Reviewing the SPS Agreement: A Developing Country Perspective

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Abstract

Sanitary and phytosanitary measures are increasingly important in the international trade of agricultural products. They are implemented to ensure that food is safe for consumers, and to prevent the spread of pests or diseases among animals and plants. But they may also be used as protectionist devices to keep foreign competitors out. The SPS Agreement of the WTO has been created in order to distinguish between these two functions of SPS measures and to rule the latter out. This paper evaluates the Agreement from the viewpoint of developing countries. It is concluded that although developing countries have a high demand for an effective agreement of this sort, in practice they face a great number of difficulties when using the Agreement. A few larger middle-income countries appear to see clear benefits from the Agreement while most countries do not possess the financial, human, and technical resources necessary to use it. Some especially least developed countries are excessively burdened by the implementation costs of the SPS Agreement. In the paper the opportunities offered in the Agreement are analysed, problems are identified, and proposals that have surfaced on how to improve the Agreement are discussed.

1. Introduction

As tariffs are being lowered and the use of other traditional trade barriers is being disciplined by the agreements of the World Trade Organisation (WTO) there is a concern that technical measures such as sanitary and phytosanitary (SPS) measures are taking their place. Governments use SPS measures to ensure that food is safe for consumers, and to prevent the spread of pests or diseases among animals and plants. Hence, by their very nature, SPS measures may restrict trade either explicitly or implicitly. While such measures do indeed serve legitimate goals, there is at the same time a risk that SPS measures are misused for protectionist purposes. This distinction is, of course, difficult to make and it is not less difficult to design a system that ensures that protectionism in disguise of SPS measures is ruled out. Yet, during the Uruguay Round negotiations, the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) was established to accomplish just that.

Developing countries in particular are experiencing difficulties in meeting the SPS requirements of developed countries and concerns have been expressed about the way in which the SPS Agreement has been implemented to date. Hence, this paper evaluates the SPS Agreement from the viewpoint of developing countries. It aims at identifying the specific problems that developing countries experience in trying to derive benefits from the Agreement. The paper illustrates how many of these problems are directly related to the lower level of development of these countries and points to steps that could be taken to improve the functioning of the Agreement by taking into account the specific needs and problems of developing countries. If successful, the SPS Agreement can serve as a catalyst for increased market access in food and agricultural markets for developing countries. These markets are of

particular importance to developing countries that see them as one of their main areas of comparative advantage.

2. Background

The use of SPS measures in developed countries is increasing and this has been the case for a long time (Henson, Loader, Swinbank, Bredahl, and Lux 2000). It can be argued that this is due to protectionism in disguise. As traditional trade barriers are being dismantled by multilateral negotiation rounds, the presumption is that SPS measures become convenient refuges for protectionists. Whether or not this allegation is true, there is another important explanatory factor behind this observation. Food safety continues to rank higher and higher on the political agenda in developed countries. This can be explained at least in part by the fact that food safety is a good with a high income elasticity of demand. As incomes increase as they have done in developed countries, SPS measures are tightened to eliminate ever smaller risks to human life and health. At the same time, big food importers like the US and the EU have seen a number of high profile food scares that include food contaminated with bacteria like E. coli and salmonella, food transferred disease like Mad Cow disease and food contaminated with dioxin.

The difficulties in exporting under increasingly strict SPS measures are manifold and particularly acute for many developing countries. The costs involved included both the production costs of respecting the SPS requirements and the conformity costs of making sure they are respected. When SPS requirements increase production costs do too as new inputs may be required or technologies changed. The conformity costs include the costs of certification and control. The costs of respecting SPS measures are higher in developing countries than in developed countries. Access to technical know-how is more restricted and the private service sector and the public sector that certifies and control conformity is underdeveloped. The establishment of international disciplines as to apply SPS measures is therefore potentially very important to developing countries.

The SPS Agreement of the WTO is the latest and so far most comprehensive attempt to do so although the rules of the GATT agreed upon in 1948 also have implications for the use of SPS measures. Article I of the GATT, the most-favoured nation clause, requires non-discriminating treatment of imported products from different foreign suppliers, and Article III, requires that such products be treated no less favourably than domestically produced goods with respect to any laws or requirements affecting their sale. These rules apply, for instance, to limits for pesticide residues and food additives as well as to restrictions for animal or plant health purposes. The GATT rules also contained an exception (Article XX(b)) which permitted countries to take measures "necessary to protect human, animal or plant life or health", as long as these did not unjustifiably discriminate between countries where the same conditions prevailed, nor were a disguised restriction to trade.

In the Tokyo Round of multilateral trade negotiations (1974-79) the Agreement on Technical Barriers to Trade was negotiated (informally known as the "Standards Code"). The Standards Code covered all technical barriers including requirements resulting from food safety and

animal and plant health measures like pesticide residue limits, inspection requirements and labelling. Governments which signed the 1979 Standards Code agreed to use relevant international standards (such as those for food safety developed by the Codex Alimentarius) except when they considered that these standards would not adequately protect health. They also agreed to notify other governments through the GATT Secretariat of any technical regulations which were not based on international standards. The Standards Code included provisions for settling trade disputes arising from the use of food safety and other technical restrictions.

The impetus for the creation of the SPS Agreement during the Uruguay Round came from two factors. First, the Standards Code was seen as fundamentally flawed and unable to avoid increasing tension between major trading partners like the US and the EU. The Standards Code was a separate agreement from the GATT Agreement and only about half of the signatories to the GATT had signed the Standards Code (Hooker 1999). Various production and process standards were excerpt from many of the disciplines and the dispute settlement system was based on consensus which prevented the rulings from binding (Roberts 1998).

Second, as liberalisation of ordinary trade barriers like tariffs and quotas progressed further during the Uruguay Round and was extended to agricultural trade, it could be foreseen that there was a risk that SPS measures would be used more frequently for protectionist purposes. It is important to emphasise that although it was recognised that an effective SPS Agreement would be important for the market access of developing countries, they participated only very little in the negotiations at the time. The concerns of developed countries, most notably those who had major export interests like the US, EU and the developed countries members of the Cairns Group, were the driving force behind the negotiations (Roberts 1998; Zarrilli 1999). Only a handful of developing countries participated actively in the negotiation of the Agreement, mainly as members of the Cairns Group.

Developing country exporters seeking access to foreign markets will of course have to conform to the SPS measures of import markets no matter whether they are protectionist devices or they serve legitimate purposes. If successful, the SPS Agreement can help to assure that exporters only spend resources on conforming to legitimate SPS measures. The difficulties of doing so is largely outside the scope of the Agreement. This implies that a distinction must be drawn between the difficulties related to regulatory protectionism and the difficulties from conforming to legitimate SPS measures when the SPS Agreement is evaluated. The criteria of success is whether regulatory protectionism decreases, and this may take place while the difficulties of conforming to legitimate SPS measures are increasing as they are likely to do when the demand for increased food safety is becoming ever stronger.

This paper evaluates the SPS Agreement will be evaluated from the viewpoint of the developing countries, by analysing the Agreement itself, Panel and Appellate Body rulings, interpretations of the Agreement and the rulings, submissions by WTO members before the Seattle Ministerial Meeting, submissions in the SPS Committee and the general literature on the SPS Agreement and on SPS barriers.

3. The Agreement on Sanitary and Phytosanitary Measures

The SPS Agreement establishes international rules on how to apply SPS measures. On the one hand, it acknowledges a country's right to protect itself from risks to human, animal and plant life and health. On the other hand, it confirms the need to hinder countries from using such risks as convenient excuses to create unnecessary barriers to trade. In short, the purpose of the Agreement is to allow the legitimate protection of life and health to take place, while avoiding giving rise to illegitimate protectionism. Protectionism in this regard is defined as trade barriers over and above what is required to meet desired protection levels

The approach taken to address these two issues simultaneously is to demand that SPS measures are based on sound science. That way, only measures which are truly aimed at protecting life and health are allowed, and measures which are either not related to life and health issues at all or that are excessively strict are ruled out.

The two basic principles of the Agreement are (1) the principle of non-discrimination and (2) the principle of scientific justification. The principle of non-discrimination is described in Article 2.3 of the Agreement. This principle is the SPS Agreement equivalent to the GATT basic principle of most favoured nation privileges. A measure shall not discriminate against or between trading partners more than necessary to reach its goal of sanitary and phytosanitary protection. The principle of scientific justification of SPS measures is spelled out in Article 2.2. Any SPS measure must be backed by scientific justification.

The SPS Agreement also contains a number of instruments that are to be used in achieving its goal. These are described briefly below. Box 1 describes the components of the Agreement and briefly summarises its general functioning.

Risk assessment

An SPS measure has to be backed by a risk assessment that provides scientific justification for the relationship between the measure chosen and the level of protection the measure is aiming at. This is stipulated in Article 5.1- 5.3 of the Agreement.

The Agreement is not very explicit as to what distinguishes a valid risk assessment under the auspices of the Agreement from assessments not judged valid. Yet, judging by subsequent Panel and Appellate Body reports there is a tendency to require very stringent risk assessments. The requirements of a risk assessment as defined by the Agreement are generally seen as high, and even developed countries with highly sophisticated standard infrastructures including human capital and technical facilities face a substantial task when they have to provide a risk assessment solid enough to be judged in conformity with the SPS Agreement.

Box 1. The SPS Agreement

Aim: To allow countries to protect themselves from trade-related risks to human, animal and plant health and life while avoiding that these risks give rise to regulatory protectionism

General principles:

Non-discrimination
Scientific justification of SPS measures

Instruments:

risk assessment
rules on setting protection levels
exception in the case of insufficient evidence
harmonisation
equivalence
regionalisation
transparency
dispute settlement

Special concerns:

developing countries

General functioning of the Agreement:

Cases where international standards have already been agreed	harmonisation based on international standards
Cases where international standards have not been agreed	individual country measures (allowed when based on a risk assessment and when the measures are non-discriminatory)
Cases where a Member desires a higher level of protection than the one provided by international standards	stricter measures (allowed when based on a risk assessment and when the measures are non-discriminatory)
Cases where the scientific evidence on which standards must be based is insufficient	temporary measures allowed

Rules on setting protection levels

Articles 5.4 - 5.6 and 5.8 describe how the anti-discriminatory principle is to be used in practice. A risk assessment is a necessary but not sufficient condition for an SPS measure to be in conformity with the Agreement. In addition, a measure must be the least restrictive to trade among the available alternatives and it shall be no more restrictive to trade than necessary to achieve the desired level of protection. The protection level provided by an SPS measure shall also be consistent with the levels resulting from other measures in similar situations.

Exceptions in case of insufficient evidence

There is a single exception to the risk assessment requirement. Article 5.7 stipulates that when scientific evidence is insufficient, a member country is entitled to use measures based on "available pertinent information". There are two conditions attached to this use. First, such measures must be temporary and, second, the member must seek additional evidence and must review the measure after "a reasonable period of time".

Harmonisation

The tool of harmonisation plays a special role in the Agreement. Before the Agreement was signed, international organisations had already worked on harmonising various SPS measures for several years. The most important of such organisations are the Codex Alimentarius (on food safety), the International Office of Epizootics (on animal health and zoonoses), and the Secretariat of the International Plant Protection Convention (on plant health). The standards developed were voluntary and covered only a limited number of SPS measures.

