The Case for International Standards and Agricultural Free Trade

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Abstract

The sharp decline of tariff trade barriers has been one of the achievements of the world trading system. However, the reduction in tariffs has exposed the many non- tariff barriers that remain. As tariffs continue to fall, there seems to be a corresponding reliance on SPS measures as a source of protection for domestic producers. This underscores the need for a legal framework that can address the fundamental issue of whether a measure validly exists to protect consumers or is merely a 'sham' to protect domestic producers. This thesis argues that the protectionist use of SPS measures undermines the promised benefits of agricultural trade liberalization. Developing countries face numerous problems with regard to SPS measures. This thesis examines these problems and argues that there is a need to strengthen the capacity of developing countries to establish and implement SPS measures; meet the SPS requirements of trade partners; and participate fully in the work of standard setting organizations in the establishment of international standards, guidelines and recommendations. In addition, despite the proposed reductions in tariff barriers stipulated in the WTO Agreement on Agriculture, a lot remains to be done to fully liberalize trade in agriculture. Several issues still need to be addressed in order to enable developing countries to reap the benefits of trade liberalization in agriculture. These issues include market access, domestic and export support, food security and special and differential treatment.

L'objet de l'établissement des standards internationaux et la libéralisation du commerce agricole

Resumé

La baisse des obstacles tarifaires au commerce á été un des succès du système commercial mondial. Cependant, la réduction des tarifs douaniers a mis en exergue les nombreuses barrières non-tariffaires qui existent. Alors que les tarifs continuent de chuter, les États semblent se servir des mesures sanitaires et phytosanitaires (SPS) comme source de protection pour les producteurs locaux. Cela souligne la nécessité d'élaborer une structure juridique qui s'adresse a cette question fondamentale, à savoir si une mesure existe réellement pour protéger les consommateurs ou s'il ne s'agit en réalité que d'une "façade" destinée a protéger les producteurs locaux. Cette thèse discute l'idée que l'utilisation de mesures SPS à titre protectionniste compromet les avantages escomptés de la libéralisation du commerce agricole. Les pays en voie de développement font face à de nombreux problèmes relatifs aux mesures SPS. Cette étude examine ces problèmes et conclut qu'il est nécessaire de renforcer la capacité des pays en développement afin de contribuer á l'établissement et la mise en oeuvre des mesures SPS, afin de pouvoir répondre aux exigences des partenaires commerciaux en matière de mesures SPS, et de participer pleinement aux travaux des organisations chargées de définir les normes internationales ainsi que les directives et recommandations associées. De plus, malgré les réductions des barrières tarifaires envisagées dans l'Accord de l'Organisation Mondiale du Commerce (OMC) sur l'Agriculture, il reste encore beaucoup à faire pour assurer la libéralisation totale du commerce agricole. De nombreuses questions doivent être adressées afin de permettre aux pays en voie de développement de profiter des avantages promis par la libéralisation du commerce agricole, à savoir les questions relatives á l'accès au marché, les subsides au niveau national et à l'exportation, la sécurité alimentaire et les traitements spéciaux et différentiels.

The Case for International Standards and Agricultural Free Trade

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Introduction

"Free trade advocates want to limit the use of regulations as barriers to trade, while environmentalists and consumer advocates want to prevent trade agreements from serving as barriers to regulation," observes David Vogel.[1] The sharp decline of tariff trade barriers has been one of the achievements of the world trading system. However, it is noted that the reduction in tariffs has exposed the many non-tariff barriers that remain, and in several cases, "governments have kept protectionism in place by simply shifting from tariff to non-tariff measures".[2]

According to the WTO Agreement on Agriculture, tariff barriers have been reduced by an average of 36% over six years from its inception.[3] However, there remains a lot to be done to fully liberalize trade in agriculture. The reductions in tariff barriers have triggered, and will continue to trigger an increase in world trade in agricultural products.[4] This has caused an increase in the number of disputes concerning health and safety standards, particularly sanitary and phytosanitary (SPS) measures.[5] This is because as tariffs continue to fall, there will likely be a corresponding reliance on SPS measures as a source of protection for domestic producers.[6] This underscores the need for a legal framework that can address the fundamental issue of whether a measure validly exists to

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[1] See David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge: Harvard U Press, 1995), at 23.
[2] See D Victor, "The Sanitary and Phytosanitary Agreement of the World Trade Organization: An assessment after five years" (2000) 32 N.Y.U. J. Int'l L. & Pol. 865, at 1.
[3] See M.J Trebilcock & R. Howse, *The Regulation of International Trade*, 2nd ed. (New York: Routledge, 2001), at 145.
[4] See WTO, "Trading into the Future : The Introduction to the WTO" online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm> (date accessed: 19 April 2002).
[5] See Micheal Friis Jensen, 'Reviewing the SPS Agreement' (Working Paper, 2002) Centre for Development Research, at 2.
[6] *Ibid.*

protect consumers or is merely a 'sham'[7] to protect domestic producers. As noted by Trebilcock and Howse, the World Trade Organization (WTO) Agreement on Sanitary and Phytosanitary Measures (hereinafter "SPS Agreement") was designed to address this need and is used primarily as a tool to regulate SPS measures as non-tariff barriers.[8] The area of SPS measures is a highly controversial one as it concerns for the most part the safety of a nation's food supply. Food safety continues to rank higher and higher on the political agenda in developed countries.[9] This can be explained at least in part by the fact that food safety is a good with a high elasticity of demand.[10] As incomes increase, as they have done in developed countries, SPS measures are tightened to eliminate ever smaller risks to human life and health. At the same time, big food importers like the US and the EU have seen a number of high profile food scares that include food contaminated with bacteria like E. coli and salmonella, food transferred diseases like Mad Cow disease and food contaminated with dioxin.[11]

Concerns about SPS measures being used for protectionist purposes are not new and go back many decades, as noted by Charnovitz.[12] He notes that even the League of Nations examined this problem "with a view toward using science to determine the validity of trade bans".[13] In reference to concerns about SPS measures being used for protectionist purposes, another commentator suggests that cultural differences,

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[7] See Trebilcock & Howse, *supra* note 3, at 145.
[8] One commentator suggested that the SPS Agreement was motivated in part by the US-EU dispute regarding the safety of hormone-treated beef. See Donna Roberts, "Preliminary Assessment of the WTO Agreement on Sanitary and Phytosanitary Regulations" (1998) I.J. Int'l Eco L., at 377.
[9] See Jensen, *supra* note 5, at 2.
[10] *Ibid.*
[11] *Ibid.*
[12] See S Charnovitz, "The Supervision of Health and Biosafety Regulation by World Trade Rules" (2000). 13 Tul. Env'tl. L. J. 271, at 2.
[13] *Ibid.*

misperceptions, and protectionist instincts are difficult forces to overcome.[14] Indeed, it has "become increasingly difficult to delineate the boundaries between a nation's sovereign right to regulate and its obligation to the international trading system not to restrict trade gratuitously".[15] The provisions of the SPS Agreement therefore, are meant to strike a balance between two equally important objectives: helping governments to protect consumers, animal and plant health against known dangers and potential hazards on one hand, and avoiding the use of health and safety regulations as protectionism in disguise on the other hand.[16]

Despite this attempt to balance these objectives, this thesis thus argues that the use of SPS measures for protectionist purposes highly compromises the promised benefits of trade liberalization in the agricultural sector. It argues that international standards have an important role to play in reducing the need for individual countries to develop and justify their own measures, as well as in enabling countries to take advantage of international trade opportunities. This thesis also favours the view that nations' ability to make distinctive rules for legitimate reasons should not be constrained.

Chapter one deals with the major elements of the SPS Agreement. This chapter examines the key features of the SPS Agreement and also discusses the relevant international standard-setting organizations. This thesis emphasises that the controversy surrounding the international standard-setting process needs to be addressed if international standards are to serve the role envisioned for them in the SPS Agreement.

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[14] See R Neugebauer, "Fine-tuning WTO Jurisprudence and the SPS Agreement: lessons from the beef hormones case." (2000) 31 L. & Pol'y in Int'l Bus. 1255, at 18.
[15] See Trebilcock & Howse, *supra* note 3, at 135.
[16] See WTO, Briefing Note, "Sanitary and Phytosanitary (SPS) Measures: Food safety, etc," at 6., online: WTO <http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about...> (date accessed: 18 February 2002) [hereinafter WTO Briefing Note].

Chapter two looks at the practice of the SPS Agreement to-date. This chapter examines the disputes concerning SPS measures that have been fully handled in the WTO's dispute settlement system, and makes an assessment of the lessons that could be derived from them, as well as exploring the issue of the validity of 'downward harmonization' fears. Implications for the GMO controversy are also considered, and note should be taken that with regard to the US-EU dispute over GMOs, at the time of submission of this thesis, consultations were on-going pending the setting up of a WTO dispute settlement panel. In section III, this chapter also looks at the problems that developing countries are facing as a result of SPS measures. Developing countries in particular are experiencing difficulties in meeting the SPS requirements of developed countries and concerns have been expressed about the way in which the SPS Agreement has been implemented to date. There is a need to identify the specific problems that developing countries experience in trying to derive benefits from the Agreement. This section illustrates how many of these problems are directly related to the lower level of development of these countries and points to steps that could be taken to improve the functioning of the SPS Agreement by taking into account the specific needs and problems of developing countries. If successful, the SPS Agreement can serve as a catalyst for increased market access in food and agricultural markets of developing countries.[17] These markets are of particular importance to developing countries that see them as one of their main areas of comparative advantage. This thesis underscores the need to strengthen the capacity of developing countries to establish and implement SPS measures, to meet the SPS requirements of trade partners and to participate fully in the work of standard setting

[17] See Jensen, *supra* note 5, at 1.

organizations in the establishment of international standards, guidelines and recommendations.

Besides the problems developing countries face as a result of SPS measures, they are further frustrated by the current heavily protectionist agricultural measures. Chapter three gives an assessment of the WTO Agreement on Agriculture and its promised benefits from the perspective of developing countries. Although agricultural trade liberalization is vital for all nations, it is more important for developing countries where more than 70% of the population is employed by the agricultural sector and whose majority of exports are primary commodities. This thesis argues for changes in the current provisions of the WTO Agreement on Agriculture. Developed countries must reduce their excessive support for domestic products, which distorts world markets and hurts poor farmers. They must lower tariff peaks in the commodities produced by developing countries and stop using non-tariff barriers to restrict market access. It is noted that recent studies put the resulting loss of rural income among developing countries as high as $60 billion annually.[18] Developed countries should also improve market access for small single-commodity exporters that are net importers of food and otherwise compensate them in case their preferential trading relationships are eroded. Developed countries should also agree to an interpretation of the language on special and differential treatment that would enable developing countries to take the appropriate domestic policy measures.

Lastly, conclusions are drawn and some recommendations are provided.

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[18] See David Orden, et al., "Liberalizing Agricultural Trade and Developing countries," Trade, Equity, and Development Series, no. 6, March 2003, online: www.ceip.org (date accessed: 01 March 2003) at 1.

Chapter One

Major Elements of the SPS Agreement

I. Key Features of the SPS Agreement

The SPS Agreement's central purpose is to promote international trade by limiting the use of SPS measures as disguised barriers to trade.[19] The SPS Agreement's basic rights and obligations allow WTO members to impose SPS measures that are necessary "for the protection of human, animal or plant life or health."[20] However, members may not arbitrarily or unjustifiably discriminate between members when imposing SPS policies on imported products.[21] Members are also not allowed to use SPS measures as disguised barriers to trade.[22]

a. Harmonization and Equivalency

In addition to restraining the SPS policies that countries may develop on their own, the SPS Agreement urges members to implement international standards.[23] The SPS Agreement declares that "Members shall base their sanitary and phytosanitary measures on international standards, guidelines or recommendations."[24] However, countries may impose measures that are stricter than international standards "if there is scientific justification, or as a consequence of the level of sanitary and phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions...of Article 5".[25]

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[19] See Charnovitz, *supra* note 12, at 2.
[20] See World Trade Agreement Annex 1A, Agreement on the Application of Sanitary and Phytosanitary Measures (entered into force 1 January 1995) , Article 2, [hereinafter SPS Agreement].
[21] *Ibid.*, Article 2.3.
[22] *Ibid.*
[23] *Ibid.*, Article 3.
[24] *Ibid.*, Article 3.1.
[25] *Ibid.*, Article 3.3.

Therefore, WTO members are given a choice. A member may simply implement international standards where they exist, or it may deviate from those standards.[26] It is imperative to examine what exceptions permit a country to deviate from those international standards, but before looking at these exceptions, it is relevant to note that the SPS Agreement includes several important obligations that extend the Agreement's influence beyond simply the setting of SPS levels and measures. In principle, the SPS Agreement also allows exporters broad latitude when determining the SPS measures that are needed to meet the level of SPS protection that importers demand.[27] More specifically, Article 4 of the SPS Agreement requires that importers accept the SPS measures of exporters "as equivalent, even if these measures differ from their own or from those used by other members trading the same product, if the exporting member objectively demonstrates to the importing member that its measures achieve the importing member's appropriate level of SPS protection".[28]

Basing on the assumption that exporters have an interest in identifying the least trade restrictive measure, this "equivalence" requirement could automatically ensure that SPS rules are not more discriminatory than necessary and "equivalence" could also open markets without requiring actual harmonization.[29] In economic terms, strict

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[26] See Victor, *supra* note 2, at 5. This understanding of the Agreement is different from what is sometimes argued in the public debate most notably by consumer interest groups. Silverglade, for instance, downplays the right granted by the Agreement to member countries to set their own levels of protection over and above the ones provided by international standards and chooses to interpret the Agreement as a strict legal requirement to international (downward) harmonization. As argued above, member countries retain their sovereignty right to set their own levels of protection subject to the condition of risk assessment. See Silverglade B.A., "The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?" (2000) Food & Drug Law Journal 55(4), at 517-519.

[27] *Ibid.*

[28] *Ibid.*, at 521. Article 4 is very short in the Agreement but the text has been expanded by a decision by the Committee on Sanitary and Phytosanitary Measures. The fourth WTO Ministerial Conference in Doha took note of this decision. See WTO, Implementation related Issues and Concerns – Decision of 14 November 2001. WT/MIN (01)17, (Ministerial Conference, Fourth Session, Doha, 9-14 November 2001).

[29] *Ibid.*, at 4.

harmonization is not always desirable.[30] As member countries have different capability of setting and enforcing different types of measures, focus is directed towards the outcome of the regulatory process rather than the form. This allows for economising on the costs of SPS regulations without jeopardising human, animal or plant health. Indeed, in the context of the creation of the European Community's single market, it is argued that similar concepts such as "mutual recognition" brought positive results and created a strong market-opening dynamic.[31]

b. Transparency

The SPS Agreement also requires that countries make their SPS policies transparent both through publication and creation of national enquiry points that can answer any reasonable question about that country's SPS rules.[32] These enquiry points are meant to enable foreigners obtain information about the sanitary and phytosanitary rules in force. The information that must be disclosed includes information about the rules themselves, the control mechanisms to assure conformity, and the risk assessment procedures on which the measures are based.[33] If measures differ from international standards or if international standards do not exist, a member country is obliged to notify other members of their measures through the WTO. A country must allow some time between the publication of a new measure and the entry into force in order to allow its trading partners to comment on the changes (except in emergency cases).[34]

In order to make use of the "equivalence" requirement, transparency is a very essential factor. If a system operates properly and transparently, exporters will not

[30] See Jensen, *supra* note 5, at 7.
[31] *Ibid.*, at 5.
[32] See SPS Agreement, *supra* note 20, Articles 5.8, 7 and Annex B.
[33] See Jensen, *supra* note 5, at 8.
[34] See SPS Agreement, *supra* note 20, Annex B.

encounter many problems in complying with an importer's SPS rules, which in turn promotes trade. One of the main problems of the various SPS measures applied today is the lack of transparency.[35] It is time-consuming and costly for foreign companies and their governments to learn about the SPS measures of another country. Such measures are often subject to frequent changes which add further to the costs of exporting goods subject to SPS measures. One commentator notes that when rules are unclear and their relation to scientific evidence is masked, it becomes more difficult to distinguish between legitimate and illegitimate SPS measures.[36]

c. The SPS Committee

The SPS Agreement further creates an international "SPS Committee" that meets on a regular basis to consider relevant topics and periodically review the performance of the SPS Agreement.[37] At each meeting both individual members' SPS measures as well as general issues are discussed. This Committee is a forum for discussion of potential conflicts between WTO members, which may help prevent some disputes from escalating.[38] It also adopts documents that guide interpretation and implementation of the SPS Agreement.[39] In this way, the SPS Committee serves both as an instrument that increases the transparency of members' SPS regimes and as a first informal step in the dispute settlement process.[40]

The SPS Agreement allows the least developed countries to delay implementation of the Agreement for five years, but this period elapsed and since 1 January 2000, the

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[35] See Jensen, *supra* note 5, at 7.
[36] See Neugebauer, *supra* note 14, at 21.
[37] *Ibid.*, Article 12.
[38] See Victor, *supra* note 2, at 5.
[39] *Ibid.*
[40] See Jensen, *supra* note 5, at 8.

provisions of the SPS Agreement also apply for the least-developed countries.[41] In addition to other extensions, the SPS Agreement also empowers the SPS Committee to grant temporary extensions and relief from the Agreement's obligations in cases of hardship.[42]

d. Exceptions for deviation from international standards

The debate over trade liberalization has caused a lot of controversy; the most controversial aspect has been the fear that free trade will force all countries to harmonize their national standards into a "straitjacket" of international standards.[43] The argument advanced by those afraid of the "straight jacket" is that this could force nations to adopt stricter SPS measures than they would otherwise want, which would in turn cause heavy financial burdens due to having to spend resources on SPS protection that they could have devoted to other purposes such as economic development.[44] On the other hand, it is also argued that the "straight jacket" could force countries that already have tight SPS measures to relax them, leading to "downward harmonization" if international standards merely mirror the lowest common denominator.[45] The "downward harmonization" fear has been the most controversial aspect because existing SPS measures are generally much tighter in the advanced industrialized countries, which is also where most of the active SPS public interest groups are located.[46] Their fear is that harmonization will require compromising hard-won rules that protect consumers and the environment.

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[41] See SPS Agreement, *supra* note 20, Article 14.
[42] See Victor, *supra* note 2, at 6.
[43] *Ibid.*, at 5.
[44] See Silverglade, *supra* note 26, at 538.
[45] See Victor, *supra* note 2, at 5.
[46] *Ibid.*

As a result of this heated debate, that was underway when the WTO agreements were negotiated, the SPS Agreement permits countries to adopt SPS protection policies that are stricter or weaker than international standards.[47] Rather than requiring harmonization to a common international standard, the SPS agreement imposes discipline on both the level of SPS protection that countries seek and the measures they impose to attain those levels.[48] In respect of interpretation, the SPS Agreement and disputes have underscored that any country may set the level of SPS protection that it determines to be appropriate as will be seen later.

The SPS Agreement is mainly intended to discipline SPS measures that cause an unjustified barrier or restriction on trade because they are stricter than international standards.[49] Article 3.3 of the SPS Agreement explicitly provides for an exception to the goal of harmonization for SPS measures that are stricter than international standards. This article requires that a member must be able to provide "scientific justification" for choosing a higher level of SPS protection.[50] Likewise, Article 2.2 requires that SPS measures be based on "scientific principles".[51] These general requirements are quite broad, and thus, in practice, the Panel and Appellate Body decisions in the three WTO disputes related to the SPS Agreement (Beef Hormones, Australian Salmon and Japan Varietals) have turned to Article 5 for a more detailed description of what constitutes acceptable "scientific" basis when a country sets its SPS levels and measures.[52] The Agreement is not very explicit as to what distinguishes a valid risk assessment under the

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[47] See Charnovitz, *supra* note 12, at 4.
[48] *Ibid.*
[49] *Ibid.*
[50] See SPS Agreement, *supra* note 20, Article 3.3.
[51] *Ibid.*, Article 2.2.
[52] See Charnovitz, *supra* note 12, at 6.

auspices of the Agreement from assessments not judged valid. Yet, judging by subsequent Panel and Appellate Body reports in the Beef Hormones case, there is a tendency to require very stringent risk assessments. The requirements of a risk assessment as defined by the Agreement are generally seen as high, and even developed countries with highly sophisticated standard infrastructures including human capital and technical facilities face a substantial task when they have to provide a risk assessment solid enough to be judged in conformity with the SPS Agreement.[53]

Article 5 requires that SPS measures be "based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations".[54] It requires that members take into account available scientific evidence and that when performing risk assessments, countries must account for economic factors, such as potential loss in production or sales, if a pest or disease enters a country as well as the cost-effectiveness of different measures that could limit such risks.[55]

Article 5 also underscores that the SPS Agreement does not address every aspect of SPS protection. Rather, it concerns only those SPS policies that affect trade. It urges countries to minimize the negative trade effects of SPS measures.[56] It requires that countries avoid "arbitrary or unjustifiable distinctions" in their levels of SPS protection "if such distinctions result in discrimination or a disguised restriction on international trade".[57] Article 5.6 requires that countries not impose SPS measures that are "more trade restrictive than required to achieve" the level of SPS protection that the member deems

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[53] See Jensen, *supra* note 5, at 4.
[54] See SPS Agreement, *supra* note 20, Article 5.1.
[55] *Ibid.*, Article 5.3.
[56] *Ibid.*, Article 5.4.
[57] *Ibid.*, Article 5.5.

appropriate.[58] A footnote to Article 5.6 declares that a measure would be inconsistent with Article 5.6 if an alternative is found that passes each of the three tests: (a) it is "reasonably available", (b) it achieves the member's appropriate level of SPS protection, and (c) it is "significantly less restrictive to trade" than the SPS measure contested.[59]

These crucial provisions in Article 5 essentially create four rules that countries must follow when they impose SPS measures that deviate from international standards or when no international standards exist:

(1) The country must obtain a risk assessment;[60]

(2) The SPS measures imposed must be "based on" that risk assessment;[61]

(3) The country must not discriminate or create disguised trade barriers by requiring different levels of SPS protection in comparable situations;[62] and

(4) The measures must not be more restrictive of trade than necessary to reach the level of SPS protection that the country desires.[63]

It is argued that Article 5 is the "linchpin" of the SPS Agreement because it puts discipline on SPS protection policies that countries adopt without requiring the politically impossible task of harmonization.[64]

However, it is also noticeable, that there is a tension in Article 5 and other related provisions of the SPS Agreement. These provisions, and Article 5 in particular, are mainly concerned with ensuring that countries base their SPS measures on risk assessments and that they do not adopt measures that are more restrictive of trade than

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[58] *Ibid.*, Article 5.6.
[59] *Ibid.*, Article 5.6, note 3.
[60] *Ibid.*, Articles 5.1, 5.2, 5.3, 5.7
[61] *Ibid.*, Articles 5.1, 5.7.
[62] *Ibid.*, Article 5.5.
[63] *Ibid.*, Article 5.6.
[64] See Victor, *supra* note 2, at 6.

necessary.[65] These provisions are largely silent on the level of SPS protection that a country seeks. Indeed, as mentioned earlier, the SPS Agreement repeatedly underscores that countries are free to set their own level of SPS protection, even if that level of protection is different from the level that would be afforded by international standards.[66] The only provision in the SPS Agreement that specifically constrains the level of SPS protection that a country may set is Article 5.5, which requires that countries seek comparable levels of SPS protection in comparable situations.[67] Therefore, to determine whether a country's level of SPS protection is legitimate, one must look inside the country itself to establish whether the country consistently seeks a particular level of SPS protection.[68]

The Article 5 requirements that measures be based on risk assessment and take into account available scientific evidence apply whether measures are stricter or weaker.[69] However, Charnovitz contends that the SPS Agreement is a trade agreement and not a health agreement and that it only targets the overuse of national health regulations.[70] He therefore suggests that in respect of weak SPS measures, a nation would not have to justify the deviation.[71] Rather, it would only have to assert that the lower standard results from its chosen level of protection.[72] Up to now, no formal WTO dispute has addressed SPS measures that are less strict than international standards. This has been attributed to the fact that the issue of weak SPS measures is most prominent in developing countries and many of them are still in transition to full implementation of the

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[65] See Charnovitz, *supra* note 12, at 5.
[66] See SPS Agreement, *supra* note 20, Articles 2.1, 3.3.
[67] *Ibid.*, Article 5.5.
[68] See Victor, *supra* note 2, at 7.
[69] See SPS Agreement, *supra* note 20, Article 3.3.
[70] See Charnovitz, *supra* note 12, at 2.
[71] *Ibid.*, at 8.
[72] *Ibid.*

SPS Agreement.[73] It has also been attributed to the fact that for many products, weak SPS measures are much less of a threat to trade than strong measures.[74] However, this type of exception might come under closer scrutiny and tighter discipline in the future as trade is further liberalized. It is believed that for manufactured goods, such as processed foods, there is often a substantial premium in efficiency for producers that can export to a market that is governed by a single standard.[75] Indeed, lax standards even if applied equally to local and imported products, could favour domestic producers and harm imports that are produced according to more expensive standards that prevail in the rest of the world. It is very unlikely though, that cases concerning weak measures will arise because demonstrating the existence of a trade effect from weak SPS measures is difficult and disputes are very costly.

