

AVOCADOS FROM ECUADOR: IS THE UNITED STATES PROPOSING FAIR STANDARDS?

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The United States previously signed a World Trade Organization agreement committing to not discriminate between countries with its food importation regulations. Currently, the United States is considering implementation of 7 C.F.R. § 319.56–84 to govern the importation of fresh avocado fruit from continental Ecuador. When comparing the proposed regulation for Ecuador to the existing regulation for Mexico, is Ecuador being treated fairly? Parts of the proposed regulation for Ecuador seem fair because of their similarity to the existing regulation for Mexico. However, it appears that only parts of the proposed regulation take Ecuador’s developing industry status into consideration. This comment attempts to show that the proposed regulation should be amended to provide increased fairness to Ecuador as a developing nation in the avocado industry.

Keywords: Avocado, Ecuador, Mexico, SPS Agreement, Trade Barriers

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I. INTRODUCTION: THE GENESIS AND RISE OF THE AVOCADO IN THE UNITED STATES

A. *Importation of the First Avocados into the Continental United States*

Evaluation of avocado importation into the United States begins with the story of the first imported avocado. In 1889, a botanist named David Fairchild persuaded Congress to create and fund the Office of Foreign Seed and Plant Introduction (OFSPD).¹ As the OFSPD's first director, Fairchild hired "agricultural explorers, known as 'plant hunters'" and sent them to the "non-Western regions of the world" looking for plants that American farmers could grow to benefit themselves and the national economy.² One of the men hired by Fairchild was Wilson Popenoe, whom Fairchild sent to Guatemala to locate new varieties of avocados during World War I.³ In the 1920's, during a visit to Ecuador, Popenoe wrote about the avocados he encountered in the Chota valley and sent several varieties of budwood from the avocado trees back to the United States.⁴ Popenoe's actions demonstrate that the history of Ecuadorean avocados coming to the United States traces back nearly 100 years.⁵

B. *Dangers of Pest Infestation*

After their original importation, the United States subsequently banned the importation of avocados from Mexico and Central America over fears of pest invasions.⁶ The avocado

1. Robert R. Alvarez, *The March of Empire: Mangos, Avocados, and the Politics of Transfer*, GASTRONOMICA Summer 2007, at 28, 28.

2. *Id.*

3. *See id.* at 30 (describing Fairchild offering Popenoe a job with the USDA in 1913).

4. Wilson Popenoe, *Avocados of the Chota Valley, Ecuador*, CALIFORNIA AVOCADO SOCIETY 1921-22 YEARBOOK, http://www.avocadosource.com/CAS_Yearbooks/CAS_07_1921/CAS_1921-22_PG_35-39.pdf (last visited Dec. 17, 2018). Popenoe sent 10 varieties of Ecuadorean avocado budwood to the United States but only 5 survived the arduous journey that included transport on "mule-back" and "in the hold of a steamer." *Id.*

5. *Id.*

6. Alvarez, *supra* note 1, at 32; Martha Groves & Mary Beth Sheridan, *U.S. Lifts*

ban started in 1914, before Popenoe sent his avocado budwood from Ecuador.⁷ The ban remained in place for 83 years until 1997 when the USDA lifted the ban to allow the importation of avocados from Mexico on a limited basis subject to a systems approach to screening.⁸ Initially, only the Mexican region of Michoacán was deemed to meet United States standards.⁹ The avocados were only allowed entry into “nineteen northeastern states and the District of Columbia during a four-month period.”¹⁰ In 2001, the area permitted to receive the Mexican avocados expanded to include “an additional twelve states, and the period of importation was extended to six months.”¹¹ In 2004, Michoacán’s avocados were permitted “year-around” importation into all states except California, Florida, and Hawaii.¹² Finally, in 2007, Mexican avocados were allowed “full access to the American market.”¹³

C. Rising Demand

Since avocado importation in the 1990s, the demand for avocados in the United States has skyrocketed.¹⁴ Avocados have become “one of the most highly demanded fruit in the world.”¹⁵ Brook Larmer of the *New York Times* says that “in 1994, Americans consumed a little more than one pound of fruit per

Ban on Avocados from Mexico, L.A. TIMES (Feb. 1, 1997), http://articles.latimes.com/1997-02-01/business/fi-24310_1_mexican-avocado-imports; Brook Larmer, *How the Avocado Became the Fruit of Global Trade*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/magazine/the-fruit-of-global-trade-in-one-fruit-the-avocado.html>.

7. Everett B. Peterson & David Orden, *Avocado Pests and Avocado Trade*, 90 AM. J. AGRIC. ECON. 321, 321 (2008) (“From 1914 until 1997, phytosanitary restrictions precluded entry of Mexican avocados into the conterminous United States due to prevalence of certain avocado-specific pests and fruit flies in Mexico.”); Popenoe, *supra* note 4 (noting his first shipment from Ecuador occurred on March 1, 1921).

8. Groves & Sheridan, *supra* note 6; Peterson and Orden, *supra* note 7, at 321.

9. Groves & Sheridan, *supra* note 6.

10. Peterson & Orden, *supra* note 7, at 321.

11. *Id.*

12. *Id.*

13. *Rising Demand for Avocado: What to Expect in 2018*, TRIDGE (March, 14, 2018), <https://blog.tridge.com/deep-dive-into-avocado-c5fb1d6b91ae>.

14. Larmer, *supra* note 6.

15. *Rising Demand for Avocado: What to Expect in 2018*, *supra* note 13.

person per year . . . today that figure is up to seven pounds per person year-round.”¹⁶

The avocado demand is driven by the popularity of guacamole, demographics, and nutrition.¹⁷ First, guacamole has greatly risen in popularity, as evidenced by the 135 million pounds of avocados consumed by Americans during the weeks leading up to the 2018 Super Bowl.¹⁸ Another factor adding to avocado demand in the United States is demographics.¹⁹ For example, the growing Hispanic population in states like California has led to a dramatic increase in the amount of Mexican restaurants that use avocados in their food.²⁰ Additionally, as avocados have become “associate[ed] with healthfulness[,]” Americans have increasingly incorporated the fruit into their diets, increasing the overall consumption of avocados.²¹ A 2015 study published in the Journal of the American Heart Association showed incorporation of avocados “into a healthy diet” lowering cholesterol for some overweight and obese adults.²² Avocado growers have directly benefitted from the avocado’s healthy reputation because avocado demand has broken records every year.²³

D. Need for International Importation

The United States avocado demand has outpaced its domestic production and forced the country to rely on importation, a

16. Larmer, *supra* note 6.

17. See Roberto A. Ferdman, *The Rise of the Avocado, America’s New Favorite Fruit*, WASH. POST (Jan. 22, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/01/22/the-sudden-rise-of-the-avocado-americas-new-favorite-fruit/?noredirect=on&utm_term=.b30ed62d4e57](https://www.washingtonpost.com/news/wonk/wp/2015/01/22/the-sudden-rise-of-the-avocado-americas-new-favorite-fruit/?hpid=hp_hp-top-table-main-food-avocado%3Ahomepage%2Fstory&hpid=hp_hp-top-table-main-food-avocado%3Ahomepage%2Fstory&utm_term=.b30ed62d4e57) (attributing “much of the avocado’s rise to the popularity of guacamole”); *Rising Demand for Avocado: What to Expect in 2018*, *supra* note 13.

18. Ferdman, *supra* note 17; Larmer, *supra* note 6.

19. *Rising Demand for Avocado: What to Expect in 2018*, *supra* note 13.

20. *Id.*

21. Ferdman, *supra* note 17.

22. Andrew M. Seaman, *Does an Avocado a Day Lower Bad Cholesterol?*, SCIENTIFIC AMERICAN, <https://www.scientificamerican.com/article/does-an-avocado-a-day-lower-bad-cholesterol/> (last visited Dec. 18, 2018).

23. Ferdman, *supra* note 17.

reliance that has only continued to grow.²⁴ Figure 1 illustrates the pace at which reliance on importation has grown.²⁵

Figure 1
Imported Avocados as a Percentage of Total U.S. Avocado Sales

Year	Percent
2000	40%
2005	67%
2014	85%
2017	90%

The increased demand in the United States has led to “periodic shortfalls”²⁶ and “soaring prices.”²⁷ A case of 48 avocados that cost \$34.45 in September 2016 rose to \$83.75 by September 2017.²⁸ Part of the shortage in the United States is due to strikes by growers in Mexico,²⁹ droughts, California wildfires, and increasing global demand from countries like China.³⁰

E. The United States’ Response

The United States is responding to the avocado demand in

24. See *id.*

25. *Id.*; Jackie Wattles, *Guess Where All Those Avocados Come From*, CNN BUS. (Jan. 27, 2017, 5:08 PM), <https://money.cnn.com/2017/01/27/news/economy/avocados-trump-mexico/index.html> (explaining that in 2017 the United States is expected to only meet 10% of the country’s demand with domestically grown avocados and that the remaining 90% is imported from other countries; 80% is from Mexico and 10% is from Chile, Peru, and the Dominican Republic).

26. Kyle Jahner, *USDA Approves Imports of Columbian Avocados*, LAW360 (Aug. 15, 2017, 3:58 PM), <https://www.law360.com/articles/954099/print?section=foodbeverage>.

27. *Droughts, Storms and Global Demand Tests America’s Love Affair with Avocado*, ECONOMIST (Jan. 25, 2018), <https://www.economist.com/business/2018/01/25/droughts-storms-and-global-demand-tests-americas-love-affair-with-avocado>.

28. *Id.*

29. Jahner, *supra* note 26.

30. *Droughts, Storms and Global Demand Tests America’s Love Affair with Avocado*, *supra* note 27.

several ways.³¹ For example, in 2017, the United States began allowing avocado importation from Columbia.³² Continuing the trend, in June 2018, the USDA proposed new regulatory standards that allow Ecuadorean avocado growers to bring their produce to market in the United States.³³ The proposed standards are in many ways similar to the existing standards for avocados imported from Mexico.³⁴ However, issues may arise from the similar regulatory treatment between Mexico, a country that sells many avocados internationally, and Ecuador, which sells only a small number of its avocados internationally.³⁵ Is it fair for the USDA to impose similar regulations on both Mexico and Ecuador?

On their face, the proposed importation regulations for Ecuadorean avocados appear similar to their Mexican counterparts despite slight differences. This similarity matters because the United States has agreed not to discriminate

31. See Jahner, *supra* note 26 (announcing the beginning of U.S. importation of avocados from Columbia); Dave Simpson, *USDA To Propose Opening Ecuadorean Avocado Imports*, LAW360 (June 14, 2018), <https://www.law360.com/articles/1053896/usda-to-propose-opening-ecuadorean-avocado-imports> (announcing the proposed importation of Ecuadorean avocados to the U.S.).

32. Jahner, *supra* note 26.

33. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84); Simpson, *supra* note 31.