Article 3 stipulates the relationship between international standards and national SPS measures. In general, harmonisation is encouraged by the article. Article 3.2 makes it clear that if a country adopts an SPS measure which conforms to an internationally agreed standard, the measure is then consistent with the SPS Agreement. In other words, the obligation to provide a risk assessment is fulfilled and the measure is judged as being non-discriminatory. As explained in Article 3.3 however, this does not imply that international standards are mandatory. Yet, if a country chooses a higher level of protection than implied by the international standard, it must produce its own risk assessment and the measure must be non-discriminatory.

It is important to note that the harmonisation instrument has been the issue of much confusion. This is to a large extent due to the unclear phrasing of Article 3. This led to a lengthy debate during the EU hormones case brought before a Panel and the Appellate Body which is discussed in more detail below. It is important to stress that while conformity to international standards remain voluntary, their legal status has increased. If harmonisation arises out of article 3, it is likely to evolve around established international standards as they serve as the point of reference. More importantly the use of international standards automatically grants a country immunity from legal proceedings under WTO law. Whether widespread international harmonisation actually occurs remains an empirical question to be answered sometime in the future. Member countries are free to choose to ignore the encouragement of harmonisation by designing their own measures and providing their own scientific evidence[1].

[1] This understanding of the Agreement is different from what is sometimes argued in the public debate most notably by consumer interest groups. Silverglade (2000), for instance, downplays the right granted by the Agreement to member countries to set their own levels of protection over and above the ones provided by international standards and chooses to interpret the Agreement as a strict legal requirement to international (downward) harmonisation. As argued above, member countries retain their sovereign right to set their own levels of protection subject to the condition of risk assessment.

Equivalence

The SPS Agreement encourages the use of equivalence and mutual recognition Agreements in article 4. The article is very short in the Agreement but the text has been expanded by a decision by the Committee on Sanitary and Phytosanitary Measures on 26 October 2001 (WTO 2001a). The fourth WTO Ministerial Conference in Doha took note of this decision (WTO 2001b).

According to article 4 as well as the decision by the SPS Committee, two SPS measures are said to be equivalent to one another when they are not identical but they yield the same level of sanitary and phytosanitary protection. The equivalence article can be seen as another example of the limited use of the harmonisation principle. In economic terms, strict harmonisation is not always desirable. As member countries have different capabilities of setting and enforcing different types of measures, focus is directed towards the outcome of the regulatory process rather than the form. This allows for economising on the costs of SPS regulations without jeopardising human, animal or plant health.

Regionalisation

In article 6 of the Agreement, members are encouraged to adapt their SPS measures to the regional characteristics of their trading partners. Historically, it has been common to stop exports from an entire country if a particular problem exists in that country, even in the case where the problem is isolated to specific regions in the country. Article 6 stipulates that this practise has to stop and that member countries must recognise pest- or disease free areas of their trading partners according to objective factors.

Transparency

One of the main problems of the various SPS measures applied today is the lack of transparency. It is time-consuming and costly for foreign companies and their governments to learn about the SPS measures of another country. Such measures are often subject to frequent changes which add further to the costs of exporting good subject to SPS measures. It also makes protectionism in disguise of SPS measures easier. When rules are unclear and their relation to scientific evidence masked it becomes more difficult to distinguish between legitimate and illegitimate SPS measures.

The SPS Agreement contains a notification procedure through which members are obliged to make public any changes in their SPS regulatory frameworks. If measures differ from international standards or if international standards do not exist, a member country is obliged to notify other members of their measures through the WTO. A country must allow some time between the publication of a new measure and the entry into force in order to allow its trading partners to comment on the changes (except in emergency situations).

The Agreement outlines the necessary infrastructure to allow transparency to work. A member is obliged to establish a notification point. The notification point is responsible for

notifying future changes in SPS measures as described above. In addition, each member must establish enquiry points so that foreigners can obtain information about the sanitary and phytosanitary rules in force. The information that must be disclosed includes information about the rules themselves, the control mechanisms to assure conformity, and the risk assessment procedures on which the measures are based.

Dispute settlement

The rules of the SPS Agreement that has been in force since 1 January 1995 are binding. This was not the case of the Standards Code that preceded it. Disagreements among members of the WTO concerning the SPS Agreement may be brought before the Dispute Settlement Body. Any ruling adopted by the Body must be obeyed. Under the Standards Code, signatories also had the option of bringing disputes under a Dispute Settlement Body but in contrast with the current Agreement, rulings on the Standards Code were not binding.

The dispute settlement mechanism of the WTO begins with a member requesting consultations with another member concerning a particular trade issue. If the initial consultations do not lead to a result, the member can request a dispute panel to be established. The panel will investigate the complaint and issue a report on the trade conflict in question. The SPS Agreement also has an informal option that is often exploited before the more cumbersome formal procedure of the dispute settlement system is used: disagreements are presented at the regular meetings of the SPS Committee. The Committee is set up in the Agreement, it has representatives from all members and meets three to four times a year. At each meeting both individual members' SPS measures as well as general issues are discussed. Members take the opportunity to seek information about their trading partners' SPS measures and the consequences thereof. It is very common that disagreements are solved bilaterally without recourse to the formal dispute settlement system. In this way, the SPS Committee serves both as an instrument that increases the transparency of members' SPS regimes and as a first informal step in the dispute settlement process.

But some issues cannot be solved informally and a formal complaint is filed with the Dispute Settlement Body. The Body then establishes a Panel that will investigate the trade conflict and the Panel issues a report on whether or not the SPS measure in question is in conformity with the SPS Agreement. The Panel consists of three members, typically senior diplomats from countries not involved in the dispute. The findings of the Panel report can be appealed to the Appellate Body. The Appellate Body consists of experts on international law. The findings of the report that the Appellate Body issues are judge as final and must be implemented otherwise the member not complying will be found violating the SPS Agreement and will therefore face punitive action.

Box 2. Special treatment of developing countries in the SPS Agreement

- The preamble to the Agreement recognises that "developing country Members may encounter special difficulties in complying with the sanitary and phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary and phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard" (Preamble).
- Choice of measure: Members are allowed to take into account the "technical and economic feasibility" of SPS measures when choosing how to reach desired protection levels (Article 5.6). This sentence is addressing the lower level of technical and economic capacity of developing countries.
- Technical assistance: Members must facilitate the provision of technical assistance to developing countries (Article 9.1).
- Technical assistance: A Member must consider providing technical assistance to a developing country if it introduces a new measure that threat to severely restrict market access (Article 9.2).
- Special and differential treatment – general: special care must be exercised when preparing and applying SPS measures when developing country interests in general and least developed country interests in particular are involved (Article 10.1).
- Special and differential treatment – time-frames: When possible developing country should be given longer time-frames for implementation of new SPS measures (Article 10.2).
- Special and differential treatment – exceptions: in special cases the SPS Committee is authorised to provide time-limited exemptions from the SPS Agreement (Article 10.3).
- Special and differential treatment – participation in standard-setting organisations: Members should encourage and facilitate the active participation of developing country Members (Article 10.4).
- Implementation deadline: Least developed countries may delay the entry into force[2] of the Agreement for a period of five years (until 2000). Other developing countries may delay the entry into force for a period of two years (until 1997).
- Exemption from the demand of providing copies of SPS legislation (Annex B, Art. 8).
- When a country notifies measures on products of particular interest to developing countries, the Secretariat must draw these to the attention of these countries to the notifications (Annex B, Art. 9).

Until now, three complaints have undergone the full dispute settlement process including the issue of both Panel and Appellate Body reports. These cases are the (1) complaints by the US and Canada about the prohibition on hormone-treated beef imports into the European Union (the hormones case)[3], (2) the complaint by Canada about the import ban on salmon into Australia (the salmon case)[4], and (3) the complaint by the US about Japanese fruit varietal testing import procedures (the varietal testing case)[5]. These three cases have involved respectively human, animal and plant health issues.

[2] The SPS Agreement came into effect on 1 January 1995.
[3] Cases DS 26 (complaint by the US) and DS 48 (complaint by Canada). The two complaints were identical in issue and the Panel report and Appellate Body report dealt with them simultaneously.
[4] Case number DS 18. Case DS 21 involved a similar complaint by the US. This case was eventually settled.
[5] Case number DS 76.

Special concerns

The special situation of developing countries is addressed explicitly in the Agreement in several regards. An overview of the parts of the Agreement specifically addressing developing countries can be found in Box 2. The general functioning of the Agreement is the same for developed and developing countries alike. The differences occur mainly in the implementation of the Agreement and in the obligations to provide technical assistance to other members.

General functioning of the SPS Agreement

The elements of the Agreement as described above boil down to the following general functioning. The regulation of SPS measures can be divided into four cases.

- In areas where international standards already exist, the Agreement encourages international harmonisation based on international standards. It must be clear that this does not necessarily imply identical world-wide standards but rather standards that have some basic relation to the same reference points.
- In areas where no international standards exist, individual member country measures are allowed on the condition that they are based on a risk assessment and are non-discriminative.
- If a country does not find that the protection level provided by an international standard is high enough, it may implement stricter measures. Again this right is conditional on a formal risk assessment and the obligation that measures are to be non-discriminatory.
- Finally, in a number of cases there is not enough scientific evidence to enable a proper risk assessment. In such cases, temporary measures are allowed. This right is also conditional. Temporary measures must be reviewed after a certain time and the implementing country must seek additional evidence.

4. The practice of the SPS Agreement

When reading the SPS Agreement a word of caution is warranted. Some articles of the Agreement are ambiguous and therefore left to interpretation. In the WTO system such interpretation is done by the Panels in the first instance and as the highest instance the Appellate Body[6].

As mentioned above three reports have been issued so far by the Appellate Body. These cover all the broad subjects of the Agreement, namely human, animal and plant health. The Appellate Body reports have established a guidelines for the use of the two general principles

[6] According to the Dispute Settlement Understanding, the Panels treat both factual and legal matters of a complaint. The findings of a Panel may be appealed to the Appellate Body, but this body only issues reports on the legal matters of a complaint. The Appellate Body is the highest legal institution of the WTO. The dispute settlement mechanism of the WTO is not based on precedent. Nevertheless as cases accumulate, future Panels and the Appellate Body are likely to use previous reports as a guideline to their decisions (OECD 1999).

of the Agreement, the principle of non-discrimination and the principle of scientific justification. The reports have also led to the clarification of parts of the Agreements which lend itself to interpretation. Two issues have been the subject of intense controversy. The interpretation of the words "based on" in Articles 3 and 5 as well as the application of the so-called "precautionary principle".

The principle of non-discrimination

In the EU hormones case, the Appellate Body analysed whether the EU had violated Article 5.5 which states in brief that a country must avoid implementing measures that involves arbitrary or unjustifiable differences in protection levels when such differences damage international trade. This is one way of expressing the general principle of non-discrimination in the Agreement and the only one brought under scrutiny by the Appellate Body so far.

