

THE SPS AGREEMENT: SOME ISSUES FOR SMALL ISLAND STATES

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I INTRODUCTION

Sanitary and phytosanitary (SPS) measures are of considerable importance to all nations for health, environmental and economic reasons. A country's SPS measures provide its primary defences for the exclusion of pests and diseases that might impact on human, animal or plant health as well as its ability to control aspects of food safety. Such measures may, however, also be used for illegitimate purposes and, in particular, to impose non-justified protectionist trade barriers.

The Agreement on the Application of Sanitary and Phytosanitary Measures¹ (the Agreement), one of the most important outcomes of the Uruguay Round, was negotiated primarily to prevent the misuse of SPS measures for such purposes. For the first time, it provides a reasonably clear and coherent set of principles and rules providing for predictability and transparency of SPS measures. The Agreement is binding on all members of the World Trade Organization (WTO) as

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1 See GATT *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (GATT, Geneva, 1994) 69; Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) (15 April 1994) 33 ILM 1144.

part of the single undertaking approach² adopted in relation to all WTO agreements. The difficulty that the SPS Agreement is intended to resolve is that of providing a balance between legitimate SPS protective requirements on the one hand and, on the other, legitimate trade objectives. This balance is achieved primarily by requiring WTO members, if challenged, to justify their SPS measures against specified scientific and trade related criteria. Failure to comply with an adverse decision may result in retaliatory measures being authorised under the WTO's Dispute Settlement Understanding (DSU).³

Given the importance of SPS measures in international trade, it is important for exporting nations that they are able to both participate in the development of SPS standards and protect their own SPS interests, whether that be defending their own provisions or challenging the non-conforming measures of import partners. The issues are likely to become of increasing importance over the next decade if the Doha Round succeeds in liberalising trade in agricultural products as now seems possible.⁴ The original SPS Agreement was negotiated in part because of fears that developed countries would use SPS measures for protectionist purposes and so reverse concessions made during the Uruguay Round.⁵ To negate such possibilities, developing countries

2 Members must adopt the WTO package as a whole. Derogations from agreements or non-ratification of some agreements is not permitted: Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (15 April 1994) 33 ILM 1125.

3 Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) 31 ILM 1226.

4 This paper was written shortly after the 31 July 2004 negotiating framework was agreed, signalling an initial breakthrough in negotiations on agricultural access. See WTO Doha Work Programme *Decision Adopted by the General Council on 1 August 2004* (WT/L/579, Geneva, 2004) Annex A <www.wto.org> (last accessed 15 December 2004). Significant substantive progress is, however, unlikely for some months.

5 John Croome *Reshaping the World Trading System. A History of the Uruguay Round* (WTO, Geneva, 1995) 236.

must develop their scientific, technical and legal expertise to protect current and potential export markets.

II SPS PROTECTION AND DEVELOPING COUNTRIES

By their nature, SPS measures, even when legitimate, pose problems for all exporters of agricultural and food products. Henson and Loader point to three major effects:⁶ first, they can prohibit trade by imposing an import ban or by prohibitively increasing production costs; secondly, they can divert trade from one trading partner to another by means of regulations that discriminate across suppliers; and, thirdly, they can reduce overall trade flows by increasing costs or raising obstacles to access for all potential suppliers. The point is also made that even if SPS measures are comparable across suppliers the ability to impose higher compliance costs on importers, compared to domestic suppliers, can also raise prohibitive costs.

Such trade impediments are likely to have a disproportionate impact on developing countries, a point made by Henson and Loader when reviewing studies on the impact of SPS measures. They conclude:⁷

It is suggested, however, that SPS are a particularly prominent issue for developing countries ... This reflects the predominance of agricultural and food products in total exports and the technical capability of developing countries to comply with SPS requirements.

Henson and Loader's survey of lower and middle income countries indicates that respondents considered SPS requirements to be a significant factor influencing the ability to export agricultural and food products to developed countries. Problems due to SPS requirements were ranked as strongly significant in the ability to export to the European Union (EU), Australia and the United States.

6 Spencer Henson and Rupert Loader "Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Measures" (2001) 29 World Dev J 85, 89.

7 Henson and Loader, above n 6, 89.

The survey also indicated the types of products for which agricultural and food exports to the EU had been prevented as a result of SPS requirements. The most significant were fish and fish products (60 per cent of responding countries reporting problems); meat and meat products (50 per cent); fruit and vegetables (45 per cent); and spices (25 per cent).

