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THE SPS AGREEMENT AND THE DEVELOPING COUNTRIES

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INTRODUCTION

The issue of human and animal health and plant protection is getting very high in several developed countries' agenda fuelled by recent cases of food poisoning, spread of pests among animals and environmental contamination. International trade is perceived as a magnifier of such problems. While appreciating that in several cases these concerns are genuine, developing countries fear that developed countries may use SPS measures for protectionist purposes. Considering that the major difficulty in dealing with SPS measures is likely to distinguish those measures which are justified by a legitimate goal and have a scientific justification from those which are applied to shield domestic producers, developing country concern is well founded.

Developing countries are, however, not well positioned to address this issue. They lack complete information on the number of measures that affect their exports, they are not certain about whether these measures are consistent or inconsistent with the SPS Agreement and they do not have reliable estimate on the impact such measures have on their exports.

Most developing countries are unable to effectively participate in the international standard setting process and, therefore, face difficulties when requested to meet requirements based on international standards in the importing markets. Transparency-related requirements usually represent a burden for developing countries, while they are often unable to benefit from them, due to lack of appropriate infrastructure. They experience serious problems on testing and conformity assessment. The provision of adaptation to regional conditions contained in the SPS Agreement, which would be of great benefit to developing countries, has been little used because of the difficulties related with its scientific aspects. The provisions relating to S&D remain rather theoretical and apparently have not materialized in any concrete step in favour of developing countries.

The need for specialist scientific or technical knowledge makes restrictions imposed for health and safety much more difficult to challenge than some other barriers to trade. While the requirements for SPS measures to be based on scientific evidence helps secure trade policy objectives, it is perceived by environment and consumer protection groups as a dangerous limitation on the right of governments to take precautionary measures to protect their citizens and the environment against risks which can have irreversible effects. Differences between "sound science" and the "precautionary approach" to health and safety are causing acute tensions among countries.

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The situation is further complicated by the emergence of biotechnology and international trade in biotechnology products. Because of the scientific uncertainty related to the impact of biotechnology products on health and on the environment and because of strong consumer resistance in some countries to production and consumption of these products, restrictive trade measures affecting bio-engineered products are increasingly being implemented by a number of governments. Developing countries are facing several challenges in this field. As exporters, they may have to prove that their products do not contain any bio-engineered inputs. This may imply a system of certification and segregation that can be rather costly and burdensome. As importers, those developing countries which have imposed trade restrictive measures affecting bio-engineered imports, are in a rather difficult position to justify the scientific basis of their trade measures.

Equivalence of SPS measures is of special relevance to developing countries, taking into account the share and destination of their agricultural and food exports and considering that they face climatic, developmental and technological conditions that often differ from those prevailing in developed countries. However, equivalence has not yet been recognized in a significant number of trade transactions.

The Doha Ministerial Decision on Implementation-Related Issues and Concerns provides some flexibility to developing countries in relation to the time-frame for compliance with the SPS measures, to the interval between the publication of a SPS measure and its entry into force, to the issue of equivalence, to developing country participation in the international standard-setting activities, and to technical assistance.

The aim of this paper is to recall the main features of the SPS Agreement, its purposes and negotiating history; stress some of the main difficulties encountered by developing countries in this area, and formulate a number of suggestions on how to improve developing countries' ability to use the SPS Agreement and benefit from it. Some actions that developing countries may wish to consider in the course of the ongoing trade negotiations are proposed.

For developing countries the most promising option to maintain and expand their agricultural and food exports is to become able to respond to the exigencies which are emerging in their target markets by providing high quality and safe products. This implies building up knowledge, skills and capabilities. Strengthening domestic capacities in the SPS domain would also help developing countries to identify products that they may wish to keep out of their markets because of the actual or potential negative impact on local people's health and safety, animal health or the environment. However, for this goal to materialize, developing countries need the support of their developed partners, of the international trade organizations and of technical organizations. They also need a multilateral legal framework, which facilitates the achievement of such a result.

THE AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

Negotiating history

When the Uruguay Round started, there was a consensus that the time had come for reform of international agricultural trade[3]. The Punta del Este Declaration, which launched the Round in September 1986, called for increased disciplines in three areas in the agricultural sector: market access; direct and indirect subsidies; and sanitary and phytosanitary measures. On the latter,

[3] Stewart, T. P. Editor (1993) *The GATT Uruguay Round: A Negotiating History*, Kluwer Law and Taxation Publishers, Deventer - Boston.

the negotiators sought to develop a multilateral system that would allow simplification and harmonization of SPS measures, as well as elimination of all restrictions that lack any valid scientific basis.

At the beginning of the Round the negotiating positions were the following. The United States and the European Communities (EC) were proposing broad harmonization efforts, based upon the expertise of international organizations. The EC was calling for all standards to be based on scientific evidence. The Cairns Group[4] endorsed the broad recommendations toward harmonization and suggested that the burden of justification of SPS measures should be placed upon the importing country. Japan supported harmonization efforts based upon the work of international organizations, giving preference to the development of guidelines rather than standards; the improvement of notification and consultation procedures and of the dispute settlement mechanism; and special allowances for developing countries. Developing countries strongly advocated the removal of sanitary and phytosanitary measures that acted as non-tariff barriers to trade. They supported the international harmonization of SPS measures to prevent developed countries from imposing arbitrarily strict standards.

At the Mid-Term Review of the Uruguay Round (December 1988), it was agreed that the priorities in the area of SPS were: international harmonization on the basis of the standards developed by the international organizations; development of an effective notification process for national regulations; setting-up of a system for the bilateral resolution of disputes; improvement of the dispute settlement process; and provision of the necessary input of scientific expertise and judgement, relying on relevant international organizations.

The Working Group on Sanitary and Phytosanitary Regulations, which was formed in 1988, produced a draft text in November 1990. First of all, the discipline related to SPS measures was included in a separate draft agreement. Secondly, a consensus was reached by the parties on the following points: SPS measures should not represent disguised trade barriers; should be harmonized on the basis of international standards, guidelines and recommendations and of generally-accepted scientific principles; special consideration should be taken of developing countries and their difficulties in meeting standards; transparency should be ensured in setting regulations and in solving disputes; and an international committee should be established to provide for consultations regarding standards. Some areas, however, remained unsettled.

Due in large part to the agriculture deadlock, the Round, which was supposed to be concluded by December 1990, was adjourned. In December 1991 the so-called "Dunkel Draft" was issued by the Director General of the General Agreement on Tariffs and Trade (GATT) with the intention to move the talks toward completion. The draft incorporated proposals on sanitary and phytosanitary issues. The Dunkel text closely followed the draft text produced by the Working Group in November 1990. The final text of the Agreement on the Application of Sanitary and Phytosanitary Measures that was approved at the end of the Uruguay Round was largely based on the Dunkel text. It fulfils the general objectives of the Punta del Este Declaration in this area.

[4] At the time of the UR negotiations the Cairns Group comprised Argentina, Australia, Brazil, Canada, Chile, Colombia, Hungary, Indonesia, Malaysia, New Zealand, the Philippines, Thailand and Uruguay. The composition of the Group has changed meanwhile, since Bolivia, Costa Rica, Fiji, Guatemala, Paraguay and South Africa have joined, while Hungary has left.

Salient features of the Agreement and the legal framework

The main goal of the SPS Agreement is to prevent SPS measures having unnecessary negative effects on international trade and their being misused for protectionist purposes. However, the Agreement fully recognizes the legitimate interest of countries in setting up rules to protect food safety and animal and plant health. In fact, the Agreement allows countries to give food safety and animal and plant health priority over trade, provided there is a demonstrable scientific basis for their food safety and health requirements.

