations in all Members'.<sup>4</sup> It also targets the 'establishment of a multilateral framework of rules and disciplines to guide the development, adoption, and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade'.<sup>5</sup> The Agreement finally envisages 'furthering the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex

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<sup>2</sup> Prévost D. & Van den Bossche, P., *The Agreement on the application of sanitary and phytosanitary measures* in 'Patrick F. J. *et al*, *The World Trade Organization: Legal, Economic and Political Analysis*, Springer (2005), Page 233

<sup>3</sup> *Id.*

<sup>4</sup> Paragraph 2 of the Preamble of the WTO SPS Agreement

<sup>5</sup> Paragraph 4 of the Preamble of the WTO SPS Agreement

Alimentarius Commission, the International Office of Epizootics and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal and plant health'.<sup>6</sup>

Article 1 of the WTO SPS Agreement defines what falls within its scope of application. It provides that the SPS Agreement applies to 'all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade'. The term 'sanitary and phytosanitary measures' is defined in Annex A of the SPS Agreement as any measure applied (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Annex A of the WTO SPS Agreement adds that 'sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety'.

### **C - Basic Rights and Obligations under the WTO SPS Agreement**

Under the SPS Agreement, Members may impose SPS measures provided that they are justified and supported by science and that they do not constitute a barrier to international trade. The basic rights of Members are set out under Article 2 of the SPS Agreement. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health. These measures must be applied only to the extent necessary to protect human, animal or plant life or health. They must be based on scientific principles and must not be maintained without sufficient scientific evidence. These measures must not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Finally, these

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<sup>6</sup> Paragraph 6 of the Preamble of the WTO SPS Agreement

measures must not be applied in a manner which would constitute a disguised restriction on international trade.

#### **D- Harmonization and the Role of International Standards Setting Bodies**

As stated previously, one of the primary objectives of the SPS Agreement is ‘... to further the use of *harmonized* sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health’.

Article 3 of the SPS Agreement defines how ‘harmonization’ is to be achieved. It mentions that Members must base their SPS measures on international standards, guidelines or recommendations, where they exist. This does not prevent Members from adopting SPS measures that result in a higher level of protection than would be achieved by measures based on international standards, provided that the measures are supported by scientific justification (Article 3.3). Article 3.2 adds that SPS measures that conform to international standards are presumed consistent with the SPS Agreement and GATT 1994.

It is important to define the differences between the meaning of ‘based on’ and ‘conform to’. This question was addressed in the *EC-Hormones* case. The Appellate Body contended that ‘based on’ does not have the same meaning of ‘conform to’. It held:

*“In the first place, the ordinary meaning of ‘based on’ is quite different from the plain or natural import of ‘conform to’. A thing is commonly said to be ‘based on’ another thing when the former ‘stands’ or is ‘founded’ or ‘built’ upon or ‘is supported by’ the latter. In contrast, much more is required before one thing may be regarded as ‘conform[ing] to’ another: the former must ‘comply with’, ‘yield or show compliance’ with the latter. The reference of ‘conform to’ is to ‘correspondence in form or manner’, to ‘compliance with’ or ‘acquiescence’, to ‘follow[ing] in form or nature’. A measure that ‘conforms to’ and incorporates a Codex standard is, of course, ‘based on’ that standard. A measure, however, based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure. In the second place, ‘based on’ and ‘conform to’ are used in different articles, as well as in differing paragraphs of the same article. Thus, Article 2.2 uses ‘based on’, while Article 2.4 employs ‘conform to’. Article 3.1 requires the Members to ‘base’ their SPS measures on international standards; however, Article 3.2 speaks of measures which ‘conform to’ international standards. Article 3.3 once again refers to measures ‘based on’ international standards. The*

*implication arises that the choice and use of different words in different places in the SPS Agreement are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement. Canada has suggested the use of different terms was 'accidental' in this case, but has offered no convincing argument to support its suggestion. We do not believe this suggestion has overturned the inference of deliberate choice."*

Consistent with this distinction, the Appellate Body in *EC-Hormones* identified three autonomous options open for Members as they implement these provisions. It held that:

*"Under Article 3.2 of the SPS Agreement, a Member may decide to promulgate an SPS measure that conforms to an international standard. Such a measure would embody the international standard completely and, for practical purposes, converts it into a municipal standard. Such a measure enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the SPS Agreement and of the GATT 1994.*

*Under Article 3.1 of the SPS Agreement, a Member may choose to establish an SPS measure that is based on the existing relevant international standard, guideline or recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2;...*

*Under Article 3.3 of the SPS Agreement, a Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement or embody that level of protection in a measure not 'based on' the international standard. The Member's appropriate level of protection may be higher than that implied in the international standard. The right of a Member to determine its own appropriate level of sanitary protection is an important right."*

In light of the above, a SPS measure that is **based on** an international standard, without **conforming** to it does not enjoy the presumption of consistency with the SPS Agreement. If the presumption of consistency with the SPS Agreement does not apply to SPS Measures based on international standards, guidelines or recommendations, one may ask why a Member State would choose this option.



Prévost D. & Van den Bossche noted that as a measure based on an international standard is automatically based on risk assessment (the risk assessment used by the relevant standard setting body when drafting the standard), it could be assumed compliant with the Articles 5.1 to 5.3 of the WTO SPS Agreement on risk assessment.<sup>7</sup> As a consequence, an evaluation of whether the requirements of these provisions on risk assessment are rendered unnecessary. This is particularly important for developing countries which often do not have sufficient resources to undertake risk assessment in accordance with the WTO SPS Agreement. Prévost & Van den Bossche argue further that in order for a SPS measure to be regarded as ‘based on’ an international standard, such a measure must not only adopt at least some of the elements of the international standard but also result in the same level of protection.<sup>8</sup>

### **D.1 – Definition of International Standards, Guidelines and Recommendations**

The third paragraph of Annex A of the SPS Agreement provides a definition of the term ‘international standards, guidelines and recommendations’.