34. Compare 7 C.F.R. § 319.56-30(a)(1) (2018) (allowing only commercial consignments from Mexican growers), with Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,921 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(b)) (allowing only commercial consignments from Ecuadorean growers). Compare 7 C.F.R. § 319.56-30(c)(3)(ii) (2018) (requiring screens with spacing not wider than 1.6 mm on Mexican packinghouses), with Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(d)(3)) (requiring screens with spacing not wider than 1.6 mm on Ecuadorean packinghouses).

35. See, e.g., HASS AVOCADO BOARD, GLOBAL TRADE REPORT 1ST QUARTER, 2018 (2018), https://www.hassavocado.com/sites/default/files/pdf/global-trade-reports/global_trade_report_united_states_q1_2018.pdf (listing Hong Kong as the only country to receive avocado imports from Ecuador in the fourth quarter of 2017 and describing how Ecuador's 200,000 lb. avocado shipment to Hong Kong was dwarfed by Mexico's 3.2 million lb. avocado shipment to Hong Kong during the same period).

between foreign nations with its importation regulations.³⁶ Because the regulations are similar, they initially appear to comply with international standards. However, this comment argues that the regulations have a disparate impact by holding the developing nation of Ecuador to the same standards of Mexico, which has already proven itself capable of competing on the international market. The proposed standards increase production costs for growers in Ecuador and make it harder for Ecuador to enter the global avocado market. This comment offers some prescriptive solutions and suggestions to make a more equitable compromise.

II. SIMILARITIES BETWEEN THE AVOCADO IMPORTATION REGULATIONS FOR MEXICO AND THE PROPOSED AVOCADO IMPORTATION REGULATIONS FOR ECUADOR

A. Appearance of Fairness

At first glance, the regulations that the United States has proposed for Ecuador's avocados look very similar to the established importation regulations for Mexico's avocados. There are slight differences between the two, but the proposed Ecuador regulations still appear to comply with international standards.

B. Sanitary and Phytosanitary Measures Agreement

1. *Background.* International safety standards for fresh agricultural products are governed by the World Trade Organization's ("WTO") Sanitary and Phytosanitary Measures Agreement ("SPS Agreement").³⁷ The WTO signed the SPS Agreement during the Uruguay Round of the Multilateral Trade Negotiation in 1994 to demonstrate the organization's commitment to ensuring the safety of food for human

36. Agreement on the Application of Sanitary and Phytosanitary Measures, art. 2, cl. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 494 [hereinafter "SPS Agreement"].

37. SPS Agreement, *supra* note 36, arts. 1–2; Gil Rodriguez et al., *Beyond Iso-Risk to Include Benefits Under the SPS Agreement*, in THE ECONOMICS OF QUARANTINE AND THE SPS AGREEMENT 164, 164 (Kym Anderson et al. eds., 2001).

consumption and preventing the spread of disease and pests among animals and plants.³⁸

While member countries retain the right to enact their own protective regulations under the SPS Agreement, the agreement imposes certain standards meant to promote international regulatory harmony and to encourage international trade.³⁹ One such international standard is the Codex Alimentarius, which is maintained by the Food and Agricultural Organization of the United Nations (“FAO”) and the World Health Organization (“WHO”).⁴⁰ The SPS Agreement also encourages member nations to promote transparency by requiring them to inform co-signers of any policy changes and to maintain an office or “Enquiry Point” designated to receive and answer any requests for information.⁴¹

The SPS Agreement attempts to balance its goal of promoting the uniformity of sanitary and phytosanitary regulations with its desire to minimize the possibility that those regulations might hinder international trade.⁴² For example, while each WTO member nation retains the right to implement their own sanitary and phytosanitary measures, the SPS Agreement states that member states should use those measures “only to the extent necessary” and should be based on science.⁴³ In fact, the SPS Agreement imposes an affirmative duty on member nations to prevent phytosanitary measures and regulations from becoming trade barriers:

Members shall ensure that their sanitary and
phytosanitary measures do not arbitrarily or

38. *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, WORLD TRADE ORG. (May 1998) https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm [hereinafter *Understanding the SPS Agreement*]. In the SPS agreement, “sanitary” refers to human and animal health and “phytosanitary” refers to plant health. *Id.*

39. SPS Agreement, *supra* note 36, arts. 2–3.

40. *Id.* art 3, cl. 4; *Codex Alimentarius*, FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, <http://www.fao.org/fao-who-codexalimentarius/codex-texts/list-standards/en/> (last visited Dec. 20, 2019).

41. See SPS Agreement, *supra* note 36, art. 7; *Understanding the SPS Agreement*, *supra* note 38.

42. SPS Agreement, *supra* note 36, art. 2, cl. 2–3, art. 3, cl. 1.

43. SPS Agreement, *supra* note 36, art. 2, cl. 2.

unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.⁴⁴

Member states must also consider other economic consequences of such regulations, including: 1) potential damage in terms of lost production; 2) potential damage in spread of pests or diseases; 3) costs of control or eradication in the territory; and 4) cost-effectiveness of alternative approaches.⁴⁵ Member states must also ensure that their sanitary or phytosanitary measures are adapted to fit the unique sanitary and phytosanitary characteristics of the area.⁴⁶

2. *Authority of the SPS Agreement.* To borrow a popular phrase, the SPS Agreement's provisions are "more what you would call guidelines than actual rules."⁴⁷ The SPS Agreement does not create specific sanitary and phytosanitary regulations for countries to apply.⁴⁸ Under WTO rules, member countries can elect to adopt their own regulations under the SPS Agreement.⁴⁹ When governments elect to develop their own regulations, they use the SPS Agreement as a framework to guide their decision-

44. *Id.* art. 2, cl. 3.

45. *Id.* art. 5, cl. 3.

46. *Id.* art. 6, cl. 1.

47. *Pirates of the Caribbean: The Curse of the Black Pearl*, YOUTUBE, <https://www.youtube.com/watch?v=j10hMfqNQ-g> (last visited Nov. 10, 2018) (explaining that the Pirate Code is more like "guidelines" than strict regulations).

48. Terence P. Stewart & Caryn B. Schenewerk, *The Conflict Between Facilitating International Trade and Protecting U.S. Agriculture from Invasive Species: APHIS, the U.S. Plant Protection Laws and the Argentine Citrus Dispute*, 13 J. TRANSNAT'L L. & POL'Y, 305, 325 (2004).

49. Esteban Ferro, Tsunehiro Otsuki, & John S. Wilson, *The Effect of Product Standards on Agricultural Exports*, FOOD POLICY, Jan. 2015, at 68, 68.

making.⁵⁰

3. *The Codex Alimentarius*. The SPS Agreement recommends that countries adopt an international standard in order to create “harmonization” among its members.⁵¹ These recommended gold standards are found in The Codex Alimentarius (the “Codex”).⁵² The Codex provides recommendations for best practices for hundreds of different agricultural products.⁵³ For example, the Codex includes the international standard for foods such as canned salmon, honey, edible fungi, quick frozen peas, and table olives.⁵⁴ The Codex’s Standard for Avocados is found in Codex 197-1995 and was last amended in 2015.⁵⁵ This avocado standard groups avocados into different classes based on their quality and sets standards for packaging and labeling.⁵⁶ Avocado labeling must identify the nature of the produce, the name and address of the exporter, and the country of origin.⁵⁷ The Codex’s Standard for Avocados specifies that avocados should be packaged in compliance with yet another rule—the Code of Practice for Packaging and Transport of Fresh Fruits and Vegetables (the “Code of Practice”).⁵⁸

The Code of Practice includes recommended best practices for prepping, loading, and transporting produce.⁵⁹ The best

50. Stewart & Schenewerk, *supra* note 48, at 325.

51. SPS Agreement, *supra* note 36, art. 3, cl. 1.

52. *Id.* art. 3, cl. 4.

53. *Codex Alimentarius*, *supra* note 40.

54. *Id.*

55. FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, STANDARD FOR AVOCADO, CXS 197-1995 (2015), http://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FStandards%252FCXS%2B197-1995%252FCXS_197e.pdf.

56. *Id.* at 2–4. There are three levels of quality for avocados: “Extra” Class, Class I, and Class II. *Id.* at 2. “Extra” Class avocados are “of superior quality” free of defects except for slight superficial defects. *Id.* Class I avocados as “good quality” but possibly containing “defects in shape and coloring,” “skin defects,” “sunburn” over less than 4 square cm, and “stalk defects.” *Id.* Class II avocados as those “which do not qualify for inclusion in the higher classes, but satisfy the minimum requirements.” *Id.*

57. *Id.* at 4–5.

58. *Id.*

59. FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, CODE OF PRACTICE FOR

practices include a list of necessary qualities for transport vehicles, such as cleanliness, deep floor grooves or channels for air circulation, air-ride suspension, and refrigerator units.⁶⁰ The Code of Practice also includes best practices for packaging materials, which includes fibreboard bins, wood bins, plastic bins, and boxes.⁶¹ The Code of Practice authorizes the use of alternative materials, provided they can withstand “rough handling,” impact, and temperature and humidity changes.⁶² Lastly, the Code of Practice encourages the removal of “field heat” by a refrigeration process called “precooling,” which helps to protect and preserve the fruit for export and sale.⁶³

4. *The United States Department of Agriculture.* The United States, Mexico, and Ecuador are all member countries of the WTO.⁶⁴ Thus, the United States Department of Agriculture, Animal and Plant Health Inspection Service (“APHIS”) has already adopted sanitary and phytosanitary standards for the importation of avocados from Mexico.⁶⁵ In June 2018, APHIS proposed standards for the importation of avocados from Ecuador.⁶⁶ Both the regulations for Mexico and for Ecuador are divided into roughly nine separate subheadings,⁶⁷ as displayed in

PACKAGING AND TRANSPORT OF FRESH FRUIT AND VEGETABLES, CAC/RCP 44-1995 4 (2004), HEREINAFTER CODE OF PRACTICE], [HTTP://WWW.FAO.ORG/FAO-WHO-CODEXALIMENTARIUS/SH-PROXY/JP/?LNK=1&URL=HTTPS%253A%252F%252FWORKSPACE.FAO.ORG%252FSITES%252FCODEX%252FSTANDARDS%252FCAC%2BRCP%2B44-1995%252FCXP_044E.PDF](http://www.fao.org/fao-who-codexalimentarius/sh-proxy/jp/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252Fstandards%252FCAC%2BRCP%2B44-1995%252FCXP_044E.pdf).

60. *Id.* at 2.

61. *Id.* at 4–5.

62. *Id.* at 4.

63. *See id.* at 7 (describing how precooling slows the rate of ripening, moisture loss and spread of decay). Three precooling methods are Hydrocooling, Forced-Air Cooling, and Controlled Atmosphere Storage. *Methods for Cooling Avocados after Harvest*, SEMCO/SEMCO/LLC (Nov. 30, 2014), <https://semcoice.com/cooling/cooling-storing-avocado-post-harvest/>.

