

**RGICS Working Paper Series
No. 12, 2000**

**THE SANITARY AND PHYTOSANITARY
MEASURES AGREEMENT**

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Abstract

India imposed restrictions on the import of Bovine Semen from Europe, in the aftermath of the Bovine Spongiform Encephalopathy (BSE or the "Mad Cow Disease") scare, citing the Sanitary and Phytosanitary (SPS) Measures of the WTO for these restrictions. The European nations alleged violation of a provision of the SPS and the matter is still to be decided. However, this is one in a large number of cases involving all trading nations wherein similar restrictions have been imposed on one of the partners citing issues relating to food safety, animal and plant health. In short, the SPS Measures. In the new world order, where economics, and not politics, determines the relations between nations, it is such Measures of the WTO that assume great significance especially for the developing countries.

In this paper, there is a detailed discussion of the various issues pertaining to the SPS Measures of the WTO. Section I is a general introduction about the role of standards and regulations in the new economic order. Section II goes into the background of the work done by the WTO in the field of trade and environment. Section III gives an overview of the SPS Measures. Section IV examines the important provisions of the SPS Agreement in detail. Section V discusses some issues of interest relating to the SPS Measures including the prominent 'Hormones Dispute' Case. Section VI deals with the issue from a developing country perspective. Section VII highlights the special position of India vis-à-vis the SPS Measures. Section VIII talks about the SPS Committee, while Section IX has the 1998 Committee Report on the Review of the Operation and Implementation of the Agreement on the Application of the SPS Measures. Section X discusses the role of these measures as a catalyst for regulatory reform. Section XI includes recommendations and suggestions for improvement. And finally, Section XII draws some relevant conclusions.

SECTION I

I. A Introduction: The Role of Standards and Regulations

Countries require that domestically produced and imported goods conform to regulations and possibly adhere to standards. These standards and regulations aim at meeting both traditional and less traditional objectives. In addition, these also respond to growing public demand, often voiced by consumer associations and environmental groups. The number of standards and regulations is constantly increasing in most countries because of the expansion in volume, variety and technical sophistication of products manufactured and traded. Because the tasks that standards and regulations aim to fulfill have expanded and deepened, the number of interested parties involved in setting-up standards and regulations is also increasing, with the participation of groups such as consumer and environmental organizations, which were not previously involved in these activities. Like most things in life, these standards and regulations are a double-edged sword and can promote economic development and trade on the one hand, and, on the other hand, may also be used as powerful tools to impede international trade and protect domestic producers, mainly through:

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

The risk of the use of these standards and regulations for domestic protection is particularly high in the agricultural sector where lowering the level of protection provided by tariff and many non-tariff barriers would increase the importance of sanitary and phytosanitary measures as border protection instruments. Probably, the major difficulty in dealing with standards and regulations is to distinguish those measures which are justified by a legitimate goal from those which are applied for protectionist purposes.

Compliance with regulations is mandatory; therefore products that do not comply with regulations cannot be sold in a given market. On the other hand, standards are voluntary; therefore no product can be

stopped at the border or refused access to the domestic market because of non-compliance with standards. In addition, the world today also has conformity assessment measures aimed at assessing the compliance of a product with a standard or a regulation. Conformity assessment can enhance the value of standards and regulations by ensuring that both domestic and imported products meet the required conditions. Measures to evaluate and ensure conformity may be as significant as the standards and the regulations themselves. Therefore they can also act as powerful non-tariff barriers if they impose costly, time-consuming and unnecessary tests or duplicative conformity assessment procedures. And in both cases, the line between legitimate measures and measures aimed at discouraging imports and protecting domestic producers is very difficult to draw.

SECTION II

II. A Background to WTO work on trade and environment

When Trade Ministers approved the results of the Uruguay Round negotiations in Marrakesh in April 1994, they also took a decision to begin a comprehensive work programme on trade and environment in the WTO. The issue of trade and environment was not included for negotiation in the Uruguay Round, but certain environmental concerns were nevertheless addressed in the results of the negotiations.

II. B The Marrakesh Ministerial Decision on Trade and Environment

Trade Ministers in Marrakesh agreed to establish a WTO Committee on Trade and Environment (CTE) with a broad-based remit covering all areas of the multilateral trading system -- goods, services and intellectual property. The CTE has been given both analytical and prescriptive functions: to identify the relationship between trade and environmental measures to promote sustainable development, and to make recommendations on whether any modifications to the provisions of the multilateral trading system are required.

SECTION III

III. A SPS Agreement and Agreement on Agriculture

The decision to start the Uruguay Round trade negotiations was made after years of public debate, including debate in national governments. The decision to negotiate an agreement on the application of sanitary and phytosanitary measures was made in 1986 when the Round was launched. The SPS negotiations were open to all of the 124 governments which participated in the Uruguay Round.¹ During the Uruguay Round, agricultural negotiations strove to lower barriers that countries used to protect their domestic markets. Some countries feared, however, that the elimination of agriculture-specific non-tariff measures and the tariff reductions would be circumvented by disguised protectionist measures in the form of sanitary or phytosanitary regulations. This concern provided a major driving force which led negotiators to create a separate Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement"), in parallel with the major agricultural trade negotiations.

The SPS and Agriculture Agreements are complementary. Both are in fact serviced by the same Division within the WTO Secretariat, i.e. the Agriculture and Commodities Division. But they differ in design.

The Agreement on Agriculture contains not only rule-based

1. The negotiation of the SPS Agreement during the Uruguay Round was motivated by shortcomings in the two legal instruments that disciplined the use of SPS measures prior to the Round - the original GATT Articles and the 1979 Tokyo Round Agreement on Technical Barriers to Trade (TBT) (which was a plurilateral agreement known as the Standards Code.) The consensus view was that these two had failed to stem disruptions of trade in international markets caused by proliferating technical restrictions. Numerous flaws in the pre-Uruguay Round legal infrastructure blunted the effectiveness of disciplines on SPS measures and other technical barriers. (i) the lack of a single integrated rule system (ii) the GATT's consensus-based dispute settlement process (iii) the arguable exemption of production and process standards from many of the disciplines of the Standards Code (iv) not all signatories of the previous GATT Agreement had signed the Standards Code (v) even if two nations had signed the code, the consensus-based dispute settlement process effectively allowed either country to block a request to convene a panel or block adoption of a panel report (vi) another loophole was created by the Standard Code's definition of a measure which omitted explicit reference to process and production methods.

commitments, but also detailed, specific quantitative commitments to reduce protection and support over a well-defined implementation period. **The SPS Agreement does not impose any quantitative and legally binding schedules of concessions. It is a set of rules, principles and benchmarks for WTO Members to ensure, among other things, that sanitary and phytosanitary trade measures are justified and do not constitute disguised restrictions on international trade.**

III. B From TBT to SPS

Prior to the negotiation of the SPS Agreement, many food safety, animal and plant health regulations fell within the scope of the plurilateral 1979 Agreement on Technical Barriers to Trade (TBT). The "TBT Agreement", also called the "Standards Code", resulted from the Tokyo Round of multilateral negotiations. This Code permitted its limited number of signatories to introduce potentially trade-restrictive technical or sanitary and phytosanitary regulations in the pursuit of a "legitimate" objective. In light of the reforms resulting from the agricultural trade negotiations, it was felt that the relationship between health protection and trade measures required more specific and in-depth coverage than the Standards Code provided.

III. C GATT 1947 Article XX (b)

Another potential loophole existed in the GATT 1947, under Article XX, General Exceptions, point (b). Under this clause, a measure could be exempt from other GATT provisions if it was "necessary to protect human, animal or plant life or health". However, even here there were similar concerns about the misuse of the clause for domestic protection. This added further weight to the view that a self-contained agreement was needed to provide an expanded and clearer set of rules and principles regulating the application of sanitary and phytosanitary measures.

III. D Understanding the WTO Agreement on Sanitary and Phytosanitary (SPS) Measures

The SPS Agreement entered into force with the establishment of the World Trade Organization on 1 January 1995. It sets out the basic rules for food safety and animal and plant health standards. It allows

countries to set their own standards. But it also says regulations must be based on science. They should be applied only to the extent necessary to protect human, animal or plant life or health. And they should not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail.

