WTO Agreement on Sanitary and Phytosanitary Measures: Issues for Developing Countries

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Preface

The South Centre, with funding support from UNDP, has established a pilot project to monitor and analyse the work of WTO from the perspective of developing countries. Recognizing the limited human and financial resources available to the project, it focuses on selected issues in the WTO identified by a number of developing countries as deserving priority attention. It is hoped that the project will lead to more systematic and longer term activities by the South Centre on WTO issues.

An important objective of the project is to respond, to the extent possible within the limited resources, to the needs of developing country negotiators in the WTO for concise and timely analytical inputs on selected key issues under negotiation in that organization. The publication of analytical *cum* policy papers under the T.R.A.D.E. working paper series is an attempt to achieve this objective. These working papers will comprise brief analyses of chosen topics from the perspective of developing countries rather than exhaustive treatises on each and every aspect of the issue.

It is hoped that the T.R.A.D.E. working paper series will be found useful by developing country officials involved in WTO discussions and negotiations, in Geneva as well as in the capitals.

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List of Abbreviations

FMD Food and mouth disease
GATT General Agreement on Tariffs and Trade
LDCs Least-developed countries
MRAs Mutual Recognition Agreements
S&D Special and differential
SPS Sanitary and phytosanitary
TBT Technical barriers to trade
TTMRA Trans Tasman Mutual Recognition Agreement

Organizations

APEC Asia-Pacific Economic Co-operatioon
ASEAN Association of South East Asian Nations
EC European Communities
EU European Union
FAO Food and Agriculture Organization of the United Nations
FTAA Free Trade Area of the Americas
IPPC International Plant Protection Convention
MERCOSUR Southern Common Market
NAFTA North American Free Trade Agreement
OIE International Office of Epizootics
UN United Nations
UNCTAD United Nations Conference on Trade and Development
UNDP United Nations Development Programme
WTO World Trade Organization

Executive Summary

Sanitary and phytosanitary (SPS) measures are typically applied to both domestically produced and imported goods to protect human or animal life or health from food-borne risks; humans from animal and plant-carried diseases; plants and animals from pests or diseases; and, the territory of a country from the spread of a pest or disease. To reach these goals, SPS measures may address the characteristics of final products, as well as how goods are produced, processed, stored and transported. They may take the form of conformity assessment certificates, inspections, quarantine requirements, import bans, and others. While some of these SPS measures may result in trade restrictions, governments generally recognize that some restrictions are necessary and appropriate to protect human, animal and plant life and health.

Sanitary and phytosanitary (SPS) measures are not a new issue in global agricultural trade. Because of the concern that SPS measures might be used for protectionist purposes, a specific Agreement on the Application of Sanitary and Phytosanitary Measures was negotiated during the Uruguay Round. The Agreement recognizes that countries have the right to maintain SPS measures for the protection of the population and the agricultural sector. However, it requires them to base their SPS measures on scientific principles and not to use them as disguised restrictions to trade.

Despite growing concern that certain sanitary and phytosanitary measures may be inconsistent with the SPS Agreement and unfairly impede the flow of agricultural trade, developing countries are not well positioned to address this issue. They lack complete information on the number of measures that affect their exports; they are not sure whether these measures are consistent or inconsistent with the SPS Agreement; they do not have reliable estimates on the impact such measures have on their exports; they experience serious problems on scientific research, testing, conformity assessment and equivalency. Developing countries are unable to effectively participate in the international standard-setting process and, therefore, face difficulties when requested to meet SPS measures in foreign markets based on international standards. Transparency-related requirements represent a burden for developing countries, while they are often unable to benefit from them, due to the lack of appropriate infrastructure. The provision of adaptation to regional conditions, which would be of great benefit to developing countries, has been little used because of the difficulties related with its scientific side. The provisions relating to special and differential treatment for developing countries remain rather theoretical and apparently have not materialized in any concrete step in their favour.

The aim of this paper is to formulate a number of suggestions on how to improve developing countries' ability to use the SPS Agreement and benefit from it, and propose some amendments to be included in the legal text for this purpose.[1]

It is worth noting that, according to Article 12.7, the operation and implementation of the SPS Agreement was reviewed during 1998 and finalized by March 1999. However, the review was regarded as not exhaustive by Member countries, therefore it was agreed that at any time countries could raise any issue for consideration by the SPS Committee. Article 12.7 specifies that the Committee shall review the operation and implementation of the Agreement as the need arises. This opens the way to a proactive approach by developing country Members.

It is, however, important to keep in mind that, while all efforts should be made to limit the protectionist use of sanitary and phytosanitary measures and for this purpose some modifications of the text of the SPS Agreement may be worth considering, in many cases SPS measures reflect genuine concerns to protect health and safety. The present situation, where consumers are increasingly requesting governments to be vigilant and make efforts to minimize the risks of marketing and importing products which could jeopardize the health of people or animals or harm agriculture, is the result of several episodes -- such as the so-called "mad cow" disease or the recent case of contamination by dioxin of a large number of agricultural products (and of the spreading of contamination through international trade) -- where consumers have felt that health and safety were at risk. The spreading of the use of genetically-modified seeds and the perception that GM crops may negatively affect human and animal health and the environment contribute to a strong request for strict measures in the sanitary and phytosanitary field. For developing countries the best option is, therefore, to become able to respond to the exigencies which are emerging in their target markets as well as to the wishes and expectations of final consumers, by providing good 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 potential negative impact on local people's health, animal health or the environment. Developed countries and the relevant international organizations should be willing to support developing countries in this endeavour.

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I. Introduction: The Role of Standards and Regulations

Countries require that domestically produced and imported goods conform to regulations and possibly adhere to standards. The number of standards and regulations is constantly increasing in most countries because of the expansion in volume, variety and technical sophistication of products manufactured and traded. Nowadays, standards and regulations aim at complying with a variety of aims and tasks. Some of them are traditional -- such as minimizing risks, providing information to consumers about the characteristics of products, providing information to producers about market needs and expectations, facilitating market transactions, raising efficiency and contributing to economies of scale. Other are less traditional -- such as serving as benchmarks for technological capability and network compatibility and enhancing technology diffusion. Standards and regulations respond also to growing public demand, often voiced by consumer associations and environmental groups, to have in the market products which have minimum detrimental effect on the environment, display clear information regarding their possible impact on health and respond to high quality requirements. Because the tasks that standards and regulations aim to fulfil have expanded and deepened, the number of interested parties involved in setting-up standards and regulations is also increasing, with the participation of groups such as consumer and environmental organizations, which were not previously involved in these activities.

While standards and regulations, by satisfying the above-mentioned tasks, can promote economic development and trade, they may also be used as powerful tools to impede international trade and protect domestic producers, mainly through:

- unjustified different requirements in different markets;
- unnecessary costly or time consuming tests; or
- duplicative conformity assessment procedures.

The risk that countries resort to standards and regulations to maintain a degree of desired domestic protection is increasing, since more obvious trade barriers, such as tariffs, were reduced through several rounds of multilateral negotiations. This risk is particularly high in the agricultural sector where lowering the level of protection provided by tariffs and many non-tariff barriers would increase the importance of sanitary and phytosanitary measures as border protection instruments. Probably, the major difficulty in dealing with standards and regulations is to distinguish those measures which are justified by a legitimate goal from those which are applied for protectionist purposes.

