

Addressing SPS Challenges in India

Kasturi Das

Fellow

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1. The Backdrop

The recent past is witness to an increasing attention being paid to sanitary and phytosanitary (SPS) issues, particularly in the developed countries of the world. Rapid advancement in science and technology has enabled identification of hitherto unknown food-borne pathogens and other hazards; estimation of the incidence and severity of food-borne illnesses; and tracing of hazards to their sources. Enhanced scientific understanding in this area, coupled with growing public awareness and concern about food-safety, has in turn, resulted in an increasing preference for safe and hygienic food, particularly in the countries of the North. In tandem with these trends, certain new approaches to food safety regulations have emerged during the 1990s, particularly in the developed countries. These are characterized by:

- (i) A growing use of risk analysis;
- (ii) Treatment of public health as the primary goal of food safety regulations;
- (iii) Emphasis on a farm-to-table approach in addressing food safety hazards;
- (iv) Adoption of the Hazard Analysis and Critical Control Point (HACCP) system to regulate microbial pathogens in food;
- (v) Increase in the stringency of standards pertaining to food safety;
- (vi) Emergence of newer and more extensive regulations to handle newly identified hazards;
- (vii) Improvement in market performance in food safety through provision of information.¹

However, while on the one hand, consumers, particularly in the developed countries are showing an enhanced preference for safe and hygienic food, an increasing share of their food basket is originating from imports in this era of globalization. Given the increasing world food trade over the past few decades, SPS regulations and standards are gaining in importance in the context of international trade as well. The WTO Agreement on the

¹ Roberts and Laurian (2005).

Application of Sanitary and Phytosanitary Measures (SPSA) came into being (with effect from 1 January 1995) with this backdrop.

The past several years are witness to an increasing attention being paid to sanitary and phytosanitary (SPS) issues. Enhanced scientific understanding in this area, coupled with growing public awareness and concern about food- and health-safety, has resulted in an increasing preference for safe and hygienic food, particularly in the North. In tandem with these developments, SPS issues have assumed enhanced significance in the context of international trade, as well. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPSA) came into being (with effect from 1 January 1995) against this backdrop.

SPSA was not the maiden initiative at the multilateral level to deal with trade-related SPS issues though. Article XX (b)² of the General Agreement on Tariffs and Trade (GATT) 1947 allowed Member countries to deviate from their obligations under the Agreement when 'necessary to protect human, animal or plant life or health'.³ This flexibility, however, was subject to compliance with the *chapeau* of Article XX,⁴ which required that in order to be justified under one of the paragraphs of Article XX, a measure must not be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.⁵ Thus, while Article XX created room for Member countries to pursue certain legitimate policy objectives (like protection of life or health, among others); it also attempted to ensure that such measures were not applied for

² Article XX (b) of the GATT (with the *Chapeau*) reads as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(b) necessary to protect human, animal or plant life or health;

³ The 'General Exceptions' included in Article XX of the GATT allow states, subject to certain conditions included in its introductory paragraph (*chapeau*), to deviate from its GATT obligations to serve certain legitimate policy objectives included in the ten headings ((a) to (j)) of this article.

⁴ In *US – Gasoline*, the Appellate Body presented a two-tiered test under Article XX, as follows:

In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under [one of the exceptions]; second, further appraisal of the same measure under the introductory clauses of Article XX. [Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US-Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, at 20-21]

⁵ The Appellate Body, in *Shrimp-Turtle Article 21.5* stated that:

There are three standards contained in the chapeau: first, arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination between countries where the same conditions prevail; and third, a disguised restriction on international trade [Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia (Shrimp-Turtle Article 21.5)*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481, at para 118.]

In order for the measure not to be entitled to the justifying protection of Article XX, the existence of only one of these three standards would have to be proven.

protectionist purposes. The latter attempt was quite in keeping with the stated objective of the GATT to substantially reduce tariffs and other barriers to trade and to eliminate discriminatory treatment in international commerce.⁶ Notwithstanding such assertion on reduction of non-tariff barriers (NTBs), the process of trade liberalization that was embarked on under the aegis of the GATT became almost synonymous with the lowering of tariffs, while the critical issue of NTBs remained on the margin. Moreover, despite the existence of a range of NTBs, much of the efforts in the initial years of the GATT were devoted to elimination of quantitative restrictions (QRs) – the most prevalent form of NTBs during that time. QRs, both agricultural and non-agricultural, were the subject of negotiations during the Kennedy Round (1963-1969), but little progress was made. However, an important initiative was undertaken during that period to develop an Inventory of Non-tariff Measures (NTMs) under the aegis of the Committee on Trade in Industrial Products. In fact, it was in the area of NTMs rather than QRs that the Kennedy Round made a new beginning. The GATT work programme on NTMs underwent significant expansion during the Tokyo Round (1973-79), when six multilateral instruments on NTMs were negotiated.⁷ These included, among others, the Agreement on Technical Barriers to Trade, generally referred to as the ‘Standards Code’. This plurilateral agreement was negotiated with the aim of ensuring non-discrimination in the preparation, adoption and application of technical regulations and standards; and transparency of such technical measures. The Standards Code covered the technical aspects of trade in both food and non-food products.

Finally, the decision to negotiate a stand-alone agreement on the application of SPS measures was taken during the Uruguay Round (1986-94) of negotiations that were launched in Punta del Este and culminated into the creation of the WTO in 1994 by subsuming the GATT 1947 into it. The Punta del Este Declaration (of 20 September 1986) called for increased disciplines in three areas pertaining to agriculture: market access, subsidies, and SPS regulations.⁸ The need for a separate agreement dealing exclusively with SPS measures was felt due to the perceived shortcomings in the then-existing legal instruments dealing with SPS, namely Article XX of the GATT, and the 1979 Standards Code.⁹ A view had emerged that these two instruments had failed to prevent disruptions in trade caused by ever-increasing technical restrictions, including those related to SPS. Moreover, some countries were apprehensive that the proposed elimination of agriculture-specific tariffs and non-tariff measures under the Uruguay Round would be circumvented by disguised protectionist measures in the form of SPS requirements. This perception

⁶ Preamble to GATT 1947.

⁷ Dhar and Kallummal (2007), at 140-41.

⁸ The Punta del Este Declaration states:

...Negotiations shall aim to achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines, taking into account the general principles governing the negotiations by: (i) improving market access through, inter alia, the reduction of import barriers; (ii) improving the competitive environment by increasing discipline on the use of all direct and indirect subsidies and other measures affecting directly or indirectly agricultural trade, including the phased reduction of their negative effects and dealing with their causes; (iii) minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements...

⁹ For further details on shortcomings, refer to Ratna (2005), at 74.

reinforced the need for negotiating a separate agreement, which, among other things, would seek to establish a multilateral framework that would allow simplification and harmonization of SPS measures and would eliminate all restrictions lacking any scientific basis.¹⁰

From a political standpoint, there were two streams of advocacies involved in the Uruguay Round negotiation: one that wanted to adhere to the GATT Article XX *chapeau* benchmark and allow only the 'least trade restrictive' SPS measures, and another that wanted to protect the right of (developed) countries to decide the 'appropriate level of SPS protection' (ALOP) relevant for their society based on consumer choice, in addition to SPS concerns. The agreement that finally emerged in 1994 and became operational with effect from 1 January 1995, set in place an array of multilateral trade rules that on the one hand, recognized the legitimate right of WTO Members to adopt SPS measures necessary to protect human, animal or plant life or health, and on the other, enshrined certain checks and balances to cope with the possibility of these measures emerging as NTBs.

SPSA obligates WTO Members to apply SPS measures¹¹ only to the extent necessary to protect human, animal or plant life or health. Such measures are, in general, required to be based on scientific principles and are not to be maintained without sufficient scientific evidence (Article 2.2). Moreover, as per Article 5.1 of SPSA, WTO Members are obliged to base their SPS measures on risk-assessment, taking into account risk assessment techniques developed by the relevant international organizations. Other provisions under Article 5 of SPSA contain the requirements that WTO Members are to comply with for assessment of risk and for determination of the 'appropriate level of SPS protection' (ALOP) for themselves. Article 5.6 requires WTO Members to ensure that their SPS measures are not more trade-restrictive than necessary to achieve their ALOP, taking into account technical and economic feasibility. While 'sufficient scientific evidence' (Article 2.2) is the general requirement of SPSA, in case, relevant scientific evidence is insufficient, SPSA allows a Member to 'provisionally' adopt SPS measures on the basis of available pertinent information. However, since such measures may be applied on a provisional basis only, Members must seek to obtain the additional information necessary for a more objective assessment of risk and review the SPS measure accordingly, within a reasonable period of time. Members are required to ensure that their SPS measures do not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail, and are not applied in a manner, which would constitute a disguised restriction on international trade (Article 2.3). With the aim of achieving harmonization, the Agreement urges WTO Members to base their SPS measures on international standards, wherever they exist (Article 3.1) and to participate (subject to their resource constraints) in the standardization processes of relevant international organizations, such as the Codex Alimentarius Commission, the International Office of Epizootics (OIE), and International

¹⁰ Ibid, at 74-75.

¹¹ For the purpose of this Agreement, SPS measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety (Annex A, Article 1 of SPSA).

Plant Protection Convention (IPPC) (Article 3.4). Members, however, are allowed to introduce or maintain SPS measures, which result in a higher level of SPS protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or if it is determined to be appropriate by the Member in accordance with the relevant provisions of Article 5. Such higher level of SPS measures, however, must not be inconsistent with any other provision of this Agreement (Article 3.3). The Agreement (Article 4) encourages Members to enter into 'equivalence' agreements. It also urges them to recognize the concepts of pest- or disease-free areas or regions and accordingly adapt their SPS requirements for products originating from such areas or regions (Article 6). SPSA acknowledges the need to provide technical assistance to the developing countries (Article 9) and also includes certain special and differential treatment (S&DT) provisions for them (Article 10).

Notwithstanding the existence of this WTO Agreement, SPS measures have continued to act as a major form of NTBs, particularly for the developing countries, who have often found it difficult to comply with the ever-stricter SPS requirements, imposed predominantly by the developed countries. This was clearly revealed by the submissions made by the developing countries under the notification process established by the Negotiating Group on Market Access (NGMA) as a part of the Non-agricultural Market Access (NAMA) negotiations of the ongoing Doha Round of trade talks. Under this process, WTO Members were invited to submit notification on NTBs that directly affected their exports according to the NAMA Inventory of Non-tariff Measures, which provided for a broad and comprehensive coverage of NTBs.¹² Between March 2003 and October 2004, 21 non-OECD countries¹³ made a total of 1200 notifications.¹⁴ Notably, the set of 21 countries could be regarded as fairly representative of the perceptions of developing countries about NTBs, given that it comprised a geographically and economically diverse and balanced sample of developing countries.¹⁵ As per the incidence of notifications, SPS measures (with 137 entries) turned out to be the third most frequently reported barriers for developing countries, after technical barriers to trade (TBT) (with 530 entries) and customs and administrative procedures (380 entries). It was widely reported by developing countries that certain countries were imposing onerous standards without first conducting comprehensive risk assessment. These measures included chemical residue limits, freedom from disease, and specified product treatment, among others (74% of SPS entries).

¹² The Inventory of Non-tariff Measures groups barriers into seven broad categories. See, WTO (2003), TN/MA/S/5/Rev.1 of 28 November 2003 for this inventory.

¹³ The sample of developing countries used in this analysis is non-OECD countries that submitted notifications as of 1 November, 2004. These are from Africa and the Middle East: Egypt, Jordan, Kenya, and Senegal; from Asia and the Pacific: Bangladesh, China, Hong-Kong, India, Macao, Malaysia, Pakistan, Philippines, Chinese Taipei, Singapore, and Thailand; from Latin America and the Caribbean: Argentina, Trinidad and Tobago, Uruguay, and Venezuela; and from Eastern Europe: Bulgaria and Croatia. Countries from Asia and the Pacific are the most represented (87.7% of NTB notifications), with Latin America & the Caribbean and Africa & the Middle East following in the number of barriers reported [OECD (2005), at 16].

¹⁴Ibid, at 15.

¹⁵ In terms of income level, 19% of these countries are high-income economies; 28% upper-middle income; 28% lower -middle income; and 24% low-income (of the latter, one country – Bangladesh -- is a least developed country (LDC) as per the World Bank classification of countries by levels of income. In 2002, the total value of merchandise exports from these 21 countries was 1,132,567 million USD, representing approximately 57% of total DC exports and 18% of total global exports [Ibid, at 16].

Approximately 17% of complaints in this area pertained specifically to testing, certification and other conformity assessment related to SPS.¹⁶ The product group that was found to be the worst victim of NTBs was 'live animals and products' (309 notifications) and SPS measures turned out to be the primary concern in this product category (114 notifications).¹⁷ As for India, in its notification, the country exemplified in some detail how various restrictive standards; and burden-some regulations and procedures in the areas of both SPS and TBT were acting as barriers significantly affecting its capacity to trade with several countries. In fact these formed the first entry in India's notification, clearly reflecting their importance *vis-à-vis* other NTBs.¹⁸

The present paper brings to the fore some of the key SPS issues and concerns of developing countries, by taking India as a case in point. Section 2 contains a brief account of certain sector-specific SPS barriers being faced by India. In the light on India's experiences *vis-à-vis* two of its major trading partners, the European Union (EU) and the United States (US), Section 3 examines to what extent the SPSA and its interpretations by the WTO dispute settlement bodies could be held responsible for SPS measures emerging as NTBs. Section 4 explores some of the strategies that India could adopt, both at the domestic as well as at the international levels, in its quest for coping with SPS challenges in a more effective manner. Section 5 concludes the paper with some observations and policy recommendations for India.