Currently, only two countries within Oceania, Fiji and the Solomon Islands, are WTO members. Another three, Samoa, Tonga and Vanuatu, have observer status, which is the first step towards full membership.⁸ The developed economies surrounding the Oceania region, Australia and New Zealand in particular, are of course WTO members. Clearly, if the nations of Oceania wish to consolidate and expand their export markets, SPS measures will need to be taken seriously for at least two reasons. First, exporters in these nations must be able to meet the SPS requirements of their export markets. Secondly, they must ensure that their own biosecurity measures are adequate to prevent the entry of pests or diseases that may impact on their own agricultural production or lead to import prohibitions in export markets. The reaction of Australia and New Zealand to "foot and mouth" disease outbreaks in the United Kingdom in recent years indicates the seriousness with which such threats are treated. Clearly the spread of such diseases into the country would be likely to devastate both its internal agriculture and its export markets.⁹

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- 8 Observer states must start accession negotiations within five years of becoming observers. WTO *Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council* (WT/L/161, Geneva, 1996) Annex 2. For an indication of SPS issues considered during accession negotiations, see WTO *Technical Note on the Accession Process – Note by the Secretariat – Checklist of Illustrative SPS and TBT Issues for Consideration in Accessions* (WT/ACC/8, Geneva, 1999).
 - 9 The reaction in New Zealand involved measures including a ban on animal products from European Union countries, tightening of customs requirements as well as participation in simulation exercises and agreements to cooperate with technical assistance. See The Ministry of Agriculture and Fisheries <www.maf.govt.nz/mafnet/press/040902fmd.htm> (last accessed 23 August 2004).

The exports of most of the Oceania nations are heavily biased towards a limited range of primary products. Thus, growth of primary-based export markets is likely to be heavily dependent on the importing partner's acceptance of the domestic SPS regime and may also be vulnerable to changed SPS requirements in the import market. The export commodities of Oceania nations tend to be those identified as posing problems for developing countries. It might also be noted that a relatively high percentage of exports are to Australia and Japan, both of which are countries with high levels of SPS protection.

One further characteristic that the nations of Oceania share with Japan and Australia as well as New Zealand is that, as island states, SPS measures relating to quarantine and biosecurity are likely to be of particular importance. Geographical isolation has often provided significant protection from the spread of various pests and diseases that has not proved possible in the case of countries situated on a continental landmass. It is perhaps unsurprising that the majority of the SPS disputes to come before the Dispute Settlement Body (DSB) have concerned the quarantine measures adopted by the island states of Japan and Australia – most notably the *Australian Salmon*¹⁰ case and the *Japan Agriculture*¹¹ and *Japan Apples*¹² cases.

III THE SPS AGREEMENT

The right of governments to protect their population from unsafe food and to shield their countries' fauna and flora from the spread of pests and diseases is so fundamental as to be uncontroversial. This right was explicitly recognised in Article XX(b) of the 1947 General Agreement on Tariffs and Trade (GATT 1947),¹³ which allows

10 *Australia – Measures Affecting Importation of Salmon* (Report of the Appellate Body) (20 October 1988) WT/DS18/AB/R (Dispute Settlement Body).

11 *Japan – Measures Affecting Agricultural Products* (Report of the Appellate Body) (22 February 1999) WT/DS76/AB/R (Dispute Settlement Body).

12 *Japan – Measures Affecting the Import of Apples* (Report of the Appellate Body) (26 November 2003) WT/DS245/AB/R (Dispute Settlement Body).

13 General Agreement on Tariffs and Trade (30 October 1947) 55 UNTS 187, 262.

measures "necessary to protect human, animal or plant life or health" subject to the chapeau in that Article, which provides that measures are:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

The SPS Agreement, negotiated during the Uruguay Round, recognises and reinforces that right. Indeed, the non-controversial nature of the right presumably explains not only the relatively non-controversial nature of the SPS Agreement but also the fact that there was considerable common ground on the principles of the Agreement during negotiations.¹⁴

A Requirements of the Agreement

The Preamble to the Agreement notes that it is intended "to elaborate rules for the application of the provisions of GATT 1994 ... in particular Article XX(b)." The Preamble goes on to refer to various other matters, including the reaffirmation of the right of members to adopt and enforce SPS measures, subject to compliance with the Agreement. The Preamble also refers to "the important contribution that international standards, guidelines and recommendations can make" and notes the desire to "further the use of harmonized sanitary and phytosanitary measures between Members" but "without requiring Members to change their appropriate level of protection of human, animal or plant life or health."