For food safety, the SPS agreement refers specifically to the standards, guidelines and recommendations established by the Codex Alimentarius Commission (the ‘CAC’) relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice. The CAC is a body created in 1963 by jointly the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). The CAC develops and encourages implementation of standards, codes of practice, guidelines and recommendations covering all aspects of food safety, including handling and distribution. In setting international standards for food, Codex has a dual mandate to protect the health of consumers and to ensure fair practices in the food trade. Codex standards usually relate to product characteristics and may deal with all government-regulated characteristics appropriate to the commodity, or only one characteristic.<sup>9</sup>

For animal health and zoonoses, the SPS Agreement specifically refers to the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics (the ‘OIE’). The OIE was created in 1924 through an international agreement signed by 28 governments. As of 2012, the OIE comprises 178 Members. The OIE’s main objectives are to promote and coordinate research on contagious diseases of livestock for which international collaboration was desirable, to collect and disseminate information on the spread of epizootic diseases and the means to control them, and to examine draft international agreements for animal sanitary measures and to provide the means of supervising their enforcement. OIE’s standards, guidelines and recommendations are contained in the Terrestrial Animal

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<sup>7</sup> Prévost D. & Van den Bossche, P., *supra note 2*, page 274

<sup>8</sup> Id.

<sup>9</sup> WHO & FAO, ‘Understanding the Codex Alimentarius’ Third Edition (2006)

Health Code, the Manual of Diagnostic Tests and Vaccines for Terrestrial Animals, the Aquatic Animal Health Code and the Manual of Diagnostic Tests for Aquatic Animals. These standards relate for instance to the trade measures, import/export procedures and veterinary certification in Chapter 5 of the Terrestrial Animal Health Code<sup>10</sup> which includes, among others, general obligations related to certification, certification procedures, model veterinary certificates for international trade, etc.

For plant health, the SPS Agreement refers specifically to the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention (the 'IPPC'). The IPPC is an international treaty which was initially adopted in 1951. It was amended in 1997 to reflect the changes brought by the entry into force of the SPS Agreement which consecrates the IPPC as one of the standards setting agencies. The New Revised Text of the IPPC, which came into force in 2005 has been adopted by 177 Member States. As of April 2011, the IPPC has adopted 34 international standards for phytosanitary measures (ISPMs)<sup>11</sup>. ISPMs include, for instance, Phytosanitary certification system (originally adopted in 1997, revised in 2011), Phytosanitary certificates (originally adopted in 2001, revised in 2011 by CPM-6), etc.

Finally for matters not covered by the CAC, the OIE or the IPPC, the SPS Agreement refers to appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the SPS Committee.

In the context of the SPS Agreement, it is worth noting that reference is made to *international*) standards, guidelines and recommendations. In 1997, the CAC made a request for clarification to the SPS Committee about the status it would assign to Codex regional standards and related texts in relation to the implementation of the SPS Agreement. The SPS Committee noted that regional standards are not included in the definition of international standards provided by Annex A of the SPS Agreement. It recognized that, even if they were based on scientific evidence, regional standards were meant to apply only within a particular geographic region. However, Members do recognize that such scientifically-sound regional standards could become the foundation for the creation and adoption of international standards.<sup>12</sup>

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<sup>10</sup> Available from <http://www.oie.int/en/international-standard-setting/terrestrial-code/access-online/>

<sup>11</sup> The list of ISPMs is available from [https://www.ippc.int/file\\_uploaded/1320739134\\_ippc-ispmlist-2011-09-en.pdf](https://www.ippc.int/file_uploaded/1320739134_ippc-ispmlist-2011-09-en.pdf)

<sup>12</sup> See Committee on Sanitary and Phytosanitary Measures, Clarification of References to Codex Texts Draft Response to the Codex Alimentarius Commission, G/SPS/W/86/Rev.1 (13 March 1998)

## **D.2 - The Legal Authority of International Standards, Guidelines and Recommendations**

The international standards, guidelines and recommendations developed by the standards setting organization are voluntary. Therefore, they are not legally binding in and of themselves.<sup>13</sup> There is no legal obligation on Members to apply international standards, guidelines and recommendations and, in accordance with the terms of Article 3 of the SPS Agreement, Members may choose to apply them or not.<sup>14</sup> However, the legal effects of these standards, guidelines and recommendations draws from the fact that Members may enact SPS measures which *are based on* or which *are conform* to these standards, guidelines and recommendations.

Article 3 compels Members to maintain at least the minimum level of SPS protection that is provided under international standards, guidelines or recommendations but allows them to enact measures that are higher than that implied in the international standards, if there is scientific justification, upon the determination of their own appropriate level of sanitary protection.

Even though the Codex texts, the OIE codes and the IPPC ISPMs are not legally binding, the provisions of the text of the IPPC deserve special attention, as the legal nature of the ISPMs is different from that of the text of the IPPC. Unlike the instruments issued under the CAC and the OIE, the IPPC is an international treaty that exists independently from the Multilateral Trade Regime but is consistent with the provisions of the WTO Agreements.

The text of the IPPC imposes national legal obligations on its Members with the specific objectives of securing common and effective action, preventing the spread and introduction of pests of plants and plant products, and promoting appropriate measures for their control. It obliges Members to establish an official national plant protection organization and assigns such an organization with specific responsibilities. Whereas the text of the IPPC is not an international standard, guideline or recommendation in the framework of the WTO SPS Agreement, some of the mandatory provisions contained in the IPPC text are reflected in the ISPMs. For instance, the IPPC sets out a mandatory wording of phytosanitary certificates in the models provided in Annex. According to Article V, these certificates should be completed and issued taking into account relevant international standards<sup>15</sup>.

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<sup>13</sup> Mosoti, V. & Gobena, A. 'International trade rules and the agriculture sector Selected implementation issues' FAO Legislative Study No. 98, page 28

<sup>14</sup> See the conclusions of the Appellate Body on the *EC-Hormones* case

<sup>15</sup> Article V(2)(b) of the IPPC

## **E. Other Substantive Provisions of the SPS Agreement**

### **E.1 - Equivalence**

Article 4 of the SPS Agreement provides for the notion of ‘equivalence’. It allows Members to negotiate at a bilateral or regional level, the mutual recognition of standards if they are deemed to be equivalent. The recognition of equivalence must not be used as an instrument for discrimination among countries or to increase trade barriers. They are also not intended to replace the need for the development and use of international standards.<sup>16</sup>

### **E.2 - Risk Assessment**

As stated previously, Members of the SPS Agreement may only impose SPS measures after the establishment of a scientific evidence of risk. They have the option to have their SPS measures based on or conform to international standards or to conduct risk assessment to achieve a higher level of protection. Paragraph 4 of Annex A defines two types of risk assessments. The first relates to the 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. The second relates to 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.