More specifically, the SPS Agreement covers measures adopted by countries to protect human or animal life from food-borne risks; human health from animal or plant-carried diseases; animal and plants from pests and diseases; and the territory of a country from the entry, establishment or spread of pests. Therefore, SPS measures are meant to ensure food safety and to prevent the spread of diseases among animals and plants.

SPS measures are typically applied to both domestically produced and imported goods. They may address the characteristics of final products, as well as how goods are produced, processed, stored and transported. They may take the form of residue limits, conformity assessment certificates, inspections, quarantine requirements, designation of disease-free areas, import bans, and others.

The Agreement states that countries should base SPS measures on science and establish them on the basis of an assessment of the risk involved. SPS measures should ensure that the appropriate level of protection that a country deems appropriate is achieved. If international standards, guidelines and recommendations exist, the Agreement urges countries to base their SPS measures on them. It encourages countries to play a full part in the activities of international organizations in order to promote the harmonization of SPS regulations on an international basis; to accept the SPS measures of exporting countries as equivalent to their own if they achieve the same level of SPS protection; and, where possible, to conclude bilateral and multilateral agreements on recognition of the equivalence of specific SPS measures.

The Agreement requires countries to choose those measures which are no more trade restrictive than required to achieve domestic SPS objectives, provided these measures are technically and economically feasible (e.g. to apply a quarantine requirement instead of an import ban). The SPS Agreement recognizes that, due to differences in geographical, climatic and epidemiological conditions prevailing in different countries or regions, it would often be inappropriate to apply the same rules to products coming from different regions/countries. This flexibility should not lead to any unjustified discrimination among foreign suppliers or in favour of domestic producers. On the same lines, governments should recognize disease-free countries, or disease-free areas within countries, and adapt their requirements to products originating in such countries/areas.

The SPS Agreement allows countries to introduce sanitary and phytosanitary measures which result in a higher level of protection than that which would be achieved by measures based on international standards, if there is a scientific justification or where a country determines on the basis of an assessment of risks that a higher level of sanitary and phytosanitary protection would be appropriate. In carrying out risk assessment, countries are urged to use risk assessment techniques developed by the relevant international organizations. Since the entry into force of the SPS Agreement, a substantial amount of work has been undertaken in the area of risk analysis by the FAO/WHO Joint Codex Alimentarius Commission, the Secretariat of the International Plant Protection Convention and the International Office of Epizootics[5]. On the other hand, the SPS Agreement permits

[5] According to Annex A of the Agreement, risk assessment is "the evaluation of the likelihood of entry, establishment

governments to choose not to use international standards and adopt lower standards. The Agreement also permits the adoption of SPS measures on a provisional basis as a precautionary step, in cases where there is an immediate risk related to the spread of diseases, food contamination, biodiversity damage, etc., but where the scientific evidence is insufficient.

All countries must maintain an Enquiry Point, which is an office in charge of receiving and responding to requests for information regarding domestic SPS measures, including new or existing regulations and decisions based on risk assessment. Countries are required to notify the World Trade Organization (WTO) Secretariat of any new SPS requirement, or modification of existing requirements, which they are proposing to introduce domestically, if the requirements differ from international standards and may affect international trade. The WTO Secretariat circulates the notifications to all Member countries. Notifications should be submitted in advance of the implementation of the measure, so as to provide other countries with the opportunity to comment on them. In cases of emergency, governments may implement a measure prior to notification. Countries are also requested to publish the sanitary and phytosanitary measures they have adopted and to allow a reasonable interval between the publication of a new SPS measure and its entry into force.

The SPS Agreement provides for special and differential treatment in favour of developing countries and least-developed countries (LDCs). It includes, under certain circumstances, longer time-frames for compliance, time-limited exceptions from the obligations of the Agreement and facilitation of developing country participation in the work of the relevant international organizations.

The Agreement includes provisions for a two-year grace period for all developing countries, which expired at the end of 1997. For the LDCs, a five-year grace period expired at the end of 1999.

Prior to the entry into force of the SPS Agreement, health and safety regulations affecting imports were subject to The General Agreement on Tariffs and Trade (GATT) and to the 1979 Plurilateral Agreement on Technical Barriers to Trade (Standards Code).

The GATT recognizes that protecting human, animal and plant life and health is a legitimate objective of governments. The General Exceptions of Article XX except from GATT obligations, under specific and strict circumstances, measures which are designed to meet these objectives. The SPS Agreement provides indeed detailed rules along the lines of Article XX (b), especially from the point of view of procedural obligations concerning appropriate risk assessment and proper scientific experimentation.

It is important to be able to distinguish measures which fall under the SPS Agreement from those which fall under the Agreement on Technical Barriers to Trade (TBT), which has replaced the Standards Code. This distinction is relevant, as there are some significant differences in the provisions of the two Agreements. Whether a specific measure is a technical regulation, therefore within the scope of the TBT, or a sanitary/phytosanitary measure, thus under the SPS, depends on the objectives for which it has been adopted. As a general rule, if a measure is adopted to ensure the protection of human, animal and plant life and health and the protection of the territory of a country from damage caused by the entry, establishment or spread of pests, this measure is a SPS measure. Measures adopted for other purposes to protect human, animal and plant life and health are subject to the TBT Agreement. For instance a

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or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs".

pharmaceutical restriction would be a measure covered by the TBT Agreement[6]. Labelling requirements related to food safety are usually SPS measures, while labels related to the nutrition characteristics or the quality of a product fall under the TBT discipline.

As far as the legal relationship between the TBT and SPS Agreements and GATT 1994 is concerned, once SPS applies, TBT cannot apply. This is because the SPS Agreement has a very well-defined but limited scope of application and is more rigorous than the TBT Agreement in its requirements. Either the SPS or the TBT Agreements and the GATT can apply concurrently. In the event of conflict between TBT/SPS and GATT, the specific Agreement prevails over GATT, according to the General Interpretative Note to Annex 1A of the WTO Agreement.

MAIN ISSUES FOR DEVELOPING COUNTRIES IN THE SPS AGREEMENT

Equivalence

The Doha Decision on Implementation-Related Issues and Concerns[7] instructs the SPS Committee "to develop expeditiously the specific programme to further the implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures".

Discussion on equivalency has been going on in the SPS Committee since 2000 and a Decision on the implementation of equivalence was taken in October 2001.[8]

Article 4 of the SPS Agreement encourages countries to give positive consideration to accepting as equivalent the SPS measures of other Members, even if these measures differ from their own or from those used by other countries, if the exporting country demonstrates that its measures achieve the importing Member's appropriate level of sanitary and phytosanitary protection. It also instructs countries to enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

Equivalence is the best option when harmonization of standards is not desirable or when international standards are lacking or are inappropriate. For developing countries - which face climatic, developmental, and technological conditions rather different from those prevailing in developed countries - the recognition of the equivalence of their SPS measures to those applied by the importing countries would represent a key instrument to enhance market access for their products.