In the context of this paper, the Preamble also recognises that:

Developing country Members may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary or phytosanitary measures in

14 Croome, above n 5, 236.

their own territories, and desiring to assist them in their endeavours in this regard.

The substantive provisions of the Agreement impose a number of obligations which can be considered under three broad headings: first, those related to the setting of a member's own SPS standards and measures; secondly, requirements related to the transparency of those measures; and, thirdly, obligations and procedures relating to the administration of SPS matters both domestically and within the WTO. Of these, the most detailed and the most onerous are those related to the setting of domestic SPS standards. The Agreement also contains provisions relating to the particular circumstances of developing countries.¹⁵

B SPS Standard Setting

The core principle, set out in Article 2.1, reaffirms that members "have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health" but adds the qualification that this right is subject to the proviso that "such measures are not inconsistent with the provisions of this Agreement." The most important qualifications in the Agreement are that a measure:

- "may be applied only to the extent necessary to protect human, animal or plant life or health;"¹⁶
- must be "based on scientific principles and ... not maintained without sufficient scientific evidence;"¹⁷
- must not "arbitrarily or unjustifiably discriminate between Members where identical or similar conditions apply;"¹⁸ and,

15 SPS Agreement, above n 1, arts 9 and 10.

16 SPS Agreement, above n 1, art 2.3.

17 SPS Agreement, above n 1, art 2.3.

18 SPS Agreement, above n 1, art 2.4.

- must not be "applied in a manner which constitutes a disguised restriction on international trade."¹⁹

Measures that conform to the requirements of the SPS Agreement, according to Article 2.4, are presumed to be in accordance with the 1994 General Agreement on Tariffs and Trade (GATT 1994).²⁰

Members have three options in standard setting. First, they may adopt international standards where such standards exist and, if a domestic standard conforms to the international standard, it is deemed to be GATT compliant.²¹ Alternatively, members may base their standards on an international standard or introduce standards that maintain a higher level of protection than the international standard. Each of these three methods is equally valid. In spite of the Agreement's exhortations as to harmonisation, at best, the Agreement only encourages some preference being given to the adoption of standards and measures which conform to international standards,²² by presuming that such standards are consistent with the Agreement and with GATT 1994.²³ The guiding principle remains member autonomy. The actual requirement of Article 3.1 is that members shall *base* their measures on international standards. Moreover, Article 3.3 is explicit that each member has the right to set a higher level of SPS protection than would be achieved by international standards as long as there is a scientific justification, or as a consequence of the level of SPS protection a member determines to be appropriate in accordance with the relevant provisions of Article 5.²⁴ The Appellate Body has

19 SPS Agreement, above n 1, art 2.4.

20 General Agreement on Tariffs and Trade 1994 (15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187; 33 ILM 1153.

21 SPS Agreement, above n 1, art 2.4.

22 International standard setting bodies are defined in the SPS Agreement, above n 1, Annex A.3.

23 SPS Agreement, above n 1, art 3.2.

24 SPS Agreement, above n 1, art 5. This provision outlines the risk assessment requirements and guidelines for members.

made it clear that utilisation of Article 3.3 is "an autonomous right and *not* an 'exception' from a general obligation under Article 3.1."²⁵ It has also ruled that the fact a member has chosen to adopt its own measures under Article 3.3, rather than the international standard, does not impose any initial *prima facie* burden on the adopting member to justify that measure.²⁶

The international SPS standards referred to are those set by one of three bodies: Codex Alimentarius Commission (food safety); International Office of Epizootics (animal health and zoonoses); or, the Secretariat of the International Plant Protection Convention (plant health).²⁷ Of these three bodies, the Codex Alimentarius Commission, a joint initiative of the Food and Agriculture Organization and of the World Health Organization, is the most important. The body has set over 4,500 standards on various food related matters such as hygiene standards, pesticide residues and the like. It should be noted that the SPS Agreement makes no provision as to how measures are adopted by these international bodies, a point of some contention. The Codex Alimentarius Commission, for example, can adopt measures by a simple majority vote, a procedure that conflicts with the normal consensus approach of the WTO. It has been argued that the voting procedure allows some measures to be forced through over the objections of dissenting countries, thus devaluing the acceptability of the standard. A classic example was the adoption of standards on the

25 *European Communities – EC Measures Concerning Meat and Meat Products (Beef Hormones)* (Report of the Appellate Body) (16 January 1998) WT/DS26/AB/R para 172 (Dispute Settlement Body) (emphasis added).