Compliance with regulations is mandatory, therefore products which do not comply with regulations cannot be sold in a given market. On the other hand, standards are voluntary, therefore no product can be stopped at the border or refused access to the domestic market because of non compliance with standards. However, in practical terms, the distinction between standards and regulations is fading away, since adherence to standards is often a pre-condition for the acceptability of products by consumers and/or distributors. Moreover,

insurance companies may request compliance with standards to reduce product liability exposure; importers may ask adherence to standards when there is a need for compatibility with a prevailing product in the importing market; and standards may be incorporated in regulations.

Conformity assessment measures are aimed at assessing the compliance of a product with a standard or a regulation. Conformity assessment can enhance the value of standards and regulations by ensuring that the required conditions are met by both domestic and imported products. Measures to evaluate and ensure conformity may be as significant as the standards and the regulations themselves, therefore they can also act as powerful non-tariff barriers if they impose costly, time-consuming and unnecessary tests or duplicative conformity assessment procedures. In the case of conformity assessment, as well as in the case of standards and regulations, the line between legitimate measures and measures aimed at discouraging imports and protecting domestic producers is very difficult to draw. However, statistics show that conformity assessment is a rapidly growing activity, especially in developed countries. According to a study carried out in the USA[2], the activities of testing laboratories in the United States which carry out conformity assessment evaluation have been expanding by 13.5 per cent a year during the period 1985-1992. Adding the revenue from all firms involved in testing activities, the industry is estimated to involve around US$ 10.5 billion annually. The size of this activity mirrors its growing importance and gives an indication of the potential obstacle that multiple requests for testing and certification may represent for international trade[3].

2 National Research Council (1995), *Standards, Conformity Assessment, and Trade*, Washington D.C., National Academy Press.

3 S. M. Stephenson (1997), *Standards, conformity assessment and developing countries*, Organization of American States, Trade Unit.

II. The Agreement on the Application of Sanitary and Phytosanitary Measures

II. 1 Negotiating history

When the Uruguay Round started, there was a consensus that the time had come for reform of international agricultural trade[4]. 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.[5] On the latter, 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[6].

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[7] endorsed the broad recommendations toward harmonization proposed by the EC and the United States. However, regarding the determination of what would be an acceptable level of sanitary and phytosanitary risk, it 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; the improvement of notification and consultation procedures and of the dispute settlement mechanism; and special allowances for developing countries. However, Japan also supported the idea that international standardization bodies should develop guidelines rather than standards, thus providing countries with more flexibility in drafting SPS regulations. 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.

In December 1988, at the Mid-Term Review of the Uruguay Round, 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[8], 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. However, several areas remained unsettled: there was no agreement on whether and under what circumstances, countries could implement domestic measures stricter than international standards, or on whether economic considerations or consumer concerns, other than health-related concerns, should be taken into account in the risk assessment. The issues of inspection and approval still remained an area of dispute. It is worth noting that progress on SPS-related issues continued to outpace many other sectors within agriculture.

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, while providing for more stringent national regulations and excluding economic considerations. 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.

II. 2 Salient features of the Agreement

The main goal of the SPS Agreement is to prevent domestic 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.
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; and animal and plants from pests and diseases. Therefore, the specific aims of SPS measures are to ensure food safety and to prevent the spread of diseases among animals and plants. SPS measures can take the form of inspection of products, permission to use only certain additives in food, determination of maximum levels of pesticide residues, designation of disease-free areas, quarantine requirements, import bans, etc.

The Agreement provides national authorities with a framework to develop their domestic policies. It encourages countries to base their SPS measures on international standards, guidelines or recommendations; 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 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 a 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. The SPS Agreement allows, therefore, countries to apply different SPS measures depending on the origin of the products. 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 drafting and 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[9]. On the other hand, the SPS Agreement permits 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 of the spread of diseases 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.

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). However, this delay did not include the transparency provisions. For the LDCs, a five-year grace period, covering all obligations including the transparency ones, will expire at the end of 1999. One of the advantages of the transitional period is that countries are not required to provide a scientific justification for their SPS measures during this period, therefore, their measures can not be challenged on this basis.

II. 3 Main differences between the SPS and TBT Agreements

While the SPS Agreement is a new agreement concluding during the Uruguay Round, a plurilateral Agreement on Technical Barriers to Trade (TBT), applying only to those countries which chose to accept it, had already been negotiated during the Tokyo Round (1974-1979). The TBT agreement, while not primarily negotiated having SPS concerns in mind, covered, nevertheless, requirements for food safety, animal and plant health measures, inspection and labelling. This Agreement was modified during the Uruguay Round and constitutes an integral part of the Final Act of the Uruguay Round, thus applying to all WTO Members. It covers all technical regulations and voluntary standards and the procedures to ensure that these are met, except when these are sanitary or phytosanitary measures as defined by the SPS Agreement. The TBT Agreement also covers measures aimed at protecting human health or safety, animal or plant life or health. To identify whether a specific measure is subject to the provisions of the SPS or the TBT Agreement, it is necessary to look at the purposes for which it has been adopted. As a general rule, if a measure is adopted to protect *human life* from the risks arising from additives, toxins, plant and animal-carried diseases; *animal life* from the risks arising from additives, toxins, pests diseases, disease-causing organisms; *plant life* from the risks arising from pests, diseases, disease-causing organisms; and a *country* from the risks arising from damages 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, are subject to the TBT Agreement. For instance a pharmaceutical restriction would be a measure covered by the TBT Agreement[10]. Labelling requirements related to food safety are usually SPS measures, while labels related to the nutrition characteristics or the quality of a product falls under the TBT discipline.

II. 4 Disputes under the WTO involving violations of the SPS Agreement

Since the inception of the new Dispute Settlement Mechanism under the WTO in January 1995, three cases involving alleged violations of the SPS Agreement have reached the final stage of dispute resolution, that is, adoption of a panel/Appellate Body ruling by the Dispute Settlement Body (DSB). Moreover, in two additional disputes mutually acceptable solutions were found by the parties before the establishment of a panel[11]. In several other cases, consultations are still pending, as the parties have not found mutually acceptable solutions but have not asked for the establishment of a panel either[12].
The first of the three cases that have reached the final stage of the adoption of panel/Appellate Body ruling by DSB were the complaints by the United States and Canada against a measure introduced by the EC prohibiting imports of bovine meat and meat products from cattle treated with six growth hormones. The EC forbade the use of such hormones in its territory and had prohibited "hormone-treated beef" imports since 1989, since, in its view, beef hormones might threaten human health. On the other hand, according to the United States and Canada, the use of hormones for growth promotion purposes in cattle was safe and posed no threat to human health. Therefore the EC measure, they contended, was scientifically unfounded and was designed to protect EC domestic producers from foreign competition. The panel reports, which were released in August 1997, found that the EC ban was inconsistent with the SPS Agreement, since it was neither based on international standards nor was it justified by a risk assessment (violation of Articles 3.1,

3.3 and 5 of the SPS Agreement). The EC appealed the panels' decisions. The Appellate Body (AB) upheld most of the findings and conclusions of the panels and concluded that the EC ban was inconsistent with the requirements of Articles 3.3 -- as it was not based upon a risk assessment -- and 5.1 of the SPS Agreement, which calls for the need for scientific justification for measures which imply a higher level of SPS protection than that included in international standards. In particular, the AB emphasized that nations have the right to set their SPS standards at higher levels than those set by accepted international organizations (in this case the Codex Alimentarius), provided a risk assessment has been carried out showing that a risk may indeed exist. However, the AB found that the EC import prohibition was not based on a risk assessment. The EC was given 15 months (expiring in May 1999) as a "reasonable period of time" for complying with the recommendations of the Appellate Body.