Member countries are encouraged to use international standards, guidelines and recommendations where they exist. However, members may use measures which result in higher standards if there is scientific justification. They can also set higher standards based on appropriate assessment of risks so long as the approach is consistent, not arbitrary.

The agreement still allows countries to use different standards and different methods of inspecting products.

The main goal of the SPS Agreement is to prevent domestic SPS measures having unnecessary negative effects on international trade and their being misused for protectionist purposes.

These sanitary and phytosanitary measures can take many forms, such as requiring products to come from a disease-free area, inspection of products, specific treatment or processing of products, setting of allowable maximum levels of pesticide residues or permitted use of only certain additives in food, quarantine requirements, import bans, etc. However, although the measure may be imposed outside the territory of the importing country, its purpose must be to protect health within the territory of the importing country.

III. E Definition of SPS Measures

Sanitary measures are those related to human or animal health, and phytosanitary measures deal with plant health. The protection of fish and wild fauna, forests and wild flora are included while the protection of the environment *per se* and animal welfare are excluded. The SPS Agreement further narrows this broad definition to a limited range of solutions.

Any measure applied to protect from

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|----------------------------|--|
| (i) human or animal life | risks arising from additives, contaminants, toxins or disease-causing organisms in their food; |
| (ii) human life | plant or animal carried diseases (zoonoses) |
| (iii) animal or plant life | pests, diseases or disease-causing organisms |
| (iv) a country | damage caused by the entry, establishment or spread of pests |

III. F The Four Cases

Case 1

Protection of human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in their food. Restrictions on imports of oranges containing a certain level of pesticide residues, or regulations applied to imports of poultry products containing salmonella, and veterinary drugs given to farm animals are covered in this case.

Case 2

Protection of human life from plant- or animal-carried diseases. This includes measures taken to prevent the spread of rabies or the banning of imports of meat and meat products originating from foot-and-mouth disease regions.

Case 3

Protection of animal or plant life from the introduction of pests, diseases or disease-causing organisms. An import ban on live cattle with the objective of avoiding the introduction and spread of the disease to domestic cattle and restrictions on certain fruits from areas plagued by the fruit-fly are included in this case.

Case 4

Protection of a country from damage caused by the entry, establishment or spread of pests. The measures taken to prevent the undesired importation of certain weeds that can cause major damage in terms of crowding out domestic animal and plant species without necessarily causing a disease would fall under this fourth category.

III. G PRINCIPAL PROVISIONS OF THE SPS AGREEMENT

Article 2 (Basic Rights and Provisions) : Members must ensure that SPS measures are applied only to the extent necessary to safeguard plant, animal and human health, are based on scientific principles, and are not maintained without sufficient scientific evidence. SPS measures must not discriminate between Members where identical or similar conditions prevail, including between their own territory and that of Members.

Article 3 (Harmonization) : Members shall have their SPS measures on international standards, guidelines or recommendations (where they exist) (3. 1) , although they may adopt measures that result in a higher level of protection (3. 3) , as long as these measures are in accordance with the provisions of Article 5 (see below) .

Article 4 (Equivalence) :Members are obliged to recognize that measures adopted by other Members, although different, provide equivalent levels of protection for plant, animal and human health, if this is objectively demonstrated by the exporting country.

Article 5 (Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection) :Members are obliged to base their measures on a risk-assessment, taking into account, when possible and as appropriate, risk-assessment methodologies developed under the auspices of relevant international organizations, including the Codex Alimentarius Commission, the International Office of zootics (OIE) and the Secretariat of the International Plant Protection Convention (IPPC) . Each Member is also obliged, in order to achieve the objective of consistency in the application of SPS measures, to avoid arbitrary or unjustifiable distinctions in the levels of protection it considers to

be appropriate if the distinctions would result in disguised restriction on international trade.

Article 6 (Adaption to Regional Conditions, Including Pest-or-Disease-Free Areas and Areas of Low Pest or Disease Prevalence): This provision recognizes that SPS risks do not necessarily correspond to political borders. In particular, the Agreement recognizes that pest-or-disease-free areas are largely determined by geographic and other ecological conditions, and therefore may be part of one country, or all or parts of several countries. Therefore, import protocols must be based on a risk assessment which evaluates the claims by countries (if made) that certain regions are disease-or-pest-free.

SECTION IV

IV. A SPS: Harmonization

IV. A. 1 Definition

The SPS Agreement aims to overcome health-related impediments to market access by encouraging the "establishment, recognition and application of common sanitary and phytosanitary measures by different Members". The establishment of national sanitary and phytosanitary regulations that are consistent with international standards, guidelines and recommendations is referred to as "harmonization". The primary incentive for the use of common international norms is that these provide the necessary health protection based on scientific evidence and improve trade flows at the same time. The standards are developed by leading scientists in the field and governmental experts on health protection and are subject to international scrutiny and review.

International standards are often higher than the national requirements of many countries, including developed countries, but the SPS Agreement explicitly permits governments to choose not to use the international standards. However, if the national requirement results in a greater restriction of trade, a country may be asked to provide scientific justification, demonstrating that the relevant international standard would not result in the level of health protection the country considered appropriate.

IV. A. 2 The role of standard-setting organizations

International standard-setting organizations offer ready-made benchmarks for WTO Members to use in developing their regulations. Most WTO Members are actively involved in those fora. Together with scientists and health experts, they participate in the development of internationally-agreed standards.

IV. A. 3 The Three Sister Organizations

The SPS Agreement explicitly refers to three standard-setting international organizations whose activities are considered to be particularly relevant to its objectives: the FAO/WHO Codex Alimentarius Commission (Codex), the Office International des Epizooties (OIE), and the international and regional organizations operating within the framework of the FAO International Plant Protection Convention (IPPC). These organizations are often referred to as the "Three Sisters". They are observers and important contributors to SPS Committee meetings. They can also be called in as experts to give advice to WTO dispute settlement panels.

IV. A. 4 FAO/WHO Codex Alimentarius

The Codex Alimentarius Commission, based in Rome, is a subsidiary organ of the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO). The SPS Agreement designates Codex as the authority for all matters related to international food safety evaluation and harmonization. Several Codex activities relate to the evaluation of food-borne hazards, although Codex also develops non-health related technical food standards, like nutrition, composition, and quality standards. Codex develops scientific methodologies, concepts and standards to be used worldwide for food additives, microbiological contaminants, veterinary drug and pesticide residues to be used worldwide. It has also developed useful references like the "General Principles on Food Hygiene" and the "General Principles on Meat Hygiene".

IV. A. 5 OIE

The Office International des Epizooties (OIE) is the world animal

health organization, based in Paris. The OIE's "International Animal Health Code" and "Aquatic Animal Health Code" offer international animal health standards and procedures that are periodically amended to take into account the latest scientific research. The OIE develops manuals on: animal diseases; standards for diagnosis, vaccination, epidemiological surveillance, disease control and eradication; procedures such as disinfection and certification; and laboratory equipment. It shares scientific information with its member countries and identifies countries that are free of a particular disease.

IV. A. 6 IPPC

The International Plant Protection Convention (IPPC), based in Rome, is a subsidiary body of the FAO. Its main objectives are to take specific actions to prevent the introduction and spread of plant pests, and to promote measures for pest control, including information exchange. It has developed region-specific lists of plant pests. The IPPC develops international plant import health standards, principally on quarantine pests, a "Glossary of Phytosanitary Terms", basic principles governing phytosanitary laws and regulations, and harmonized plant quarantine procedures. The IPPC guidelines for pest risk assessment provide a scientific means for evaluating risks before governments determine the appropriate level of plant protection.

IV. A. 7 Use of international standards

Before the entry into force of the WTO, international standards, guidelines, recommendations and other advisory texts could be adopted by governments on a voluntary basis. Although these norms remain voluntary, a new status has in effect been conferred on them by the SPS Agreement. A WTO Member adopting such norms is presumed to be in full compliance with the SPS Agreement. A Member may decide to establish protection levels that exceed international standards if there is a scientific justification or if it determines that the standard does not meet its acceptable level of protection. However, in this case its measure must be based on a proper risk assessment and is subject to a range of other conditions set out in detail in Article 5 of the SPS Agreement.

IV. B SPS: Equivalence

IV. B. 1 Different ways of reducing risk

The SPS Agreement recognizes that there may be varied ways of ensuring food safety or animal and plant health protection in different countries, but provides that WTO Members should accept each other's regulations as equivalent whenever the same level of human, animal or plant health protection is achieved.