26 *Beef Hormones*, above n 25, paras 97–109.

27 SPS Agreement, above n 1, Annex A.3. For a brief description of each of these bodies, see Simonetta Zarrilli "WTO Sanitary and Phytosanitary Agreement: Issues for Developing Countries" in *Trade-Related Agenda, Development and Equity (TRADE)* (Working Paper no 3, South Centre, Geneva, 1999) 15. The creation of all three bodies preceded the formation of the WTO and they are independent of it.

controversial question of hormone residues in beef, which were adopted by 33 votes to 29 with seven abstentions.²⁸

In principle, the adoption of international standards may be relatively straightforward, although in practice significant costs are likely to be incurred if a member seeks to take an active role in the deliberations of the organisation in question – something that is likely to be crucial if standards having an economic impact on a member are under consideration. Article 3.4 of the Agreement requires members to "play a full part, within the limits of their resources, in the relevant international organisations." Zarrilli²⁹ points out that developing countries have had some success in urging the Codex Alimentarius Commission to develop standards on products of interest to those countries, including tropical fresh fruits and vegetables, as well as exerting some influence in relation to products such as edible oils. From the perspective of a developing country, adopting international standards is likely to be the most cost effective SPS measure as it need not then defend such standards against challenge and gains the benefit of a ready made standard.

A member may, however, choose not to adopt international standards and to set its own level of protection, a right made clear in Article 3.3, which again emphasises the right to determine a "level of ... protection a Member determines to be appropriate." Moreover, the Appellate Body has made it clear that each of the choices in Article 3 are equally valid and that, in particular, an Article 3.3 choice is not an "exception" to measures based on international standards.³⁰ The Appellate Body commented:³¹

28 Zarrilli, above n 27, 14.

29 Zarrilli, above n 27, 14.

30 *Beef Hormones*, above n 25, para 165. Here, the Appellate Body indicates that to require standards to be based on international standards would effectively make compulsory what were intended to be recommendations by such bodies as the Codex Alimentarius Commission.

31 *Beef Hormones*, above n 25, para 172.

A Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement or embody that level of protection in a measure not "based on" the international standard. The Member's appropriate level of protection may be higher than that implied in the international standard. The right of a Member to determine its own appropriate level of sanitary protection is an important right.

As Jensen points out, developed countries are likely to set levels of protection higher than international standards because of the political importance accorded to food safety and the tendency to tighten SPS measures "to eliminate ever smaller risks to human life and health."³² The *Beef Hormones* dispute is illustrative of this political concern. Even though the EU was unable to defend its SPS regime, it preferred to bear the cost of the resulting retaliation measures rather than amend that regime.

C Equivalency

Article 4.1 encourages members to accept the SPS measures of other countries as equivalent to their own if the exporting member can demonstrate that the measure achieves the same degree of SPS protection. In practice, such agreement has proved difficult to achieve, equivalent often being treated as "the same". Generally, it has only proved possible between developed countries and, even then, mainly at a regional level, although there are exceptions as in the EU agreements with a number of countries (including New Zealand).³³ The creation of Food Standards Australia New Zealand is an example of the culmination of such an approach, having moved from mutual recognition of measures to joint standard setting. There has, however,

32 Michael F Jensen *Reviewing the SPS Agreement: A Developing Country Perspective* (CDR Working Paper 02.3, Centre for Development Research, Copenhagen, 2002) 2; Centre for Development Research <http://www.cdr.dk/working_papers/wp-02-3.pdf> (last accessed 16 December 2004).

33 Zarrilli, above n 27, 17.

been very limited use of this mechanism in relation to developing countries even though, as Zarrilli points out:³⁴

For developing countries which face climatic, developmental, and technological conditions rather different from those prevailing in developed countries, the recognition of the equivalency of their SPS measures to those applied by importing countries would represent a key instrument to enhance market access for their products.