64. *Members and Observers*, WORLD TRADE ORG. (July 29, 2016), https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

65. 7 C.F.R. § 319.56-30 (2018).

66. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84).

67. 7 C.F.R. § 319.56-30 (2018); Importation of Fresh Avocado Fruit from

Figure 2.⁶⁸

Figure 2
U.S. Sanitary and Phytosanitary Standards for Avocados
Imported from Mexico and Ecuador

Type of Standard	Title and Location in the Regulation for Mexico	Title and Location in the Regulation for Ecuador
<i>Shipping Requirements</i>	Shipping Restrictions 7 C.F.R. § 319.56-30(a)	Commercial Consignments 7 C.F.R. §319.56-84(b)
<i>Trust Fund Requirements</i>	Trust Fund Requirements 319.56-30(b)	N/A
<i>Municipality Requirements</i>	Municipality Requirements 7 C.F.R. § 319.56-30(c)(1)	Production Site Requirements 7 C.F.R. §319.56-84(c)
<i>Production Site Requirements</i>	Orchard & Grower Requirements 7 C.F.R. § 319.56-30(c)(2)	Production Site Requirements 7 C.F.R. §319.56-84(c)
<i>Packinghouse Requirements</i>	Packinghouse Requirements 7 C.F.R. § 319.56-30(c)(3)	Packinghouse Requirements 7 C.F.R. §319.56-84(d)
<i>Certification</i>	Certification 7 C.F.R. § 319.56-30(d)	Phytosanitary Certificate 7 C.F.R. §319.56-84(g)
<i>Pest Detection</i>	Pest Detection 7 C.F.R. § 319.56-30(e)	Phytosanitary Inspection 7 C.F.R. §319.56-84(f)

Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,921 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84).

68. 7 C.F.R. § 319.56-30 (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,921 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84).

<i>Inspection</i>	Inspection 7 C.F.R. § 319.56-30(f)	Phytosanitary Inspection 7 C.F.R. §319.56-84(f)
<i>Repackaging and Labeling</i>	Repackaging 7 C.F.R. § 319.56- 30(g)	Packinghouse Requirements 7 C.F.R. §319.56- 84(d)(5); Phytosanitary Certificate 7 C.F.R. §319.56-84(g)

The following section analyzes how these sets of subheadings look in a side-by-side comparison.

C. Side-by-Side Comparison of the Regulations

1. *Similar Provisions.* There are strong similarities between the existing SPS regulation for Mexico and the proposed regulation for Ecuador.⁶⁹ For example, shipments from Mexico and Ecuador must be in commercial consignments.⁷⁰ Growers in both countries are required to register with their NPPO⁷¹ and receive a certificate for their produce.⁷² Packinghouses in Mexico and Ecuador can only accept fruit from growers approved by the country's NPPO.⁷³ Both regulations require fruit to be labeled and list the name of the originating grower.⁷⁴ The packinghouse

69. Compare 7 C.F.R. § 319.56-30, with Importation of Fresh Avocado Fruit from Continental Ecuador Into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84).

70. 7 C.F.R. § 319.56-30(a)(1) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador Into the Continental United States, 83 Fed. Reg. 27,918, 27,921 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(b)).

71. 7 C.F.R. § 319.56-30(c)(2) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador Into the Continental United States, 83 Fed. Reg. 27,918, 27,921 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(1)).

72. 7 C.F.R. § 319.56-30(d) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador Into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(g)).

73. 7 C.F.R. § 319.56-30(c)(3)(i) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador Into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(d)(4)).

74. 7 C.F.R. § 319.56-30(c)(3)(v); Importation of Fresh Avocado Fruit from

window screens in Mexico and Ecuador cannot have spacing wider than 1.6 mm⁷⁵ and the packinghouse must have two sets of double doors.⁷⁶ And lastly, fruit leaving Mexico and Ecuador must be biometrically sampled.⁷⁷

Many of these similar provisions have rational explanations. First, “produce grown commercially is less likely to be infested with plant pests than noncommercial consignments.”⁷⁸ Noncommercial consignments have a higher probability of pest infestation because the produce from noncommercial consignments is more often “ripe to overripe.”⁷⁹ Noncommercial consignments also tend to contain avocado varieties other than Hass avocados and are “often grown with little or no pest control.”⁸⁰

Second, the requirement to register with the exporting country’s NPPO is equally necessary for both exporting countries because the NPPO has an essential role in facilitating SPS compliance.⁸¹ The NPPO works with APHIS to establish an

Continental Ecuador Into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(d)(5)).

75. 7 C.F.R. § 319.56-30(c)(3)(ii) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador Into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(d)(3)).

76. 7 C.F.R. § 319.56-30(c)(3)(iii) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador Into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(d)(3)).

77. 7 C.F.R. § 319.56-30(c)(3)(iv); Importation of Fresh Avocado Fruit from Continental Ecuador Into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(f)).

78. Importation of Fresh Avocado Fruit from Continental Ecuador Into the Continental United States, 83 Fed. Reg. 27,918, 27,919 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84).

79. *Id.*

80. *Id.*

81. See 7 C.F.R. § 319.56-30(c)(2)–(2)(i), (c)(iv), (c)(vii), (d), (e), (2018) (directing Mexico’s NPPO to receive orchard registrations, conduct orchard surveys, sample and test harvested fruit, conduct fly trapping, place a seal on all shipments leaving the packinghouse, and issue phytosanitary certificates); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,921 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(1)–(2), (d)(5)–(6), (g) (directing Ecuador’s NPPO to receive orchard registrations, conduct orchard inspections, conduct and maintain records for fruit fly detections, and issue phytosanitary

operational workplan and to carry out the required inspections, sampling, and labeling.⁸²

Third, the uniform labeling requirement provides an essential regulatory component for both countries that ensures any contaminated fruit can be traced back to its originating orchard.⁸³ The tracing procedure allows APHIS to prohibit shipments from the producing orchard until the threat is eradicated, while still allowing shipments from unaffected orchards.⁸⁴

Fourth, the packinghouses in both countries must have window screens with openings not wider than 1.6 mm in order to protect the avocados from pests.⁸⁵ The window screens are a logical barrier because they protect against fruit flies, and fruit fly infestation is a threat in both countries.⁸⁶

Fifth, requiring double-doors on packinghouses is logical for both countries because many shipments of produce are transported on pallets that likely do not fit through single doors.⁸⁷

certificates).

82. 7 C.F.R. § 319.56-30(c), (c)(2), (c)(3), (c)(3)(iv), (c)(3)(viii) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,921–22 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(a), (c)(1)–(2), (d)(5), (f)).

83. 7 C.F.R. § 319.56-30(c)(3)(v) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(8)).

84. 7 C.F.R. § 319.56-30(c)(3)(v) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(8)).

85. 7 C.F.R. § 319.56-30(c)(3)(ii) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(d)(3)).

86. See 7 C.F.R. § 319.56-30(c)(2)(v) (2018) (describing protection from “fruit fly infestation” during transport from the orchard to the packinghouse); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(8)) (describing protection from “fruit fly infestation” during transport from the production site to the packinghouse).

87. See CODE OF PRACTICE, *supra* note 59, at 6; *Commercial Door Dimensions: What is the Average Size of a Commercial Door?*, AEROSEAL, <https://aerosealcorp.com/commercial-door-dimensions-what-is-the-average-size-of-a-commercial-door/> (last visited December 13, 2019) (noting that the international building code permits doors 32 to 48 inches

Lastly, cutting open biometric samples of the fruit at an agreed upon rate is a logical way to search the interior of a shipment for infestation without checking every avocado individually.⁸⁸ Although APHIS may justify the similar provisions with different explanations, this list shows a few of the possible justifications.

2. *Different Provisions.* The SPS regulations for Mexican avocado importation and the proposed regulations for Ecuadorean importation have minor differences under every major heading with the exception of Certification.⁸⁹

Figure 3
Comparison of Sanitary and Phytosanitary Standards
Applicable to Avocados Imported from Mexico and Ecuador

Rule in the Regulation for Mexico	Rule in the Proposed Regulation for Ecuador
Trust fund agreement is required ⁹⁰	No mention of a trust fund agreement ⁹¹
Fallen fruit must be removed from the orchard every 7 days ⁹²	Fallen fruit must be removed from the orchard every 7 days, starting 2 months before harvest and continuing through the end

wide); *What You Need to Know About Standard Pallet Sizes*, BOX AROUND THE WORLD, <https://boxaroundtheworld.com/standard-pallet-sizes/> (last visited Dec. 13, 2019) (describing the standard pallet size as approximately 48 by 40 inches).

88. 7 C.F.R. § 319.56-30(c)(3)(iv) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(f)).

89. See *infra* Figure 3. Compare 7 C.F.R. § 319.56-30, with Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84).

90. 7 C.F.R. § 319.56-30(b).

91. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84).

92. 7 C.F.R. § 319.56-30(c)(2)(ii).

	of harvest ⁹³
Dead branches must be pruned and removed from the orchard ⁹⁴	No mention of dead branches ⁹⁵
Harvested fruit must be transported to the packinghouse on the day of harvest or protected until moved ⁹⁶	Harvested fruit must be transported to the packinghouse within three hours of harvest or protected until moved ⁹⁷
All stems, leaves and other portions of plants must be removed ⁹⁸	No mention of stems, leaves, or other portions of plants ⁹⁹
Packinghouses must use clean, new boxes, bulk shipping bins, or clean plastic crates ¹⁰⁰	Packinghouses must use insect-proof cartons or containers ¹⁰¹
Transportation vehicle from the packinghouse must be a refrigerated truck ¹⁰²	Vehicle not described ¹⁰³

93. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(3)).

94. 7 C.F.R. § 319.56-30(c)(2)(iii).

95. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84).

96. 7 C.F.R. § 319.56-30(c)(2)(iv).

97. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(8)).

98. 7 C.F.R. § 319.56-30(c)(3)(vi).

99. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84).

100. 7 C.F.R. § 319.56-30(c)(3)(vii).

101. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(d)(2)).

102. 7 C.F.R. § 319.56-30(c)(3)(viii).

103. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R.

Detected pests must be isolated and eradicated ¹⁰⁴	Sites with non-Hass avocados must conduct fruit fly trapping; if too many flies are detected, then the orchard cannot export to the United States ¹⁰⁵
Mexican avocados are subject to inspection in Mexico and at any stops in the United States en route to an approved state ¹⁰⁶	Ecuadorean avocados are subject to inspection after post-harvest processing ¹⁰⁷
Mexican trucks or containers leaving the packinghouse must have a NPPO seal ¹⁰⁸	No mention of seals on trucks or containers ¹⁰⁹

a. Scientific and Logical Support for Differences. Some of the differing provisions have logical explanations. First, the different rules for fly trapping in Ecuador may be because the two countries have different threatening insects.¹¹⁰

Second, a potential, simple scientific reason that dead

§319.56-84).

