

The Implementation Record of the SPS Agreement – the Third Review

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) has now been in force for over 14 years. Since the Fourth Ministerial Conference in Doha (2001), the SPS Committee has been required to review the operation of the Agreement at least every four years¹. The initial review² had been completed in 1999 and a second³ was finalised in 2005. The third review is currently underway. Some initial informal discussions have taken place already based on WTO members' submissions and WTO Secretariat background documentation. Assuming the schedule⁴ agreed in August 2008 is followed, a draft report will be tabled in the coming weeks, to be followed by a series of informal meetings and consultations throughout the summer. These should culminate in the formal adoption of the Third Review report by the SPS Committee on 14-15 October 2009.

The following notes draw from the Third Review background document⁵ presented to the SPS Committee by the Secretariat in February 2009. However, it focuses on, and gives precedence to aspects of the review likely to be of most interest to developing countries and particularly to least-developed countries (LDCs).

I. Special and Differential Treatment (S&D) (Article 10)

1. Well before the Seattle Ministerial Conference in 1999, developing countries had expressed concern with their capacity to implement SPS obligations. These concerns figured in the so-called "implementation agenda" that occupied the WTO in the years up to the Doha Ministerial, where they were partially resolved and partially returned to the SPS Committee for further consideration. The Doha implementation decision text⁶ notes, in particular, the efforts to ensure that developing countries participated effectively in the work of international standards setting bodies. It clarified the longer time-frame available to developing members for compliance with new SPS measures. It also sharpened the obligation on members to provide adequate financial and technical assistance to LDCs where it is required for broad implementation of the

¹ See *Implementation-related Issues and Concerns, Decision of 14 November 2001, paragraph 3.4, WT/MIN(01)/17, WTO, 20 November 2001.*

² See *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures, G/SPS/12, WTO, 11 March 1999.*

³ See *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary measures, G/SPS/36, WTO, 11 July 2005.*

⁴ See *Proposed Process for the 3rd Review of the SPS Agreement, G/SPS/W/228, WTO, 1 August 2008.*

⁵ See *Review of the Operation and Implementation of the SPS Agreement, G/SPS/GEN/887/Rev.1, WTO, 2 November 2008.*

⁶ See *Implementation-related Issues and Concerns, Decision of 14 November 2001, WT/MIN(01)/17, WTO, 20 November 2001.*

SPS Agreement and for adaptation to new SPS measures that may have a negative export impact.

2. This latter obligation, broadly implemented by developed Members (see next section) brought with it a transparency issue: while some LDC exporters benefited from financial and technical assistance, others – possibly competitors in the product and market concerned – might not. To avoid an unfair competitive advantage falling to only certain LDC suppliers, at the expense of others, the SPS Committee adopted a new transparency procedure⁷ in 2004. This required S&D related to new SPS measures to be notified to the WTO Secretariat by the member implementing the new measure. The procedure was reviewed in 2006 and extended despite its extremely limited use. While the 2004 procedure remains in place, the latest WTO report notes that it remains largely unobserved and the Committee has been unable to agree on alternative approaches.

3. In any event, transparent or not, the financial and technical assistance delivered to developing countries for SPS purposes appears generally to be inadequate. These members have continued to complain that they are unable to adapt to new SPS measures sufficiently quickly and are losing out in export markets for the affected products. A report⁸ on proposals for special and differential treatment, adopted by the SPS Committee in June 2005 commented:

“...such assistance is often characterized as supply-driven, and may be determined to a greater extent by the policy interests of the donor rather than the specific needs of the recipient.”

4. Thus, the capacity concerns of developing countries, and especially LDCs, that were present a decade ago may have been ameliorated but are still on the table in the shape of a variety of undecided proposals.