In cases where relevant scientific evidence is insufficient, Members are allowed, upon the completion of certain requirements, to take provisional measures on the basis of pertinent available information.

### **E.3 - Transparency and Notification Obligations**

Article 7 of the SPS Agreement obliges Members to notify changes in and provide information on their SPS measures in accordance with the provisions of Annex B. According to Annex B1, Members must publish all their proposals or regulations that may have a significant effect on trade of other Members or whose content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation. They must notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. They must provide to other Members upon request copies of the

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<sup>16</sup> See G/SPS/W/1111 of 4 July 2011, Equivalence – Note by the Secretariat

proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations.

## **Part 2 - The Common Market for Eastern and Southern Africa (COMESA), the COMESA SPS Regulations and their Effects on the National Legal Obligations of COMESA Member States**

### **A – The Common Market for Eastern and Southern Africa**

#### **A.1 - Objectives and Members of the COMESA**

The Common Market for Eastern and Southern Africa (COMESA) was founded on 5 November 1993 upon the signature of its Constitutional treaty (the COMESA Treaty). The COMESA treaty was ratified on 8 December 1994 and supersedes the Preferential Trade Area for Eastern and Southern African States (PTA). The COMESA treaty aims at strengthening the process of regional economic integration that had been initiated under the PTA, in order to help member states achieve sustainable economic growth. The creation of the COMESA was notified to the WTO on 5 July 1995.<sup>17</sup>

The COMESA comprises 19 Members: Burundi, Comoros, Congo (DRC), Egypt, Eritrea, Ethiopia, Kenya, Lesotho, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

Burundi, Congo (DRC), Djibouti, Egypt, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Swaziland, Uganda, Zambia and Zimbabwe are members of WTO. Comoros, Libya and Sudan have an observer status with WTO. Ethiopia and Seychelles are also observers and are in the process of accession to WTO. Eritrea is not a member of WTO.

All the Members of the COMESA are parties to the IPPC, except Congo (DRC) and Zimbabwe, and all of them are members of the OIE and the CAC.

The objectives of the COMESA are set out in Article 3 of the COMESA Treaty. The COMESA aims to attain sustainable growth of Member States by promoting a more balanced and harmonious development of its production and marketing structures, a joint development in all fields of economic activity and the joint adoption of macro-economic policies and programmes to raise the standard of living of its peoples and to contribute towards the establishment, progress, and the realization of the objectives of the African Economic Community. The COMESA Treaty calls for cooperation in all economic and social sectors of the economies of the Member States, such as, among

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<sup>17</sup> WTO Committee on Trade and Development, WT/COMTD/N/3 of 29 June 1995

others, in the field of the export of agricultural commodities (where Members must harmonize their policies and regulations relating to phytosanitary and sanitary measures without impeding the export of crops, plants, seeds, livestock, livestock products, fish and fish-products)<sup>18</sup> or in the field of agricultural development (where Members must cooperate in the control of animal and plant diseases and pests)<sup>19</sup>.

## **A.2 - The COMESA Governance Structure**

The main organs of the COMESA are the Authority, the Council of Ministers and the Secretariat. The COMESA also has a Court of Justice and several Committees: the Committee of Governors of Central Banks; the Intergovernmental Committee; the Technical Committees; and the Consultative Committee.

The Authority of the Common Market is the supreme policy organ of the COMESA. The Authority comprises Heads of State or Government of Member countries. The Authority is responsible for the general policy and direction and control of the performance of the executive functions of the COMESA and the achievement of its aims and objectives. The directions and decisions of the Authority are binding on the Member States and on all other organs of the COMESA.

The Council of Ministers comprises Ministers appointed by each Member government. It monitors the COMESA activities, including supervision of the Secretariat, recommends policy direction and development, and reports to the Authority. The Council is vested with the power to make regulations, issue directives, take decisions, make recommendations and give opinions.

The Secretariat is the main administrative organ. It is headquartered in Lusaka, Zambia and headed by a Secretary-General assisted by two Assistant Secretaries-General (one for programmes and the other for administration and finances) .

The Court of Justice is established by Article 7 of the COMESA Treaty and has the responsibility of ensuring the adherence to law in the interpretation and application of the COMESA Treaty. The two chambers of the Court of Justice (the Court of First Instance and the Appellate Division) have jurisdiction<sup>20</sup> over, *inter alia*:

- Claims made by a Member State which considers that another Member State or the Council has failed to fulfill an obligation under the COMESA Treaty or has infringed a provision of the COMESA Treaty;
- Claims made by a Member State for the determination of the legality of any act, regulation, directive or decision of the Council on the grounds that such

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<sup>18</sup> Article 132 of the COMESA Treaty

<sup>19</sup> Article 130 of the COMESA Treaty

<sup>20</sup> The scope of jurisdiction of the Court of Justice is provided under Articles 23 to 31 of the COMESA Treaty

- act, regulation, directive or decision is *ultra vires* or unlawful or an infringement of the provisions of the COMESA Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power;
- Claims made by any legal or natural person who is resident in a Member State, upon the exhaustion of all local remedies in national jurisdictions, for the determination by of the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of the COMESA Treaty;

Upon the request of the Authority, the Council or a Member State, the Court of Justice is also empowered to give advisory opinions regarding questions of law arising from the provisions of the Treaty affecting the Common Market.<sup>21</sup>

Finally, COMESA comprises several Committees in its governance structure. The Committee of Governors of Central Banks is responsible for advising the Authority and the Council of Ministers on monetary and financial matters. It ensures implementation of the Monetary and Financial Co-operation programmes. The Intergovernmental Committee is a multi-disciplinary body composed of Permanent or principal secretaries from the Member States responsible for the development and management of programmes and action plans in all the sectors of co-operation, except in the finance and monetary sector. The Technical Committees, composed of representatives of the Member States are responsible for the various economic sectors, such as agriculture, energy, environment and natural resources as well as for administrative and budgetary matters. At end, the Consultative Committee of the Business Community and Other Interest Groups provides a link and facilitates dialogue between the business community and other interest groups and organs of the Common Market.