Since the AB report was issued, the EC has maintained that the AB ruling gives it the right to retain the ban while complementary risk assessments are performed to provide the necessary scientific evidence for permanently prohibiting "hormone beef" imports. According to the EC, the AB did not find that the import prohibition *per se* was inconsistent with the SPS Agreement, but only that the EC had violated its obligation under the Agreement by not conducting a proper risk assessment as the basis for the import prohibition. Therefore, by providing a more adequate risk assessment, the EC would put itself in compliance with the Agreement. According to the United States and Canada, the EC was free to conduct a risk assessment, but such a risk assessment would be irrelevant to the implementation of the recommendations of the AB and could not be used to delay compliance: the withdrawal of the ban would be the only action consistent with the WTO ruling.

While some preliminary results of the complementary risk assessment were made available in May 1999, the EC has recognized that the complementary risk assessment might not be finalized until the year 2000. The EC, therefore, has suggested three interim measures[13] to implement the WTO ruling. However, these proposed options have been rejected by the complaining parties. WTO arbiters are in the process of deciding the amount of the retaliatory measures which the United States and Canada will be authorized to apply starting in July 1999.

According to some, the attitude taken by the EC in this case may weaken the SPS Agreement, the WTO dispute settlement mechanism and the credibility of the whole WTO system. The lack of timely and full implementation of the Appellate Body's recommendations may prove that there are loopholes in the SPS Agreement and that member countries may circumvent the obligations they have undertaken under it. On the other hand, the WTO verdict has attracted wide-spread criticism from consumer associations and food safety groups who have accused the WTO of supporting "downward harmonization". As a consequence of this case, the debate about the possible inclusion in the SPS Agreement of economic considerations or consumer concerns or about the need to strengthen the precautionary principle may be reopened.

In 1997 a panel was established at the request of Canada regarding Australia's ban on the importation of fresh, chilled, and frozen salmon. Australia had maintained this prohibition

since 1975 to protect Australian fish from up to 24 diseases that could enter the country through imported salmon from Canada. According to Australia, the establishment of these diseases could have damaging economic and biological consequences for Australia's fisheries. Canada claimed that the Australian measures were not scientifically justified and represented a disguised restriction on international trade. The panel's report, which was released in June 1998, found that Australia was in violation of the SPS Agreement as it did not base its measures upon a risk assessment (violation of Articles 5.1 and 2.2); was using its import restrictions on salmon in a way that resulted in a disguised restriction on international trade (violation of Articles 5.5 and 2.3); and was maintaining a SPS measure which was more trade restrictive than necessary to reach Australia's appropriate level of SPS protection (violation of Article 5.6). In July 1998 Australia announced that it would appeal the panel's decision. While the Appellate Body reversed the panel's reasoning with respect to certain SPS Articles, it nevertheless found that Australia had acted inconsistently with some Articles of the SPS Agreement, namely Articles 5.1 and 2.2 -- since the relevant measure was not based upon a risk assessment -- and Articles 5.5 and 2.3 -- since the measure represented a disguised restriction on international trade.

In 1997 the United States introduced a panel against Japan regarding Japan's approval process for the importation of certain agricultural products. Japan prohibited the importation of eight fruits originating, *inter alia*, from the United States, on the ground that they were potential hosts of a pest of quarantine significance to Japan. The import prohibition on these products could, however, be lifted if an exporting country proposed an alternative quarantine treatment (i.e. fumigation) which achieved a level of protection equivalent to the import prohibition. The exporting country bore the burden of proving the efficacy of the alternative. In 1987, Japan's Ministry of Agriculture, Forestry and Fisheries developed two guidelines for the confirmation of the efficacy of the alternative quarantine treatment: a guideline which outlined testing requirement applicable to the initial lifting of the import prohibition on a product; and a guideline which set out the testing requirement for approval of additional varieties of that product (so-called varietal testing). The United states claimed that it took from two to four years to conduct the necessary varietal tests, that tests were expensive, and that Japan's policy adversely affected U.S. agricultural exports and violated Japan's obligations under the SPS Agreement. The panel determined that Japan's measures were violating several SPS articles, since they were not based upon scientific evidence (violation of Article 2.2) and were more trade restrictive than necessary (violation of Article 5.6). Moreover, since Japan had not published the measure, the panel held that Japan was also in violation of Article 7 and Annex B.1, both related to transparency. In 1998, Japan notified its intention to appeal the panel report. The Appellate Body upheld most of the findings of the panel and expanded them, confirming that Japan's varietal testing requirement could not be scientifically justified, was not based on a risk assessment and, therefore, was inconsistent with the SPS Agreement.

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

5 The text of the Punta del Este Ministerial Declaration states, with respect to agriculture, that "Negotiations shall aim to achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more

operationally effective GATT rules and disciplines, taking into account the general principles governing the negotiations, by: ...

> minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements".

6 The SPS negotiations were led by Argentina, Australia, Canada, the EC, Japan, New Zealand, the Nordic Countries and the United States.

7 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 South Africa has joined, while Hungary has left.

8 The United States requested the Negotiating Group on Agriculture to establish a working group to address sanitary and phytosanitary measures, which, due to their technical aspects, were not well-suited to multilateral negotiations. According to the US, the results of the working group could then be incorporated into an overall draft text emerging from the agriculture group.

9 According to Annex A of the Agreement, risk assessment is "the evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; 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".

10 See: WTO (1999), *Understanding the WTO Agreement on Sanitary and Phytosanitary (SPS) Measures.*

11 First complaint was introduced by the United States in 1995 with respect to requirements imposed by the Republic of Korea on imports from the United States of shelf-life of products. The US questioned the scientific basis for uniform shelf-life requirements and claimed that the measure had the effect of restricting imports. The United States alleged violations, inter alia, of Articles 2 (Basic Rights and Obligations) and 5 (Assessment of Risk and Determination of the Appropriate Level of Sanitary and Phytosanitary Protection) of the SPS Agreement. However, the parties reached a mutually acceptable solution: South Korea agreed to allow manufacturers of frozen food and vacuum-packed meat to set their own use-by dates. A similar case introduced by Canada about Korean regulations on the shelf-life and disinfection of bottled water was also solved by the parties.