The US and Canada had complained that while the EU banned the import of beef produced using hormones for growth promotion purposes, it was legal to use two hormones for growth promoting purposes for the raising of pigs. The Appellate Body dismissed the complaint and found that the EU had not violated Article 5.5. It could be argued that an arbitrary difference did exist between the legislation for beef production and the legislation concerning pig meat production, and that this difference did result in a *de facto* restriction on trade, but nevertheless, the Appellate Body did not accept the complaint as they ruled that the intent of the EU had been to protect its citizens from the potential carciogenic effects of growth hormones in beef. It was the intent behind a measure and not the real effects that was to be the basis of a ruling.

This decision by the Appellate Body substantially weakens the principle of non-discrimination. First, legislation often involve several objectives and it is therefore difficult to speak of the intent of a country at all. Second, it is next to impossible to design a principles way to go about an inquiry meant to uncover the intent of a measure. Therefore, there will be no guidance to members speculating whether their trading partners' rules respect Article 5.5 or not (Hurst 1998). Third, the idea that the analysis should turn on the intent and not the real effects of a measure seems to contradict other parts of the Agreement, notably the focus on scientific justification. It seems contradictory that the SPS Agreement in some aspects are focused exclusively on whether a scientific basis exist or not and then in this aspect is about the intent of legislators, be that based on science (so that the intent and the real effects of a measure are the same) or something else.

The principle of scientific justification

Article 5.1 of the Agreement on the use of risk assessment is the most straightforward application of the principles of scientific justification. All three cases brought to the Appellate Body has revealed the strict science-based disciplines of the SPS Agreement. No respondent has been able to demonstrate that the measure under scrutiny respects the demand for a risk assessment.

Actually, some observers believe that few risk studies would comply with the risk assessment required in Article 5.1 (Landwehr 1999). This is evidence to the fact that the principle of scientific justification is applied rigorously in the Agreement and is likely to induce considerable change in the process of setting SPS measures in all WTO members.

Harmonisation - the discussion of "based on"

The degree of harmonisation aimed at in the SPS Agreement was a major issue in the EU hormones case. According to article 3.1, SPS measures shall be "based on" international standards. In the hormones case, the US argued that "based on" should be interpreted as "conform to". Using this interpretation member countries would be obliged to use measures resulting in the same level of protection as the international standards or to provide their own risk assessment as stipulated in Article 3.3. The panel agreed with the US, but the Appellate Body did not.

According the Appellate Body report, "based on" shall not be interpreted in the strict way of the Panel. The ruling says that member countries are allowed to use SPS measures that result in levels of protection that differ from those achieved by international standards while still respecting the harmonisation requirement of the SPS Agreement. This sounds contradictory, but apparently the Appellate Body interpreted Article 3.1 in the way that only a loose relationship between the international standard and the SPS measure in question is required for the measure to be in conformity with Article 3.1 (Hurst 1998). Unfortunately, the exact nature of this relationship is not explained by the Appellate Body. The crucial question is how strong a link there has to be between the SPS measures and international standards in order to satisfy the "based on" requirement[7].

To date, this question is unanswered. But it is worth emphasising that the interpretation established by the Appellate Body in the hormones case implies that the standards, guidelines and recommendations issued by international organisations like the Codex Alimentarius are not transformed into binding norms for SPS measures. Only future cases brought before the Appellate Body (or a new and more precise SPS Agreement) may determine how different individual member countries' SPS measures are allowed to be.

[7] Another related question also falls into the grey areas of the Agreement: If an SPS measure is based on an international standard (i.e. if complies with Article 3.1), does the country applying the measure then have to conduct a risk assessment? According to Article 2.2 and 5.1 the answer seems to be yes because these articles generally require that any measure has to be based on a risk assessment. It could be argued, though, that when basing a measure on an international standard the risk assessment has already been done. This is because international organisations establishing standards do their own risk assessment. This would provide an incentive to harmonise SPS measures on the basis of international standards. If an independent risk assessment has to be done when complying with Article 3.1 the requirements for satisfying this article becomes identical with the requirements for satisfying Article 3.3 (used when setting standards at protection levels higher than with international standards). If the Agreement is interpreted that way, there is no incentive to undertake harmonisation in comparison with setting higher standards than the international ones and Article 3.1 therefore in essence becomes identical to Article 3.3 (Hurst 1998). Unfortunately, the Appellate Body has so far not been explicit on this matter.

The precautionary principle

In the EU hormones case, the EU raised the issue of the precautionary principle. The EU argued that the precautionary principle had reached the status of a generally accepted principle of international law, and was therefore applicable when interpreting the SPS Agreement. According to the EU, this implied that the precautionary principle would override the language of Articles 5.1 and 5.2 and lead to the finding that EU's measures on hormones were based on a risk assessment (Hurst 1998).

Both the panel and the Appellate Body found that whether or not the precautionary principle was an internationally recognised one, it would not overrule paragraphs in the SPS Agreement. The Appellate Body further stated that the precautionary principle was already reflected in the Agreement, notably in Article 5.7 (establishing the right to implement provisional SPS measures in conditions of insufficient scientific evidence) but also in the sixth paragraph of the preamble and in Article 3.3 (establishing the right of a country to set higher protection levels than the ones implicit in international standards).

In the Japan varietal testing case, the Panel addressed the conditions necessary for invoking Article 5.7. According to the Panel there were four elements, all of which had to be met: (i) the measure is imposed in a situation where 'relevant scientific information is insufficient'; (ii) the measure is adopted 'on the basis of available pertinent information'; (iii) the Member must 'seek to obtain the additional information necessary for a more objective assessment of risk'; and (iv) it must 'review the … phytosanitary measure accordingly within a reasonable period of time'.

The European Union has presented a proposal for an alternative interpretation of Article 5.7 which it claims will imply a more correct application of the precautionary principle (European Commission 2001). The elements of the proposal is described in Box 3.

A substantial part of the EU's proposal is little more than a repetition of paragraphs already in the SPS Agreement. Point (a) is already contained in Article 5.4, (b) is already covered by Articles 2.3 and 5.5 while (c) is mainly a repetition of parts of (b) and already contained in Article 5.5. Point (d) is new in the sense that there is stronger emphasis on the potential costs of a lack of action in the case of insufficient evidence. The issue of potential damages and the costs of control regarding animal and plant health measures is already discussed in Article 5.3 however. Point (e) is in fact not an interpretation of Article 5.7. Rather it is a revision in the sense that the requirement contained in Article 5.7, that a country shall seek new evidence, is omitted. Finally criteria (f) is uncontroversial because the Appellate Body in the EU hormones case has already confirmed that SPS measures need not be based on majority views.

The Japan varietal testing case did not offer any guidance as to the crucial interpretation of "insufficient" evidence. The usefulness of Article 5.7 as a vehicle for the precautionary principle or, to put it differently, the threat that Article 5.7 poses to exporters by allowing unjustified high entry barriers is therefore still highly uncertain.

Box 3. EU proposal concerning criteria for the application of Article 5.7

(a) The measures should be proportionate and no more trade restrictive than is required to achieve the level of protection which they have determined to be appropriate.

(b) The measures should not be discriminatory and therefore identical or similar situations should not be treated differently.

(c) The goal should be to achieve consistency in the application of the level of protection, by avoiding arbitrary or unjustifiable distinctions in the levels members consider to be appropriate in different situations.

(d) The measures adopted presuppose examination of the benefits and costs of action and lack of action. This examination must consider whether another measure is reasonably available, taking into account technical and economic feasibility, that achieves the appropriate level of protection and is significantly less restrictive on trade.

(e) The measures, although provisional, may be maintained as long as a more complete risk assessment cannot be conducted because the scientific data remain incomplete, imprecise or inconclusive and as long as the risk is considered to be too high relative to the chosen level of protection. However, maintenance of the measures should depend on the development of scientific knowledge. Therefore, the regulatory authorities should re-evaluate the data and the measure once new scientific information is obtained.

(f) The measures should be based upon scientific evidence, coming from qualified and respected sources but not necessarily that of the majority of the scientific community

Source: European Commission (2001).

5. Evaluation of the SPS Agreement and the impact on developing countries

The SPS Agreement has led to an intense debate in both developed and developing countries about its consequences. In developed countries, consumers organisations has been quick to argue that the Agreement risk leading to a downward harmonisation of standards and that it thereby poses a health risk to consumers (Silverglade 2000, Public Citizen 2000). This argument has led to an intense campaign against the Agreement especially after the EU was not allowed to uphold the ban on hormones in imported beef. In developing countries, this view is practically absent from the debate (Henson and Loader 2001, Henson et al. 2000, Zarrilli 1999)[8]. Instead, focus is on the whether the Agreement will lead to extended market access for developing countries seeking to export to developed ones. This is a reasonable stance as the concerns of consumers in developed countries are of little importance to the developing country consumers who live with food markets for which standards are much lower than in developed countries.

[8] Consumer interests do play a minor role in developing countries although only rarely. An example is a proposal from Kenya that exports of a member should be in compliance with that member's SPS legislation no matter the prevailing SPS legislation of the importer. This proposal is aimed at avoiding sub-standard products from developed countries being dumped in developing countries (WTO 2001c).

This is the perspective on which the evaluation of the SPS Agreement below is based. The Agreement has a number of effects on developing countries. The effects are presented in Box 4. These effects will be analysed in turn below.

The ability to challenge SPS measures of other countries

The possibility of binding arbitration is one of the greatest achievements of the Uruguary Round. To date, a total of 18 complaints have been made under the SPS Agreement concerning 16 distinct issues. Of these, three cases have gone through the entire dispute settlement process including the issue of a report by the Appellate Body. The rest are either settled or are at the stage of consultations. A list of the cases is contained in Appendix 1.

Box 4. Effects on developing countries of the SPS Agreement

Effects	**Legal basis**
The ability to challenge SPS measures of other countries	Article 11 (based on the disciplines laid down in the SPS Agreement, notably Article 2 and 5)
The SPS Committee	Article 12
The ability to participate in international standards setting	Articles 3.3, 3.4 and 10.4
Equivalence	Article 4
Regionalisation	Article 6
Technical assistance for developing countries	Article 9
Transparency	Article 7
Special and differential treatment for developing countries	Articles 10.1, 10.2, and 10.3
Implementation costs	The SPS Agreement as a whole
The SPS Agreement as a catalyst for regulatory reform	The SPS Agreement as a whole

Developing countries are involved in four cases. In two of the cases developing countries are defending SPS measures against a complaint filed by a developed country[9], in the third case, both the defendant and the complainant are developing countries[10], and in the fourth case, a developing country is complaining about an SPS measure of a developed country.[11] [12]

The SPS Agreement is still young and it is difficult to conclude much from the few complaints that have been made under it until now. At the face of things, it should be noted that developing countries have either not found it worthwhile to make formal complaints

[9] DS 96: EU - Indian import quotas; DS 203: US - Mexican import restrictions on live swine.
[10] DS 205: Thailand - Egyptian import restrictions on canned tuna.
[11] DS 134: India - EU import duties on rice.
[12] In the definition of developing countries used above, newly industrialised countries and transition economies are not classified as developing countries. If one uses a definition including newly industrialised countries and transition economies, five more cases most be added. Four cases where Korea has defended various import regulations against complains from Canada and the United States (DS 3, DS 5, DS 20, DS 41) and one case where the Slovak Republic has defended a regulation on transit requirements against a complaint by Switzerland (DS 133).

about their trading partners SPS measures or they have not been able to do so with just two exceptions mention above.