II. International Standards and Relevant International Organizations

A. Relevant International Organizations

Although the SPS Agreement considerably focuses on exceptions, the main objective of its drafters was to harmonize the SPS measures of the WTO members.[76] To achieve this goal the SPS Agreement encourages WTO members when creating or maintaining SPS measures to rely upon the SPS standards established by three international organizations: the Codex Alimentarius Commission (Codex), the International Plant Protection Convention (IPPC), and the International Office of

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[73] See Victor, *supra* note 2, at 8.
[74] *Ibid.*
[75] *Ibid.*, at 7.
[76] See WTO, "Understanding the WTO Agreement on Sanitary and Phytosanitary Measures" (May 1998), online: WTO <http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm> (date accessed: 4th March 2002) [hereinafter Understanding the SPS Agreement].

Epizootics (OIE).[77] These organizations address respectively issues concerning human, plant and animal life and health.

The three organizations have been recognized by the world's food and agricultural communities as the premier international bodies for the establishment of SPS standards and for the coordination of information concerning SPS issues.[78]

(i) The Codex Commission

Of the three organizations, the Codex Commission has been the most active in actually setting standards and has, by far, attracted the most political attention, as the safety of food for humans is the most politicized aspect of the SPS Agreement.[79]

The Codex Commission establishes standards relating to human health, and its standards can concern additives, contaminants and veterinary drug and pesticide residues in foods.[80] The Codex Commission was founded in 1962 by the Food and Agricultural Organization (FAO) of the United Nations and the World Health Organization (WHO).[81] It currently has 162 members and is based in Rome.[82] The stated objective of the Codex Commission is "to guide and promote the elaboration and establishment of definitions

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[77] See Codex Alimentarius Commission, Report of the 21st Session, List of Standards and Related Texts Adopted by the 21st Session of the Codex Alimentarius Commission, ALINORM 95/37, online: http: //www.fao.org/docrep/meeting/005/V7950E/V7950E00.htm (date accessed: 12 March 2002) [hereinafter Codex 21st Report]; see FAO, Conference, 29th Session, Revision of the International Plant Protection Convention, C97/17, online: http://www.fao.org/unfao/bodies/conf/c97/w5913e.htm (date accessed: 03 March 2002); see International Office of Epizootics, The OIE: The World Organization for Animal Health online: OIE<http://www.oie.int/overview/a_oie.htm> (date accessed: 12 February 2002) [hereinafter The OIE].

[78] *Ibid.*

[79] See Victor, *supra* note 2, at 7.

[80] See Codex Alimentarius, Latest News, online: <http:/www.fao.org/WAICENT/FAOINFO /EONOMIC/ESN/codex/lnews.htm> (date accessed: 4 February 2002) [hereinafter Codex Latest News].

[81] See Victor, *supra* note 2, at 7.

[82] See, T.P Stewart & D.S. Johanson, "The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics" (1998) 26 Syracuse J. Int'l L. & Com. 27, at 2.

and requirements for foods to assist in their harmonization and, in doing so, to facilitate international trade."[83]

Most of the work of the Codex Commission is conducted through its various committees, which consist of delegates from its member states. Some of these committees are the Committee on Food Additives and Contaminants and the Committee on Processed Fruits and Vegetables.[84] Standards of the Codex Commission are established through a lengthy eight-step process that provides members with the opportunity to comment on the proposed standards.[85] Throughout the Codex Commission's history, most of its standards have been adopted by consensus.[86]

The Codex Commission's mandate was to develop and adopt food standards that would allow firms and countries to realize world trade in safe food products.[87] Right from the outset, the emphasis was on participation and consultation, especially with industry, the engagement of which, the architects of the Codex Commission hoped, would lead these stakeholders to harmonize their activities without the need for international enforcement.[88] The Codex Commission has experienced controversy surrounding the adoption of some of its standards since the implementation of the SPS Agreement.

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[83] See Codex Latest News, *supra* note 80.
[84] *Ibid.*
[85] See Codex Alimentarius Commission, Procedures for the Elaboration of Codex Standards and Related Texts (The Codex "Step Procedure") online:http://www.fao.org/waicent/faoinfo/economic /esn/codex/proced1.htm. (date accessed: 26 june 2002).
[86] *Ibid.*
[87] See Stewart & Johanson, *supra* note 82, at 8.
[88] *Ibid.*

(ii) The OIE

The OIE is an intergovernmental body established in 1924 with the purpose of protecting animal health.[89] It serves as the umbrella of numerous commissions that prepare codes, protection strategies, and manuals.[90] Some commissions work on specific diseases such as fish diseases or foot and mouth disease, while others work on problems of specific geographical regions.[91] The work of these commissions is approved by an International Committee, which is OIE's main decision-making body.[92] This committee meets at a minimum once a year.[93]

The OIE is the oldest veterinary association in the world and like the Codex Commission it has a long history of establishing advisory international standards.[94] OIE standards are found in the OIE's Code, which lists standards for international trade, and Manual, which provides the standard diagnostic procedures for animal diseases as well as vaccine standards related to international trade.[95] The Fish Diseases Commission of the OIE issues a separate Code and Manual pertaining to aquatic life.[96]

The OIE has undergone few changes since the implementation of the SPS Agreement in 1995.[97] Unlike the Codex Commission, the OIE has not experienced significant controversy when creating standards.[98] This lack of controversy has partly been attributed to the nature of the risks that the OIE addresses. It is argued that the

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[89] See International Office of Epizootics, The OIE: The World Organization for Animal Health, at Introduction, online: OIE<http://www.oie.int/overview/a_oie.htm> (date accessed: 12 February 2002). [hereinafter The OIE, Organization for Animal Health].
[90] *Ibid.*
[91] *Ibid.*, at Overview.
[92] *Ibid.*
[93] See Stewart & Johanson, *supra* note 82, at 12.
[94] See The OIE, *supra* note 77.
[95] *Ibid.*
[96] See The OIE, Organization for Animal Health, *supra* note 89, at Overview.
[97] *Ibid.*
[98] See Stewart & Johanson, *supra* note 82, at 12.

establishment of standards for animal products does not evoke the same concerns for most people as do the standards of the Codex Commission, which relate to human health.[99] Further, in contrast to the IPPC, the OIE prior to the Uruguay Round Agreements was well suited to establishing new standards, thus was not in need of revision.[100]

As demonstrated in the Australia-salmon dispute (as will be seen later), the prominence of the OIE in resolving trade disputes will most likely increase in the near future.[101] Also, bovine spongiform encephalopathy (BSE), commonly referred to as "mad cow disease" has had a significant impact on the international trade of live cattle and beef products; it is believed that this disease might lead to conflicts involving the WTO.[102]

One dispute that could result in WTO challenges concerns the European Communities' proposal to ban the use of "specified risk materials" (SRMs) that might pose risks regarding transmissible spogiform encephalopathies.[103] The European Communities' proposal was partly based upon OIE standards which state that certain materials, such as bovine brains and spinal cords originating from countries with cases of BSE, should not be traded internationally.[104] Such a ban by the European Communities

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[99] Although the OIE monitors and establishes standards for animal health, its standards can also indirectly impact humans. For example, the OIE monitors for bovine spongiform encephalopathy (BSE) as this disease is carried by cattle. At the same time, however, the OIE's regulations concerning BSE also affect humans as its regulations apply to cattle products, which are ultimately consumed by humans. See Stewart & Johanson, *supra* note 82, at 12.

[100] See Stewart & Johanson, *supra* note 82, at 12-15.

[101] *Ibid.*, at 13.

[102] See International Office of Epizootics, 65th Annual General Session of the International Committee of the Office International des Epizooties (May 30, 1997) online: < http://www.oie.int/eng/press/en_ historique.htm> (date accessed: 12 March 2002), [hereinafter The OIE, 65th Session].

[103] See USTR, Barshefsky Letter on SRM Ban, September 19, 1997 online: < http://www.ustr.gov/ pdf/1998_eu2.pdf> (date accessed: 3 April 2002).

[104] *Ibid.*

could restrict billions of dollars worth of U.S. pharmaceutical exports to Europe as many pharmaceutical products are encased in gelatin capsules composed partly of SRMs.[105]

(iii) The IPPC

Lastly, the third organization is the IPPC which came into force in 1952. According to its Article I, the purpose of the organization is to secure "common and effective action to prevent the spread and introduction of pests of plants and plant products and to promote measures for their control".[106] The IPPC was amended in 1979, and the amended text became operative in 1991.[107]

In order to prepare the IPPC to fulfill the role envisioned by the WTO, the FAO Conference decided in 1995 to amend the IPPC to adapt it to the new responsibilities anticipated for it in the SPS Agreement.[108] The revised IPPC will go into effect after two-thirds of the IPPC's contracting parties approve it.[109]

The most significant change proposed in the amendments is the creation of a new standard-setting focus for the IPPC.[110] Currently the IPPC does not contain provisions relating to the establishment of standards.[111] Instead an ad hoc standard-setting process, which is viewed by many as unsatisfactory, was developed in 1993 for the IPPC and was approved by the FAO Conference.[112] Consequently, unlike the Codex and the OIE, the

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[105] *Ibid.*
[106] See FAO, "Secretariat of the International Plant Protection Convention," online: FAO <http://www.fao.org/ag/agp/pq/secretar.htm> (date accessed: 3 March 2002) [hereinafter FAO Secretariat of the IPPC].
[107] *Ibid.*
[108] *Ibid.*
[109] See FAO, "Biological Diversity in Food and Agriculture: International Plant Protection Convention," online: <http://www.fao.org/biodiversity/IPPC_en.asp> [hereinafter Biological Diversity, IPPC].
[110] *Ibid.*
[111] *Ibid.*
[112] See FAO, Secretariat of the IPPC, *supra* note 106.

IPPC does not have an extensive history of establishing new standards.[113] The revisions are intended to provide the IPPC with the structure and capability to become a major standard-setting organization like Codex and OIE.

Other notable changes to the IPPC that were proposed in the amendments include, the mention of a Secretariat and the codification within the IPPC of some of the principles of the SPS Agreement, such as the use of risk assessment, pest free areas, and harmonization.[114]

B. Problems associated with International Standards

The Codex Commission, IPPC, and OIE were created well prior to the adoption of the Uruguay Round Agreements. They are now adjusting to the new role in the international trading system that was established for them through the SPS Agreement. The reliance on these three organizations within the SPS Agreement has already brought changes to these international bodies.[115] Although the standards set by these organizations remain solely advisory, the stakes for WTO members in international SPS standards have become higher, and there is a potential for an increased politicization of the codex, IPPC, and OIE when new standards are being set.[116] Questions have also arisen within these organizations as to their structural capabilities to fulfill their new roles.

The participation of these organizations' numerous members renders them not immune to politics. Yet, as Stewart and Johanson note, the Codex Commission, IPPC and

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[113] See Stewart & Johanson, *supra* note 82, at 12.
[114] See FAO, Conference, 29th Session, Revision of the International Plant Protection Convention, C97/17 (18 November 1997) online: < http://www.fao.org/unfao/bodies/conf/c97/default.htm> (date accessed: 24 February 2002), [hereinafter 29th Session, Revision of the IPPC].
[115] See Victor, *supra* note 2, at 22.
[116] *Ibid.*

OIE are scientific bodies whose decisions have traditionally not been the subject of great political concern.[117]

As stated earlier, of the standards established by these three international organizations named in the SPS Agreement, those of the Codex Commission have perhaps the greatest potential to lead to conflicts among WTO members.[118] As standards established by the Codex Commission relate to human health, they have caused more concerns for the populations of WTO members than have the standards of the IPPC and OIE, which deal respectively with plant and animal health. Controversy increasingly surrounds the establishment of certain Codex standards, and the adoption of its standards through consensus can no longer be assumed.

One indication of such controversy was the non-consensus approval of maximum residual levels for five growth promoting hormones, which later became the focus of the beef hormone disputes.[119] At the request of the United States, a secret vote was held on these standards, and they were approved with 33 delegates favouring their adoption, 29 opposing, and 7 delegates abstaining from the vote.[120] After the vote, the Observer of the European Communities stated that the secret vote was unfortunate as it deviated from the Codex Commission's goal to operate transparently.[121] The Observer also said that the vote brought into question the validity of the Codex standards and warned that the European Community might reconsider its participation in this body.[122] However, the delegations of the Netherlands, Sweden, Finland, Spain, and the United Kingdom

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[117] See Stewart & Johanson, *supra* note 82, at 3.
[118] *Ibid.*, at 8.
[119] See Codex 21st Report, *supra* note 77, at 45.
[120] *Ibid.*
[121] *Ibid.*, at 46.
[122] See Codex, Latest News, *supra* note 80.

disassociated themselves from parts or all of these remarks.[123] This further attests to the potential for conflict inherent in the standard-setting process.

There was also more controversy exhibited at the Twenty-Second Session of the Codex commission, where a vote was held on a draft standard for maximum residue levels for Bovine somatotropin (BST).[124] In the debates preceding the vote, the Codex Commission was divided into two groups: those who sought to adopt the draft standard at Step 8 of the Codex Commission's standard-setting process and those who favoured postponing consideration of its adoption pending the re-evaluation of scientific information.[125]

Discussions on a draft standard for natural mineral waters at the Twenty-Second Session of the Codex commission were also controversial and resulted in a close vote.[126] As reported out of the Codex Committee on Natural Mineral Waters in October 1996, this draft standard did not permit microbial treatments of natural mineral water.[127] Instead, the draft standard comported with the traditional means of producing natural mineral waters in Europe, a process which protects the purity of water by bottling it at its source.[128] Some delegations supporting the adoption of the standard stated that they would not oppose the creation of another standard for bottled waters besides "natural mineral waters."[129] Countries opposing the adoption of the draft natural mineral water standard, such as Japan, expressed concerns about an international standard that would

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[123] See Codex 21st Report, *supra* note 77, at 48.
[124] BST is injected into diary cows and increases their milk production. Its use is common in major diary producing countries, such as the United States.
[125] See Codex Alimentarius Commission, Report of the 22nd Session, ALINORM 97/37 (28 June 1997), 34-39, online: <http://www.fao.org/docrep/W5979E/W5979E00.htm> (date accessed: 12 February 2002) [hereinafter Codex 22nd Report].
112 *Ibid.*
[127] *Ibid.*,at 43.
[128] *Ibid.*
[129] *Ibid.*, at 48.

prohibit the use of microbial treatments as certain conditions, presumably including water quality, vary throughout the world.[130]

Perhaps recognizing the influence of the European Communities over countries seeking admission to it, Japan requested that secret ballots be used when a roll call vote was proposed for this draft standard, but Japan's proposal was rejected by a show of hands.[131] In the actual vote on the adoption of the proposed standard, some 33 countries voted for the resolution while 31 voted against it, and 10 delegations abstained.[132] The member states of the European Communities and most other European countries voted in favour of the draft standard.[133] Following the vote, the delegates of 16 countries expressed their reservations about this new standard.[134] The United States issued a statement denouncing it as a possible threat to public health and a non-tariff trade barrier as it imposes restrictive requirements on the bottling of water.[135]This vote caused several delegations to reiterate that the Codex Commission should attempt to reach major decisions through consensus.[136] Because of majority voting rules, the result may in principle be a large number of standards adopted against a country's wishes.[137] Moreover, the large number of Codex advisory texts and guidelines now potentially have binding application through the SPS Agreement, as they serve as the point of reference.[138]

The IPPC has also had its share of controversies. It is argued that with its new standard-setting focus, the decisions of the IPPC could possibly become more

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[130] See Codex Latest News, *supra* note 80.
[131] *Ibid.*
[132] *Ibid.*
[133] See Codex 22nd Report, *supra* note 125, at 51-63.
[134] *Ibid.*
[135] See Codex Latest News, *supra* note 80.
[136] *Ibid.*
[137] See Victor, *supra* note 2, at 10.
[138] See Jensen, *supra* note 5, at 6.

controversial as has occurred with some Codex decisions.[139] Indeed, the IPPC Secretariat expressed concerns during the IPPC revision process that trade matters were possibly being viewed as more important than plant health issues.[140] It is also argued that block voting within the revised IPPC might be less effective than within the Codex Commission, since according to Article X.5 of the proposed revised IPPC, if consensus cannot be reached on a matter that comes before the IPPC's Commission on Phytosanitary Measures, decisions will be made by a two-thirds majority, not by a simple majority.[141]

Some argue that the rising conflict in the standard-setting bodies should not be lamented.[142] Their view is that it is the "by-product of a shift from a voluntary (and often ineffective) system of standards to a scheme that may have a more binding impact".[143] The shift has made some players less willing to compromise their interests for the sake of agreement.[144] Indeed, previously, compromise was less painful because the procedures for creating Codex standards for instance, especially the provisions for acceptance, allowed one the possibility to ignore inconvenient standards. The impression that international standards are now more relevant has attracted new actors such as consumer protection organizations into the process, and, with new voices and interests, it has proved more difficult to reach consensus let alone majority agreement.

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[139] See Stewart & Johanson, *supra* note 82, at 12.
[140] See WTO, Committee on Sanitary and Phytosanitary Measures, Summary of the Meeting (Held on 8-9 October 1996) Note by the Secretariat, at 10, G/SPS/R/6 online: WTO <http://www.wto.org/english /tratop_e/sps_e/rep96_e.htm> (date accessed: 16 February 2002).
[141] See FAO, Conference, 29th Session, Revision of the International Plant Protection Convention, C 97/17 (18 November 1997), at 1, online: FAO <http://www.fao.org/DOCREP/MEETING/004/Y1938e.HTM> (date accessed: 9 February 2002) [hereinafter Revision of the IPPC].
[142] See Victor, *supra* note 2, at 23.
[143] *Ibid.*
[144] *Ibid.*, at 24.

One may wonder if the strategy adopted in respect of the shift has been the most effective. If we look at the case of the GATT for instance, we note that the shift from the weaker 1947 GATT framework to the integrated WTO system was made by the GATT members themselves, who changed not only the organizational framework but also the stringency of the legal commitments and the power of the enforcement mechanism.[145] However, in the case of the Codex Commission, the change in de facto legal status has arrived on its doorstep from the outside, and the corollary is that internal Codex procedures are changing in response and at the margins.[146] Given the increasing relevance of Codex standards, questions have been raised concerning whether the huge committee system is the best way to draft standards, and whether the Commission's working through majority voting is the most appropriate way to adopt standards.[147]

Due to conflict, the work of international standard-setting bodies risks being greatly slowed down. For instance, the failure to adopt standards for bovine somatotropins (BST), for which scientific evidence of safety is comparable with that of growth hormones, suggests that on politically charged topics, the standard-setting bodies may become bogged down in deadlock.[148] The result of this will be either lack of standards or broad and meaningless guidelines that are equally useless.[149] This will not however, compromise the disciplines of the SPS Agreement because the Article 5 requirement to base national SPS levels and measures on risk assessment remains in place, even when international standards do not exist.

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[145] *Ibid.*, at 23-24.
[146] *Ibid.*
[147] See Stewart & Johanson, *supra* note 82, at 11.
[148] See Revision of the IPPC, *supra* note 141.
[149] See Victor, *supra* note 2, at 23.

The deadlock on standards hurts the free trade agenda especially considering that one of the areas where international standards have been consistently influential is when filling gaps in areas of food law and in nations not already covered by standards.[150] As new markets for food products develop, there will be many gaps especially in developing countries where administrative capacity is often low.[151] International standards could play an important role in creating constructive regulatory frameworks in these new markets and thus help to expand trade. On the other hand, international standards could also ensure that nations, especially developing countries do not incur high transaction costs as a result of regulatory diversity.

[150] *Ibid.*
[151] *Ibid.*, at 25.

Chapter Two

SPS Measures and Disputes

I. SPS Disputes

Since 1995, three cases have gone through the dispute settlement process. These cases reveal how the SPS Agreement has been interpreted to date and thus provide a good number of lessons. There are several things to note about the practice of the SPS Agreement to-date. As noted by one commentator, 'when reading the SPS Agreement a word of caution is warranted.'[152] Some articles of the Agreement are ambiguous and therefore left to interpretation. In the WTO system such interpretation is done by the Panels in the first instance and as the highest instance the Appellate Body.[153] Three reports have been issued so far by the Appellate Body. These cover all the broad subjects of the Agreement, namely human, animal and plant health. The Appellate Body reports have established guidelines for the use of the two general principles of the Agreement, the principle of non-discrimination and the principle of scientific justification. The reports have also led to the clarification of parts of the Agreement which lend itself to interpretation. Two issues have been the subject of intense controversy. The interpretation of the words "based on" in Articles 3 and 5, and the application of the so-called "precautionary principle."[154]

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[152] See Jensen, *supra* note 5, at 10.

[153] According to the Dispute Settlement Understanding, the Panels treat both factual and legal matters of a complaint. The findings of a Panel may be appealed to the Appellate Body, but this body only issues reports on the legal matters of a complaint. The Appellate Body is the highest legal institution of the WTO. The dispute settlement mechanism of the WTO is not based on precedent. Nevertheless as cases accumulate, future Panels and the Appellate Body are likely to use previous reports to their decisions. See OECD, Food Safety and Quality: Trade Considerations (Paris: OECD), at 22, online: http://www.oecd.org/catch_404/?404;http://www.oecd.org/subject/biotech/5199081e.pdf (date accessed: 12 October 2002).

[154] See Jensen, *supra* note 5, at 11.

A. Beef Hormones

In 1988, the European Communities prohibited the use of growth promoting hormones in beef production, and an import ban on hormone treated meat was implemented in 1989.[155] The United States and Canada claimed that the use of hormones for growth promotion purposes in beef cattle was safe and posed no threat to human health.[156] They contended that the European Communities' policy was scientifically unfounded and was designed to protect EC beef producers from competition.[157] The European Communities countered by stating that beef hormones might threaten human health and claimed that science supported its policy.[158]

The European Communities and Canada, as well as the European Communities and United States held WTO-based consultations regarding the beef hormones controversy in 1996, but these talks did not result in mutually satisfactory solutions for the parties, and WTO dispute settlement panels were subsequently formed.[159] The two panels released their final reports on August 18, 1997.