D Risk Assessment

If a member does wish to set its own level of protection, it must do so in accordance with the Agreement and, in particular, carry out a risk assessment. The function of a risk assessment is to demonstrate and justify the link between the appropriate level of protection determined by the member and the SPS measure intended to achieve that level of protection. In *Beef Hormones*, the Appellate Body stressed the central role that risk assessment plays in the Agreement:³⁵

The requirements of a risk assessment under Article 5.1, as well as of "sufficient scientific evidence" under Article 2.2, are essential for the maintenance of the delicate and carefully negotiated balance in the SPS Agreement between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings.

In *Japan Agriculture*, the Appellate Body noted that the risk assessment aims to ensure compliance with:³⁶

The obligation in Article 2.2 that an SPS measure not be maintained without sufficient scientific evidence [and] requires that there be a rational or objective relationship between the SPS measure and the scientific evidence.

34 Zarrilli, above n 27, 17.

35 *Beef Hormones*, above n 25, para 19.

36 *Japan – Measures Affecting Agricultural Products*, above n 11, para 84.

It is not surprising, therefore, that one of the important lessons to emerge from Appellate Body decisions to date is that a member must comply fully and completely with all required elements to a risk assessment. Failure to do so will almost inevitably result in an adverse decision that the risk assessment was not properly carried out and that the member is in breach of its WTO obligations. The failure to demonstrate that a proper risk assessment was carried out has been central to adverse findings in most SPS cases.³⁷

Annex A.4 of the SPS Agreement distinguishes two separate forms of assessment, quarantine risk and food-borne risk, with the requirements differing between them:

The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences ["disease risk"];

[O]r the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs ["food risk"].

This distinction affects the nature of the assessment to be undertaken. In *Beef Hormones*, dealing with food risk, a two-step analysis was seen as appropriate. The Appellate Body supported the Panel approach of:³⁸

A two-step process that "should (i) identify the *adverse effects* on human health (if any) arising from the presence of the hormones at issue when used as growth promoters *in meat* ... and (ii) if any such adverse effects exist, evaluate the *potential* or probability of occurrence of such effects".

37 This was particularly apparent in *Australia – Measures Affecting Importation of Salmon*, above n 10, paras 124 and 127-128.

38 *Beef Hormones*, above n 25, para 183 (emphasis added).

In the *Salmon* case, dealing with disease risk, a three-step analysis was required:³⁹

[A] risk assessment ... must:

- (1) *identify* the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases;
- (2) *evaluate the likelihood* of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences; and
- (3) evaluate the likelihood of entry, establishment or spread of these diseases *according to the SPS measures which might be applied.*

Article 5.2 elaborates the factors that a member "shall" take into account in assessing risk:

In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

Article 5.3 expands this but makes it clear that a risk assessment is permitted to include a broad range of factors and, in particular, that it is not confined to strict scientific factors:

In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or

³⁹ *Australia – Measures Affecting Importation of Salmon*, above n 10, para 121 (emphasis added).

eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

The completion of the risk assessment is of course only the first stage of implementing a defensible SPS measure. Once an appropriate level of protection is determined and the risk assessment carried out, a member still has several other hurdles to overcome. The overriding obligation of Article 2.2 that measures "be based" on scientific principles must first be satisfied. The member must then go further and consider the trade impact of the measure. In particular, it must consider the requirement to avoid arbitrary or unjustifiable distinctions that result in discrimination or a disguised restriction on international trade. Perhaps most controversially, it must also consider the Article 5.6 requirement that measures are not to be more trade-restrictive than required to achieve the appropriate level of protection.

As noted above, Panel and Appellate Body reports to date make it clear that risk assessments must meet stringent standards and there must be full compliance with the Agreement's requirements. Up to now, the challenges have involved only developed countries, but even they have had considerable difficulty in defending SPS measures. The comment could be made, however, that such difficulties might also arise because the measures were inherently protectionist.

Article 5 takes relatively little account of the problems that risk assessment may pose for developing countries. In *Beef Hormones*, however, it was conceded that "[t]he SPS measure may well find its objective justification in a risk assessment carried out by another Member, or an international organisation."⁴⁰ Such a procedure may well be of use to developing countries as they can then take advantage of the technical expertise and assistance of developed countries. In reality, it is probably unlikely that the SPS measures of small developing countries will be challenged given the value of the trade involved compared with the financial and political costs of mounting such a challenge. However, that may not be the case for the large

40 *Beef Hormones*, above n 25, para 190.

developing economies particularly should they maintain measures that limit trade in such areas as bio-engineered food.