II. Technical Assistance (TA) (Article 9)

5. As the Third Review background document records, the WTO Secretariat has undertaken a total of 172 technical assistance activities on the SPS Agreement, in the period 1994 to 2008, including 65 regional (or sub-regional) and 72 national workshops. Teaching tools have been developed and widely distributed to assist developing countries in adapting to the obligations of the SPS agreement. This work is complemented by that of the Standards and Trade Development Facility (STDF) and the three specialist standards setting organisations⁹ relevant to the agreement: CODEX (food standards under the WHO/FAO umbrella), OIE (World Organization for Animal Health) and IPPC (International Plant Protection Convention).

6. As noted above, there is a marked transparency problem in measuring the direction as well as the extent of technical assistance spending for SPS. In October 2006, the WTO Secretariat produced a report¹⁰ that attempted an assessment based on information made available under the SPS Agreement and through the STDF.

⁷ See *Procedure to Enhance Transparency of Special and Differential Treatment in favour of Developing Country Members – Decision by the Committee – 27 October 2004*, G/SPS/33, WTO, 2 November 2004.

⁸ See *Report on Proposals for Special and Differential Treatment – Adopted by the Committee on 30 June 2005*, G/SPS/35, WTO, 7 July 2005.

⁹ See Annex to Trade and Development Brief - SPS Part One.

¹⁰ See *Overview of SPS-related Technical Assistance Reported to the WTO/OECD Trade Capacity Building Database*, G/SPS/GEN/726, WTO, 4 October 2006.

While stressing the significant uncertainty attached to the reporting record of members, the total number of specific entries of technical assistance projects was shown to have climbed from 393 for the period 2001-2003 (in the STDF database) to 2,475 for 2001-2006 (in the TCBDB¹¹). Figures on the financial value of these entries are unreliable especially since much of the spending is within the European Union and directed at new EU members from the East. The second largest beneficiary of assistance was Sub-Saharan Africa with 416 entries at a total value of US\$221 million. As SPS technical assistance directed to LDCs, a total of 328 entries appeared on the database at a value of USD201 million for the period 2001-2006.¹² This figure corresponds to approximately 13 per cent of the total number of entries. The more recent trends are impossible to ascertain in the absence of reliable reporting. Certainly, however, the US and EU remain the most active donors while Norway, Switzerland, Australia, Japan and New Zealand among others are significantly engaged.

7. The same WTO report made an attempt at assessing the effectiveness of TA in the SPS area through a questionnaire. While the number of responses was far from representative, the survey portrayed a mixed picture: projects were well-directed and demand-oriented but only a minority were subsequently evaluated with respect to the impact on the recipient and there were few follow-up initiatives.

III. Specific Trade Concerns Raised in the SPS Committee

8. The Third Review process will also have before it an analysis¹³ of trends in the type and number of trade concerns raised in the SPS Committee. This shows that in the 14 years, between 1995 and the end of 2008, some 277 specific trade concerns were notified with peaks of activity in the period 2001-2005. Some 41 per cent of the cases related to animal health issues, notably foot-and-mouth disease, “mad cow” disease and avian flu. Another 28 per cent of the concerns focused on food safety and 27 per cent on plant health.

9. Developing countries have turned to the SPS Committee in a substantial way. In fact, these WTO members have raised 135 issues in 14 years compared to the 188 brought up by developed members (sometimes more than one member raises, supports or maintains a measure). However, in the same period only three cases have been introduced by LDCs even though it is clear that the food exporters among this group experience severe difficulties with tightening food standards in their external markets. In 173 cases, the measure concerned was maintained by a developed WTO member while 135 cases involved measures put in place by developing countries.

10. Is the system effective in resolving SPS problems among members? Some cases, of course, end up in the DSU. However, of the original 277 measures raised, solutions have been reported for 76 and partial solutions for a further 19. Thus, 182 cases (two-thirds) remain on the table – unless, of course, they have been resolved without a subsequent notification to the SPS Committee.

11. Naturally, this is more than a statistical exercise. The SPS Committee’s consideration of specific trade concerns has permitted careful, dispassionate debate

¹¹ OECD/WTO Trade Capacity Building Data Base.