Taking all complaints under any agreement of the WTO into account, it appears that developing countries are getting more involved. The first five years of the WTO dispute settlement mechanism showed that more developing countries made formal complaints under this mechanism than under the mechanism of the GATT that preceded it. In a few cases, developing countries have successfully contested large developed countries on various issues (e.g. Costa Rica: US restrictions on cotton textiles; Venezuela and Brazil: US gasoline regulations). But to date, no African nor least developed country has been involved in a dispute at all (Hoekman and Mavrodis 2000).

Several observers express deep concern about the obstacles developing countries face when seeking to pursue complaints under the SPS Agreement (Henson and Loader 2001; Hoekman and Mavroidis 2000; Zarrilli 1999).

The dispute settlement process is often lengthy and very demanding in terms of financial capacity and human resources (ACWL 1999). Hoekman and Mavroidis (2000) describe the problems as having an upstream and a downstream dimension. The upstream dimension consists of the problems that a developing country encounters before the legal process is enacted in Geneva. Filing a complaint about the SPS Agreement requires identification of a violation of a specific commitment. Information is the critical factor. In developing countries information may be under-supplied due to several factors. The private enterprises that must provide the information about market access problems may see little use of the SPS Agreement. Sometimes the market is too small to make it worthwhile spending the time and money to convince the national government to bring the case to the WTO. Sometimes the solution promised by the dispute settlement process is out of touch with commercial realities. A process frequently lasts two to three years before a possibly favourable decision by a panel or the Appellate Body will bring about changes in regulations. For a producer or exporter the loss in the meantime may be so large that it would be wiser to search for alternative market outlets.

Knowledge about the SPS Agreement and its opportunities is not always widespread among private enterprises (nor among governments) in developing countries (WTO (1997, 1999a). In such circumstances the flow of information from the private sector to the responsible public agencies will of course be limited.

The downstream dimension involves the costs of proceeding with a complaint. The costs of bringing cases to the WTO are high in terms of both financial and human resources. Least developing countries face particularly severe problems, as they lack representation in Geneva as well as financial and human resources (Zarrilli 1999). Many developing countries feel that they are either unable to use the dispute settlement process at all or that they are only able to do so as part of a collective effort or as a partner to a developed country complaint (Henson *et al.* 2000). It appears that the ability of a country to bear the costs of a complaint the whole

way through the dispute settlement process can be assumed to be largely correlated with the income level of the country.

The enforcement of decisions by the dispute settlement body is based on a trade war logic. If a decision is not respected, the penalty will be exercised by the complaining party. It will be entitled to enforce punitive tariffs on the offender. For many developing countries, this is a very impractical way of enforcing decisions as it is likely to hurt the developing country more than the offender. As most developing countries in general import only essential raw materials, capital goods and consumption items like foodstuffs, imposing punitive tariffs is likely to hurt their own economy severely. Therefore, it can be argued that developing countries do not pursue formal complaints because they lack an effective sanction against rulebreakers in case they win (Footer 2001; South Centre 1999). On the other hand, recourse to retaliation has rarely been required to enforce multilateral dispute settlement decisions under the GATT (Hudec 1993). Hoekman and Mavroidis (2000) therefore argue that the pressure to comply with rulings is really moral in nature and that it is based on the value that governments attach to maintaining a good reputation.

The problem of enforcing panel and Appellate Body decision has been suggested solved by a reform of the dispute settlement process. Proposals include that financial compensation instead of the withdrawel of preferences should be the penalty for breaking trade rules. Alternatively, the punishment could be the withdrawel of preferences by all member countries instead of only the one suffering (Hoekman and Mavroidis 2000). While such proposals would solve developing countries problems regarding lack of power to retaliate, they appear to be a political impasse. Hudec (1987) mentions that the proposal of withdrawing preferences by all member countries have been discussed several times but it has always faced fierce resistance.

The SPS Committee

The SPS Committee is both a cost-minimising way to solve conflicts between member countries before they become formal dispute complaints and a forum for clarifying upcoming legislative changes.

Appendix 4 contains a list of conflicts discussed during Committee meetings. A total of around 120 issues have been raised since the implementation of the Agreement. As can be seen from Table 1 almost half of these have involved developing countries and/or transition economies in the role of complainants. In 18 cases such countries were both complainants and defendants, while in the remaining cases, developed countries' SPS measures were targeted.

Table 1. Developing countries in the SPS Committee

	Number of times a country acted as a complainant	Numbers of distinct cases involving a country from the group indicated
Total	196	118
Developed countries	94	73
Transition economies	15	6
Developing countries	85	53
Latin America	40	29
Africa	5	3
Asia	40	21
Cairns developing countries	70	43
Least developed countries	3	2

Note: the number of times a country acted as a complaint is higher than the number of distinct cases because the same case often involve complaints from several countries. Groups of countries such as the EU and ASEAN is counted as one.
Source: Appendix 2.

It is interesting to note that Table 1 confirms the observation made concerning the use of the formal dispute settlement system. The richer developing countries such as the Cairns Group of countries are almost the only ones to use the dispute settlement capacity of the SPS Committee. They do this in a very active fashion and target a large number of SPS measures involving both human, animal and plant health issues. African and least developed countries are practically absent. The explanation behind this seems to be the same as that behind the slack of use of the formal system. The importance of financial and human resource constraints appears to be confirmed by the fact that the poorest developing countries hardly even participate in Committee meetings (Henson and Loader 2001; Blackhurst, Lyakurwa and Oyejide 1999). This issue has been adressed by a proposal by Jamaica to set up a trust fund that would grant assistance to developing countries (WTO 2000e).

Regarding the SPS Committee's role as a discussion forum, the Agreement appears to work well, also for many developing countries. The transparency clauses in the Agreement, most notably the requirement to notify changes in legislation in advance, is indeed promoting debate about the measures among government representatives. The Committee spends a lot of time commenting on and answering questions about new legislation. It is doubtful that such dialogue would have taken place without the Agreement. This process is very important for developing countries which lack resources to follow legislative changes in foreign markets. While many African and least developed countries hardly participate in the debate nor in the meetings, some middle income countries are very active. The most active developing countries include the Cairns countries and a few others like India and Mexico. Guatemala is an example of a low-income country with an unusually high degree of participation.

The ability to participate in international standard setting

The preferred tool used in the SPS Agreement to achieve its goals is international harmonisation. Hence the ability of a country to participate in setting international standards is crucial.

The Agreement explicitly mentions three organisations that are involved in setting such standards: the Codex Alimentarius, the International Office of Epizootics (OIE), and the International Plant Protection Convention (IPPC). It turns out that the likelihood of a country being member of these organisations is correlated with incomes as can be seen from Table 2. Formal participation, however, is not necessarily a good indicator. In the Codex, for instance, the influence on decision-making is far from equal across members. The working process involves an eight-step procedure where draft standards are first formulated in one of 28 specialist

Table 2. Membership of organisations by income group, June 1999[a]

Income group[b]	Total countries[c]	WTO		OIE		IPPC		Codex Alimentarius		Member of all	
Least developed	*29*	*29*	*(100)*	*21*	*(72)*	*11*	*(38)*	*25*	*(86)*	*9*	*(31)*
Low	60	40	(67)	52	(87)	26	(43)	51	(85)	19	(32)
Lower middle	60	34	(57)	40	(67)	35	(58)	49	(82)	20	(33)
Upper middle	29	24	(83)	25	(86)	23	(79)	31	(107)	17	(59)
High	38	35	(92)	33	(87)	25	(66)	32	(84)	26	(68)
Total	187	133	(71)	150	(80)	109	(58)	163	(87)	75	(40)

[a] Number in parentheses are percentages of total countries.
[b] Least developed countries as defined by the UN; income groups as defined by the World Bank.
[c] Excluding the European Union.
Source: Henson and Loader (2001), table 7.

committees and finally become adopted at the biannual meetings of the Commission. Traditionally, standards have been adopted by consensus, but more recently majority voting has also been used. Few developing countries have the financial and human resources to participate actively in this process. This is particularly troublesome as the ideal standard is likely to vary according to the development level of a country (World Bank 2000).

Developing countries may end up with standards set at levels inappropriate to their situation and/or which require a standards infrastructure which simply does not exist in their countries. This seems to be the case since the various standards already set in the international organisations, with the words of Binswanger and Lutz (2000:10), "[...] were not developed as part of the WTO process and left out the developing countries". Likewise, standards will be slow to develop in areas where developed countries have few interests. An example of the latter is the lack of international standards for pesticide residues in tropical fruits (Chan and King 2000).

Developing countries have voiced widespread dissatisfaction with the way international standards are set. Proposals have been put forward regarding two issues. Many developing countries wish to see changes to the rules of decision-making in international organisations to make sure that developing countries' interests are safeguarded (Zarrilli 1999, Wilson 2000). A group of eight developing countries, for instance, have proposed that a standard should only be recognized as an international standard under the SPS Agreement if in its formulation, an agreed minimum percentage of countries from different regions have participated in the technical work throughout the process leading to its adaption, and if the standard was implemented by consensus. Several other developing countries have formulated similar proposals. Yet, a word of caution is warrented. Such rules will make decision-making much more complicated in international standardisation institutions and will in many areas lead to the adoption of fewer international standards. It seems unlikely that such a development will actually be to the advantage of developing country exporters as fewer international standards will lead to more and differing national standards, and differing national standards was exactly why the SPS Agreement was established in the first place.

As mentioned above developing countries have also put forward proposals to create a trust fund to support developing countries finacially to participate in the work of international standardisation organisations and of the SPS Committee (WTO 2000e).

Equivalence

The use of the principle of equivalence of SPS measures in trade with developing countries was, among other things, the issue of an informal meeting of the SPS Committee in November 2000 (WTO 2000b). Developed country representatives noted that equivalence, although a useful principle in theory, was in practice difficult to deal with even for large developed countries (WTO 2000c). Formal equivalence agreements are rare even between developed countries. The reason for this is that negotiations are very demanding in terms of resources and time. At the same time, ad hoc acceptance of the equivalence of specific products, or of the equivalence of certain technical aspects related to SPS measures, are common. The acceptance often takes place without formal agreements.

Developing countries have frequently complained about the lack of implementation of Article 4 regarding equivalence. They state that importing countries often require "sameness" instead of "equivalence", the former implying that the measures must be identical not only in outcome but in formulation too (WTO 1999b, 2000b). At the same time, a number of developing countries have requested more information about how and under what circumstances equivalence can and should be implemented through mutual recognition agreements (Wilson 2000).

The lack of clear rules of implementation of equivalence was addressed by the decision taken by the SPS Committee on 26 October 2001 (WTO 2001a). The decision explains in more detail the procedures leading to agreements of equivalence and encourages international harmonisation such procedures through international organisations like the Codex Alimentarius. It also states that the SPS Committee shall develop a programme to further the

implementation of article 4 with particular consideration of the problems encountered by developing countries.

Codex Alimentarius has already begun work on guidelines for equivalence agreements on food safety although this is still at an early stage (WTO 2000d). The OIE and the IPPC have not yet addressed the issue of equivalence.