12 In 1996, the United States complained about Korean measures aimed at inspecting and testing agricultural products imported into Korea. According to the United States, those measures restricted exports and appeared to be inconsistent with Articles 2 (Basic Rights and Obligations) and 5 (Assessment of Risk and Determination of the Appropriate Level of

Sanitary or Phytosanitary Protection) of the SPS Agreement. In 1997, the European Communities complained about a ban on imports of poultry and poultry products imposed by the United States. The EC contented that, although the ban was allegedly on grounds of product safety, it did not indicate why EC poultry products had suddenly become ineligible for entry into the US market. Therefore, it claimed that the ban was inconsistent, inter alia, with Articles 2 , 3 (Harmonization) , 4 (Equivalence), 5, 8 and Annex C (both Article 8 and Annex C deal with Control, Inspection and Approval Procedures) of the SPS Agreement. In 1998, India complained about the restrictions allegedly introduced by an EC Regulation establishing a so-called cumulative recovery system for determining certain import duties on rice. According to India, the discipline introduced through the new Regulation restricted the number of importers of rice from India and had a limiting effect on the export of rice from India to the EC. India claimed violation, inter alia, of Article 5 of the SPS Agreement. In the same year, Switzerland complained about measures concerning the importation of dairy products and the transit of cattle imposed by the Slovak Republic. Switzerland alleged that these measures had a negative impact on Swiss exports of cheese and cattle and were inconsistent, inter alia, with Article 5 of the SPS Agreement. In 1998, Canada questioned certain measures implemented by the European Communities regarding the importation into the EC market of wood conifers from Canada. Canada alleged violation of, inter alia, Articles 2, 3, 4, 5 and 6 (Adaptation to Regional Conditions) of the SPS Agreement. In the same year, Canada complained about measures imposed in one state of USA prohibiting entry or transit of Canadian trucks carrying cattle, swine and grain. Canada alleged, inter alia, violations of several Articles and of Annexes B (Transparency) and C of the SPS Agreement.

13 These are, to pay compensation through trade concessions, most likely by increasing market access for other US agricultural products; transforming the present ban into a provisional one on the basis of available pertinent evidence; lifting the ban on imports and applying a mandatory labelling system which would specify that cattle have been treated with growth hormones.

III. Main Issues for Developing Countries in the SPS Agreement

III.1 The triennial review

According to Article 12.7 of the SPS Agreement, "the Committee shall review the operation and implementation of this Agreement three years after the date of entry into force of the WTO Agreement...". The SPS Committee agreed in July 1998 on a procedure to review the operation and implementation of the Agreement. The Committee finalized the Triennial Review in March 1999[14]. The SPS Committee did not recommend any modification of the text of the Agreement as a result of the review. However, since the review was not regarded as exhaustive, it was decided that Member countries could at any time raise issues for consideration by the Committee, as provided by Article 12.7.

Even though no modifications were introduced in the legal text, several issues have captured in particular the attention of country delegations and some suggestions to improve the functioning of the Agreement have been put forward.

III. 2 International standards and international standardizing organizations

The divergence of standards and regulations creates costs for international trade. In some cases these costs are justified, since they arise from legitimate differences in societal preferences, technological development, environmental and health conditions. In these cases standards harmonization would not be a desirable solution, while mutual recognition of standards would provide a better option. On the other hand, where divergences are not justified, international harmonization of standards seems to be an appropriate solution. However, it is the efficiency and fairness of the international standard development process that is crucial for minimizing distortions to international trade. The benefits of harmonization may be impeded if the process is captured by special interests in order to exclude other market participants or if it is not adequately transparent[15].

Article 3 of the SPS Agreement encourages countries to use international standards as a basis for their regulations. In Annex A it recognizes for food safety the standards, guidelines and recommendations established by the Codex Alimentarius Commission (Box 1), for animal health those developed by the International Office of Epizootics (OIE) (Box 2), and for plant protection those developed under the auspices of the Secretariat of the International Plant Protection Convention (IPPC) (Box 3). For matters not covered by these organizations, standards developed by "other relevant international organizations open for membership to all Members", as identified by the SPS Committee, are recognized. However, the Agreement does not specify the procedures that the relevant international organizations should adhere to in order to produce genuine international standards.

Box 1
The Joint FAO/WHO Codex Alimentarius Commission

The Codex Alimentarius Commission's membership totalled 163 countries in 1998. The Commission has nine General Committees whose work is relevant to standards for all commodities, 16 Commodity Committees which have responsibility for developing standards for specific food or classes of food, and five Co-ordinating Committees, one per region, to ensure that the work of Codex is responsive to regional needs. A feature of the "Committee system" is that each committee is hosted by a Member country responsible largely for the cost of the committee's maintenance and administration and for providing the Committee's Chairperson. The Commission meets every two years. Depending on the need, meetings of Codex subsidiary bodies are held by host countries usually once a year. The Codex Alimentarius, which is a collection of international food standards adopted by the Codex Alimentarius Commission, includes standards for all the principal foods: processed, semi-processed or raw. To date, the Codex Alimentarius includes 4,821 standards. The main purpose of the standards is to protect the health of consumers and to ensure fair practices in the food trade. Standards are specified in the areas of Food Standards for Commodities, Codes of Hygienic or Technological Practice, Pesticides Evaluated, Limits for Pesticide Residues, Guidelines for Contaminants, Food Additives Evaluated, and Veterinary Drugs Evaluated.

Box 3
The International Plant Protection Convention

The Secretariat of the IPPC was formed in 1993 and the standard-setting activity started the same year. The IPPC is responsible for phytosanitary standard-setting and the harmonization of phytosanitary measures affecting trade. To date, eight standards have been completed and 14 others are at different stages of development. The Interim Commission on Phytosanitary Measures has the responsibility for identifying the topics and priorities for the standard-setting activity. The IPPC is an international treaty for plant protection to which 107 countries currently adhere. The Convention came into force in 1952 and has been amended once in 1979 and again in 1997.

Box 2
The Office International des Epizooties (OIE)

The OIE has currently 151 Member countries. Its objectives and functions include the harmonization of health requirements for international trade in animals and animal products and the adoption of international standards in the field of animal health. The International Committee is the highest authority of the OIE. It comprises all the delegates of the Member countries and meets at least once a year. The Specialist Commissions, such as the International Animal Health Code Commission and the Standard Commission, are involved

in the preparation of OIE recommendations. OIE has five Regional Commissions to study specific problems affecting veterinary services and organize co-operation within the regions. In the absence of more precise indications, standards developed by a limited number of countries or approved by a narrow majority of participants may get the status of international standards. Developing countries have repeatedly expressed their concern about the way in which international standards are developed and approved, pointing out how their own participation is very limited from the point of view of both numbers and effectiveness. As a consequence of the inadequacy of the process, international standards are often inappropriate for use as a basis for domestic regulations in developing countries and these countries face problems when they have to meet regulations in the importing markets developed on the basis of international standards.

Under the present rules, the Codex Alimentarius Commission and the OIE adopt standards, guidelines and recommendations by a simple majority of votes cast, when adoption by consensus proves to be impossible to achieve. Because of the simple majority rule, some Codex standards were adopted or rejected by a relatively small majority with a large number of member countries not voting in favour. Two recent examples illustrate this situation: the standard on maximum residue limits for growth hormones (beef) was 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[16]. The way in which these standards were adopted has given rise to a number of criticisms and questions on the genuine international nature of Codex standards. As a result, the Codex Alimentarius Commission is in the process of analysing a number of options to improve the standard-setting process and to ensure that standards truly reflect the views of all member countries or, at least, of a large majority of them (see Box 4). On the other hand, in certain cases developing countries have been successful in urging the Codex Alimentarius Commission to develop standards on products of export interest to them, such as certain tropical fresh fruits and vegetables, and in ensuring that their concerns were taken into account while developing standards for products that they export, like in the case of sugars or edible oils.