104. 7 C.F.R. § 319.56-30(e).

105. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(4)–(7)).

106. 7 C.F.R. § 319.56-30(f).

107. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(f)(1)).

108. 7 C.F.R. § 319.56-30(c)(3)(viii).

109. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84).

110. *Compare* Importation of Fresh Avocado Fruit from Continental Ecuador Into the Continental United States, 83 Fed. Reg. 27,918, 27, 918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84) (explaining that the four pests from Ecuador being screened are the Mediterranean fruit fly, the South American fruit fly, the sapote fruit fly, and the guava fruit fly), *with* Mexican Hass Avocado Import Program, 81 Fed. Reg. 33,581, 33,582 (May 27, 2016) (explaining that the pests from Mexico currently being screened from Mexico are fruit flies, three types of weevil, and a moth, but noting that changes are being considered).

branches are pruned and removed in Ecuador and not in Mexico is because the Hass avocado trees in Ecuador are younger and have not yet reached full maturity.¹¹¹ Because Ecuador's avocado trees are younger, they currently require less pruning.¹¹²

Third, a potential reason that fallen avocados must be picked up year-round in Mexico and only starting two months before harvest and continuing through the end of harvest in Ecuador is because of water availability.¹¹³ Too little water can cause avocado trees to drop their fruit.¹¹⁴ The environmental impact of the avocado industry in Mexico has led to the use of "more and more water," leading to water shortages in some areas.¹¹⁵ Mexico's growing water shortages can be contrasted with the growing conditions in Ecuador. Ecuador has the "location, the climate, the soil and water quality" which make up "ideal conditions" for avocado production.¹¹⁶ The United States Army core of engineers has described Ecuador's water supply as "abundant."¹¹⁷

111. See *Ecuador Next in Line for Hass Avocado Boom*, PRODUCE BUSINESS UK (July 13, 2017), <http://www.producebusinessuk.com/insight/insight-stories/2017/07/13/ecuador-next-in-line-for-hass-avocado-boom> (explaining that there were no Hass variety avocados planted in Ecuador until 2002 and most of the Hass variety avocado plants are young plantings that still haven't reached their maximum productivity).

112. See *Care of a Young Avocado Tree*, SFGATE, <https://homeguides.sfgate.com/care-young-avocado-tree-54651.html> (last visited July 29, 2019) (noting that "young avocado trees don't need much trimming").

113. 7 C.F.R. § 319.56-30(c)(2)(ii) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador Into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(3)); But c.f. *infra* note 165 (explaining that the difference in fallen fruit pickup gives no benefit to Ecuadorean growers who harvest year-round).

114. *What's New on the MG Site?*, *Avocados*, UNIV. OF CAL. AGRIC. AND NATURAL RES. <http://mgorange.ucanr.edu/?story=898> (last visited Dec. 21, 2019).

115. Ignacio Fariza, *Is Mexico's Avocado Boom Sustainable?*, EL PAIS (Mar. 27, 2017), https://elpais.com/elpais/2017/03/27/inenglish/1490612533_740839.html.

116. *Avocado Growers in Ecuador Growing Fast, Determined to Meet U.K. Standards*, PRODUCE BUSINESS UK (Sept. 20, 2018), <https://www.freshfruitportal.com/news/2018/09/20/avocado-growers-in-ecuador-growing-fast-determined-to-meet-u-k-standards/>.

117. U.S. ARMY CORPS OF ENGINEERS, WATER RESOURCES ASSESSMENT OF ECUADOR 13 (1998).

Lastly, the NPPO seal may be needed on transportation vehicles in Mexico, and not in Ecuador, because of criminal activity surrounding the Mexican avocado trade.¹¹⁸ The Mexican drug cartels are violent and use kidnapping and extortion to coerce money from the orchard owners.¹¹⁹ Organized crime has been so severe that some citizens and avocado farmers in Mexico have hired “self-defense groups” comprised of local municipality members with military training and intimidating military gear.¹²⁰ In fact, Michoacán’s ability to produce 1.7 billion pounds of avocados in such a “cartel-riddled” state was described as a “miracle of modern trade.”¹²¹ Although not strictly scientific under the SPS agreement, the presence of violent cartel activity may give rise to a need to ensure the product has not been tampered with during transit through the Mexican countryside. Showing the product has not been tampered with is especially important considering that United States’ avocado imports from Mexico constituted 86% of a billion-dollar industry in 2015.¹²²

b. Codex Standards Support for Differences. There are several differences between the import regulations for Mexico and Ecuador that are explained by the Codex’s best-practice standard. For example, in the import regulations, a refrigerated truck is required in Mexico,¹²³ while no particular vehicle is required in Ecuador.¹²⁴ This difference may be related to the volume of avocados exported from each country.¹²⁵ The Codex’s Code of

118. Fariza, *supra* note 115. The flourishing avocado industry in Michoacán has attracted “organized crime.” *Id.*

119. See Katy Watson, *The Avocado Police Protecting Mexico’s Green Gold*, BBC NEWS (Nov. 28, 2017), <https://www.bbc.com/news/world-latin-america-41635008> (recounting the story of a Mexican avocado farmer who was kidnapped twice and later paid \$500,000 in extortion when his 16-year-old son was kidnapped).

120. See *id.* (describing the equipment used by the hired defenders as “impressive” including “arms, body armour and . . . a bullet-proof pickup).

121. Larmer, *supra* note 6.

122. Simpson, *supra* note 31.

123. 7 C.F.R. § 319.56-30(c)(3)(viii) (2018).

124. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84).

125. HASS AVOCADO BOARD, *supra* note 35.

Practice notes that refrigerated transport is “recommended for most high-volume produce.”¹²⁶ Mexico currently transports avocados in much higher volumes than Ecuador.¹²⁷ Requiring refrigerated trucks in Mexico, but not Ecuador, is likely a response to the Codex’s best practice for high-volume fruits.¹²⁸

A second difference explained by the Codex is the difference in required packaging materials. The requirements for Mexico are much more specific than those for Ecuador. Mexican growers are required to use “new boxes, bulk shipping bins, or clean plastic crates”¹²⁹ while Ecuadorean growers are required to use “insect-proof cartons or containers.”¹³⁰ Under the Code of Practice, factors for choosing packaging materials include “precooling method, strength, cost,” and “availability.”¹³¹ Thus, Mexico may be required to use specific crates, such as plastic crates allowing for air circulation and sturdy stacking,¹³² because Mexico transports avocados in such high volumes.¹³³ Using plastic crates may also be more conducive to the precooling methods used.¹³⁴

A third difference explained by the Codex is the time difference allowed for transporting avocados to packinghouses when the fruit is not protected prior to the transportation. In Mexico, growers have all day to transport the fruit after harvest; however, in Ecuador, growers must transport the fruit within three hours of harvest.¹³⁵ This difference is potentially explained

126. CODE OF PRACTICE, *supra* note 59, at 1.

127. HASS AVOCADO BOARD, *supra* note 35.

128. CODE OF PRACTICE, *supra* note 59, at 1.

129. 7 C.F.R. § 319.56-30(c)(3)(vii) (2018).

130. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(d)(2)).

131. CODE OF PRACTICE, *supra* note 59, at 4.

132. *About Plastic Crates*, PLASTIC2GO, <https://www.plastic2go.com.au/plastic-crates-about/> (last visited Dec. 14, 2018) (describing plastic crates as “durable,” “strong,” and “vented” to allow “air circulation if needed”).

133. See Larmer, *supra* note 6 (describing Mexico’s Hass avocado export as “more than 1.7 billion pounds” in 2017).

134. *Facilities*, WEST PAK AVOCADO INC., <https://www.westpakavocado.com/facilities/> (last visited Dec. 14, 2018) (describing its packing facilities as “modern” and utilizing “pallet and bin precooling”).

135. Compare 7 C.F.R. § 319.56-30(c)(2)(iv) (2018), *with* Importation of Fresh

by the presence of precooling facilities in Mexico, which are not present in Ecuador. The Code of Practice describes “precooling” as a method of extending the life of produce by reducing “field heat, rate of respiration and heat generated by the produce, rate of ripening,” and “the spread of decay.”¹³⁶ As a giant in the avocado industry, Mexico has multiple technologically advanced avocado packinghouses.¹³⁷ Many avocados grown in Mexico are packed in these advanced packinghouses before shipment, where they are likely cooled, increasing their shelf-life.¹³⁸ Ecuador, in contrast, has fewer options; none of the major avocado shippers have packing facilities in Ecuador or even use Ecuador as a source.¹³⁹ Only a single avocado producer in Ecuador advertises having a packinghouse in Ecuador,¹⁴⁰ and that packinghouse appears far less advanced than its Mexican equivalents.¹⁴¹ Because Ecuador has fewer advanced packinghouses with precooling facilities that cool avocados before shipment, it is important to protect the harvested avocados in Ecuador from the sun within a shorter time frame than required in Mexico. APHIS

Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(8)).

136. CODE OF PRACTICE, *supra* note 59, at 7.

137. See, e.g., *Trade*, MISSION PRODUCE, <https://www.worldsfinestavocados.com/trade/> (last visited Dec. 14, 2018) (describing itself as having a packing facility in Mexico that “utilize[s] cutting edge technology”).

138. See CODE OF PRACTICE, *supra* note 59, at 7 (describing how precooling reduces the “rate of ripening” and the “spread of decay”).

139. See *Facilities*, WEST PAK AVOCADO INC., <https://www.westpakavocado.com/facilities/> (last visited Dec. 14, 2018) (listing packing facilities in the U.S.A., Mexico, Chile, and Peru and sourcing locations in the U.S.A., Mexico, Columbia, Peru, Chile, and South Africa); *Market*, JBR <http://www.aguacatesjbr.com/english/market.html> (last visited Dec. 14, 2018) (describing itself as having a packinghouse in Mexico); *Trade*, *supra* note 137 (listing packing facilities in California, Mexico, Peru, Chile, and New Zealand); *Packing Houses*, HEALTHY AVOCADO, <https://healthyavocado.com/packing-houses/> (last visited Dec. 14, 2018) (describing itself as having packinghouses in Uruapan and Patzcuaro, Mexico).

140. See *Export Report*, CORPOAGUACATE (Sept. 10, 2017), <http://corpoaguacate.ec/noticias.html> (describing Corpoaguacate’s export process and showing a video that includes footage of an Ecuadorean avocado packinghouse).

141. Compare *id.* (showing a medium sized, cinder-block building, with some basic conveyer belt technologies, and multiple workers cleaning and packing avocados by hand), with *Facilities*, *supra* note 139 (showing photos of a large packing facility fully equipped with mechanized, modern technology).

may have alternative explanations for the differing provisions, but the foregoing list contains a few possible explanations that APHIS may have used.