The rationale behind the use of equivalence is strong also in trade involving developing countries. The need for equivalence and not "sameness" is likely to increase in the future. Process standards like the Hazard Analysis and Critical Control Point approach (HACCP) are becoming mandatory requirements for the trade of many food and agricultural products (Lee and Hathaway 1999). Simultaneously, the principle of traceability of food products is also becoming more commonly applied and the use of labelling is also increasing (European Commission 2000). The use of complicated process standards increases the need of flexibility in implementation. At the same time it increases the complexities of negotiating equivalence. Developing countries must take part in the international setting of guidelines on how to achieve equivalence in these areas so as not to be left out.

Whether the SPS Agreement, including the international standards and guidelines that are to be developed in these areas, is a sufficiently strong instrument to assure that developing countries can in practice derive benefits from the use of the principle of equivalence remains a question to be answered in the future. The core of the problem is the lack of trust developed countries have in the capacities of the food safety systems of developing countries. It must be noted that this lack of trust is often based on real deficiencies in developing country food safety systems. More work by international organisations on clear guidelines on the establishment of equivalence agreement could be very helpful and could help distinguish between 'equivalence' as defined by the SPS Agreement and 'sameness'.

Regionalisation

The raison d'être of Article 6 regarding regionalisation is the conflict between the fact that many sanitary and phytosanitary problems like the occurrence of pests, and animal and plant diseases do not follow national borders, on the one hand, and the established practice of national legislation in most countries defining their SPS measures along national lines on the other. According to this article, SPS measures must be applied in accordance with the specific problems of the areas the products concerned originate. So if a country has a particular disease in the north but not in the south, its trading partners shall not block exports from entire country but only from the north. The article can in fact be seen as an application of the general principle of the SPS Agreement, namely that a measure must be based on sound science. Of course, in many incidences there is little reason to block the exports from an entire country if the problem in question only relates to parts of the country. Despite the clear support for this approach, in many cases measures are still implemented on a national scale.

The issue potentially has a significant impact on many developing countries including some low income countries. In the case of meat exports, for instance, a major trade barrier is the

occurrence of food-and-mouth disease (FMD) in many developing countries. Recognising a formal process for determining which regions are affected by FMD could help promote exports from areas where the disease is absent. This has been seen most recently in South America, where exports have been allowed from countries such as Argentina, Uruguay and Brazil due to a classification of different regions with respect to FMD occurrence (Roberts 1998).

The International Office of Epizootics (OIE) has developed a procedure for the international recognition of FMD free countries and regions. This leads to a general classification by the OIE of countries and regions with respect to the occurrence of FMD. While the recognition by the OIE of FMD-free status is not legally binding it could be used as a point of reference in future WTO disputes. The OIE has started performing similar tasks for other major diseases (Zarrilli 1999). If the classification of the OIE becomes accepted by developed countries, the positive impacts could be great for developing countries with the capacity and resources to provide regionalisation plans. Today, regionalisation is always an issue of conflict and moreover a country has to negotiate a separate plan with each trading partner. A generally accepted classification could lead to savings of the scarce resources otherwise spent on designing and negotiating regionalisation plans.

Technical assistance for developing countries

Article 9 of the Agreement encourages members to provide technical assistance to developing countries. Article 9.1 talks about general technical assistance to help developing countries comply with SPS measures in their export markets. Article 9.2 addresses the situation when developing countries have to undertake 'substantial investments' to fulfil the requirements of an importing member country. In this situation the importer is encouraged to provide the technical assistance that will permit the developing country to maintain and expand its market access.

The formulation of Article 9 is vague and the article does not contain any commitments. This has been criticised by developing countries who feel that the level of assistance falls short of the immense needs and that the types of assistance are often inappropriate (Henson and Loader 2001). Several developing countries call for a more organised approach to the provision of technical assistance related to SPS requirements. Furthermore, it is argued that the provision of technical assistance should be bound to specific commitments by the developed countries (WTO 1998a, 1999b). An example of a specific proposal to adress these issues is a proposal by the ASEAN[13] countries to create a trust fund within the WTO which would channel technical assistance to developing countries

The SPS Committee has attempted to respond to these concerns by providing a survey of technical assistance given under the SPS Agreement. The survey reveals a number of individual projects in a large number of fields provided by both individual member countries

[13] The Association of South-East Asian (ASEAN) countries include Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

and international organisations (WTO 1999c). Unfortunately, the survey is not very successful in providing an overview because member countries have been slow to respond. Another problem is that no analysis have been undertaken of the demand for technical assistance by developing countries and to which extend this demand is met by the volume and types of technical assistance actually given. It is not known either whether the amount of technical assistance provided is truly additional and due to the existence of the SPS Agreement or whether it is part of the general donor policies of developed countries. The fourth WTO Ministerial Meeting in Doha also discussed the issue of technical assistance but the discussions only led to a repeated call for financial and technical assistance but without offering specific commitments (WTO 2001b).

It should be noticed that some of the problems developing countries face regarding SPS measures are related directly to their overall level of economic development. According to Henson and Loader (2001:98) examples include "[...] the efficacy of prevailing systems of SPS controls, development of scientific and technical expertise and access to modern testing methods". Such problems will be hard to solve by technical assistance measures which are more appropriate for isolated problems within an overall sound standards infrastructure.

Transparency

The difficulties of today's SPS measures as they apply to international trade are not only that they are different in different countries but also that they are often very complicated and subject to frequent changes. Hence exporters face great uncertainty about the state of sanitary and phytosanitary legislation in their export markets. In the Agreement, member countries are obliged to establish notification points as well as enquiry points. This is aimed at improving access to information both for foreign exporters who wish to access the national markets and for the country's own exporters in need of information about foreign markets.

While notification and enquiry points were created rapidly in developed countries, the process has been more slow in developing countries with many especially least developing countries still not having established such points (Henson *et al.* 2000). Little is known of the quantity and quality of information passing through these new channels. It is unlikely that many private exporters in developing countries have benefited directly by now given the low pace of implementation.

Another transparency provision in the SPS Agreement is the obligation that a member country implementing SPS measures which differ from international standards or in areas where no international standards exist must notify the new measure.

The increased transparency has given rise to more inter-governmental discussion of SPS measures as discussed above. An example is the discussion in the SPS Committee that followed the notification of a proposal by the EU to introduce new limits on aflatoxin in foodstuffs (Otsuki, Wilson, and Sewadeh 2001). The notification led to a wide range of responses from WTO delegations including from some African and least developed countries.

The EU subsequently decided to amend its proposed legislation thereby meeting some but not all of the criticism that emerged.

Developing countries have nevertheless brought forward complaints about the functioning of the transparency mechanism. They have complained that the notification procedure do not work properly. While developed countries generally notify changes in legislation they rarely take developing countries comments into account. They desire a formal mechanism for dealing with comments. For instance, Egypt has suggested that if an importing country does not take comments into account for various reasons, it should be obliged to explain the reason (1999d).

Many of the problems that developing countries experience with transparency is related to the lack of financial and human ressources necessary to follow, understand and comment upon developments in their trading partners regulatory frameworks. This has led to the proposal of establishing a mechanism or institution that through which data on SPS measures are collected and analysed (Hoekman and Mavroidis 2000; Zarrilli 1999; WTO 1999d). This body would provide easy access to information about regulatory changes to developing countries on the product most relevant to them and would serve as a mechanism of early warning when or if new topics in food safety regulation starts threatening developing countries' export interests. It could complement the Trade Policy Review Mechanism by collecting and analysing data on SPS measures and their trade effects

Special and differential treatment of developing countries

The SPS Agreement contains a number of vague formulations about the need for special and differential treatment of developing countries but very few explicit commitments. Discussions prior to the Seattle Ministerial Meeting and during the triennial review of the SPS Agreement have revealed widespread dissatisfaction in developing countries with the lack of use of Article 10 of the Agreement on special and differential treatment (Wilson 2000).

Developing countries have expressed a need for longer time frames for commenting on new measures with special relevance for developing countries. The present standard is 60 days (WTO 1996). Developing countries have also desired longer implementation deadlines. This issue was adressed by the Doha Ministerial Meeting which decided that a reasonable period between the publication of a measures and its entry into force was to be 6 months (WTO 2001b). This does not fully meet developing country demands. Some developing countries have demanded a time frame of 12 months and some have asked for specific time frames to be established in specific areas. The Philippines, for instance, speaking on behalf of ASEAN, has emphasised that the country has problems in the application of new techniques such as HACCP and has asked guidelines that address these concerns explicitly (WTO 2000f). In addition, as mentioned above, developing countries have proposed that a separate mechanism be established to monitor SPS-related issues of relevance to developing countries.

The concerns about the difficulties that developing countries face when using the dispute settlement body have led to demands for a fund to help developing countries bear the costs of

dispute settlement and demands for expert assistance. These demands have been addressed by the establishment of the Advisory Centre on WTO Law in Geneva on 17 July 2001. The Centre functions essentially as a law office specialised in WTO law, providing legal services and training exclusively to developing-country and economy-in-transition Members of the Centre and all Least Developed Countries (ACWL 1999). It is financed by the creation of an endowment fund to which its member countries contribute according to economic size[14]. Least developing countries are excempt from the obligation to provide financial contributions. In addition, legal advice will be subject to charges although at levels depending on the economic level in countries benefitting. Although the intentions behind the creation of the Advisory Centre are in accordance with developing countries needs and desires, its size is very modest. It employes one executive director and four lawyers as well as support staff (Trade and Development Centre 2001).

The proposed mechanism to monitor SPS issues and the ACWL are both examples of an alternative way to deal with the demand for special and differential treatment. Instead of designing special rules for developing countries (for instance by allowing them not to follow certain established disiplines) supporting institutions are being proposed that will allow developing countries to benefit be the existing set of rules.

Implementation costs

In the old days of trade liberalisation prior to the Uruguay Round, implementation of the trade liberalisation agreements was a minor issue. The costs of implementing tariffs cuts and other changes in border policies are negligible. Reducing tariffs only involves passing a law and changing custom practice. The many new issues included in the Uruguay Round has put emphasis on implementation costs. Implementing deep regulatory reforms involves spending resources on building new public agencies, educating personnel and so on. The implementation of the SPS Agreement is an example of this. In low income countries this issue is particularly important. Resources are scarce in general and public resources are particularly scarce.

The implementation costs of the SPS Agreement include the costs of setting up the public infrastructure required. Notification and enquiry points must be established and the country must have a representation in Geneva that can participate in the meetings of the SPS Committee. It must also be a member of international standardisation organisations and be able to participate in the meetings of these organisations. This includes overseas representations and the building of domestic human, technical and financial capacity to back the representations with inputs on how to develop new standards. The country must also restructure public agencies and educate personnel so that the SPS regulatory regimes of trading partners can be followed and the country is capable of responding. Links to the private

[14] Contributors (by early 2001) includes the following developing countries: Canada, Denmark, Finland, Ireland, Italy, the Netherlands, Norway, Sweden and the UK. Developing and transition economies contributors include: Hong Kong, China, Columbia, Eqypt, India, Pakistan, the Philippines, Thailand, Uruguay, Venezuela, Bolivia, Dominican Republic, Ecuador, Guatemala, Honduras, Kenya, Latvia, Nicaragua, Panama, Paraguay, Peru, Senegal, Tunisia, and Zimbabwe.

sector must be established to ensure a smooth flow of information about the problems encountered in foreign markets. Only a share of these expenditures are truly mandatory in the Agreement, such as the establishment of notification and enquiry points. The rest is necessary in order to be able to derive benefits from the Agreement.