IV. B. 2 Burden of proof

The exporting country has the burden of demonstrating that its domestic sanitary requirements are at least as good as those of the importing country in that they achieve the same level of health protection. In doing so, the exporter must supply relevant information that the importer may need to form its judgement, including access to its health authorities, facilities, equipment and procedures. If the exporter's measures are found to provide the same level of health protection, they should be accepted as equivalent by its trading partners.

IV. B. 3 Bilateral consultations

The concept of equivalence requires countries to develop confidence in their trading partners' health and safety standards without compromising their own health objectives. Bilateral consultations and the sharing of information are essential to the successful negotiation of equivalence agreements.

IV. C SPS: Risk assessment

Risk assessment is a vehicle for interpreting and characterizing scientific evidence, and involves hazard identification, an estimate of the likelihood of a hazard, and an evaluation of the consequences of the hazard should it occur. Assessments are usually oriented towards the evaluation of a single target exposure that can be regarded as providing an acceptably small risk-which involves a mixture of scientific analysis, scientific opinion, and value judgments – rather than evaluating a number of risk management alternatives that provide an array of different benefits and costs for national authorities to consider. The SPS Agreement increases the transparency of sanitary and phytosanitary measures.

Countries must establish SPS measures on the basis of an appropriate assessment of the actual risks involved, and, if requested, make known what factors they took into consideration, the assessment procedures they used and the level of risk they determined to be acceptable.

IV. C. 1 The process

Members must establish SPS measures on the basis of an evaluation of the actual risks involved. The parameters used in such risk analyses commonly include substantial safety margins as a precautionary measure. The SPS Agreement encourages the use of a systematic approach to risk assessment. Risk assessments may be qualitative or quantitative. Quantitative risk assessment can be a costly process, requiring expertise, and an adequate sanitary infrastructure, and this may not always be within the reach of countries with budget constraints and scarce resources. This implies that there are significant advantages in adopting established international standards.

IV. C. 2 Consistency in risk management decisions

WTO Members have the right to determine what they consider to be an appropriate level of health protection. However, this level should be a reflection of health protection, not a means to protect domestic producers from competition. In particular, where the health risks are similar, the acceptable level of protection should normally be similar, especially if any distinction would result in discrimination or a disguised restriction on international trade.

IV. C. 3 Selection of an SPS measure

An acceptable level of risk can often be ensured in alternative ways. A government should not choose a measure that is more stringent and trade-restrictive than necessary. A complete ban on imports of wheat may be one way to limit pesticide residue levels causing certain health risks to consumers. However, the importing country's obligation under the SPS Agreement is to consider alternative measures to the ban, bearing in mind not only its health protection objectives but the potential trade effects of the measures as well. Random testing for maximum residue levels at the port of entry may be a less trade-restrictive measure than a complete ban on wheat imports, and wheat complying

with the relevant residue requirements could safely be distributed in the domestic market.

IV. C. 4 Exceptions

The SPS Agreement allows Members to take precautionary measures in cases of emergency and when sufficient scientific evidence does not yet exist to support definitive measures. For example, following the BSE scare in 1996, several emergency bans were immediately introduced. However, these emergency measures should only be provisional. Within a reasonable period of time, governments must seek the additional information needed to carry out a more objective assessment of the risks involved, and review their measures accordingly.

IV. D SPS: Disease-free areas

IV. D. 1 The Principle

Differences in climate, existing pests or diseases, or food safety conditions, make it inappropriate to impose the same sanitary and phytosanitary requirements on food, animal or plant products coming from different countries. Therefore, sanitary and phytosanitary measures sometimes vary, depending on the country of origin of the food, animal or plant product concerned. This is taken into account in the SPS Agreement. Governments should also recognize disease-free areas which may not correspond to political boundaries, and appropriately adapt their requirements to products from these areas. For example, animal diseases such as foot-and-mouth disease may be limited only to a geographical area in a country. As against this, in the past, importing countries often required the whole exporting country to be free from a disease before it could be granted access.

IV. D. 2 Burden of demonstration

The burden rests on the exporting Member (as with the Principle of Equivalence) to demonstrate that given areas within an exporting country are free from a disease. The exporting country must allow experts from the importing country to inspect the area concerned and the controls in place to check the disease from spreading. Recently, the Office International des Epizooties, the competent organization

for animal health concerns, has developed a procedure to declare a country, or a region, as free from certain diseases.

SECTION V

SPS AND RELATED ISSUES

V. A Protection or protectionism?

SPS measures may result in restrictions on trade. All governments accept the fact that some trade restrictions may be necessary to ensure food safety and animal and plant health protection. However, governments are sometimes pressured to go beyond what is needed for health protection and to use sanitary and phytosanitary restrictions to shield domestic producers from economic competition. Such pressure is likely to increase as other trade barriers are reduced as a result of the Uruguay Round agreements. A sanitary or phytosanitary restriction which is not actually required for health reasons can be a very effective protectionist device, and because of its technical complexity, a particularly deceptive and difficult barrier to challenge.

The SPS Agreement builds on previous GATT rules to restrict the use of unjustified sanitary and phytosanitary measures for the purpose of trade protection. The basic aim of the SPS Agreement is to maintain the sovereign right of any government to provide the level of health protection it deems appropriate, but to ensure that these sovereign rights are not misused for protectionist purposes and do not result in unnecessary barriers to international trade.

V. B Justification of measures

The SPS measures should meet the following desiderata :

- Reduce possible arbitrariness of decisions and encourage consistent decision-making.
- Be applied for no other purpose than that of ensuring food safety and animal and plant health. In particular, the agreement clarifies which factors should be taken into account in the assessment of the risk involved.
- Be based as far as possible on the analysis and assessment of objective and accurate scientific data.

V. C Alternative measures

An acceptable level of risk can often be achieved in alternative ways. Among the alternatives governments should select those which are not more trade restrictive than those required to meet their health objective. Furthermore, if another country can show that the measures it applies provide the same level of health protection, these should be accepted as equivalent. This helps ensure that protection is maintained while providing the greatest quantity and variety of safe foodstuffs for consumers, the best availability of safe inputs for producers, and healthy economic competition.

V. D Transparency

Governments are required to notify other countries of any new or changed sanitary and phytosanitary requirements which affect trade, and to set up offices (called "Enquiry Points") to respond to requests for more information on new or existing measures. They also must open to scrutiny how they apply their food safety and animal and plant health regulations. The systematic communication of information and exchange of experiences among the WTO's member governments provides a better basis for national standards. Such increased transparency also protects the interests of consumers, as well as of trading partners, from hidden protectionism through unnecessary technical requirements.

V. D. 1 National Notification Authority

Each WTO Member must designate a national central government authority as responsible for the implementation of the notification procedures. A list of national notification authorities and their addresses is regularly circulated by the WTO Secretariat.

V. D. 2 National Enquiry Point

Governments must also set up offices, called "enquiry points", which provide their trading partners any information requested on the application of food safety and animal and plant health regulations, the existence of equivalence agreements, or information on risk assessment procedures and decisions. The enquiry point should be able to answer any reasonable question regarding SPS measures, and should be able to provide the

texts of the new or modified regulations that were notified to the WTO together with other relevant documents.

V. D. 3 Regular Procedure

Members must inform their trading partners, through the WTO Secretariat, about new or modified SPS regulations that differ from international standards and which could affect trade. The Secretariat distributes it to all WTO Members within the shortest possible time. All notifications should be sent to the WTO Secretariat in advance of the date of entry into force of the regulation so as to give Members at least 60 days to submit their comments to the country issuing the regulation. The notifying Member may, if necessary, extend deadlines so that more inputs may be considered during this process and the regulation amended, if necessary, in light of the comments received.

V. D. 4 Format

There are standardized formats for notifying SPS regulations. The notification must specify the competent authorities and the agency responsible for promulgating the regulation. The products covered must be clearly identified. There should be an official title together with a brief abstract of the regulation as also an indication of the language in which the document is available. Members must also indicate whether an international standard exists, whether a measure is based on such a standard, and if not, how it deviates from it. For the purpose of transparency, full reference details must be indicated as well as the agency responsible for handling comments, if this is different from the designated national enquiry point.