E Administrative and Transparency Requirements

One of the major concerns of the SPS Agreement is to ensure that SPS measures are transparent. Transparency requires both reasonably sophisticated notification systems and domestic administrative structures, matters that are likely to be of concern to developing countries, and especially those in Oceania with relatively limited governmental resources. Article 7 provides that members must "notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary and phytosanitary measures in accordance with the provisions of Annex B." Article 8, which deals with control, inspection and approval procedures, requires compliance with Annex C.

Annex B of the SPS Agreement imposes three primary obligations: the prompt publication of SPS measures "to enable interested Members to become acquainted with them"; the creation of a single enquiry point to provide answers to "all reasonable questions"; and, for early notification and the opportunity to comment

Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members.

Annex C is concerned with the efficacy of control, inspection and approval procedures and, in particular, that such procedures are carried out without undue delay.

F Dispute Settlement

The DSU covers consultations and disputes under the Agreement. The only special provision is the Article 11.2 requirement that a panel should seek advice from an advisory group of experts where disputes involve scientific or technical issues. Article 12 creates a Committee on SPS Measures. Amongst other functions, the Committee is tasked

with facilitating "ad hoc consultations or negotiations among members on specific sanitary and phytosanitary issues." This function has the potential for disputes to be resolved in a manner that avoids the inherently more confrontational procedures of the DSU and may be of particular use to developing countries.

G Developing Countries

Both the Preamble to the Agreement and the provisions of Articles 9 and 10 recognise and attempt to deal with some of the particular problems facing developing countries. Initially, developing countries were given additional time to comply with most provisions of the Agreement,⁴¹ although those periods have now expired. The two provisions of continuing relevance are Articles 9 and 10.

Article 9 states that members agree to "facilitate the provision of technical assistance" to developing country members "to allow such countries to adjust to, and comply with, sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets." This obligation is stated both in general and specific terms. Where substantial investments are required to fulfil the requirements of an importing member, the member "shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved." It should be noted that the above provisions are not stated in mandatory terms and it is, therefore, a matter for the decision of developed countries generally or specifically as to whether technical assistance is in fact provided.

Article 10 covers special and differential treatment. Again, the provisions are stated in non-binding terms but require members to "take account of" the special needs of developing countries when preparing and applying SPS measures. Article 10 also allows longer timeframes for compliance for products of interest to developing

41 SPS Agreement, above n 1, art 14.

country members where phased introduction of measures is feasible. At a more general level, the SPS Committee created under the Agreement is authorised to grant developing countries, "upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs." Finally, members are exhorted to "encourage and facilitate the active participation of developing country Members in the relevant international organizations."

The SPS Committee has taken various steps to deal with the issues SPS measures pose for developing countries, including providing the forum for consultations on specific SPS measures. More generally, the Committee has tried to reach agreement on various aspects of special and differential treatment, including a Canadian proposal to enhance the transparency of such treatment as well as attempting to deal with issues relating to enquiry points in developing countries.⁴² How effective such measures are is debatable as developing countries apparently experience difficulties in adjusting to notified new SPS measures within the specified timeframes.

The WTO has placed considerable emphasis on technical assistance and capacity building in developing countries and funding for technical cooperation activities had reached CHF 30 million by 2002.⁴³ The WTO's technical assistance database indicates 287 entries in 2002 (the last full year reported) in relation to SPS and technical barriers to trade (TBT) activities, including a number of entries for both member and observer governments in Oceania.⁴⁴ Activities have included a regional workshop on SPS and TBT issues held in 2001.

42 See WTO Committee on Sanitary and Phytosanitary Measures *Report by the Chairman to the General Council – Implementation and Special Differential Treatment* (G/SPS/27, Geneva, 2003).