In the case of the IPPC, a two-thirds majority for the establishment of a standard is required. However, passage by vote is allowed only when a draft has been presented twice to the Interim Commission on Phytosanitary Measures and no consensus has been reached. The Interim Commission, established in 1997 as a result of the revision of the IPPC, is pursuing the adoption of its own procedure for the elaboration of standards[17]and will discuss this topic at its next meeting (4-8 October 1999). Two concerns have strongly influenced discussions to date: increased transparency and increased participation by developing countries. Numerous changes to the present procedures are proposed to address these concerns.

Box 4

Codex Alimentarius: some options to improve the standard-setting process

The Codex Committee on General Principles, at its Fourteenth Session, 19-23 April 1999, discussed the following options to improve its standard-setting process:

1. The Rules of Procedure could be amended to make it clear that every effort should be made to reach consensus on all matters, including the adoption of standards (at present any member has the right to call for a vote to be taken on any matter at any time);
2. The most desirable approach would be to try to avoid situations where voting on the adoption of standards is resorted to. In situations where consensus cannot be achieved and voting cannot be avoided, one possible approach would be to increase the majority required to a two-thirds majority. When the requirement of a two-thirds majority vote could constitute an undue block on the process of adopting standards, a two-thirds majority vote would be required on the first two sessions at which the standard is proposed for adoption. However, if the same standard is reconsidered for adoption at a subsequent session, only a simple majority would be required for its adoption;
3. Some measures could be taken to facilitate consensus building in the elaboration of standards: i. Reallocating work priorities to take into account the possibility of reaching consensus on particular subject areas; ii. Ensuring that the scientific basis is well established; iii. Ensuring that issues are thoroughly discussed at meetings of the Committees concerned; iv. Organizing informal meetings of the parties concerned where disagreements arise; v. Redefining the scope of the subject matter being considered for the elaboration of standards, in order to cut out issues on which consensus cannot be reached; vi. Ensuring that matters do not progress from step to step until all relevant concerns are taken into account and adequate compromises worked out; vii. Emphasizing to the Committees and their Chairpersons that matters should not be passed on to the Commission until such time as consensus has been achieved at the technical level.

However, the Committee could not agree to change the simply majority rule to a two-thirds majority when consensus could not be found. Countries which opposed this change alleged that a two-thirds majority requirement would slow down Codex procedures and make it more difficult to propose new standards or to amend existing ones.

Source: Joint FAO/WHO Food Standard Programme, Codex Committee on General Principles, op. cit.

As pointed out in the previous paragraphs, standards formulation procedures vary among international standards setting organizations. Therefore, an initial step towards the establishment of a more coherent, transparent and effective system of international standardization would be the harmonization of the procedures. A second step would be to restate the principle that consensus should be pursued throughout the different phases of standard setting and that the participation of countries from different geographical regions and at different levels of development should be ensured. It would be useful to evaluate which initiatives have been taken up to now by international standardizing bodies to ensure the effective participation of developing countries in the adoption of standards and whether

those organizations have taken into account the specific conditions of developing countries while setting standards. Acknowledging the concerns raised by developing countries in the review process, the SPS Committee has agreed to communicate these concerns to the Codex Alimentarius, the OIE and the IPPC, and has requested them to keep the Committee informed of any action taken in this regard.

The process of international standards setting is becoming increasingly politicized, with the inclusion of a large number of non-traditional stakeholders. This trend makes the adoption of standards more complex and time-consuming and implies that considerations of a non scientific nature may play a role. Some developed and developing countries have stressed the principle that domestic health and safety measures and international SPS standards must be based on science as a precondition for an effective implementation of the SPS Agreement. While strict adherence to this principle may help prevent the introduction of protectionist measures, developing countries have to be ready to demonstrate the scientific soundness of their own SPS measures, also through carrying out risk assessments, when these measures differ from international standards. They may also need to challenge the risk assessment carried out by their trade partners as the scientific basis for their SPS measures. Risk assessment may represent a major problem for developing countries, since they often lack the human and financial resources for it.

In the framework of the triennial review of the TBT Agreement, the issue of international standards and international standardization organizations was also addressed and some suggestions were put forward to eliminate or minimize problems related to it. It may be of interest to analyse these suggestions and assess whether they can usefully apply in the context of SPS. Ideally, a coordinated and common approach should be followed, given the similarity of the two Agreements.

In particular, in the framework of the TBT review, it was suggested that in the exchange of information evidence be included about the difficulties that countries face in relation with international standards, to encourage international standardizing bodies to follow the rules spelt out in the Code of Good Practice, and to invite them to a session of the TBT Committee[18] in order to give information on issues of particular concern to member countries. These concerns include, for example, transparency of procedures (e.g. publications or notifications of draft standards, availability of work programmes); openness in drawing up programmes (e.g. responsive to the needs of the market and regulators, and reflection of trade priorities); procedures for comments and decision making; percentage of standards developed by consensus and the definition of consensus; and whether and how account is taken of the special problems of developing countries. The EC has suggested that if international standards are to play the role assigned to them by the WTO Agreements, the international standardization bodies should remain accountable to the entire range of interested parties, and should achieve a high degree of effectiveness. The EC has spelled out some rules in this regard[19] and has suggested the establishment of some kind of formal code of procedures for observance by international bodies, along the line of the Code of Good Practice. The United States has stressed that international standardizing bodies should have established procedures to ensure that all interested parties have adequate notice, time and opportunity to make an input into the development of standards. It has also suggested that

the TBT Committee articulate a set of principles and procedures to be followed by international standardizing bodies.

III. 3 Equivalency

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 (Article 4.1). However, the implementation of this principle so far has been rather limited. Developing countries have reported that in several instances importing countries are looking for "sameness", instead of equivalency, of measures. The interpretation of equivalency as sameness is depriving Article 4.1 of its function, which is to recognize that different measures can achieve the same level of sanitary and phytosanitary protection and therefore countries can enjoy flexibility about the kind of measures to adopt to ensure adequate SPS protection.

Equivalency 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 equivalency of their SPS measures to those applied by the importing countries would represent a key instrument to enhance market access for their products.

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

Equivalency of regulations is at present taking place in very special cases, as for example, among the Member countries of the European Community, among those of the North American Free Trade Agreement (NAFTA), and, more recently, between Australia and New Zealand. In the case of the EC, the concept of mutual recognition among Member countries was made explicit in the "Cassis de Dijon" decision by the European Court of Justice in 1979. The decision explicitly stated that nations were free to maintain and enforce their own regulations for products produced within their jurisdiction but that they could not legally prevent their citizens from consuming products that met the legal standards of another Member country of the EC, as long as they offered an equivalent level of protection of the public interests at issue. However, it seems that where technical regulations play a significant role in domestic markets, equivalency only works if there is either a formal arrangement, or harmonized standards have been developed. This is particularly the case when there are serious concerns about health and safety hazards[20].
In February 1995, the EC Council agreed a mandate authorizing the Commission to conduct negotiations with a view to the conclusions of agreements with third countries on sanitary and phytosanitary measures. Following this mandate, the EC Commission has conducted negotiations with a number of countries. Agreements have been concluded with the United

States, Canada, New Zealand and the Czech Republic, while negotiations are continuing with Australia, Uruguay, Chile and Argentina.