V. D. 5 Dual Objectives

In case a single regulation addresses the twin objectives of technicality (eg. quality or labeling) and SPS, then it must be notified twice. For cross-reference purposes, the elements belonging to each category must be clearly differentiated.

V. D. 6 Emergency Procedure

In case of emergencies, unexpected disease outbreaks for instance, a notification must be made upon implementation, using the special

format developed for this purpose. Under this format, the nature of the urgent problem must be clearly stated and a period for its application must be identified. Comments may still be received from concerned WTO Members. Eventually, an emergency measure must be supported by an appropriate risk assessment and the government must stand ready to provide a scientific justification for maintaining the measure.

V. E SPS: Dispute settlement

V. E. 1 Unified WTO dispute settlement procedures

The SPS Agreement is subject to the unified WTO dispute settlement procedures. A specific food safety or animal or plant health requirement may be challenged, for example, if it restricts trade and if the scientific evidence does not appear to support its implementation. Bilateral consultations are encouraged so that countries have a chance to solve their disagreement through discussions and find a mutually acceptable solution. However, if no satisfactory solution results, the complainant(s) may request, following a 60-day formal consultation period, the establishment of a panel.

V. E. 2 Technical and scientific advice

During the course of the deliberations over a SPS trade measure, the panel may seek advice on scientific or technical issues, as it sees appropriate. Such advice can be sought from individual experts, a group of technical experts, or a relevant international organization.

V. E. 3 Alternative dispute settlement procedures

Some of the international standard-setting organizations in the SPS area, such as the IPPC, have their own procedures through which countries can settle their differences. The SPS Agreement does not limit the right of governments to use these dispute settlement procedures rather than those of the WTO. Similarly, Members of a regional organization, such as NAFTA, could choose to take SPS-related matters to that organization's dispute settlement mechanisms, or alternatively, to bring them to the WTO dispute settlement system.

V. E. 4 Cases

Since 1 January 1995, several complaints involving SPS measures

have been formally raised in the WTO. These include: inspection procedures for fresh fruits; shelf-life regulations for processed meat products; bottled water requirements; a ban on imported salmon; a ban on the use of growth-enhancing hormones in meat production; and restrictions on poultry processing methods.

THE 'HORMONES DISPUTE' CASE² : OUTCOME AND SUGGESTIONS IN IT'S LIGHT

The EU (the second largest market for US agricultural exports) ban on the import of "GMO produced"³ meat from the US is an SPS issue, particularly contentious in US-EU agricultural trade relations. On the face of it, if restrictions on bioengineered products are justified on the basis of food safety concerns, then the provisions of the SPS Agreement would apply (this is however not the case so far).

The Case : The US challenged the ban in the WTO DSB (Dispute Settlement Body) , arguing that it violated the Uruguay Round SPS Agreement. The WTO Panel ruled in August 1997 that the ban violated Articles 2, 3 and 5 of the SPS Agreement besides being inconsistent with four of it's provisions . The Panel held that the ban was not based on :

- scientific evidence (Article 3. 3)
- an assessment of the risk to health posed by meat treated with hormones (Article 5. 1)

2. The 'Estrogen Scandal' occurred in Italy in the early 1980s wherein residues of the illegal growth promotant DES were found in manufactured baby food. The 'Hormones Dispute' Case ban was proposed to allay public anxieties against this background as well as against the mis-handling of the Bovine Spongiform Encephalopathy ("Mad Cow Disease") incident.

3. The meat has been produced using growth promoting hormones. Crops produced from GMOs (Genetically Modified Organisms) are rapidly being introduced into US agriculture - include herbicide-insect and disease-resistant hybrids and varieties mainly of soyabeans and corn. Three of the six hormones at issue, oestradiol-17B, progesterone and testosterone are natural hormones while the other three, trenbolone, zeranol and MGA (melengestrol acetate) are synthetic. The hormones are variously used to increase the rate of animal growth ('growth promoting' purpose), to synthesize the estrus cycles of dairy cattle to lower costs of production ('zotechnical' purpose) or to correct certain endocrine dysfunctions ('therapeutic' purpose) .

- existing international standards (Article 3.1).
- In addition, the ban provided a level of protection different from that provided by other EU measures, and this resulted in a disguised restriction on trade (Article 5.5).

In sum, the Panel suggested voluntary labeling of such hormone-aided products but none of the parties has endorsed it to date. The EU appealed the ruling and on 16th January 1998, the Appellate Body of the WTO upheld the Panel's ruling, but the option to the EU to conduct a risk assessment of hormone-treated meat was left open and the EU was given fifteen months to implement the Panel decision (withdrawal or modification of the ban).

The US Perspective : It wants the ban to be lifted immediately while the EU conducts its new risk assessment. Concerned about the continuing loss of the EU as an export market for meat, the US meat producers and exporters see the ban as a disguised barrier. Moreover, the US fears that other countries might resort to a similar ban.

The EU Perspective : It plans to keep the ban in place while it conducts its risk assessment, being under considerable political pressure as it is from consumer and environmental groups. After the risk assessment, the EU will either have to implement the WTO Panel decision or will need to negotiate compensation to the US for its lost export sales.

Critical Evaluation : This case is a manifestation of the 'Biotechnology Issue' in general which has caused widespread concern among consumers in the EU especially in the aftermath of the "Mad Cow Disease" episode. The outcome of the case is likely to dominate any judgement about whether the SPS Agreement has struck the proper balance between the advocates of consumer/environmental activism and those of free trade. Nevertheless, critics have pointed out that there exists too great a burden on the regulatory authority to justify SPS measures. Still, against the background of this case and the rulings made so far, it must be said that those who voiced concerns over "downward harmonization", "precautionary principle" and the use of SPS measures as a non-transparent barrier to trade should be satisfied. One must add though that any such judgement that rests on the final outcome of

this case is complicated by the fact that it is not yet known how the EU will fulfill its obligation to bring its measures into conformity with the Agreement. Even so it does warrant greater clarity and transparency in the rules governing biotechnology trade.

General Implications : Many SPS disputes in the coming years will centre on different risk assessment posed by biological stressors like noxious weeds, yield-reducing arthropods or food-borne microbial pathogens. The current state of biological risk assessment methodology could therefore represent one of the principal challenges to effective enforcement of new WTO disciplines in the near future.

Legal Implications : The case provides supplementary evidence for the observation by legal scholars that the hardest cases for WTO dispute panels will involve facially neutral measures ie. those applying equally to domestic and foreign producers. Moreover, controversy over panel decisions could be compounded in cases of this ilk where the measures at issue could be viewed as a hybrid of protection and protectionism.

Implications for Public Policy : Studies indicate that the occurrence of a low probability, high consequence event, can cause the public's estimate of the probability of the re-occurrence of the event to be biased upward, thereby fomenting demand for stricter regulations. Regulators have sometimes decided to design policies that reflect public risk perceptions, defending their choices by pointing to the democratic foundations of their actions.

Implications for the WTO : Successful challenges of measures whose most visible votaries are consumer or environmental groups as opposed to domestic producers, can quickly undermine popular support of trade liberalisation efforts. The technical complexity of these cases can make refutation of such claims by consumer/environmental groups difficult for proponents of free trade. One of the principal lessons is that risk assessment may not only serve as the normative basis for SPS decisions, but will also constitute key evidence in SPS disputes. Risk assessment as typically performed by regulatory bodies may make judgement about a measure's conformity with the SPS disciplines difficult.

Two particularly significant decisions in this context are (a) what is the definition of "safe" and (b) what are the assumptions that underpin the determination of "safe"?

V. F SPS: Developing countries

V. F. 1 Special and Differential Treatment

Developing country Members have the "right to delay application of the Agreement with regard to measures affecting imports". Compliance with SPS rules and principles was delayed for 5 years following the entry into force of the Agreement for least-developed countries (until 2000) , and 2 years for other developing countries (until 1997) . This delay was intended to give developing countries the time necessary to adopt international standards or otherwise develop their national SPS regulatory framework on the basis of scientific principles. During this grace period, their SPS measures directly or indirectly affecting trade flows cannot be challenged under WTO rules. The SPS Committee may grant longer time-frames for compliance with some or all of the obligations upon special request.