A developing country also has to reform its standards regulations and its standards setting process under the SPS Agreement's Article 3. Standards must be upgraded to international levels and the capacity to undertake risk assessment must be created. As argued by Finger and Schuler (2000) developing countries carry a heavier burden than developed countries when it comes to fulfilling these commitments. Standards and standards setting procedures at international levels are already more or less in place in the developed countries. Yet they are far from common practice in developing countries. Therefore, formally the Agreement implies that (a) a developing country shall upgrade its standards system to world-class levels in those areas where international standards exist, and (b) shall perform risk analysis using internationally recognised methods to back any standards in areas where international standards do not exist.

The cost implications of these commitments may be less severe than they appear at first sight. Although point (a) described above is a formal commitment, it is unlikely to be enforced. No country will take action against a developing country's SPS measures as long as they are less stringent than international standards. This is typically the case in developing countries where human, animal and plant health standards in general lag far behind standards in developed countries. The consequences of point (b) appear to be more disturbing. If a developing country is to apply SPS measures in areas not covered by international standards, it must develop the domestic capacity to undertake risk assessments acceptable by the WTO. The costs of this will be high as many especially poorer developing countries lack the necessary technical and human capacities.

Some argue that the money spent on upgrading the SPS regulations will have benefits over and above the benefits to trade. WTO (2000a:3) states that:

> "Although considerable resources may be needed to raise health standards to international levels, the benefits are not limited to agricultural exporters. In fact, the most important benefits from improvements in the food safety situation within a country are for the local population, through improvements in health. In a parallel fashion, improving the animal health and plant health situation within African countries also brings benefits to local producers, irrespective of their interest in export markets"

Two questions must be asked in relationship to the statement above. First, is it true that raising health standards to international levels in the way required by the Agreement will yield substantial benefits to domestic consumers and producers? Second, if there are such benefits, are they achieved in a cost minimising way?

The standards set by international standardisation organisations such as the Codex Alimentarius are targeted primarily at products and problems relevant for developed

countries. This comes naturally since, until recently, few developing countries participated in the work in these organisations (Henson and Loader 2001; South Centre 1999). The food safety problems in developing countries are very different from the problems existing in developed countries. The food safety hazards are different and they are transferred by different products. Therefore only a selection of the food safety problems in developing countries are covered by international standards. It seems very optimistic to assume that there will be strong links between enforcing international standards and the domestic health standards of developing countries.

If domestic health is improved by enforcing international standards, would this then be done in a cost-minimising fashion? The question is difficult to answer. But some consideration of the history of international standards may provide useful indications. In general, international standards have been set by rich countries. In rich countries there is a strong demand for the elimination of even very small risks. As countries have grown richer, more and more resources have been devoted to risk elimination. This implies that relying on the SPS measures of these countries will be very costly.

Resources spent to implement international standards in developing countries can be spent on targeting special developing country food safety problems instead. It seems likely that focusing on developing country concerns would yield more cost effective food safety measures. This way resources would be spent in areas where lives can be saved at the lowest costs before setting protection levels at developed country levels in a few selected areas where lives will be much more costly to safe. Another, related question, is whether it would be economical to enforce international standards, as required by the SPS Agreement, in countries with limited public capacities for enforcement (Unnevehr 2000).

The problem of providing risk assessment in developing countries lacking the necessary financial, technical and human resources to do so is the issue of a proposal by Cameroon presented before the meeting of the SPS Committee on 21-22 June 2000 (WTO 2000g). Cameroon proposes that developing countries should be allowed to take protective measures against foodstuffs without the obligations to produce a risk assessment. It should be the responsibility of the exporting country to proof that the food is safe rather than the responsibility of the importing country to proof that the food is unsafe when the importer is a developing country.

The SPS Agreement as a catalyst for regulatory reform

The existence of the SPS Agreement may serve as a catalyst for regulatory reform. Members may unilaterally decide to review their existing regulations and procedures for drafting new regulations so that they are in conformity with the SPS Agreement. This implies that member countries may benefit from the Agreement despite they are unable to use to complex instruments of the Agreements like the dispute settlement system. This is particularly interesting for developing countries as they, as emphasised above, face difficulties in using many of the opportunities offered to members in the Agreement. They will nevertheless benefit from the Agreement, if the mere existence of it creates a pressure to respect it.

The existence of such an effect is to some extent speculative. Roberts (1998) states that there are signs that the effect is already working. She mentions that "[...] at least in the G8 countries that led the SPS negotiations, regulatory authorities in several instances are either unilaterally modifying regulations to comply with the Agreement or voluntarily modifying regulations after technical bilateral exchanges" (Roberts 1998:396). Examples includes Mexico, which has gained access to the US avocado market for fruit from certain parts of the country. This ended a 80 year old ban when the conflict was finally solved along the lines laid down in Article 6 on regionalisation. Latin American countries like Argentina and Brazil already have gained access to the US beef market or are currently negotiating about access. This comes after the lengthy discussion with US authorities about creating regionalisation plans concerning the occurrence of foot-and-mouth disease. Other initiatives have resulted in imports of pork products from Italy and from the Mexican state of Sonora being allowed. Similarly, trade in papaya from specific producing regions in Costa Rica and Brazil has been opened (Roberts 1998; WTO 1998b). The hope of developing countries is that the strong emphasis of the Agreement on science-based measures and the few high profile panel cases between developed countries makes these countries' authorities more responsive to science-based arguments from developing countries.

6. Conclusion

In principle the SPS Agreement should help developing countries maintain and expand their market access for food and agricultural products by preventing the implementation of SPS measures that cannot be justified scientifically and by improving transparency and encouraging harmonisation. As with all other multilateral agreements under GATT or the WTO signed during the last century, the SPS Agreement was negotiated principally by developed countries with the developing countries signing it without having been part of the negotiation process and for some countries without any deep understanding of the contents and implications of the Agreement. As the SPS Agreement has grown older, developing countries have realised that it is hard and sometimes impossible for many of them to make sure that the disciplines agreed upon in the Agreement become used in practice. Despite this, all developing countries endorse the aim of the Agreement but most find that parts of it does not work properly.

The disciplines are based on the two fundamental principles of the Agreement, the principle of scientific justification and the principle of non-discrimination. The evaluation of the Agreement above has shown that the first of these principles is used rigorously while the second is weak. Developing countries has a clear interest in as strict an agreement as possible. Therefore it is a disappointment that the principle of non-discrimination appear to be of little use in practical dispute settlement as it has been shown in the EU hormones Appellate Body report. Another interpretation of this report, the interpretation of "based on" laying down the extent of harmonisation desired in the Agreement, can also be seen as a step in the wrong direction. The interpretation allow widely different standards and makes it difficult to predict *a priori* whether a standard is in accordance with the SPS Agreement or not. From the perspective of market access, it would be preferable if the international standards were given higher legal status. On the other hand, the interpretation of the so-called precautionary

principle in the context of the SPS Agreement that has been provided by the Appellate Body report seems to serve developing countries well. Developing countries have no interest in increasing the number of excuses that can be used to erect trade barriers in the form of SPS measures.

The analysis of the Agreement has demonstrated two fundamental problems. First, there appear to be a wide gap between the financial, human, and technical resources of a very large number of developing countries and the resources demanded if participation in the Agreement is going to be effective. The costs of participating in the management of the Agreement taking place in the SPS Committee, the costs of participating in future negotiations about the Agreement[15], the costs of participating in international standards setting, and the costs of making complaints in the dispute settlement system all sum up to a demand for resources that few if any developing countries are capable of meeting. This however does no exclude developing countries from benefiting from the Agreement at all, as a member may benefit from parts of the Agreement without being able to participate in full.

The implementation costs of the Agreement may be considerable too. The exact size of these costs is unknown as this is an under-researched topic in the literature. But they are likely to be substantial and they are particularly troublesome as they lead to the possibility that some developing countries may come out as net losers from the Agreement. This would be the case if a country is incapable of using the opportunities offered in Agreement while still having to bear the implementation costs. For a number of least developing and African countries this seems to be a likely situation. The issue of implementation costs lead to the second fundamental problem of the Agreement. This is the extent of harmonisation of international standards that is desirable from a developing country viewpoint. In the Agreement, standards that achieve a higher protection level than international standards are considered but standards that achieve a lower protection level are ruled out. This is contrary to many developing countries' interest as the food safety problems they experience differ radically from the ones international standards are addressed at. This problem is a major source of high implementation costs although the discussion is properly more theoretical than real as a country is unlikely to be asked to raise standards by a trading partner. But as the harmonisation of SPS measures around international standards evolve it is nevertheless a very important problem that must be taken into account. Should the world aim for one harmonised set of standards as it is the aim of the SPS Agreement or would a two-tier system be appropriate with high standards domestically in developed countries and in developing country export sectors targeting these and lower standards domestically in developing countries? If the latter is the right answer (and developments in the real world seems to point in that direction), it would be wise to incorporate this in the SPS Agreement in order of avoiding to encourage developing countries to use their scarce resources wastefully. This issue is not only relevant for domestic trade within developing countries but also for trade between developing countries. Would it be reasonable to allow, for instance, Tanzania to deny access of imported fruit from Kenya referring to international standards if these international

[15] The SPS Agreement will not be part of the new WTO round of trade negotiations launched in Doha in November 2001. Yet, minor issues regarding the Agreement like implementation issues may be discussed at Ministerial meetings and in other fora.

standards in practice apply neither in Kenya nor in Tanzania but only in developed countries far away?

The above issue is not on the agenda in the new round on WTO negotiations launched in Doha in November 2001, as a matter of fact the whole SPS Agreement is off the agenda. But implementation issues and other issues keep coming up. Developing countries and analysts have put forward a number of proposals regarding reform of the SPS Agreement. No doubt, if the developing countries are to feel that they are part of the Agreement it is crucial that the many encouragements and promises of technical assistance and special and differential treatment mentioned in the text of the SPS Agreements are converted into commitments on behalf of developed countries. Developing countries by and large support the Agreement and rightly so. The world without an SPS Agreement would be even worse than the world with it. For many countries it is very difficult to use the Agreement to open markets, but it does not, and this is a minimum criteria for success, make it any harder either. The only factor that threatens to make the world with an agreement worse than the world without it, is the issue of implementation costs. This issue should and can be taken care of. Either by generous financial and technical assistance or by drafting exceptions for a limited number of poor countries. Some developing countries strongly support the Agreement. Large middle-income countries with great agricultural and food export potential like Mexico, Chile, Argentina, Brazil, many of the ASEAN countries as well as South Africa believe in the Agreement and work hard both to exploit its current opportunities as well as to improve it. The fact that developing countries differ so much when it comes to the capacity to exploit the Agreement could be used to argue for a concentration of technical assistance and special and differential treatment on the poorer developing countries. This will make it politically easier for governments of developed countries to accept to bind the commitments to assist developing and it will secure a more targeted and effective assistance to the countries needing it the most.

References

ACWL (1999): *Agreement establishing the Advisory Centre on WTO Law* (www.itd.org).