In this regard, the following issues might be of special concern to developing countries.

a) *The concept of equivalence and its function.* The function of equivalence is to facilitate international trade by recognizing that different measures can achieve the same level of sanitary and phytosanitary protection. Therefore, countries can enjoy flexibility about the kind of measures to adopt to ensure adequate SPS protection. Equivalence, then, is not about "duplication" or "sameness" of SPS measures. What is relevant for equivalence is the achievement of the appropriate level of protection sought by the importing country. How the appropriate level of protection is achieved is not an autonomous issue. Methods might be relevant to the extent that the inquiry into methods is instrumental to assessing the achievement of the appropriate level of protection, but do not have any discrete relevance *per*

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[6] See: WTO (1998), *WTO Agreements Series: Sanitary & Phytosanitary Measures.*
[7] *Decision on Implementation-Related Issues and Concerns*, WT/MIN(01)/17, 20 November 2001, para 3.3.
[8] *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, G/SPS/19, 26 October 2001.

se. The option of introducing additional requirements relating to how the level of protection is achieved would add an unnecessary burden to the recognition of equivalence.

b) *Implementation of equivalence.* The concept of equivalence is capable of various applications.[9] Variables upon which the practical implementation of equivalence depends are, *inter alia*, the scope of the equivalence arrangement (specific products or product sectors; specific technical aspects of certain SPS measures; specific SPS measures; SPS systems; inspection and control systems; processing techniques), its level of formality (ad hoc recognition at the technical level[10], unilateral determination of equivalence at the administrative level[11], formal agreements) and the parties involved (bilateral or multilateral).[12] Equivalence arrangements on specific technical matters play an important role in building up confidence between laboratories and certifying authorities in different countries and usually represent a necessary step towards the conclusion of broader arrangements. They may also represent crucial learning experiences, since they imply an intensive exchange of information and close contacts between relevant authorities.

c) *Recognition of equivalence versus equivalence agreements*. In the on-going debate on equivalence, emphasis is increasingly placed upon "recognition of equivalence" rather than on formal "equivalence agreements". *Ad hoc* acceptance of the equivalence of particular SPS measures is largely recognized as the most effective way to apply the equivalence provisions. However, it might be worth considering some advantages associated with the negotiation of formal equivalence agreements. Firstly, equivalence agreements can incorporate a general part establishing overall principles and long-term objectives, which might accommodate developing countries' attitudes and concerns on the issue of equivalence, and which might reflect into the way specific equivalence arrangements are forged. Second, even if equivalence agreements are time consuming and resource intensive, developing countries might find even more costly seeking equivalence on an *ad hoc* basis at the technical level. Argentina has proposed that equivalence agreements should contain a general part establishing overall principles, criteria, objectives and long-term targets, and specific annexes for the products coming under the agreement.[13]

d) *Guidelines on recognition of equivalence.* A related issue concerns the provision of guidance on recognition of equivalence. International guidelines may be needed for systematic application. In particular, in the absence of guidelines on methodology for judging equivalence, specific bilateral issues are more likely to arise, and methodological concerns of developing countries are more likely to be neglected. International standard setting bodies have been formally encouraged to elaborate guidelines, as appropriate, on equivalence of SPS measures and equivalence agreements.[14] Draft guidance for the recognition of equivalence of products

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[9] Report by the Chairman, *Summary of the Discussions of the SPS Committee*, G/L/423, 29 November 2000; Second Report by the Chairman, *Summary of Informal Discussion on Equivalence*, G/L/445, 21March 2001.

[10] New Zealand's experience on the implementation of equivalence (*Experience in Recognizing Equivalence of Phytosanitary Measures.* Submission by New Zealand to the Committee on Sanitary and Phytosanitary Measures, 28 February 2001, G/SPS/GEN/232) provides various examples of *ad hoc* recognition of SPS measures as equivalent: the acceptance of high-temperature forced air as effective fruit fly disinfestation treatment for paw-paw, mangoes and eggplants from South Pacific; acceptance of a "winter window" for cucurbit imported from Australia as equivalent to a post-harvest chemical dip; acceptance of tamper-proof official stickers for accompanied consignments of fresh orchids from Singapore as equivalent to certificates to verify official inspection of the consignment.

[11] For example, an FSIS determination of equivalence is a prerequisite for export of meat and poultry to the USA. At the successful completion of an equivalence determination process, basically consisting of document review and on-site audit, a country becomes eligible to export meat and poultry to the United States. The determination of equivalence does not imply the stipulation of formal agreements between the parties concerned. *Equivalence*. Submission from the United States to the Committee on Sanitary and Phytosanitary Measures, 7 November. 2000, G/SPS/GEN/212

[12] *Equivalence*. Submission from the United States to the Committee on Sanitary and Phytosanitary Measures, 7 November 2000, G/SPS/GEN/212.

[13] *Equivalence*. Communication from Argentina, G/SPS/GEN/268, 15 August 2001.

[14] The Codex Alimentarius Commission (CAC) has adopted Guidelines for the Development of Equivalence Agreements Regarding Food Import and Export Inspection and Certification Systems (CAC/GL 34-1999). The

historically or previously traded, on the basis of categorization of trade patterns and risks will be considered shortly within the SPS Committee.[15]

e) *The North/South dimension of equivalence.* According to some WTO Members, it might be desirable not to emphasise the North/South dimension of equivalence. The North/South perspective on the issue is seen as over-simplistic and not exhaustive, disregarding the reciprocal nature of equivalence arrangements and the fact that an increasing number of decisions are concerned with South-South trade. Even if equivalence cannot be reduced to a North/South issue, the North/South dimension should not be underestimated. This follows from the fact that equivalence is a particularly prominent issue for developing countries, such prominence reflecting the share and destination of agricultural and food exports from developing countries[16], the technical capability of developing countries to comply with SPS requirements and the diversity of conditions prevailing in developed and developing countries. Developing countries face climatic, developmental and technological conditions that often differ from those prevailing in developed countries, and which might not be duly reflected in SPS systems designed and operated in developed countries. In these cases, equivalence could contribute considerably to achieving cost effectiveness.

f) *Equivalence and the importing Member's appropriate level of protection.* The concept of equivalence is linked to the determination of the appropriate level of protection: SPS measures are deemed to be equivalent when achieving the same appropriate level of protection. A crucial issue for the exporting country is therefore to identify the importing country's acceptable level of protection and the way the importing Member sets it. It might be worth emphasizing that the determination of the level of protection is not an unquestionable sovereignty issue, being qualified by the wording of Article 5.4 (i.e. obligation to minimize negative trade effects) and 5.5 (i.e. obligation to avoid arbitrary or unjustifiable discriminations or disguised restrictions to international trade). Care should be taken to ensure that the appropriate level of protection set by the importing country is consistently met by domestically-produced goods. Very strict SPS measures which are not enforced on domestic producers, but which are imposed on foreign ones, represent disguised trade restrictions. Another relevant issue relates to transparency and cooperation. In particular, the importing country should supply correct information on its acceptable level of risk, so that the exporting country can meet the requirement of objectively demonstrating that its SPS measures are equivalent. In the *Salmon* case, the Appellate Body noted that the determination of the appropriate level of protection is a prerogative of the Member concerned, and that there is no obligation to determine the appropriate level of protection in quantitative terms, however, this does not mean "that an importing Member is free to determine its level of protection with such vagueness or equivocation that the

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Codex Committee on Food Import and Export Inspection and Certification Systems (CCFICS) is continuing work on Guidelines in the area of equivalence, mainly related to the judgement of equivalence of sanitary measures associated with food inspection and certification systems (and also equivalence of technical regulations). The primary intention is to assist countries, and especially developing countries, in the application of the SPS provisions. The Guidelines did not advance in the Codex Step process at the most recent 10th CCFICS meeting mainly due to ongoing discussions in the WTO/SPS Committee on Article 4 of the Agreement. In other words, several delegations at the CCFICS meeting were trying to incorporate the rights and obligations of WTO Members into the Codex Guidelines. A lot of the debate centered on the rights of exporters, when trying to establish equivalence, on obtaining from the importers the basis for their risk assessment.

[15] *Equivalence – Programme for Further Work*. Decision by the Committee, G/SPS/20, 21 March 2002.