2. Sector-specific SPS Barriers Faced by India

Over the past several years, Indian exporters have encountered various SPS-related problems especially in the EU, but also in several other destinations, such as the US, Japan, South East Asia, Russia, and the Middle East, among others.¹⁹ This section dwells on some of the sector-specific SPS experiences of India. While the list of sectors included here and the SPS issues pertaining to each of them is in no way exhaustive, the discussion is aimed at exemplifying the nature and types of SPS challenges confronting the country in some of its major export destinations.

2.1 Marine Products

SPS-related problems have always remained a major cause of concern for Indian marine exports to the EU, which has very stringent regulations in the field of marine products. In August 1997, the EC banned fisheries products exports from India. The EU stated that:

- Community inspection in India has shown there are serious deficiencies with regard to infrastructure and hygiene in fishery establishments and there is not enough guarantee of the efficiency of the controls by the competent authorities.
- There is a potentially high risk for public health with regard to the production and processing of fisheries products in this country.

¹⁶ Ibid, at 17-19.

¹⁷ Ibid, at 20-21.

¹⁸ For further details, refer to WTO (2003), TN/MA/W/25 of 28 March, at 31-41.

¹⁹ Divvaakar, et al. (2006), at 241-42.

- Results of checks of the community border inspection ports on fishery products imported from India have indicated that these products may be contaminated by microorganism, which may constitute a hazard to human health.
- Import of fishery products from India must therefore not be further allowed.²⁰

Although the ban was subsequently lifted, the compliance with the stringent EU requirement involved heavy investment in infrastructure and equipment, apart from higher running costs. For example, it became necessary for each factory to have a potable water system, continuous power (standby generators), effluent treatment plants, flake ice machines, chill rooms and a laboratory. As per rough estimations, such upgradation involved an expenditure of about US\$ 250,000 to US \$500,000 per unit as fixed cost. The Seafood Exporters Association of India claimed to have spent US\$ 25 million on upgradation of their facilities to meet the EU requirements. This figure excludes the costs involved in appropriate training of the personnel involved in various stages of production and processing.²¹

Even in the more recent years, there have been several complaints on the part of the EU relating to Indian marine products, particularly, in respect of the use of antibiotics and bacterial inhibitors. In the beginning, India did not have adequate facilities to check for antibiotic residues at the *ppb* level as required by the EU, and as a result, exporters had no way of knowing whether their products were conforming to the EU standards. Suitable equipment was subsequently procured in some laboratories and testing at the *ppb* level became possible. However, the justification of EU complaints in this area is often questionable. For instance, there are nearly 250 bacterial inhibitors, of which only less than 10 are banned substances. However, it has been observed that in some cases, complaints are filed by the EU authorities on the mere presence of any of these 250 inhibitors, even if these are not specifically banned substances (e.g. nitrofurans and sulphamide). This is seen as an incorrect application of the EU regulations by the local health authorities, and taking advantage of ambiguities in the provisions.²²

In recent years, exports of Indian marine products have faced several detentions/rejections in the EU, on the grounds of use of antibiotics and bacterial inhibitors. This is particularly significant because marine products exports to the EU can take place only from units pre-approved by EU authorities, and all export shipments require compulsory pre-shipment certification by the Export Inspection Council (EIC), which is the EU authorized agency for a number of food and agricultural products. This certificate is issued by the EIC as per the EU guidelines as prescribed from time to time.²³ The volume of EU detentions/rejections despite these stringent pre-shipment requirements warrants specific attention to the EU procedures at the point of entry.²⁴

²⁰ Jha (2002), p.16.

²¹ Kaushik and Saqib (2001).

²² Divvaakar *et al.* (2006), pp.264-65.

²³ Export Inspection Council's Certificate Recognized for: Basmati Rice by the EU; Black Pepper by the United States Food & Drug Administration; Fish & Fishery Products by the EU; Fish and Fishery Products by the Australian Quarantine & Inspection Service, etc.

²⁴ Divvaakar *et al.* (2006), p. 242.

Specifically, it is noted that maximum detentions are observed in Italy and Spain (nearly 50 per cent of all complaints in 2002 and 2003). Moreover, detentions by different destinations have often been on different grounds for the same or similar consignments. Almost all detentions in Italy have been for bacterial inhibitors and none for antibiotic residues, whereas, in the same period, the majority of detentions in Spain have been for antibiotic residues and none for bacterial inhibitors. This has been observed even in the case of the same processing/exporting units. A view has also emerged among the Indian exporters that these rejection patterns coincide with the high season in the Mediterranean catch, leading to a drop in domestic prices. Both Italy and Spain have large domestic fisheries sectors, which depend on this catch for the tourist seasons.

India's shrimp exports have also encountered SPS problems in Japan, notwithstanding the fact that India is one of the most important suppliers of shrimp to Japan. Moldy smell²⁵ is the most serious problem of Indian shrimp. Other periodic quality problems include non-freshness, inclusion of foreign materials (metal, plastics), mixture with smaller shrimp, and not enough weight.²⁶ Indian exporters of marine processed products, including joint venture companies with Japanese investors, however, have faced problems in understanding technical requirements under the planned import system, with the problems relating to translations of Japanese texts into English with a substantial alteration in meaning and scope of interpretation.²⁷

2.2 Meat and Meat Products

India's exports of meat and meat products have faced diverse SPS problems, particularly in the EU. EU does not allow import of Indian buffalo meat due to prevalence of foot and mouth diseases (FMD) in Indian cattle. Like the Codex standards for food products, OIE guidelines are taken as international standards for trade in animal and animal products. According to article 2.1.1.22 of the OIE Terrestrial Animal Health code, fresh meat could be exported from an FMD infected country provided the veterinary requirements as stipulated in the OIE code are followed. The OIE experts on FMD have further opined that if the recommendations of OIE international animal health code are followed, it would be sufficient to prevent transmission of FMD and rinderpest from one country to another. India exports deboned and deglazed frozen boneless meat, by strictly following the OIE guidelines. India is of the view that the EU is adopting higher and more stringent standards than the international standards in this regard and has urged the EU to be guided by the OIE stipulations for trade in livestock products. The EU, however, argues that the four

²⁵ The moldy smell originates from the chemicals Geosmin and 2-Methyl-Iso-Borneol, which are produced by some types of algae that grow in turbid water. It occurs mostly in shrimp from the Bimavaram area of Andhra Pradesh, location of the biggest areas of shrimp farming in India. According to biologists, phytoplankton that cause this smell thrive in water with low salinity, caused by, for example, the flow of fresh water into the culture ponds during the monsoon season; or in super-nutritious water, caused by insufficient cleaning of ponds or by overcrowded culture (Jonker et al., 2005, p.30).

²⁶ Jonker et al. (2005), p.30.

²⁷ Divvaakar et al. (2006), p.229.

member states hit by the FMD epidemic in 2001 spent a total of 12 billion Euros on eradication measures. To preserve these huge investments, the protective measures applied by the EC follow strictly the scientific advice provided by the European Food Safety Authority (EFSA), which as per the EC is in compliance with the OIE and WTO law.²⁸

Another problem pertains to the process followed by the EC for geographical BSE risk assessment. The Scientific Standing Committee of the EC after examining the application of India for determination of BSE status, categorized India as the country of GBR level-II, i.e., BSE is unlikely but not excluded that domestic cattle are infected with BSE agent. In June 2005, India expressed concerns regarding the categorization of India in the suspected list of the GBR. According to India, the assumptions made by the EC while conducting the risk assessment needed to be reconsidered, as BSE had never been reported in Indian cattle and buffalos.²⁹ The EC categorization had the potential to disrupt India's beef trade not only with EC member States but also with its other trading partners. India had made these concerns known to the European Communities on several occasions. India has also made efforts to re-determine its status from GBR level II to GBR level-I (i.e. no risk of BSE) by submitting the requisite details. The Department of Animal Husbandry has provided additional details to the EC for this purpose. However, this is being delayed by the EC. The delay in re-determining the status of India is affecting India's exports. India has requested the EC to re-determine the GBR status of India at the earliest so that export of meat and meat products to the EU can resume. The EU maintains that the OIE as World Animal Health Organization should play a leading role in the categorization of countries according their BSE risk. Hence, it suggested India to apply to the OIE to be categorized in one of the three BSE risk categories. The problem still persists.

Notably, India is not the only country facing problems pertaining to the EC's categorization of countries in terms of BSE status. In 2001, Canada requested information on the EC geographical BSE risk assessment (GBR) process, the consistency of its application and how assessments could be reviewed when risks changed. In February 2006, Chile noted that while it had never registered any cases of BSE, in 2005 the European Food Safety Authority (EFSA) evaluated Chile as being a country where BSE was likely to occur or had been confirmed (Category 3 of the GBR). Chile disagreed with EFSA's analysis, particularly the time-frame and some of the data underpinning the analysis. The United States was concerned that the European Communities was applying similarly stringent measures to countries with significantly different risk factors, a practice which lacked scientific justification and ran counter to existing international standards. It was not entirely transparent how country classifications would be determined or what requirements would be applied in the meantime. The United States had submitted detailed comments identifying a number of problems with the methodology and with the information related to the United States.³⁰

²⁸ WTO (2007h).

²⁹ WTO (2007i).

³⁰ WTO (2007i).

2.3 Various Food Products (Aflatoxin Problem)

Exports of many food items from India have long since been facing severe problems on the grounds of presence of aflatoxin beyond the maximum levels permitted by the EU. There is a requirement of meeting a certain MRL (minimum residue levels) value of aflatoxin in products, such as spices, peanuts, groundnuts, cereals, various other processed food, etc. The MRLs are often more stringent than the international standards set by the Codex Alimentarius Commission (CAC). Moreover, the sampling procedure for testing the presence of aflatoxin is so complex and expensive that it is technically and economically very difficult for a developing country like India to undergo.

A few years back, with the aim of tackling the Aflatoxin problem in peanuts better, APEDA (Agricultural and Processed Food Products Export Development Authority) requested the UNDP (United Nations Development Programme) to organize special training for peanut farmers of Gujarat to improve their skill for management of aflatoxin. Several farmers were trained under this special programme. The problems identified by the UNDP aflatoxin management during that time included, among others, the following:

- Stringent aflatoxin standards in the EU, which are like a moving goalpost, have resulted in trade displacements.
- The standards set are hypothetical and they are often not backed by supporting scientific evidence.
- The permissible limits are different in different member countries of the EU.
- Lack of mutual recognition of inspections and standards and involvement of developing countries in standard setting processes.
- No rationality of the sampling size and testing procedures/methods adopted; lower the sample size, greater the risk of rejection of good lots.
- Lack of financial and technical resources to implement stringent requirements is the biggest obstacle for India.³¹

The suggestions for improvement of aflatoxin management included the following:

- Joint monitoring of production sites by the experts of importing countries as well as producing countries.
- Issuing aflatoxin-free tags certifying the quality and conformity with SPS measures.
- Testing for aflatoxin status of the produce before shipment by the labs identified by the importing country.
- No retesting with subsequent rejection in off-loading port.³²

With respect to the last two suggestions mentioned above, it needs to be mentioned here that in actuality, it is expected that the MRL should be respected on arrival of the consignment at the ports of the EU Member countries. India is of the view that this approach is impractical because aflatoxins can come up at any stage after drawl of samples

³¹ Jha (2002), p.25.

³² Jha (2002), p.25.

for testing and that the voyage provides an optimum environment for growth of aflatoxins. The EC, however, maintains that the EC approach towards testing is fully compatible with its international obligations and with best laboratory practice. According to the EC, it is possible, through appropriate packaging, storage and shipping conditions, to reduce the environmental conditions conducive to aflatoxin growth. Hence, India's concerns continue to persist.³³

Apart from the EU, India has faced aflatoxin-related problems in Russia also. Import of sesame seeds from India was banned by Russia in June 2007 on the ground of detection of aflatoxin B1 and metallomagnetic admixture in sesame consignments from India. The ban was temporarily lifted with effect from 11 September 2007. The Export Inspection Council of India (EIC), set up primarily to facilitate development of exports through quality control and pre-shipment inspection, was nominated as the agency from the Indian side for signing the draft protocol with Russia for export of sesame seeds. It is reported that in order to ensure safety of sesame seeds, each consignment would be accompanied with a quality certificate issued by a laboratory recognized by India.³⁴

2.4 Mango and Mango Pulp

Indian exports of mango and mango pulp have been affected by SPS-related problems in various export destinations including the USA, Japan, the EU, Australia and New Zealand. Even though India is the largest Mango producer, accounting for around 50% of the world's total mango production, with the largest number of varieties in the world, exports of mangoes or mango pulp from India have not really been significant. India's share in the global mango trade is only around 5%. Issues related to pesticides in Indian mangoes and other SPS requirements are main reasons behind this poor performance on the export front, despite India being quite competitive in terms of cost of production of mangoes. India had to wait, without much scientific reason, for almost two decades to secure access for its mangoes to two of the leading developed countries (USA and Japan) in 2007.³⁵

Until April 2007, India was not allowed to export mangoes to the US on SPS grounds. India had been pursuing the matter for quite some time with the USA and finally it was decided that APEDA (Agricultural and Processed Food Products Export Development Authority) would formulate a protocol for market access of mangoes to the USA. With the aim of exporting 100% pest and disease-free mangoes, an operations work plan (OWP) was agreed upon between the quarantine authorities of the two countries; whereby, APHIS (Animal and Plant Health Inspection Service) of the USDA (United States Department of Agriculture) would conduct on-site inspection of the accredited irradiation facility and conduct pre-clearance tests, mandatory protocols and other post-treatment activities. Satisfied by the results of the work plan, US agreed to the import treated mangoes and the export of Indian mangoes started in April 2007.

After the USA, in May 2007, Japan also opened its door to Indian mangoes. It was way back in the late 1980s that Japan banned import of Indian mangoes on health grounds. After long negotiations, Japan agreed to allow the import of six varieties — Alphonso,

³³ WTO (2007h).

³⁴ Padmanabhan (2007).

³⁵ WTO (2007c), p.33.