43 WTO "WTO News: 2002 Press Releases" <<http://www.wto.org>> (last accessed 16 August 2004).

44 See Standards and Trade Development Facility Database <<http://stdfdb.wto.org>> (last accessed 16 August 2004).

Similarly, a two-day seminar on SPS capacity building was held in Geneva in 2002 prior to a meeting of the SPS Committee.⁴⁵

In the particular case of the Oceania states, one of the more effective means of assistance is the provision of targeted support in relation to the particular products exported from those countries. This type of assistance can be provided both in the exporting and importing nations. For example, the provision of specialised plants and equipment, such as heat processing plants, allows a country to meet quarantine requirements in the relatively common situations where such processing is required. Another example of direct assistance is New Zealand's provision of NZ\$750,000 from its aid budget to provide a dedicated position in the Ministry of Agriculture and Forestry to work solely on applications from the Pacific to import fruit and vegetables.⁴⁶ This aid allows a more rapid turnaround of such applications which, given the value of the trade, might not receive a high priority in the standard queue of applications. Another more general initiative is the Pacific Regional Trade Facilitation Programme. In July 2003, NZAID announced funding of NZ\$1 million over three years for this programme to "assist Pacific Island countries in the areas of quarantine, customs and product standards."⁴⁷ The Pacific Agreement on Closer Economic Relations contains specific obligations relating to the provision of technical assistance and capacity building.⁴⁸

45 See WTO Committee on Sanitary and Phytosanitary Measures *Seminar on Technical Assistance and Capacity Building Related to the SPS Agreement* (5 November 2002) <<http://www.wto.org>> (last accessed 16 August 2004).

46 Hon Jim Sutton, Minister of Agriculture "FAO Pacific Meeting" (Wellington, 25 August 2003); The Official Website of the New Zealand Government <<http://beehive.govt.nz>> (last accessed 18 October 2004).

47 See NZAID <<http://www.nzaid.govt.nz>> (last accessed 18 October 2004).

48 Pacific Agreement on Closer Economic Relations (PACER) (18 August 2001), arts 9, 11 and Annex I; Pacific Islands Forum Secretariat <www.forumsec.org.fj> (last accessed 6 December 2004).

IV DEVELOPING COUNTRIES AND SPS ISSUES

In principle, there is no significant difference in the legal obligations between developed and developing countries in respect of SPS measures. A country must meet the standard obligations in the Agreement of having the required administrative arrangements such as an enquiry point and the ability to provide answers to enquiries.⁴⁹ In practice, of course, the situation is quite different, primarily because it is unlikely that developing countries will have either the financial or human capacity to fully and effectively implement an SPS regime or to take advantage of the rights in the Agreement to challenge the SPS regimes of other WTO members. The most important challenges, however, are likely to relate to export-orientated SPS issues, especially meeting the SPS requirements of importing countries and defending the country's SPS interests internationally.

To successfully implement an adequate SPS regime, a country needs expertise at several levels. To begin with, it requires the necessary domestic expertise to ensure both that a country's SPS measures and the SPS requirements of its importing partners can be met. Naturally, this necessitates reasonably sophisticated scientific and technical expertise both at governmental and industry level. Importing countries increasingly require export facilities to be licensed, which involves meeting the SPS standards of the importing countries. But even if this is not the case, the costs associated with goods rejected at the border by the importing country are significant. Some indication of the costs associated with meeting the demands of importers can be seen in a report on the costs faced by the Bangladeshi frozen shrimp industry updating to meet United States and EU standards. The cost per plant of US\$239,000 provides a likely realistic figure for smaller countries who may need to update food manufacturing facilities.⁵⁰

49 SPS Agreement, above n 1, Annex B.

50 See James C Cato *Economic Values Associated with Seafood Safety and Implementation of Seafood Hazard Analysis Critical Control Point (HACCP) Programmes* (FAO Fisheries Technical Paper no 381, Rome, 1998) para 8.2.7;

Beyond these largely inevitable costs, it seems clear, and indeed obvious, that the major problem faced by developing countries is their ability to participate effectively in WTO affairs both generally and at the level of the individual agreements. This is a problem that is particularly acute for the smaller and lower income developing countries that are unlikely to have permanent missions in Geneva.⁵¹ Fiji, for example, has no permanent representation in Geneva, with its Brussels' Mission having responsibility for WTO matters. In the absence of permanent representation, it is unlikely that such countries will be fully able to protect their interests in the multitude of WTO meetings, including such specialised bodies as the SPS Committee. In the particular case of SPS measures, a country also needs to keep at least a watching brief on the various international standard setting bodies to the extent that their activities affect products of interest to the country concerned. Henson and Loader note that the membership level of developing countries in bodies such as the Codex Alimentarius Commission is significantly lower than for developed countries and that participation at meetings of the SPS Committee is also relatively low.⁵² They do, however, suggest that on at least some occasions developing countries are able to respond to particular issues that affect their own interests. That may be so if developing countries are alerted to the problem at issue, something that is more likely with larger developing countries. Many smaller countries are, however, likely lacking the expertise both to identify and to deal with many of the issues raised. Recognising and dealing with a relevant SPS issue requires involvement at two levels. First, good communication between the government and industry is essential so that the

FAO Fisheries Department <<http://nsgd.gso.uri.edu/haccp/flsgph98002.htm>> (last accessed 14 October 2004).