[16] According to the World Bank, the value of agricultural exports as a proportion of total merchandise exports in Sub-Saharan Africa averaged above 25% over the period 1980-1997. Concerning the destination of such export flows, developed countries still constitute the main recipient of agricultural and food export from developing countries (*World Development Indicators 1998/1999)*. According to UNCTAD estimates, in 1997 developed market economy countries accounted for 54.8% of all food items export from developing countries and territories. These figures are likely to be confirmed and strengthened should further trade liberalisation occur in the agricultural and food products sectors.

application of the relevant provisions of the SPS Agreement, such as Article 5.6, becomes impossible".[17]

g) *Burden of proof and costs sharing.* A related issue is concerned with the division of responsibilities between the importer and the exporter in relation to the determination of equivalence. According to the October 2001 Decision on equivalence, the importing country should explain the objective and rationale of the SPS measure at stake; identify the risks that the measure is intended to address; indicate the appropriate level of protection which the measure is designed to achieve; and give full consideration to requests by developing countries for technical assistance to facilitate the implementation of Article 4. It is up to the importing Member to analyze all relevant evidence provided by the exporting Member on its SPS measures with a view to determining whether these measures achieve the appropriate level of protection. However, the importing country is not requested to justify the refusal of equivalence, though it should respond, normally within six months, to any request of equivalence. A crucial issue to this respect is the impact on the competitiveness of the exported products of costs related to assessing equivalence of SPS measures and the sharing of such costs between the importer and exporter.

Equivalence at regional level, in the framework of regional or sub-regional agreements, is easier to achieve. Developing countries may therefore have an interest in analyzing the possibility of including reference to equivalency of SPS measures in the framework of regional and sub-regional groupings.[18]

A necessary precondition for implementing equivalence is the capacity of the exporting country to provide scientific and technical information to support the claim that its measures achieve the appropriate level of protection identified by the importing country. The latter may request to check the laboratories and the testing facilities of the exporting country to be ensured on the reliability of the information provided and on the technical competence of the exporting country. Obviously, a well prepared case, adequately justified from a scientific point of view and supported by trustable certificates, will have more chances to considered positively than a case ill-prepared. Developing countries face in this field enormous difficulties which could jeopardize their capacity to benefit from equivalence and from the specific work programme which has been launched. Opeationalizing equivalence implies, therefore, the strengthening of developing country scientific capacities, of their laboratories and of their certification and accreditation authorities. The setting up of internationally financed national, regional or sub-regional laboratories, certification bodies and accreditation institutions could be explicitly included as one of the suitable outcomes of the work programme on equivalence.

Special and differential treatment and technical assistance

The SPS Agreement includes a specific article (Article 10) on special and differential treatment (S&D) for developing countries and LDCs, and another (Article 9) on technical assistance. The Doha Decision on Implementation-Related Issues and Concerns provides some instructions and clarifications aimed at operalitionalizing Article 10, and indicates July 2002 as the deadline for the identification of the S&D provisions that should be made mandatory and for examining additional ways in which S&D provisions can be made more effective.[19]

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[17] WT/DS18/AB/R, paragraphs 199 and 206.

[18] Equivalence of regulations is at present taking place among the Member States of the European Community, among those of the North American Free Trade Agreement (NAFTA), and between Australia and New Zealand. The States parties to MERCOSUR have adopted three resolutions establishing the criteria, principles and scopes for determining the equivalence of control systems in MERCOSUR. The issue is currently been discussed in the FTAA

[19] *Decision on Implementation-Related Issues and Concerns, supra,* note 7, para 3.1 and para 12.1 (i) and (ii).

Six types of S&D provisions have been identified by the WTO secretariat: (i) provisions aimed at increasing the trade opportunities of developing countries; (ii) provisions under which WTO members should safeguard the interests of developing countries; (iii) flexibility of commitments, of actions, and use of policy instruments; (iv) transitional time periods; (v) technical assistance; (vi) provisions related to LDCs. Provisions relating to flexibility and transition times tend to specify exceptions to rules to which developing countries may have recourse if they choose. Provisions related to technical assistance, the safeguarding of the interests of developing countries and measures to increase developing country participation in world trade tend to specify positive actions to be undertaken by developed countries in favour of developing countries. According to this classification, Article 10.1 and 10.4 of the SPS Agreement falls under the second category, Article 10.2 and 10.3 falls under the forth category, while Article 9 falls under the fifth category.[20] The WTO secretariat has identified Article 10.1 and Article 9 as mandatory provisions and Article 10.2 and 10.4 as non-mandatory provisions.[21] Presumably, Article 10.3 is also a non-mandatory provision.

During the 1980s and the beginning of the 1990s, the S&D principle started to be criticized: instead of encouraging good polices and practices in the developing countries, it was perceived to somehow contribute to development-unfriendly policies. This perception had an influence on how S&D provisions were included in the Uruguay Round Agreements: they reflect the trend toward reducing the scope for S&D, in particular for non-LDCs. The present rules and the related debate reflect a difficult equilibrium between the recognition of international asymmetries - implying that unequal countries cannot be treated as equals, and the notion of "levelling the playing field" - meaning that developing countries should not be shielded through discriminatory instruments in their favour, but helped to become more efficient and able to compete fairly in the international markets. S&D provisions are included into two different areas of international economic cooperation: financial and monetary instruments as provided by the international and regional financial institutions; and trade disciplines at the multilateral and sub-regional levels. The latter are more prone to criticisms and challenges than the former.[22]

Article 10.1 of the SPS Agreement states that the special needs of the developing and least developed countries shall be taken into account in the preparation and application of SPS measures.

Article 10.2 states that "Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary and phytosanitary measures, longer time-frames for compliance should be accorded on products of export interest to developing country Members so as to maintain opportunities for their exports."

The Decision on Implementation clarifies that "longer time-frames for compliance" shall be understood to mean normally a period of not less than 6 months. Moreover, "Where the appropriate level of sanitary and phytosanitary protection does not allow scope for the phased introduction of a new measure, but specific problems are identified by a Member, the Member applying the measure shall upon request enter into consultations with the country with a view

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[20] WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WT/COMTD/W/77/Rev.1, 21 September 2001, pp. 5 and 56-62.

[21] WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, Mandatory and Non-Mandatory Special and Differential Treatment Provisions, Corrigendum*, WT/COMTD/W/77/Rev.1/Add.1/Corr.1, 4 February 2002.

[22] See: UNCTAD secretariat, Note on the Work on Special and Differential Treatment, mimeo, March 2002, and A. Breckenridge, *Developing an Issue-Based Approach to Special and Differential Treatment*, paper presented at the Third Meeting of the Integration and Trade Network organized by the Inter-American Development Bank, 19-20 March 2002.

to finding a mutually satisfactory solution to the problem while continuing to achieve the importing Member's appropriate level of protection".[23]

Article 10.3 provides that specified, time-limited exceptions in whole or in part from the obligations under the SPS Agreement could be granted to developing countries by the SPS Committee, upon request, to ensure that developing countries are able to comply with the provisions of the Agreement. To date, no request has been made under Article 10.3.

Article 10.4 refers to developing country participation in the relevant international organizations. The issue is addressed in the following section.

It is worth stressing that developing countries' agricultural exports are concentrated in a few products and in a few markets and that the number of exporting enterprises is as well limited. This situation should make easier implementing Article 10.1, 10.2 and 10.3 of the SPS Agreement and para 3.1 of the Decision on Implementation. To further facilitate the functioning of such provisions, each developing and least developed country could prepare a list of the main agricultural products it exports (perhaps a list of five to seven products) and identify the principal countries of destination (again a list of five to seven markets) and circulate it among WTO Members. Whenever new SPS measures affecting the listed products are introduced by a developed Member, it should contact the developing countries concerned and ensure that the newly introduced SPS measure is not going to disrupt traditional trade flows. For this to happen, the list should be "dynamic" in the sense that, when necessary, products and markets could be added to it or deleted from it. The list should be as well rather detailed (e.g. it should include the list of pesticides used on the exported products) to facilitate the task of the importing country to alert the exporting country about new SPS measures that may have an impact on its exports.