Banginapalle, Chausa, Kesar, Langra and Mallika. Market access for the Malda and Dushehari varieties is under review. The process of vapour heat treatment had to be put in place to comply with Japan's SPS requirements.

Indian mangoes face SPS restrictions in Australia too. India has raised the issue in SPS committee and has also provided required information regarding the efficacy of treatment for pests in mangoes in this country. However the matter is still pending before Australia. The Government of India is negotiating with the Australian Government and is expecting to be able to reach a solution.³⁶ As per recent news paper reports, India is expecting to be able to export mangoes to Australia starting from April 2008.³⁷

As for New Zealand, India believes that the acceptable level of risk has been defined too stringently by New Zealand in the case of mango and could not be justified scientifically. India has expressed its desire to have speedy progress on the part of New Zealand on this issue.³⁸

APEDA has been asked to set up an irradiation facility in Andhra Pradesh to treat mangoes before exporting to the USA. A similar facility exists at Lasal Gaon near Nashik. The APEDA has set up a vapour heat treatment plant at Vashi near Mumbai. Three more are coming up at Tirupati, Nuzvid in Andhra Pradesh and Saharanpur in U.P. at an investment of Rs.8 crore each. These are important, keeping in mind Japanese and US health standards. India is planning to set up more such facilities to boost exports of mangoes.³⁹

2.5 Rice

India's exports of rice face SPS-related problems in countries, such as the EU, the USA, Japan, the Middle-East and Russia. In June 2007, Russia banned import of rice (along with sesame and groundnuts) from India on the grounds of detection of pests in rice consignments.⁴⁰ The problems in the EU and Japan largely relate to pesticide residues, frequent changes in standards and lack of clarity on the scientific justification of the standards. The difficulties of exporting to the Middle East arise primarily from a lack of clarity in the specification of standards and the extensive documentation required from their embassies.⁴¹

In the case of the US, Basmati rice is found to face more problems than other categories of rice. This sometimes gives rise to the suspicion that SPS issues are being used to protect domestic producers of high-cost rice in the USA, that are often 'passed-off' as 'Basmati' (rice), disregarding the fact that the name and reputation of 'basmati' is linked to its geographical origin in the Greater Punjab region, situated in the foothills of the Himalayas, now divided between India and Pakistan.⁴² The need to comply with stringent

³⁶ Joshi (2007).

³⁷ *The Hindu Business Line* (2008).

³⁸ WTO (2007d).

³⁹ Joshi (2007).

⁴⁰ Source: <<http://oryza.com/Europe/Russia-Market/russian-imports-india-ban.html>> (viewed on 16 January 2008).

⁴¹ Jha (2002), p.27.

⁴² While this makes 'Basmati' eligible to get protection as a geographical indication (GI), 'Basmati' is yet to get legal protection as a GI. For further details, refer to Das (2006), p. 461, and Das (2007b), p.52.

US standards significantly increases production costs.⁴³ Moreover, there are problems relating to delays in clearing consignments, repeated tests, and bidding down of prices. As a result of all this, the incentive to export rice to the USA is very low.⁴⁴

India has various capacity constraints in the rice sector. Rice millers in India also lack storage, transportation and testing facilities. The cost of modern milling facilities may be prohibitive for many of the rice millers, particularly for the small millers who dominate the rice milling industry in India. General infrastructure problems like testing facilities for pesticides, radioactivity, and dioxins often come in the way of increase in rice exports from India.⁴⁵

2.6 Red Chilli Powder (Sudan Red)

Sudan Red (three grades: 1, 2, and 3) is a synthetic colourant used in the food industry several years ago. On grounds that Sudan Red is potentially carcinogenic, the EU banned its use in processed foods. . In October 2003, the EU specified the requirement of Sudan-free certificates for all spices, including red chilli powder and notified the appropriate agencies in India (the Spices Board and the Export Inspection Council) (EIC) , after finding traces of Sudan Red in some export consignments of red chilli powder from India. Although spice processors in India do not use synthetic colourants in the processing plants, in line with the EU requirements, the Spices Board laboratories tested all export consignments for Sudan and issued certificates of compliance. Despite such steps, several consignments of red chilli powder continued to get rejected in the EU. Upon detailed enquiry, it emerged that advanced EU equipment could detect traces of Sudan Red at the parts per billion (ppb) level whereas the Indian equipment could detect traces at the parts per million (ppm) levels. Subsequently, the Spices Board invested Rs. 1.5 crores in modern Gas Chromatography Mass Spectrometry Mass Spectroscopy (GCMSMS) equipment, which could provide the same level of accuracy as the EU equipment. Upon testing with this equipment, several consignments in India were not allowed to be exported. However, given that the spice processors do not use colorants, it was difficult to trace the origin of the problem for several months. Eventually it was found out that chilli farmers in some belts of Andhra Pradesh added colourants to the dry chillies before sending them to the *mandis*, with the expectation of getting higher prices. These lots got mixed up with the other lots coming into the wholesale markets making it practically impossible to trace the origin of Sudan Red. The Spices Board is of the view that the harmful effects of Sudan Red can occur only at intake levels of chilli powder that are substantially higher than that even in countries like India, where chilli is a key ingredient in daily diets. Such high intake levels are unforeseeable in the European countries. This seems to be a case of over-stringent requirements in the EU based on unrealistic apprehensions. Moreover, other large markets like Africa, South East Asia, and the Middle East do not impose this requirement, and allow Indian chilli powder to be imported without Sudan-free certificates. Sudan tests cost Rs. 2,000 per sample, and several samples are drawn from a container load. The costs of

⁴³ For further details on compliance cost, refer to Jha (2002), p.27.

⁴⁴ Jha (2002), p.27.

⁴⁵ Jha (2002), p.27.

inspection are very high for a low value product like red chilli; it is estimated to be around 3% of CIF value.⁴⁶

2.7 Milk Products

India is the world's largest producer in dairy sector. However, presently, Indian milk products are not allowed to be exported to the EU. This is the case notwithstanding the fact that the Export Inspection Council (EIC) of India is operating a food safety management system based certification (FSMSC) for export of milk products to ensure that the quality of the products exported meets the requirements of an importing country. During a recent visit of an FVO (Food and Veterinary Office) mission team from the EC to India to evaluate control of residues in live animals products, including controls on veterinary medicinal products in line with the Council Directive 96/23/EC, the residue monitoring system for milk in India was assessed. Overall the team was satisfied with the control measures in place in India from milk production level to processing level and also with the analytical facilities available in the country. Subsequently, India requested the EC to arrange for a visit of the FVO Mission team for assessment of Indian Milk products processing plants so as to allow export of milk products from India into the EU. Despite such initiatives, India is yet to succeed in exporting its milk products to the EU.⁴⁷

2.8 Tea

India is the world's largest producer and consumer of tea. Pesticide residue in Indian tea has been a major cause of concern for India with respect to market access in export destinations, particularly in the EU. For example, Germany complained about high residue levels of ethion in Darjeeling teas. Complaints were also received about high levels of bicofol in Assam, Terai and dooars teas. The justifications of some of these objections raised by the EU markets have been questioned by major tea exporting countries like India and China. For instance, in 1995, the residue limits of 0.01 mg of tetradifon and 2 mg of ethion per kg of tea, were allegedly imposed by Germany somewhat arbitrarily because of lack of data from India on its pesticide safety limits for tea. Later, the Teekanne Darjeeling Gold brand of tea was rejected because it contained 0.24 mg of tetrafidon per kg, which was 24 times the limit set by Germany. The rejection was soon followed by a report by the German Institute of Environment Analytics, Messzelle, branding it as unsafe. On the other hand, there were no rejections from the UK, another European market. This gave rise to a view that the German ban was protectionist.

India raised the issue of tea in SPS committee meeting in March 2005, along with China. They pointed out that in July 2001, the EC had issued a directive on residual pesticide tolerance and inspection methods for tea in which the maximum residue limits (MRLs) stipulated by the EC for seven types of pesticides were higher than those of the Codex standards. When previously discussing that issue bilaterally, China had unsuccessfully requested the scientific evidence and risk assessments justifying these MRLs. China requested the EC to apply its detection methods for residues on diluted tea as opposed to dry tea leaves, in which pesticide levels were much higher compared to those in

⁴⁶ Divvaakar et al. (2006), pp.263-64.

⁴⁷ WTO (2007h).

diluted tea. India expressed concerns that tea was being singled out for rigid residual limits while other competing products consumed in larger quantities in EC were not affected.⁴⁸

Recently, the EC has, through a new directive⁴⁹ addressed to the member states of the Community, amended certain annexes to earlier Council Directives with regard to maximum permissible levels for pesticide residues in processed agri crops, cereals, fruit and vegetables, and tea among others. The measures provided for in the new directive are said to be in accordance with the opinion of the EU Standing Committee on the Food Chain and Animal Health. As per the WTO, the Community's trading partners have been consulted on the new MRLs and their comments on the pesticide levels have been taken into account while arriving at the new MRLs.⁵⁰ The Directive required the member states of the EU to adopt and publish by 14 June 2008, at the latest, the laws, regulations and administrative provisions necessary to comply with the new directive, except for deltamethrin and atrazine for which the deadline was stipulated as 18 December 2007 and for imazalil, for which it was set as 14 September 2008.

2.9 Flowers

Indian floriculture consignments have faced various market access problems in the EU, in particular the Netherlands. Indian floricultural produce is being subject to 50% checks at entry points in the Netherlands, despite high quality procedures prevalent on the exporting farms and very stringent phytosanitary inspection procedures followed by them. For instance, most farms exporting floricultural products in India have a very stringent pest control management system operational which adheres to International standards. Most of them have also adopted Good Agricultural Practices (GAP). The 50% check, is a time consuming process and results in unwanted delays in clearances, processing and delivery of the consignments to the end clients. Such delays cause loss of quality and reputation, particularly because floricultural products are very delicate with a short shelf-life. India has proposed that the EU should reduce checks on Indian floriculture consignment to a reasonable level of say 3%-5% so as to avoid unnecessary delays leading to heavy losses in the ornamental quality of flowers. However, the problem is yet to be sorted out.

Divvaakar et al. (2006) reports a specific problem faced by an exporter of cut flowers from India to the Netherlands.⁵¹ The exported product consisted of *rajnigandha*, an Indian ethnic flower, in flower cartons, sent by air or direct shipment. The shipments had valid phytosanitary certificate issued by an approved authority. *Rajnigandha*, was tested in the EU markets as a new, unconventional export and positioned as a niche product. The airport quarantine authorities in the Netherlands mandate post-entry observations for a period of two to six days upon arrival. Given that *rajnigandha* has a short shelf life of less than seven days, the consignment perished soon after its release from quarantine procedures, and was returned by the retail shops. This is an example of lack of adaptation

⁴⁸ WTO (2007i).

⁴⁹ European Commission (2007).

⁵⁰ Padmanabhan (2008).

⁵¹ Divvaakar et al. (2006), pp. 262-63.

of procedures followed by the quarantine authorities in the Netherlands, as a result of which market access for new products is rendered more difficult.

3. SPS Measures and WTO Jurisprudence

As mentioned earlier, the SPSA was negotiated with the aim of recognizing the legitimate right of WTO Members to adopt SPS measures that they might deem necessary for the protection of human, animal or plant life or health, while at the same time setting in place certain checks and balances to cope with the possibility of these measures emerging as non-tariff barriers (NTBs). However, the experience of India and other developing countries bear testimony to the fact that SPSA has by far proved to be rather ineffective in preventing these measures from emerging as NTBs. This is largely attributable to the fact that, its dual objective notwithstanding, SPSA has left ample room for Member governments to use these measures for protectionist purposes under the guise of addressing their 'legitimate' concerns on health or safety. Moreover, in our view, the WTO dispute settlement system (DSS) may also be held responsible, to a large extent, for emergence of SPS measures as a protectionist tool. Indeed, a close look at the mode of interpretation of some of the key provisions of SPSA put forward by the WTO panels and the Appellate Body (AB) in various SPS-related disputes reveals a clear tendency to bestow upon WTO Members a large measure of autonomy and flexibility in imposing SPS requirements, in the process creating sufficient space for such measures being used for protectionist intents.⁵² The significance of the interpretations put forward by the DSS may be judged in the light of the fact that WTO dispute settlement bodies can alter the balance of rights and obligations contained in adopted agreements by creating new obligations through the process of interpretation.⁵³ While a detailed exposition of this issue is outside the scope of the present paper, the rest of this section refers to some such interpretations of legal provisions of SPSA in the context of India's experiences *vis-a-vis* two of its major trading partners, the EU and the US.

It is evident from the sector-specific experiences enumerated in the previous section that the EU has always been a major source of SPS-related problems for India. This is not unexpected given that the EU is generally known to have the strictest SPS regulations in the world. Developing countries at large have been severely affected due to its non-acceptance of established international standards and the application of its own higher standards on grounds of observance of higher safety norms. It is widely believed that often there is not enough justification for such higher standards. More so because very often it is found that lower standards exist in several other developed countries. The EU does not always provide sufficient evidence to justify those stricter requirements also. In many cases, the scientific justification of the EU requirements has been called into questions too.⁵⁴

⁵² It may be noted here that while strictly speaking the doctrine of precedent is not a part of the WTO dispute settlement system, in practice the previous reports of the Panel and the Appellate Body receive due consideration in subsequent disputes and therefore form important part of the WTO *acquis*.

⁵³ Chimni, B. S. (2002), at 133.

⁵⁴ Jha (2002), at 22.

Howsoever justified these concerns of developing countries might be, the fact remains that there is ample possibility of such approaches on the part of the EU being judged as WTO-compliant, in view of the significant leeway provided by the SPSA and its interpretations by the WTO DSS. Consider for instance, the requirement of SPS measures to be *generally* based on sufficient scientific evidence (Article 2.2⁵⁵) and risk assessment (Article 5.1⁵⁶).