III. DISCRIMINATION PRESENT IN THE PROPOSED AVOCADO IMPORTATION REGULATIONS FOR ECUADOR

Despite the nondiscriminatory appearance of the proposed regulations, they do not take into account Ecuador's level of development in the avocado industry. While comparing Mexico and Ecuador may seem to create the fairest standard, the vast differences in each country's development makes the comparison inherently discriminatory.

The SPS Agreement has multiple provisions regarding fair treatment for developing nations on the world stage.¹⁴² Article 9 of the SPS Agreement provides that "members agree to facilitate the provision of technical assistance to other members, especially developing country members."¹⁴³ Article 10 of the SPS Agreement states that "members shall take account of the special needs of developing country members"¹⁴⁴ and shall "allow longer time-frames for developing country members so as to maintain opportunities for their exports."¹⁴⁵ To fully comply with the SPS Agreement, the proposed regulations for Ecuador should take into account Ecuador's status as a developing country in the avocado industry.

A. Challenges Faced by Developing Countries Selling in the Global Marketplace

Developing countries have a difficult time integrating into the global food trade market.¹⁴⁶ The WTO agreements have historically benefitted developed countries while leaving developing countries "lagging behind" because they are unable to

142. SPS Agreement, *supra* note 36, art. 9, cl. 1, art. 10, cl. 1–2.

143. *Id.* art. 9, cl. 1.

144. *Id.* art. 10, cl. 1.

145. *Id.* art. 10, cl. 2.

146. S.A. Neeliah and D. Goburdhun, *Complying with the Clauses of the SPS Agreement: Case of a Developing Country*, 21 FOOD CONTROL 902, 902 (2010).

keep up with the fast pace with which food safety standards are growing.¹⁴⁷ It is “widely acknowledged” that SPS requirements can “impede trade, particularly in the case of developing countries.”¹⁴⁸ The “most established view” is that food safety standards of industrialized countries create a “trade barrier” particularly for “small producers and agro-enterprises.”¹⁴⁹ With over 50% of developing country exports being fresh food commodities, developing countries are disproportionately affected by SPS agreements because their agricultural and food products are their high-value trade products.¹⁵⁰

The challenges facing developing countries in the global marketplace are caused by a variety of factors. Because developing countries do not possess the resources of their more developed counterparts, they are unable to truly participate in the institutions of the WTO.¹⁵¹ Additionally, consumers in industrialized countries differ from consumers in developing countries because industrialized consumers have concerns about chemical residues and contaminants in their food, unlike most consumers in developing countries.¹⁵² This disparity is often worsened by media scares about food safety and weakening consumer confidence in the existing safety standards.¹⁵³ Further, based on demographic and social changes within developed nations, consumers have changed the types and quality of foods in demand.¹⁵⁴ Thus, developing countries must be flexible to respond to these changes. However, the extent and speed of the changes have created difficulties for developing

147. *Id.*; see Spencer Henson & Steven Jaffee, *Food Safety Standards and Trade: Enhancing Competitiveness and Avoiding Exclusion of Developing Countries*, 18 EUR. J. OF DEV. RES. 593, 594–95 (2006) (explaining that “extent and speed” of “proliferating” food safety standards ultimately pose “challenges for developing countries”).

148. Spencer Henson & Rupert Loader, *Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements*, WORLD DEV., Jan. 2001, at 85, 85.

149. Henson and Jaffee, *supra* note 147, at 594.

150. *Id.* at 593–94.

151. Henson & Loader, *supra* note 148, at 85.

152. Henson & Jaffee, *supra* note 147, at 595.

153. *Id.*

154. *Id.*

countries.¹⁵⁵ Even more, developing nations face additional difficulties when adapting to the need for traceability and the role of product liability for food sellers.¹⁵⁶

B. Comparison of Regulations in Light of Ecuador's Developing Status

1. Equitable, Different Provisions. Although some of the parallel provisions between the regulations for Mexico and the regulations for Ecuador are different, they are still fair to Ecuador.

a. More Lenient Trust Fund Requirements. The proposed regulation for Ecuador has no trust fund requirement, thus making its standard appropriately more lenient than the trust fund requirement in the regulation for Mexico.¹⁵⁷ A 2001 publication of the Federal Register describes the Mexican trust fund requirement as effectively causing an association of Mexican avocado growers to pay for APHIS's operating expenses related to regulation enforcement in Mexico.¹⁵⁸ For example, APHIS stations an inspector in Michoacán year-round to "ensure that APHIS regulations and the conditions of the program are being complied with in approved orchards and packinghouses."¹⁵⁹ The trust fund covers "all estimated costs that APHIS expects to incur through its involvement in the trapping, survey, harvest, and packinghouse operations."¹⁶⁰ This difference imposes a higher burden on Mexico. Thus, it is appropriate to not have a trust fund requirement in Ecuador considering Ecuador's developing status

155. *Id.*

156. Henson & Jaffee, *supra* note 147, at 596.

157. 7 C.F.R. § 319.56-30(b) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84). The regulation for Mexico requires a trust fund, and the regulation for Ecuador has no equivalent. 7 C.F.R. § 319.56-30(b) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84).

158. Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530, 55,532 (Nov. 1, 2001).

159. *Id.* at 55,536.

160. 7 C.F.R. § 319.56-2ff(b) (2003).

in the avocado market.¹⁶¹

b. More Lenient Orchard/Production Site Requirements. The regulation for Ecuador is also more lenient than the regulation for Mexico because it permits Ecuadorean growers to perform minimal pick up work in their orchards.¹⁶² For example, the regulation for Mexico requires fallen fruit to be picked up every seven days year-round,¹⁶³ but the equivalent rule for Ecuador only requires fallen fruit to be picked up two months before harvest.¹⁶⁴ Although this rule only provides benefit to Ecuadorean growers not harvesting year-round, it provides a more lenient standard for certain Ecuadorean growers.¹⁶⁵

Additionally, the regulation for Mexico includes a provision that dead branches be pruned and removed from the orchard.¹⁶⁶ In contrast, the regulation for Ecuador does not mention dead branches in any way.¹⁶⁷ While the fallen fruit and dead branches provisions may have scientific explanations, their absence in the regulation for Ecuador creates an appropriately lighter burden that supports Ecuador's development. Picking up fallen fruit can impose additional costs upon growers, and the regulation's absence frees up more capital for growers to invest in additional

161. *Avocado Growers in Ecuador Growing Fast, Determined to Meet U.K. Standards*, *supra* note 116 (describing Ecuador's avocado potential as "greater" because more orchards are being planted and will "enter commercial bearing").

162. 7 C.F.R. § 319.56-30(c)(2)(ii)–(iii) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(3)).

163. 7 C.F.R. § 319.56-30(c)(2)(ii)–(iii) (2018).

164. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (to be codified at 7 C.F.R. § 319.56-84(c)(3)).

165. *See Avocado Growers in Ecuador Growing Fast, Determined to Meet U.K. Standards*, *supra* note 116 (describing one Ecuadorean avocado producer as harvesting for only nine months of the year); *Products*, GREEN EXPORT ECUADOR (Sept. 18, 2018), <https://greenexportecuador.com/products-green-export-ecuador-avocado-mangoes-lemon-pitahaya-banano/> (showing Hass avocados to be in-season year-round).

166. 7 C.F.R. § 319.56-30(c)(2)(iii) (2018).

167. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84).

planting if they so choose.¹⁶⁸

c. More Lenient Packinghouse Requirements. The packinghouse requirements are more lenient in the regulations for Ecuador than in the regulations for Mexico because they are more general.¹⁶⁹ The regulation for Mexico requires that avocados be cleansed of all stems, leaves, and other portions of the plant.¹⁷⁰ Mexican packinghouses must also use clean, new boxes or clean, plastic reusable crates.¹⁷¹ The regulation for Ecuador does not mention stem or leaf removal or the use of clean, new boxes or plastic, reusable crates.¹⁷²

Also, in Mexico, avocados leaving packinghouses must be transported in refrigerated trucks to comply with U.S. import regulations.¹⁷³ Mexican avocados that have not been packed or loaded into a refrigerated truck or container by the end of the workday must be kept in a screened packing area.¹⁷⁴ In Ecuador, however, the regulations do not require the use of refrigerated trucks for transportation from the packinghouses and do not have specified requirements for unpacked avocados.¹⁷⁵ Although the lower standards for stem removal, transportation, and storage may decrease food safety, the lower standards are all appropriate considering that Ecuador has less experience exporting avocados than Mexico and that requiring refrigerated trucks would impose

168. See Kristen Holmes, *Amid Immigration Crackdown, This Avocado Farmer is Struggling to Find Workers*, CNN (June 15, 2018), <https://money.cnn.com/2018/06/15/news/economy/california-farmer-workers-immigration/index.html> (noting that a new avocado harvester in California can make “\$200 to \$300 a day after a few weeks”).

169. 7 C.F.R. § 319.56-30(c)(3) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(d)).

170. 7 C.F.R. § 319.56-30(c)(3)(vi) (2018).

171. 7 C.F.R. § 319.56-30(c)(3)(vii) (2018).

172. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(d)).

173. 7 C.F.R. § 319.56-30(c)(3)(viii) (2018).

174. 7 C.F.R. § 319.56-30(c)(3)(ix) (2018).

175. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(d)).

additional cost on Ecuadorean producers.¹⁷⁶

d. More Lenient Inspection Requirements. The regulation for Ecuador is more lenient than the regulation for Mexico with the timing and location of fruit inspections.¹⁷⁷ Mexican avocados are subject to inspection at their first port of arrival in the United States and at “any stops” within the United States *en route* to their destination.¹⁷⁸ The inspector of Mexican avocados may sample and cut avocados from each consignment to detect pest infestation.¹⁷⁹ Ecuadorean avocados, however, are only subject to inspection before they leave Ecuador.¹⁸⁰ The inspector in Ecuador visually assesses the fruit after post-harvest processing and cuts into the fruit if signs of quarantined pests are observed.¹⁸¹ This minor difference is appropriate and potentially makes a large difference to burgeoning Ecuadorean avocado farmers. For major avocado producers in Mexico, a denied shipment would be a challenge and likely an expense.¹⁸² But, for growers in Ecuador just entering the global market,¹⁸³ a denied shipment at the U.S. border, after shipping costs are already paid, would be a debilitating blow.¹⁸⁴ This different inspection standard is

176. See HASS AVOCADO BOARD, *supra* note 35; *National Reefer Rates*, DAT, <https://www.dat.com/industry-trends/trendlines/reefer/national-rates> (last visited Dec. 13, 2018) (noting that the national average commercial reefer shipping rate was \$2.46 per mile during the week of Dec. 2–8, 2018.).

177. 7 C.F.R. § 319.56-30(f) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(f)(1)).

178. 7 C.F.R. § 319.56-30(f) (2018).

179. *Id.*

180. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(f)(1)).