If an importing country implements an SPS measure which is scientifically justified but which has nevertheless a disruptive effect on developing country exports, either the implementing country should reconsider the measure, or, if this proves impossible because the removal of the measure would jeopardize the achievement of the level of SPS protection that the country is pursuing, assistance should be provided to the developing countries affected to meet the new requirements in order to preserve existing trade flows. The option of equivalence should also be considered. In this respect, developing countries have stressed that lack of adequate infrastructure, technology, finance and skilled manpower, as well as lack of full understanding of the Agreement, of appropriate administrative framework and limited participation in the activities of the international standards-setting organizations and of the SPS Committee lead to difficulties for them in complying with the commitments under the SPS Agreement.[24]

As far as Article 10.3 is concerned, a delay in the implementation of the Agreement would be worth pursuing under the condition that the transitional period is used to strengthen capacities in developing countries to satisfy their trade partners' SPS requirements, bring their domestic measures in conformity with international standards and enter into equivalence agreements. For this to happen, international technical and financial support should be provided. Hence, developing countries will need both longer time-frames for compliance and technical assistance to make it possible for their products to meet the requirements and expectations in the markets of destination and for creating or strengthening the domestic institutional framework which is necessary to comply with the provisions of the Agreement. In fact, granting a longer time-frame for compliance without, at the same time, providing technical

[23] *Decision on Implementation-Related Issues and Concerns*, *supra*, note 7, para 3.1

[24] The WTO secretariat has prepared a paper summarizing the positions taken by Member countries, especially developing Members, on S&D: *Special and Differential Treatment*, G/SPS/W/105, 9 May 2000.

assistance, would have the solely effect of postponing the problem. Transitional periods, longer time frames and the like acquire a real meaning for development when they are accompanied by a policy package that facilitates the needed adjustments.

The provisions on S&D are, therefore, very much linked to those on technical assistance. The SPS Agreement was apparently negotiated and concluded with scant regard for the conditions necessary for its effective implementation, particularly in developing countries. Article 9.1, provides that the assistance that shall be provided to developing countries bilaterally or through the appropriate international organizations, may, *inter alia*, take the form of credits, donations and grants. This is a mandatory provision and its effective implementation would create a more substantial type of policy coherence since it would enable developing countries to establish the necessary infrastructural and other conditions necessary to the effective implementation of the Agreement. Technical co-operation and financial support, however, are not a panacea and should not be used to replace the removal of unnecessary obstacles to trade.

Technical co-operation should be extended to cover capacity building of the officials in developing countries in charge of the enquiry points, since transparency is proving to be a key issue for the correct functioning of the Agreement. Technical co-operation should in particular be extended to up-grade the technical skill of personnel working in laboratories, certification bodies and accreditation institutions in developing countries, since their having a certain level of qualifications and training is a precondition for the international acceptance of certificates issued by them and represents the basis for the negotiation of equivalence agreements. Since developing countries experience difficulties in dealing with the scientific side of the Agreement, in particular risk assessment, technical co-operation should be extended on this matter.

The Decision on Implementation addresses the issue of technical assistance, but only with reference to LDCs: It "(i) Urges Members to provide, to the extent possible, the financial and technical assistance necessary to enable least-developed countries to respond adequately to the introduction of any new SPS measures which may have significant negative effects on their trade; and (ii) urges members to ensure that technical assistance is provided to least-developed countries with a view to responding to the special problems faced by them in implementing the Agreement on the Application of Sanitary and Phytosanitary measures."[25]

According to Article 9.2, "where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved". Article 9.2 can be addressed along the same lines of Article 10. Namely, this provision should be strengthened by, first of all, requesting the country which has implemented an SPS measure which creates particular difficulties for developing countries, to reconsider it. Secondly, if, after reviewing its implications the importing country reconfirms the measure, then the provision of technical co-operation, including the transfer of the necessary technology, should follow, considering that Article 9.2 is a mandatory provision. Countries that experience the same trade problems in connection with a specific SPS measure may wish to join forces and table a common position. For developing countries it may be useful both to develop flexible alliances among themselves and with developed countries, considering that the latter are often more experienced in bringing specific cases to the attention of other countries or to the attention of the SPS Committee. Since technical co-operation in the field of sanitary and phytosanitary measures is being provided by several international organizations and by a

[25] *Decision on Implementation-Related Issues and Concerns*, *supra*, note 7, para 3.6.

number of developed countries, better co-ordination among the different institutions would ensure that beneficiary countries fully benefit from these efforts.

The WTO secretariat has identified four categories of technical assistance: information, training, "soft" infrastructure development, and "hard" infrastructure development and has developed a questionnaire for submitting requests for technical cooperation.[26] An informal meeting of the SPS Committee on technical assistance was held in July 2001 and some specific suggestions were put forward to improve the effectiveness of technical cooperation activities, namely, linking the private sector to all initiatives; taking a regional approach; integrating all forms of assistance into a coherent programme regardless of the source of assistance; focussing on the development of human resources; targeting assistance both to help developing countries comply with measures in their export markets, as well as to develop their own regulatory control systems to ensure the safety of their domestic food supplies.[27] As a general rule, the more specific a request is the more likely it is to be satisfied promptly and adequately. On the other hand, vague and "shopping-list"-like requests risk to trigger rather un-focused and not particularly effective actions.

In conclusion, developing and least developed countries may wish to request the establishment of a clear and mandatory link between the S&D provisions included in the SPS Agreement and those on technical assistance as one of the ways to make the S&D approach more effective, within the mandate included in the Decisions on Implementation-Related Issues and Concerns, paragraph 12.1(ii). This goal could be achieved through a change in the language of the Agreement, or through an authoritative interpretation of it pursuant to Article IX:2 of the WTO Agreement.

International standards and international standardizing organizations

The SPS Agreement desires to further the use of harmonized measures based on internationally agreed standards. Hence, SPS measures which conform to international standards "shall be deemed to be necessary to protect human animal or plant life or health, and presumed to be consistent with the relevant provision of the SPS Agreement and of GATT 1994"[28]. The standards, guidelines and recommendations developed under the auspices of the Codex Alimentarius Commission (CAC), the International Office of Epizootics (OIE) and the Secretariat of the International Plant Protection Convention (IPPC) are explicitly referred to in the SPS Agreement as the international reference respectively for food safety, animal health and zoones, and plant health.[29] For matters not covered by these organisations, standards established by other relevant international organisations, as identified by the SPS Committee, may be recognised.[30]

Harmonization of international standards entails major benefits: it facilitates trade - the same requirements applying in all countries which base their national measures on international standards; it reduces disputes - since measures based on standards are presumed to be WTO-consistent they are, in principle, not challenged by trading partners; it fosters global dialogue on technical issue - no single country bearing the burden of risk assessment. Conversely, the divergence of standards and regulations creates costs for international trade. Nevertheless, in some cases, these costs are justified, since they arise from legitimate differences in societal preferences, technological development, environment and health conditions. In these cases,

[26] WTO, *Questionnaire on Technical Assistance*, G/SPS/W/113, 15 October 2001.
[27] WTO, *Discussion on Technical Assistance and Coordination – Informal meeting of the SPS Committee of 9 July 2001 – Report by the Chairman*, G/SPS/GEN/267, 16 July 2001.
[28] Article 3.2.
[29] Annex A, paragraph 3(a).
[30] Annex A, paragraph 3(b).

standards harmonisation would not be a desirable solution, while equivalence of SPS measures would provide a better option.

The benefits of harmonization may be impeded if the process is captured by special interests in order to exclude market participants or if it is not adequately transparent. Yet, the adoption of consultative and participatory procedures in standard setting, in some cases envisaging the engagement of non-traditional stakeholders, makes the development and adoption of international standards more complex and time consuming and implies that considerations of a non scientific nature may play a role.