The Agreement between the EC and the United States on sanitary measures is aimed at facilitating trade in live animals and animal products between the two countries, by establishing a mechanism for the recognition of equivalence of sanitary measures. The procedure to reach recognition of equivalency is, however, rather complicated and consists of several steps. Basically, the importing country has to explain the objective of the sanitary measure for which recognition of equivalency is sought and identify its appropriate level of sanitary protection. The exporting country has to demonstrate that its sanitary measure achieves the importing country's appropriate level of sanitary protection. On the basis of the evidence provided by the exporting country, the importing country decides whether the foreign measure achieves its appropriate level of sanitary protection and, therefore, can be regarded as equivalent. The evidence that the exporting country may be requested to provide includes its domestic legislation regarding standards, procedures, policies, infrastructure, enforcement and control; the efficacy of its enforcement and control programme; and the powers of its regulatory authority. The agreement includes application of the principle of regionalization for the main animal diseases and lists those commodities for which equivalency is recognized. The other agreements negotiated by the EC are similar to the one described[21].

The NAFTA Treaty provides for the mutual recognition of SPS measures if the exporting country's regulations achieve the importing country's appropriate level of protection. The burden of proof is on the exporter. If the importing country does not accept the exporting country SPS measure as equivalent, then it has to give reasons in writing upon request (Article 714). The final decision about equivalency stays with the authorities of the importing country who take decisions on a case by case basis.

Australia and New Zealand have agreed, under the 1996 Trans Tasman Mutual Recognition Agreement (TTMRA), to recognize each other's regulations in specific industrial sectors. This means that a product legally sold in one market can be also sold in the other without having to comply with additional requirements. In New Zealand, equivalency has also been provided in some cases by making reference to the applying national standards of other countries as means of compliance for regulations. In the food sector, the two countries have implemented mutual recognition of their respective regulations. However the next step will be the setting up of a joint food standards system which is expected to enter into force by the end of 1999[22].

The recognition of the equivalence is not easy to achieve and usually implies the fulfiment of several requirements. However, for developing countries, this option is worth pursuing since it would greatly facilitate market access for their products.

III. 4 Mutual Recognition Agreements

Mutual Recognition Agreements (MRAs) can take several forms. They can be limited to testing methods, they can cover conformity assessment certificates, or they can be full-fledged and include the standards themselves. MRAs of the first type entail only limited savings in international trade, but play an important role in building up confidence between laboratories in different countries and usually represent a necessary step towards the conclusion of broader MRAs. MRAs on conformity assessment improve market access by avoiding duplicative testing and the related costs, by reducing possible discrimination against foreign products and by eliminating delays. Moreover, they may represent crucial learning experiences, since they imply an intensive exchange of information and close contacts between relevant authorities. MRAs of the third type require that parties consider their domestic requirements as equivalent, with the consequence that a good which can be legally sold in one country may be legally sold in the other(s). Article 4.2 of the SPS Agreement makes reference to this last type of MRA[23].

The limited capacity of several developing countries to carry out the functions of certification and accreditation of laboratory testing has serious implications for MRAs and for trade liberalization in general. This is reflected in the very small number of MRAs which involve developing countries. The lack of reciprocal recognition of standards and conformity assessment procedures on the national level has been mirrored on the regional level, where regional standardizing bodies in developing countries have accomplished relatively little during the history of their operation, due in part to the lack of dynamism and interest on the part of their members[24].

On the other hand, in the framework of regional trade arrangements, there appears to be an increased acceptance of the advantages of mutual recognition as a means of advancing the objectives of integration and trade facilitation. Mutual recognition for conformity assessment is mandatory within the EC[25] and has been agreed as a basic principle within the Asia-Pacific Economic Co-operation (APEC), where the text of a model Mutual Recognition Agreement has already been adopted. The Free Trade Area of the Americas (FTAA), NAFTA, MERCOSUR, the Association of Southeast Asian Nations (ASEAN) and the Andean Group are also considering how to make progress in this area [26].

The following measures could enhance the beneficial role that MRAs can play in international trade: MRAs should be developed in a transparent way (i.e., the SPS Committee should be informed of the intention of two or more countries to negotiate an MRA, the draft MRA should be notified to member countries for comments, the adopted text should be published); they should be open to other parties who wish to join them at a later stage; they should contain flexible rules of origin (i.e., the benefits of a MRA should be granted to all products which pass through the conformity assessment procedures of the contracting parties and not only to products originating in those countries). However, the costs in terms of the negotiation and implementation of such arrangements need to be taken into account[27].

To alleviate the problem of non-recognition of developing country certificates, the pooling of human resources for research and laboratory development could be envisaged in regional and sub-regional agreements and the establishment of regional or sub-regional laboratories, certification bodies and accreditation institutions could be considered . These bodies could be granted international financing and be regularly supervised by the Codex Alimentarius Commission, the OIE and the Secretariat of the IPPC.

III. 5 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.

In order to improve transparency, some measures were agreed during the triennial review of the SPS Agreement. According to the Agreement, Members shall allow a reasonable interval between the publication of a SPS measure and its entry into force. This time frame is crucial for producers to adapt their products to the new requirements. 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. Sixty days have been agreed as the appropriate time-frame in the latter case, while no decision has been taken for the first case. Language may be an obstacle to the effective capacity of countries to comment on draft regulations. Therefore, it was 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.

At times, even when countries are able to provide comments on the draft, those comments are not taken account of 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.

As a means to improve the efficiency and the speed of the notification procedures, some countries, both developed and developing, have proposed the use of electronic transmission. While electronic means may in fact improve the system, it should be kept in mind that several developing countries still have limited access to INTERNET and that many enquiry points in developing countries do not have well-functioning e-mail systems. Therefore, not all countries would benefit from a switch from hard copy notification to electronic notification. A possible solution would be to make the two systems complementary. The SPS Committee has recommended Members to publish their SPS measures on the world wide web, in order to improve transparency.

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,

unfortunately, making limited use of this forum, 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.

III. 6 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 epidemiologic 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 (see Box 5). 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 (see Box 6). 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 (see Box 7). 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. 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 should refrain from requesting additional evidence of the status of a country or area free from pests or diseases.

Box 5
Adaptation to regional conditions: problems and achievements

Brazil and the United States have held talks to liberalize imports of fresh bovine meat from certain southern states in Brazil which are aftosa-free. However, until now, the talks have been inconclusive. The same is happening in the case of Brazilian exports to Japan and Canada. Both countries are banning imports of fresh bovine meet from Brazil, including

from the states of Rio Grande do Sul and Santa Catarina where no cases of aftosa fever have been reported since 1994. The EC has recognized that some Brazilian states are aftosa-free and is, therefore, authorizing imports from these states, but limited to bovine meat without bones only. In other cases the principle of adaptation to regional conditions has led to more concrete results: the United States nowadays allows imports of uncooked beef from regions in Argentina which have been recognized aftosa-free after a 80-year ban. The United States recently replaced a 83-year ban on imports of Mexican avocados with a process standard which allows avocados from a specified region in Mexico to be exported to the northeastern United States during winter months.