181. *Id.*

182. Doug Nelson, *Rejected Loads and Ownership: Seller not Responding to Rejections*, PRODUCEBLUEBOOK (Feb. 21, 2018), <https://www.producebluebook.com/2018/02/21/rejected-loads-and-ownership/> (explaining that ownership of rejected produce shipments typically reverts to the seller who then is responsible for storing the load or trying to find a replacement buyer).

183. See *Ecuador Next in Line for Hass Avocado Boom*, *supra* note 111 (explaining that Ecuadorean farmers did not see “export potential” for Hass avocados until 2012).

184. See Henson & Jaffee, *supra* note 147, at 600 (arguing “the ultimate risk faced

appropriate for Ecuador because Ecuador ships significantly fewer avocados than does Mexico.¹⁸⁵ Fewer avocado shipments results in a numerically lower risk of pest infestation.

2. *Inequitable, Equivalent Provisions.* However, there are parallel provisions that are the same, but are unfair to Ecuador.

a. *Equivalent Shipping Requirements.* The matching shipping requirements in both regulations are inequitable to Ecuador because they do not allow for Ecuador's developing industry status. The shipping requirements in both regulations allow only for commercial consignments to be shipped to the United States.¹⁸⁶ As a general rule, consignment sales allow a retailer to offer a manufacturer's or grower's product for sale without first buying the product.¹⁸⁷ If the product sells, the retailer then pays the grower or manufacturer for the sold product.¹⁸⁸ If the product does not sell, however, the retailer may return the unsold product without any payment obligation.¹⁸⁹ This restriction prohibits Ecuadorean growers from being paid upon shipment by delaying payment until the avocados are sold.¹⁹⁰ This effectively requires the growers to have additional capital to sustain them during this waiting period.¹⁹¹

During the waiting period, the avocados are owned by the Ecuadorean growers but outside of the grower's control.¹⁹² The fruit may be subject to damage and "shopper abuse" while being

by exporters is that their consignments will be turned back at the border" giving rise to additional costs for destruction or diversion to a different market).

185. HASS AVOCADO BOARD, *supra* note 35.

186. 7 C.F.R. § 319.56-30(a)(1) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,921 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(b)).

187. *Selling Products on Consignment*, INFO ENTREPRENEURS, <https://www.infoentrepreneurs.org/en/selling-products-on-consignment/> (last visited Dec. 17, 2018).

188. *Id.*

189. *Id.*

190. *Id.*

191. *See id.* (describing that a manufacturer must have "cash on hand to wait extended periods for payments of merchandise sold").

192. *Id.*

offered for sale on the retailer's shelves.¹⁹³ Thus, the regulation places a larger burden on Ecuadorean growers than Mexican growers because Mexico is more likely to have additional capital on hand¹⁹⁴ with its established, large avocado farming operations set up and running.¹⁹⁵

Ecuador, however, is in a transition period.¹⁹⁶ It is transitioning from growing Fuerte avocados for local consumption to growing Hass avocados for international exportation.¹⁹⁷ While Ecuadorean farmers have grown Fuerte avocados for an extended time, the transition to high-demand Hass avocados is a process that is only happening slowly.¹⁹⁸ Thus, the proposed importation regulation should consider Ecuador's needs as a developing country and allow Ecuadorean growers the option to be paid immediately for their shipments. Such a regulation would enable more farmers to be paid faster, easing their slow transition from Fuerte to Hass avocados.

b. Equivalent Packinghouse Requirements. The parallel packinghouse requirements in both regulations are also inequitable to Ecuador because of the higher burden they impose. For example, the sampling provision in the regulation for Mexico requires that the NPPO or its designee take a biometric sample from the avocados in the packinghouse at a rate determined by APHIS.¹⁹⁹ The Mexican NPPO then cuts and inspects the sample.²⁰⁰ Similarly, the regulation for Ecuador requires APHIS and Ecuador's NPPO to agree upon biometric samples of post-

193. *Id.*

194. *See* Watson, *supra* note 119 (describing one Mexican avocado farmer who had \$500,000 on hand).

195. *See id.* (explaining that Tancitaro, Mexico is a municipality of only 30,000 people, but ships "nearly two billion" avocados to the United States each year).

196. *See Ecuador Next in Line for Hass Avocado Boom*, *supra* note 111 (explaining that Ecuadorean farmers are starting to show "more interest" in producing Hass avocados because they are being paid higher prices for them overseas).

197. *Id.* Until recently, many Ecuadorean producers primarily grew Fuerte avocados because their local customers preferred Fuerte over Hass. *Id.*

198. *See id.* (describing the transition to selling Hass avocados as "slothlike at best").

199. 7 C.F.R. § 319.56-30(c)(3)(iv) (2018).

200. *Id.*

harvest avocados; Ecuador's NPPO then cuts and inspects the samples for internal pests.²⁰¹ The two provisions are fair in the sense that the national NPPO and APHIS work together to implement the process in Mexico and Ecuador.²⁰² Yet, the fairness of this provision will ultimately be determined by the rates established for each country. If the rate of produce taken for sampling is the same, the lost produce will affect the developing country more heavily.²⁰³ The appropriate choice would be to set a rate that is initially equivalent to Mexico's rate, until a period of pest-free shipments has been attained. Ecuador's rate should then be lowered to ease the financial loss of Ecuadorean growers while Ecuador is entering the avocado market. If enacted, this would employ a method previously used by APHIS for the standards initially set for Mexican avocados.²⁰⁴

The physical specifications for the packinghouses will also likely be more burdensome on Ecuadorean growers than Mexican growers. Both regulations require avocado packinghouses to have either window screens with openings not wider than 1.6 mm or a barrier that prevents pests from entering.²⁰⁵ The regulations require the packinghouses to have double-doors at the entrance and the interior area where avocados are packed.²⁰⁶ While the screening and double-doors seem reasonable, the impact of those costs will likely be disparate. For a developing nation, "the costs of installing the necessary physical

201. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(f)(1)).

202. 7 C.F.R. § 319.56-30(c)(3)(iv) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(f)(1)).

203. See, e.g., Henson & Jaffee, *supra* note 147, at 609 (explaining that fruit and vegetable growers in the developing country of Ghana have very "modest" margins and even recurring costs that are "limited" can "compromise competitiveness").

204. 7 C.F.R. § 319.56-30(c)(1)(ii) (2018).

205. 7 C.F.R. § 319.56-30(c)(3)(ii) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(d)(3)).

206. 7 C.F.R. § 319.56-30(c)(3)(iii) (2018); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(d)(3)).

infrastructure” such as packing facilities, can be “enormous.”²⁰⁷ The provision would be more equitable if it contained additional language permitting the use of alternative methods. For example, an alternative method may require the same opening width for the door but allow any method of closure as long as the seal is equivalent.²⁰⁸ Another possible remedy may be to create an initial temporary grace period that allows growers to use their existing facilities while earning the capital needed for the structural improvements.

c. Equivalent Pest Detection Requirements. The equivalent requirements for pest detection are potentially more burdensome to Ecuador than to Mexico. As noted previously, the pest detection requirements for Mexico and Ecuador are roughly similar in regards to Hass avocados,²⁰⁹ but the regulation for Ecuadorean avocados contains an additional provision for non-Hass avocados.²¹⁰ The non-Hass avocados must be kept 100 meters away from Hass avocado production sites.²¹¹ Orchards that include non-Hass avocados must maintain additional fruit fly traps and records not required for Hass-only orchards,²¹² and growers run the risk of all shipments being prohibited in the event of a violation.²¹³ This exception for non-Hass avocados likely

207. Henson & Jaffee, *supra* note 147, at 607.

208. See, e.g., *Econo Max Strip Door*, CHASE DOORS, <https://www.chasedoors.com/econo-max-strip-door/> (last visited Mar. 8, 2019) (showing an example of an industrial width closure made of vertical strips of plastic).

209. Compare 7 C.F.R. § 319.56-30(e) (2018) (requiring general eradication of pests in Mexican packinghouses and orchards), with Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,919 (June 15, 2018) (describing production site requirement paragraph (c)(2) and requiring general compliance with the “systems approach” designed to mitigate pest risks).

210. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(4)).

211. *Id.*

212. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(6)).

213. See Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(7)) (warning that if the number of flies trapped exceeds specified

presents a significant difficulty for many Ecuadorean growers because of the established presence of the Fuerte avocado in Ecuador.²¹⁴ There are still large amounts of Fuerte trees in Ecuador given the preferences of Ecuadorean consumers.²¹⁵ Additionally, non-Hass avocados in Ecuador are not limited to the Fuerte variety, but are found in “endless shapes, colors and sizes . . . in the central town markets.”²¹⁶ The 100 meter distance requirement potentially forces Ecuadorean growers to remove native avocado trees or plant new Hass-only orchards in order to comply.²¹⁷ Planting a new orchard of Hass-only avocado trees involves significant investments of time and money for Ecuadorean growers desiring to enter the international avocado market.²¹⁸ Thus, this regulation involves additional expenses for Ecuadorean growers that Mexican growers do not face, whether through maintaining additional fly traps or creating an orchard free from non-Hass avocado trees.²¹⁹

3. *Inequitable, Different Provisions.* Some of the parallel

levels for “more than 2 weeks” that orchard could be temporarily prohibited from exporting to the United States).

214. See *Ecuador Next in Line for Hass Avocado Boom*, *supra* note 111 (explaining that Ecuador has traditionally grown Fuerte avocados and growing Hass avocados instead has been a challenging “cultural change”).

215. See *id.* (describing how the “majority of Ecuadoreans grew up with Fuerte avocados”).

216. Alastair Bland, *What Makes These Avocados Different From All Others?*, SMITHSONIAN (Feb. 26, 2013), <https://www.smithsonianmag.com/travel/what-makes-these-avocados-different-from-all-others-27947578/>.

217. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(4)).

218. See Claire Bendix, *Avocado Market Ripe for Change—And Patents*, LAW360 (April 2, 2018), <https://www.law360.com/articles/1025605/print?section=california> (describing how “developing new varieties” of avocado “requires a large investment of time”); see, e.g., *Avocado Production—Part 3: Planning Your Orchard*, FARMER’S WEEKLY (June 30, 2016), <https://www.farmersweekly.co.za/farm-basics/how-to-crop/avocado-production-part-3-planning-your-orchard/> (describing how a newly planted Avocado orchard is not profitable until “seven to 10 years” after planting).

219. Compare 7 C.F.R. § 319.56-30 (2018) (lacking any requirements for nearby non-Hass avocado trees), with Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(4)) (requiring 100-meter distance from non-Hass

provisions are not only different, but also unfair to Ecuador.

a. *More Stringent Provision Regarding Pest Detection.* The stricter pest detection regulation for Ecuador is highly inequitable. The Ecuador regulation is more stringent than the regulation for Mexico because it requires more frequent inspections.²²⁰ For Mexican orchards that have been successfully in compliance for over 5 years, only one inspection per year is required.²²¹ In contrast, Ecuadorean orchards must be inspected monthly beginning two months before harvest and continuing through the end of the growing season.²²² The growing season for avocados in Ecuador is year-round, with part of the year being high season and part being low season.²²³ Thus, inspections of avocado orchards in Ecuador potentially occur up to twelve times per year,²²⁴ compared with only once or twice a year for Mexican orchards.²²⁵ An Ecuadorean avocado producer

avocado trees or additional fly trapping and record keeping).