¹² As noted above, the monetary values of assistance for Sub-Saharan Africa and Least Developed Countries under-estimates the real value of assistance offered.

¹³ See *Specific Trade Concerns*, G/SPS/GEN/204/Rev.9, WTO, 5 February 2009.

on major health and food safety concerns that sometimes generate excessive public, political and media excitement outside.

IV. Transparency (Article 7 and Annex B)

12. In the 14 years until December 2008, members submitted 6,648 regular notifications and 1,086 emergency notifications of measures relating to the SPS agreement. However, of the 153 WTO members, 44 developing countries (including 22 LDCs) have yet to provide a single notification. This reflects considerable capacity shortfalls in poorer countries in coming to terms with the bureaucratic obligations of the agreement. In 2007, following a suggestion by New Zealand, a mentoring process was put in place to help developing countries meet transparency obligations. A procedural manual for the operation of enquiry points and national notification authorities was also developed.

13. Meanwhile, the transparency requirements continue to develop. A further set¹⁴ of procedures was adopted by the Committee in 2008.

V. Private Voluntary Standards

14. Since 2005, the toughest policy issue facing the SPS Committee has been the increased use of private standards. With political and consumer pressures for ever-safer food – sometimes regardless of justification – retailers and distributors are putting in place their own standards which often exceed national or international norms. This can be especially serious for developing countries that struggle to reach international standards only to find they are still falling short of what is required by buyers in their most promising markets. First noted in the context of a complaint by St Vincent and the Grenadines in relation to a standards scheme applied by British supermarkets that affected imported bananas, the Committee has been unable to reach a consensus on whether such voluntary standards fall within the purview of the SPS agreement.

15. Thus, some members regard private standards as undermining international norms, as sometimes arbitrary and as a breach of their rights under the agreement. Others insist there can be no jurisdiction over the decisions of private operators in a free market. Further, schemes that assist exporters in meeting private standards can be an effective means of securing market access. The EU has stated that private standards seldom exceed official international standards, *“instead they focus on compliance and certification issues related to retailers’ efforts to ensure that their products are indeed safe”*.

16. Certainly the private standards business is booming. GlobalGAP¹⁵ – GAP for Good Agricultural Practices – is one instance of an international alliance of major retailers and distributors along with large producer groups, including in developing countries.

17. With little agreement on the legal status of private standards under the SPS Agreement and following an informal information session with some of the private

¹⁴ See *Recommend Notification Procedures in Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7) - Revision, G/SPS/7/Rev.3*, WTO, 20 June 2008.

¹⁵ <http://www.globalgap.org>

standards bodies last summer, the Committee agreed to ask members to complete a questionnaire on the subject, including the private standards schemes operating and products affected in their jurisdictions. The hope is that the questionnaires – many of which are still in the process of being completed – will permit a more informed discussion at the Committee's June 2009 meeting. Thereafter, the *ad hoc* group of about 30 members which is focusing on the issue is expected to prepare an analytical report with some concrete proposals.

VI. Regionalisation (Article 6)

18. In 2008, the Committee adopted guidelines on the implementation of Article 6 of the SPS Agreement which opens the way to the recognition of pest- and disease-free areas of an individual member's territory. The guidelines identify the type of information normally needed for the recognition of regionalisation.

Acronyms

DSU	Dispute Settlement Understanding
FAO	Food and Agriculture Organization
GlobalGAP	GAP for Good Agricultural Practices
IOE	International Office of Epizootics
IPPC	International Plant Protection Convention
LDCs	least-developed countries
OECD	Organisation for Economic Co-operation and Development
S&D	Special and Differential Treatment
SPS	Sanitary and Phytosanitary Measures
STDF	Standards and Trade Development Facility
TA	Technical Assistance
TCBDB	OECD/WTO Trade Capacity Building Data Base
WHO	World Health Organization
WTO	World Trade Organization