The efficiency and fairness of the international standard setting process is crucial. It has occurred that standards developed by a limited number of countries or approved by a narrow majority of participants got the status of international standards. Because of the simple majority rules, for instance, some Codex standards have been adopted or rejected by a relatively small majority. This situation is well illustrated by the standard on maximum residue limits for growth hormones (beef), which had been approved by 33 votes in favour, 29 against and 7 abstentions. The revised standard for natural mineral waters was approved by 33 votes in favour, 31 against and 10 abstentions. As a result of increased criticism, international standard setting bodies have adopted and are being developing new procedures to ensure that standards truly reflect the view of all member countries. As regards the CAC, the Codex Committee on General Principles, at its Fourteen Session, 19-23 April 1999, discussed various options to ensure greater fairness and efficiency in standard setting.[31] Since then, the Commission has committed itself to pursue consensus in the approval of its standards, as opposed to a simple majority of votes cast. The CAC, and specifically its most recent 24th Session, continues to address the matter of developing country participation. The issue of participation (and transparency) is being discussed in several areas, including as part of the Commission's Strategic Framework, which sets out the strategic priorities for the CAC and provides the basis for the elaboration of the Medium Term Plan for the period 2003-2007[32]. Moreover, the participation of developing countries in the Codex process is likely to be considered within the current Review of the Joint FAO/WHO Food Standards Programme, which was most recently discussed at the extraordinary 49th Session of the Executive Committee.[33] As to the IPPC, current procedures, entailing a 9-step elaboration and consultation process including review after adoption, were adopted by the Interim Commission on Phytosanitary Measures (ICPM) in 1999, based on interim procedures established by FAO.[34] Current procedures and policies emphasize transparency, participation and geographic representation in the IPPC's standard-setting processes. All standards submitted to the ICPM have been adopted by consensus. Standards can be adopted by a two-thirds majority vote if necessary, however a vote cannot be requested for the adoption of a standard on the first occasion it is submitted to the ICPM. The OIE has adopted a consensus approach to the development and adoption of standards. However, it is reported that almost all written comments on draft Animal Health Code standards come from less than ten countries, with the situation for oral comments being about the same.

Article 10.4 of the SPS Agreement states that "Members should encourage and facilitate the active participation of developing country Members in the relevant international organization". However, developing countries have repeatedly expressed their concern about the way in which international standards are developed and approved, pointing out how their

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[31] Joint FAO/WHO Food Standard Programme, Codex Committee on General Principles, *Improvement of procedures for the adoption of Codex standards and measures to facilitate consensus*, CX/GP 99/5, March 1999.

[32] See Appendix II of ALINORM 01/41. "Promoting Maximum Membership and Participation" (Objective 5) figures among the objectives considered to be equally important to the overall achievement of the strategic vision.

[33] ALINORM 03/3, paras. 42-43.

[34] Report of the Second Session of the ICPM (1999), ICPM-99/REPORT.

own participation is very limited from the point of view of both number and effectiveness, thus making international standards irrelevant to them, inappropriate for use as a basis for their domestic SPS measures, and very difficult to comply with when incorporated by the importing countries in their national regulations. Developing countries' participation in international standards setting is an "implementation" issue that has been discussed in the General Council. The "three sisters" (CAC, OIE, and IPPC) briefed members on participation in international standard-setting bodies in a workshop before the 14–15 March 2001 meeting of the SPS Committee[35]. The information showed that developing countries are participating more, but not necessarily in the most adequate manner.[36]

The Decision on Implementation-Related Issues and Concerns "(i) takes note of the actions taken to date by the Director-General (of the WTO) to facilitate the increased participation of Members at different level of development in the work of the relevant international standard setting organizations as well as his efforts to coordinate with these organizations and financial institutions in identifying SPS-related technical assistance needs and how to best address them; and (ii) urges the Director-General to continue his cooperative efforts with these organizations and institutions in this regard, including with a view to according priority to the effective participation of least-developed countries and facilitating the provisions of technical and financial assistance for this purpose."[37]

At the WTO Ministerial Conference in Doha, the WTO, FAO, OIE, WHO, and the World Bank have issued a joint statement committing themselves to help developing countries' participate more fully in setting international norms for SPS measures. The agencies are committed to coordinating the technical assistance they give to developing countries as part of this effort.[38]

Costs of direct participation in standard setting pose a constraint to participation by developing countries. As to the CAC, its subsidiary bodies responsible for drafting proposed standards meet either annually or biennially, creating a burden on all Member countries in regard to participation costs, but affecting developing countries to the greatest extent. Hence, developing countries participate directly in the standards-setting activities of the CAC mainly in the plenary Commission sessions (where standards are formally adopted). Conversely, participation of developing countries in the committees responsible for drafting proposed standards is still below the level that would be considered as being representative of the CAC as a whole.[39] The OIE bears the cost of experts' participation in the working groups and specialist commissions, as well as that of delegates attending the annual General Session of the International Committee, where draft standards are discussed and adopted. Funds are available for developed and developing country experts alike.

However, the most critical constraint to effective participation by developing countries in international standards setting refers to the lack of capabilities at the national level for the evaluation of draft standards and the formulation of positions in consultation with all

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[35] WTO Workshop on Standards Setting, Geneva, 13 March 2001.
[36] See summary documents from Codex (G/SPS/GEN/236); IPPC (G/SPS/GEN/227); World Health Organization (G/SPS/GEN/231).
[37] *Implementation-Related Issues and Concerns*, *supra*, note 7, para 3.5.
[38] *Agencies to Boost Developing Countries' Participation in Setting Food Safety and Related Norms*, PRESS/254, 12 November 2001.
[39] Codex Committees are organized by host governments, who pay the operating costs of these meetings. The Rules of Procedure of the CAC specify that costs of delegates' participation are borne by the governments concerned. There have been several proposals to improve the participation of developing counties by holding Codex meetings in developing countries, paid for by the usual host country. The recent meetings of the Codex Committee on Food Additives serve to illustrate the potential of this option. Additionally, countries may still participate by correspondence. Anyhow, although participation by accredited representatives to the parent Organizations allows for greater nominal participation, the technical nature of the subject matter does not always ensure that the participation is as effective as it could be.

interested parties. This means that solutions such as sponsoring the participation of developing country delegates in plenary meetings where international standards are formally approved are positive but by far not sufficient. The adequate and effective participation of developing countries in the international standard-setting process relies on their technical capacity to contribute to the process by proposing solutions and criteria which are both scientifically sound and consistent with their technological and developmental conditions. To this end efforts should be made. On the contrary, should international cooperation only be aimed at increasing the number of developing country delegates present at the official meetings of the international standardization bodies, it would be inadequate and even counterproductive for developing countries, since it would make it possible to define as "genuinely international" activities which are not such in reality.

The work of standard setting organisations may also be of relative relevance to developing countries, in the sense that often standards are developed for products which are not of export interest to them. This situation has not helped to make developing countries particularly interested and, then, active in the process of international standardization. To a large extent, developing countries see the international standards as developed by and for the developed countries. An effort should therefore be made to develop standards which are of immediate relevance to developing countries and that can facilitate their exports. Certain financial issues relating to directed funding for the development of standards should be taken into account when addressing this problem. A recent development occurred within the IPPC may well illustrate the case. Because of severe under-funding of the work programme, financial assistance is provided for standard setting through directed financial contributions from governments ("sponsorship of standards"). Concerns have been expressed by a number of Members that if funds are provided to assist with the development of a specific standard, then the standard might be afforded preferential treatment in the list of priorities. Hence, rules have been developed to ensure that no special treatment is given to the development of standards that are provided with financial assistance. In view of the Fourth Session of the ICPM, held in Rome 11-15 March 2002, the Informal Working Group recommended[40] that the provision of external resources for standard setting should be applied only for standards that are approved as priorities by the ICPM, and that it should follow the normal procedures, policies and practices of standard setting with no modification according to the preferences of the funding entities. Accordingly, the ICPM has been invited to amend the existing criteria for setting the topics and priorities in standard setting[41] by removing the last criterion listed, namely "availability of external resources to support preparation of a standard".