Binswanger, H. and Lutz, E. (2000): *Agricultural Trade Barriers, Trade Negotiations, and the Interests of Developing Countries*. Paper presented at the International Association of Agricultural Economists Meeting in Berlin, August 2000.

Blackhurst, R., Lyakurwa , B. and Oyejide, A. (1999*): Improving African Participation in the WTO*. Paper commissioned by the World Bank for a Conference at the WTO on 20-21 September 1999.

Chan, M.-K., & King, B. (2000). *Review of the Implications of Changes in EU Pesticides Legislation on the Production and Export of Fruits and Vegetables from Developing Country Suppliers*. Greenwich: Natural Resources Institute, University of Greenwich.

European Commission (2001): WTO Committee on Agriculture, Informal Special Session Meeting (23-27/07/2001) - EU additional negotiating proposals. Food Safety. Brussels: European Commission. Available at http://www.europa.eu.int/comm/agriculture/external/wto/officdoc/foodsafety_en.htm

European Commission (2000): *White Paper on Food Safety*. Brussels: European Commission.

Finger, J.M., Schuler, P. (2000): Implementation of Uruguay Round Commitments: The Development Challenge. *World Economy 23*(4), 511-525.

Footer, M.E. (2001): Developing Country Practice in the Matter of WTO Dispute Settlement. *Journal of World Trade 35*(1), 55-98.

Henson, S. and Loader, R. (2001): Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements. *World Development 29*(1), 85-102.

Henson, S., Loader, R., Swinbank, A., Bredahl, M. and Lux, N. (2000): *Impact of Sanitary and Phytosanitary Measures on Developing Countries***.** Department for International Development, London.

Hoekman, B. and Mavrodis, C. P. (2000): WTO Dispute Settlement, Transparency and Surveillance. *World Economy 23*(4), 527-542.

Hooker, N.H. (1999): Food safety regulation and trade in food products. *Food Policy 24*(6), 653-668.

Hudec, R. (1993): *Enforcing International Trade Law*. New Hampshire: Butterworth.

Hudec, R. (1987): *Developing Countries in the GATT Legal System*. Aldershot: Gower Press.

Hurst, D. (1998): Hormones: European Communities - Measures Affecting Meat and Meat Products. *European Journal of International Law* 9(1) (only accessible through the internet at http://www.ejil.org).

Landwehr, O. (1999): Decisions of the Appellate Body of the World Trade Organization, Japan - Measures Affecting Agricultural Products. *European Journal of International Law 9*(1) (only accessible through the internet at http://www.ejil.org).

Lee, J.A., and Hathaway, S.C. (1999): Experiences with HACCP as a tool to assure the export of food. *Food Control 10*, 321-323.

OECD (1999): *Food safety and quality: trade considerations*. Paris: OECD.

Otsuki, T., Wilson, J.S., and Sewadeh, M. (2001): *Saving two in a billion: A case study to quantify the trade effect of European food safety standards on African exports*. World Bank Research Paper No. 2563. World Bank, Washington D.C.

Public Citizen (2000): Harmonization Handbook - Accountable Governance in the Era of Globalization: the WTO, NAFTA, and International Harmonization of Standards. Washington D.C.: Public Citizen.

Roberts, D. (1998): Preliminary assessment of the effects of the WTO agreement on sanitary and phytosanitary trade regulations. *Journal of International Economic Law 1*(3), 377-405.

Silverglade, B.A. (2000): The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade? *Food and Drug Law Journal 55*(4), 517-524.

South Centre (1999): *Issues Regarding the Review of the WTO Dispute Settlement Mechanism*. T.R.A.D.E. Working Paper #1. Geneva: South Centre.

Trade and Development Centre (2001): *Advisory Centre on WTO Law*. Trade and Development Centre website at <http://www.itd.org/links/acwlintro.htm> created July 2001, cited 23 October 2001.

Unnevehr, L. J. (2000): Food safety issues and fresh food product exports from LDCs. *Agricultural Economics 23*(3), 231-240.

Wilson, J.S. (2000): *The Post-Seattle Agenda of the World Trade Organization in Standards and Technical Barriers to Trade: Issues for Developing Countries*. Mimeo. Washington D.C.: World Bank.

World Bank (2000): *Global Economic Prospects and the Developing Countries 2001*, Washington D. C.: World Bank.

WTO (2001a): Decision on the Implementation of Article 4 of the Agreement on Sanitary and Phytosanitary Measures. G/SPS/19. Geneva: World Trade Organisation.

WTO (2001b): Implementation-Related Issues and Concerns - Decision of 14 November 2001. WT/MIN(01)/17. Ministerial Conference, Fourth Session, Doha, 9-14 November 2001.

WTO (2001c): WTO Negotiations on Agriculture: Proposal by Kenya. G/AG/NG/W/136. Geneva: World Trade Organisation.

WTO (2000a): *The SPS Agreement – Matters of Particular Interest to African Countries*. Background document of the Libreville 2000 Meeting of African Trade Ministers 13-15 November 2000. Document MM/LIB/WS6/3. Geneva: Agriculture Division, World Trade Organisation.

WTO (2000b): Equivalence: Consideration of Article 4 of the SPS Agreement - Summary of the Discussions of the SPS Committee. G/L/423. Geneva: World Trade Organisation.

WTO (2000c): Equivalence - Submission by the United States. G/SPS/GEN/212. Geneva: World Trade Organisation.

WTO (2000d): Relevant Codex Documents on Equivalence of Sanitary Measures - Information Submitted by the Codex Alimentarius Commission (Codex). G/SPS/GEN/211. Geneva: World Trade Organisation.

WTO (2000e): Special and Differential Treatment. G/SPS/W/105. Geneva: World Trade Organisation.

WTO (2000f): Summary of the Meeting held on 21-22 June 2000. G/SPS/R/19. Geneva: World Trade Organisation.

WTO (2000g): Summary of the Statement by the Representative of Cameroon at the Meeting of 21-22 June 2000. G/SPS/GEN/192. Geneva: World Trade Organisation.

WTO (1999a): Development and Adaptation of Sanitary and Phytosanitary Systems in Developing Countries for the Purpose of Complying with Commitments under the Agreement on the Application of Sanitary and Phytosanitary Measures - Statement by Guatemala at the Meeting of 10-11 November 1999. G/SPS/GEN/17. Geneva: World Trade Organisation.

WTO (1999b): SPS Agreement and Developing Countries - Statement by Egypt at the Meeting of 7-8 July 1999. G/SPS/GEN/128. Geneva: World Trade Organisation.

WTO (1999c): Summary of the Replies to the Questionnaire on Technical Assistance. G/SPS/GEN/143. Geneva: World Trade Organisation.

WTO (1999d): Summary of the Meeting held on 7-8 July 1999. G/SPS/R/15. Geneva: World Trade Organisation.

WTO (1998a): Special and Differential Treatment and Technical Assistance - Submission made by India at the Meeting of 10-11 June 1998. G/SPS/GEN/85. Geneva: World Trade Organisation.

WTO (1998b): Summary of the Meeting held on 12-13 March 1998. Geneva: World Trade Organisation.

WTO (1997): Experiences from Technical Assistance and Cooperation in Developing Countries. G/SPS/GEN/157. Geneva: World Trade Organisation.

WTO (1996): Recommended Notification Procedures. G/SPS/7. Geneva: World Trade Organisation.

Zarrilli, S. (1999): *WTO Sanitary and Phytosanitary Agreement: Issues for Developing Countries*. T.R.A.D.E. Working Paper #3. Geneva: South Centre.

Appendix 1 Disputes referring to the SPS Agreement

Case	Measure	Complainant *	SPS art. referred to	TBT art referred to	Case status
DS3	Korea: Testing and inspection requirements	United States	2, 5	5, 6	Consultations
DS5	Korea: Shelf-life regulation – frozen meat	United States	2, 5	2	Settlement
DS18	Australia: Import ban – salmon	Canada	2, 5		Appellate report
DS20	Korea: Shelf-life regulation – bottled water	Canada	2, 5	2	Settlement
DS21	Australia: Import ban – salmon	United States	2, 5		Settlement
DS26	EU: Import ban – hormone-treated beef	United States	2, 3, 5	2	Arbitration
DS41	Korea: Testing and inspection requirements	United States	2, 5, 8	2, 5, 6	Consultations
DS48	EU: Import ban – hormone-treated beef	Canada	2, 3, 5	2	Arbitration
DS76	Japan: Quarantine regulations	United States	5, 5, 8		Appellate report
DS96	India: Import quotas	EU	2, 3, 5	2	Settlement
DS 100	US: USDA decision on poultry product safety	EU	2, 3, 4, 5, 8, Ann. C	2, 5	Consultations
DS 133	Slovak Republic: Transit requirements	Switzerland	5		Consultations
DS 134	EU: Import duties – rice	India	2	2	Consultations
DS 135 **	EU: Asbestos and asbestos products	Canada	2, 3, 5	2	Appellate report
DS 137	EU: Import restrictions – wood of conifers	Canada	2, 3, 4, 5, 6	2	Consultations
DS 144	US: State trucking regulations	Canada	2, 3, 4, 5, 6, 13, Ann. B, C	2, 3, 5, 7	Consultations
DS 203	Mexico: Import restrictions – live swine	United States	2.2, 2.3, 3, 5.1, 5.6, 7, 8	2, 5	Consultations
DS 205	Egypt: Import restrictions – canned tuna	Thailand	2, 3, 5, Ann.B (paragraph 2, 5)		Consultations

* Does not include countries who subsequently requested to join consultations.

** The case focused exclusively on obligations under the TBT Agreement. In its request for the establishment of a panel (WT/DS/135/3), Canada claimed that the EU decree in question was inconsistent with obligations under the SPS as well as the TBT Agreement. However, Canada only pursued the claim that the EU decree was inconsistent with obligations under the TBT Agreement in its written or oral arguments before the established Panel.