In *Japan-Agricultural Products II*, the WTO Appellate Body (AB) observed that:

(T)he obligation in Article 2.2 that an SPS measure not be maintained without sufficient scientific evidence requires that there be a *rational or objective relationship* between the SPS measure and the scientific evidence (emphasis added).⁵⁷

In *EC - Hormones*, the AB clarified that Articles 2.2 and 5.1 should ‘constantly be read together’ and pointed out that:

Article 2.2 informs Article 5.1: the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1.⁵⁸

Importantly, the AB, in the same case, referred to the requirement of ‘sufficient scientific evidence’ as part of a ‘balance’ contained in the SPS Agreement:

The requirements of a risk assessment under Article 5.1, as well as of ‘sufficient scientific evidence’ under Article 2.2, are essential for the maintenance of the delicate and carefully negotiated balance in the *SPS Agreement* between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings.⁵⁹

However, the interpretations of these two provisions (Articles 2.2 and 5.1) alongside other related provisions of SPSA seem to have tilted the ‘balance’ in favour of the latter ‘interest’ to a great extent, as discussed below.

⁵⁵ Article 2.2:

Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

⁵⁶ Article 5.1:

Members shall ensure that their sanitary or phytosanitary measures are 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.

⁵⁷ Appellate Body Report, *Japan – Measures Affecting Agricultural Products (Japan - Agricultural Products II)*, WT/DS76/AB/R, adopted 19 March 1999, para. 84.

⁵⁸ Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones) (EC – Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 180

⁵⁹ *Ibid*, para. 177.

Regarding the first definition of ‘risk assessment’ as enshrined in para 4 of Annex A,⁶⁰ the AB in *Australia-Salmon* observed that ‘the first type of risk assessment demands an evaluation of the *likelihood* of entry, establishment or spread of a disease, and of the associated potential biological and economic consequences.’⁶¹ However, it pointed out that ‘the *SPS Agreement* does not require that the evaluation of the likelihood needs to be done quantitatively. *The likelihood may be expressed either quantitatively or qualitatively*’ (emphasis added). It furthermore clarified that ‘there is no requirement for a risk assessment to establish a *certain magnitude or threshold level of degree of risk*’ (emphasis added).⁶² As for the second definition of ‘risk assessment’ in para 4 of Annex A, the AB observed that it ‘requires only the evaluation of the *potential* for adverse effects on human or animal health.’⁶³

The AB in *EC-Hormones* also pointed out, in the course of commenting on the Panel’s interpretation of ‘risk assessment’, that:

To the extent that the Panel purported to require a risk assessment to establish a minimum magnitude of risk, we must note that imposition of such a quantitative requirement finds no basis in the *SPS Agreement*. A panel is authorized only to determine whether a given SPS measure is ‘based on’ a risk assessment. As will be elaborated below, this means that a panel has to determine whether an SPS measure is sufficiently supported or reasonably warranted by the risk assessment.⁶⁴

In our view, the lack of requirements to undertake a ‘quantitative’ evaluation of risk and to establish a minimum magnitude or threshold level of degree of risk dilutes the stringency of the obligation under Article 5.1 to a large extent.

Moreover, on the question of whether a WTO Member is required to carry out a ‘risk assessment’ by itself, the AB in *EC-Hormones* observed that:

Article 5.1 does not insist that a Member that adopts a sanitary measure shall have carried out its own risk assessment ... The SPS measure might well find its objective justification in a risk assessment carried out by another Member, or an international organization.⁶⁵

⁶⁰ Para 4 of Annex A reads as follows:

Risk assessment - The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

⁶¹ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon (Australia – Salmon)*, fn. 69.

⁶² *Ibid*, paras. 123-124.ch.

⁶³ *Ibid*, fn. 69.

⁶⁴ Appellate Body Report, *EC – Hormones*, para. 186.

⁶⁵ *Ibid*, para. 190.

As noted by Chimni (2000), the AB thus permitted the justification of a SPS measure on the basis of scientific evidence that was never taken into account while being formulated.⁶⁶

In another significant pronouncement, the AB in *EC-Hormones* ruled that reliance on a non-majority opinion in the scientific community does not, by itself, 'necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment, especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety'.⁶⁷ It noted that:

The risk assessment could set out both the prevailing view representing the 'mainstream' of scientific opinion, as well as the opinions of scientists taking a divergent view. Article 5.1 does not require that the risk assessment must necessarily embody only the view of a majority of the relevant scientific community.⁶⁸

This interpretation definitely provides enormous leeway for the countries imposing SPS measures.

Regarding the factors to be taken into account in assessment of risk as per Article 5.2⁶⁹ of SPSA, the AB in *EC-Hormones* apparently depicted its 'willingness to descend into the real social world',⁷⁰ by observing that:

It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but *also risk in human societies as they actually exist*, in other words, the *actual potential for adverse effects on human health in the real world where people live and work and die* (emphasis added).⁷¹

The AB further noted the 'depth and extent of the anxieties experienced' and 'the intense concern of consumers' within the EC. The Appellate Body report reveals 'surprising sensitivity to public anxieties regarding ecological risks, and adopts a broad concept of risk'.⁷² It thus created 'a legal link' between the level of public anxiety and conformity to WTO rules, endowing the civil society with the power to confer legitimacy on governmental regulatory measures.⁷³ As Chimni (2000) has cautioned, '(t)he WTO DSS has to be alert to the fact that this legal link between the democratic sentiment and trade measures can be mobilized in future by the forces of protection to curtail free trade.'⁷⁴

⁶⁶ Chimni, B. S. (2000), at 1758.

⁶⁷ Appellate Body Report, *EC – Hormones*, above n 41, para. 194.

⁶⁸ *Ibid*, para. 194.

⁶⁹ Article 5.2 of SPSA:

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

⁷⁰ Chimni (2000), above n 49 at 1758.

⁷¹ Appellate Body Report, *EC – Hormones*, above n 41, para. 187.

⁷² Perez, Oren (1998), at 563.

⁷³ *Ibid*, at 572.

⁷⁴ Chimni (2000), at 1758.

As for the relationship between the 'precautionary principle' and the SPSA, the AB in *EC-Hormones* pointed out that 'the principle has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement'. Nevertheless it observed that 'the precautionary principle indeed finds reflection in Article 5.7 of the *SPS Agreement*.'⁷⁵ It furthermore suggested that:

(A) panel charged with determining, for instance, whether 'sufficient scientific evidence' exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that *responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned* (emphasis added).⁷⁶

The aforesaid pronouncement depicts significant deference towards the judgment of the representative governments imposing SPS measures (which in that particular case happened to be the EC).

Although promotion of harmonization of SPS measures across countries through adherence to international standards is purportedly a key objective of SPSA, the interpretations of the relevant provisions under Article 3 leave sufficient room for WTO Members to deviate from international standards, even where they exist, as has often been done by the EU. The AB in *EC-Hormones* observed that:

In generalized terms, the object and purpose of Article 3 is to promote the harmonization of the SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, *the right and duty of Members to protect the life and health of their people*. The ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or as a disguised restriction on international trade, *without preventing Members from adopting or enforcing measures which are both 'necessary to protect' human life or health and 'based on scientific principles', and without requiring them to change their appropriate level of protection* (emphasis added).⁷⁷

Regarding the obligation to base SPS measures on international standards as included in Article 3.1,⁷⁸ the AB in *EC-Hormones* stated that '(u)nder Article 3.1 of the *SPS*

⁷⁵ Article 5.7 of SPSA:

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

⁷⁶ Appellate Body Report, *EC - Hormones*, para. 124.

⁷⁷ *Ibid*, para. 177.

⁷⁸ Article 3.1 of SPSA:

Agreement, a Member may choose to establish an SPS measure that is based on the existing *relevant* international standard, guideline or recommendation.' However it clearly mentioned that '(s)uch a measure may adopt some, not necessarily all, of the elements of the international standard',⁷⁹ thereby leaving adequate room for WTO Members to deviate from the international standard in question.

Moreover, Article 3.3⁸⁰ explicitly allows WTO Members to diverge from international standards under certain conditions. In *EC - Hormones*, the AB observed that:

Under Article 3.3 of the *SPS Agreement*, a Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement or embody that level of protection in a measure not 'based on' the international standard. The Member's appropriate level of protection may be higher than that implied in the international standard. The right of a Member to determine its own appropriate level of sanitary protection is an important right.⁸¹

The AB furthermore clarified that the 'right of a Member to establish its own level of sanitary protection under Article 3.3 of the *SPS Agreement* is an autonomous right and *not* an 'exception' from a 'general obligation' under Article 3.1'.⁸² As observed by Chimni (2000), the determination of the AB that it is the autonomous right of a state to adopt a higher than international standard offers states greater latitude in the adoption of SPS measures than if it had deemed it an exception.⁸³

The AB, in *Australia – Salmon*, further stressed that an explicit statement by a Member about its level of protection could not be questioned by a panel or the AB:

To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

⁷⁹ Appellate Body Report, *EC - Hormones*, para. 171

⁸⁰ Article 3.3 of SPSA:

Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5 (footnote omitted). Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

The footnote added to this provision reads as follows:

For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

⁸¹ Appellate Body Report, *EC - Hormones*, para. 172.

⁸² *Ibid*, para. 172.

⁸³ Chimni (2000), at 1758.

The determination of the appropriate level of protection, a notion defined in paragraph 5 of Annex A, as 'the level of protection deemed appropriate by the Member establishing a sanitary ... measure', is a *prerogative* of the Member concerned and not of a panel or of the Appellate Body.⁸⁴

While distinguishing between risk assessment under Article 5.1 and the determination, by a Member, of its own appropriate level of SPS protection (ALOP), the AB in *Australia-Salmon* further clarified that:

As stated in our Report in *European Communities – Hormones*, the 'risk' evaluated in a risk assessment must be an ascertainable risk; theoretical uncertainty is 'not the kind of risk which, under Article 5.1, is to be assessed.' This does not mean, however, that a Member cannot determine its own appropriate level of protection to be 'zero risk'.⁸⁵

Evidently, WTO Members have been bestowed by the DSS with enormous leeway to define their own appropriate levels of SPS protection as per their respective preferences and priorities. This leeway seems to have been effectively exploited by the developed countries like the EU. While the EU as a whole has often deviated from international standards in defiance of the harmonization principle of the SPSA, lack of harmonization among the member states of this customs union with regard to SPS requirements and their implementation has turned out to be another major cause of concern for the developing countries.

A special characteristic of EU integration is that even member states are allowed to maintain their own internal regulations and standards on a range of subjects, including SPS. It has been observed that often food products entering into the EU are subject to inspections under the common EU standards at the first point of entry to the EU, and once again at the point of entry into the final destination country, which may have a higher standard for the same product. Due to the independent jurisdiction of member states, there is no uniformity in EU standards for risk management, detentions, and disposal at the point of entry. This causes enormous uncertainty in the resolution of issues relating to SPS matters. The absence of a common and harmonized regulatory environment in the EU is the underlying cause for a majority of rejections encountered by many exporters, including those from India.⁸⁶ Other key issues include the absence of clearly laid out procedures for detention and disposal of consignments, and inadequate coordination among member states' agencies in the notification and de-notification of suppliers placed under alerts, following detentions.⁸⁷

The EU system of 'rapid alert' is worth a special mention at this juncture. Rapid alert is a border control mechanism for monitoring and ensuring the quality of imported food

⁸⁴ Appellate Body Report, *Australia – Salmon*, para. 199.

⁸⁵ *Ibid*, para. 125.

⁸⁶ Divvaakar et al. (2006), at 225-26.

⁸⁷ *Ibid*, at 242-43.

products by issuing a notification in case of detection of contaminated imports or of products not meeting the required standards. The notification is made to all EU member countries as well as to the exporter. As a result of such alert, a predetermined number of subsequent export consignments of that particular exporter face 100% inspection at the border of every port of the EU member countries. However, this 'predetermined number' varies from one member state to another. Moreover, member states do not always inform the central authorities about the successful completion of a rapid alert notice period, which delays denotification. Importantly, since upon notification of a rapid alert, the 100% check rule gets applied by each member state, the exporter concerned must get denotified in each of the member countries, which means up to 200 consignments in all and a minimum number of consignments in each member state. This, in effect, implies that the exporter could be permanently blacklisted. In fact, at times, it is almost impossible to achieve, since an exporter may not trade with all member states or may not have the same volume of trade with all member states. While, termination of the alert requires the same procedures to be followed by the authorities as its institution, it does not take place as promptly and is often far more onerous than its institution, thus creating a trade barrier. The termination of a rapid alert does not also get the same publicity as its institution in the first place and leads to a continued trade chilling effect for the exporters.

Another damaging procedure followed by the EU is the system of destruction of rejected food consignments on account of lack of conformity with standards, without even intimating the consignors, let alone returning them. This is particularly frequent in France and Italy. The destruction is carried out on the grounds that consignments declared unfit for human consumption could not be salvaged. This is different from the practices followed by India and several other developing countries. The EU system results in destruction of good cargos along with the bad ones, all at the cost of the exporters, thereby resulting in huge losses for them.⁸⁸ It is reasonable to expect that the exporter should have the first right to a rejected consignment and should have the option to either take it back or to divert the consignment to another country where it may be acceptable as per its SPS requirements. Such diversion may be possible in view of the fact that the definition and scale of threat to public health may be different in other export destinations compared to those in the EU. Hence, diverting of consignments may constitute feasible ways of avoiding substantial financial losses in case of many food items with a sufficiently long shelf life. However, exporters are not being able to explore such alternatives owing to the EU system of destruction of rejected food consignments.

As for the US, the foremost cause of concern of India is the 'Public Health Security and Bioterrorism Preparedness and Response Act of 2002', or the Bioterrorism Act, which came into being after the September 11's terrorist attacks.⁸⁹ Title III of this Act deals with 'Protecting Safety and Security of Food and Drug Supply'. It requires, among other things, that: domestic and foreign facilities that manufacture, process, pack, and hold food for consumption in the US register with the US FDA (Food and Drug Administration); the FDA receives notice prior to the entry of food that is imported or offered for import into the US;

⁸⁸ Ibid, at 266.