Box 1

The Joint FAO/WHO Codex Alimentarius Commission (CAC)

The CAC is an intergovernmental body reporting to the Directors General of FAO and WHO. It is open to all Members of FAO and WHO and currently there are 166 Members. It meets every two years. Its primary function is protecting the health of consumers while at the same time ensuring fair practices in the food trade. The Commission's organisational structure comprises 23 Codex Committees and Task Forces, responsible for drafting food standards; 6 Regional Coordinating Committees to ensure regional coordination and an Executive Committee that oversees the Commission's work. The *Codex Alimentarius* is the complete collection of standards, codes of practice, guidelines and recommendations adopted by the Commission to achieve its objectives. The standards, guidelines and recommendations established by the CAC on food additives, veterinary drug and pesticide residues,

[40] Document ICPM 02/15.

[41] As established in the *Report of the First Session of the ICPM* (1998), ICPM-98/REPORT, paragraph 13.

contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice are recognized by the SPS Agreement as the international reference for food safety requirements.

Box 2

The Office International des Epizooties (OIE)

The OIE, an intergovernmental organisation totalling 158 Member Countries, is concerned with the occurrence and course of epizootics that could endanger animal or human health. Its objectives and functions include developing regulations designed to prevent the spread of transmissible diseases to humans and animals through trade in animals and animal products; and the harmonisation of requirements for such trade, in order to avoid unjustified trade barriers. OIE standards are recognised by the SPS Agreement as reference international sanitary rules. They are prepared by elected Specialist Commissions and by Working Groups bringing together internationally renowned scientists. Standards are adopted by the OIE highest authority, the International Committee, meeting in General Session in May each year. Standards, guidelines and recommendations developed under the auspices of the OIE principally refer to: standards for international trade in animals and animal products (International Animal Health Code, 10th Ed., 2001); standardised diagnostic techniques and vaccine control methods for use in international trade (Manual of Standards for Diagnostic Tests and Vaccines, 4th Ed., 2000); aquatic animals (International Aquatic Animal Health Code, 4th Ed., 2001; Diagnostic Manual for Aquatic Animal Diseases, 3rd Ed., 2000).

Box 3

The International Plant Protection Convention (IPPC)

The IPPC is a multilateral treaty deposited with the Director-General of the FAO. One hundred and seventeen governments are currently contracting parties to the IPPC. Amendments to the Convention were unanimously adopted by the FAO Conference in 1997 (New Revised Text of the IPPC) to update the Convention and reflect the role of the IPPC with relation to the WTO-SPS Agreement. The Convention is administered through the IPPC Secretariat located in FAO's Plant Protection Service. The Interim Commission on Phytosanitary Measures (ICPM), established as an interim measure by FAO until the IPPC (1997) comes into force, establishes priorities for standard setting and harmonization of phytosanitary measures. IPPC is named by the SPS Agreement as the international organization responsible for phytosanitary standard-setting and the harmonization of phytosanitary measures affecting trade. To date, seventeen international standards for phytosanitary measures (ISPMs) have been adopted. ISPMs 13-17 were recently adopted at the Fourth Session of the ICPM (11-15 March 2002). Additionally, a number of standards are under development and revision.

Transparency and notification provisions

Transparency is vital to make sure that SPS measures are scientifically sound and do not have an unnecessary detrimental impact on international trade. However, variations in the quality and content of the information provided by countries in their notifications, short comment periods, delays in responding to requests for documentation, absence, at times, of due

consideration for the comments provided by other Members are recurrent problems limiting the effective implementation of the transparency provisions.

Paragraph 2 of Annex B of the SPS Agreement mandates Members to allow "a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member." The Decision on Implementation-Related Issues and Concerns clarifies that "the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months". According to paragraph 5 of Annex B, an adequate time frame has also to be provided between the notification of a proposed regulation and its adoption, since this allows other Members to provide comments on the draft. Language may be an obstacle to the effective capacity of countries to comment on draft regulations. Therefore, Members have agreed that at least a summary of the proposed regulation in one of the official languages of the WTO should be made available by the notifying country, if the notifying country is a developed country. According to paragraph 9 of Annex B of the SPS Agreement, the WTO secretariat circulates copies of the notifications to all Members and draws the attention of developing countries to any notification of special interest to them. Notifications are circulated both by hard copy and electronically. The ability of the Enquiry Points in developing countries to receive and provide information electronically is, therefore, crucial.

At times, even when countries are able to provide comments on the draft, those comments are not taken into account by the notifying country and the whole exercise becomes worthless. A possible solution to this problem could be that when comments and suggestions are not reflected in the final text of the measure, the notifying country has to explain the reason.

The SPS Committee is a forum where countries can discuss the implementation of the Agreement, bring the difficulties they are experiencing in the field of sanitary and phytosanitary measures to the attention of other countries and challenge specific SPS measures proposed or already implemented by other Members. Developing countries are still making limited use of this forum, though their participation is growing, as well as of the other transparency provisions included in the Agreement. This may be due to the fact that the links between the public authorities and the private sector are only loose and, therefore public authorities are not fully aware of the difficulties that exporters face, while the private sector does not have appropriate channels to bring the difficulties it experiences to the attention of the competent authorities. Developing countries may, therefore, consider making the necessary efforts to strengthen these links.

Adaptation to regional conditions

Within a given country, the situation regarding plant or animal disease may not be uniform. The importing country should, therefore, consider whether there are zones within the exporting country which represent a lesser danger, either as a result of the prevailing natural conditions or because the exporting country has made efforts to eradicate the disease from such zones and has taken the necessary measures to prevent its reintroduction.

The adaptation to regional conditions, including the recognition of pest- or disease-free areas or areas of low pest or disease prevalence (Article 6), is of key relevance to developing countries, especially large countries where geographical, environmental and epidemiological conditions may vary considerably from one region to the other. In some cases the provision of adaptation to regional conditions has facilitated trade in agriculture products. However, the efforts to eradicate a pest or disease from a specific area may imply large investment and the procedures to prove that an area is pest- or disease-free or is an area of low pest or disease

prevalence are usually long and burdensome and often involve the need to provide complex scientific evidence. Developing countries have, therefore, not been able to fully benefit from this Article, despite the support provided by the relevant international organizations. Possible solutions include the simplification of the procedures, while maintaining them scientifically sound, and support for developing countries to prepare their submissions for the recognition of pest- or disease-free areas or of areas of low pest or disease prevalence. Developing countries have to determine when it is feasible and cost-effective to make efforts to eradicate a particular disease from a zone and whether they can get appropriate return on their investment. This is clearly an area where expert assistance would facilitate the actual implementation of the provision of the Agreement by developing countries.[42] Once a country or an area within a country has been declared pest- or disease-free by the relevant international organizations, this status should not be questioned again by individual trade partners, which may, if necessary, request further evidence in terms of Article 6.3, but should refrain from requesting the concerned country to submit all the evidence again. The non-recognition by a trade partner of the status of "pest- or disease free area" declared by the competent international organization can be regarded as a trade restrictive measure in terms of Article 2.3 of the Agreement.[43]

THE PRECAUTIONARY APPROACH TO HEALTH AND SAFETY AND BIOTECHNOLOGY

In the present debate abut health and safety, the "precautionary approach" is often opposed to a "sound-science approach". Varying perceptions about public health risks, different level of acceptance of them, divergent priorities and dissimilar economic interests have driven countries to take quite opposite positions in this field and have created acute tensions among them. International trade magnifies the problem.

The SPS Agreement permits the adoption of SPS measures on a provisional basis as a precautionary step in cases where there is an immediate risk of the spread of disease but where the scientific evidence is insufficient. However, "Members shall seek to obtain the additional information necessary to a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time" (Article 5.7, second sentence). Therefore, the SPS Agreement includes a rather strict interpretation of the precautionary approach.