### **A.3 - The COMESA Regulatory Instruments**

Under Article 10 of the COMESA Treaty, the Council is vested with the power to make regulations, issue directives, take decisions, make recommendations or deliver opinions. A regulation is binding on all the Member States in its entirety. A directive is binding upon each Member State to which it is addressed as to the result to be achieved but not as to the means of achieving it. A decision is binding upon those to whom it is addressed. A recommendation and an opinion do not have any binding force.

While the legal effect of directives, decisions and recommendations on national governments is clear, one may ask what is the meaning of ‘a regulation is binding on all the Member States in its entirety’, as provided under Article 10(2) of the

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<sup>21</sup> Article 32 of the COMESA Treaty



COMESA Treaty. Does it mean that a COMESA regulation is directly applicable in Member Countries or does it need to be implemented through a national legal instrument?

Article 5(2)(b) of the COMESA Treaty provides that each Member State must take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty and in particular, ..., to confer upon the regulations of the Council the force of law and the necessary legal effect within its territory.

Clarifications on the practical implementation of these provisions were provided by the Legal Office of COMESA Secretariat, which read as follows:

*'As for what it means when it says "a regulation shall be binding in its entirety", it simply means that all provisions of the regulation are mandatory and Member States are required to comply with them. It also means that a regulation is directly applicable and a Member States using its own procedures has to ensure that it is domesticated. In some countries it does not need to be ratified. In some countries it needs to be ratified as a matter of course since it is already binding on the Member States by virtue of the Authority of the Treaty'*

Regulations enter into force upon the date of their publication in the COMESA Official Gazette or such later date as they may specify. Directives and decisions are notified to those to whom they are addressed and take effect upon the receipt of the notification or on any date they may specify.

#### **A.4 - The COMESA Customs Union**

The COMESA Treaty provides for the creation of a Customs Union within a transitional period of ten years<sup>22</sup>. Within the Customs Union, customs duties and other charges of equivalent effect imposed on imports, as well as non-tariff barriers including quantitative or like restrictions or prohibitions and administrative obstacles to trade among the Member States will be removed.<sup>23</sup>

The Council Regulations Governing the COMESA Customs Union (the 'Customs Union Regulations') were published on 9 June 2009 in the COMESA Official Gazette.<sup>24</sup>

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<sup>22</sup> Article 45 of the COMESA Treaty

<sup>23</sup> Id.

<sup>24</sup> Council Regulations Governing the COMESA Customs Union, Legal Notices Number 1 of 2009, Official Gazette of the COMESA, Vol. 15 No. 1 of 9 June 2009 [The provisions on the date of entry into force of these Regulations refer to Article 12 of the COMESA Treaty which stipulates that 'Regulations shall be

Under Article 3 of the Customs Union Regulations, the objectives of the Customs Union are to:

- further liberalize intra-regional trade in goods;
- promote efficiency in production within the COMESA;
- enhance domestic, cross border and foreign investment in the COMESA; and
- promote economic development and diversification in industrialization in the COMESA.

Within the framework of the Customs Union, COMESA Members must cooperate on matters concerning trade liberalization<sup>25</sup>. This includes, *inter alia*, cooperation in the implementation of harmonized standards and sanitary and phytosanitary measures.<sup>26</sup> All the existing non- tariff barriers to the importation into Members' territories of goods originating in the other Member States must be removed.<sup>27</sup> However, a Member State may, upon certain conditions, introduce or continue to execute restrictions or prohibitions affecting, among others, the protection of human, animal or plant; the maintenance of food security in the event of war and famine, etc...<sup>28</sup>

### **B - The COMESA SPS Regulations and their implications in the Member States Domestic Legal Framework**

After 4 years of negotiations,<sup>29</sup> the Regulations on the Application of Sanitary and Phytosanitary Measures (the 'COMESA SPS Regulations') were adopted by the Council and entered into force on 9 December 2009, upon their publication in the COMESA Official Gazette.

The COMESA SPS Regulations set out principles and mechanisms for cooperation in the implementation of SPS measures by Members States. The principles are mostly modeled on the WTO SPS Agreement. The mechanisms refer to practical provisions such as the establishment of a green pass certification scheme, regional accreditation bodies and regional reference laboratories.

Under the COMESA Treaty, as stated previously, Member States must take all appropriate measures to ensure the fulfillment of their obligations arising from the

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published in the Official Gazette of the Common Market and shall enter into force on the date of their publication or such later date as may be specified in the Regulations'. As the Regulations do not specify any date of entry into force, it may be argued that the date entry into force of the regulations are that of their publication in the Official Gazette. ]

<sup>25</sup> Article 1(a) of the Customs Union Regulations

<sup>26</sup> Article 4(2)(i) of the Customs Union Regulations

<sup>27</sup> Article 8 of the Customs Union Regulations

<sup>28</sup> Article 24 of the Customs Union Regulations

<sup>29</sup> Interview of Mr Chungu Mwila, Acting Chief Executive Secretary of ACTESA (05 March 2012)

COMESA SPS Regulations<sup>30</sup>, in their entirety<sup>31</sup>. They must take steps to enact legislation to confer upon the regulations of the Council the force of law and the necessary legal effect within their territory.<sup>32</sup> Article 20 of the COMESA SPS Regulations provides for special treatment, under which, the Council of Ministers is compelled to take such steps as are appropriate, including longer time frames for compliance, to ensure that the special needs of a Member State are addressed taking into account the principle of variable geometry, in order to ensure that all Member States are able to comply with the Regulations. COMESA Member States are requested to cooperate in the harmonization of their respective national legislation in relation to SPS measures.