Included among their arguments before the panels, the United States and Canada contended that the European Communities' prohibition on the importation of beef violated the European communities' obligations under Article 3.1 of the SPS Agreement as the European Communities failed to base its measure upon international standards.[160]

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[155] See Stewart & Johanson, *supra* note 82, at 6.
[156] *Ibid.*
[157] See EC Measures Concerning Meat and Meat Products (Hormones) (Complaint by Canada) (1997), WT/DS48/R/CAN at para. 8 (Panel Report) online: SICE < http://www.sice.oas.org/DISPUTE/ wtoindex.asp> (date accessed: 12 February 2002) [hereinafter Beef Hormones Canada Panel]; EC Measures Concerning Meat and Meat Products (Hormones) (Complaint by the United States) (1997) WT/DS26/R/USA at para. 8 (Panel Report) online: SICE < http://www.sice.oas.org/DISPUTE/ wtoindex.asp > (date accessed: 8 February 2002)[hereinafter Beef Hormones U.S. Panel].
[158] See Trebilcock & Howse, *supra* note 3, at 156.
[159] See Beef Hormones U.S. Panel, *supra* note 157, para. 1.
[160] See Beef Hormones Canada Panel, *supra* note 157, para. 8; see Beef Hormones U.S. Panel, para. 8.

The Codex maintains standards for five of the six hormones that were under dispute. [161] According to codex, these five hormones, when used according to sound veterinary practices for purposes of growth promotion in beef cattle, do not pose risks to human health.[162] The panels determined that the European Communities' measures varied from the international standards of the Codex and thus were not in conformity with Article 3.1.[163] The panel interpreted Article 3.1 of the SPS Agreement, which declares that "members shall base their sanitary or phytosanitary measures on international standards" as a requirement that SPS measures conform with international standards.[164] In particular the panel decided that "based on" meant that the SPS measures should afford the same level of SPS protection as the international standards. However, the WTO Appellate Body explicitly overturned this interpretation, preferring instead the more "common-sense" definition of "based on": a measure can be based on international standards without conforming with those standards.[165] Instead of conformity, the Appellate Body pointed to Article 3's fundamental purpose: to promote the use of international standards while allowing countries to deviate from those standards if those deviations conform with Article 5, which as already seen, pertains to the use of risk assessment.[166] This interpretation sounds contradictory to Hurst.[167] He says the Appellate Body interpreted Article 3.1 in the way that only a loose relationship between the international standard and the SPS measure in question is required for the measure to be in conformity with

[161] See Trebilcock & Howse, *supra* note 3, at 156.
[162] See Stewart & Johanson, *supra* note 82, at 6.
[163] *Ibid.*
[164] See Beef Hormones U.S. Panel, *supra* note 157, para. 8.
[165] See Victor, *supra* note 2, at 12.
[166] See Beef Hormones, *supra* note 157, para. 160.
[167] See D Hurst, "Hormones: European Communities – Measures Affecting Meat and Meat Products," European Journal of Int'l L. 9 (1) online: http://www.ejil.org (date accessed: 23 April 2002).

Article 3.1.[168] Unfortunately, the exact nature of this relationship is not explained by the Appellate Body. The crucial question is how strong a link there has to be between the SPS measure and international standard in order to satisfy the "based on" requirement.[169]

The European Communities argued before the WTO panels that the failure of the Codex to adopt the beef hormone maximum residue levels through consensus demonstrated the very controversy of using these standards.[170] The European Communities also stated that Codex members were accustomed to adopting non-binding measures and were unaware that these standards for beef hormones would in effect become mandatory for the member states of the European Communities through the operation of the SPS Agreement and the DSU.[171] The panels held however, that nothing in the SPS Agreement requires that votes on the measures of the relevant international

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[168] *Ibid.*

[169] Another related question also falls into the grey areas of the Agreement: If an SPS measure is based on an international standard (that is if it complies with Article 3.1), does the country applying the measure then have to conduct a risk assessment? According to Article 2.2 and 5.1 the answer seems to be yes because these articles generally require that any measure has to be based on a risk assessment. It could be argued, though, that when basing a measure on an international standard, the risk assessment has already been done. This is because international organizations establishing standards do their own risk assessment. This would provide an incentive to harmonize SPS measure on the basis of international standards. If an independent risk assessment has to be done when complying with Article 3.1 the requirements for satisfying this article become identical with the requirements for satisfying Article 3.3 (used when setting standards at protection levels higher than those of international standards). If the Agreement is interpreted that way, there is no incentive to undertake harmonization in comparison with setting higher standards than the international ones and Article 3.1 therefore in essence becomes identical to Article 3.3. Unfortunately, the Appellate Body has so far not been explicit on this matter. See Hurst, *supra* note 167, at 31.

[170] See Beef Hormones - Canada Panel, *supra* note 157, para. 8.69; see Beef Hormones - U.S. Panel, para. 8.66.

[171] See Beef Hormones Canada Panel, *supra* note 157, para. 8.71; see Beef Hormones U.S. Panel, para. 8.68. The Appellate Body in the Beef Hormone dispute held that the voluntary standards of the relevant international organizations have not become mandatory standards for WTO members through the operation of the SPS Agreement. Members may maintain SPS measures that are higher than international standards if these measures are based upon risk assessments. See EC Measures concerning Meat and Meat Products (Hormones) (Complaints by United States and Canada) (1998), WTO Doc. WT/DS26/AB/R & WT/DS48/AB/R, para. 165, 177 (Appellate Body Report) online: SICE < http://www.sice.oas.org /DISPUTE/wtoindex.asp> (date accessed: 12 February 2002) [hereinafter Beef Hormones Appellate Report].

organizations be by consensus, thus the European Communities' argument was rejected.[172]

The Dispute panel also ruled that the EC measure was not based on a risk assessment as required by Article 5.1. The Appellate Body agreed with this ruling.[173] The Appellate Body underscored that risk assessment did not have to be based entirely on research in the physical sciences; nor did it have to exclusively examine quantitative risks. The EC measure failed because the EC had not applied risk assessment techniques to the particular risks that the EC claimed were the basis of its SPS measure (an import ban). The EC had argued for instance, that misuse of hormones as growth promoters could cause excessive risks and thus all use of hormones for growth promotion had to be banned.[174] The Appellate Body concluded that the EC had not actually presented an assessment of such risks.[175] Hence the conclusion that the EC measures were not based on a risk assessment. Thus, there is not only a procedural requirement to obtain a risk assessment, but the Appellate Body also declared that "the requirement that an SPS measure be based on a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment."[176] The fact that all the valid risk assessments showed that "good practice" application of growth hormones was safe, and the failure to examine the risks that the EC claimed could result in harm to consumers, meant that the EC measure failed the "rational relationship" test.[177]

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[172] See Beef Hormone – Canada Panel, *supra* note 157, para. 8.72, see Beef Hormone – U.S. Panel, *supra* note 157, para. 8.69. The Appellate Body did not address the issue of non-consensus decisions by the relevant international organizations in its report for the Beef Hormone dispute.
[173] See Beef Hormone – Canada Panel, *supra* note 157, para. 8.162, see Beef Hormone – U.S. Panel, *supra* note 157, para. 8.159, see also Beef Hormone – Appellate Report, *supra* note 171, para. 208.
[174] See Victor, *supra* note2., at 12.
[175] See Beef Hormone – Appellate Report, *supra* note 171, para. 207.
[176] *Ibid.*, para. 193.
[177] See Victor, *supra* note 2, at 13.

The Panel also found that the EC had violated Article 5.5 of the SPS Agreement by demanding different levels of SPS protection in comparable situations.[178] Notably, the EC had allowed caradox and oliquindox to be used as antimirobial feed additives that promoted the growth of pigs, yet the EC banned the use of hormones as growth promoters in cows although the hormones resulted in similar (or lower) risks to humans.[179] The US and Canada had complained that while the EC banned the import of beef produced using hormones for growth promotion purposes, it was legal to use the two hormones for growth promoting purposes for the raising of pigs. The Appellate Body dismissed the complaint, as they did not find the EC to have failed the third test in regard to Article 5.5 of the SPS Agreement.[180] In order to establish a violation of Article 5.5, three elements have to be established: (1) the Member must have done so in numerous situations, (2) those levels of protection must exhibit arbitrary or unjustifiable differences in their treatment of comparable situations, and (3) such measures result in discrimination or a disguised restriction of trade.[181] It could be argued that an arbitrary difference did exist between the legislation for beef production and the legislation concerning pig meat production, and that this difference did result in a *de facto* restriction on trade, but nevertheless, the Appellate Body did not accept the complaint as they ruled that the intent of the EC had been to protect its citizens from the potential carcinogenic effects of growth hormones in beef. It was the intent behind a measure and not the real effect that was to be the basis of a ruling.[182]

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[178] See Beef Hormones U.S. Panel, *supra* note 157, para. 8.
[179] See Victor, *supra* note 2, at 13.
[180] *Ibid.*
[181] See Trebilcock & Howse, *supra* note 3, at 157.
[182] See Jensen, *supra* note 5, at 11.

Some observers think this decision by the Appellate Body substantially weakens the principle of non-discrimination. First, legislation often involve several objectives and it is therefore difficult to speak of the intent of a country at all. Second, it is almost impossible to design a principled way to go about an inquiry meant to uncover the intent of a measure. Therefore, there will be no guidance to members speculating whether their trading partners' rules respect Article 5.5 or not.[183] Third, the idea that the analysis should turn on the intent and not the real effects of a measure seems to contradict other parts of the Agreement, notably the focus on scientific justification.[184] Indeed, as Hurst notes, it seems contradictory that the SPS Agreement in some aspects is focused exclusively on whether a scientific basis exists or not and then in this aspect is about the intent of legislators, be that based on science (so that the intent and the real effects of a measure are the same) or something else.[185]

Lastly, as seen earlier, the Panel viewed the SPS Agreement as requiring strict adherence to international standards and sharply limiting a nation's right to determine its SPS levels and measures, while the Appellate Body, which in Victor's view is more attuned to the political and social context in which the SPS Agreement and WTO operate, gave importers much greater autonomy in setting up SPS policy.[186] Unlike the Panel, which found three main reasons to rule against the EC, the Appellate Body endorsed only one: the EC's failure to base its SPS measures on a risk assessment.

[183] See Hurst, *supra* note 167, at 10.
[184] See Jensen, *supra* note 5, at 11.
[185] See Hurst, *supra* note 167, at 12.
[186] See Victor, *supra* note 2, at 13.

B. Australian Salmon

On October 5, 1995, Canada requested WTO-based consultations with Australia regarding Australia's ban on fresh, chilled, and frozen salmon from Canada.[187] Australia argued that its prohibition of such imports, which became operative in 1975, was necessary to protect Australian fish from up to 24 diseases that could enter the country through imported salmon from Canada.[188] The establishment of these diseases could have damaging economical and biological consequences for Australia's fisheries.[189] Many of the diseases could adversely affect trout, which are vital to Australian sport fishing and tourism as well as a small trout acquaculture industry. The diseases could also harm the Atlantic salmon aquaculture farms, first established in 1986 in Tasmania, that export high value salmon to world markets and sell their products on the local Australian market. To combat the threat, Australia required heat treatment for all imports from regions where fish might become infected with the diseases.

Canada, a major exporter of fresh and frozen salmon, challenged Australia's regulation. Canada claimed that Australia's policy was not founded upon science and was a disguised restriction to international trade.[190] Canada also contended that Australia violated Article 3.1 of the SPS Agreement as the disputed measure was not based upon an international standard of the relevant international organization, the OIE, and that the measure did not meet the requirements of Article 3.3 of the SPS Agreement, which

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[187] See Australia-Measures Affecting Importation of Salmon (Complaint by Canada) (1998) WTO Doc. WT/DS18/R para. 1 (Panel Report) online: SICE < http://www.sice.oas.org/DISPUTE/wtoindex.asp> (date accessed: 12 February 2002) [hereinafter Australian Salmon, Panel Report]; see Australia-Measures Affecting Importation of salmon (Complaint by Canada) (1998) WTO Doc. WT/DS183/AB/R (Appellate Body Report) online: SICE < http://www.sice.oas.org/DISPUTE/wtoindex.asp> (date accessed: 12 February 2002) [hereinafter Australian Salmon, Appellate Report].
[188] *Ibid.*, Australia Salmon, Panel Report 187, *supra* note, para. 4.
[189] *Ibid.*
[190] *Ibid.*

permits WTO members to maintain standards that are higher than international standards, but only if they are based upon science or are a "consequence of the level of sanitary and phytosanitary protection a member determines to be appropriate" and are based upon risk assessments.[191]

Australia countered that it did not claim that its measure on salmon was based upon OIE standards.[192] After all, OIE standards did not exist for all the 24 diseases from which Australia was seeking protection, and the OIE had no guidelines for salmon as a specific product.[193] Australia argued that the lack of guidelines for all the 24 diseases meant in effect that no appropriate OIE guideline existed upon which Australia could base its measure.[194]

Canada did not dispute that Australia had the right to preserve a pristine environment – that is, in the language of the SPS Agreement, Australia had the right to determine its own "appropriate level of SPS protection." But, Canada argued, the quarantine was arbitrary because Australia did not apply similarly strict quarantine measures against other disease risks. Australia had allowed imports of frozen herring bait fish and live ornament fish that could much more easily transmit many of the twenty-four diseases into Australian waters, but it barred Canadian salmon. Bait fish are by design disposed directly into Australian waters where diseases could easily pass to other fish.[195] Ornament fish often escape their ponds and aquaria; when they die, they may be disposed of without care for the risk of transmitting diseases to other fish in Australian waters.[196]

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[191] *Ibid.*, para. 3.
[192] *Ibid.*, para. 8.
[193] *Ibid.*, para. 8.
[194] *Ibid.*, para. 4.
[195] See Victor, *supra* note 2, at 14.
[196] See Australian Salmon, Panel Report, *supra* note 187, para. 4.

In contrast, headless and eviscerated fresh or frozen salmon from Canada had a low and implausible chain of events.[197] None of the several existing risk assessments supported the Australian argument. As the EC argued in the Beef Hormones case, Australia maintained that although the risks were low it could not be certain that headless eviscerated fish would not spread disease.

The Panel's report did not address Canada's claims concerning Australia's failure to base its measure upon OIE standards. Rather, the Panel found that Australia was in violation of the SPS Agreement as it (1) did not base its salmon import regulation upon a risk assessment (in violation of Article 5.1 and consequently Article 2.2, which requires that SPS measures be based upon scientific principles); (2) was applying arbitrary or unjustifiable distinctions in the levels of SPS protection for measures for different situations, that is, was applying more restrictive measures to imports of salmon than to imports of ornament live fish although the latter posed higher risks,[198] which resulted in a disguised restriction on international trade (in violation of Articles 5.5 and 2.3); and (3) was maintaining an SPS measure that was more trade-restrictive than necessary to reach Australia's appropriate level of SPS protection (in violation of Article 5.6).[199] As the

[197] For example, a disease-ridden fish carcass would be disposed in the sewers, sewage would leak into waterways, and waterways would then carry the disease (perhaps via an intermediate host) into the Australian fisheries. Canada argued that the probability of each step was low and, in total, the probability of the full chain of events was extremely low. See Australian Salmon, Panel Report, *supra* note 187, para. 4.69-70. The case focused on Pacific wild salmon, which were the most important potential Canadian export and had been the subject of a special effort by Canada and the United States to perform a risk assessment and obtain export permission from Australia. Later that same risk assessment process would be extended to other species. Such risk assessment must be differentiated between populations and species because the incidence of disease and risk of transmission probably vary. *Ibid.*, para. 8.53-60.

[198] See Victor, *supra* note 2, at 14-15.

[199] See Australian Salmon, Panel Report, *supra* note 187, para. 8-9.

Panel found that Australia was violating these provisions, the Panel stated that it saw "no need to further examine Canada's other claims under...Article 3."[200]

Although the Appellate Body struck down some of the findings contained in the Panel's report, it upheld the Panel's decision that Australia's policy regarding the importation of salmon violated the country's obligations under the SPS Agreement.[201] The Appellate Body, like the Panel, found that Australia's policy as applied to ocean-caught salmon contravened Australia's obligations under article 5.1 as the relevant measure was not based upon a risk assessment, and therefore, Australia's policy also violated Article 2.2, which requires that SPS measures be based upon scientific evidence.[202] The Appellate Body upheld the Panel's finding that Australia, by maintaining unjustifiable distinctions in levels of SPS protection in different situations, was imposing a disguised restriction on international trade in violation of Articles 5.5 and 2.3.[203] The Appellate Body reversed the Panel's finding that Australia's measure as applied to ocean-caught salmon was more trade restrictive than necessary, and thus in violation of Article 5.6, as the Panel premised its finding upon the wrong SPS measure.[204] This was because the Panel addressed Australia's heat treatment for salmon as opposed to Australia's ban on the importation of salmon.[205] Further, due to a lack of adequate facts on the record, the Appellate Body was unable to determine whether Australia's import prohibition was inconsistent with Article 5.6.[206]

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[200] *Ibid.*, para. 8.184.
[201] *Ibid.*
[202] See Australian Salmon, Appellate Report, *supra* note 187, para. 123-24.
[203] *Ibid.*, para. 85-86, 93 & 124.
[204] *Ibid.*, at 124.
[205] *Ibid.*
[206] *Ibid.*

In sum, while the Australia-salmon Panel decision did not turn directly upon an international standard, the OIE's guidelines figured prominently in the arguments of both Canada and Australia. In addition, the Panelists looked to the OIE for guidance when addressing other issues, such as whether Australia presented the Panelists with a risk assessment.[207] The Appellate Body limited its examination to the findings of the Panel, and as the measures of the OIE did not play a prominent role in the Panel's decision, the Appellate Body did not examine issues directly related to the OIE.

C. Japan Varietals

This case concerned a Japanese regulation that required exporters of various fruits and nuts to submit each new variety they intended to export to Japan to an extensive regime to verify that fumigation with methyl bromide would effectively kill the eggs and larvae of coddling moths.[208] The case focused on four species, namely, apples, cherries, nectarines, and walnuts, but potentially had application to others.[209]

Japan argued that varietal testing was needed because the most effective treatments might vary not only with the characteristics of the fruit or nut but also the season of harvest.[210] Different varieties have different harvest times, and thus Japan argued that test results for one variety were not applicable to another. The United States

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[207] See Australian Salmon, Panel Report, *supra* note 187, para. 8.

[208] See Japan-Measures Affecting Agricultural Products (Complaint by United States) (1998) WTO Doc. WT/DS76/R (Panel Report) online: SICE < http://www.sice.oas.org/DISPUTE/wtoindex.asp> (date accessed: 12 February 2002) [hereinafter Japan Agricultural Products, Panel Report]; Japan Measures Affecting Agricultural Products (Complaint by United States) (1999) WTO Doc. WT/DS76/AB/R (Appellate Body Report) online: SICE http://www.sice.oas.org/DISPUTE/wtoinde2.asp#jap (date accessed: 12 February 2002) [Japan Agricultural Products, Appellate Body Report].

[209] The United States challenged the Japanese varietal testing requirement for all "US products on which Japan claims that coddling moth may occur," which included apricots, pears, plums, and quince. But the United States had not provided a prima facie case that the Japanese testing requirement was maintained "without sufficient scientific evidence." The United States met that standard for apples, cherries, nectarines, and walnuts but not for the other four fruits. See Japan Agricultural Products, Appellate Report, *supra* note 208, at 132-38.

[210] *Ibid.*

challenged the requirement as not being based on an assessment of risks; it also argued that the varietal testing requirement imposed excessive costs and delays and thus was more trade-restrictive than required. The United States contested only the measures that Japan had applied; it explicitly did not question Japan's right to determine its "appropriate level of SPS protection" – that is, for Japan to ensure that its pristine islands remain free of coddling moth. [211]

The Panel determined that Japan's policy contravened that country's obligations under the SPS Agreement. This was because Japan's measure, as applied to apples, cherries, nectarines, and walnuts, was not based upon scientific evidence, in violation of Article 2.2, and was more trade restrictive than necessary in violation of Article 5.6.[212] The Appellate Body endorsed the conclusion that the Japanese testing requirement was not based on a risk assessment.[213]

However, with respect to the finding that the varietal testing requirement was more trade restrictive than necessary and thus violated Article 5.6 of the SPS Agreement, the Appellate Body overturned this ruling because it was based on evidence gathered by the Panel itself and thus in the Appellate Body's view, had over-stepped its authority.[214]

The United States contended that Japan had failed to base its policy upon risk assessments and that Japan was thus in violation of Article 5.1.[215] Japan claimed, however, that it had conducted such assessments under the procedures set forth in the risk assessment guidelines of the IPPC.[216] The Panel provided a detailed description of the

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[211] See Japan Agricultural Products, Panel Report, *supra* note 208, para. 2.
[212] *Ibid.*, Panel Report, para. 9.
[213] See Victor, *supra* note 2, at 15.
[214] The idea for a 'determination of sorption level' approach derived from suggestions from the experts advising the Panel. See Japan Agricultural Products, Panel Report, *supra* note 208, para. 8.
[215] See Japan Agricultural Products, Panel Report, *supra* note 208, para. 3.
[216] *Ibid.*, para. 4.

IPPC's guidelines, and these guidelines figured prominently in the arguments of both the United States and Japan concerning the issue of risk assessments.[217] In the end, the Panel decided not to address the issue of whether Japan's policy was based upon risk assessments as required by Article 5.1 as the Panel had already found that Japan was in violation of Article 2.2 because its measure was not based upon scientific evidence.[218]

Lastly, as Japan's measure was not published, the Panel and Appellate Body found that Japan was in violation of Article 7 and Annex B.1, both of which concern transparency.[219] It is argued that the Japanese varietal testing requirement was based on numerous de facto rules that were not easily understood by outsiders, which made it difficult for exporters to understand and comply with requirements of the Japanese market.[220]

II. Lessons Learned and Implications for the GMO Controversy

A. Lessons learned from the Disputes

As contended by Robert Howse, these disputes attest to the need for transparency in regulatory justification. He argues that harmonization through international standards may be justified where lack of transparency in the domestic regulatory process makes it impossible to make a principled decision as to whether a given regulation is legitimate or an example of illegitimate cheating on trade liberalization commitments.[221] Leebron observes that if trade liberalization commitments can be neutralized by disguised

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[217] *Ibid.*, para. 2 & 4.
[218] *Ibid.*, para. 8.
[219] *Ibid.*; Japan Agricultural Products, Appellate Body Report, *supra* note 208, para. 108 & 143.
[220] See Victor, *supra* note 2, at 16.
[221] See Robert Howse, "Democracy, Science, and Free Trade : Risk Regulation on Trial at the World Trade Organization" (2000) 98 Mich. L. Rev., at 5.

regulatory measures, the multilateral trade negotiation process will be undermined.[222] On the issue of harmonization constraining the ability of governments to make distinctive rules for legitimate reasons, Leebron argues that the SPS Agreement should be understood as a compromise or trade-off between these countervailing concerns.[223] If we develop Leebron's insight, we can conclude that the SPS Agreement works on two fronts simultaneously: on the one hand facilitating international harmonization as a solution to the transparency problem, on the other hand seeking to reduce the problem itself, through a range of disciplines on how governments engage in deliberation and justification with respect to regulatory choices.[224]

Some commentators have argued that although the purpose of the SPS Agreement is to promote harmonization of SPS measures, the three cases suggest that international standards have not had much impact.[225] Victor says this finding is surely biased by the three above cases. [226] He argues that dispute panels are likely to hear only those cases for which national SPS measures do not conform with international standards since cases where there is conformity are explicitly in compliance with the SPS Agreement and therefore yield no viable dispute.[227] Thus perhaps international standards are having a large unseen effect.

In each of these cases, although none of the outcomes from the disputes actually required the existence of an international standard, international standards were referenced in the resolution of the disputes. In the Beef Hormones case the Appellate

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[222] See David W. Leebron, "Lying Down with Procrustes: An Analysis of Harmonization Claims," in Jagdish Bhagwati & Robert E. Hudec eds., *Fair trade and harmonization: prerequisites for free trade?* (1996) 41, at 65.
[223] *Ibid.*
[224] *Ibid.*, at 66.
[225] See Stewart & Johanson, *supra* note 82, at 13.
[226] See Victor, *supra* note 2, at 21.
[227] *Ibid.*

Body underscored that international standards were at best a starting point for countries that wanted to deviate from them. Indeed, the main line of legal reasoning in this case was the failure for the EC's hormone ban to demonstrate some "rational relationship" between risk assessment and the measures it imposed.