⁸⁹ Becker, Geoffrey S. (2006), at 6-7.

persons involved in the manufacture, distribution, and receipt of food in the US establish and maintain records that identify the immediate previous sources and immediate subsequent recipient of that food. The Bioterrorism Act has also given the FDA the authority to administratively detain any food for which there is credible evidence or information that the food presents a threat of serious adverse health consequences or death to humans or animals.

Despite a general recognition that greater bioterrorism protection is needed, concerns have widely been raised about the potential trade-restrictive implications of Title III. It has been pointed out that Title III discriminates between domestic and foreign food manufacturers by imposing increased transaction costs and procedural burdens solely on foreign facilities, thereby creating NTBs.⁹⁰The foreign agent requirement for exporters and the problems associated with implementation of the prior notice requirements for imports are some of the potential sources of such NTBs, as discussed below.

As per the registration process, exporters of the products covered under this Act must designate an US agent at the time of registration. The agent is required to live or maintain a place of business in the US and be physically present there. For the developing country exporters, to find an US agent is not only difficult, but also costly.⁹¹

Under the prior notice requirement of the Act, all food imports must be notified to the FDA. There are time limits for sending the notice of food imports to the FDA, based on the mode of transportation used: eight hours for food arriving by water, four hours by air or rail, and two hours by road.⁹²The exporter or her US agent can file this information with the FDA. The problem arises because the exact arrival details of vessels are not easily disclosed to exporters by shipping lines or their agents, especially in the case of trans-shipment vessels. This makes it difficult to honour the deadlines stipulated. Moreover, these deadlines are often alleged to be based on the FDA's administrative convenience and not on security concerns. Some Indian exporters have expressed the view that the compulsory ACD (Advance Cargo Declaration) requirements for US ports also provide nearly the same information, and hence there should not be any need for filing pre-arrival declarations with the US FDA separately.⁹³

The US government, however, has expressed the view that it recognizes the potential of the Bioterrorism Act for trade disruption and has taken every possible step to ensure that legitimate trade is not disrupted. It has pointed out that the FDA has included an economic impact analysis in the proposed rules under the Act; allowed the stakeholders to review and provide comments; and finally incorporated revisions to the rules based on the comments thus received with the aim of further minimizing the impact to

⁹⁰ Boisen, Claire S. (2007), at 670-71.

⁹¹ Some export organizations of India, such as the Cashew Export Promotion Council, have collectively appointed US agents and share the costs through a pool account or through membership service charges (Divvaakar et al., 2006, at 222).

⁹² WTO (2006e).

⁹³ Divvaakar et al. (2006), at 222.

trade consistent with the requirements in the Act. Both interim and final rules, according to the US, have included a regulatory impact analysis.⁹⁴

It may be noted here that Article 5.4 of SPSA states that '(m)embers should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.' However, the mode of interpretation of this and other provisions of SPSA pertaining to trade effects of SPS measures (e.g. Articles 5.5 and 5.6), as put forward by the WTO DSS, seems to make it quite difficult to effectively address this issue. For instance, the panel on *EC – Hormones*, in a finding not reviewed by the AB, held that Article 5.4⁹⁵ was of a hortatory nature:

Guided by the wording of Article 5.4, in particular the words 'should' (not 'shall') and 'objective', we consider that this provision of the SPS Agreement does not impose an obligation. However, this objective of minimizing negative trade effects has nonetheless to be taken into account in the interpretation of other provisions of the SPS Agreement.⁹⁶

In *EC – Hormones*, the AB considered the three elements of Article 5.5⁹⁷ and held that these elements were cumulative in nature:

The first element is that the Member imposing the measure complained of has adopted its own appropriate levels of sanitary protection against risks to human life or health in several different situations. The second element to be shown is that those *levels of protection* exhibit arbitrary or unjustifiable differences ("distinctions" in the language of Article 5.5) in their treatment of different situations. The last element requires that the arbitrary or unjustifiable differences result in discrimination or a disguised restriction of international trade. We understand the last element to be referring to the *measure* embodying or implementing a particular

⁹⁴ WTO (2006f).

⁹⁵ Article 5.4 of SPSA:

Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

⁹⁶ Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada (EC – Hormones (Canada))*, WT/DS48/R/CAN, adopted 13 February 1998, modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, para. 8.169; and Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States (EC – Hormones (US))*, WT/DS26/R/USA, adopted 13 February 1998, modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, para. 8.166.

⁹⁷ Article 5.5 of SPSA:

With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, 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. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

level of protection as resulting, in its application, in discrimination or a disguised restriction on international trade. ...

We consider the above three elements of Article 5.5 to be cumulative in nature; all of them must be demonstrated to be present if violation of Article 5.5 is to be found. In particular, both the second and third elements must be found. The second element alone would not suffice. The third element must also be demonstrably present: the implementing measure must be shown to be applied in such a manner as to result in discrimination or a disguised restriction on international trade.⁹⁸

As noted by Chimni (2000), '(t)he interpretations of the Appellate Body makes it relatively more difficult to strike down protectionist measures. Thus, a mere demonstration that levels of protection exhibit arbitrary or unjustifiable differences in their treatment of different situations will not suffice. It must further be shown that it constitutes a disguised restriction in international trade.'⁹⁹

As for Article 5.6,¹⁰⁰ the AB in *Australia-Salmon* identified three separate elements and found that these elements applied cumulatively:

...Article 5.6 and, in particular, the footnote to this provision clearly provides a three-pronged test to establish a violation of Article 5.6. As already noted, the three elements of this test under Article 5.6 are that there is an SPS measure which:

- (1) is reasonably available taking into account technical and economic feasibility;
- (2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and
- (3) is significantly less restrictive to trade than the SPS measure contested.

These three elements are cumulative in the sense that, to establish inconsistency with Article 5.6, all of them have to be met. If any of these elements is not fulfilled, the measure in dispute would be consistent with Article 5.6. Thus, if there is no alternative measure available, taking into account technical and economic

⁹⁸ Appellate Body Report, *EC – Hormones*, paras. 214-15.

⁹⁹ Chimni (2000), at 1759.

¹⁰⁰ Article 5.6 of SPSA:

Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.(footnote omitted)

The footnote to this provision reads as follows:

For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

feasibility, *or* if the alternative measure does not achieve the Member's appropriate level of sanitary or phytosanitary protection, *or* if it is not significantly less trade-restrictive, the measure in dispute would be consistent with Article 5.6.¹⁰¹

In our view, this three-pronged test makes it extremely difficult to make a case for violation of Article 5.6.

The significance of the difficulty of making a case needs to be judged in the light of the distribution of the burden of proof in any SPS-related dispute at the WTO. As pointed out by the AB in *EC - Hormones*, the initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the SPS Agreement on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.¹⁰² Rejecting an argument put forward by the panel in *EC-Hormones*, the AB further ruled that the burden of proof to make out a *prima facie* case was on the complainant even when it resulted in a higher level of protection than would be achieved by measures based on relevant international standards.¹⁰³

It may be noted that 'a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.'¹⁰⁴ Thus a *prima facie* is not made out unless there is such strong and compelling evidence that it cannot be ruled against in the absence of contrary evidence.¹⁰⁵ In our view, the difficulties embedded in the process of making out a *prima facie* case are likely to constrain the developing countries from lodging SPS-related complaints with the WTO DSS. Besides, there are issues as to 'how and when to decide that a *prima facie* case has been established by the complaining party and, as the case may be, that this *prima facie* case has been rebutted by the defendant party'.¹⁰⁶ There is a risk that the indeterminacies which characterize the meaning of a *prima facie* case and its rebuttal can be used to arrive at rulings which favour the use of SPS measures.¹⁰⁷

¹⁰¹ Appellate Body Report, *Australia – Salmon*, para. 194.

¹⁰² Appellate Body Report, *EC - Hormones*, para. 98.

¹⁰³ The AB noted:

Under Article 3.1 of the *SPS Agreement*, a Member may choose to establish an SPS measure that is based on the existing *relevant* international standard, guideline or recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2; but, as earlier observed, the Member is not penalized by exemption of a complaining Member from the normal burden of showing a *prima facie* case of inconsistency with Article 3.1 or any other relevant Article of the *SPS Agreement* or of the GATT 1994. (Ibid, para. 171).

¹⁰⁴ Ibid, para. 104.

¹⁰⁵ Chimni (2000), at 1759.

¹⁰⁶ Pauwelyn, Joost (1998), at 258.

¹⁰⁷ Chimni (2000), at 1758.

The problems of the developing countries have been further exacerbated by the lack of 'teeth' in many special and differential treatment (S&DT) provisions of the SPSA¹⁰⁸ and their interpretations by the WTO DSS. In *EC-Biotech*, for instance, the panel gave a very weak interpretation of the S&DT provision enshrined in Article 10 of SPSA. It observed that:

(T)he obligation laid down in Article 10.1 is for the importing Member to "take account" of developing country Members' needs. The dictionary defines the expression "take account of" as "consider along with other factors before reaching a decision". [footnote omitted] Consistent with this, *Article 10.1 does not prescribe a specific result to be achieved. Notably, Article 10.1 does not provide that the importing Member must invariably accord special and differential treatment in a case where a measure has lead, or may lead, to a decrease, or a slower increase, in developing country exports (emphasis added).*¹⁰⁹

The panel further noted that:

While the European Communities must take account of the interests of developing country Members in applying its approval legislation, the European Communities may at the same time take account of *other legitimate interests, including those of its own consumers, its environment, etc. There is nothing in Article 10.1 to suggest that in weighing and balancing the various interests at stake, the European Communities must necessarily give priority to the needs of Argentina as a developing country (emphasis added).*¹¹⁰

The discussion in this section clearly indicates that the SPSA and the mode of interpretation of its provisions by the WTO DSS has provided significant leeway for WTO Member countries to impose SPS measures as per their own preferences and priorities, in the process increasing to a large extent the risk of these measures being used for protectionist purposes.

4. Addressing SPS Challenges in India: Points to Ponder

It is evident from the discussions in the foregoing sections that SPS requirements have acted as a major market access barrier for India, particularly in the developed country markets. India has also suffered significant export losses from time to time on account of its inability to respond to such SPS requirements adequately. Even where it has succeeded in complying with stringent SPS requirements, compliance has always involved substantial

¹⁰⁸ For further details, refer to Ratna (2005), at 81-84.

¹⁰⁹ Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC-Biotech)*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006, para. 7.1620.

¹¹⁰ *Ibid*, para. 7.1621.

investments. Moreover, there is no guarantee that once suitable changes in the production processes are made, the goods would get continued or enhanced market access, as buyers do not give any such guarantee upfront. A concomitant problem is that of shifting standards.¹¹¹ The worst affected in the whole process are the small players, who are often technically ill-equipped and financially hard-pressed to be able to comply with SPS requirements. Moreover, experience shows that installation of certain facilities required for compliance often becomes cost-effective only at a certain minimum scale of operation. Therefore, SPS requirements often have the effect of pushing small players out of business, thereby putting their livelihoods at stake. Hence, coping with SPS challenges assume enormous significance for the Indian economy as well as for the livelihoods of the people concerned.

A significant point that emerges from the foregoing discussions on India's experiences with SPS requirements is that there is often a substantial overlap between issues that come under the purview of the SPSA and those that may very well be covered under the ongoing negotiations on Trade Facilitation, which forms part of the single undertaking of the Doha Round. Interestingly, India has been trying to make use of this new window of opportunity to address some such overlapping issues. These include, (i) lack of harmonized rules and regulations among the EU member countries; (ii) destruction of rejected consignments by the EU; (iii) the EU system of 'rapid alert'; (iv) information on detained consignments, among others. India has also submitted textual proposals for this purpose (Box 1). The country must try and ensure that these proposals form part of the final outcome of the negotiations on trade facilitation.

[Box 1 comes here]

Notwithstanding the difficulties faced by India on the SPS front, it may be noted that on several instances, questions have also been raised against some of the SPS requirements imposed by India (see Box 2 for select SPS requirements imposed by India).

[Box 2 comes here]

As shown in Table 1, seven concerns were raised against India in the SPS committee meetings between 1995 and 2006, all by developed countries. India also had to confront several SPS-related questions from countries, such as the EU, Canada, the US, Australia, New Zealand, among others, during its latest Trade Policy Review carried out by the WTO in 2007.¹¹² For instance, several countries raised questions as to whether the SPS requirements of India were as per international standards and whether they were based on scientific principles. According to the Indian authorities, the SPS measures in force in the country are based on scientific principles of risk analysis and on the lines of international standards, including those of Codex, OIE, IPPC, among others. It is further maintained that

¹¹¹ UNCTAD (2006), *Trade and Environment Review 2006*, United Nations Conference on Trade and Development, United Nations, New York and Geneva, at 51.