This Section attempts to understand the COMESA SPS Regulations, by analyzing the principles provisions of the COMESA SPS Regulations which are found from Articles 2 to 6, and the provisions on the implementation mechanisms which are found from Articles 7 to 26. The potential legal impacts of the implementation of these provisions at the national level are respectively provided.

## **B.1 - The Principles of the COMESA SPS Regulations**

### *i - Analysis*

Most of the principles provisions of the COMESA SPS Regulations seem to have been literally derived from the WTO SPS Agreement. They also refer to the definitions set out in Annex 3 of the WTO SPS Agreement for the interpretation of any term which is not defined in the COMESA Regulations.

The COMESA SPS Regulations aim generally at the elaboration of rules for the harmonized application of SPS measures within the Common Market.<sup>33</sup> The word ‘harmonized’ or ‘harmonization’ occurs four times in the Preamble.

The COMESA SPS Regulations recognize that Member States have undertaken international commitments and obligations under the WTO SPS Agreement and other international and regional agreements. They also recognize the crucial harmonizing role of international standards, guidelines and codes of practices elaborated by international bodies. The second Paragraph of the Preamble mentions specifically the CAC, the OIE and the relevant international and regional organizations operating within the framework of the IPPC. It refers also to any other organization relevant to SPS matters, without any further clarification.

As in the SPS Agreement, the COMESA SPS Regulations grant the right of Members

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<sup>30</sup> Article 3 of the COMESA SPS Regulations

<sup>31</sup> Article 10 of the COMESA Treaty

<sup>32</sup> Article 5.2 of the COMESA Treaty

<sup>33</sup> 7<sup>th</sup> Paragraph of Preamble of the SPS Regulations

to take the SPS measures necessary for the protection of human, animal or plant life or health, provided that such measures are applied only to the extent necessary to protect human, animal or plant life or health, are based on scientific principles and are not maintained without sufficient scientific evidence. They forbid Members from taking any arbitrary or unjustified measure which could result in discrimination or disguised restriction on regional or international trade. The COMESA SPS Regulations also provide for interim measures, where a Member State may apply the precautionary principle in the absence of sufficient scientific evidence.

In Article 6(1) on specific obligations on the application of SPS measures, the Regulations provide a general rule which obliges Members, except as provided otherwise, to comply with Articles 3 to 8 of the WTO SPS Agreement (harmonization, equivalence, assessment of risk and determination of appropriate level of SPS protection, adaptation to regional conditions, transparency and procedures on control, inspection and approval). Article 6(2) adds a list of specific obligations, such as the harmonization of SPS measures, including surveillance, emergency preparedness, traceability, control, inspection and approval procedures; the communication of any notification, report or information made under Article 7 of the SPS Agreement to the Secretariat. Finally, the same Article compels Members to have their SPS Related Institutions adopt international standards in respect of any procedures to check and ensure the fulfillment of SPS measures.

*ii – Legal implications at country level*

It is clear from these provisions on principles that the COMESA SPS Regulations mainly aims at the implementation of the WTO SPS Agreement at the COMESA regional level. As previously stated, six COMESA Member countries (Comoros, Ethiopia, Libya, Seychelles and Sudan, Eritrea) have not joined the WTO. With the entry into force of the COMESA SPS Regulations, all the COMESA Members States will have to take legislative and regulatory measures to implement the WTO SPS Regulations and specifically their Articles 3 to 8. The COMESA SPS Regulations promote the implementation of the multilateral trade regime, as they have States that are not member of WTO committed to certain provisions of the Multilateral Trading System.

One of the key objectives of the COMESA SPS Regulations is the harmonization of SPS measures. To achieve this objective, the COMESA SPS Regulations refer generally to the relevant provisions of the WTO SPS Agreement and recognize the crucial harmonizing role of international standards, guidelines and codes of practices which are elaborated by the three WTO standard setting bodies. In other words, in order to harmonize their SPS measures, each COMESA Member States must base its SPS measures on existing international standards, guidelines or recommendations, which are defined under Annex A of the WTO SPS Agreement.

## **B.2 - The COMESA Green Pass Certification Scheme**

### B.2.1 – The objectives and the mechanisms of the Green Pass Certification Scheme

#### *i – Analysis*

Article 7 of the COMESA SPS Regulations establishes the COMESA Green Pass. Under this Article, the Green Pass is a **‘commodity specific SPS certification scheme and authority for movement of food and agricultural products within the Common Market’**.

The same Article 7 indicates that the Green Pass is issued by a National Green Pass Authority. This is further detailed by the last Paragraph of Article 10<sup>34</sup>, which provides that the Green Pass is issued by the National Green Pass Authority, in collaboration and in coordination with the COMESA Secretariat SPS Unit.

Article 8 of the COMESA SPS Regulations sets out the objectives of the Green Pass, which are:

- to facilitate movement and trade in food and agricultural commodities;
- to protect (1) human health and life from risks arising from additives in food and drink contaminants in food and drink, toxins in food and drink, and plant or animal carried diseases; (2) animal health and life from risks arising from additives in feed and water, toxins in feed and water, pests, diseases and disease causing organisms; (3) plant health and life from risks arising from pests, diseases and disease causing organisms; and (4) the socio-economic structures and institutions of a Member State from risks arising from the entry, establishment and spread of pests and diseases.

With reference to the definition of ‘SPS measures’ provided in Annex A of the WTO SPS Agreement and the goal and purpose of the Green Pass Certification Scheme stated above, it can be asserted that the **COMESA Green Pass Certification Scheme is intended to be a SPS measure**.

Article 12 of the SPS Regulations provides the prospect for an enterprise to be registered by national Green Pass authorities, when such an enterprise satisfies the requirements required for the commodity in question that are to be defined later in specific council regulations, directives or code of practices. The purpose of registration, which is not mentioned explicitly in Article 12 but rather implicitly in Article 10 on the functions of the National Green Pass Authority, is for the registered

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<sup>34</sup> Article 10(f) states that ‘... a National Green Pass Authority shall have functions and powers to... (f) collaborate and coordinate with the Regional SPS Unit at the Secretariat with regard to the issuance of the Green Pass’

enterprises to be issued with a Green Pass. Article 10(b) implies this by providing that the Green Pass may be only issued to registered enterprises.<sup>35</sup>

Articles 7, 8, 10 and 12, when read together, allow a broad but partial understanding of the Green Pass Certification Scheme. The Green Pass is a SPS measure which would be a phytosanitary or a sanitary certificate issued by a National Green Pass Authority to exclusively registered enterprises for the movement of specified food and agricultural commodities within the Common Market.