Formal disputes are important not only because they often address important trade barriers, but also because they create interpretations of the law, focus expectations on how the WTO system will handle possible future disputes, and deter other violations. If disputes demonstrate clear discipline and a credible threat to dismantle trade barriers, then countries will be more likely to remove illegitimate SPS measures on their own. Victor argues that there is substantial evidence that the extended effect is significant.[228] He argues that the SPS Agreement has been a "broader catalyst" well beyond the three measures that have been the subject of formal disputes, and that it has induced some nations to remove illegitimate SPS measures.[229] As with any properly functioning enforcement system, it is true that well-handled disputes can deter countries from imposing illegitimate SPS measures in the future.

The Beef Hormones decision raises a number of concerns relating to difficulties in the adjudication of scientific issues. Indeed, as Wirth puts it, "there is unlikely to be a single, unique way to analyze even the purely scientific significance of much empirical data".[230] He further notes that scientific questions do not always lend themselves to a "yes" or "no" answer that is demanded by an adversarial process.[231] Therefore, in order to avoid the WTO from becoming the "World Trans-science Organization", which would

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[228] *Ibid.*
[229] *Ibid.*, 20.
[230] See Trebilcock & Howse, *supra* note 3, at 158.
[231] *Ibid.*

surely pose a threat to sovereignty, and perhaps even to human health, Vern Walker proposes an approach that would promote a gradual development of consensus through the proper structuring of the WTO's fact-finding process.[232]

The three WTO disputes have helped to clarify the obligations in the SPS Agreement, but they have also left many areas still uncertain. One such area of ambiguity concerns the criteria for judging the trade effects of SPS measures. As is the case, the SPS Agreement seeks to bar SPS levels and measures that cause unjustifiable distortions of trade. However, there is no agreed-upon standard for how large a distortion of trade is necessary for a level or measure to qualify as trade-related and thus be subject to the discipline of the SPS Agreement.[233] In fact with globalization, practically every national measure has an effect on trade, which would suggest that all SPS levels and measures could be subject to the discipline of the SPS Agreement.

It is also unclear how to interpret the requirements in the SPS Agreement that bar countries from setting SPS protection levels that "arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail."[234] That requirement is set out in Article 5.5, which requires that countries apply measures that yield a comparable level of protection under comparable situations.[235] In two of the three disputes to date, it has been relatively easy to identify a comparable situation where

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[232] See V.R Walker, "Keeping the WTO from Becoming the "World Trans-science Organization": Scientific Uncertainty, Science Policy, and Fact-finding in the Growth Hormones Dispute" (1998) Cornell Int'l L. J. 251, at 40.
[233] See Charnovitz, *supra* note 12, at 12.
[234] See SPS Agreement, *supra* note 20, Article 2.3.
[235] The exact language in Article 5.5 states that 'each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.' See SPS Agreement, *supra* note 20, Article 5.5. But Victor argues that the language of "different situations" is counter-intuitive and awkward to use in plain English. He prefers to follow the approach of the Panel in the Beef Hormones case which used the term "comparable situations." See Victor, *supra* note 2, at 17.

allowable SPS risks were substantially different. In the Beef Hormones case, carbadox and olaquindox were allowed for swine production, but natural and synthetic hormones were not allowed for beef production; yet both substances caused a similar health effect (carcinogenicity). Some experts consulted by the Dispute Panel even suggested that such feed additives could directly harm workers who handled feeds.[236] In the salmon case, Australia allowed imports of frozen herring bait and live ornament fish that harboured many of the same diseases that Australia feared would arrive on imported salmon; yet fresh and frozen salmon were effectively barred, which protected the nascent Australian aquaculture industry.[237] These easy cases have not given much clarity to what is "comparable," except to underscore that "comparable" will not be interpreted in the narrowest possible manner as a requirement to impose comparable levels of SPS protection only when exactly the same sources and types of risks are at stake.

Charnovitz believes that SPS dispute settlement is providing good results for producers in exporting countries.[238] This view is supported by the fact that the three cases were adjudicated in favour of the exporters. He also notes that the process of the SPS Agreement being used to challenge foreign trade barriers, has worked reasonably well with the exception of a few rough spots.[239] It is hoped that the lessons from these disputes are used appropriately to avoid repeating similar errors in future adjudication.

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[236] The argument that carbadox and olaquindox were 'comparable situations' and thus proof that the EC rules were in violation of the SPS Agreement was rejected by the Appellate Body. See Beef Hormones: Complaint by Canada, Panel Report, *supra* note 157, para. 6.98-116. That Body held that the use of these as feed additives for growth promotion was, indeed, a "comparable situation," but the use of this argument was rejected because the United States could not demonstrate negative international trade effects that were a consequence of the discrimination under these "comparable situations." See Beef Hormones, Appellate Report, *surpa* note 171, at 235, 245, 246.

[237] See generally Australian Salmon, Panel Report, *supra* note 187,; Australian Salmon, Appellate Report, *supra* note 187.

[238] *Ibid.*, at 10.

[239] *Ibid.*, at 19.

B. How Valid is the "Downward Harmonization" Fear?

Liberalizing trade requires reducing barriers, including non-tariff barriers such as national regulations, which has led many observers to fear that lowering trade barriers could cause a "race toward the bottom".[240] They are worried that as governments strive to promote their export industries, they will dismantle regulations that protect consumers, preserve the environment, and advance other important objectives.[241] They also fear that promoting the use of international standards in order to yield a level playing field will require "downward harmonization" towards the lowest common denominator.[242] These fears are central issues in the trade and environment debate and thus worth examining.

Some argue that the experience to date does not give any support to these fears. It is noted that the greatest fear with the "race toward the bottom" is that free markets will create a strong incentive for producers to adopt less costly processes that make exports more competitive but have harmful effects, such as greater pollution, in the locality of production.[243] However, on SPS issues, the importing country sets its own level of SPS protection and exporters do not compete by undercutting that level but rather have to comply with the importing country's regulations. Thus, in this regard there would be no regulatory chill.

Leebron acknowledges that harmonization constrains the ability of governments to make distinctive rules for legitimate reasons.[244] However, he also observes that transparency in regulatory justification is needed to distinguish legitimate policies from

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[240] See J. MacDonald, "Big beef up or consumer health threat: the WTO food safety agreement, bovine growth hormone and the precautionary principle" (1998) 27 Cornell Int'l L. J. 459, at 16.
[241] *Ibid.*, at 18.
[242] *Ibid.*, at 17.
[243] See Victor, *supra* note 2, at 18.
[244] See Leebron, *supra* note 222, at 66.

disguised cheating on tariffs or other concessions.[245] But we should also ask ourselves if there is any suggestion of harmonization to date. Although some areas of interpretation still remain grey, the legal text of the SPS Agreement and the cases to date have underscored that nations have latitude in setting their SPS protection levels and measures, and evidence suggests that harmonization of SPS levels and measures is not under way.

It is believed that developing countries for instance, lodged more "full acceptances" of Codex commodity standards because they did not have many SPS measures already in place, while industrialized countries, especially those with the most advanced SPS protection systems, principally employed "acceptances with specific deviations"[246] This suggests that international standards are "a fluid that can fill gaps (when countries let the fluid flow)", rather than "a solid block that crushes deviation".[247] The SPS Agreement therefore allows diversity to flourish.

One commentator, Regine Neugebauer, contends that fears of "downward harmonization" show a misreading of the SPS Agreement.[248] She argues that higher levels of protection are only prohibited if there is no sound scientific basis for them as stipulated by Article 3.3.[249] She also believes that the harmonization of SPS standards is a worthy goal that should be pursued, but regrets the WTO Appellate Body ruling in the Beef Hormones case, which in her view weakened the force of the SPS Agreement.[250]

It is also argued that the SPS Agreement might lead to a gradual raising of global SPS standards as a result of encouraging sharing of information and techniques, which

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[245] *Ibid.*
[246] See Victor, *supra* note 2, at 22.
[247] *Ibid.*
[248] See Neugebauer, *supra* note 14, at 18.
[249] *Ibid.*
[250] *Ibid.*, at 2.

will facilitate scientific research despite socio-political barriers.[251] The argument is based on the premise that artificially high levels of protection (those implemented without scientific support) would be reduced, while the standard of scientific knowledge overall would be raised.[252] Even one critic of the SPS Agreement is said to have admitted that it may assist in raising food safety standards and will "impel greater coordination between the international regimes for trade, environment, and labour".[253]

In sum, where food and health are concerned, politicized issues will be commonplace. As Victor observes, the special challenge for the WTO system is for governments to ready their societies to accept defeat and implement reform.[254] In reference to the Beef Hormones case, he suggests that the EC painted itself further into a corner by continuing to argue that European consumers required the ban to restore confidence in the market and then fanning consumer fears of the same.[255] In his view, this has probably taught the EC a lesson that such strategy is bad because "it makes the eventual fall longer and harder".[256]

C. Implications for the GMO controversy

It is pertinent to examine what insight the above WTO decisions give to the current international controversy over GMOs. The issue of WTO compatibility of EU regulation of GMOs remains a vast and complex subject. Firstly, on the question of whether the EU regulation of GMOs would fall, exclusively or even principally, for

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[251] See MacDonald, *supra* note 240, at 18.
[252] *Ibid.*, at 19.
[253] See Neugebauer, *supra* note 14, at 19.
[254] See Victor, *supra* note 2, at 19.
[255] *Ibid.*
[256] *Ibid.*

consideration under the SPS Agreement, the proposed regulation apparently suggests the contrary.[257] With such expanded premises underpinning this proposal, and in particular its concern with consumer interests, the SPS Agreement seems to mark the beginning and not the end, of the WTO affair.[258]

On the issue of the precautionary principle, while the Appellate Body in Beef Hormones refused to rule on its status in international law, it did, however, provide that this principle cannot override the specific provisions of the agreement.[259] Therefore, in understanding Article 5.1, which requires members to ensure that their SPS measures are based on a risk assessment, the Appellate Body established that theoretical uncertainty is not the kind of risk which is to be assessed under Article 5.1.[260] This observation cannot be assumed to apply equally to Article 5.7, which contains a specific embodiment of the precautionary principle.[261] Article 5.7 permits members to adopt provisional SPS measures where relevant scientific evidence is insufficient, and to do so on the basis of available pertinent information, subject to an obligation to seek additional information necessary for a more objective assessment of risk within a reasonable period of time.[262] These four inherent requirements are to be regarded as cumulative.[263]

To-date the Appellate Body has not precluded the legality of acting on the basis of theoretical uncertainty, or hypothetical risk, subject to compliance with the four elements

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[257] See Robert L. Paarlberg, et al., 'Regulation of GM Crops : Shaping an International Regime' (2002) online : <http://www.economia.uniroma2.it/conferenze/icabr/abstract/Hopkins.htm> (date accessed : 12 April 2003), at 23.
[258] *Ibid.*, at 25.
[259] See Beef Hormone – Appellate Report, *supra* note 171, para. 228.
[260] See SPS Agreement, *supra* note 20, Article 5.1.
[261] See Jan Bohanes, "Risk Regulation in WTO: A Procedure-Based Approach to the Precautionary Principle" (2002), 40 Colum. J. Transnat'l L. 323, at 31.
[262] See SPS Agreement, *supra* note 20, Article 5.7.
[263] See Japan Agricultural Products, Appellate Body Report, *supra* note 208, para. 89-94.

of Article 5.7.[264] However, the construction of this article is not clear, as it only states that the additional information sought must be intended for conducting a more objective risk assessment, and that the concept of a "reasonable period of time" is to be determined on a case-by-case basis, depending upon the circumstances of the given case, including the difficulty inherent in obtaining the additional information.[265] Scott suggests that in terms of the precautionary principle, it may be thought that the EU has conceded too much too quickly.[266] At the same time, it may be lawful, under the SPS Agreement, to adopt provisional measures to guard against hypothetical risk, and there may be circumstances in which it is rational to do so.[267]

Since 1999, the United States and the EU have been discussing the creation of an ad hoc scientific panel to resolve GMO issues.[268] Biotech companies also had extended an olive branch, offering, inter alia, to label all GM products through all processing

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[264] See Joanne Scott, "European Regulation of GMOs and the WTO" (2003) 9 Colum. J. Eur. L. 213, at 23.
[265] See Japan Agricultural Products, Appellate Body Report, *supra* note 208, para. 92 and 93. Considerable doubt remains as to the scope of Article 5.7. Article 5.7 refers to insufficient scientific evidence being a factor to be taken into account in a risk assessment: see Daniel Wuger, "Symposium Issue on WTO Dispute Settlement Compliance: The Never Ending Story: The Implementation Phase in the Dispute between the EC and the United States on Hormone-Treated Beef" (2002) 33 Law & Pol'y Int'l Bus. 777, at 21-25. He notes that this does not imply that Article 5.7 can be invoked without risk assessment, but merely that such an assessment can be made on the basis of factors which would not otherwise fulfill the Article 5.2 risk assessment standard (systematic, disciplined and objective enquiry and analysis ...). Therefore, the threshold for the application of Article 5.7 will depend not only upon the nature of the risk (hypothetical or otherwise) which might serve to justify provisional measures, but also the nature of the risk assessment which must precede such measures. Also of relevance here, is the Asbestos Appellate Body Report. It confirmed that Member States have an undisputed right to determine the level of protection of health which they consider appropriate including, as in this case, the right "to halt" the spread of asbestos-related health risks. This looks very much like an endorsement of a "zero-risk" approach. Thus, as long as the risk is more than merely hypothetical/theoretical, it is open to Member States to seek to guard against it completely. See Scott, *supra* note 266, at 24-25.
[266] See Scott, *supra* note 266, at 26.
[267] *Ibid.*
[268] See Kevin C. Kennedy, 'Resolving International Sanitary and Phytosanitary Disputes in the WTO : Lessons and Future Directions' (2000) 55 Food Drug L.J. 81, at 20.

stages.[269] American farmers do not want US- EU negotiations to drag on indefinitely.[270] The United States has continuously urged WTO members to participate in the work of Codex to advance agreement on relevant international standards for GMOs.[271] Interestingly, although the United States has now finally launched dispute settlement proceedings against the EU at the WTO, its hesitancy in calling for the creation of a WTO panel suggested that there was insufficient clarity in the SPS Agreement to ensure a U.S. victory.[272] This is because in the past the United States has not been hesitant about using the WTO dispute settlement mechanism to resolve trade disputes that some observers have considered trivial.[273] However, others have suggested political reasons for the hesitation, arguing that the White House held up the process of formally initiating WTO dispute settlement proceedings pending the conclusion of the conflict in Iraq.[274]

Several controversies characterize new GM crop prospects, including the fact that trade factors have pushed the US and the EU toward a confrontation over regulation of GM crops. The European Parliament recently voted to accept proposals on GMOs that establish clear traceability and labelling procedures that will modify existing European regulations.[275] The proposals were presented by the European Commission as the latest

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[269] See Int'l Trade Rep., 'Biotech Companies Propose to EU Measures Aimed at Fears of GMO Products,' (1999) 16 (BNA), at 1775.
[270] See Gary G. Yerkey, 'Farm Leader Urges U.S. to Establish Six-Month Deadline for Biotech Pact with EU' (1999) 16 Int'l Trade Rep. (BNA), at 1904.
[271] See Committee on Technical Barriers to Trade, Genetically Modified Agricultural and Food Products, Submission from the United States, G/TBT/W/115 (17 June 1999).
[272] See Yerkey, *supra* note 270, ('Isi Siddiqui, Special Assistant to the Secretary of Agriculture for International Affairs,...said that if the US-EU discussions were to fail, the United States would be prepared to seek clarification of existing WTO rules to ensure that national approval procedures for bioengineered products were transparent, science-based, and predictable.').
[273] *Ibid.*
[274] See Genet, 'U.S. may continue WTO case after moratorium ends,' online : http://www.gene.ch/genet/2003/May/msg00069.html (date accessed: 16 June 2003).
[275] See EU Institutions Press Releases, "Wallstrom and Byrne welcome EP acceptance of a trustworthy and safe approach to GMOs and GM food and feed" at 1, online:

step in building a clear regulatory system to allow new approvals for the import and production of GM crops and foods.[276]

The proposals are intended to "ensure full traceability of GMOs throughout the chain from farm to table and will provide consumers with comprehensive information by labelling all food and feed consisting of, containing or produced from a GMO."[277] For instance, all foods containing more than 0.9% GM ingredients would have to declare the use of GM materials on the label.[278] To ensure the traceability of GM materials, business operators using or handling GM products will be required to transmit and retain information at each stage between production and placing of products on the market.[279]

This vote is being viewed as the last major obstacle to the clearing of the de facto moratorium on new GM crop approvals.[280] The EU Commission, which initiated the informal moratorium in 1998, proposed a new regulation in 2001 requiring labelling and traceability of GM and GM-derived food products.[281] The Commission hoped that this move would alleviate health safety concern surrounding GM products in member states, allowing lifting of the moratorium on approvals.[282] However, the US, claimed that the proposed EU regulatory solution was too stringent, would stigmatize GM use globally

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http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_ action.gettxt=gt&doc=IP/03/935|0| RAPID&lg= EN&display= (date accessed: 3 July 2003).

[276] *Ibid.*

[277] *Ibid.*, at 3.

[278] See The Scientist, "EU Parliament OKs GMO rules" online: http://www.biomedcentral.com/news/ 20030702/03 (date accessed: 2 July 2003).

[279] See Environment News Service, "EU Parliament Clears Way to End Ban on Biotech Crops" online: http://ens-news.com/ens/jul2003/2003-07-02-02.asp (date accessed: 4 July 2003).

[280] *Ibid.*

[281] See Paarlberg, *supra* note 257, at 26.

[282] *Ibid.*

and be unduly costly to American farmers.[283] The debate over whether European standards for approvals, tracing, and labelling of GM foods constitutes acceptable precaution (based on scientific foundations) or a violation of rules forbidding trade restrictions not based on science, has triggered considerable passion.

Another controversy over GM regulation has emerged among scientists. Among both public and private sector scientists who do research on trans-genetic innovations, competing conclusions on the risk and gains of GM products over issues of bio-safety and food safety exist.[284] Whether genetically modified organisms produced already, and ones contemplated, are safe or not has equally divided scientists.[285]

Also, contending public interest groups, both intergovernmental agencies and various NGOs, are now battling over the net benefits of GM crops and placing demands on various government agencies, including national regulatory bodies, the FAO and the World Bank to advance or pull back from use of GM technology.[286] Greenpeace, for example, citing scientific concerns, has been active in lobbying worldwide for a moratorium.[287]

One effect of the campaigns of anti-GMO NGOs has been to amplify the view of some scientists that GM technology "poses irreversible threats of biological pollution and a host of other risks," while tying this claim to other concerns such as a fear of a

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[283] See Kennedy, *supra* note 268, at 22.
[284] See Paarlberg, *supra* note 257, at 12
[285] See Emily Robertson, 'Finding a Compromise in the Debate over Genetically Modified Food : An Introduction to a Model State Consumer Right-to-know Act' (2003) B.U.J. Sci. & Tech. L. 156, at 21.
[286] See Kennedy, *supra* note 268, at 22.
[287] See Paarlberg, *supra* note 257, at 19.

multinational take-over of the seed industry.[288] The public and cultural controversy therefore is rather diffuse, mixing together food and environmental safety, corporate power, and world hunger issues in the GMO dispute.[289]

The EU has attacked the US for using developing countries' legitimate concerns regarding GM food aid against the EU GMO policy, arguing that these countries had the right to set their own level of protection.[290] With the Cancun Ministerial drawing closer, it remains to be seen what potentially adverse effect challenges such as the US' decision to initiate WTO dispute settlement proceedings could have on the success of the negotiations. While some expect the European Parliament's vote to take the heat out of U.S. anger with the EU, others believe that for the U.S. biotech industry, the labelling requirements represent a de facto continued European ban on GM products.[291] Environmental advocates on their part strongly welcomed the vote and think it was a "historic victory for consumers" and a good example of Europe standing up to pressure from the US over GM products.[292] According to Greenpeace for instance, the "vote is a slap in the face of the US administration, which thought that by bullying and waving the WTO stick Europe, and eventually others, would swallow its GMO policy ."[293]

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[288] See Kim JoDene Donat, 'Engineering Akerlof Lemons : Information Asymmetry, Externalities, and Market Intervention in the Genetically Modified Food Market,' (2003) 12 Minn. J. Global Trade 417, at 15.
[289] See Paarlberg, *supra* note 257, at 17.
[290] See Caribbean Export, 'Dispute over EU Biotech Moratorium wages on,' online : http://www.carib-export.com/ index. php3?page_id=6021 (date accessed : 12 June 2003).
[291] See CBS NEWS, "U.S. Sour on EU Bio-Food Vote" online: http://www.cbsnews.com/stories/2003 /06/25/tech /main560287.shtml (date accessed: 4 July 2003).
[292] See Bangkok Post, "EU moves to ease transatlantic row over biotech foods," online: http://matrix. bangkokpost.co.th/afp_news/020702150928.qsebu0mq.html (date acessed: 3 July 2003).
[293] *Ibid.*

III. SPS Measures and Developing Countries

As mentioned earlier, with the reduction of tariff barriers, some countries are looking to non-tariff measures such as import regulations, partly to compensate for the loss of trade protection through traditional means.[294] There has been a proliferation of technical measures, especially in developed countries and it is becoming increasingly difficult for developing country exporters to access these markets, partly because of SPS requirements and the way in which they are enforced.[295] As seen earlier, in developed countries, consumer organizations have been quick to argue that the SPS Agreement risks leading to a downward harmonization of standards and that it thereby poses a health risk to consumers.[296] This argument has led to an intense campaign against the Agreement especially after the EC was not allowed to uphold the ban on hormones in imported beef.

It is important to emphasise that although it was recognised that an effective SPS Agreement would be important for the market access of developing countries, they participated only very little in the negotiations at the time.[297] The concerns of developed countries, most notably those who had major export interests like the US, EU and the developed countries members of the Cairns Group, were the driving force behind the negotiations.[298] Only a handful of developing countries participated actively in the negotiations of the Agreement, mainly as members of the Cairns Group.[299]

Developing country exporters seeking access to foreign markets of course have to

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[294] See NRET Policy watching Brief, "Improving the positions of developing country producers" (March 2002) Edition 2, at 2 [hereinafter "NRET Brief"]
[295] *Ibid.*
[296] See Silverglade, *supra* note 26, at 16-18.
[297] See Roberts D., "Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations" (1998) Journal of Int'l Econ. L. 1 (3), at 377-78.
[298] *Ibid.*, at 377-90.
[299] *Ibid.*

conform to the SPS measures of import markets no matter whether they are protectionist devices or they serve legitimate purposes. If successful, the SPS Agreement can help to ensure that exporters only spend resources on conforming to legitimate SPS measures. The difficulty of doing so is largely outside the scope of the Agreement.[300] This implies that a distinction must be drawn between the difficulties related to regulatory protectionism and the difficulties from conforming to legitimate SPS measures when the SPS Agreement is evaluated. One commentator notes that the criteria of success is whether regulatory protectionism decreases, but this may take place while the difficulties of conforming to legitimate SPS measures are increasing as they are likely to do when the demand for increased food safety is becoming ever stronger.[301]

In principle, the SPS Agreement should facilitate South-North[302] trade, but in reality this is dependant on countries' ability to participate effectively in the Agreement.[303] Thus, it is pertinent to assess the extent to which developed countries have complied with commitments vis à vis technical assistance and the recognition of developing countries' special and differential circumstances as enshrined in the SPS Agreement.[304]

In practice, SPS measures create many problems for developing country exporters.[305] There is a gulf between developing countries' international rights and the capacity to enforce and utilise these rights. The problem seems to lie in the fact that developing countries are not well positioned to address issues such as whether SPS

[300] See Jensen, *supra* note 5, at 4.
[301] *Ibid.*
[302] Refers to developing and developed countries respectively.
[303] See NRET, *supra* note 294, at 1.
[304] See SPS Agreement, *supra* note 20, Articles 9 & 10.
[305] See NRET Brief, *supra* note 294, at 1.

measures are inconsistent with the SPS Agreement and unfairly impede the flow of agricultural trade.[306] Developing countries therefore face difficulties as a result of the nature of the regulations imposed by importing countries and how they are enforced, as well as their own capacity to implement the regulations on their exports.