51 Constantine Michalopoulos *The Participation of the Developing Countries in the WTO* (Policy Research Working Paper, WPS 1906, World Bank, Washington, 1998); World Bank <<http://www.worldbank.org>> (last accessed 14 October 2004).

52 Henson and Loader, above n 6, 95-97.

government is alerted to the issue. In addition, a government requires the technical expertise in Geneva to deal with the issue at that level.

Participation as described above is primarily defensive. A country may, however, seek to challenge SPS measures affecting its imports. Such a challenge is demanding in terms of both human expertise and cost, and quite likely to be pointless in the longer term. In the case of most small economies, the value and size of the export market is likely to be relatively small and even if a challenge were to be successful it is likely that the market may be lost during the period of the dispute. Even if successful, there is no guarantee that the respondent country will change its measure and retaliatory sanctions are likely to hurt the complainant more than the respondent.⁵³ Again, many of the provisions of the WTO instruments are of limited value and it should also be noted that smaller countries have had some success in addressing issues at a less formal and confrontational level such as the SPS Committee.⁵⁴

V CONCLUSION

There seems to have now developed a broad consensus that the solution to many of the problems of developing countries lies in better access to developed countries' markets for their primary exports, especially agricultural goods.⁵⁵ The main impediment to such access at present is of course the unconscionable and massively distorting subsidies paid particularly by the EU and United States governments. Such subsidies not only provide high levels of internal protection but also distort world markets in products, such as cotton and sugar, where developing countries should have some advantage. Reforms to the subsidy problem may slowly emerge over the next decade and increased market access opportunities also seem likely. However, access opportunity is one thing and actual access another. Jensen⁵⁶

53 See Jensen, above n 32, 2, 15-17.

54 Jensen, above n 32, 17.

55 Henson and Loader above n 6, 86-87 and the references cited therein.

56 Jensen, above n 32, 2.

makes the point that the political sensitivity of food safety in most developed countries has led to increasingly stringent requirements at all stages of the production process. Such requirements are unlikely to reduce and, if anything, will become more stringent as a side effect of the war on terrorism. The United States has already imposed increased traceability requirements throughout the food production chain.⁵⁷ Developing countries may gain greater access opportunities, but the cost of meeting the access requirements is likely to increase and become more onerous.

The SPS Agreement, although not without its problems, does lay down at least some international requirements to control the abuse of SPS measures. For the immediate future, the priority of developing countries would seem to be the provision of greater technical and financial assistance to enable them to fully participate in the SPS regime, including at the standard setting level, and to meet the particular SPS measures of their trade partners. In the particular case of the nations of Oceania, this would seem to rely heavily on regional initiatives and cooperation, something easier to achieve with a limited range of products sold in a limited range of markets. Moreover, it will be easier to muster the political will in such a regional context. The greater difficulty would seem to lie in the longer term and in particular in what is likely to be an increase in different national and regional SPS measures, a trend already apparent in United States-EU differences. From the perspective of developing countries, the preference would clearly be for a degree of genuine internationalisation of SPS standards either through the international standard setting bodies or, more likely, through the increased recognition of equivalent standards. Whether this will be achieved is difficult to foresee but it might be hypothesised that current omens are not optimistic, at least at a broad international level.

⁵⁷ Public Health Security and Bioterrorism Preparedness and Response Act of 2002 Pub L No 107-188, § 301, 116 Stat 594, 662. For an Australasian comment, see "Traceability: A Hot Global Issue" <http://www.intentia.com/www/resource.nsf/pub/Traceab%20article_AU.pdf> (last accessed 14 October 2004).

Whatever the future, the immediate reality is that SPS matters are crucial to the exporting future of developing nations. In Oceania, this should not, however, be an insurmountable problem given the relative size and needs of the nations in the region and the high level of technical and human expertise in the large Pacific countries of Australia and New Zealand.