V. F. 2 Technical Assistance

The Agreement calls for assistance to developing country Members to enable them to strengthen their food safety and animal and plant health protection. These countries may ask for technical assistance during SPS Committee meetings. Members are encouraged to provide technical assistance on a bilateral basis or through other international organizations. Such assistance can be in the area of processing technology, research or infrastructure development, and may take the form of technical advice, expertise, financial assistance or procurement of adequate equipment. OIE technical assistance activities include development of animal health and epidemiology networks, programmes for eradication of foot-and-mouth disease, and information exchange. Several FAO programmes focus on food safety and Codex standards, as well as the assessment of food control systems. Other FAO programmes address needs in establishing plant protection structures.

V. F. 3 Training Activities

A number of regional seminars in Asia, Latin America, Africa, Eastern Europe and the Middle East have been carried out by the WTO Secretariat in cooperation with Codex, OIE and IPPC. At the invitation of national governments or private associations, the Secretariat also participates in various workshops and seminars related to the SPS Agreement. The SPS Agreement also features regularly on the agenda of the WTO Training Courses. Codex is involved with several cooperation projects worldwide and has carried out numerous workshops related to the implementation of the SPS Agreement and Codex standards. The OIE addresses activities such as harmonization of the registration of veterinary drugs, training in epidemiology and control of vaccination, disease information and control, surveillance systems, and risk assessment methods. The FAO provides considerable training in the development of plant protection systems. The WTO Secretariat also provides technical assistance through national workshops and to governments through their representatives in Geneva.

V. G Who benefits from the implementation of the SPS Agreement?

- **Consumers** in all countries benefit. The SPS Agreement helps ensure, and in many cases enhances, the safety of their food as it encourages the systematic use of scientific information in this regard, thus reducing the scope for arbitrary and unjustified decisions. The elimination of unnecessary trade barriers allows consumers to benefit from a greater choice of safe foods and from healthy international competition among producers.
- Specific sanitary and phytosanitary requirements are most frequently applied on a bilateral basis between trading countries. **Developing countries** benefit from the SPS Agreement as it provides an international framework for sanitary and phytosanitary arrangements among countries, irrespective of their political and economic strength or technological capacity. **Without such an agreement, developing countries could be at a disadvantage when challenging unjustified trade restrictions.** Furthermore, under the SPS Agreement, governments must accept imported products that meet their safety

requirements, whether these products are the result of simpler, less sophisticated methods or the most modern technology. Increased technical assistance to help developing countries in the area of food safety and animal and plant health, whether bilateral or through international organizations, is also an element of the SPS Agreement.

- **Exporters** of agricultural products in all countries benefit from the elimination of unjustified barriers to their products. The SPS Agreement reduces uncertainty about the conditions for selling to a specific market.
- **Importers** of food and other agricultural products also benefit from the greater certainty regarding border measures. The basis for sanitary and phytosanitary measures which restrict trade are made clearer by the SPS Agreement, as well as the basis for challenging requirements which may be unjustified. This also benefits the many processors and commercial users of imported food, animal or plant products.

SECTION VI

The Developing Countries Perspective

In the negotiations on SPS measures, the developing countries were active participants, often represented by their national food safety or animal and plant health experts. Although a number of developing countries have excellent food safety and veterinary and plant health services, others do not. For these, the requirements of the SPS Agreement present a challenge to improve the health situation of their people, livestock and crops which may be difficult for some to meet. Because of this difficulty, the SPS Agreement delayed all requirements, other than those dealing with transparency (notification and the establishment of Enquiry Points) , until 1997 for developing countries, and until 2000 for the least developed countries. Countries which need longer time periods can request the SPS Committee to grant them further delays.

Many developing countries have already adopted international standards (including those of Codex, OIE and the IPPC) as the basis

for their national requirements. The SPS Agreement encourages them to participate as actively as possible in these organizations, in order to contribute to and ensure the development of further international standards which address their needs.

Still developing countries do pose a special problem and there exist numerous issues especially pertaining to the "technical assistance" provision of the SPS under Article 9. Despite growing concern that certain SPS measures may be inconsistent with the SPS Agreement and unfairly impede the flow of agricultural trade, developing countries are not well positioned to address this issue.

- There continues to be a need for expanding the knowledge and understanding of the Agreement. Uncertainties remain, in particular, with regard to the difference between the coverage of the SPS Agreement and the Agreement on Technical Barriers to Trade.
- In many countries, co-ordination and exchange of information on a national level, within and among the three sectors – food safety, animal and plant health – needs to be further developed.
- There is a growing need for more technical assistance with regard to the establishment of national regulatory frameworks, including the development of legislation.
- They lack complete information on the number of measures that affect their exports.
- They are not sure whether these measures are consistent or not with the SPS Agreement.
- They do not have reliable estimates on the impact of such measures on their exports.
- They experience serious problems on scientific research, testing, conformity assessment and equivalence.
- They are unable to effectively participate in the international standard-setting process and so face difficulties when requested to meet SPS measures in foreign markets based on international standards.
- Transparency-related requirements represent a burden for them as they are often unable to benefit from them due to lack of appropriate infrastructure.

- The provision of adaptation to regional conditions (which would be of great benefit to developing countries) has been little used due to the difficulties related with its scientific side.
- The provisions relating to special and differential treatment remain rather theoretical and apparently have not materialized in any concrete step in their favour.

Given this, the best option for them is to become able to respond to the exigencies which are emerging in their target markets as well as to the wishes and expectations of final consumers, by providing good quality and safe products. This implies building up knowledge, skills and capabilities. Strengthening domestic capacities would also help them to identify products that they may wish to keep out of their markets due to the potential negative impact on local people's health, animal health and the environment. And most importantly, the developed countries and the pertinent international organizations should be willing to support them in this endeavour. And so far as the problems vis-à-vis the "technical assistance" provisions are concerned, Members and the relevant international organizations may wish to consider the expansion of their technical assistance programmes. In turn, the developing countries may make better use of these provisions and may take advantage of the existing opportunities for technical assistance from the appropriate institutions.

SECTION VII

SPS AND INDIA

I begin this section by discussing certain cases of trade restrictions involving India to illustrate the application of these measures in the new economic order. I then give an account of India's stand on some of the provisions of the SPS Agreement. The entire section serves to highlight the position of a developing country like India vis-à-vis these measures, following from the section above that talked about developing countries in general.

VII. A Illustrative Cases

VII. A. 1 Restriction on the Export of Bovine Semen to India

As mentioned in the beginning, India imposed these restrictions in the aftermath of the "Mad Cow Disease" scare in Europe. However, the EU maintained that this violated Article 5. 8 of the SPS Agreement and further stated that India chose not to refer to the OIE guideline regarding such trade in semen. The negotiations are currently at a stalemate.

VII. A. 2 Restriction on the Export of Horses to India

These restrictions are based on the age of the animals and as in the above case, the EU alleges that they violate Article 5. 8 of the SPS Agreement. They state that the import restrictions are based on the presence of cases of contagious equine metritis (CEM) which has never before been an obstacle to trade and feel that India has gone beyond the OIE guidelines about CEM. The matter is yet to be decided.

VII. A. 3 Restriction on certain European Import Duties on Rice from India

India feels that export of basmati rice has been especially affected by this restriction, introduced by the EU through the Cumulative Recovery System (CRS) , which it regards as an infringement of Article 2 of the SPS Agreement among others. The issue is still not settled and India considers that the benefits accruing to it directly or indirectly under the Agreement are being nullified or impaired due to the failure of the EU to carry out its obligations under the provisions of the Agreement.

VII. A. 4 Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products from Europe

The EU considers these as an infringement of Articles 2, 3 and 5 of the SPS Agreement among others. On April 7, 1998 the two parties notified a mutually agreed solution.

VII. A. 5 Draft Regulation - Aflatoxin Control

This pertains to the EU's proposal to adopt a new regulation to establish maximum limits for aflatoxins in groundnuts, nuts and dried fruit and processed products thereof; cereal and processed products

thereof; and for milk and milk products. India maintains that these levels are unjustifiably low in relation to consumer aflatoxin exposure and potential risk and that they will inevitably lead to serious trade disruptions without a corollary increase in consumer protection. Further, India feels that the provisions for multiple sampling and analysis will greatly increase handling costs with no appreciable reduction of aflatoxin contamination in consumer products. India is also concerned that these measures have been notified even while the Codex is seized of the matter, especially since the maximum permissible levels which the EU proposes to implement are much higher/stringent than those under consideration in the Codex Committee. In sum, India holds these violative of Articles 3. 1, 5. 4 and 5. 6 of the SPS Agreement. The issue is still not settled.