Appendix 2 Issues discussed in the WTO SPS Committee

Discussed at	Measure	Complainant	Case status	Documentation
Meeting #1 (26-27/6 1995)	Mexico: Notification procedure	New Zealand		
	Malaysia	New Zealand		G/SPS/W/17
	Korea: Inspection and testing requirements	United States	DSB (DS3)	WS/DS3/1
	Korea: Shelf-life regulation – frozen meat	United States	DSB (DS5)	WS/DS5/1
Meeting #2 (15-16/11 1995)	Korea: Shelf-life regulation – bottled water	Canada	DSB (DS20)	
Meeting #3 (20-21/3 1996)	Norway: Import ban – gelatine	Brazil		
Meeting #4 (29-30/5 1996)	Korea: Testing and inspection requirements	United States	DSB (DS41)	G/SPS/W/64 G/SPS/W/66
	Numerous: Import restrictions of dairy products due to BSE	Switzerland		
	Brazil: Food safety legislation – wine	EU		
	Canada: Food safety legislation - cheese	EU		G/SPS/N/CAN/8
	US: Regionalisation and animal health	EU		G/SPS/N/USA/37
	Korea: Shelf-life regulation – UHT milk	Canada		
Meeting #5 (8-9/10 1996)	Japan: testing requirements for fruit	United States	DSB (DS76)	
	Australia: Import ban – salmon	United States	DSB (DS21)	
	Spain: Copper and cadmium in imported squid	United States		
	Chile, Czech Republic, El Salvador, Slovak Republic, Honduras: Zero-tolerance for salmonella in imported poultry products	United States		
Meeting #6 (19-20/3 1997)	Numerous: Import restrictions due to BSE	Switzerland		G/SPS/W/79
	France: Certification requirements – pet food	United States		G/SPS/GEN/18
	Israel: Import restrictions – bovine meat	Uruguay		
	Poland: Import restrictions – wheat and fruit	United States		

Discussed at	Measure	Complainant	Case status	Documentation
	Panama: Certification requirements – rice	United States		
	Brazil: Import restrictions – wheat	United States		
	Chile: Import restrictions – wheat and fruit	United States		
	Indonesia: Import restrictions – fruit and vegetables	United States, Australia		G/SPS/N/IDN/2
	Canada: Import policies due to BSE	EU		G/SPS/N/CAN/18
	Honduras: Import restrictions – rice	United States		
	Australia: Import ban - salmon	Canada	DSB (DS18)	
	EU: Protected zones or areas	Uruguay, Mexico, South Africa, Chile		
	EU: Cosmetics and BSE	Australia, Brazil		G/SPS/N/EEC/43
Meeting #8 (1-2/7 1997)	Venezuela: Ban on import of US poultry and poultry products	United States		G/SPS/GEN/19
	EU: Measures on the citrus canker	Argentina, South Africa, Brazil, Uruguay		G/SPS/N/EEC/46 G/SPS/N/EEC/47 G/SPS/GEN/21 G/SPS/GEN/26
	Switzerland: Import restrictions – wheat	Argentina		G/SPS/N/CHE/5
Meeting #9 (15-16/10 1997)	EU: Ban of the use of certain specified risk materials due to BSE	United States		G/SPS/GEN/36 G/SPS/GEN/66
	Australia: Quarantine requirements – bovine embryos	Switzerland		G/SPS/N/AUS/56 G/SPS/N/AUS/57
	Czech Republic: Import restrictions – cattle	Switzerland		G/SPS/N/CZE/14
	United States: Import restrictions – fruits and vegetables	Brazil		G/SPS/N/USA/94
	Mexico: Import ban of Thai rice	Thailand		G/SPS/GEN/82 G/SPS/GEN/105 G/SPS/N/MEX/153 G/SPS/GEN/172
	Korea: Import ban of Thai poultry	Thailand		G/SPS/GEN/83
	Japan: Import requirements – FMD vaccine	Argentina		
	General: Impact of decisions by local governments	Chile		
	EU: Import restrictions – fishmeal	Chile, Peru		

Discussed at	Measure	Complainant	Case status	Documentation
	France, Italy: Import ban – fishmeal for feeding ruminants	Chile		
	Czech Republic: Import requirements - potatoes	EU		G/SPS/N/CZE/12 G/SPS/N/CZE/13 G/SPS/GEN/42
	Czech Republic: Import requirements - potatoes	Argentina		
	Czech Republic: Production requirements – cereals for animal feeding	EU		
	Italy: Classification as Special Risk Materials regarding BSE	Uruguay		
	Slovak Republic: Import ban – fruits	Hungary, EU		G/SPS/N/SVK/8/Rev.1 G/SPS/GEN/79
	EU: Food safety legislation – MRLs for aflatoxins	Argentina, Australia, Brazil, Gambia, India, Indonesia, Malaysia, Philippines (on behalf of ASEAN), Senegal, Thailand, Canada, Columbia, South Africa, Turkey, United States, Uruguay, Bolivia, Pakistan		G/SPS/GEN/51 and Add.1G/SPS/GEN/52 G/SPS/GEN/61 G/SPS/GEN/58 G/SPS/GEN/50 G/SPS/GEN/54 G/SPS/GEN/63 G/SPS/GEN/56 G/SPS/EN/62 G/SPS/GEN/55 G/SPS/GEN/57 G/SPS/GEN/93 G/SPS/N/EEC/51 G/SPS/N/EEC/95
	South Africa: Import ban - beef	EU		G/SPS/N/ZAF/2 G/SPS/GEN/95
	Argentina: Import ban – pork and pork products	EU		G/SPS/N/ARG/9
Meeting #10 (10-11/3 1998)	Brazil: Import ban – coconut palms and related products	Philippines, Sri Lanka		
	Turkey: Import ban – livestock	United States, Hungary, EU, Australia		G/SPS/GEN/89
	Slovak Republic: Measures regarding the importation of dairy products and the transit of cattle	Switzerland	DSB (DS133)	WT/DS133/1 G/SPS/GEN/71
	Australia, New Zealand: Import restrictions – cheese	Switzerland, EU		G/SPS/GEN/116

Discussed at	Measure	Complainant	Case status	Documentation
	US: Import restrictions - certain ruminants and ruminant products	EU		G/SPS/N/USA/106
	Poland: Import restrictions - gelatine	United States		G/SPS/N/POL/5
	EU: Measures on establishments operating in the animal feed sector	United States		G/SPS/N/EEC/58
	EU: Import restrictions - seafood	Tanzania		G/SPS/N/EEC/4 G/SPS/GEN/53
Meeting #12 (15-16/9 1998)	France: Import restrictions – gelatine	Brazil		G/SPS/GEN/133
	Austria, Spain, Slovenia, Chile: Import ban – bovine semen	Switzerland		
	EU: Food safety legislation – food treated with ionizing irradiation	United States		G/SPS/N/EEC/61
	Switzerland: Import requirements - meat	United States, Australia, Canada		G/SPS/N/CHE/14
	Australia: Quarantine requirements – chicken meat	Thailand, EU		G/SPS/N/AUS/72 G/SPS/GEN/90 G/SPS/GEN/96
	Poland: Veterinary measures and measures on animal products	Switzerland		G/SPS/N/POL/4 G/SPS/N/POL/13 G/SPS/N/POL/14
	EU: Emergency measures on citrus pulp	Brazil		G/SPS/N/EEC/62
	Czech Republic: Import ban – poultry	Thailand		G/SPS/N/CZE/16
	Australia: Import restrictions – sauces	Philippines, Malaysia		
Meeting #13 (11-12/11 1998)	US: Use of Solid wood packaging material imported from China	Hong Kong – China		G/SPS/GEN/107
	Switzerland: Import requirements – meat, eggs, egg products, food containing eggs or egg products	United States, Israel, Canada, Australia, Hungary, Chile, Brazil, India, New Zealand		G/SPS/N/CHE/14 and Corr.1G/SPS/N/CHE/16
	Japan: Changes in Plant Protection Law	United States, EU, Uruguay, Philippines (on behalf of ASEAN), Chile, New Zealand, Canada		G/SPS/N/JPN/37

Discussed at	Measure	Complainant	Case status	Documentation
	Israel: Import restrictions – live cattle	EU		G/SPS/N/ISR/2
	US: Refrigeration and labelling requirements for shell eggs	EU		G/SPS/N/USA/133
	Poland: Food safety legislation – heat treatment of products made from raw milk	EU		G/SPS/N/POL/14
Meeting #14 (10-11/3 1999)	Argentina: Import restrictions – bovine semen	EU		G/SPS/GEN/114 G/SPS/N/ARG/37
	India: Import restrictions – bovine semen	EU		G/SPS/GEN/113
	India: Import restrictions – horses	EU		G/SPS/GEN/112
	Slovak Republic: Import restrictions – potatoes	Poland		G/SPS/GEN/115
Meeting #15 (7-8/7 1999)	Mexico: Import restrictions – beef	Argentina		
	Korea: Import restrictions – beef	Argentina		
	Malaysia: Import restrictions – meat, egg and dairy products	Switzerland		G/SPS/N/MYS/6 G/SPS/N/MYS/7
	Argentina: Import restrictions – bovine semen, milk and milk products	EU		G/SPS/N/ARG/38 G/SPS/N/ARG/47
	EU: Ban on antibiotics in feed	US, Canada, Australia		
	Poland: Import restrictions – cereals, maize, malt	Slovak Republic		
	US: Import restrictions – rhododendron	EU		G/SPS/N/USA/121
	Venezuela: Import requirements for pork meat and products	EU		
Meeting #17 (10-11/11 1999)	El Salvador: Import restrictions – meat and dairy products	Uruguay		
	Belgium: Import restrictions – canned tuna	Philippines		
	US: Import restrictions - citrus	Argentina		
Meeting #18 (15-15/3 2000)	Australia: Import restrictions – tropical fresh fruit	Philippines, Thailand, Malaysia		
Meeting #19 (21-22/6 2000)	Numerous: Import restriction due to the Belgian dioxin crisis	EU		G/SPS/GEN/123/ Add.4
	US: Import restrictions on citrus	Argentina		

Discussed at	Measure	Complainant	Case status	Documentation
	Numerous: Import restrictions on bovine semen due to BSE,	EU		G/SPS/GEN/187
	Turkey: Import restriction on live cattle and beef			
	Australia: Import restrictions on tropical fresh fruits while waiting on risk assessment	Philippines (on behalf of ASEAN)		
	Australia: Import restrictions on citrus and table grapes while waiting on risk assessment	US		
	Australia: Import restrictions on mango while waiting on risk assessment	Brazil		
	Australia: Import restrictions on mango while waiting on risk assessment	India		
	Australia: Import restrictions on bulbs while waiting on risk assessment	EU		
	Australia: Import restrictions on sauces containing benzoic acid	Philippines		
	Mexico: Import restrictions on rice	Thailand		G/SPS/GEN/172; G/SPS/N/MEX/153
	India: Import restrictions on bovine semen	Canada		
	Egypt: Ban on the import of canned tuna due to fear of GMO soybean oil	Thailand		
	Japan: Import restrictions on citrus	Argentina		
Meeting #20 (8-9/11 2000)	EU: Emergency measures for wood packaging	Canada, US, Korea, Japan, Chile		G/SPS/N/EEC/93
	Australia: Import restrictions – durian	Thailand, EU, India, Philippines		
	Indonesia: Import ban – fruit	Australia		G/SPS/GEN/219
	India: Import restrictions – bovine semen	Canada, United States		
Meeting #21 (14-15/3 2001)	Canada: Import ban due to BSE	Brazil		

Discussed at	Measure	Complainant	Case status	Documentation
	Australia, Argentina, Canada, Korea, New Zealand, US: Import bans due to BSE	Romania, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Poland, Slovak Republic, Slovenia		
	Numerous: Responses to the outbreak of Food and Mouth Disease	EU		
	Australia: Risk analysis – table grapes	United States, Malaysia, Indonesia, Philippines, Thailand, EU		
	Venezuela: Import requirements – garlic, potatoes	Argentina		
	Hungary: Import restrictions - pork	Canada		
	Bolivia: Import restrictions - poultry	Chile		
	EU: Maximum levels of lead, cadmium, mercury and 3-MCPD in soy sauce and other foodstuffs	Thailand, Malaysia, Indonesia, Philippines		G/SPS/N/EEC/100
	Australia: Import restrictions - prawn	ASEAN		G/SPS/N/AUS/124 G/SPS/N/AUS/126
	EU: Import restrictions – gelatine	United States		
	Turkey: Import restrictions - bananas	Ecuador		