Box 6

Adaptation to regional conditions: the case of Egypt

Starting on September 1998, the EC has been banning potato imports from Egypt because of contamination from potato brown rot, in a derogation from recognized "pest-free areas". The decision taken by the European authorities has, therefore, changed the regime for Egyptian potato imports from all products considered disease-free unless proven otherwise, to all imports considered diseased unless proven to be disease-free. 133 dossiers for the recognition of pest-free areas were subsequently prepared by Egypt. However, only 23 were taken into consideration by the EC Standing Plant Protection Committee and ultimately only five pest-free areas were approved, while for other 14 areas additional documentation was requested. According to the EC authorities, the very low score of approval of disease-free areas was due to the fact that the documentation prepared by Egypt was inadequate (e.g. maps were not readable, documentation was in Arabic), which was due to the lack of technical capabilities in the country to deal with this issue. On the other hand, Egypt felt that the EC measure was unjustified. It claimed that brown rot was endemic in the EC and that it had actually been introduced in Egypt because of infected seeds imported from the EC. It also contended that the European authorities were much stricter with Egypt than with other suppliers. However, the EC ban is disrupting trade in a product which ranks third in Egypt for the generation of foreign exchange.

Source: findings from on-going research carried out by the Centre for Food Economic Research, Department of Agricultural and Food Economics, The University of Reading, United Kingdom.

Box 7
Recognition of Foot and Mouth Disease (FMD)-free countries by the International Office of Epizootics (OIE)

The International Office of Epizootics (OIE) had developed a procedure for the international recognition of Foot and Mouth Disease (FMD)-free countries. The procedure is voluntary and it is applied so that the OIE can recognize that the entire country or certain zones are free from FMD. Salient features of the procedure are as follows:

1. The interested country sends a proposal to the Director General of the OIE, accompanied by a comprehensive report based on a model prepared by the OIE;
2. The OIE Commission on FMD can support a country proposal at this stage, if it is convinced that the application is well-founded. Otherwise, it can decide not to support the proposal and request clarification or additional information. It can decide that the visit of a group of experts is necessary. The cost of a visit is borne by the applicant country;

3. The Director General informs all OIE member countries of the Commission's support for a country's proposal. Countries have 60 days to inform the OIE of any objections they may have, based on scientific or technical grounds. The Commission then examines any objections received and decides whether or not to accept them.
4. Each year, during its general session, the OIE adopts, by resolution, the list of recognized FMD-free countries and zones;
5. Maintaining the FMD-free status is subject to continual observation of the OIE's rules and regulations and the declaration of any significant events likely to modify such status.

OIE's recognition of FMD-free status is not legally binding. However, if the WTO were called upon to resolve a dispute over the exporting country status regarding FMD, the country's recognition by the OIE could have a bearing on the panel's decision. The OIE has started performing similar tasks for other major diseases.

Source: T. Chillaud, R.E. Reichard, J. Blancou (1997), The standardization activities of the Office International des Epizooties, OIE, Paris.

III. 7 Special and differential treatment

Even though the SPS Agreement includes a specific Article (Article 10) on special and differential treatment (S&D) for developing countries and LDCs, the provisions of this article apparently have not been converted into specific obligations. Developing countries' agricultural exports are often concentrated in a few products and in a few markets. Each developing country could, therefore, prepare a short list of the main agricultural products it exports (perhaps a list of five to seven products), identify the main obstacles it faces in the principal countries of destination (again a list of five to seven markets) and request these countries and/or the relevant international organizations to provide assistance to facilitate the export of the listed products. Assistance would be multi-faceted and could include the following elements: help in eradicating a disease; help in proving that a country is free from a certain disease; support to improve packaging and transportation; support in the development of Good Manufacturing Practices for individual plants or for groups of products, such as meat and meat products, milk and dairy products, fish and fishery products; training of laboratory personnel who deal with the assessment of the exported products, etc.

III. 8 Technical co-operation

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. The effective implementation of this provision 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 could 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 and mutual recognition 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.

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". 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 be considered mandatory. 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. The least-developed countries are approaching the end of the transitional period (31 December 1999), therefore, special efforts should be made to enable them to comply with the requirements of the Agreement. Since technical co-operation in the field of sanitary and phytosanitary measures is being provided by several international organizations and by a number of developed countries, better co-ordination among the different institutions would ensure that beneficiary countries fully benefit from these efforts.

14 SPS Committee, *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures*, G/SPS/12, March 1999

15 OECD (1997), *Product standards, conformity assessment and regulatory reform*, TD/TC/WP(96)49/Rev2.

16 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.

17 The Commission is presently working under the interim procedures established by FAO.

18 An information session was held in November 1998.

19 Openness should be provided in the drawing up of programmes and in the approval of standards so as to ensure reconciliation of conflicting opinions. The work programme of international standardizing bodies should reflect trade priorities; up-to-date international standards should be delivered in due time; and the activities of international standardizing bodies and the standards they produce need to be coherent both internally and with other bodies, and kept up to date. See: TBT Committee, Note from the European Community, G/TBT/W/87, 14 September 1998.

20 According to the "New Approach", which the EC embraced in the mid-80s, legislative harmonization is limited to the adoption, by means of directives, of the essential requirements with which products put on the market have to conform. The task of drawing up the technical specifications is entrusted to the EC standardization organizations, such as CEN (Comité Européen de Normalisation) and CENELEC (Comité Européen de Normalisation Électrotechnique). The technical specifications are not mandatory and maintain the status of voluntary standards. See: W.S. Atkins (1996), The Single Market Review Series, Sub-series III - Dismantling of Barriers: Technical Barriers to Trade, Web site: europa.eu.int/comm/dg15/studies.

21 Sources: Web sites: europa.eu.int/scadplus/leg/en/lvb/l21021.htm and, europa.eu.int/scadplus/leg/en/lvb/l21002.htm

22 TBT Committee, *Equivalency of standards: an interim measure to facilitate trade in the absence of relevant international standards*, Note from New Zealand, G/TBT/W/88, 15 September 1998.

23 "Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures".

24 S.M. Stephenson (1997), op.cit.

25 The "Global Approach" to testing and certification was developed by the EC to facilitate mutual recognition between the testing or certification bodies, and the European Organization for Testing and Certification was set up to provide the necessary infrastructure.

26 For detailed information on the regional trade agreements see: S.M. Stephenson, op. cit.

27 The TBT Committee has decided to address the problems associated with MRAs and may draft guidelines on MRAs. See: TBT Committee, *First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade,* G/TBT/5, 19 November 1997.

IV. Recommendations

The benefits of trade liberalization in the agriculture sector achieved by the Uruguay Round negotiations 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 to the legal text to ensure that the risk of using SPS measures as border protection instrument is minimized, while all countries benefit equally from the Agreement.

The following articles would need some kind of revision.

Article 3. Since developing countries feel that their participation in the international standard-setting process is not effective and, therefore, they face problems in complying with measures based on international standards, reference should be made in the Article to the need for international standards to be developed through a fair process, based on consensus, where countries at different levels of development and from different geographical regions are effectively represented. The SPS Committee could be encouraged to develop a set of rules that the relevant international organizations should adhere to in the process of standard-setting.