VII. B India's Stand on Certain Provisions of the SPS Agreement

VII. B. 1 International Harmonisation of SPS Standards

India is not satisfied with Articles 3. 1 and 12. 4 of the SPS Agreement vis-à-vis the International Harmonisation Principle. In particular, India points out the following drawbacks :

- The definition of "international standard" is vague. The criteria adopted for determining an international standard is rather general and broad-based.
- Ineffective participation by the majority of the developing countries primarily due to the paucity of background research that is needed for the submission of technical papers.
- Due to the non-participation of developing countries in the proceedings of various international organizations engaged in standardisation, these standards get fixed by default and consequently, the measures based on these standards are difficult to be complied with by the developing and the less-developed countries, particularly since the safety limits in many cases are prescribed without conducting any clinical study in the developing countries with regard to contaminants, pesticides, animal diseases, etc.
- The two major international organizations in the area of standards

for food viz. the ISO (International Standardisation Organization) and the Codex follow different standards-formulation procedures so that there is no uniformity.

- There is no longer any consensus in international organizations like the Codex while formulating standards and more and more standards are now being adopted by a majority vote.
- Increasing involvement of interest groups and lobbies (Government, the business community and environmental groups) in the standardising work may lead to the politicization of standardisation activities that may have serious ramifications on the role of science in the formulation and adoption of international standards.

India offers the following suggestions to tackle the above shortcomings :

- More precise definition of international standards.
- The SPS Committee should evaluate what steps have been taken by the international standardising bodies to ensure effective participation of developing country Members in the adoption of standards.
- Steps should be taken to ensure that international standards, guidelines or recommendations pertaining to developing countries accommodate their development and trade needs and are compatible with their prevailing level of technological and socio-economic development and trade.
- Need to adopt consensus-based decision making in the international organizations.

VII. B. 2 Special and Differential Treatment and Technical Assistance

India is of the view that the SPS Agreement strives to achieve the twin objectives of providing Members the flexibility to adopt such measures as may be necessary to protect human, animal or plant life or health, while at the same time specifically providing that such measures do not constitute a disguised restriction to international trade. Issues related to "special and differential provisions" and "technical assistance" are, therefore, fundamental to an analysis that seeks to examine whether the twin objectives mentioned above have been achieved.

VII. B. 2. 1 Special and Differential Provisions

As against what has been laid out in Article 10 of the SPS Agreement regarding the "Special and Differential Provisions" accorded to developing countries, India makes the following observations :

- The provisions of Article 10 remain as general guidelines instead of having been transposed into more specific, and perhaps mandatory obligations.
- Constraints of infrastructure, technology, finance and skilled manpower together with the preponderance of small scale industries and peasant farming in the production pattern makes it difficult for developing countries to achieve some of the standards set by the developed countries. Consequently, their market access suffers, especially since they often find it difficult to adjust to constantly evolving SPS measures.
- The absence of specific international standards, guidelines or recommendations often means that exports of the same product from developing countries have to comply with varying standards.

In view of the above, India makes the following suggestions :

- Examination of the action taken by developed country Members, since the entry into force of this Agreement is to take into account the special development, financial and trade needs of developing country Members in the implementation of the Agreement.
- Examination of the steps taken to engender the capacity of developing country Members to prepare and adopt SPS measures, keeping in view their technological and socio-economic constraints, and thereafter suggestion of measures which could be taken in the future to enhance this capacity.
- Undertake a study to identify the market access barriers faced by developing country suppliers in the context of SPS standards.
- The "grace period" accorded to developing country Members to bring their standards in conformity with international standards needs to be extended.

VII. B. 2. 2 Technical Assistance

With regard to the "Technical Assistance" provisions under Article 9 of the SPS Agreement, it has been observed that so far technical assistance has largely comprised holding seminars and workshops of a general nature. However, India feels that given the low levels of processing technology available within the developing countries, technical assistance today is primarily needed in setting up the requisite infrastructure necessary for ensuring quality testing in accordance with international standards. A mechanism, therefore, needs to be set up whereby technical assistance and training provided, including in the areas of risk analysis and techniques of risk assessments, are monitored in the SPS Committee, perhaps through annual notifications.

The provision also mandates that where substantial investments are required by an exporting developing country Member to fulfil the SPS requirements of an importing Member, the latter shall consider providing such technical assistance. But India observes that this too has been an exception rather than a rule.

Thus, India has the following specific suggestions vis-a-vis technical assistance :

- The provisions of Article 9 should be translated into specific and implementable guidelines so that positive gains of this clause accrue to developing country Members.
- It would be important to consider measures which would help in the transfer of technology on preferential and non-commercial terms to developing countries for preparing and adopting standards conducive to their technical and socio-economic conditions and to their development, financial and trade needs.
- It may be appropriate to give on-the-job training for representatives of different developing country industries in their developed country counterparts for imbibing the necessary technology required to meet the SPS standards set for these industries.

VII. B. 3 Transparency

As regards the transparency provisions under Article 7 of the SPS

Agreement, India feels that the issue needs to be considered in a broader perspective and cannot be limited to issues of notification and the need to ensure fulfilment of notification obligations alone. In particular, India considers two broad aspects :

- It is of vital importance to ensure that all Members are up-to-date in the fulfilment of their notification obligations with respect to the implementation of the Agreement.
- It is crucial to ensure that the process of developing SPS measures is made as transparent as possible, especially in view of the potential that these measures have for affecting international trade.

India has observed the following problems in this regard :

- Very often the notifications of Members do not contain the details regarding the methodology of risk assessment and the factors taken into account for determining the appropriate level of SPS protection.
- At times, more than one domestic agency, within a Member country, is involved in establishing these standards.
- The documentation/information provided is at times in the language of the importing country which may not necessarily be one of the official languages of the WTO.
- Moreover, requests for detailed information are responded to after considerable time has elapsed and often after the expiry of the time period for making comments, rendering the whole exercise futile.
- Annex B pertaining to SPS regulations stipulates that the proposed regulations be discussed bilaterally upon request. However, at times the comments are not given due consideration by the notifying Member, and the entire procedure is gone through only routinely.
- At times, there is also a lack of awareness about the legislative requirements of the importing country.

India has the following suggestions to make on this :

- It needs to be strictly ensured that the notification is in one of the official languages of the WTO only, and not in any other language

- The Agreement does not specify what should be deemed to be a sufficient time interval between the circulation of a proposed measure and its entry into force. This time issue needs to be addressed in the review of the Agreement.
- Members should specifically respond to Members who have submitted comments or raised objections on the proposed notification and may use the Internet for this purpose. This would go a long way in increasing the transparency in the procedure.
- It would be suitable to create a suitable data base incorporating Member's SPS rules and regulations having a major trade impact so as to provide precise knowledge about the SPS requirements of various countries. It may be useful to circulate standards on the Internet to facilitate easier and quicker accessibility.

SECTION VIII

VIII. A SPS: The Committee

The SPS Agreement established a Committee on Sanitary and Phytosanitary Measures (the "SPS Committee") to provide a forum for consultations about food safety or animal and plant health measures which affect trade, and to ensure the implementation of the SPS Agreement. The SPS Committee, like other WTO committees, is open to all WTO Member countries. Governments which have an observer status in the higher-level WTO bodies (such as the Council for Trade in Goods) are also eligible to be observers in the SPS Committee. The Committee has agreed to invite representatives of several international intergovernmental organizations as observers, including Codex, OIE, IPPC, WHO, UNCTAD and ISO.

Members are required to give advance notice of proposed new sanitary and phytosanitary regulations, and to provide an opportunity for other trading partners to comment on these proposed regulations before they are implemented. The SPS Committee has developed procedures to ensure the full implementation of these requirements and has agreed on the formats to be used for both advance notifications and notification of emergency actions. Members may raise questions

and concerns regarding specific notifications at any of the SPS Committee meetings. They may also discuss any issues related to sanitary or phytosanitary measures and the implementation of the SPS Agreement.

The SPS Committee usually holds three regular meetings each year. It also holds occasional joint meetings with the TBT Committee on notification and transparency procedures. Informal or special meetings may be scheduled as needed.