One may ask what the specific criteria and standards applicable for the Green Pass Certification are since they are not currently provided in the COMESA SPS Regulations. Elements of response may be found across some of the provisions of the SPS Regulations themselves. In line with Article 4 on the application of SPS measures and Article 8 on the objectives of the Green Pass, these criteria and standards that will be imposed for the Green Pass Certification must be justified and based on science, must not be any more trade restrictive than is necessary to protect health and must not arbitrarily or unjustifiably result in discrimination or disguised restriction on regional or international trade. Also, under Article 6 on specific obligations for the application of SPS measures, it could be argued that these criteria and standards could be also based on international standards, directives or recommendations or conform to them, in which specific case, they are deemed consistent with the WTO SPS Agreement.

The issue on the competent body in charge for the establishment of the criteria and standards applicable for the Green Pass is only addressed intermittently in the text of the COMESA SPS Regulations. First, Article 15 on Regional Accreditation Bodies provides that the COMESA Secretariat establishes national certification bodies in member states with the aim of establishing a common certification criteria for the Green Pass<sup>36</sup>. Then, Article 12 implies that regulations of the COMESA Council of Ministers, directives or codes of practices will provide the SPS requirements for a commodity or a group of commodities. Articles 16 and 17 on the matter of laboratories imply that risk analyses are carried out by Member states.

The wording of Article 15.2(c) implies that the common certification criteria for the Green Pass will be established by the COMESA Secretariat, together with national certification bodies in Member States.

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<sup>35</sup> Article 10(b) of the COMESA SPS Regulations provides that 'A Member State shall ensure that a National Green Pass Authority shall have the functions and powers to ... (b) register enterprises to be issued with a Green Pass'

<sup>36</sup> Article 15.2(c) states that 'A regional accreditation body shall, in its field of accreditation ... assist the Secretariat in establishing national certification bodies in Member States, with the aim of establishing common certification criteria, for the Green Pass'

Article 13 addresses the cases where an importing Member State has reasons to believe that a Green Pass has not been issued in accordance with the COMESA SPS Regulations. In this case, the importing Member State may (i) prevent the importation of the commodity; (ii) request for additional information from the exporting Member State and (iii) notify the COMESA Secretariat.

*ii – Legal implications at country level*

Under the COMESA SPS Regulations, the Green Pass must be issued for the movement, within the Common Market of food, plant and animal commodities that were specified to fall under scope of the Green Pass, traded by enterprises registered for specified commodities and certified on the basis of common criteria or standards which must be either technically justified or based on or conform to the international standards, guidelines or recommendations elaborated by the CAC, the OIE or the IPPC.

It is noted that the effective implementation of the Green Pass Certification Scheme is conditioned by the prior establishment of certification criteria and standards, which are yet to be established and published under regional regulations, directives or codes of conduct as well as the definition of food and agricultural commodities that will fall under the scope of the Green Pass, in addition to the institutional framework which is addressed in the next section.

At the national level, COMESA Member countries might have to adjust their legislative framework to implement the Green Pass Certification Scheme. In doing so, the COMESA Member Countries might have to take into consideration the following.

Despite the fact that OIE standards are not legally binding in themselves as mentioned previously, it is important to note that certain OIE standards, such as certification procedures, model veterinary certificates are widely anchored in the animal health legal framework of most COMESA countries which then have implemented them for many years. The standards also provide a list of fundamental principles with which veterinary services must comply in order to establish and maintain confidence in their international veterinary certificates by the Veterinary Services of other countries. To implement the Green Pass on animal commodities, COMESA Member States are likely to adjust their animal health legislation in order to create a Green Pass Certification Scheme that could possibly deviate from the OIE system for specific commodities traded by specific enterprises within the Common Market. The trade in these specified animal commodities in the external market as well as the trade in all unspecified animal commodities in both internal and external trade will continue to be governed by the current existing worldwide recognized veterinary certification system. This situation triggers the potential existence of a dual certification system that might create confusion rather than trade facilitation.

With regards to plant protection, the situation of the 17 COMESA Member States which are parties to the IPPC deserves a special attention. These countries must comply with the national obligations that are imposed on them by the IPPC. These include the phytosanitary certification of exported plants, plants products and regulated articles and the issuance of phytosanitary certificates worded in the models set out in the Convention itself. These provisions must apply regardless of whether the plants or plant products to be exported are already certified with a COMESA Green Pass or not. Therefore, the implementation of the Green Pass Certification Scheme on plant commodities will create within a country a dual certification system which might be cumbersome for trade and would undermine the purpose of the Green Pass which to enable a coordinated certification scheme.

### B.2.2 The National Green Pass Authority

#### *i - Analysis*

Under Article 9 of the COMESA SPS Regulations, Member States may set up a National Green Pass Authority or designate an existing national institution as National Green Pass Authority under domestic laws. Such an Authority must be certified by the COMESA Committee on Agriculture upon meeting certain conditions listed in Article 11.

The functions and powers of the National Green Pass Authority are stated in Article 10. National Green Pass Authorities are responsible for receiving and considering applications for Green Passes; registering enterprises eligible to be issued with a Green Pass; monitoring and evaluating these enterprises registered under paragraph; assisting enterprises in meeting eligibility criteria for Green Pass; establishing and maintaining a register, comprising of such information as the Authority may decide, subject to confidentiality rules, of eligible enterprises; and collaborating and coordinating with the COMESA SPS Unit, with regard to the issuance of the Green Pass.

Under Article 11, in order to be certified by the COMESA Committee on Agriculture as National Green Pass Authority, the national institution must demonstrate to such a Committee that it complies with the requirements of the COMESA SPS Regulations, has adequate resources to carry out its functions, has an effective monitoring and surveillance system, has an effective emergency preparedness system and has an effective traceability system.