220. Compare 7 C.F.R. § 319.56-30(c)(1)(ii) (2018) (requiring the municipality be checked for pests twice a year for 5 years and then checked once annually), with Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,921 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(2)) (requiring monthly inspection of production sites “starting 2 months before harvest” through the end of “shipping season”).

221. 7 C.F.R. § 319.56-30(c)(2)(i) (2018).

222. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,921 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(2)).

223. See *Products*, *supra* note 165 (showing Hass avocados to be in-season and available for purchase year-round with high season lasting from May through September and low season from October until April); see also *Ecuador Can Produce Avocados When Other Nations Can't*, FRESHPLAZA (June 12, 2018), <http://www.freshplaza.com/article/2196239/ecuador-can-produce-avocados-when-other-nations-can-t/> (quoting the president of Ecuadorean Federation of Exporters as saying “Ecuador has the advantage of being able to produce avocado when other nations that have four seasons, like Chile, can’t produce it”).

224. See *Products*, *supra* note 165; *Ecuador Can Produce Avocados When Other Nations Can't*, *supra* note 223; Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,921 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(2)). If inspections continue until the end of the shipping season and shipping season never ends, then inspections happen every month of the year. *Id.*

225. See 7 C.F.R. § 319.56-30(c)(2)(i) (2018) (describing orchard inspections as “semi-annually for . . . at least 5 years” and then once per year after that as long as the orchards

that harvests only nine months of the year may still have three times more inspections than a similar grower in Mexico.²²⁶ This demands additional vigilance from exporters who will be shipping avocados to the United States for the first time, and the additional costs for monthly inspection likely creates another obstacle for Ecuadorean avocado growers.

b. More Stringent Provision Regarding Transportation to the Packinghouse. The transportation provision for Ecuador is highly inequitable because it is more demanding than the provision for Mexico. The proposed regulation for Ecuador requires that harvested avocados be “moved to the packinghouse within [three] hours or [they] must be protected from fruit fly infestation until moved.”²²⁷ The provision in the Mexican regulation only specifies that the harvested avocados be moved to the packinghouse on “the day of harvest or they must be protected from fruit fly infestation until moved.”²²⁸ The difference in time creates additional expenses for Ecuadorean growers that Mexican growers do not bear. For example, the shorter time span potentially forces growers to hire more harvesters to complete the day’s work within three hours,²²⁹ or alternatively, forces the grower to pay for additional daily transportation runs.²³⁰ The proposed regulation should give

“remain pest free”).

226. Compare 7 C.F.R. § 319.56-30(c)(2)(i) (2018) (listing one or two inspections per year for Mexican growers), *with* Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,921 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(2)) (showing monthly inspections for Ecuadorean growers during shipping season), *and Avocado Growers in Ecuador Growing Fast, Determined to Meet U.K. Standards*, *supra* note 116 (describing one Ecuadorean avocado grower producing from coastal orchards from May to July and highlands orchards from September to February).

227. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(8)).

228. 7 C.F.R. § 319.56-30(c)(2)(iv) (2018).

229. See Holmes, *supra* note 168 (noting that an experienced avocado harvester in California can “make up to \$400 per day”).

230. KRISTEN PARK, PRODUCE INDUSTRY PROCUREMENT STUDY RESULTS, PART IV: TRANSPORTATION 1 (2016), <http://publications.dyson.cornell.edu/docs/smartMarketing/pdfs/SmrtMkgMar2016-IV.pdf> (commenting that transportation costs for produce are “rising

Ecuadorean harvesters at least as much time as given to Mexican harvesters considering Ecuador's status as a new exporter of avocados.²³¹ Notwithstanding scientific evidence, this provision should take more account of Ecuador's status as a developing nation in the avocado exportation industry.

IV. PRESCRIPTIVE SOLUTION FOR MINIMIZING DISCRIMINATORY SPS REGULATIONS

The creation of a healthy avocado trade relationship between the United States and Ecuador will require deliberate effort from both nations working together. As noted above, the SPS Agreement and the Codex provide guidelines and suggested best practices, respectively,²³² and these standards have tremendous impact on WTO member countries.²³³ Favorable standards propel a country in the market place and unfavorable standards hold a country back.²³⁴ Member countries are then further affected by the actual practices adopted by individual nations.²³⁵ Thus, member countries are affected at both levels.

A. *Proactive Actions by Developing Nations in the Rulemaking Process*

1. *Reactive and Proactive Responses to Regulations: Exit, Loyalty, and Voice.* In their 2006 article "Food Safety Standards and Trade: Enhancing Competitiveness and Avoiding Exclusion

rapidly" and "the volume of fresh produce moved on trucks climbed 16.9 percent from 27.8 to 32.5 million tons" since 2002).

231. See *Ecuador Next in Line for Hass Avocado Boom*, *supra* note 111 (describing Ecuador as just "starting to export" Hass avocados).

232. *Codex Alimentarius*, *supra* note 40; Stewart & Schenewerk, *supra* note 48, at 325.

233. Henson & Jaffee, *supra* note 147, at 593 (noting that food safety standards impact developing countries when they act as "barriers to trade").

234. *Id.* at 600–01 (explaining that the "lack of [SPS standards] harmonization" between nations can potentially create "insurmountable barriers for developing countries," but also noting that evolving food safety standards present "potential opportunities" that can be used for "competitive advantage").

235. Stewart & Schenewerk, *supra* note 48, at 325–27 (describing, for example, how a "zero tolerance level" in the United States would negatively impact other countries, which would, in turn, "hurt U.S. exports").

of Developing Countries,” authors Spencer Henson and Steven Jaffee give three possible action responses to regulations that can be performed either reactively or proactively.²³⁶ The three possibilities discussed are exit, loyalty, and voice.²³⁷

First, a nation can “exit” the market altogether,²³⁸ which affects other countries economically rather than politically.²³⁹ For example, if enough dissatisfied retail customers take their business to a competitor, the company will be economically forced to respond to the exit of those customers.²⁴⁰ In the context of SPS regulations, an exporting nation that is negatively impacted by new import regulations imposed by the purchasing country may exit the market. If the exporting nation does nothing to prepare for the change and instead stops trading with the purchasing nation, then the exporting nation has used exit reactively.²⁴¹ In theory, a nation with overly strict SPS regulations would eventually be forced to respond because of a lack of trading partners.²⁴² The proactive version of exit occurs when the exporting nation anticipates the incoming standards, and strategically “leave[s] particular markets” before sustaining losses.²⁴³

Second, a nation can choose to show “loyalty.”²⁴⁴ Loyalty represents efforts to effect change in an entity’s “goals and processes”²⁴⁵ from within the entity and effectively functions as a

236. Henson & Jaffee, *supra* note 147, at 612.

237. *Id.*; see also ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY 15, 77 (1970) (describing “exit” and “voice” as “endogenous forces of recovery” and “voice” as “that special attachment to an organization”).

238. Henson & Jaffee, *supra* note 147, at 612 (noting that in a different context “exit” could also “involve leaving an organization or ceasing to buy a [company’s] product”).

239. HIRSCHMAN, *supra* note 237, at 15.

240. *Id.*

241. Henson & Jaffee, *supra* note 147, at 612. A nation using the reactive version of exit would “wait for the standards” to take effect and then “give up.” *Id.*

242. See generally HIRSCHMAN, *supra* note 237, at 15–16 (explaining exit in the context of retail sales and describing how customer “exit” can reduce company profit thereby forcing managers to respond to customers).

243. Henson & Jaffee, *supra* note 147, at 612.

244. *Id.*

245. *Id.*

check on exit.²⁴⁶ As a result of loyalty, some “potentially most influential” customers might stay longer before choosing to exit in the hope that “reform can be achieved.”²⁴⁷ In the context of SPS regulations, a nation showing loyalty would remain in the market under the new regulations.²⁴⁸ The reactive version of loyalty is embodied by waiting for the implementation of new standards and then making the changes needed in order to comply.²⁴⁹ A nation using the proactive version of loyalty anticipates the changes ahead of time and brings itself into compliance before the measures take effect.²⁵⁰ Theoretically, this provides a seamless transition for the proactive nation with no loss of trade during the period when changes are taking place.²⁵¹

Third, a nation can exercise its “voice” to address the new standard.²⁵² In contrast to exit, voice is primarily political rather than economic;²⁵³ it involves protesting or lobbying for changes in regulations and policies.²⁵⁴ A classic example of voice is dissatisfied retail customers protesting in front of a store instead of simply shopping elsewhere.²⁵⁵ In the context of SPS regulations, a small exporting nation may use voice by complaining about an importing nation’s restrictive practices.²⁵⁶ The complaints may be targeted at the importing nation itself or directed upwards towards the United Nations as a plea for help.²⁵⁷ A reactive nation will use its voice to complain about the

246. HIRSCHMAN, *supra* note 237, at 79.

247. *Id.*

248. Henson & Jaffee, *supra* note 147, at 612.

249. *Id.*

250. *Id.*

251. *Id.* at 612–113 (noting that a proactive approach provides “greater scope” for “compliance in a manner that brings about strategic gain and minimizes any detrimental spillovers”).

252. *Id.* at 612.

253. HIRSCHMAN, *supra* note 237, at 15.

254. Henson & Jaffee, *supra* note 147, at 612.

255. HIRSCHMAN, *supra* note 237, at 30.

256. See Henson & Jaffee, *supra* note 147, at 613 (explaining that a nation using voice could “raise a complaint through cross-notification in the SPS committee” or “engage in bilateral negotiations with their trading partners”).

257. *Id.*

standards once adopted.²⁵⁸ The proactive nation participates in creating the standard or “negotiate[s] before standards are applied.”²⁵⁹ In each instance, the proactive nation is better situated in the market than its reactive counterpart.²⁶⁰

2. *Proactive and Reactive Actions by Developing Countries: India and Kenya.* Henson and Jaffee give an example of the effectiveness of proactive action over reactive actions using the history of two different developing locations: India (specifically the city of Kerela) and Kenya.²⁶¹ Both countries were exporters of frozen processed fishery products.²⁶² Their exports to the European Union, however, were affected by hygiene standards that were enforced beginning in 1997.²⁶³ At first, both countries experienced a period where their exports were “prohibited” by the EU.²⁶⁴ This supports the theory that both countries were initially reactive instead of proactive.²⁶⁵ India, however, responded “rapidly” by “reform[ing] its food safety controls,” resulting in exports from India to the EU only being prohibited for five months.²⁶⁶ Kenya’s reaction, on the other hand, was “protracted” resulting in “long periods of restrictions” from 1997 to 2001.²⁶⁷ As of the date of Henson and Jaffee’s article, Kerala, India’s shrimp exportation had thrived, while Kenya’s perch exports faced continued challenges.²⁶⁸

258. Henson & Jaffee, *supra* note 147, at 612.

259. *Id.*

260. *Id.* at 614 (describing that the proactive approach is the most “advantageous” to “exit,” “voice,” and “loyalty”).