The SPS Committee is developing a procedure to monitor Member's use of international sanitary and phytosanitary standards and has been considering some proposals in this regard. The Committee has also begun work on the development of guidelines to facilitate government's implementation of obligations related to decisions taken on what constitutes an appropriate level of health protection.

Finally, the SPS Committee notes that it will undertake appropriate work for a periodic review of the operation and implementation of the SPS Agreement.

VIII. A. 1 Role

The SPS Committee is the forum for discussion, information exchange and, where appropriate, resolution of sanitary and phytosanitary issues. It is open to all WTO Members, who often send capital-based food safety and animal and plant health experts to attend the meeting. Observer status has been granted to the OIE, Codex, IPPC, WHO, FAO, UNCTAD, ITC and ISO.

VIII. A. 2 Regular tasks

VIII. A. 2. 1 Reviewing implementation

The Committee reviews the implementation of the SPS Agreement. It periodically receives updates on new or proposed SPS regulations and procedures that explicitly address Members' obligations stemming from the SPS Agreement. It considers information provided by governments regarding their national regulatory procedures and their institutional infrastructures. The Committee is also being informed of the initiatives undertaken by Members to negotiate equivalency agreements on sanitary and phytosanitary matters with their trading partners.

VIII. A. 2. 2 Checking compliance

Members are encouraged to bring specific trade concerns to the attention of the Committee related to specific notifications or trade measures. The SPS Committee also considers issues of a more general concern. It provides a forum for multilateral consultation. Issues raised during past meetings include regulations restricting imports of cheese made of unpasteurized milk; regulations imposing government-mandated shelf-life period for heat-treated milk; restrictions on levels of copper and cadmium in imported squid; and zero-tolerance levels for salmonella in imported poultry products. Considerable discussion has focused on bovine spongiform encephalopathy (BSE or "mad cow disease") and related trade measures. The Committee has also discussed the information exchange procedures of Members, and procedures commonly followed in the establishment of maximum residue levels.

VIII. A. 3 Specific tasks

VIII. A. 3. 1 Monitoring the harmonization process

The SPS Committee is specifically mandated to develop a procedure to monitor the use of international standards, guidelines and recommendations. In October 1997, the Committee agreed, on a provisional basis, to examine those international norms which Members identify as of particular importance.

VIII. A. 3. 2 Drafting guidelines on consistency

The SPS Agreement specifically seeks to reduce arbitrariness in decision-making processes so that the level of acceptable risk is determined in the most objective manner, and SPS measures are not used for trade protectionism. In this respect, the Committee is developing guidelines to further the practical implementation of a provision related to the objective of achieving consistency in the application of the concept of the appropriate level of protection for human, animal or plant health.

VIII. A. 3. 3 Liaison and coordination

The effective implementation of the SPS Agreement requires close contact and coordination with technical international organizations in the field of SPS protection, and in particular with the "Three Sisters".

International organizations play an important role in the implementation of the objectives of the Agreement. They are active participants and contributors to the work of the Committee.

SECTION IX

THE 1998 REVIEW OF THE OPERATION AND IMPLEMENTATION OF THE AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

IX. A Introduction : The review was conducted by the Review Committee under Article 12. 7 of the SPS Agreement which says a review has to take place three years after the agreement came into force - 1st January, 1995 - and after that when necessary. Article 12. 7 says the committee can recommend changes to the agreement, but no such recommendation was made in this report made public on 11th March, 1999. The Review, essentially of the first three and a half years of SPS, maintains that these measures have clarified trade issues.

In its discussion of issues concerning the operation and/or implementation of the Agreement, the Committee focussed especially on the provisions relating to transparency of sanitary and phytosanitary measures (Annex B), including the notification procedures; special and differential treatment of developing country Members (Article 10) and technical assistance (Article 9). The Committee also discussed international harmonization (Article 3); equivalence (Article 4); adaptation to regional conditions (Article 6); risk assessment (Article 5); and dispute resolution (Articles 11 and 12. 2).

IX. A. 1 General : The SPS has helped to defuse potential disputes, to improve trading relations between countries, and to help countries be better informed about each others' food safety concerns albeit the agreement is still a new framework for dealing with regulations and actions related to food safety and animal and plant health. Even so the report points out that formal disputes have been avoided in several other cases because of discussions under the agreement. Since its inception, the Committee has adopted a number of decisions, recommendations

and arrangements aimed at improving the operation and implementation of the Agreement. However, it recognized that a number of issues needed to be addressed in the context of the future work programme of the Committee, and that further issues could be raised at any time by Members. The report does not go into details, but among recent subjects the Committee has discussed are new EU limits for aflatoxin (a cancer-causing poison associated with a fungus) in a number of products, a US restriction on certain solid wood packaging materials designed to combat infestation of Asian longhorn beetles, and various countries' measures in response to bovine spongiform encephalopathy (BSE, or "mad cow disease"). In some cases, the measures have been modified after countries discussed them in the SPS Committee and through other channels.

IX. A. 2 Transparency of Sanitary and Phytosanitary Measures (Annex B) : The report mentions that among the most important achievements is the way governments are keeping each other better informed about the application of sanitary and phytosanitary measures. "As of 11 March 1999, over 1, 100 notifications had been submitted by 59 members; 91 members had established National Notification Authorities; and 100 members had established National Enquiry Points to respond to requests for information," the report said. The increased transparency has helped countries avoid trade conflict in this area, and a substantial number of SPS-related trade matters had been resolved following their discussion at formal meetings of the committee or bilaterally. However, there is room for improvement in transparency. The Committee agreed on a new format for increasing the relevant information supplied in notifications, and it urged member governments to use the Internet to publish their regulations and improve transparency. The Committee also stressed the need for an accurate summary of the notified measure in one of the WTO official languages. It noted that a number of the other concerns identified in this area could be addressed by modification or clarification of the recommended procedures. In this regard, the Committee agreed to the revised recommended notification procedures and notification formats contained in the Annex of this report.

IX. A. 3 Technical assistance (Article 9) : The Committee stressed the need for enhanced technical assistance and cooperation to developing countries, in particular with regard to human resource development, national capacity building and the transfer of technology and information, particularly by way of concrete, "hands-on" assistance. It recognized that technical assistance has been provided to developing country Members by Members on a bilateral basis and by the Secretariat and other international organizations like WHO, FAO and ITC (International Trade Centre) . However, the Committee emphasized that there was still a need for further assistance which, due to the expertise required, could best be provided by the relevant standard-setting international organizations. This could have a significant impact on the resources of these bodies and/or Members' resources.

IX. A. 4 Developing Countries - Special and differential treatment (Articles 10 and 14) : Some of the concerns raised came, in particular, from developing countries in terms of the lack of money and the people to deal with the complex and scientific SPS issues such as adopting international standards. They also have difficulties in participating in the development of these standards. Although the Committee stressed that Members should accord longer time-frames for compliance on products of interest to developing country Members so that they can continue to export, it said that it had no information how this provision was being implemented.

IX. A. 5 International harmonization (Articles 3 and 12. 4) : The Committee noted the concerns raised by developing country Members with regard to the procedures for the development and adoption of international standards, including difficulties in actively participating in the development of international standards and the lack of a mechanism to take into account the economic and technical capacity of developing country Members to implement such standards. However, the Committee considered that it was more appropriate for these concerns to be addressed within the relevant international organizations. It noted that some of these issues were already under discussion in the standard-setting bodies, including an evaluation of how to ensure a greater and more effective

participation of developing countries in the development and adoption of international standards.

IX. A. 6 Equivalence (Article 4) : While recognizing that further discussions were necessary regarding this issue, the Committee noted the progress in the application of the concept of equivalence of sanitary and phytosanitary measures as illustrated by the increasing number of instances where equivalence has been accepted and of negotiations aimed at the recognition of equivalence. The Committee recognized the need for further efforts to achieve the practical application of this provision, including with respect to recognition of equivalence of measures applied by developing country Members. In this context, the Committee stressed the need for Members to provide relevant information regarding the determination of their appropriate level of protection and to recognize equivalence rather than sameness of measures. With a view to further enhancing transparency, it encouraged Members to submit information on their bilateral equivalency agreements and determinations.

IX. A. 7 Adaptation to regional conditions (Article 6) : The Committee welcomed the application of these concepts by an increasing number of Members. However, the Committee also noted certain difficulties in the implementation of this Article. Such difficulties included divergences in interpretation and implementation of international guidelines; an excessively lengthy administrative process in importing countries for recognizing pest- or disease-free areas or areas of low pest or disease prevalence; and the complexities often involved in risk assessment.