Article 11 on the certification of the National Green Pass Authority implies that the Green Pass would be only implemented in countries which have achieved a high capacity level in the implementation of SPS related mechanisms. Indeed, in order to be certified as National Green Pass Authority and therefore to be empowered to issue a Green Pass, a national SPS related institution must meet the stringent criteria



mentioned above. In other words, the effective implementation of the WTO SPS Agreement and most likely the OIE, the CAC or the IPPC international standards, guidelines or directives by the COMESA Member Countries is a prerequisite to the creation of a National Green Pass Authority and therefore the implementation of the Green Pass Certification Scheme.

In addition, the wording of Article 9, through the use of ‘*may*’ implies that the setting up or the designation of the National Green Pass Authority is not mandatory. This legal wording might compromise the operation of the Green Pass Certification Scheme by creating confusion in making the Green Pass mandatory for the movement of specified food and agricultural commodities within the Common Market and whereas leaving the designation of the national institution to issue it optional.

Finally, if a Member State applies for authority to issue a Green Pass for a particular commodity or group of commodities but fails to meet the requirements stipulated for the commodity or group of commodities, the Secretariat may assist the Member State to formulate a programme of interventions and source funds to address the specific deficiencies observed.

*ii- Legal implications at the national level*

If a COMESA Member State intends to issue a Green Pass Certificate, it would have to ask for the certification of a national institution as National Green Pass Authority by the COMESA Committee on Agriculture. To do so, it must take legislative, institutional and financial measures to comply with and implement the COMESA SPS Regulations, which compel it, *inter alia*, to implement Articles 3 to 8 of the WTO SPS Agreement. Moreover, measures must also be taken to achieve an effective monitoring, surveillance, emergency preparedness and traceability systems.

Generally, the existing national SPS related institutions in most developing countries are usually the national institution(s) for plant health, the national institution(s) for animal health and the different institutions related to food safety control. In the realm of food safety, responsibilities for food certification might be vested into one or a number of different authorities and regulated in a plethora of laws, including, but not only, food legislation, veterinary and dairy products legislation, health, customs and legislation governing processed food.

In order to be eligible for certification as National Green Pass Authority, the existing national institution or the new national institution must have already achieved a high level of capacity in the implementation of SPS measures for plant, food and animal commodities, in compliance with the COMESA SPS Regulations and in consequence, the WTO SPS Agreement. In order to reach this objective, it implies that a Member state will have to undertake legal and institutional reforms to establish a national agency competent for plant health, animal health and food safety all together and invest in human and financial resources to develop its capacities in order to make

eligible for certification as National Green Pass Authority. In addition, such an institution must also demonstrate, for instance, effective food and animal traceability systems, pest and animal diseases surveillance, etc...

Notwithstanding the above, COMESA Member countries which are also parties to the IPPC must comply with the provisions of the Convention on the designation of a National Plant Protection Organization, which is responsible, among others, for issuing an export or re-export phytosanitary certificates for the intra-community or extra-community movement of all plants and plant products.

Similarly, national veterinary authorities are commonly vested by law with the responsibility to issue veterinary international certification, and are designated as OIE counterparts. Food safety legislation and strategy describes the authorities with a role and responsibility for food safety control and certification.

The institutional reform required to implement the Green Pass Certification Scheme is likely to be a complex and costly process as the institution to be certified as National Green Pass Authority will have to accommodate the functions of each of the existing national SPS institutions and be endowed with all the technical capacities required for a SPS single institution responsible to coordinate food safety, plant health and animal health.

### B.2.3 Other institutional devices

#### *i- Analysis*

Article 15 provides for the designation by the COMESA Council of Ministers of national SPS related institutions as regional accreditation bodies. A regional accreditation body must “carry out audit, inspection and accreditation of any recognized national SPS related institution or a process; assist recognized national SPS related institutions in establishing quality assurance and management systems; assist the COMESA Secretariat in establishing national certification bodies in Member States with the aim of establishing common certification criteria for the Green Pass; establish a peer review mechanism for ensuring compliance with agreed standards; and conduct relevant training to ensure effective operations”. It is important to mention that the COMESA SPS Regulations do not specifically oblige national SPS institutions to be accredited, audited or inspected.

Moreover, under the COMESA SPS Regulations, the regional accreditation bodies should assist the COMESA Secretariat for the establishment of national certification bodies in Member States, with the aim of establishing common certification criteria for the Green Pass. The sharing of responsibilities between national certification bodies and the National Green Pass Authority is not clear. It would appear also

unusual that national certification bodies would be created by a regional body which could be a national SPS related institution of another COMESA Member Country.

The COMESA SPS Regulations also establish regional SPS reference laboratories, which may be selected by the Committee on Agriculture. Such laboratories are mandated, inter alia, to monitor compliance with regional disease and pest requirements by countries as well as producer/processor enterprises, and oversee the appropriate certification process; to process selected samples of commodities for the purpose of maintaining a databank of disease causing agents and pests relevant to international trade; to validate and standardize diagnostic procedures and reagents on behalf of satellite and national laboratories; to provide credible scientific basis for resolution of disputes between the importing and/or exporting parties; to assist Member States in carrying out risk analysis; to train personnel from the national laboratories of Member States and to establish and implement inter-laboratory comparison schemes; etc... These regional SPS reference laboratories are also empowered to designate, supervise and coordinate the work of Regional SPS Related Satellite Laboratories. These Satellite Laboratories are designated by the Council of Minister amongst the national SPS related laboratories.

The compliance monitoring functions of laboratories might raise an issue as laboratories are not usually mandated to monitor compliance with SPS standards. Also, empowering laboratories to oversee the appropriate certification process might place them in a situation of conflict of interest.

*ii – The legal implications at country level*

A COMESA Member State will have to take measures to permit a national SPS related institution to be accredited as regional accreditation body and empower it to carry out extra-territorial functions, such as the audit, inspection and accreditation of other national SPS related institutions in other COMESA member countries;

It should also allow recognized national SPS related institutions to be audited, inspected and accredited by a regional body, which can be a SPS related institution from another COMESA member country. Finally, a COMESA Member State should allow the COMESA Secretariat assisted by regional accreditation bodies to create national certification bodies.