¹¹² WTO (2007), *Trade Policy Review: India*, WT/TPR/M/182/Add.1 of July 20.

the health protocol of India is product-specific and takes into account the disease situation in India *vis-à-vis* that prevailing in other countries and that the protocol is uniformly applicable to all countries. The determination of SPS measures is claimed to be based on a risk analysis process so as to protect the human and animal health. The import risk analysis is reportedly conducted in consultation with technical experts on the basis of well-recognized scientific principles and with reference to the specific product and the disease situation prevailing in the exporting country *vis-à-vis* that prevailing in India. Standards are formulated through technical committees, which have representatives of different stakeholders, such as manufactures, consumers, testing labs, R&D institutions and so on.¹¹³

[Table 1 comes here]

Some developed countries have also smelt protectionist tendencies behind Indian regulations and standards on a few occasions, as revealed by the following instance. In India, certain products are brought under mandatory certification on grounds of health, safety, environment, infrastructure and mass consumption. As per the existing government regulations, the products conforming to mandatory Indian Standards and certified by the Bureau of Indian Standards (BIS) are accepted. The EC, however, considers the list of products subject to mandatory conformity assessment to be discriminatory against imported goods.¹¹⁴

Concerns have often been raised about non-notification or late notification of various SPS measures imposed by India. The Indian official response regarding this matter, however, gives a different picture altogether. While answering a question on the issue during the latest Trade Policy Review process, India had clarified its position as follows:

During the Review period, i.e., from 2003 to 2007 (till date), India notified 39 SPS notifications (without addenda). Out of these 39 notifications, 16 (41 per cent to the total notifications) were notified after their commencement; of these 16 notifications, 6 (15 per cent) were emergency notifications, 2 (5 per cent) did not have any trade effect, and 8 (20.5 per cent) notifications were based on international standards. An emergency notification is sometimes made, after the same has been enforced, due to the exigency of the situation. As per the WTO rules, a WTO member is not required to notify an SPS measure if the measure is based on international standards or it does not have any trade effect. But these are often notified for the sake of information of the other WTO members.¹¹⁵

However, in our view, India needs to traverse a long distance both at the domestic as well as international fronts before the country can address the multi-pronged SPS challenges confronting it in an effective manner. Rather than merely reacting to problems that may accrue from time to time, India needs to undertake a more proactive approach to

¹¹³Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

SPS management, focusing on development of a well-knit and comprehensive action plan for medium to long term. The rest of the section explores and analyzes some of the strategies that the country might adopt both at the domestic as well as international levels towards this end, while Box 3 summarizes the key policy recommendations for India emanating from this discussion.

4.1 Building Awareness

The general level of awareness about SPS issues is very low among the stakeholders in India, particularly the small and medium enterprises (SMEs). Organization of workshops and training programmes for entrepreneurs, managers, workers etc. may help in increasing the awareness. However, to solve practical problems faced by the exporters, it may be helpful to have appropriate consultancy services. Given resource constraints, it may not always be possible for the governments to provide such services by experts free of cost. However, government or semi-government agencies could open consultancy wings where such services could be provided to exporters at a price commensurate with their financial conditions and size of business, thereby taking into account the resource constraints confronting the SMEs. The general awareness level among consumers about SPS matters also needs to be improved.

4.2 Coordination

In India, there are different laws and agencies dealing with SPS issues often making coordination among them a challenging task. It is essential for a vast country with a federal structure like India to ensure effective coordination among various relevant national and sub-national agencies. There is also a need for increased collaboration among research organizations, government departments, standard-setting agencies, and industry.

Importantly, with a view to streamline the food sector that has thus far been governed by a multiplicity of laws and ministries, often resulting in overlapping jurisdictions, lack of coordination and concomitant problems of standard-setting and implementation, India has recently enacted the Food Safety and Standards Act, under the aegis of the union Ministry of Health and Family Welfare, by subsuming the existing food-related laws at the national level.¹¹⁶ The Food Safety and Standards Authority (FSSA) has already been established under this Act and is expected to be fully functional very soon. With a view to ensure availability of safe and wholesome food for human consumption, the FSSA would lay down science-based standards¹¹⁷ for articles of food and would also

¹¹⁶ The laws are: The Prevention of Food Adulteration Act, 1954 (37 of 1954), The Fruit Products Order, 1955. The Meat Food Products Order, 1973, The Vegetable Oil Products (Control) Order, 1947, The Edible Oils Packaging (Regulation) Order, 1998, The Solvent Extracted Oil, De oiled Meal, and Edible Flour (Control) Order, 1967, The Milk and Milk Products Order, 1992 and any other order issued under the Essential Commodities Act, 1955 (10 of 1955) relating to food.

¹¹⁷ The Quality Council of India (QCI) and Bureau of Indian Standards (BIS) would lend their expertise in laying standards for the regulator to administer. QCI is an autonomous body under the government and works in the area of standards and quality. BIS is the national standards body of India.

regulate their manufacture, storage, distribution, sale and import. It would also enforce standards specifications for ingredients, contaminants, pesticide residue, biological hazards and labels. The members of the FSSA would have representation from consumer and scientific organizations, industry and farmer bodies and various ministries, including agriculture, consumer affairs and commerce. State Commissioners of Food Safety and other local level officials would enforce the law at the ground level. Every entity in the food sector would be required to get a licence or a registration under the Act. The FSSA would also be responsible for imported food products, as well as food recalls in case unsafe or hazardous batches were discovered.

While this may be regarded as an important step forward in streamlining food safety-related issues in India, implementation is likely to become a significant challenge at least as far as regulation of domestic market is concerned. While there are large players, a vast majority are small players operating in unorganized sectors that have by and large remained unregulated thus far. Various provisions of this legislation, in fact have attracted significant criticisms, particularly from the point of view of their possible implications for the unorganized sector in India.¹¹⁸

4.3 Transparency

In India, the National Enquiry Points (NEPs), responsible for responding to SPS-related queries, and the National Notification Authority (NNA), responsible for all procedures associated with notification of new or amended SPS measures, established as per the transparency provisions of SPSA, are housed in separate agencies. While NEP for food-safety-related issues is under the Ministry of Health and Family Welfare; NEPs for animal health- and plant health-related issues are with two separate departments of the Ministry of Agriculture. NNA, on the other hand is based at the Ministry of Commerce and Industry. Experience of several WTO Members that have combined these two functions in the same agency reveals that this helps in ensuring better coordination.¹¹⁹ On the other hand, the lack of an effective communication among SPS-related institutions has been identified as a key factor contributing to a country's failure to notify, send comments and reply to questions.¹²⁰

[Table 2 comes here]

Effective functioning of NEPs and the NNA is not only necessary for the foreign countries to get information, it is equally important for the domestic exporters to access information on SPS-related matters in other countries. However, in India, access to relevant information is a major problem for the domestic industries and exporters. NEPs and the NNA of the country need to be strengthened for this purpose. Given the large volume of SPS

¹¹⁸ See, for instance, Sharma (2005); Madhavan and Sanyal (2006). Also see, FICCI (2007).

¹¹⁹ WTO (2004), G/SPS/R/32 of 6 February.

¹²⁰ See WTO (2003), G/SPS/GEN/427 of 13 October.

notifications being circulated, it is essential to have well-qualified, technically-skilled and experienced staff in NEPs to undertake the preliminary screening of the notifications to determine the relative importance of a notification for domestic exporters; to disseminate them among appropriate domestic stakeholders, and so on .

Although the Geneva-Mission of India might get information on SPS notifications by other WTO Members, due to the enormity of such notifications, it often takes a long time to reach the appropriate agencies or organizations back home, which have the technical expertise to comment on a notification. In the process, a substantial proportion of the comment period (usually 60 days) might get wasted making it difficult or often impossible to comment on a notification within the stipulated time limit. Thus India often ends up losing the opportunity to raise its concerns before the notified measure comes into effect. A possible way to deal with this problem could be to develop a mechanism to dispatch any new notification directly to the relevant agencies in the country; thereby saving the time that otherwise gets wasted.

If a notification and/or detailed rules and regulations issued by a developed country is in languages other than English then it may be proposed that the onus would be on the developed country to ensure that authentic English translations of such notification and/or rules and regulations are dispatched to the relevant agencies in India. Otherwise getting the documents translated in English would also waste substantial time (thereby curtailing the time available for comment) and resources.

Regarding comments on notifications, Annex B of the SPSA states that comments from other Members should be taken into account and the recommended procedures adopted by the SPS Committee indicate that a period of at least 60 days should be provided for the submission of comments. However, an analysis of the SPS notifications submitted during 2002 undertaken by China¹²¹ reveals that majority of WTO Members who made routine notifications in that year allowed for a comment period of less than 60 days, or they did not specify a final date for receiving comments. Furthermore, it was found that some Members did not provide an interval for considering comments. Adequate time period for comments is crucial for developing countries. Given the lack of technical capacity to analyze risk assessments and other technical information available from the notifying Member, preparation of substantive comments within the short comment period becomes a challenging task for these countries.

As per China's analysis, during 2002, most notifying Members did not indicate the date of adoption or the date of entry into force of the SPS measure notified and of those Members that did mention, most indicated an interval that was less than six months from the date of publication. However, Paragraph 2, Annex B of SPSA, states that:

Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in

¹²¹ WTO (2003), G/SPS/GEN/378 of 31 March.

developing country Members, to adapt their products and methods of production to the requirements of the importing Member.

Article 3.2 of the Doha Ministerial Declaration defined the 'reasonable interval' as a period of not less than six months. Sufficient interval between publication of an SPS measure and its coming into force are crucial for developing countries like India in order to get prepared.

India must vouch for ensuring that WTO Members adhere to the stipulated time periods regarding the aforesaid matters.

Back home, it is also essential for the country to involve experts, industry and other relevant stakeholders to formulate comments on SPS measures notified by other WTO Members.

4.4 Utilizing the WTO Window

Notwithstanding the range of SPS concerns of India, predominantly around developed countries, the country does not seem to be sufficiently vocal at the WTO to vouch for remedial measures. The track record of India in terms of raising its concerns in the SPS committee meetings bears testimony to this assertion. Among the 245 specific trade concerns raised by all WTO Members in the SPS committee meetings between 1995 and 2006, only three were raised by India (Table 2).¹²²

[Table 3 comes here]

The SPS Committee meetings, held every 3-6 months, is a forum where WTO Members may discuss various issues and concerns around implementation of the SPSA; bring their SPS-related difficulties to the attention of other countries; and challenge specific SPS measures proposed or applied by other WTO Members. India has so far made very limited use of this window of opportunity. It should participate in SPS committee meetings regularly and should be more vocal in terms of flagging its concerns.

4.5 Participation in International Standardization Exercises

Towards harmonization of SPS measures on as wide a basis as possible, SPSA encourages WTO Members to 'base' their measures on international standards, guidelines or recommendations, where they exist (Article 3.1). Article 3.2 further states that SPS measures, which 'conform to' international standards, guidelines or recommendations 'shall' be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994. Hence, it is important for India to ensure that its views and concerns are taken on

¹²² At the 15-16 March 2000 meeting of the SPS Committee, the WTO Secretariat was requested to prepare a paper summarizing the specific trade concerns that had been brought to the Committee's attention since 1995. The Secretariat has revised the resultant document (G/SPS/GEN/204) annually. In the sixth revision (in 2006) of G/SPS/GEN/204, the specific trade concerns were assigned numbers according to the chronological order of the Committee meetings in which they were first raised. The columns titled 'Issue Number' in Tables 3 and 4 indicate those assigned numbers.

board in the course of developing international standards. This requires effective participation in the standard setting processes of the key international standard setting bodies, in particular, the three bodies explicitly mentioned in SPSA: the Codex Alimentarius Commission (CAC), the International Office of Epizootics (OIE), and the international and regional organizations operating within the framework of the International Plant Protection Convention (IPPC). Track records of India, however, indicate that just like most other developing countries, its participation in the proceedings of the international standard-setting bodies is very poor, both in quantitative and qualitative terms.¹²³The lack of an effective participation by developing countries implies that international standards generally get set as per the wishes of the developed countries, by default or often with a slender majority vote. Consequently, the measures based on these standards are often difficult to be coupled with, particularly since the safety clients in many cases are prescribed without conducting any clinical study in the developing countries with regard to contaminants, pesticides, animal diseases, etc.¹²⁴This approach, coupled with the lack of participation by the developing countries, often results in inappropriate international standards being set.¹²⁵

India should try to increase its participation in the standard setting processes both in quantitative and qualitative terms. Given that a major constraint in this regard is financial, it should try to get as much funding support from donor agencies for this purpose as possible. As far as enhancing participation in Codex is concerned, funding support is available from the Codex Trust Fund (CTF). Launched in 2003, the main objective of CTF is to help (approximately 135) developing countries and economies in transition to enhance their levels of effective participation in the development of global food safety and quality standards by the Codex Alimentarius Commission (CAC). The CTF targeted to devote US\$40 million over a 12-year period towards meeting this objective. As per the 2003 Project Document,¹²⁶approximately US\$4.0 million per year was expected to be made available by the donors. This amount was expected to cover the costs associated with sending more than 600 participants annually from all eligible countries to Codex meetings, as well as providing some capacity building and training support directly related to such participation. However, funding from donor countries¹²⁷and other agencies (like DFID) has so far remained much below the level expected initially. As per the Ninth Progress

¹²³ Jha (2002), at 43-44.

¹²⁴ Ratna (2005), at 90.

¹²⁵ For instance, the Spices Boards in India and in Sri Lanka, which have taken up the issue of the permissible average daily intake of certain chemicals and chemical compounds before the Pesticide Residue Committee of Codex Alimentarius Commission. The argument of the Boards is that spices constitute a very miniscule proportion of the dishes/servings of food and therefore the MRLs fixed for directly consumed agricultural products cannot be applied to spices. Similar thought process is required in other sectors too. However, the standards set by Codex have not changed as a consequence [see Jha (2002), at 12].

¹²⁶ Codex (2003).

¹²⁷ Till 2007, only developed countries contributed in CTF. However, in 2008, for the first time in its history, the CTF will be welcoming developing countries into the circle of countries that will be making a contribution to the Fund. The first developing country to pledge its support was Malaysia in an intervention made at the 30th Session of the CAC in July 2007. However, it has been decided that developing countries who would be contributing to the CTF would still remain eligible for support from the Fund, provided that they continue to meet the country eligibility criteria.

Report¹²⁸ of CTF released in end-2007, during the period January to September 2007, a total of US\$831,676 was received in contributions. Additional contributions amounting to approximately US\$625,000 were expected by December 2007. Total expenditure by the CTF in 2007 was projected to be US\$1,590,800 (including administrative and management costs). Consequently, the number of developing country delegates assisted to participate in the work of Codex was much less than the stipulated target of 600, since the 2003 Project Report clearly mentioned that this number would depend upon the funds made available to the CTF by donors. From January to September 2007, 177 delegates from 88 countries were supported to attend 13 Codex meetings. Another 69 delegates from 54 countries were expected to be supported to attend 3 Codex meetings between October and December 2007.¹²⁹ Hence, it needs to be underscored here that although the creation of the CTF is a step in the right direction, the level of donor funding remains way below what is required to ensure adequate participation by the developing countries in CAC meetings.