Finally, the Committee observed that extensive discussions on particular implementation problems at its formal meetings had helped to draw attention to specific trade concerns and related issues and to avoid potential trade conflicts.

SECTION X

THE SPS AGREEMENT AS A CATALYST FOR REGULATORY REFORM

Legal scholars have noted that the mere formal existence of the SPS Agreement and the new WTO Dispute Settlement procedures does not guarantee the imposition of greater discipline in the disingenuous use of SPS barriers, but may contribute to matters being resolved without recourse to lengthy, and sometimes fractious, dispute settlement proceedings. This is exemplified by the US's recent adoption of its "regionalization region" - a significant departure from its long-standing practice of only recognizing entire countries as "free" or "not free" of a particular disease. (This has favourably helped the import of uncooked beef from Argentina as well as those of Mexican avocados.)

Members have also used the SPS Committee forum to air grievances over SPS measures when bilateral technical exchanges have reached an impasse. This has sometimes led to the correction of erroneous accounts of trade barriers reported by industry sources. This has been demonstrated by the South Korean change in policy regulating government mandated shelf-life standards wherein formal consultations led to a negotiated settlement.

The transparency provisions offer the greatest promise of effective implementation of the new disciplines. However even after five years of entry into force of the Agreement, complete transparency still remains a goal. It is too early to judge if the transparency provision will significantly curb regulatory protectionism, but in the short run, its contribution to promoting symmetry of information among Members should be recognized.

SECTION XI

Recommendations

The benefits of trade liberalization in the agriculture sector achieved by the Uruguay Round negotiations could be undermined by the

protectionist use of sanitary and phytosanitary measures. The SPS Agreement was negotiated to limit this danger and represents a useful instrument for this purpose, but it has its shortcomings. It could thus be worth considering the introduction of certain amendments to the legal text to ensure that the risk of using SPS measures as border protection instrument is minimized, while all countries benefit equally from the Agreement.

The following articles would need some kind of revision :

Article 3. Due to the feeling of the developing countries about their ineffective participation in the international standard-setting process, reference should be made in the Article to the need for international standards to be developed through a fair process, based on consensus, where countries at different levels of development and from different geographical regions are effectively represented. The SPS Committee could be encouraged to develop a set of rules that the relevant international organizations should adhere to in the process of standard-setting.

Article 4. Equivalency is being interpreted as "sameness". This interpretation is depriving Article 4. 1 of its function, which is to recognize that different measures may achieve the same level of SPS protection and, therefore, countries can enjoy a certain level of flexibility regarding the kind of measures to adopt. This could be spelled out more clearly in the Article. Considering that one of the main difficulties developing countries face in this field is the lack of recognition of their conformity assessment certificates, the setting up of internationally - financed regional or sub-regional laboratories, certification bodies and accreditation institutions should be included in this Article. These institutions would function under the supervision of the Codex Alimentarius Commission, the OIE, and the Secretariat of the IPPC.

Article 6. The adaptation to regional conditions is of key relevance to developing countries. However the procedures to prove that some

areas are pest- or disease-free or at low risk are usually long and burdensome and often include the need to provide complex scientific evidence - a considerable investment, the return on which is a critical issue for developing countries. Therefore, clear reference should be made in the Article to the effect that scientific and administrative support shall be provided by international organizations and developed countries to developing countries to facilitate the implementation of the provisions on adaptation to regional conditions. Moreover, if a country, or an area within a country, has been recognized free from a certain disease by the competent international organization, the disease-free status should also be recognized by all trade partners, without the need to provide additional evidence.

Article 9. Technical assistance is essential to facilitate developing country fulfilment of the obligations of the Agreement. Since the Agreement puts emphasis on the scientific side, technical co-operation should be extended to this area. Article 9 should, therefore, make reference to the upgrading of personnel and equipment of laboratories, certification bodies and accreditation institutions and to strengthening developing countries' ability to deal with scientific issues, especially those related to risk assessment and to the recognition of pest- or disease-free areas and areas of low pest or disease prevalence. The connection between credits, donations and grants on one side, and developing country ability to establish the necessary infrastructural and other conditions necessary to the effective implementation of the Agreement, on the other, should also be stressed.

Article 10. Developing countries should be entitled to receive special support from their trade partners and from the relevant international organizations in relation to agricultural products of particular export interest to them to ensure that SPS measures do not hamper their exports of these listed products.

SECTION XII

Concluding Remarks

The challenge before the negotiators of the SPS Agreement was to create a set of rules which would strike the proper balance between allowing protection while disallowing regulatory protectionism. **One of the principal challenges to effective enforcement of new WTO disciplines in the near future may be the current state of risk assessment methodology and practice.**

The outcome of the 'Hormones Dispute Case' is likely to dominate any judgement about whether the SPS Agreement has struck the proper balance between the advocates of consumer/environmental activism of free-trade. Against the background of this case and the rulings made so far, those who voiced concerns over "downward harmonization", "precautionary principle" and the use of SPS measures as a non-transparent trade barrier should be satisfied. One must add though that any such judgement that rests on the final outcome of this case is complicated by the fact that it is not yet known how the European Union will fulfill its obligation to bring its measures into conformity with the Agreement.

The effectiveness of the new WTO/GATT "hard law" system still depends fundamentally on the political will of the WTO Members to comply with legal discipline over their policies. Here, the SPS agreement must be credited with being an important contributing factor in prompting/prodding Members to revise some restrictive SPS policies which have eased bilateral trade relations, notably between the US and East Asia and between the US and Latin America.

Compliance with the transparency provisions of the SPS Agreement may weigh heavily in future evaluations of whether the Agreement has made a significant contribution to the liberal international trading system. Changes in regulatory regimes, are the norm, not the exception, and these changes will likely continue to spawn disagreements between importers and exporters.

Further, study of individual SPS measures will provide evidence about the degree to which these disciplines contribute to good economic policy. **Nothing in the Agreement requires countries to enact only those measures whose "benefits" outweigh the "costs"**. The Agreement appears to be firmly rooted in a risk assessment paradigm, which embeds value judgements about "acceptable" risks into regulatory policies, rather than an economic paradigm in which normative values rest on cost-benefit analysis to infer appropriate levels of protection from individual preferences. In many cases, sound Science is compatible with sound Economics, but in others, SPS regulations may have net economic costs even if they have solid scientific justification. This is demonstrated by two recent studies of quarantine policies – the US geographic/seasonal ban on Mexican avocados and the Australian ban on bananas – which underscore the point that restrictive measures can produce consumer welfare losses that exceed the domestic costs of possible pest infestation.

A larger question is whether the Agreement could actually hinder efforts to base SPS measures on economic efficiency criteria if policy makers choose to do so. A recent study by Donna Roberts (USTR Mission to the WTO) notes that the Agreement is ambiguous about the standing that trade benefits should have in SPS regulatory decision-making, creating uncertainty about the WTO legality of measures based on cost-benefit analysis in some circumstances. Overtime, one can anticipate that further research will permit more substantive judgment about how well the legal principles of the WTO/GATT system function to address SPS measures and how might they be improved.

And what does all this imply for India? Being a signatory to the WTO Agreement, India is bound by its commitment to respect the various obligations under the Agreement which also includes the SPS Agreement. Besides being the world's largest democracy and a fast-growing economic superpower, India is also a very important Member of the developing world and hence, it is up to India to use the SPS Agreement not only to its own advantage but also to advance the cause of the developing countries in general. India has already been a keen

participant in this process as evidenced by its stand on the various provisions of the SPS Agreement as also by its approach in the various cases relating to trade restrictions on/from its trading partner. India has continuously been voicing its concern vis-à-vis the SPS measures and provisions before the Dispute Settlement Body and the SPS Committee. India must ensure that the special dispensation accorded to developing countries in the SPS Agreement is translated into reality by Members and relevant changes take place overtime to suit the special needs of the developing world. In fact, the SPS measures are a significant medium for India to drive home the point that unless developing countries are able to derive the benefits that they have legitimately expected from the multilateral trading system by entering into different arrangements under the WTO Agreement, it would be extremely difficult for them to be expected to proceed further along the path of trade liberalization.

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