The difficulties in exporting under increasingly strict SPS measures are manifold and particularly acute for many developing countries.[307] The costs involved include both the production costs of respecting the SPS requirements and the conformity costs of making sure they are respected. When SPS requirements increase, production costs do too as new inputs may be required or technologies may have to be changed. The conformity costs include the costs of certification and control. The costs of respecting SPS measures are higher in developing countries than in developed countries. Access to technical know-how is more restricted and the private service sector and the public sector that certifies and control conformity is underdeveloped.[308] The establishment of international disciplines as to apply SPS measures is therefore potentially very important to developing countries.

Although the SPS Agreement is supposed to protect against unnecessary regulations, the experience to date indicates that only relatively developed countries have been able to take advantage of its disciplines.[309] SPS measures have potential for tremendous negative consequences on the well-being of developing countries that are increasingly following export-oriented development strategies.

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[306] *Ibid.*
[307] See Jensen, *supra* note 5, at 3.
[308] *Ibid.*
[309] See NRET Brief, *supra* note 294, at 3.

a. Participation in international standard setting

The ability of a country to participate in setting international standards is crucial as the preferred tool used in the SPS Agreement to achieve its goals is international harmonization. As mentioned earlier, the Agreement explicitly mentions three organizations that are involved in setting such standards: the Codex Alimentaruis, OIE, and IPPC. It turns out that the likelihood of a country being a member of these organizations is correlated with incomes.[310] Few developing countries have the financial and human resources to participate actively in this process. This is particularly troublesome as the ideal standard is likely to vary according to the development level of a country.[311]

Developing countries have repeatedly expressed their concern about the way in which international standards are developed and approved, pointing out how their own participation is very limited from the point of view of both numbers and effectiveness.[312] As a consequence of the inadequacy of the process, international standards are often inappropriate for use as a basis for domestic regulations in developing countries and they further face problems when they have to meet regulations in the importing markets developed on the basis of international standards.[313] As noted by Binswanger and Lutz, this seems to be the case since the various standards already set in the international organizations, "were not developed as part of the WTO process and left out the

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[310] See Jensen, *supra* note 5, at 19.
[311] See World Bank: Global Economic Prospects and the Developing Countries (200)1 (Washington D.C.: world Bank), at 9-13.
[312] See Z Simonetta, "WTO Agreement on Sanitary and Phytosanitary Measures: Issues for Developing Countries" (1999) Trade-Related Agenda, Development and Equity (TRADE) Working Papers, No 3, South Centre, at 12, online: <http://www.southcentre, org/ publications/s&p/toc.htm> (date accessed: 20 January 2002).
[313] *Ibid.*

developing countries."[314] Likewise, standards will be slow to develop in areas where developed countries have few interests. An example of the latter is the lack of international standards for pesticide residues in tropical fruits.[315]

Due to the widespread dissatisfaction voiced by developing countries about the way international standards are set, proposals have been put forward regarding two issues. Many developing countries wish to see changes to the rules of decision-making in international organizations to make sure that developing countries' interests are safeguarded.[316] A group of eight developing countries, for instance, have proposed that a standard should only be recognized as an international standard under the SPS Agreement if in its formulation, an agreed minimum percentage of countries from different regions have participated in the technical work throughout the process leading to its adoption, and if the standard was implemented by consensus.[317] Several other developing countries have formulated similar proposals. Yet, in Jensen's words, "a word of caution is warranted."[318] As seen earlier, such rules will make decision-making much more complicated in international standardization institutions and will in many areas lead to the adoption of fewer international standards. Jensen notes that it is unlikely that such a development will actually be to the advantage of developing country exporters.[319] This is

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[314] See H. Binswanger & E. Lutz, "Agricultural Trade Barriers, Trade Negotiations, and the Interests of Developing Countries." (Paper presented at the International Association of Agricultural Economics Meeting in Berlin, August 2000), at 22-25.
[315] See M.K. Chan & B. King, "Review of the Implications of Changes in EU Pesticides Legislation on the Production and Export of Fruits and Vegetables from Developing country Suppliers" (Report prepared for the UK Department for Intenational Development (DFID) (Kent: Natural Resources Institute, University of Greenwich, 2000), at 61-63.
[316] See S. Zarrilli, 'WTO Sanitary and Phytosanitary Agreement : Issues for Developing Countries' (1999) (T.R.A.D.E. Working Paper #3) (Geneva: South Centre), at 33.
[317] See Jensen, *supra* note 5, at 20.
[318] *Ibid.*
[319] *Ibid.*, at 26.

because fewer international standards will lead to more and differing national standards, yet differing national standards was exactly why the SPS Agreement was established in the first place.

Developing countries have also put forward proposals to create a trust fund to support developing countries financially to participate in the work of international standard-setting organizations and of the SPS Committee.[320] On a positive note, there are some instances where developing countries have been successful in urging the Codex for instance, to develop standards on products of export interest to them, such as certain tropical fresh fruits and vegetables, and in ensuring that their concerns were taken into account while developing standards for products that they export, like in the case of sugars and edible oils.[321]

b. Equivalency

Developing countries have also encountered problems on the issue concerning equivalency. There are instances where importing countries look for "sameness" instead of equivalency of measures, implying that the measures should be identical not only in outcome but in formulation too.[322] The interpretation of equivalency as sameness deprives Article 4.1 of its function.[323] The main difficulty developing countries face in this field is the lack of recognition of their conformity assessment certificates.[324] Equivalency is the best option when harmonization of standards is not desirable or when

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[320] See Binswanger & Lutz, *supra* note 314, at 29.
[321] See Simonetta, *supra* note 312, at 13.
[322] See WTO: SPS Agreement and Developing Countries – Statement by Egypt at the Meeting of 7-8 July 1999, G/SPS/GEN/128 (Geneva: World Trade Organization).
[323] See SPS Agreement, *supra* note 20, Article 4.1.
[324] See Simonetta, *supra* note 312, at 23.

international standards are lacking or inappropriate.[325] Indeed for developing countries, which face climatic, developmental, and technological conditions different from those prevailing in developed countries, the recognition of the equivalency of their SPS measures to those applied by the importing countries would represent a key instrument to enhance market access for their products.

The use of the principle of equivalence of SPS measures in trade with developing countries was, among other things, the issue of an informal meeting of the SPS Committee in November 2000.[326] Developed country representatives noted that equivalence, although a useful principle in theory, was in practice difficult to deal with even for large developed countries.[327] Formal equivalence agreements are rare even for large developed countries. The reason for this is that negotiations are very demanding in terms of resources and time. At the same time, ad hoc acceptance of the equivalence of specific products, or of the equivalence of certain technical aspects related to SPS measures, are common. The acceptance often takes place without formal agreements.

A number of developing countries have requested more information about how and under what circumstances equivalence can and should be implemented through mutual recognition agreements.[328] The lack of clear rules of implementation of equivalence was addressed by the decision taken by the SPS Committee on 26 October 2001.[329] The decision explains in more detail the procedures leading to agreements of

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[325] *Ibid.*, at 15.
[326] See WTO: Equivalence: Consideration of Article 4 of the SPS Agreement – Summary of the Discussion of the SPS Committee, G/L/423 (Geneva: WTO).
[327] See WTO: Equivalence – Submission by the United States, G/SPS/GEN/212 (Geneva: WTO).
[328] See J.S. Wilson, *The Post Seattle Agenda of the World Trade Organization in Standards and Technical Barriers to Trade: Issues for Developing Countries* (Washington D.C.: World Bank, 2000), at 44-47.
[329] See WTO: Decision on the Implementation of Article 4 of the Agreement on Sanitary and Phytosanitary Measures G/SPS/19 (Geneva: WTO).

equivalence and encourages international harmonization of such procedures through international organizations like the Codex Alimentarius. It also states that the SPS Committee shall develop a programme to further the implementation of Article 4 with particular consideration of the problems encountered by developing countries. Codex Alimentarius has already begun work on guidelines for equivalence agreements on food safety although this is still at an early stage.[330] The OIE and IPPC have not yet addressed the issue of equivalence.

The rationale behind the use of equivalence is also strong for trade amongst developing countries. The need for equivalence and not "sameness" is likely to increase in the future. Process standards like the Hazard Analysis and Critical Control Point approach (HACCP) are becoming mandatory requirements for the trade of many food and agricultural products.[331] Simultaneously, the principle of traceability of food products is also becoming more commonly applied and the use of labelling is also increasing.[332] The use of complicated process standards increases the need of flexibility in implementation. At the same time it increases the complexities of negotiating equivalence.[333] Developing countries must take part in the international setting of guidelines on how to achieve equivalence in these areas so as not to be left out.

Whether the SPS Agreement, including the international standards and guidelines that are to be developed in these areas, is a sufficiently strong instrument to ensure that developing countries can in practice derive benefits from the use of the principle of

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[330] See WTO: Relevant Codex Documents on Equivalence of Sanitary Measures – Information Submitted by the Codex Alimentarius Commission (Codex) , G/SPS/GEN/211 (Geneva: WTO), at 7-9.
[331] See J.A. Lee & S.C. Hathaway, "Experiences with HACCP as a tool to assure the export of food" (1999) Food Control 10, at 321-323.
[332] See European Commission: White Paper on Food Safety (Brussels: European Commission), at 9-12.
[333] See Jensen, *supra* note 5, at 21.

equivalence, remains a question to be answered in the future. The core problem is the lack of trust developed countries have in the capacities of the food safety systems of developing countries. But is this lack of trust based on real deficiencies in developing country food safety systems? Jensen thinks this is often the case.[334] More work by international organizations on clear guidelines on the establishment of equivalence agreements could be very helpful and could help distinguish between "equivalence" as defined by the SPS Agreement and "sameness".

c. Regionalization

The adaptation to regional conditions, including the recognition of pest or disease free areas is provided for in the SPS Agreement, and is of key relevance to developing countries.[335] Developing countries have not been able to fully benefit from this provision despite the support provided by the relevant international organizations.[336]

The raison d'etre of Article 6 pertaining to regionalization is the conflict between the fact that many sanitary and phytosanitary problems like the occurrence of pests, and animals and plant diseases do not follow national borders, on the one hand, and the established practice of national legislation in most countries defining their SPS measures along national lines on the other.[337] According to this article, SPS measures must be applied in accordance with the specific problems of the areas the products concerned originate. So if a country has a particular disease in the north but not in the south, its

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[334] *Ibid.*

[335] See SPS Agreement, *supra* note 20, Article 6.

[336] The procedures to prove that specific areas are free can be long and burdensome and often involve the need to provide complex scientific evidence. This is an area where expert assistance is of fundamental importance. 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. See Simonetta, *supra* note 312, at 18.

[337] See Jensen, *supra* note 5, at 21.

trading partners shall not block exports from the entire country but only from the north. In fact the article can be seen as an application of the general principle of the SPS Agreement, namely that a measure must be based on sound science. In many incidences there is little reason to block the exports from an entire country if the problem in question only relates to parts of the country.[338] Despite the clear support for this approach, in many cases measures are still implemented on a national scale.

This issue potentially has a significant impact on many developing and least developed countries. In the case of meat exports, for instance, a major trade barrier is the occurrence of food-and-mouth diseases (FMD) in many developing countries.[339] Recognizing a formal process for determining which regions are affected by FMD could help promote exports from areas where the disease is absent. This has been seen most recently in South America, where exports have been allowed from countries such as Argentina, Uruguay and Brazil due to a classification of different regions with respect to FMD occurrence.[340]

The International Office of Epizootics (OIE) has developed a procedure for the international recognition of FMD free countries and regions. This leads to a general classification by the OIE of countries and regions with respect to the occurrence of FMD. As seen earlier, while the recognition by the OIE of FMD-free status is not legally binding, it can be used as a point of reference in future WTO disputes. The OIE has started performing similar tasks for other major diseases.[341] If the classification of the

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[338] *Ibid.*
[339] See Zarrilli, *supra* note 316, at 10.
[340] See Roberts, *supra* note 297, at 377-378.
[341] See Zarrilli, *supra* note 316, at 11.

OIE becomes accepted by developed countries, this would have a significant positive impact on developing countries with the capacity and resources to provide regionalization plans. Today, regionalization is always an issue of conflict and moreover a country has to negotiate a separate plan with each trading partner.[342] A generally accepted classification could lead to savings of the scarce resources otherwise spent on designing and negotiating plans.

d. Technical Assistance

It is of concern that Articles 9 and 10, on technical assistance and on special and differential treatment respectively, have not been converted into specific obligations.[343] It is believed that the effective implementation of these provisions would create a more substantial type of policy coherence since it would enable developing countries to establish the necessary infrastructure and other conditions necessary for the effective implementation of the Agreement.

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

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[342] See Jensen, *supra* note 5, at 22.
[343] See SPS Agreement, *supra* note 20, Article 9 & 10.

The formulation of Article 9 is vague and the article does not contain any commitments. This has been criticized by developing countries who feel that the level of assistance falls short of the immense needs and that the types of assistance are often inappropriate.[344] Several developing countries call for a more organized approach to the provision of technical assistance related to SPS requirements. Furthermore, it is argued that the provision of technical assistance should be bound to specific commitments by the developed countries.[345] An example of a specific proposal to address these issues is a proposal by ASEAN[346] countries to create a trust fund within the WTO, which would channel technical assistance to developing countries.

The SPS Committee has attempted to respond to these concerns by providing a survey of technical assistance given under the SPS Agreement. The survey reveals a number of individual projects in a large number of fields provided by both individual member countries and international organizations.[347] Unfortunately the survey is not very successful in providing an overview because member countries have been slow to respond. Another problem is that no analysis has been undertaken of the demand for technical assistance by developing countries and to which extent this demand is met by the volume and types of technical assistance actually given. It is not known either, whether the amount of technical assistance provided is truly additional and due to the

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[344] See S. Henson & R. Loader, "Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements" (2001) World Development 29(1), at 85-90.
[345] See WTO : Special and Differential Treatment and Technical Assistance – Submission made by India at the Meeting of 10-11 June 1998, G/SPS/GEN/85 (Geneva: WTO), see also WTO: SPS Agreement and Developing Countries – Statement by Egypt at the Meeting of 7-88 July 1999, G/SPS/GEN/128 (Geneva: WTO).
[346] The Association of South-East Asian (ASEAN) countries include Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.
[347] See WTO : Summary of the Replies to the Questionnaire on Technical Assistance, G/SPS/GEN/143 (Geneva: WTO).

existence of the SPS Agreement or whether it is part of the general donor policies of developed countries.[348] The fourth WTO Ministerial Conference in Doha also discussed the issue of technical assistance but the discussions only led to a repeated call for financial and technical assistance but without offering specific commitments.[349]

It seems to be the case that some of the problems developing countries face, regarding SPS measures are related directly to their overall level of economic development. According to Henson and Loader, examples include, "...the efficacy of prevailing systems of SPS controls, development of scientific and technical expertise and access to modern testing methods".[350] One commentator thinks that such problems will be hard to solve by technical assistance measures which are more appropriate for isolated problems within an overall sound standards infrastructure.[351]

e. Special and Differential Treatment

On the issue of special and differential treatment of developing countries, the SPS Agreement contains a number of vague formulations, but very few explicit commitments. Discussions prior to the Seattle Ministerial Meeting and during the triennial review of the SPS Agreement, revealed widespread dissatisfaction in developing countries with the lack of use of Article 10 of the Agreement on special and differential treatment.[352]

Developing countries have expressed a need for longer time frames for commenting on new measures with special relevance for developing countries. The

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[348] See Jensen, *supra* note 5, at 23.
[349] See WTO : Implementation Related Issues and Concerns – Decision of 14 November 2001, WT/MIN(01)/17, Ministerial Conference, fourth Session, Doha, 9-14 November 2001.
[350] See S. , R. Loader, et al., *Impact of Sanitary and Phytosanitary Measures on Developing Countries* (Department for International Development: London, 2000), at 27-31.
[351] See Jensen, *supra* note 5, at 23.
[352] See Wilson, *supra* note 328, at 19.

present standard is 60 days.[353] Developing countries have also desired longer implementation deadlines. This issue was addressed by the Doha Ministerial Meeting which decided that a reasonable period between the publication of a measure and its entry into force was to be 6 months.[354] This does not fully meet developing country demands. Some developing countries have demanded a time frame of 12 months and some have asked for specific time frames to be established in specific areas. The Philippines, for instance, speaking on behalf of ASEAN, has emphasised that the country has problems in the application of new techniques such as HACCP and has asked guidelines that address these concerns explicitly.[355] In addition, as mentioned above, developing countries have proposed that a separate mechanism be established to monitor SPS-related issues of relevance to developing countries.

The concerns about the difficulties that developing countries face when using the dispute settlement body have led to demands for a fund to help developing countries bear the costs of dispute settlement and demands for expert assistance. These demands were answered by the establishment of the Advisory Centre on WTO Law in Geneva (hereinafter referred to as the "Advisory Centre"), on 17 July 2001. The Centre functions essentially as a law office specialized in WTO law, providing legal services and training exclusively to developing-country and economies-in-transition Members of the Centre and all least developed countries.[356] It is financed by the creation of an endowment fund

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[353] See WTO : Recommended Notification Procedures, G/SPS/7 (Geneva :WTO),.
[354] See WTO : Implementation Related Issues, *supra* note 331.
[355] See WTO : Summary of the Meeting held on 21-22 June 2000, G/SPS/R/19 (Geneva: WTO).
[356] See ACWL : Agreement establishing the Advisory Centre on WTO Law, online : www.itd.org (date accessed: 23 June 2002.)

to which its members contribute according to economic size.[357] Least developed countries are exempt from the obligation to provide financial contributions. In addition, legal advice is subject to charges, but at rates depending on the economic level of countries benefiting. Although the intentions behind the creation of the Advisory Centre are in accordance with developing countries' needs and desires, its size is very modest. It employs one executive director and four lawyers as well as support staff.[358]

The proposed mechanism to monitor SPS issues and the Advisory Centre are both very crucial alternative ways to deal with the demand for special and differential treatment. For the moment, instead of designing special rules for developing countries (for instance by allowing them not to follow certain established disciplines), it is better to put in place such supporting institutions that can enable developing countries to benefit from the existing set of rules.

f. Transparency

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

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[357] Contributors include the following developed countries : Canada, Denmark, Finland, Ireland, Italy, the Netherlands, Norway, Sweden and the UK. Developing and transition economies contributors include: Hong Kong, China, Colombia, Egypt, India, Pakistan, the Philippines, Thailand, Uruguay, Venezuela, Bolivia, Dominican Republic, Ecuador, Guatemala, Honduras, Kenya, Latvia, Nicaragua, Panama, Paraguay, Peru, Senegal, Tunisia, and Zimbabwe.

[358] See Trade and Development Centre : Advisory Centre on WTO Law, online : http://www.itd.org/links/acwlintro.htm (date accessed: 8 July 2002).

exporters who wish to access the national markets and for the country's own exporters in need of information about foreign markets.[359]

While notification and enquiry points were created rapidly in developed countries, the process has been slow in developing countries especially least developed countries, many of which have still not established such points.[360] Little is known of the quantity and quality of information passing through these new channels. It is unlikely that many private exporters in developing countries have benefited directly by now, given the low pace of implementation.[361]

Another transparency provision in the SPS Agreement is the obligation that a member country implementing SPS measures which differ from international standards or in areas where no international standards exist, must notify the new measure.[362]

The increased transparency has given rise to more inter-governmental discussion of SPS measures as discussed above. An example is the discussion in the SPS Committee that followed the notification of a proposal by the EU to introduce new limits on aflatoxin in foodstuffs.[363] The notification led to a wide range of responses from WTO delegations including some African and least developed countries.[364] The EU subsequently decided to amend its proposed legislation, thereby meeting some but not all of the criticism that emerged.

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[359] See B. Hoekman & C.P. Mavrodis, "WTO Dispute Settlement, Transparency and Surveillance," (2000) World Economy 23, at 538-39.
[360] See Henson, et al., 'Impact of Sanitary and Phytosanitary Measures on Developing Countries' (London : Dept. Int'l Devt., 2000), at 41-56.
[361] See Hoekman & Mavrodis, *supra* note 359, at 536.
[362] See SPS Agreement, *supra* note 20, Annex B.
[363] See T. Otsuki, J. S. Wilson & M. Sewadeh, "Saving two in a billion: A case study to quantify the trade effect of European food safety standards on African exports" (World Bank Research Paper No. 2563), (Washington D.C.: World Bank (2001), 53-55.
[364] See Henson, et al., *supra* note 360, at 51-52.

Developing countries have nevertheless brought forward complaints about the functioning of the transparency mechanism. They have complained that the notification procedure does not work properly. While developed countries generally notify changes in legislation, they rarely take developing countries' comments into account. There is a need for a formal mechanism for dealing with comments. For instance, Egypt has suggested that if an importing country does not take comments into account for various reasons, it should be obliged to explain the reason.[365]

Many of the problems that developing countries experience with transparency are related to the lack of financial and human resources necessary to follow, understand and comment upon developments in their trading partners' regulatory frameworks. This has led to the proposal for establishing an institution or mechanism through which data on SPS measures are collected and analysed.[366] This body would provide easy access to information about regulatory changes to developing countries on the products most relevant to them and would serve as a mechanism of early warning when or if new topics in food safety regulation start threatening developing countries' export interests. It could complement the Trade Policy Review Mechanism by collecting and analysing data on SPS measures and their trade effects.

g. Implementation costs

Prior to the Uruguay Round, implementation of the trade liberalization agreements was a minor issue. This is because the costs of implementing tariff reductions

[365] See WTO : Summary of the Meeting held on 7-8 July 1999. G/SPS/R/15 (Geneva: WTO)
[366] See Hoekman & Mavrodis, *supra* note 359, at 540-41, see also Zarrilli, *supra* note 299, at 31.

and other changes in border policies are negligible.[367] Reducing tariffs only involves passing a law and changing custom practice.[368] The many new issues included in the Uruguay Round have put emphasis on implementation costs. Implementing deep regulatory reforms involves spending resources on building new public agencies, educating personnel and so on.[369] The implementation of the SPS Agreement is an example of this. This issue is particularly important in low-income countries where resources are generally scarce, particularly public resources.

The implementation costs of the SPS Agreement include the costs of setting up the public infrastructure required. Notification and enquiry points must be established and the country must have a representative in Geneva that can participate in the meetings of the SPS Committee. It must also be a member of the international standardization organizations and be able to participate in the meetings of these organizations. This includes overseas representation and the building of domestic human, technical and financial capacity to back the representatives with inputs on how to develop new standards. The country must also restructure public agencies and educate personnel so that the SPS regulatory regimes of trading partners can be followed and to enhance the country's capacity to respond. Links to the private sector must be established to ensure a smooth flow of information about the problems encountered in foreign markets. Only a share of these expenditures are truly mandatory in the agreement, such as the establishment of notification and enquiry points. The rest is necessary in order to be able to derive benefits from the Agreement.

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[367] See Roberts, *supra* note 297, at 54.
[368] *Ibid.*, at 55.
[369] See R. Hudec, *Enforcing International Trade Law* (New Hampshire: Butterworth, 1993), at 28, [hereinafter Hudec, Enforcing...].

A developing country also has to reform its standard regulations and its standard-setting process under the SPS Agreement's Article 3. Standards must be upgraded to international levels and the capacity to undertake risk assessment must be created. As contended by Finger and Schuler, developing countries carry a heavier burden than developed countries when it comes to fulfilling these commitments.[370] Standards and standard-setting procedures at international levels are already more or less in place in the developed countries, yet they are far from common practice in developing countries.