India has benefited from the CTF funding to some extent. However, given the large number of developing countries (135 approximately) eligible to apply for the CTF support and the inadequacy of donor support made available to the CTF, it is obvious that each country would have to wait for its turn to get such support. Hence, there is a need to tap alternative funding sources. In case, participation in all international standardization exercises turns out to be difficult, given its resource constraints, India may prioritize by way of identify the sectors in which it has major export interests or potentials and then try to ensure participation in standardization exercises relevant for these sectors.

It needs to be underscored here that physical presence is not enough to effectively participate in an outright technical exercise like standards setting. Numbers may not adequately reflect the quality of participation or the degree to which the country benefits from participation in international standards setting.¹³⁰ In order to contribute effectively the representatives from India need to be technically sound too. This may sometimes call for technical support for capacity building.

Efforts should also be made by the country to involve the relevant industries or industry chambers alongside experts in the process. Although industries are a major stakeholder in this respect, their involvement has been far from adequate so far. The governments may develop strategies to work together with business communities towards achieving effective participation in the standardization process.

India should also try and evolve its own national SPS standards in more and more areas in line with international standards.

4.6 Equivalence and Mutual Recognition Arrangements

¹²⁸ Codex (2007a).

¹²⁹ Ibid.

¹³⁰ WTO (2001), G/SPS/GEN/250 of 14 May.

The concept of equivalence in the SPS context is based on the principle that a particular level of food or health safety protection may be achieved by the use of different kinds of measures. Mutual Recognition Arrangements/Agreements (MRAs), on the other hand, generally involve conformity assessment procedures. Under MRAs the parties involved mutually accept each other's conformity assessment procedures as equivalent, primarily with the aim of avoiding unnecessary and repetitive testing of a traded product in the source as well as the destination country.

SPSA has covered equivalence under Article 4,¹³¹ wherein it requires WTO Members to accept the SPS measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, provided the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's 'appropriate level of SPS protection' (ALOP). Although the term 'conformity assessment' is not specifically mentioned in SPSA, SPS measures include testing, inspection and certification, which are nothing but 'conformity assessment' procedures.¹³²

The Codex Alimentarius Commission (CAC) has carried out significant work in the area of equivalence and under its strategic framework for 2003-07 has laid out its priority to provide guidance for the practical application of the concepts of equivalence and mutual recognition for both sanitary and technical/quality measures.¹³³ According to Codex, the recognition of equivalence of inspection and certification should be facilitated where it can be objectively demonstrated that there is an appropriate system for inspection and certification of food by the exporting country in accordance with these guidelines. For the determination of equivalence, it calls the governments for recognizing that:

- Inspection and certification systems should be organized for the risk involved, considering that the same food commodities produced in different countries may present different hazards; and,
- Control methodologies can be different but achieve equivalent results. For example, environmental sampling and the strict application of good agricultural practices, with limited end product testing for verification purposes, may produce a result

¹³¹ Article 4 on Equivalence contains the following two provisions:

1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

¹³² Sareen, Sashi (2007).

¹³³ Ibid.

equivalent to extensive end product testing for the control of agriculture chemical residues in raw products.¹³⁴

The WTO SPS Committee has over the years discussed the implementation of Article 4. These deliberations resulted in the 'Decision on the Implementation of Article 4 of the Agreement on Application of Sanitary and Phytosanitary Measures', adopted by the SPS Committee in 2001 and revised several times subsequently. In July 2004, the SPS Committee completed its work on guidelines on the implementation of Article 4 in response to concerns raised by developing countries. The Decision on Equivalence adopted by the SPS Committee notes, *inter alia*, the work on recognition of equivalence undertaken in the Codex, the OIE and the IPPC, and requests for further elaboration of specific guidance by these organizations to ensure that such recognition is maintained. Equivalence still remains a standing agenda item of the Committee.¹³⁵

In practice, recognition of equivalence takes place only after considerable dialogue between two (or more) countries. The exporting country must provide robust technical information to support its application for an importing country to recognize alternative SPS measures as providing protection against risks equivalent to that achieved by the prescribed import requirements.¹³⁶ Since negotiations are highly demanding in terms of resources and time, formal equivalence agreements or MRAs are rare even between developed countries. An US submission to the WTO observes that:

Equivalence determinations require a significant investment of technical and trade experts to address and resolve safety issues. Even in instances where ALOPs and governmental institutions of two WTO Members may appear to be similar, determinations of equivalence have taken several years of negotiations and a great deal of the time of technical and trade experts and have not resulted in immediate new trade opportunities.¹³⁷

According to the US, there are several practical problems that could limit the use of Article 4. These include, among others, the following issues: (i) whether the request for equivalence would be pursued where no trade barrier exists; (ii) whether the actual trade benefits justify the administrative burden of making a determination of equivalence and/or negotiating an agreement; (iii) the inherent difficulty linking numerous and disparate measures to a country's ALOP; and (iv) stakeholder acceptance of equivalence determinations and negotiated equivalence agreements.¹³⁸

The EU also pointed out clear limitations with regard to applying both equivalence agreements and MRAs. According to the EU, such comprehensive agreements are often costly to negotiate and maintain and they normally necessitate some prior harmonization

¹³⁴ WTO (2000), G/SPS/GEN/210 of 6 November.

¹³⁵ Codex (2007b).

¹³⁶ WTO (2001), G/SPS/GEN/232 of 28 February.

¹³⁷ WTO (2000), G/SPS/GEN/212 of 7 November.

¹³⁸ Ibid.

before negotiations can start. Although the EU has generally entered into negotiations with partners having a comparable level of development, the agreements have turned out to be very difficult to implement in practice. Both the EU and the US seem to agree to the view that costs sometimes exceed the benefits of such agreements.¹³⁹

India has entered into a few equivalence agreements and only one MRA (with Singapore) so far (Box 2). India's experience in this respect reveals that most developed countries take many years to reach a decision on equivalence. For instance, the US took 3 years on organic standards, Japan took 20 years on market access to mango, and the EU has already taken more than 8 years to agree on equivalence in case of egg products. Australia has also already taken more than 6 years to give market access to mango.¹⁴⁰

India should try to get into more and more equivalence arrangements/agreements with developed countries to improve its market access in those destinations in a cost-effective manner.¹⁴¹ This is not going to be an easy task though, given the reluctance on the part of some of the major developed countries to enter into such deals as discussed above.

[Box 3 comes here]

4.7 Capacity Constraints and Technical Assistance

Various capacity constraints act as barriers to the country's ability to comply with SPS requirements in export markets. Much of these constraints emanates from and persists due to the inadequate financial and technical resources available. Some of the key constraints confronting India, among others, are enumerated below:¹⁴²

- Insufficient awareness and preparedness on the part of various stakeholders, particularly, SMEs, to effectively tackle SPS challenges;
- Lack of an effective mechanism for dissemination of SPS-related information among the stake holders;
- Inadequate access to appropriate technology and adequate finance among various stakeholders, particularly SMEs;
- Infrastructural constraints, such as lack of well-equipped and state of the art laboratories; inadequate accreditation and certification bodies; among others;
- Dearth of technically-skilled people in national enquiry points, laboratories, accreditation bodies and inspection agencies;
- Insufficient know-how for carrying out risk analysis/assessments;
- Inadequacy of state of the art ports and time-consuming customs procedures.

¹³⁹ Veggeland (2006).

¹⁴⁰ Planning Commission (2007), at 225-26.

¹⁴¹ India is trying hard to create room for such arrangements in its negotiations on the Trade and Investment Agreement with the EU.

¹⁴² The capacity constraints enlisted here are largely based on personal communication with the Ministry of Commerce and Industry, Government of India.

Technical assistance by developed countries and donor agencies is of great significance to better cope with such capacity constraints. It is also important to underscore that compliance with the SPS requirements predominantly imposed by the developed countries significantly increases the cost of production for the developing country exporters, but often does not result in price premiums in return. This implies that the developing countries are required to bear the burden of the high levels of food safety preferences of the developed country consumers. This is not justifiable. In order to shift the burden from the less wealthy to the wealthier, there is thus a case for redistribution through SPS-related technical assistance.

However, the provisions on technical assistance as enshrined in Article 9¹⁴³ of SPSA are in the nature of 'best endeavour' clauses only. Hence they do not impose any legal obligation on the developed countries to provide technical assistance to developing countries. Way back in 1998, India and some other developing countries had proposed to the WTO to translate the Article 9 provisions into specific obligations. However, no concrete progress is visible in that direction even after a decade. Although the Doha Ministerial Conference (2001) discussed the issue, the outcome was merely a renewed call for financial and technical assistance, that too for LDCs, without any legal obligation whatsoever. The soft approach is clearly evident from the relevant provisions of the Doha Declaration that:

- (i) *urges* Members to provide, *to the extent possible*, the financial and technical assistance necessary to enable least-developed countries to respond adequately to the introduction of any new SPS measures which may have significant negative effects on their trade; and
- (ii) *urges* Members to ensure that technical assistance is provided to least developed countries with a view to responding to the special problems faced by them in implementing the Agreement on the Application of Sanitary and Phytosanitary Measures (emphasis added).¹⁴⁴

Given the existing legal standing of SPSA on the issue, SPS-related technical assistance has always remained grossly inadequate when judged in terms of the needs of the developing countries. This, despite the fact that a number of agencies are engaged in

¹⁴³ Article 9.1 of SPSA mentions that:

Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations.

Article 9.2 further states that:

Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall *consider* providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved (emphasis added).

¹⁴⁴ WTO (2001), WT/MIN(01)/DEC/1 of 20 November, 'Implementation-related Issues and Concerns', Article 3.6.

providing SPS-related technical assistance.¹⁴⁵The Standards and Trade Development Facility (STDF) is worth a particular mention here. The STDF is both a financing and a coordination mechanism that was established with three years of seed funding from the World Bank Development Grant Facility (DGF). Its aim is to assist the developing countries enhance their capacity to meet international SPS requirements. The partner agencies of the STDF are: the Food and Agricultural Organization (FAO), the World Organization for Animal Health (OIE), the World Bank, the World Health Organization (WHO) and the WTO. The WTO is the administrator of the STDF and provides the secretariat. Grant financing from STDF is available for private and public organizations in developing countries seeking to comply with international SPS requirements and hence gain or maintain market access. The STDF provides funds for two types of grants: project grants and project preparation grants.

In February 2007, the WTO Secretariat issued a note regarding technical assistance and training activities undertaken by the Secretariat from 1 September 1994 to 31 December 2006. Altogether 144 activities had been undertaken over this period.¹⁴⁶This is certainly way below the immense requirement of the large number of developing country Members fraught with a range of capacity constraints in the field of SPS. Inadequate funding support from developed countries and donor agencies seems to be a key reason underlying the lack of technical assistance and training activities.

An independent evaluation of the operation of the STDF carried out in December 2005 revealed the inadequacy of available funding for technical assistance. Till that time, only nine WTO Members had made contributions to the STDF. Of these nine donors, two had entered into formal multi-annual commitments. Thus while the STDF was found to be relatively successful in attracting short term financing, raising funds for longer period proved more challenging.¹⁴⁷In contrast, the demand for SPS-related technical assistance has shown an upward trend. The records of the STDF shows, for instance, that the number of applications increased four fold in 2005 compared to 2003. The ratio of the number of project applications to projects approved for funding stood at 3:1 in 2005.

To effectively improve the access of the developing countries to developed country markets, technical assistance ought to address the major SPS-related impediments that the former faces in the latter. Since the funds available for technical assistance are limited, it is also important that the funding agencies focus on building capacities in areas where they are needed the most and where they can make some concrete contribution in terms of improving the export performance of developing countries. Effective technical assistance

¹⁴⁵ These include, among others, the WTO; Food and Agriculture Organization (FAO); International Trade Centre (ITC); the Joint Integrated Technical Assistance Programme (JITAP); the Commonwealth Secretariat; the European Commission; the Inter-American Institute for Agricultural Cooperation (IICA); the German Corporation for International Cooperation (GTZ); the Swedish International Development Corporation Agency (SIDA); the UK Department for International Development (DFID); the US Department of Agriculture (USDA); and the US Agency for International Development (USAID).

¹⁴⁶ WTO (2007), G/SPS/GEN/521/Rev.2 of 27 February.

¹⁴⁷ WTO (2006), G/SPS/GEN/648 of 24 March.

thus requires a systematic analysis before funds are actually allocated. Experience however, reveals that technical assistance more often than not takes the form of courses and seminars on SPS rules and their implications.¹⁴⁸ Technical assistance in more concrete areas is generally found to be rather rare. Moreover, a review of the allocation decisions of some major providers of technical assistance has revealed that allocation decisions are made in an unsystematic manner, with little emphasis on the expected effect of technical assistance.¹⁴⁹

It may be noted here that technical assistance is made available on request from developing countries. Hence, a basic principle of allocation is how vocal countries are in expressing their needs. So, it is important that India puts forward concrete demands for technical assistance in areas where it needs it. However, given the constraints in the availability of funds for technical assistance, it is obvious that the assistance available for a single country would be very limited. Hence, it is important for the country to prioritize its needs for technical assistance. For instance, it may rank various sectors of export interest and map out the technical assistance needs in each of those sectors, giving the most important area of assistance-need the greatest priority and so on. This approach may be helpful in maximizing benefits given the constraints on availability of technical assistance.

Along with other like-minded developing countries, India must also continue to vouch for addressing the lacunae embedded in various special and differential treatment (S&DT) provisions of SPSA, including those pertaining to technical assistance, as it has done in the past.