Article 4. Equivalency is being interpreted as "sameness". This interpretation is depriving Article 4.1 of its function, which is to recognize that different measures may achieve the same level of SPS protection and, therefore, countries can enjoy a certain level of flexibility regarding thde kind of measures to adopt. This could be spelled out more clearly in the Article. Moreover, due to the benefits which would arise from the participation of developing countries in bilateral or multilateral agreements on recognition of the equivalence of specific SPS measures, developed country Members should accept requests in this regard coming from developing country Members. Considering that one of the main difficulties developing countries face in this field is the lack of recognition of their conformity assessment certificates, the setting up of internationally financed regional or sub-regional laboratories, certification bodies and accreditation institutions should be included in this Article. These institutions would function under the supervision of the Codex Alimentarius Commission, the OIE, and the Secretariat of the IPPC. Moreover, the scope of Article 4 could be expanded to include MRAs on conformity assessment.

Article 6. The adaptation to regional conditions is of key relevance to developing countries, however the procedures to prove that some areas are pest- or disease-free or at low risk are usually long and burdensome and often include the need to provide complex scientific evidence. On the other hand, the eradication of a specific disease from an area may require a considerable investment and there is a need, especially for developing countries, to establish whether they can get appropriate return on their investment. Therefore, clear reference should be made in the Article to the effect that scientific and administrative support shall be provided by international organizations and developed countries to developing countries to facilitate the implementation of the provisions on adaptation to regional conditions.

Moreover, if a country, or an area within a country, has been recognized free from a certain disease by the competent international organization, the disease-free status should also be recognized by all trade partners, without the need to provide additional evidence.

Article 9. Technical assistance is essential to facilitate developing country fulfilment of the obligations of the Agreement. Since the Agreement puts emphasis on the scientific side, technical co-operation should be extended to this area. Article 9 should, therefore, make reference to the upgrading of personnel and equipment of laboratories, certification bodies and accreditation institutions and to strengthening developing countries' ability to deal with scientific issues, especially those related to risk assessment and to the recognition of pest- or disease- free areas and areas of low pest or disease prevalence. The provisions included in Article 9.2 should be strengthened by making technical co-operation mandatory in cases when a new SPS measure introduced by an importing country creates particular problems for developing countries and by linking the fulfilment of the sanitary and phytosanitary requirements of the importing countries with the transfer of the necessary technology. The connection between credits, donations and grants on one side, and developing country ability to establish the necessary infrastructural and other conditions necessary to the effective implementation of the Agreement, on the other, should also be stressed. Since the transitional period granted to LDCs expires at the end of 1999, special technical assistance efforts should be devoted to these countries to allow them to fulfil the obligations of the Agreement and benefit from it.

Article 10. Developing countries should be entitled to receive special support from their trade partners and from the relevant international organizations in relation to agricultural products of particular export interest to them to ensure that SPS measures do not hamper their exports of these listed products. This would be a way to convert the provisions for S&D into specific obligations.

Annex B. 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, and absence of due consideration for the comments provided are recurrent problems limiting the effective implementation of the transparency provisions. The SPS Committee has agreed that 60 days represents a reasonable time-frame for providing comments on draft regulations. On the other hand, a particular time-frame has not been agreed for the interval between the publication of a measure and its entry into force. Developing country Members have to evaluate whether the 60-day time frame for providing comments on notified measures is appropriate to their needs or whether it should be modified. They should also suggest which time frame they consider suitable as a reasonable interval between publication and entry into force of SPS measures. Article 10.2 specifies, however, that "where the appropriate level of sanitary and 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 interest to developing country Members so as to maintain opportunities for their exports". Developing country Members should make use of this provision in all necessary cases. They could request the notifying country for such delay when they receive the notification of SPS measures which affect products of export interest to them. New language should be included 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 should be provided. The WTO Secretariat could be encouraged to set up a data base which includes SPS measures implemented by Members which could have a major impact on developing countries' exports.

Selected Bibliography

& Chillaud, T., R. E. Reichard and J. Blancou (1997) *The Standardisation Activities of the Office International des Epizooties*, OIE, Paris.
& EC Commission (1996) *Community External Trade Policy in the Field of Standards and Conformity Assessment*, COM(96)564 final.
& García Jiménez, G. and M. Gardeñes Santiago (1997) "Technical Standards in a Context of Regional Integration Agreements" in Demaret P., J-F. Bellis and G. García Jiménez (1997) *Regionalism and Multilateralism After the Uruguay Round*, European Policy Series No. 12, European Interuniversity Press, Brussels, pp. 631-658.
& Goh, G. and A.R. Ziegler, (1998) "A Real World Where People Live and Work and Die: Australian SPS Measures after the WTO Appellate Body's decision in the Hormone Case", *Journal of World Trade*, 32 (5), pp. 271-290, Kluwer Law International, Great Britain, pp. 271-290.
& National Research Council (1995) *Standards, Conformity Assessment and Trade*, National Academy Press, Washington D.C.
& OECD (1997) *Product Standards, Conformity Assessment and Regulatory Reform*, TD/TC/WP(96)49/REV2.
& Roberts, D. (1998) *Implementation of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures: the First Two Years*, The International Agricultural Trade Research Consortium, Working Paper No. 98-4.
& SPS Committee (1999) *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures*, G/SPS/12 - WTO.
& Stephenson, S. M. (1997) *Standards, Conformity Assessment and Developing Countries*, Organization of American States, Trade Unit, Washington, D.C.
& Stewart, T. P. and D.S. Johanson (1998) "The SPS Agreement of the World Trade Organization and International Organizations: the Role of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics", *Syracuse Journal of International Law and Commerce*, Vol. 26:27, Fall 1998, pp. 27-53.
& Stewart, T. P. Editor (1993) *The GATT Uruguay Round: A Negotiating History*, Kluwer Law and Taxation Publishers, Deventer - Boston.
& United States General Accounting Office (1997) *Agricultural Exports - U.S. Needs a More Integrated Approach to Address Sanitary and Phytosanitary Issues*, GAO/NSIAD-98-32
& Wallner, K. (1998) *Mutual Recognition and the Strategic Use of International Standards*, SITE, Stockholm School of Economics, Stockholm.
& WTO (1999) *Understanding the WTO Agreement on Sanitary and Phytosanitary (SPS) Measures*, Geneva.

Internet Web Sites

· Codex Alimentarius: Statutes and Rules and Procedures for the Elaboration of Codex Standards and Related Texts, www.fao.org/waicent/faoinfo/economic/esn/codex
· Process for Developing International Phytosanitary Standards and International Trade, www.fao.org/waicent/faoinf/agricult/AGP/AGPP/PQ/Scrtrt/process.htm
· Malik R.K. (1998) Mutual Recognition Agreements in International Food Trade,

www.fao.org/docrep/w9474t/w9474t05.htm
· Atkins WS (1996) The Single Market Review Series, Subseries III - Dismantling of Barriers: Technical Barriers to Trade, http://europa.eu.int/comm/dg15/studies/stud25.htm
· The New Approach to Standardization - Efficiency and Accountability in Standardization and Current Position and Outlook, http://europa.eu.int/scadplus/leg/en/lvb/l21021.htm and, http://europa.eu.int/scadplus/leg/en/lvb/l21002.htm
· Overview of the State-of-play of WTO Disputes, www.wto.org/wto/dispute/bulletin.htm