Some argue that the money spent on upgrading the SPS regulations will have benefits over and above the benefits to trade.[371] However, it is important to ask oneself two questions. First, whether it is true that raising health standards to international levels in the way required by the Agreement, will yield substantial benefits to domestic consumers and producers. Second, whether if such benefits exist, they are achieved in a cost minimising way.

The standards set by international standardization organizations such as the Codex Alimentarius are targeted primarily at products and problems relevant for developed countries.[372] This was naturally the case since, until recently, few developing countries participated in the work of these organizations. The food safety problems in developing countries are very different from the problems existing in developed countries. The food safety hazards are different and they are transferred by different products.[373] Therefore, only a selection of the food safety problems in developing countries are covered by

[370] See J.M. Finger & P. Schuler, "Implementation of Uruguay Round Commitments: The Development Challenge" (2000) World Economy 23 (4), at 511-514.
[371] See WTO : The SPS Agreement – Matters of Particular Interest to African Countries. (Background document of the Libreville 2000 Meeting of African Trade Ministers 13-15 November 2000) Document MM/LIB/WS6/3 (Geneva: Agriculture Division, WTO), at 8-9.
[372] See Jensen, *supra* note 5, at 27.
[373] See Henson & Loader, *supra* note 344, at 90-92.

international standards. It seems very optimistic to assume that there will be strong links between enforcing international standards and the domestic health standards of developing countries.

If domestic health is improved by enforcing international standards, would this then be done in a cost-minimising fashion? This question is difficult to answer. But some consideration of the history of international standards may provide useful indications. In general, international standards have been set by rich countries.[374] In rich countries there is a strong demand for the elimination of even very small risks. As countries have grown richer, more and more resources have been devoted to risk elimination.[375] This implies that relying on the SPS measures of these countries will be very costly.

Resources spent to implement international standards in developing countries can be spent on targeting special developing country food safety problems instead.[376] It seems likely that focusing on developing country concerns would yield more cost effective food safety measures. Laurian Unnevehr argues that this way, resources would be spent in areas where lives can be saved at the lowest costs before setting protection levels at developed country levels in a few selected areas where lives will be much more costly to save.[377] Another related question is whether it would be economical to enforce

[374] *Ibid.*
[375] See OECD, Food Safety, *supra* note 153, at 31.
[376] See Jensen, *supra* note 5, at 27.
[377] See L.J. Unnevehr, 'Food safety issues and fresh food product exports from LDCS' (2000) Agricultural Economics 23 (3), at 231-233.

international standards, as required by the SPS Agreement, in countries with limited public capacities for enforcement.[378]

The problem of providing risk assessment in developing countries lacking the necessary financial, technical and human resources to do so was the issue of a proposal by Cameroon presented before the meeting of the SPS Committee on 21-22 June 2000.[379] Cameroon proposes that developing countries should be allowed to take protective measures against foodstuffs without the obligations to produce a risk assessment. It should be the responsibility of the exporting country to prove that the food is safe, rather than the responsibility of the importing country to prove that the food is unsafe when the importer is a developing country.

h. Ability to challenge SPS measures of other countries

It is difficult to conclude much from the few complaints that have been made so far. [380] At the face of things, it appears that developing countries have either not found it worthwhile to make formal complaints about their trading partners' SPS measures or they have not been able to do so with just a few exceptions as noted by some commentators.[381]

Taking all complaints under all the agreements of the WTO into account, it shows that developing countries are getting more involved. The first five years of the WTO dispute settlement mechanism showed that more developing countries made formal complaints under this mechanism than under the mechanism of the GATT that preceded

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[378] *Ibid.*, at 234.
[379] See WTO: Summary of the Statement by the Representative of Cameroon at the Meeting of 21-22 June 2000, G/SPS/GEN/192 (Geneva: WTO).
[380] See South Centre : Issues Regarding the Review of the WTO Dispute Settlement Mechanism, T.R.A.D.E, Working Paper No. 1 (Geneva: South Centre), at 26-28.
[381] See Jensen, *supra* note 5, at Appendix 1.

it.[382] In a few cases, developing countries have successfully contested large developed countries on various issues (e.g. Costa Rica: US restrictions on cotton textiles; Venezuela and Brazil: US gasoline regulations). But to date, no African nor least developed country has been involved in a dispute at all.[383]

Several observers have expressed concern about the obstacles developing countries face when seeking to pursue complaints under the SPS Agreement.[384] The dispute settlement process is often lengthy and very demanding in terms of financial capacity and human resources. Hoekman and Mavroidis describe the problems as having an upstream and a downstream dimension.[385] The upstream dimension consists of the problems that a developing country encounters before the legal process is enacted in Geneva. Filing a complaint about the SPS Agreement requires identification of a violation of a specific commitment. Information is the critical factor. In developing countries information may be under-supplied due to several factors. The private enterprises that must provide the information about market access problems may see little use of the SPS Agreement.[386] Sometimes the market is too small to make it worthwhile spending the time and money to convince the national government to bring the case to the WTO. Sometimes the solution promised by the dispute settlement process is out of touch with commercial realities. A process frequently lasts two to three years before a possibly favourable decision by a panel or the Appellate Body will bring about changes in

[382] *Ibid.*
[383] See Hoekman & Mavrodis, *supra* note 359, at 540.
[384] See Henson & Loader, *supra* note 344, at 118.
[385] See Hoekman & Mavroidis, *supra* note 359, at 533.
[386] *Ibid.*

regulations.[387] For a producer or exporter, the loss in the meantime may be so large that it would be wiser to search for alternative market outlets.

Knowledge about the SPS Agreement and its opportunities is not always widespread among private enterprises (nor among governments) in developing countries.[388] In such circumstances the flow of information from the private sector to the responsible public agencies will of course be limited.

The downstream dimension involves the costs of proceeding with a complaint. The costs of bringing cases to the WTO are high in terms of both financial and human resources. For instance, as seen above, each of the three SPS related cases depended critically on expert interpretations of scientific evidence as well as evaluations of the adequacy of risk assessments.[389] The services of such experts are very costly. Least developing countries face particularly severe problems, as they lack representation in Geneva as well as financial and human resources.[390] Many developing countries feel that they are either unable to use the dispute settlement process at all or that they are only able to do so as part of a collective effort or as a partner to a developed country complaint.[391]

The enforcement of decisions by the dispute settlement body is based on a trade war logic.[392] If a decision is not respected, the penalty will be exercised by the complaining party. It will be entitled to enforce punitive tariffs on the offender. For many

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[387] *Ibid.*
[388] See WTO : Development and Adaptation of Sanitary and Phytosanitary Systems in Developing Countries for the Purpose of Complying with Commitments under the Agreement on the Application of Sanitary and Phytosanitary Measures – Statement by Guatemala at the Meeting of 10-11 November 1999, G/SPS/GEN/17 (Geneva: WTO).
[389] See Victor, *supra* note 2, at 24.
[390] See Zarrilli, *supra* note 316, at 12.
[391] See Henson, et al., *supra* note 360, at 23.
[392] See Finger & Schuler, *supra* note 370, at 512-13.

developing countries, this is a very impractical way of enforcing decisions as it is likely to hurt the developing country more than the offender. Bearing in mind that most developing countries in general import only essential raw materials, capital goods and consumption items like foodstuffs, imposing punitive tariffs is likely to hurt their own economy severely. Therefore, it can be argued that developing countries do not pursue formal complaints because they lack an effective sanction against rule-breakers in case they win.[393] On the other hand, recourse to retaliation has rarely been required to enforce multilateral dispute settlement decisions under the GATT.[394] Hoekman and Mavroidis therefore argue that the pressure to comply with rulings is really moral in nature and that it is based on the value that governments attach to maintaining a good reputation.[395]

It has been suggested that the solution to the problem of enforcing panel and Appellate Body decisions is a reform of the dispute settlement process.[396] One of the proposals is that financial compensation instead of the withdrawal of preferences should be the penalty for breaking trade rules.[397] Alternatively, the punishment could be the withdrawal of preferences by all member countries instead of only the one suffering.[398] While such proposals would solve developing countries' problems regarding lack of power to retaliate, they appear to be a political impasse.[399] Hudec notes that the proposal

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[393] See M.E. Footer, 'Developing Country Practice in the Matter of WTO Dispute Settlement' (2001) Journal of World Trade 35(1), at 55-60.
[394] See Hudec, Enforcing..., *supra* note 369, at 11.
[395] See Hoekman & Mavroidis, *supra* note 359, at 48.
[396] See Footer, *supra* note 393, at 17-20.
[397] See Hoekman & Mavroidis, *supra* note 359, at 12.
[398] *Ibid.*, at 44-46.
[399] See R. Hudec, *Developing Countries in the GATT Legal System* (Aldershot: Gower Press, 1987), at 23.

of withdrawing preferences by all member countries have been discussed several times but it has always faced fierce resistance.[400]

[400] *Ibid.*

Chapter Three

The WTO Agreement on Agriculture: How Liberal?

Free trade has become a modern day religion and has been enthusiastically embraced by both wealthy industrialized countries and by many governments of poor developing countries as the generator of economic growth, development and employment.[401] However, free trade has also been denounced by non-governmental organizations (NGOs) in developing countries as the tool through which the economic dominance of wealthy, developed countries is institutionalized and maintained.[402]

Nowhere is the tension between the critics and the proponents of the existing multilateral trading system more evident than in matters of agricultural policy.[403] Indeed, agriculture was one of the most contentious issues in the previous WTO Ministerial meeting in Qatar and has been one of the most controversial issues in the multilateral trade negotiations for the past fifty years.[404] The controversy stems from the fact that the rules governing agricultural trade, as embodied in the WTO Agreement on Agriculture,

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[401] The WTO Ministerial Declaration adopted in Doha, Qatar, applauds the contribution of the multilateral trading system to growth, development and employment during the past fifty years, and emphasizes the importance of continued trade liberalization to promote recovery, growth and development. See WTO: Doha WTO Ministerial 2001: Ministerial Declaration, at 1-2, online: <http://www.wto. org/english/thewto e/min01 e/mindecl e.htm> (date accessed: 14 June 2002) [hereinafter Doha Ministerial Declaration]. However, as Professor David Driesen points out in a recent article, the voluminous literature addressing liberalized trade and its relationship to other policy areas, such as environmental law, intellectual property, and human rights, rarely includes a precise definition of "free trade." This failure to articulate a normatively attractive and coherent definition of free trade has resulted in doctrinal incoherence in the decisions of GATT/WTO dispute resolution bodies and has made it difficult for proponents of the GATT and related multilateral trade agreements to respond to critics in a persuasive manner. See David M. Driesen, "What is Free Trade? The Real Issue Lurking Behind the Trade and Environment Debate," (2001) 41 Va. J. Int'l L. 279, at 34-40.

[402] See Carmen G. Gonzalez, "Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries" (2002) 27 Colum. J. Envtl. L. 433, at 3.

[403] See Kevin Watkins, "Free Trade and Farm Fallacies: From the Uruguay Round to the World Food Summit," (1996) 26 The Ecologist 244, at 244, where he describes how free trade theory is enthusiastically embraced by agricultural ministers from both developed and developing countries, citing as an example the 1996 World Food Summit held in Rome under the auspices of the United Nations Food and Agriculture Organization, and critiquing the notion that free trade promises to end world hunger.

[404] See Gonzalez, *supra* note 402, at 3.

are perceived as allowing the United States and the European Union to continue to subsidize agricultural production and to dump surpluses on world markets at artificially depressed prices while requiring developing countries to open up their markets to ruinous and unfair competition from industrialized country producers.[405] As Ian Johnson observes, developing countries are particularly badly hit by the distortions in global agricultural trade.[406] The lack of market access makes it difficult for such countries to develop their agricultural export sectors, and the low prices caused by developed country subsidization lowers the returns from the agricultural exports for which they do have market access. In addition, this results in the displacement of local food production in developing countries by cheap imported food, increases dependence on food imports, and produces a decline in food self-reliance.

I. Major Provisions of the WTO Agreement on Agriculture

The WTO Agreement on Agriculture obligates WTO members to liberalize agricultural trade in three significant respects. First, the Agreement expands market access by requiring the conversion of all non-tariff barriers to tariffs (tariffication) and the binding and reduction of these tariffs.[407] Second, the Agreement requires the reduction of both the volume of and expenditures on subsidized exports.[408] Third, the Agreement requires the reduction of trade-distorting domestic subsidies.[409] The Agreement also provides for the negotiation of further agricultural reforms, which began

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[405] See Watkins, *supra* note 403, at 245.
[406] See World Bank : World Bank puts Agriculture High on Agenda for Next Trade Round. Two-day Conference Highlights Need for Reform (News Release) online: <http://www.worldbank.org/news/press release/nsf/673> (date accessed: 23 July 2002).
[407] See Dale E. McNiel, "Agricultural Trade Symposium: Furthering the Reforms of Agricultural Policies in the Millenium Round," (2000) 9 Minn. J. Global Trade 41, at 61.
[408] See Joseph McMahon, "The Uruguay Round and Agriculture: Charting a New Direction?," (1995) 29 Int'l Law 411, at 426-29.
[409] See McNiel, *supra* note 407, at 56-58.

in early 2000,[410] and exempts both domestic and export subsidies from certain provisions of the GATT 1994 and the Agreement on Subsidies and Countervailing Duties until 2003.[411] The key provisions of the Agreement are examined in detail below.

A. Market Access

The WTO Agreement on Agriculture requires the conversion of all non-tariff import restrictions (such as quotas, embargoes, variable import levies, minimum import prices, and non-tariff measures maintained by state enterprises) into tariff barriers that provide an equivalent level of protection.[412] The tariff equivalents resulting from this conversion, plus existing duties, must then be bound and reduced below a 1986-88 base level over a period of several years.[413] The precise amount of the tariff reduction is specified in each country's individual tariff schedule.[414] Developed countries are required to reduce these bound tariffs by an average of 36 percent over 6 years (1995-2000), with a minimum reduction rate of 15 percent for each product line.[415] In accordance with the principle of special and differential treatment, developing countries are required to reduce these bound tariffs by an average of 24 percent over 10 years (1995-2004), with a minimum reduction rate of 10 percent for each product line.[416] Least developed countries are subject to tariffication and tariff binding, but are not subject to tariff reduction.[417] The

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[410] See WTO Agreement on Agriculture, Article 20.
[411] *Ibid.*, Article 13.
[412] See McMahon, *supra* note 408, at 419. Tariffs are preferred over non-tariff barriers because they are more transparent and therefore easier to monitor and negotiate downward.
[413] See Ian Sturgess, "The Liberalization Process in International Agricultural Trade: Market Access and Export Subsidies," in Sanoussi Bilal & Pavlos Pezaros, eds., *Negotiating the Future of Agricultural Policies: Agricultural Trade and the Millennium WTO Round* (2000) at 135 & 139.
[414] *Ibid.*, at 144-47.
[415] See Jeffrey Steinle, "The Problem Child of World Trade: Reform School for Agriculture," (1995) 4 Minn. J. Global Trade 333, at 346.
[416] See Sturgess, *supra* note 413, at 147.
[417] See McNiel, *supra* note 407, at 62; see also WTO Agreement on Agriculture Article 15:2.

Agreement prohibits WTO members from maintaining or reverting to the non-tariff barriers which were required to be converted into tariffs.[418]

The Agreement contains a special safeguard provision that allows the imposition of an additional duty on a product subject to tariffication in the event of an import surge or in the event of particularly low prices, compared with 1986-88 levels.[419] For example, if the world market price for a particular commodity drops by more than 10 percent below the 1986-88 reference price (the trigger price), an additional duty may be applied to maintain price stability.[420] This additional duty, which rises as the world market price for the commodity drops,[421] resembles the variable levy system used by the European Union to protect domestic markets from cheaper foreign imports.[422] Indeed, the special safeguard provision was inserted into the Agreement at the insistence of the E.U.[423] Additional duties may also be imposed if the volume of imports exceeds 25 percent of the average volume of imports in the preceding three-year period.[424]

Perhaps anticipating that the conversion of non-tariff barriers into tariffs might result in prohibitively high tariffs, the Agreement's current and minimum access provisions are designed to prevent the tariffication process from having the perverse effect of reducing market access.[425] The Agreement requires WTO members to maintain "current access opportunities," defined as no less than the average of annual import quantities for the years 1986 to 1988.[426] In the event that there were no significant

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[418] See WTO Agreement on Agriculture, Article 4.
[419] *Ibid.*, Article 5.
[420] *Ibid.*, Articles 5:1(b), 5:5; see also Sturgess, *supra* note 413, at 147.
[421] See WTO Agreement on Agriculture, Article 5 :5.
[422] See Sturgess, *supra* note 413, at 147.
[423] *Ibid.*
[424] See WTO Agreement on Agriculture, Article 5:1(a), 5:4.
[425] See Sturgess, *supra* note 413, at 147.
[426] See McNiel, *supra* note 407, at 61.

imports during the base year, WTO members must provide "minimum access" opportunities through the introduction of tariff rate quotas (TRQs).[427] Tariff rate quotas allow a set volume of imports to enter the domestic market at a reduced tariff.[428] These quotas were set initially at 3 percent of the 1986-1988 base period domestic consumption, rising to 5 percent by the year 2000.[429]

B. Export Subsidies

The WTO Agreement on Agriculture requires developed countries to reduce expenditures for export subsidies by 36 percent and to reduce their volume of subsidized exports by 21 percent over 6 years (1995-2000) based on the 1986-90 base period.[430] In accordance with the principle of special and differential treatment, developing countries are required to reduce expenditures for export subsidies by 24 percent and to reduce their volume of subsidized exports by 14 percent over 10 years (1995-2004).[431] Least developed countries are exempt from the obligation to reduce export subsidies but are obligated not to increase subsidized exports.[432]

Unlike the market access provisions, the requirement to cut export subsidies by a specific percentage applies on a commodity-by-commodity basis rather than on the basis of an industry-wide average.[433] However, the Agreement does not prohibit the aggregation of commodities for the purpose of complying with export subsidy reduction

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[427] See Sturgess, *supra* note 413, at 147.
[428] See Christopher Stevens, et al., *The WTO Agreement on Agriculture and Food Security* (Sussex : Institute of Development Studies, 2000) at 41.
[429] See McNiel, *supra* note 407, at 61.
[430] See Kevin J. Brosch, "The Uruguay Round Agreement on Agriculture in the GATT," in H. Applebaum & L. Schlitt eds., *The GATT, The WTO and the Uruguay Round Agreements* (1995), at 868.
[431] See McMahon, *supra* note 408, at 429; see WTO Agreement on Agriculture Article 15:2. The Agreement also exempts developing countries from the obligation to reduce marketing subsidies, such as international and internal transport and freight charges, provided that these are not used to circumvent subsidy reduction obligations.
[432] See Sturgess, *supra* note 413, at 148.
[433] See WTO Agreement on Agriculture, Article 9; see Sturgess, *supra* note 413, at 147-48.

obligations.[434] For example, some countries have treated wheat, wheat flour and other wheat derivatives as a single group.[435] Consequently, a country that subsidized wheat and wheat products during the base period will have the flexibility to shift subsidies among these products as long as it complies with its export reduction commitments with respect to these commodities in the aggregate.[436]

Only the six export subsidies specifically enumerated in the Agreement are subject to reduction.[437] However, the Agreement prohibits the utilization of export subsidies not listed in the Agreement in a manner that results or may result in the "circumvention of export subsidy commitments,"[438] and prohibits the creation of export subsidies for agricultural products which were not subsidized during the 1986-90 base period.[439] The former provision has been widely interpreted as a prohibition on export subsidies that are not listed in the Agreement.[440] The latter provision would preclude countries that did not utilize export subsidies during the base period from utilizing them in the future.[441] The Agreement permits the provision of food aid that is not tied directly or indirectly to commercial exports of agricultural products, provided that food aid is given, to the fullest extent possible, in grant form and in accordance with the 1986 Food Aid Convention and with the U.N. Food and Agriculture Organization's "Principles of

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[434] See Dale Hathaway & Merlinda Ingco, "Agricultural Liberalization and the Uruguay Round," in Will Martin & Alan Winters eds., *The Uruguay Round and the Developing Countries*, (World Bank Paper No. 307, 1995), at 19.
[435] *Ibid.*
[436] *Ibid.*, at 21.
[437] See WTO Agreement on Agriculture Article 9:1. These include: (a) direct subsidies to producers, including in-kind payments, contingent on export performance; (b) the sale or disposal for export by governments of agricultural products at a price lower than the comparable price charged for the like product on the domestic market; (c) subsidies to reduce marketing costs (other than export promotion or advisory services), including handling and transportation costs.
[438] See WTO Agreement on Agriculture, Article 10 :1.
[439] *Ibid.*, Article 3 :3.
[440] See McNiel, *supra* note 407, at 70.
[441] See Hathaway & Ingco, *supra* note 434, at 19.

Surplus Disposal and Consultative Obligations."[442]

C. Domestic Subsidies

The WTO Agreement on Agriculture requires WTO members to reduce domestic subsidies based on an Aggregate Measure of Support (AMS).[443] The Base Total AMS for each WTO member is a quantification of all domestic agricultural subsidies during the 1986-88 base period.[444] The Agreement requires a 20 percent reduction in Base Total AMS over 6 years (1995-2000) for developed countries and a 13.3 percent reduction in Base Total AMS over 10 years (1995-2004) for developing countries.[445] Compliance is measured by the Current Total AMS, which refers to the level of support actually provided in any given year.[446]

While the Base Total AMS (the benchmark from which reductions are made) is a comprehensive quantification of domestic subsidies during the base period, the Current Total AMS (the standard used to measure compliance) only includes the subsidies deemed to be most trade-distorting (so-called "amber box" policies).[447] Two significant forms of domestic support are specifically excluded from the Current Total AMS.[448] First, for developed countries, the Current Total AMS excludes products where the amount of support is less than 5 percent of the total annual value of production (the de minimis exception).[449] The corresponding percentage for developing countries is 10

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[442] See WTO Agreement on Agriculture, Article 10 :4
[443] *Ibid.*, Article 6 :1.
[444] *Ibid.*, Article 1 (h)(i), Annex 3.
[445] See McMahon, *supra* note 408, at 428.
[446] See WTO Agreement on Agriculture, Articles 1(h)(ii), 6:3.
[447] See McNiel, *supra* note 407, at 57.
[448] See WTO Agreement on Agriculture, Articles 6 :4, 6 :5.
[449] *Ibid.*

percent.[450] Second, the Current Total AMS excludes direct payments under production limiting programs (the "blue box" exemption),[451] such as U.S. deficiency payments and E.U. compensation payments, both of which pay farmers the difference between a government target price for agricultural commodities and the corresponding market price.[452] As discussed more elaborately below, including U.S. deficiency payments and E.U. compensation payments in the calculation of the Base Total AMS while excluding them from the Current Total AMS has the effect of giving the U.S. and the E.U. credit for domestic subsidy reductions they never made.[453]

Finally, the Agreement does not require the reduction of certain support measures provided through government programs that are deemed to have minimal or no trade-distorting effects (the "green box" exemption)[454] and certain other measures used by developing countries to promote rural development.[455] These "green box" measures include income support to farmers decoupled from production, income safety-net programs, crop insurance programs and payments under environmental programs.[456] Investment subsidies generally available to agriculture in developing countries, input subsidies made available to low-income and resource-poor farmers in developing

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[450] See McNiel, *supra* note 407, at 57. This exception applies if the payments are based on fixed area and yields and are made on 85 percent or less of the base level of production or are livestock payments based on a fixed number of head. See WTO Agreement on Agriculture, Article 6:5.
[451] See McNiel, *supra* note 407, at 56-57.
[452] See Randy Green, "The Uruguay Round Agreement on Agriculture," (2000) 31 Law & Pol'y Int'l Bus. at, 819, 822.
[453] See WTO Agreement on Agriculture, Annex 2.
[454] *Ibid.*, Article 6 :2.
[455] *Ibid.*, Annex 2:6, 2:7, 2:8, 2:12. The term "income support decoupled from production" refers to subsidies that do not affect farmers' current or future production decisions. In other words, farmers would make production decisions based solely on world market prices. Other examples of permissible "green box" subsidies include public stockholding for food security purposes, domestic food aid, general services provided to agriculture or rural communities (such as research, pest and disease control, and extension and advisory services), and payments under regional assistance programs. See WTO Agreement on Agriculture Annex 2:2-2:13.
[456] See WTO Agreement on Agriculture, Article 6 :2.

countries, and domestic subsidies to encourage diversification from growing illicit narcotic crops are likewise excluded from domestic support reduction obligations.[457]

D. Further Negotiations

The WTO Agreement on Agriculture requires the parties to negotiate additional reforms beginning in early 2000, taking into account, inter alia, the effects of the reduction commitments on world trade in agriculture, special and differential treatment for developing countries, and non-trade concerns, including food security and environmental protection.[458] These negotiations began during the 1999 WTO Ministerial Meeting in Seattle and continued through the 2001 WTO Ministerial Meeting in Qatar.[459] One incentive to the prompt completion of these negotiations is the expiration of the so-called "peace clause" at the end of 2003.[460] The "peace clause" precludes the imposition of countervailing duties or the initiation of WTO dispute settlement proceedings under certain provisions of the 1994 GATT and the Agreement on Subsidies and Countervailing Duties to challenge agricultural subsidies that comply with the terms of the WTO Agreement on Agriculture.[461]

II. Did the Agreement Create a Fair and Market-Oriented Trading System?

Despite the free market ideology that ostensibly underlies the WTO Agreement on

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[457] *Ibid.*, Article 14.
[458] See WTO Agreement on Agriculture, Article 20.
[459] See Gonzalez, *supra* note 402, at 12.
[460] See WTO Agreement on Agriculture, Article 13 (setting forth the terms of the peace clause); *Ibid.*, Article 1(f) (explaining that the peace clause remains in effect through the end of 2003); see also Gonzalez, *supra* note 402, at 12.
[461] See WTO Agreement on Agriculture, Article 13. Under Article 13(a) and 13(b), domestic support measures that comply with the reduction commitments or with the de minimis, "blue box" or "green box" exemptions are, under certain circumstances, non-actionable subsidies for purposes of countervailing duties and are exempt from actions under the 1994 GATT and the Agreement on Subsidies and Countervailing Duties. Under Article 13(c), export subsidies that conform to the Agreement are also exempt from challenge under the 1994 GATT and the Agreement on Subsidies and Countervailing Duties.