The precautionary approach started to appear in multilateral environmental agreements in the mid-1980s. Its use increased further in the 1990s, especially when it was included as one of the 27 principles of the Rio Declaration on Environment and Development (UNCED, 1992). Principle 15 reads: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." By 1990, the precautionary approach was also appearing in regional declarations and treaties. Since 1992, it has also been reflected in the domestic legislation and case law of an increasing number of countries. [44]

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[42] For example, the European Communities have stated in a communication on adaptation to regional conditions that "When assessing the application of regionalization in an exporting country, the primary element to be taken into consideration is the quality of the service in charge of implementation and control of the policy. Acceptance of trade when a decision on regionalization is taken requires full confidence in the certifying competent authorities". WTO, *Review of the SPS Agreement, Submission by the European Communities*, G/SPS/GEN/101, 23 November 1998.

[43] See on this issue: WTO, *Articles 6(2), 6(3) and Annex A (3) (B): Recognition of the Concept of Pest- or Disease-Free Area as an International Standards, Guideline or Recommendation, Submission by South Africa*, G/SPS/GEN/139, 2 November 1999.

[44] For an in-depth analysis of the precautionary principle in regional and national legislation and in case law, see M. T. Stilwell, "The legal relationship between the precautionary principle and multilateral trade rules", UNEP, forthcoming.

The reference in multilateral, regional and national legal texts to the precautionary approach does not make it less controversial in the context of international trade: although it has been included in a number of legal instruments dealing with the environment, its status within the framework of the international trading system is still unclear.

The SPS Committee discussed the precautionary approach in several of its meetings in 2000 and 2001. While the EU has questioned the soundness of Article 5.7 of the SPS Agreement and suggested a possible revision or broader interpretation of it in order to give countries more flexibility to protect their markets against products whose health, safety or environmental impacts are uncertain, several developed and developing countries have stressed that Article 5.7 is adequate to deal with cases where emergency measures are needed but related scientific evidence is not fully available. According to these countries, a broader application of the precautionary approach in international trade would lead to a situation of unpredictability in relation to market access, which would jeopardize the results of trade liberalization.

The debate about the precautionary approach and the way it is reflected in the multilateral legal instruments acquire a specific significance when trade in biotechnology products is at stake.[45] The precautionary approach is one of the main features of the Cartagena Protocol on Biosafety.[46] It allows importing countries to ban imports because of lack of scientific certainty. The ban may last until the importing country decides that it has arrived at scientific certainty about the effects of the genetically modified (GM) products on biodiversity and human health. However, since the importing country is not obliged to seek the information necessary for reaching scientific certainty, a trade-restrictive measure may be in force without time limits. On the contrary, the SPS Agreement allows countries to provisionally adopt sanitary or phytosanitary measures when relevant scientific evidence is insufficient, but obliges them to seek the additional information necessary for a more objective assessment of risk and to review the SPS measure within a reasonable period of time.[47] The Preamble of the Biosafety Protocol states that it shall not be interpreted as implying a change in the rights and obligations of the parties under existing international agreements and that this recital is not intended to subordinate the Protocol to other international agreements. This provision is, however, rather unclear and may prove not to be very helpful if a trade conflict arises between countries with divergent interests/perceptions in the area of biotechnology.

While some developing countries have embraced biotechnology and are becoming producers and exporters of bioengineered agricultural products, others are very sceptical about this new phenomenon and fear that their lack of scientific knowledge and familiarity with it may make them risking to import products which, in the long run, may prove dangerous for health, safety or for the environment. They are therefore, putting in place restrictive trade

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For an analysis of the precautionary principle in international trade, see H. Ward, "Science and Precaution in the Trading System", Royal Institute of International Affairs and the International Institute for Sustainable Development, 1999.

[45] The Convention on Biological Diversity defines biotechnology as "any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use". The biotechnology industry provides products for human health care, industrial processing, environmental bioremediation, and food and agriculture.

[46] Negotiated under the auspices of the Convention on Biological Diversity (Rio de Janeiro, 1992) and adopted on 29 January 2000, the Cartagena Protocol provides rules for the safe transfer, handling, use and disposal of "living modified organisms" (LMOs), defined by the Protocol as "any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology" Article 3(g)). Its aim is to address the threats posed by LMOs to biological diversity, also taking into account risks to human health. The Protocol will enter into force 90 days after the 50th instrument of ratification is received. At April 2002, 108 countries, plus the European Community, had signed the Protocol and 15 countries had ratified it.

[47] See: S. Zarrilli, *Trade in Genetically Modified Organisms and Multilateral Negotiations: a New Dilemma for Developing Countries*, UNCTAD/DITC/TNCD/1, 20 October 2000.

measures vis-à-vis the production and import of GM products. However, if challenged, those countries may likely face many problems in proving the scientific basis of their trade measures. Until the moment the Cartagena Protocol will enter into force, the SPS Agreement probably remains the most adequate multilateral legal instrument to deal with trade in genetically modified agricultural products and, as mentioned above, its provisions about precautionary measures are quite strict.

Biotechnology is another field where developing countries would greatly benefit from the strengthening of their scientific and technical capacities. Once acquired a better knowledge of biotechnology, they would be able to assess the related risks and benefits as they apply to them, and move from a situation of fear – and related refusal of GM-products – to a situation where they would decide which kind of bioengineered products they may have an interest in producing and/or importing.

RECOMMENDATIONS

The benefits of trade liberalization in the agriculture sector achieved by the Uruguay Round negotiations and those which may result from the Doha Work Programme could be undermined by the protectionist use of sanitary and phytosanitary measures. The SPS Agreement was negotiated to limit this danger and represents a useful instrument for this purpose. However, this paper has identified some shortcomings of the Agreement. It could thus be worth considering the introduction of certain amendments or some authoritative interpretations of the Agreement to ensure that the risk of using SPS measures as border protection instrument is minimized, while all countries benefit equally from the Agreement. The Doha Work Programme and the Decision on Implementation-Related Issues and Concerns provide countries, especially developing countries, with a margin of flexibility in this sense.

Considering that it is quite obvious that governments are not willing to compromise public health, the most promising option for developing countries to maintain and expand their exports of agricultural and food products is to be able to meet the mandatory requirements and the expectations of consumers in the target markets. At the same time, developing countries need to develop their own regulatory control systems to ensure the safety of their domestic production and of their imports, including those that result from the application of biotechnology. Any possible modification and interpretation of the SPS Agreement should keep these two goals in mind.

International standards should be developed through a fair process, based on consensus, where countries at different levels of development and from different geographical regions are effectively represented. To this end, support is needed to improve developing country capacity to evaluate draft standards and formulate national/sub-regional/regional positions. The development of standards for products of export interest to developing countries would increase the relevance of international standard-setting activities for them and could likely result in a more meaningful participation of developing countries in such activities.

Equivalence can facilitate international trade. Considering that it requires full confidence by the importing country in the laboratories and certifying authority of the exporting country, the setting up of internationally financed regional, sub-regional or national laboratories, certification bodies and accreditation institutions should be considered.

S&D provisions should help developing countries to adjust their products and process methods to the new requirements established by the importing countries, strengthen their institutional framework, up-grade their facilities and become more capable to deal with the scientific and technical aspects of SPS measures as exporters as well as importers. S&D

provisions which only allow for longer time frame for compliance are insufficient and may prove self-defeating in the long run. *Technical assistance* and S&D are, therefore, closely linked.

The *adaptation to regional conditions* is of key relevance to developing countries. Clear reference should be made in Article 6 to the scientific and administrative support needed by developing countries to facilitate the implementation of the article. The disease-free status declared by the competent international organizations should be recognized by all trade partners.

The *transparency* provisions could be made more development-oriented by adding new language in Annex B to stress the expectation that the comments provided on the drafts are reflected in the final texts and that, in the case they are not, explanations are provided. Developing country electronic access to information should be facilitated.