261. *Id.* at 615.

262. *See id.* at 615, 617 (clarifying that Kerala was exporting shrimp and Kenya was exporting Nile perch).

263. *Id.* at 615.

264. *Id.* at 616.

265. *Id.* at 615–16.

266. *Id.* at 616.

267. *Id.*

268. *Id.*

B. Regulations that Recognize the Additional Challenges Facing Developing Nations

The degree of consideration taken by developed countries is pivotal to developing countries. Neeliah and Goburdhun discuss the difficulty that developing countries face selling internationally in their article “Complying with the Clauses of the SPS Agreement: Case of a Developing Country.”²⁶⁹ Neeliah and Goburdhun studied the small island nation of Mauritius, considering the difficulty Mauritius faced in complying with SPS regulations.²⁷⁰ They concluded the most important factor in solving the dilemma was “the degree to which developed countries took into account the needs of Mauritius in setting SPS requirements.”²⁷¹ The study was in agreement with previous studies showing the level to which developed countries “take into account the needs of developing countries” is insufficient.²⁷² The authors found that one way for a developed country to account for the needs of developing countries is by basing their sanitary and phytosanitary measures, as much as possible, on the Codex standards.²⁷³ When a developed country takes developing countries’ needs into account, the resulting trade can lead to improved economic growth and development for both countries.²⁷⁴

C. Achieving Optimal Trade between Ecuador and the United States

1. *Proactive Action by Ecuador.* Ecuador should take action

269. Neeliah & Goburdhun, *supra* note 146, at 902.

270. *Id.* at 902, 905, 910 (describing how financial constraints caused various difficulties including limited participation in “technical/scientific . . . discussions at the SPS Committee” and inability to establish national institutions to help with compliance).

271. *Id.* at 909.

272. *Id.*

273. *Id.* at 910; *Codex Alimentarius*, *supra* note 40 (showing examples of the many standards contained in the Codex).

274. *Global Trade Liberalization and the Developing Countries*, INT’L MONETARY FUND (Nov. 2001), <https://www.imf.org/external/np/exr/ib/2001/110801.htm#iii> (describing how “liberalization” in trade is a “driving force for economic growth and development” which would “strengthen” the economies of developing countries “and their trading partners”).

to promote its own interest on the international level before regulations go into effect.²⁷⁵ Ecuador could take advantage of what Jenson and Jaffee described as “the most advantageous strategy” by using voice proactively²⁷⁶ at SPS Committee and international standards organization meetings.²⁷⁷ If attendance at the meetings becomes too costly, Ecuador could consider “pool[ing] its resources” with other similarly situated countries to send a team of experts to attend and speak on their behalf.²⁷⁸

Ecuador recently used voice reactively at the June 2018 SPS Committee meeting where it maintained a complaint against Turkey’s import requirements for fresh fruit.²⁷⁹ Ecuador made an excellent proactive decision by planning attendance to the WTO’s advanced training course on sanitary and phytosanitary measures in Geneva in the fall of 2018.²⁸⁰ The course included discussion on the importance of “non-discrimination” in sanitary and phytosanitary measures as well as “identify[ing] problems” and “find[ing] possible solutions.”²⁸¹ Ecuador should continue to interact on the international level and to petition for international standards that favor Ecuador before the standards

275. See KLAUS FROHBERG, ULRIKE GROTE, & ETTI WINTER, EU FOOD SAFETY STANDARDS, TRACEABILITY AND OTHER REGULATIONS: A GROWING TRADE BARRIER TO DEVELOPING COUNTRIES’ EXPORTS? 4 (2006), <https://pdfs.semanticscholar.org/ed02/93f40cad9d722dc403c401aaede73f4fef20.pdf> (describing how countries “actively involved in the standard setting process were able to materialize gains in terms of competitiveness and cost savings”).

276. Henson & Jaffee, *supra* note 147, at 614.

277. See generally Neeliah & Goburdhun, *supra* note 146, at 910 (describing the ability to attend SPS Committee and international standards organization meetings as a factor influencing Mauritius’s ability to participate effectively in the SPS Agreement).

278. *Id.*

279. Committee on Sanitary and Phytosanitary Measures, *Review of the Operation and Implementation of the SPS Agreement*, ¶ 9.1(d) WTO Doc. G/SPS/62 (adopted July 14, 2017).

280. 2018 News Items—Advanced Course on Sanitary and Phytosanitary Measures Starts in Geneva, WORLD TRADE ORG. (Oct. 22, 2018), https://www.wto.org/english/news_e/news18_e/tra_22oct18_e.htm (listing Ecuador’s three attendees as Mr. Felipe Alejandro Torres Andrade, Mr. Israel Vaca Jiménez, and Ms. Patricia Lincango Ulcuango).

281. 2018 News Items—DG Azevêdo meets with participants in Advanced Course on Sanitary and Phytosanitary Measures, WORLD TRADE ORG. (Oct. 31, 2018), https://www.wto.org/english/news_e/news18_e/dgra_01nov18_e.htm.

are adopted.²⁸² This approach is the “most likely” way to “turn the challenges associated with evolving food safety standards into a competitive opportunity.”²⁸³

2. *United States Creation of Individualized Regulations.* The United States should keep in mind the added burden that even a matching SPS regulation has on developing nations. One method that may reduce SPS regulations becoming trade barriers includes drafting them in the style of a “preferential trading arrangement.”²⁸⁴ Although some of the provisions in the current proposed importation regulations do give preferential treatment to Ecuador,²⁸⁵ there is room for additional preferential treatment in other parts of the proposed regulation that would promote Ecuador’s growth as a developing country in the avocado market.²⁸⁶

The United States should make the current proposed

282. Henson & Jaffee, *supra* note 147, at 614 (describing that the most “advantageous strategy combines voice and proactivity”).

283. *Id.*

284. *Id.* at 598–99 (noting that less developed countries can work hard to establish financial preferential trading arrangements but still have their trade stymied by protectionist food safety standards because the preferential treatment did not extend to the food safety standards).

285. *Compare* 7 C.F.R. § 319.56-30(b) (2018) (showing a trust fund requirement for Mexico), *with* Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 5, 2018) (to be codified at 7 C.F.R. § 319.56-84) (showing no trust fund requirement for Ecuador). *Compare* 7 C.F.R. § 319.56-30(c)(3)(vi) (2018) (requiring the removal of stems and leaves from Mexican avocados), *with* Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84) (requiring phytosanitary measures that do not include stem and leaf removal). *Compare* 7 C.F.R. § 319.56-30(f) (2018) (subjecting Mexican avocados to possible additional inspections within the United States), *with* Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(f)) (requiring inspection only before departure from Ecuador).

286. *See* Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,921 (to be codified at 7 C.F.R. § 319.56-84(b)) (allowing shipments only as commercial consignments); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (to be codified at 7 C.F.R. § 319.56-84(f)(1)) (describing biometric inspection for Ecuadorean avocados in terms similar to the regulation for

importation regulations far more conducive by making a few minor changes. APHIS should amend proposed section 7 C.F.R. § 319.56-84(b) to allow for both consignment and non-consignment sales for an initial period of time.²⁸⁷ Additionally, it should amend 7 C.F.R. § 319.56-84(f)(1) to state that the biometric sampling rate is only initially equivalent to Mexico's biometric sampling rate.²⁸⁸ After the grower has produced pest free sample samples for a set period, the samples would then be taken at a lower rate. If pests appear in the samples again, the higher rate may be reinstated until compliance is demonstrated. APHIS should also amend 7 C.F.R. § 319.56-84(c)(8) to give Ecuador a longer time frame to transport harvested avocados to the packinghouse.²⁸⁹

V. CONCLUSION: APHIS SHOULD MAKE MINOR CHANGES TO THE PROPOSED REGULATION TO ALLOW FOR ECUADOR'S DEVELOPING STATUS IN THE AVOCADO INDUSTRY

The proposed regulations for avocado importation from Ecuador are less equitable than they appear when compared to APHIS's existing regulations for Mexico. The WTO's SPS Agreement empowers the United States to create protective regulations.²⁹⁰ That grant of authority, however, is cabined by a moral charge to assist developing countries into the global

Mexico); Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (to be codified at 7 C.F.R. § 319.56-84(c)(8)) (requiring harvested fruit to be moved to the packinghouse within three hours or protected until moved).

287. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,921 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(b)).

288. Currently the biometric sampling provisions for both countries are similar. *Compare* 7 C.F.R. § 319.56-30(c)(3)(iv) (2018) (describing a sampling rate set by APHIS and the Mexican NPPO), *with* Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(f)(1)) (describing a sampling rate set by APHIS and the NPPO of Ecuador).

289. Importation of Fresh Avocado Fruit from Continental Ecuador into the Continental United States, 83 Fed. Reg. 27,918, 27,922 (June 15, 2018) (to be codified at 7 C.F.R. § 319.56-84(c)(8)).

290. SPS Agreement, *supra* note 36, art 2, cl. 1.

marketplace.²⁹¹ Even in the international avocado market, the old adage is true—with great power comes great responsibility.²⁹² The United States must remember the difficulties facing Ecuador as a developing nation in the avocado industry. Considering that even the identical provisions are more difficult for Ecuadorean growers to satisfy than their Mexican counterparts, a higher level of deference is appropriate. APHIS should consider amending the regulation where possible to allow for more leniency because of Ecuador's developing status. The obligations of the regulations can later be increased when Ecuador is able to make itself more competitive in the international avocado market. Such allowances would bring the United States into further alignment with SPS provisions regarding developing nations²⁹³ and would likely increase the future availability of Ecuadorean avocados to consumers in the United States.²⁹⁴

291. *Id.* art. 10, cl. 1.

292. *Spider-Man*, YOUTUBE, <https://www.youtube.com/watch?v=b23wrRfy7SM> (last visited Mar. 8, 2019) (explaining that just because you can beat someone up, “doesn’t give you the right to”).

293. SPS Agreement, *supra* note 36, art. 9, cl. 1, art. 10, cl. 1–2.

294. LIONEL FONTAGNÉ, ET AL., PRODUCT STANDARDS AND MARGINS OF TRADE: FIRM LEVEL EVIDENCE 32, 34 (Mar. 8, 2013), https://www.wto.org/english/res_e/reser_e/ersd201304_e.pdf (noting that SPS measures can “reduce existing trade flows”).

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