Agriculture, the Agreement has enabled developed countries to maintain trade-distorting subsidies and import restrictions, and has thereby failed to achieve its stated objective of creating a "fair and market-oriented trading system."[462] It is pertinent to examine why the Agreement's provisions with respect to market access, export subsidies and domestic subsidies failed to correct distortions and inequities in world agricultural markets that systematically favor agricultural producers in developed countries.

A. Market Access

The market access requirements of the WTO Agreement on Agriculture produced very little liberalization in the highly protected markets of OECD countries.[463] One of the great innovations of the Agreement was the conversion of non-tariff barriers to tariffs and the prohibition of any further non-tariff barriers.[464] However, many developed countries evaded the underlying objective of these requirements by engaging in "dirty tariffication," the setting of tariff equivalents for non-tariff barriers at an excessively high level.[465] Dirty tariffication nullified the benefits of tariff bindings and tariff reduction by creating tariff equivalents, to which subsequent reductions apply, that were at times more import-restrictive than the non-tariff barriers they replaced.[466]

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[462] *Ibid.*, preamble, para. 2. The preamble to the WTO Agreement on Agriculture purports to address inequities in world agricultural markets by "correcting and preventing restrictions and distortions" and "providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to [developing country] Members."; *Ibid.*, preamble, para. 3, 5. The Agreement's long-term objective is to "establish a fair and market-oriented agricultural trading system ... through the establishment of strengthened and more operationally effective GATT rules and disciplines." *Ibid.*, para. 2.
[463] See Hathaway & Ingco, *supra* note 434, at 8.
[464] *Ibid.*
[465] *Ibid.*, at 11-15; see Sturgess, *supra* note 413, at 148-49.
[466] See Sturgess, *supra* note 413, at 149.

A survey of tariffication procedures used by developed countries concluded that the majority of OECD countries had engaged in dirty tariffication.[467] In many instances, dirty tariffication resulted in higher levels of protection than under the old system of quotas and variable import levies.[468] Moreover, the highest tariffs were for sugar, tobacco, meat, milk products, cereals and, to a lesser degree, fruits and vegetables, precisely the products of particular interest to developing countries.[469]

The manner in which OECD countries implemented the Agreement's tariff reductions requirements likewise restricted the market access of developing country producers. The WTO Agreement on Agriculture required a 36 percent average reduction in tariffs (subject to a 15 percent minimum reduction on each tariff), and thereby allowed countries to pick and choose which individual tariffs to reduce.[470] OECD countries generally made large tariff reductions on items that were not produced domestically or where tariff levels were already quite low in order to make minimal concessions on imports that competed with domestically produced items.[471] For example, tariff reductions were often lower on temperate-zone products and higher on tropical

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[467] See Hathaway & Ingco, *supra* note 434, at 8. While some developing countries also engaged in dirty tariffication, most developing countries did not engage in tariffication at all. Instead, these countries declared bound tariffs subject to reduction commitments. *Ibid.*, at 11; See Stevens, *supra* note 406, at 40. Many of these tariffs were set at levels far higher than the current applied tariffs, and are therefore unlikely to constrain agricultural policy unless a country wished to impose significant tariff increases. *Ibid.* at 40. However, some developing countries set their tariffs at low levels and may have fewer tools at their disposal to address market price fluctuations or import surges.

[468] See Hathaway & Ingco, *supra* note 434, at 11.

[469] See U.N.C.T.A.D, "UNCTAD/WTO Joint Study: The Post-Uruguay Round Tariff Environment For Developing Country Exports: Tariff Peaks and Tariff Escalation," (TD/B/COM.1/14/Rev. 1, (2000)) at 46. (Explaining that developed countries maintained tariff peaks as high as 350-900 percent ad valorem on certain developing country food exports), [hereinafter UNCTAD/WTO Joint Study 2000].

[470] See Sturgess, *supra* note 413, at 148.

[471] See F.A.O., "Symposium on Agriculture, Trade and Food Security," (Paper No. 4, Sept. 1999), at 27, online: <http://www.fao.org/docrep/meeting/x2998E.htm> (date accessed: 12 June 2002)[hereinafter FAO Paper No. 4].

products.[472] Food staples, fruits and vegetables, and processed food products remained subject to very high tariffs (tariff peaks).[473] Indeed, the tariff peaks on processed food illustrate the ongoing problem of tariff escalation, whereby tariffs rise as the processing chain advances.[474] Tariff escalation is problematic from the perspective of developing countries because it relegates them to the production of primary products by excluding them from developed country markets for processed goods.[475]

Many OECD countries adopted complex tariff systems whose lack of transparency made pre-and post-Uruguay Round tariff comparisons more difficult and may complicate future tariff reduction negotiations.[476] For example, many countries adopted non-ad valorem tariffs, which can vary, based on technical factors such as sugar or alcohol content.[477] Some countries adopted complex import arrangements, such as the E.U.'s "entry price" system for fruits and vegetables, which includes seasonal tariffs.[478] Tariff rate quotas, designed to guarantee minimum market access, were likewise plagued by lack of transparency, and were often used to allocate trading opportunities on advantageous terms to historic suppliers (often commercial importers owned by domestic producers) rather than to create new opportunities for developing country exports.[479]

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[472] See FAO Paper No. 4, *supra* note 471, at 27; see WTO, *Guide To The Uruguay Round Agreements*, (Hague: Kluwer Law Int'l, 1999), at 140, Table III.2. Developing countries produce both tropical agricultural products (such as coffee, cocoa, tea, and palm oil) and temperate agricultural products (such as wheat, milk, fruits and vegetables). Earlier Rounds of tariff negotiations had resulted in tariff cuts in tropical agricultural products, but tariff barriers on temperate products, which competed directly with developed country agricultural products, remained quite high.

[473] See UNCTAD/WTO Joint Study 2000, *supra* note 447, at 1-3.

[474] See OECD, The Uruguay Round Agreement on Agriculture and Processed Agricultural Products (Paris: OECD, 1997) (illustrating the problem of tariff escalation in the processing chain of various agricultural commodities, including coffee, cocoa, oilseeds, vegetables, fruits and nuts).

[475] FAO Paper No. 4, *supra* note 471, at 28.

[476] *Ibid.*, at 29, 30.

[477] *Ibid.*, at 29.

[478] See A. Swinbank, "The Impact of the GATT Agreement on E.U. Fruit and Vegetable Policy,"(1996) 20 Food Pol'y., at 27-28.

[479] See FAO Paper No. 4, *supra* note 471, at 32; see also Sturgess, *supra* note 413, at 149.

The Agreement's minimum access requirements did not effectively increase market access for developing countries because the amount of access required was very modest and because these provisions merely required WTO members to provide "access opportunities" rather than requiring that the imports actually take place.[480] Moreover, countries were permitted to satisfy the minimum access requirements through the use of existing agreements for the import of commodities on concessionary terms, such as the E.U.'s agreement to purchase sugar from certain countries in the African, Caribbean and Pacific (ACP) regions, and were not required to open up markets to new entrants.[481]

Finally, developed countries restricted market access through the strategic use of the Agreement's special safeguard provision, which was designed to allow the imposition of additional duties in the event of an import surge or of particularly low prices compared with 1986-88 levels.[482] The E.U. abused the special safeguard provision by setting trigger prices far above the 1986-88 average world prices used for the conversion of non-tariff barriers into tariffs. [483]For example, the price used for the tariffication of import barriers to sugar was the 1986-88 average world price of 193 European Currency Units (ECU) per ton.[484] However, the special safeguard trigger price was set at the price of 531 ECU paid to ACP countries under the tariff rate quota for sugar.[485] As a result, the E.U. was able to reduce market access by applying additional duties whenever the world market price for sugar was more than 10 percent below the inflated trigger price.[486] Most developing

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[480] See Sturgess, *supra* note 413, at 149.
[481] See Hathaway & Ingco, *supra* note 434, at 16.
[482] See Sturgess, *supra* note 413, at 150; see WTO Agreement on Agriculture, Article 5.
[483] See Sturgess, *supra* note 413, at 150.
[484] *Ibid.*
[485] *Ibid.*, at 151.
[486] See WTO Agreement on Agriculture, Article 5:5(b) (providing that an additional duty may be imposed whenever the difference between the import price and the trigger price is greater than or equal to 10 percent of the trigger price).

countries do not have access to the special safeguard provision because it is available only to countries that historically engaged in tariffication.[487] By contrast, approximately 80 percent of the tariffed items of the OECD countries are subject to the special safeguard provision, which may so easily be abused.[488]

B. Export Subsidies

The WTO Agreement on Agriculture did not prohibit the use of export subsidies in the agricultural sector, but merely required the reduction of subsidy levels.[489] The Agreement required developed and developing countries to reduce export subsidies by a specified percentage over the Agreement's implementation period.[490] This is in sharp contrast to the Uruguay Round Agreement on Subsidies and Countervailing Measures, which flatly outlawed export subsidies.[491] Consequently, the WTO Agreement on Agriculture, far from promoting liberalized trade in the agricultural sector, merely established permissible levels of market distortion.

The Agreement also exacerbated inequities between developed and developing countries with respect to the availability of export subsidies as a tool of agricultural policy. As explained earlier, developed countries have historically subsidized agricultural production, whereas developing countries have historically needed to tax the agricultural sector. By permitting past users of export subsidies to maintain these subsidies, subject to

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[487] See FAO Paper No. 4, *supra* note 471, at 34; see WTO Agreement on Agriculture, Article 5:1.
[488] *Ibid.*
[489] See section I. B of this chapter for a discussion of the Agreement's export subsidy reduction requirements.
[490] *Ibid.*, for a comparison of the obligations of developed and developing countries.
[491] See Agreement on Subsidies and Countervailing Measures, Article 3.1(a) (prohibiting export subsidies, but exempting agricultural products covered by the WTO Agreement on Agriculture). Convinced that export subsidies exacerbated international tensions, the GATT founders banned them entirely. See Gary C. Hufbauer & Joanna Shelton Erb, Subsidies In International Trade (1984) Eur. L. Rev. 361, at 13-14, (explaining why the GATT founders sought to ban export subsidies rather than merely reducing them gradually).

certain reduction obligations, while prohibiting the introduction of new subsidies,[492] the Agreement "institutionalized the unfair competitive advantage" held by developed country producers.[493] Indeed, the practice of providing export subsidies is heavily concentrated in a handful of countries. Only 25 out of 135 countries have the right under the Agreement to subsidize exports, and three exporting countries account for 93 percent of wheat subsidies, 80 percent of beef subsidies, and 94 percent of butter subsidies.[494]

Although the Agreement did achieve export subsidy reductions, OECD countries found other ways to promote agricultural exports. Major food exporters, such as the United States, the E.U. and Canada, have reduced export subsidies in accordance with their commitments under the WTO Agreement on Agriculture, but they have utilized other devices that are permitted by the Agreement to achieve the goal of export promotion.[495] The United States, for example, has curtailed spending on the Export Enhancement Program, which promotes the export of U.S. agricultural products by paying U.S. exporters the difference between U.S. domestic prices and lower world market prices.[496] However, the U.S. has responded to declines in world commodity prices by providing direct aid to producers that is not contingent on export performance and is therefore permitted by the WTO Agreement on Agriculture.[497] The United States has also promoted exports by providing government credit on concessional terms, and has resisted any effort to reach agreement on minimum interest rates and maximum length of credit

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[492] See Section I.B of this chapter for a discussion of the prohibition of new export subsidies.
[493] See FAO Paper No. 4, *supra* note 471, at 21; see Gonzalez, *supra* note 402, at 14.
[494] See Stevens, *supra* note 428, at 47.
[495] See Sturgess, *supra* note 413, at 150, 152; see Green, *supra* note 452, at 823.
[496] See Sturgess, *supra* note 413, at 150.
[497] See Gonzalez, *supra* note 402, at 14.

terms,[498] as contemplated by Article 10:2 of the WTO Agreement on Agriculture.[499] The absence of binding obligations with respect to export credits is recognized as a major flaw in the Agreement's export subsidy provisions.[500]

C. Domestic Subsidies

The WTO Agreement on Agriculture obligated countries to reduce domestic subsidies. However, as explained below, the Agreement exempted many of the subsidies traditionally utilized by developed countries and thereby achieved minimal domestic subsidy reductions.[501] In addition, as explained in section I.(C) of this chapter, the Agreement created inequities between developed and developing countries with respect to domestic support by allowing developed countries to use trade-distorting domestic subsidies (subject to reduction obligations) while prohibiting developing countries from utilizing these subsidies beyond de minimis levels.[502]

The Agreement required countries to reduce domestic subsidies based on an Aggregate Measure of Support (AMS), a baseline figure that took into account all domestic agricultural subsidies during the 1986-88 base period.[503] Compliance was measured through the calculation of the Current Total AMS, which included only those subsidies deemed to be most trade-distorting (the "amber box" subsidies) and specifically excluded certain direct payments to farmers under production limiting programs (the so-called "blue box" subsidies) and certain de minimis subsidies. The Agreement also

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[498] See Sturgess, *supra* note 413, at 150.
[499] See WTO Agreement on Agriculture, Article 10:2 (requiring signatories to undertake to work toward an Agreement on the use of export credits and export credit guarantees).
[500] See McMahon, *supra* note 408, at 43.
[501] See Gonzalez, *supra* note 402, at 13-15.
[502] See Stevens, *supra* note 428, at 39.
[503] See Gonzalez, *supra* note 402, at 15.

exempted from the subsidy reduction obligation certain measures deemed to have minimal or no trade-distorting effects (the "green box" subsidies).[504]

The exclusion of "blue box" subsidies from the Current Total AMS undermined the effectiveness of the Agreement's subsidy reduction obligations by excluding precisely the types of domestic support most utilized by developed countries, namely U.S. deficiency payments and E.U. compensation payments,[505] both of which pay farmers the difference between the actual market price for a given commodity and a higher target price established by the government.[506] In the United States, for example, deficiency payments accounted for over 70 percent of domestic agricultural subsidies in 1990.[507] By including deficiency payments in the calculation of baseline AMS while excluding them from the Current Total AMS, the Agreement gave the U.S. credit for reducing domestic subsidies above and beyond its obligations under the Agreement.[508] Consequently, it was not necessary for the U.S. to reduce domestic agricultural subsidies in order to comply with the terms of the Agreement.[509]

The "green box" exemption excluded from the Agreement's subsidy reduction obligations a number of measures commonly used by developed countries that may have

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[504] See WTO Agreement on Agriculture, Article 6:4, 6:5.
[505] See Gonzalez, *supra* note 402, at 15-17.
[506] See McNeil, *supra* note 407, at 57.
[507] *Ibid.* Deficiency payments protect farmers from commodity price fluctuations by paying farmers the difference between the actual market price for a commodity and the higher fixed or target price established by the federal government. Due to the large share of agricultural markets controlled by the U.S., target prices set by the federal government for the purpose of deficiency payments and other domestic subsidy programs have had an enormous impact on world market prices for agricultural commodities. Because U.S. target prices are generally set above world market prices, U.S. producers tend to produce surplus amounts of the subsidized commodities. This, in turn, causes policy-makers to provide export subsidies in order to dispose of the surplus. The dumping of the surplus on world markets drives down world commodity prices. *Ibid.*, at 202-203.
[508] See Steinle, *supra* note 415, at 356.
[509] See McNeil, *supra* note 407, at 57.

significant effects on production and trade.[510] These include direct payments to farmers that are decoupled from production, income safety net programs, and crop insurance programs.[511] While these programs are not directly linked to agricultural prices, they do provide farmers with additional revenue, thereby indirectly subsidizing agricultural production.[512] Indeed, perhaps sensing the potential vulnerability of "blue box" exemptions in the next round of agricultural negotiations and perceiving the ease with which "blue box" exemptions can be recharacterized as "green box" exemptions, the United States, in the 1996 Farm Bill, replaced deficiency payments with direct income payments to farmers decoupled from agricultural prices or current production.[513] Subsequently, the United States claimed that these direct income payments are fully compatible with the "green box" exemptions and are not subject to the Agreement's subsidy reduction obligations.[514]

Finally, the "amber box" subsidy reductions required by the Agreement have produced minimal reductions in domestic support because they were based on the 1986-88 period of extremely high domestic subsidies.[515] Because domestic subsidies had declined relative to the 1986-88 base period by the time the Agreement went into effect

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[510] See Gonzalez, *supra* note 402, at 15.
[511] *Ibid.*
[512] See WTO Agreement on Agriculture, Annex 2:6-2:8.
[513] See Steinle, *supra* note 415, at 357 (discussing the effects of income insurance programs on production). Some "green box" measures, such as payments to farmers under soil conservation programs designed to retire marginal lands from production, may serve valuable environmental conservation purposes, and should be encouraged rather than restricted. However, as a general matter, it is important to monitor "green box" exemptions to make sure that they are not abused by industrialized countries to confer advantages on domestic producers at the expense of farmers in developing countries. See FAO, State of Food and Agriculture 2000, at Part II, online: < http://www.fao.org/docrep/x4400e/x4400e00. htm>[hereinafter FAO 2000].
[514] See Gonzalez, *supra* note 402, at 15.
[515] See Steinle, *supra* note 415, at 356-7.

in 1995, WTO members have had to reduce AMS by only a few percentage points in order to comply with the Agreement.[516]

III. Implications of the WTO Agreement on Agriculture on Food Security

It is impossible to talk about the impact of distortions in global agricultural trade on developing countries without examining the crucial issue of food security. It is estimated by the United Nations Food and Agricultural Organization (FAO) that there are 826 million undernourished people worldwide.[517] As Amartya Sen remarked, "the contemporary age is not short of terrible and nasty happenings, but the persistence of extensive hunger in a world of unprecedented prosperity is surely one of the worst."[518] The WTO Agreement on Agriculture affects food security in developing countries in two distinct ways. First, the Agreement increases food insecurity by exacerbating rural poverty and inequality. Secondly, the Agreement hampers the ability of developing countries to adopt measures to promote food security.

A. Exacerbation of Rural Poverty

A 1999 study by the FAO on the impact of the WTO Agreement on Agriculture in 16 developing countries expressed concern that the Agreement on Agriculture, like the market-liberalizing structural adjustment programs that preceded it, would adversely affect food security in developing countries by exacerbating rural poverty and inequality.[519] The FAO study found that the Agreement resulted in an increase in food

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[516] *Ibid.*, at 358.
[517] See FAO 2000, *supra* note 513, at 32.
[518] See Amartya Sen, *Development as Freedom* (New York : Knopf, 1999), at 204.
[519] See FAO, "FAO Symposium on Agriculture, Trade and Food Security, Paper No. 3: Experience with the Implementation of the Uruguay Round Agreement on Agriculture: Developing Country Experiences," (Sept. 1999), at 18, online: < http://www.fao.org/DOCREP/meeting/x3065E.htm> (date accessed: 12 May 2002)[hereinafter FAO Paper No. 3]. The countries studied by the FAO were Bangladesh, Botswana,

imports and an accompanying decline in food production.[520] These increases in food imports, including surges in meat and dairy products, threatened key agricultural sectors in developing countries that were important for economic development, employment, food supply and poverty alleviation.[521] The FAO reported that agricultural trade liberalization had resulted in a concentration of landholding in a wide cross-section of countries.[522] While large, export-oriented agricultural enterprises reaped the benefits of trade liberalization, small farmers frequently lost title to their plots of land.[523] In the absence of social safety nets, rural unemployment grew and poverty increased.[524]

These conclusions are supported by twenty-seven case studies that document the effects in thirty-nine developing countries of agricultural trade liberalization resulting from structural adjustment policies, regional trade agreements and the WTO Agreement on Agriculture.[525] The case studies confirmed that liberalized trade in agricultural products produced a flood of cheap food imports that depressed food prices and threatened the livelihoods of small producers in developing countries.[526] At the same time, government cuts in agricultural input subsidies increased the price of farm inputs.[527]

Brazil, Egypt, Fiji, Guyana, India, Jamaica, Kenya, Morocco, Pakistan, Peru, Senegal, Sri Lanka, Tanzania, and Thailand. See also FAO, "Agriculture, Trade and Food: Country Case Studies," vol. II, ch. 8, Kenya, at 1, online: http://www.fao. org/DOCREP/003/x8731e/x8731e00.htm (date accessed: 6 June 2002); see OXFAM, "Trade Liberalization as a Threat to Livelihoods: The Corn Sector in the Philippines" (Dec. 1996) at 1-2, 11, online: http://www.oxfam.org .uk/policy /research/corn.htm (date accessed: 23 April 2002); see John Makamure et al., "Liberalization of Agricultural Markets" (2001) at 34, 37 online: http://www.saprin.org/zimbabwe/research/zim agriculture.pdf. (date accessed: 13 July 2002).

[520] See FAO Paper No. 3, *supra* note 519, at 15, 42 & 49,

[521] *Ibid.*

[522] See Makamure, et al., *supra* note 519, at 18.

[523] *Ibid.*

[524] *Ibid.*, at 21 & 22.

[525] For a summary of these studies, see John Madeley, "Trade and Hunger: An Overview of Case Studies on the Impact of Trade Liberalization on Food Security," (2000) online: < http://www.forumsyd.se> (date accessed: 19 August 2002).

[526] *Ibid.*, at 8, 17-18, 16-17, 25-26, 43.

[527] *Ibid.*, at 8, 16-17, 28-29; see also Makamure, et al., *supra* note 519, at 34, 37.