Finally, with regards to laboratories, some of the functions included in COMESA regulation, particularly those related to the monitoring and implementation, may require additional clarification or modification.

### **B.3 - The regime of trade with other States outside the Common Market**

The COMESA SPS Regulations do not provide any specific SPS regime for trade with countries outside the Common Market. However, the principles of the COMESA SPS Regulations imply that a COMESA Member State will have to apply SPS measures in accordance with the WTO SPS Agreement for trade with other States outside the Common Market. Consequently, for its trade with other States outside the Common Market, the general applicable rule would be that a COMESA Member State may impose SPS measures provided that they are justified and supported by science or based on international standards, guidelines and recommendations.

Article 14 of the COMESA SPS Regulations provide that 'Member States are individually or collectively encouraged to sign mutual recognition agreements with any country or group of countries outside the Common Market for the recognition of the Green Pass as authority of entry of commodities into that country's or group of countries' market'. This provision seems to refer to provisions of the SPS Agreement on equivalence. Mutual recognition agreements primarily entail conformity assessment procedures. It is noted that neither the COMESA SPS Regulations nor Article 4 of the SPS Agreement provides for specific procedures and conditions for the recognition of equivalence or the conclusion of equivalence agreement. The Chairperson of the SPS Committee, in his 2001 Report to the General Council, noted that equivalence may be achieved at different levels.<sup>37</sup> He wrote:

*In the Committee's discussions in November 2000, Members recognized that there were several different levels of equivalence, which ranged from (i) formal agreements recognizing the equivalence of sanitary and phytosanitary systems; to (ii) agreements of equivalence for specific products; to (iii) acceptance, on an ad hoc basis, of the equivalence of specific technical aspects of certain sanitary and phytosanitary measures. In the March 2001 discussions, it was also suggested that equivalence could be considered for either: (i) inspection and control systems; (ii) processing techniques; and (iii) for product standards.*

The Chairperson added that certain obligations exist for both the importing and exporting countries. In order to be accepted as equivalent, the SPS measures (in this case the Green Pass certification) of the exporting country (the COMESA Member State or group of States) must meet the appropriate level of protection of the importing country (the State or Group of States outside the Common Market). The WTO SPS Committee has published in June 2000 the Guidelines to Further the

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<sup>37</sup> Committee on Sanitary and Phytosanitary Measures, Equivalence: Consideration of Article 4 of the SPS Agreement: Summary of Informal Discussions on Equivalence. Second Report of the Chairman, G/L/445, 21 March 2011

Practical Implementation of Article 5.5<sup>38</sup>. According to Prévost and Van der Bossche, States are usually reluctant to enter into negotiations for the conclusion of formal equivalence agreements due to the lengthy and costly nature of such negotiations.<sup>39</sup> In order to implement Article 14 of the COMESA SPS Regulations, the country or group of countries willing to enter into agreements for the recognition of the Green Pass as authority of entry of commodities into that country's or group of countries' market must comply with the procedures and conditions set out by the WTO SPS Agreement.

Also, as stated previously, the recognition of equivalence must not be used as an instrument for discrimination between countries. It is not also intended to replace the need for the development and use of international standards.

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<sup>38</sup> Committee on Sanitary and Phytosanitary Measures, Guidelines to Further the Practical Implementation of Article 5.5, G/SPS/15, 18 July 2000

<sup>39</sup> See D. Prévost & P. Van der Bossche, *supra* note 2, page 327

## Conclusions and Recommendations

This study has attempted to analyze the COMESA SPS Regulations and their legal effects on COMESA Members States' national obligations, in the contexts of the construction of a Customs Union and the implementation of the Multilateral Trading System. The COMESA SPS Regulations provide principles to guide Member States in exercising their right to impose SPS measures. These principles explicitly refer to the substantive provisions of the WTO SPS Agreement and provide COMESA with an implicit role of a 'parallel processor' in the construction of the multilateral trade regime, bringing those countries that are not members to WTO in line with its Agreement on SPS. The COMESA SPS Regulations bring also some practical mechanisms for the implementation of the aforementioned principles. The Green Pass Certification Scheme is at the centre of this practical implementation mechanism.

However, it has been demonstrated throughout this study that the COMESA SPS Regulations are not sufficiently clear to enable a proper implementation, especially on the operation of the Green Pass Certification Scheme. The following summarizes the most important issues for which clarifications should be sought:

- First, some important implications on the potential co-existence of the Green Pass with other mandatory certifications such as the export or re-export phytosanitary certification imposed by the IPPC for IPPC members States or other certifications system which might have been integrated into countries national legislation such as the OIE veterinary certification should be clarified.
- The issue about the competent institution responsible for setting up the specific criteria and standards applicable for the Green Pass should be also clarified.
- The role of the different institutions that would be needed to make the Green Pass Certification Scheme operational should be also clarified. For instance, guidance should be provided on the role of national certification bodies, on the procedures of their establishment by the COMESA Secretariat and the regional accreditation body and also on the possibilities of a national SPS related institution to be vested with extra-territorial responsibilities when it becomes accredited as a regional accreditation body. The implementation of the Green Pass Certification Scheme entails the establishment of a national institution that would be responsible for SPS matters for animal health, food safety and plant health. Such a "super" institutional structure will require time and budget to set up and become effective as it is likely that in most states, SPS related responsibilities are divided among many institutions. Indeed it is strongly recommended that more directions be provided about how to bring together the food safety functions into a single institution that deals also with

plant and animal certification, particularly in countries where these functions are likely to be scattered amongst several institutional bodies. It is also recommended that the feasibility study that is foreseen addresses the technical feasibility of the establishment of such a national institution.

These insufficiencies of the COMESA SPS Regulations could be explained by the fact that a technical feasibility study was not undertaken prior to drafting the Regulations. It is recommended that more details on the operation of the Green Pass Certification Scheme be provided by amending regulations or implementing regulations of the Council of Ministers and guidelines from the COMESA Secretariat, once the technical feasibility study which is foreseen in the near future is completed.