The resulting price squeeze harmed small farmers, who were forced to pay more for agricultural inputs while receiving less for their output.[528]

Trade liberalization also led to increasing emphasis in developing countries on export production.[529] As more land and resources were devoted to export crops, domestic food production declined and food insecurity grew.[530] However, due to declining world prices for many agricultural commodities, small farmers in developing countries did not necessarily receive better prices for export commodities.[531]

In sum, the studies found that trade liberalization produced winners and losers. The winners are generally large enterprises, such as transnational corporations and domestic large-scale farming operations.[532] The losers appear to be poor farmers and rural laborers, whose livelihoods were undermined by falling commodity prices and by the loss of rural employment.[533]

B. Restriction of Developing Country Policy Options to Promote Food Security

The WTO Agreement on Agriculture restricts the policy options available to developing countries to promote food security. As the Agreement was negotiated primarily between the U.S. and E.U., it reflects the interests and priorities of these members.[534] The Agreement enables developed countries to continue to subsidize and protect domestic producers while requiring developing countries to open up their markets

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[528] See Madeley, *supra* note 525, at 8.
[529] *Ibid.*, at 8, 26, 34, 65.
[530] *Ibid.*, at 8-9, 28-29.
[531] *Ibid.*, at 9.
[532] *Ibid.*, at 8, 15, 34-35; see also T.S. Jayne et al., 'Success and Challenges of Food Market Reform : Experiences from Kenya, Mozambique, Zambia and Zimbabwe' (1999) online : http://www.aec.msu.edu/agecon/fs2/papers/idwp72.pdf. (date accessed: 29 June 2002).
[533] See Makamure, et al., *supra* note 519, at 9, 16, 27, 69; see OXFAM, *supra* note 519, at 17.
[534] See Gonzalez, *supra* note 402, at 21.

to foreign competition. The Agreement's provisions may impinge on food security in developing countries in the following ways:

(i) Market Access

As explained in section II of this chapter, the WTO Agreement on Agriculture did not produce market liberalization in OECD countries. Developed countries were able to evade the agreement's market access obligations through dirty tariffication, selective tariff reduction, strategic use of the Agreement's Article 5 safeguard provision and weaknesses in the minimum market access requirements.[535] Consequently, the WTO Agreement on Agriculture did not open up developed country markets to developing country producers.

Limitations on the use of the Agreement's Article 5 safeguard provision may hamper the ability of developing countries to protect domestic producers in the event of sudden import surges or unusually low import prices. As explained in section III (A) of this chapter, developing countries have experienced increases in food imports, including surges in meat and diary imports, and corresponding declines in domestic food production in the aftermath of the Agreement.[536] The availability of cheap imported food creates disincentives to domestic food production and encourages reliance on food imports. Because most developing countries did not engage in tariffication, they are not permitted to invoke the Agreement's Article 5 safeguard provision, which permits the imposition of additional duties in the event of import surges or particularly low import

[535] See *supra* notes 440-65 and accompanying text for a discussion of developed countries' implementation of the market access requirements.
[536] See *supra* notes 497-98 and accompanying text for a discussion of surges in imports in the aftermath of the WTO Agreement on Agriculture.

prices.[537] While some countries have proposed elimination of the safeguard provision in order to combat developed country abuses and in order to create parity between developed and developing countries, others have proposed expansion of the provision to cover developing countries and restriction of the provision to policies designed to promote food security.[538]

The onerous tariff reduction commitments adopted by certain developing countries may preclude the use of tariffs to protect particularly sensitive agricultural products, such as food staples, or to protect domestic producers from unfair competition from subsidized developed country farmers. While most developed countries adopted an aggregate 36 percent tariff reduction commitment and engaged in selective tariff reduction to protect domestic producers, many developing countries agreed to implement a uniform rate of binding and reduction for all agricultural products.[539] As a result, these countries have very little flexibility to provide higher protection for basic foodstuffs and other sensitive agricultural products.[540] In addition, some developing countries bound their tariffs at very low levels and therefore have even fewer defenses against import surges or market price fluctuations.[541]

(ii) Export Subsidies

As detailed in Section II of this chapter, the WTO Agreement on Agriculture institutionalized the existing inequities between developed and developing countries with

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[537] See FAO Paper No. 4, *supra* note 471, at 34; see also Hathaway & Ingco, *supra* note 434, at 15; see WTO Agreement on Agriculture, Article 5:1.
[538] See Hathaway & Ingco, *supra* note 434, at 35. Such an amendment might also specify with precision the requirements for setting trigger prices in order to address the Article 5 safeguard provision abuses discussed in section II (A) of this chapter.
[539] See Hathaway & Ingco, *supra* note 434, at 20.
[540] *Ibid.*
[541] *Ibid.*, at 21 & 23.

respect to the availability of export subsidies as a tool of agricultural policy. By permitting past users of export subsidies to maintain these subsidies, subject to certain reduction obligations, while prohibiting the introduction of new subsidies, the Agreement perpetuated the unfair competitive advantage held by developed country producers.[542]

The Agreement's prohibition of new export subsidies deprives developing countries of an important tool of agricultural policy that may be used to enhance export revenues and create employment opportunities in the agro-export sector. In so doing, the Agreement weakens developing countries' ability to promote food security while subjecting them to an influx of subsidized imports which displace domestic food production.

(iii) Domestic Subsidies

The WTO Agreement on Agriculture exacerbated inequities between developed and developing countries with respect to the use of trade-distorting "amber box" subsidies by permitting developed countries to use these subsidies (subject to reduction commitments) while restricting their use by developing countries.[543] Most developing countries do not have domestic subsidy reduction obligations under the Agreement because very few developing countries provided significant domestic agricultural subsidies during the 1986-88 base period.[544] However, the Agreement precludes developing countries from adopting "amber box" support measures in the future that

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[542] See *supra* notes 407-419 and accompanying text for a discussion of export subsidy reduction obligations. While the export subsidy reductions required y the Agreement are significant, they still leave sizeable export subsidies in place. Total developed country export subsidies during the base period, from which reductions are calculated, were approximately $ 19 billion. The highest subsidies were allocated to cereals, diary products and meat. See Stevens, *supra* note, at 38.
[543] See FAO Paper No. 4, *supra* note 471, at 9.
[544] *Ibid.*, at 10.

exceed de minimis levels of support.[545] For developing countries, the Agreement defines de minimis levels of support as subsidies that do not exceed 10 percent of the total value of agricultural production and 10 percent of the support provided to a particular agricultural product.[546] Developing countries may only use "amber box" subsidies in excess of de minimis levels if they fall within the "rural development" exemption (hereinafter the Special and Differential Treatment box or "SDT box") of the Agreement, which permits investment subsidies generally available to agriculture in developing countries, input subsidies generally available to low-income or resource-poor producers, and domestic support to encourage diversification from growing illicit narcotic crops.[547]

Furthermore, the fact that the baseline AMS is expressed in fixed prices poses particular problems for developing countries.[548] Because many developing countries have experienced high levels of inflation and exchange rate depreciation, AMS levels have increased on paper despite the fact that actual levels of agricultural support have not increased.[549]

Finally, the inequity with respect to "amber box" subsidies is compounded by the fact that the Agreement exempts from its subsidy reduction obligations many of the subsidies traditionally utilized by developed countries.[550] The so-called "blue box" and "green box" exemptions to the domestic support provisions impinge on food security in developing countries by encouraging overproduction in developed countries, which

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[545] See WTO Agreement on Agriculture, Article 7:2(b).
[546] *Ibid.*, Article 6:4.
[547] *Ibid.*, Article 6:2.
[548] See FAO Paper No. 4, *supra* note 471, at 16-17.
[549] *Ibid.*, at 16. Some developing countries have addressed this problem by reporting both Base Total AMS and Current Total AMS in U.S. dollars. However, the Agreement does not specifically authorize this procedure, and it has been subject to question. *Ibid.*, at 16.
[550] See *supra* notes 480-91 and accompanying text for a discussion of this issue.

depresses world prices and creates disincentives to domestic production.[551] As explained in Section II of this chapter, the "blue box" exemptions permit the U.S. and the E.U. to promote exports by paying farmers the difference between a government target price for agricultural commodities and the corresponding market price. The "green box" exemption enables developed countries to evade subsidy reduction obligations by transforming prohibited subsidies into direct payments to farmers decoupled from production. Because these provisions are used primarily by developed countries, they have enabled developed countries to evade domestic subsidy reduction obligations without conferring significant benefits to developing countries.[552] Consequently, reform or outright elimination of these exemptions is a critical concern of developing countries in the renegotiation of the Agreement.[553]

(iv) Peace Clause

The Agreement's "peace clause" precludes the imposition of countervailing duties or the initiation of WTO dispute settlement proceedings under certain provisions of the 1994 GATT and the Agreement on Subsidies and Countervailing Duties to the extent that domestic and export subsidies comply with the terms of the WTO Agreement on Agriculture.[554] The peace clause remains in effect through the end of 2003.[555] This provision renders non-actionable until 2004, the trade-distorting export subsidies and domestic support measures maintained by the U.S. and the E.U. and thereby deprives

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[551] *Ibid.*
[552] See FAO Paper No. 4, *supra* note 471, at 18, Table 3 (explaining that developing country "green box" expenditures are insignificant compared with those of developed countries).
[553] *Ibid.*, at 18.
[554] See WTO Agreement on Agriculture, Article 13.
[555] *Ibid.*, Article 1(f).

developing countries of any recourse to address the unfair competitive advantage conferred by the Agreement on developed countries.[556]

[556] See Gonzalez, *supra* note 402, at 24 & 26.

Conclusion and recommendations

I. Sanitary and Phytosanitary Measures

The SPS Agreement and the cases to date have underscored that nations have wide latitude in setting their SPS protection levels and measures. However, there should be an appropriate balance between protection of public health and the environment on one hand (since substances regulated by SPS measures are potentially dangerous), and free trade on the other hand, as measures should not be so stringent to unnecessarily restrict trade.

The SPS Agreement has gone a long way in creating a framework that can address the fundamental issue of whether a measure validly exists to protect consumers or is merely a sham to protect domestic producers. International standards have a very important role to play in ensuring that SPS measures are not used for the wrong purpose. However, the rising conflict in the international standard-setting bodies is a very disturbing reality. The deadlock on standards hurts the free trade agenda and as noted earlier, it is the efficiency and fairness of the international standard development process that is crucial for minimizing distortions to international trade. WTO members should therefore work together towards addressing the inefficiency of the international standard-setting bodies and ensuring that standards are adopted on a consensus basis.

Efforts should be made to build up the capacity of developing countries to participate in international standard development, meet standards as well as challenge them, with a view to increasing market access. The requirement in the SPS Agreement to take into account the special circumstances of developing countries when developing SPS

measures should be adhered to, while the kind of technical assistance extended should be capacity building rather than reactive; the ability of producers should be built with a view to enabling them anticipate and adapt to new standards rather than rushing to ensure compliance once standards are set.

II. The WTO Agreement on Agriculture: Issues to address

Besides the SPS agreement, it is evident from the foregoing discussion that the Agreement on Agriculture has engendered widespread dissatisfaction among all categories of developing countries, whether they are agricultural exporters, food importers, single-commodity exporters, predominantly agrarian economies, or small-island developing states. There are critical areas of imbalance in the current Agreement on Agriculture that need to be addressed to enable developing countries to realise the promised benefits of agricultural free trade.

A. Market Access

Compounding the market access problem is the fact that many developing countries have suffered import surges since the reduction or elimination of domestic barriers to trade. This has been especially damaging to the world's poorest countries, whose low-income or resource-poor farmers suffer from a lack of adequate and secure food sources.

Greater access to developed country markets should be a chief priority in the new round of agricultural trade negotiations in order to not only enable developing countries realize the promised benefits of agricultural trade liberalization, but also to address

developed countries' evasion of the Agreement on Agriculture's market access requirements. Greater market access can be achieved through further reduction of developed country tariffs in order to address dirty tariffication. Market access can also be improved by applying tariff reductions on a product-by-product basis rather than industry-wide averages in order to avoid selective tariff reduction, by eliminating tariff escalation on products of export interest to developing countries, and by requiring greater transparency in tariffs in order to avoid abuses. The Agreement's Article 5 safeguard provisions, which have been abused by developed countries and are generally unavailable to developing countries, should be made available exclusively to developing countries, and should be reformed to specify the calculation of the trigger price.

The Agreement's minimum market access requirements should also be expanded and clarified in order to ensure that trading opportunities are made available for developing country producers (rather than commercial exporters owned by developed country producers) and to compensate countries whose preferential access to developed country markets will be eroded by trade liberalization.

The WTO Agreement on Agriculture should give developing countries maximum flexibility in the implementation of tariff reductions in recognition of the fact that developing countries frequently rely on tariff revenues to fund measures to boost food production and ensure food security. For example, as explained earlier, developing countries frequently rely on tariff revenues to finance programs to promote domestic food production, such as subsidized or free inputs, research and extension services, irrigation projects, and investment subsidies. Tariff revenues may also be used to finance food price subsidies, targeted feeding programs and income safety nets. Consequently, the

maintenance of tariff revenues is critical to the ability of developing countries to promote food security.

Furthermore, it is critical that any additional tariff reduction in developing countries not occur until there have been significant reductions in export subsidies and domestic subsidies in developed countries. To do otherwise would thwart the ability of developing countries to use tariffs to prevent the displacement of domestic food production by cheap, subsidized food imports.

The Agreement should also exempt developing countries from tariff reduction obligations for particularly sensitive agricultural commodities, such as food staples. This exemption would enable developing countries to promote food security by encouraging domestic food production, reducing dependence on world markets, and encouraging diversification of food supply. Under the proposed exemption, countries that agreed to uniform tariff bindings and reductions for all agricultural commodities would be permitted to protect particularly sensitive agricultural products, such as food staples, from foreign subsidized competitors. Developing countries that bound their tariffs at very low levels would likewise be permitted to readjust their tariff bindings to provide higher protection for particularly sensitive agricultural commodities.

Finally, the Agreement's Article 5 safeguard provisions should be made available to all developing countries (regardless of whether or not they engaged in tariffication) in order to enable them to increase tariff protection when import surges or particularly low import prices threaten domestic production. As discussed in the preceding section, the trigger price calculation mechanism should be specified in order to avoid abuse of this provision.

B. Export Subsidies

Unlike the Uruguay Round Agreement on Subsidies and Countervailing Measures, which expressly prohibited export subsidies, the WTO Agreement on Agriculture permitted past users of export subsidies (primarily developed countries) to maintain these subsidies (subject to reduction obligations) while prohibiting the introduction of new export subsidies. In so doing, the Agreement institutionalized the ruinous competition between highly subsidized developed country agricultural producers and their counterparts in developing countries.

The WTO Agreement on Agriculture should flatly prohibit developed countries from subsidizing exports. The Agreement should also contain a broad prohibition on measures designed to circumvent this prohibition, such as direct aid to producers that is not contingent on export performance. Furthermore, as contemplated by Article 10:2 of the Agreement, the renegotiated Agreement should contain binding obligations with respect to minimum interest rates and maximum credit terms, in order to prevent developed countries from promoting exports by providing government credit on concessional terms.[557] Finally, the Agreement should eliminate the Article 13 "peace clause" that currently prevents developing countries from imposing countervailing duties or initiating WTO dispute settlement proceedings to challenge the trade-distorting measures adopted by developed countries to promote agricultural exports.[558]

In accordance with the principle of special and differential treatment, developing countries should be permitted some latitude to use export subsidies to nurture agro-export industries, thereby generating export revenues and creating employment opportunities.

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[557] See Orden, *supra* note 18, at 3-5.
[558] *Ibid.*, at 4 & 5.

Indeed, in light of the unfair competitive advantage obtained by developed countries through the use of export subsidies and of various measures to circumvent the Agreement's limitations on export subsidies, it is imperative that developing countries not be deprived of this important policy option.

The problem with this proposal is that few developing countries have the resources to subsidize agricultural exports. Indeed, this proposal may benefit wealthier developing countries (such as certain developing country members of the Cairns group) at the expense of developing countries that cannot afford export subsidies.[559] One solution to this dilemma may be to permit subsidies only when they can be justified by food security concerns, such as the need to diversify agricultural production in order to reduce dependence on one or two export commodities. This solution would draw a distinction between export subsidies designed to distort world markets in order to increase the market share of established agricultural producers and export subsidies designed to nurture infant agro-export industries in order to reduce overall vulnerability to world market commodity price fluctuations.

Finally, since the elimination of export subsidies in developed countries may increase agricultural prices, the renegotiated Agreement should include a binding commitment by industrialized countries to provide financial assistance to least-developed and to net food-importing developing countries to compensate for higher world market prices. This proposal represents a codification and elaboration of the commitment to

[559] See Shishir Priyadarshi, "Reforming Global Trade in Agriculture: A Developing-Country Perspective," Trade, Equity, and Development Series, no. 2, (September 2002), at 3-4.

assist the least developed and net food-importing developing countries made by WTO member nations during the Uruguay Round negotiations.[560]

C. Domestic Subsidies

The WTO Agreement on Agriculture obligated countries to reduce domestic subsidies, but excluded the very types of subsidies most commonly employed by developed countries. Consequently, the Agreement reinforced the competitive advantage of developed country agricultural producers relative to farmers in developing countries. There are several alternatives that WTO members can explore to address this inequity and to promote market access as well as food security in developing countries.

A top priority in the renegotiation of the Agreement should be to re-characterize the exempted "blue box" and "green box" subsidies utilized by developed countries as trade-distorting "amber box" subsidies and to require that these subsidies be reduced.[561] First, as detailed in Section II of chapter 3, "blue box" subsidies (such as U.S. deficiency payments and E.U. compensation payments, both of which involve direct payments to farmers based on production) directly subsidize agricultural production, and should be included in the category of trade-distorting "amber box" measures. Second, the exempted "green box" subsidies, such as payments to farmers decoupled from production, income safety net programs and crop insurance programs, indirectly subsidize agricultural production by increasing farmer revenues. Given the relative ease with which "blue box" subsidies have been transformed into "green box" subsidies, it is imperative that the renegotiated Agreement develop a more precise definition of non-trade-distorting "green

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[560] See Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries, April 15, 1994, online: http://docs online.wto.org:80/DDFDocuments/v/UR/FA/35-dag.doc (date accessed: 23 January 2002).
[561] See Gonzalez, *supra* note 402, at 33.

box" measures or, in the alternative, place a cap or ceiling on these "green box" measures. Finally, the Agreement should require sharp AMS reductions in light of the fact that the original requirements achieved negligible domestic subsidy reductions as a result of the exemptions and of the fact that the 1986-88 base period was one of extremely high domestic subsidies.

The renegotiated Agreement on Agriculture should recognize the pivotal importance of domestic subsidies to food security in developing countries, and should expand the Special and Differential Treatment box (SDT box) discussed in section III of chapter 3 to a "food security box."[562] The "food security box" should permit all subsidies designed to increase domestic food production (such as subsidized seed and fertilizer) regardless of whether the programs are restricted to low-income or resource-poor farmers and without limitation to de minimis levels. The "food security box" should also include food price subsidies, direct provision of food, and income safety nets.

With respect to domestic subsidies that are not included in the "food security box," developing countries should be allowed to adjust their calculations of AMS levels to account for inflation and should be permitted to use export taxation and price controls (negative AMS) to offset domestic subsidies. Similarly, developing countries should exclude from AMS (or include in the food security box) all costs related to the maintenance of food stockpiles or food security funds to protect against food shortfalls.

D. The "Development Box" Proposal

In a June 2000 submission to the WTO Committee on Agriculture, eleven countries – Cuba, the Dominican Republic, El Salvador, Haiti, Honduras, Kenya,

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[562] *Ibid.*, at 27.

Nicaragua, Pakistan, Sri Lanka, Uganda, and Zimbabwe – suggested creating a "development box" as a solution to some of the problems associated with food security.[563] The provisions of the development box are designed to provide developing countries with the flexibility they need to enhance domestic production for domestic consumption and to take other necessary measures to protect the livelihood of their farmers.

Given the widespread confusion over terms such as "food security" and "special and differential treatment," it is important to clearly state the objectives that are being sought with the development box. Broadly, the endeavor seeks to suggest provisions that are at best minimally trade-distorting and yet are able to provide developing countries with the flexibility they need to pursue policies aimed at reducing poverty and achieving sustainable development.[564] This proposal has three broad objectives.

Firstly, the proposal only applies to developing countries.[565] Given the fundamental differences in the kind of agriculture practiced and the role agriculture plays in developing and industrial countries, there is a clear case for devising a development box whose provisions would apply only to developing countries. Arguments offered by developed countries about "multifunctionality" – the notion that government supports for agriculture serve many purposes beyond keeping food prices low – may have merit, but they should not be confused or conflated with the problems of rural poor people in developing countries.[566]

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[563] See Orden, *supra* note 18, at 5.
[564] See Priyadarshi, *supra* note 559, at 7.
[565] See Orden, *supra* note 18, at 6.
[566] See John Audley & Ann M. Florini, 'Overhauling the WTO : Opportunity at Doha and Beyond,' Carnegie Policy Brief 6, (2001), at 6-9, online : www.ceip.org/pubs (date accessed: 18 July 2002).

For this reason, the proposal was termed a "development box" by its proponents, rather than a "food security box," which could have been interpreted to also include developed-country concerns.[567] As discussed earlier, the world's poorest people cannot meet their most basic nutritional needs, and it is important that these concerns are appropriately addressed in negotiations.

The second underlying objective is that even within developing countries, the focus of the proposals is on low-income or resource-poor farmers.[568] The key to poverty reduction and rural development is to defend and enhance the livelihoods of these farmers. Although at times it is difficult to distinguish clearly between large farmers and these disadvantaged ones, market access reforms should focus on those crops produced by low-income or resource-poor farmers, and flexibility for domestic support to these farmers should be consistent with Article 6.2 of the WTO Agreement on Agriculture and offer a way forward in ensuring that the Agreement's special and differential treatment provisions do benefit the poor.[569]

This approach should also allay any fears that measures for special and differential treatment might be misused to further the interests of agribusiness lobbies in developing countries. Although distinguishing between different kinds of producers in this way may carry an administrative burden, it is important to give governments the flexibility within WTO rules to balance for themselves the costs and benefits of supporting small producers as part of their poverty reduction strategies.[570]

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[567] *Ibid.*, at 6.
[568] See Priyadarshi, *supra* note 559, at 6.
[569] See Orden, *supra* note 18, at 5.
[570] See Kamal Malhotra, 'Doha : Is it Really a Development Round?' Trade, Environment, and Development Series, no. 1, May (2002), at 9, online : www.ceip.org (date accessed : 8 May 2002).

The third main objective of the development box is to ensure food security.[571] This proposal focuses on what it terms "food security crops," which it defines as crops and livestock products that are either staple foods in developing countries or the main source of livelihood for low-income or resource-poor farmers.[572]

On the basis of these overall objectives, the development box aims to

- protect low income or resource-poor farmers, who are often engaged in subsistence farming of food security crops, from surges of cheap or unfairly subsidized imports;
- protect and enhance the efficiency of developing countries' domestic food production capacity, particularly in key staples;
- provide and sustain existing employment opportunities for the rural poor; and
- promote improved in-country movement of surplus production.[573]

Translating the above ideas for a development box into provisions that can be effectively implemented would require building instruments into a new agreement that are designed to address the food security concerns of developing countries under the three pillars of the negotiations. Such a development box would allow developing countries, including net food importing developing countries, to further their food security by having the flexibility to support their agriculture sectors and to protect the livelihoods of their rural poor if imports surge. The box would also seek to exempt their food security crops from WTO rules on market access and tariff reductions so that they could take steps to increase their production for domestic consumption and become more self-reliant.

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[571] *Ibid.*, at 5.
[572] See Audley & Florini, *supra* note 566, at 6.
[573] See Priyadarshi, *supra* note 573, at 7.

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