5. Conclusion and Policy Recommendations

The SPS Agreement (SPSA) of the WTO was negotiated with the dual objective of recognizing the legitimate right of Members to adopt SPS measures necessary to protect human, animal or plant life or health, while at the same time setting in place certain checks and balances to cope with the possibility of these measures emerging as non-tariff barriers (NTBs). However, the experiences of India and other developing countries, as enumerated in this paper, bear testimony to the fact that SPSA has by far proved to be rather ineffective in living up to the latter objective. This is largely attributable to the fact that, its dual objective notwithstanding, SPSA has left ample space for Member governments to use these measures for protectionist purposes under the guise of addressing their 'legitimate' concerns. This 'space', in our view, has been further reinforced by the WTO Dispute Settlement Bodies, which in various rulings have demonstrated a clear tendency to bestow upon Member countries a large measure of autonomy and flexibility in imposing SPS measures.

Unfortunately, the current Round of trade talks has turned out to be a missed opportunity for taming the SPS-related NTBs. Although SPS measures were identified by the developing countries at large as the third-most important category of NTBs under the

¹⁴⁸ WTO (2001c), G/SPS/GEN/244 of 27 April.

¹⁴⁹ Wiig and Kolstad (2003).

notification mechanism established under the Doha Round, these NTBs did not form part of the negotiating mandate of this Round. This, notwithstanding the fact that enhanced market access for developing countries was identified by the Doha Ministerial Declaration as one of the fundamental objectives of the current round of negotiations.¹⁵⁰ Nevertheless, the fact remains that unless and until such NTBs are effectively disciplined, they would continue to elude the real market access for the developing countries to a great extent. Hence, it is imperative for the developing countries, including India, to vouch for disciplining of SPS-related NTBs under the aegis of the WTO. They must also continue to stress for addressing some of the major lacunae in the SPSA, including the S&DT provisions.

As revealed by this paper, India, on many occasions, have succeeded in complying with SPS requirements imposed by its trading partners. However, these success stories have largely been induced by immediate market access problems. India needs to undertake a more proactive approach to SPS management, focusing on development of a well-knit and comprehensive strategy for medium to long run to cope with its SPS challenges in a more effective manner both at the domestic and international levels. This would call for tackling the multi-pronged capacity constraints at the domestic level, coupled with appropriate reforms in the institutional structure, among others. At the WTO, the country must try and use all the windows of opportunity towards addressing its SPS concerns. It must also enhance its participation in international standard-setting exercises both in quantitative and qualitative terms.

Given that India is currently negotiating comprehensive trade and investment agreements with the EU and Japan¹⁵¹ and the agenda for both include SPS-issues, the country must make full-throated efforts to tackle its SPS concerns through these bilateral routes, as well. However, to what extent it would actually succeed in taking advantage of this alternative route would depend to a large extent on its negotiating capacities and preparedness in such difficult negotiations with unequal trading partners from the North.

Below are some of the policy recommendations that emerge from this study:

- 1) Adoption of a proactive rather than defensive approach to SPS management on the basis of an all-encompassing strategy;
- 2) Effective functioning of National Enquiry Points and National Notification Authorities relating to SPS;
- 3) Lobbying at the WTO, in association with other like-minded developing countries, for adequate time period for comments on SPS notifications; and sufficient interval between publication of an SPS measure by a WTO member and its coming into force;
- 4) Development of an appropriate mechanism to ensure effective and timely comments on SPS notifications made by other WTO Members;

¹⁵⁰ WTO(2001), above n 127, at para. 2.

¹⁵¹ Das (2007a), at 1223.

- 5) Joining hands with other developing countries to vouch for addressing the major lacunas in the SPSA, in particular the special and differential treatment (S&DT) provisions;
- 6) Ensuring that the textual proposals submitted by India under the negotiations on Trade Facilitation at the WTO are incorporated in the final outcome of these negotiations as part of the single undertaking of the Doha Round;
- 7) Lobbying for securing as much technical assistance as possible to better tackle various capacity constraints, including financial, infrastructural and technical;
- 8) Concentration of technical assistance in select areas of export interests, identified in a systematic manner;
- 9) More frequent and effective participation in the standard-setting exercises of key global agencies, like the Codex Alimentarius Commission (CAC), the International Office of Epizootics (IOE), and International Plant Protection Convention (IPPC);
- 10) In association with other like-minded developing countries, lobbying for technical and funding support from developed countries and donor agencies towards ensuring better participation in the standard-setting process;
- 11) Evolving national SPS standards in more and more areas in line with international standards and strengthening accreditation and certification systems;
- 12) Investment in physical infrastructure for building capacity for compliance, including testing activities, risk analysis and assessment, among others;
- 13) Awareness building among the domestic stakeholders, including small and medium enterprises and consumers about SPS matters;
- 14) Adequate and timely dissemination of information among the domestic stakeholders; and if required, provision of SPS-related consultancy services on a payment basis by government and semi-government agencies for the exporters;
- 15) Bringing in appropriate institutional reforms with a view to tackling the SPS challenges more effectively;
- 16) Enhanced coordination among various relevant government bodies/agencies at the central and sub-national levels;
- 17) Increasing collaboration and coordination among government bodies including standard-setting agencies, research organizations and industry;
- 18) Provision for supporting small and medium enterprises to better cope with SPS challenges, given their capacity constraint;
- 19) Vouching for more and more mutual recognition agreements (MRAs) and/or equivalence agreements with major developed countries;
- 20) Using the bilateral trade and investment negotiations to address the SPS concerns.

References

Adhikari, Ratnakar and Kamallesh Adhikari (2005), South Asia Watch on Trade, Economics & Environment (SAWTEE).

Ayub, Imran (2007), 'EU trounces Indian bid to re-export Pak seafood despite ban', *The News, Pakistan*, 30 May 2007, available on-line at: <http://www.thenews.com.pk/daily_detail.asp?id=58194>, (viewed on 14 November 2007).

Becker, Geoffrey S. (2006), *Sanitary and Phytosanitary (SPS) Concerns in Agricultural Trade*, Congressional Research Service Report for Congress.

Boisen, Claire S. (2007), 'Title III of the Bioterrorism Act', *American University Law Review*, Vol. 56(3), pp.667-718.

Cato, J. C. and C.A. Lima dos Santos (1998), 'European Union 1997 Seafood Safety Ban: The Economic Impact on Bangladesh Shrimp Processing', *Marine Resource Economics*, Vol. 13 (3), pp. 215-27.

Cato, J. C. and C.A. Lima dos Santos (2000), 'Costs to Upgrade the Bangladesh Frozen Shrimp Processing Sector to Adequate Technical and Safety Standards and to Maintain a HACCP Program', in L. Unnevehr (ed.) *The Economics of HACCP: New Studies of Costs and Benefits*, Eagan Press, St. Paul, Minn., USA.

Cato, J. C. and S. Subasinge (2003), 'Food Safety in Food Security and Food Trade, Case Study: The Shrimp Export Industry in Bangladesh', Focus 10, Brief 9 of 17, International Food Policy Research Institute (IFPRI), Washington DC, USA, September.

Chimni, B. S. (2002), 'WTO and Environment: Legitimization of Unilateral Trade Sanctions', *Economic and Political Weekly*, January 12, 133-39.

Chimni, B. S. (2000), 'WTO and Environment: Shrimp-Turtle and EC-Hormones Cases', *Economic and Political Weekly*, May 13, 1752-61.

Chowdhury, Mahfuz R. (2007), 'The Economic Integration of SAARC', *American Chronicle*, 30 July.

Codex (2003), Project Document, FAO/WHO Project and Fund for Enhanced Participation in Codex, 17 June.

Codex (2007a), *Ninth Progress Report (July - December 2007)*, FAO/WHO Project and Trust Fund for Enhanced Participation in Codex, Document no. CX/EXEC 07/60/8, Codex Alimentarius Commission.

Codex (2007b), Activities of the SPS Committee and Other Relevant WTO Activities From 2006 to the Present, Joint FAO/WHO Food Standard Programme, CAC/30 INF/5, Codex Alimentarius Commission.

Das, Kasturi (2006), 'International Protection of India's Geographical Indications with Special Reference to "Darjeeling" Tea', *Journal of World Intellectual Property*, Vol. 9 (5), pp. 459-95, Blackwell Publishing Ltd.

Das, Kasturi (2007a), 'GATS 2000 Negotiations and India: Evolution and State of Play', *Journal of World Trade*, Vol. 41(6), pp.1185-1236, Kluwer Law International, the Netherlands.

Das, Kasturi (2007b), 'Protection of Geographical Indications: An Overview of Select Issues with Particular Reference to India', *Working Paper 8*, Centre for Trade & Development (Centad), New Delhi, available online at: <http://www.centad.org/cwp_10.asp>.

Das, Kasturi (2007c), 'Question of Market Access', *The Financial Express*, India, 25 September.

Dhar, Biswajit and Murali Kallummal (2007), 'Taming the Non-tariff Barriers: Can the World Trade Organization Find a Solution?', Chapter V, *Future Trade Research Areas That Matter To Developing Country Policymakers – A Regional Perspective on the Doha Development Agenda and beyond*, *Studies in Trade and Investment*, No. 61, Economic and Social Commission for Asia and the Pacific (ESCAP), United Nations, New York, 131-80.

Divvaakar, S.V., Pankaj Agarwal & R.K.S. Bhatia (2006), in Veena Jha (ed.) *India and the Doha Work Programme: Opportunities and Challenges*, UNCTAD and MacMillan India Ltd.

European Commission (2007), Commission Directive 2007/73/EC of 13 December 2007.

FAO and UNDP (2004), 'Implications of the WTO Membership on the Nepalese Agriculture', Kathmandu.

FICCI (2007), *FICCI study on Implementation of Food Safety and Standards Act: An Industry Perspective*, Federation of Indian Chamber of Commerce and Industry, May.

FNCCI (2004), Agro-product Leaflets, distributed at Agriculture Expo Nepal 2004, Federation of Nepalese Chamber of Commerce and Industry, Kathmandu.

Frankel, J.A., E. Stein, and S.J. Wei (1997), *Regional Trading Blocs in the World Economic System*, Institute for International Economics, Washington DC.

Ganesh K. K.C., Bharat P. Upadhyay, Nabin Chand T. D. Shrestha & Damodar Devkota (2007), 'The SPS Agreement: Trade in Plants and Plant Products', available at:

<<ftp://ftp.fao.org/docrep/fao/008/ae896e/ae896e07.pdf>> (viewed on 15 November 2007).

Ghimire, Hiramani and Navin Dahal (2004), *Nepal's WTO Membership: Policy Options for Food Security*, Kathmandu: SAWTEE and ActionAid, Nepal.

Hearth, Anura (2001), 'Cost of Compliance of Sanitary and Phytosanitary Requirements in Beverages and Spices in Sri Lanka', available online at: <http://www.unctad.org/trade_env/test1/meetings/standards/anura%20herath.doc>, viewed on 14 November 2007.

Jayakody, Premathilake (2006), 'Non Tariff Barriers in North South Trade: Sri Lanka's Country Perspective', Presentation in Workshop on WTO-related Issues, 2 May.

Jha, Veena (2002), 'Strengthening Developing Countries' Capacities to Respond to Health, Sanitary and Environmental Requirements: A Scoping Paper for South Asia', UNCTAD, April.

Jha, Veena (2005), (ed.) *Environmental Regulation and Food Safety: Studies of Protection and Protectionism*, International Development Research Centre and Edward Elgar Publishing Limited, UK and USA.

Jonker, Theo H., Hiroshi Ito and Hiroji Fujishima (2005), *Food Safety and Quality Standards in Japan: Compliance of Suppliers from Developing Countries*, The International Bank for Reconstruction and Development, The World Bank, Washington, DC, USA.

Joshi, Sandeep (2007), 'Indian Mangoes Now Go to Japan', *The Hindu*, 22 May.

Kaushik, Atul & M. Saqib (2001), 'Environmental Requirements and India's Exports: An Impact Analysis', *RGICS Working Paper Series No. 25*, Rajiv Gandhi Foundation, New Delhi.

Khatun, Fahmida (2004), 'Fish Trade Liberalization in Bangladesh: Implications of SPS Measures and Eco-Labeling for the Export-Oriented Shrimp Sector', Project PR 26109, Food and Agriculture Organization (FAO), Rome, July.

Madhavan, M. R. and Kaushiki Sanyal (2006), 'PRS Legislative Brief: Food Safety and Standards Bill, 2005', available at: <<http://www.indiatogether.org/2006/feb/law-foodsafe.htm>> (viewed on 10 December 2007).

OECD (2005), 'Analysis of Non-Tariff Barriers of Concern to Developing Countries', *OECD Trade Policy Working Papers*, No. 16, Organisation for Economic Co-operation and Development, OECD Publishing.

Padmanabhan, Mohan (2007), 'Russia to sign draft rules today on Indian sesame seeds import', *The Hindu Business Line*, 7 September.

Padmanabhan, Mohan (2008), 'Pesticide Residue: EU Sets New Maximum Levels', *The Hindu Business Line*, 11 January.

Pauwelyn, Joost (1998): 'Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?', *Journal of International Economic Law*, 1, 227-58, at 258.

Perez, Oren (1998): 'Reconstructing Science: The *Hormone* Conflict between the EU and the United States', *European Foreign Affairs Review*, Vol 1, Issue 4, Winter, 563-82.

Planning Commission (2007), *Report Of The Working Group On Agricultural Marketing Infrastructure And Policy Required For Internal And External Trade For The XI Five Year Plan 2007-12*, Agriculture Division Planning Commission, Government Of India, January.

Ratna, R. S. (2005), 'The SPS Agreement: Indian Perspective', Chapter 5 in Mehta, Rajesh and J. George (eds.) *Food Safety Regulation Concerns and Trade*, McMillan India, New Delhi, pp. 73-98.

Roberts, Donna & Unnevehr, Laurian (2005), 'Resolving trade disputes arising from trends in food safety regulation: the role of the multilateral governance framework', *World Trade Review*, Cambridge University Press, Vol. 4(3), pp.469-97, November.

Sareen, Sashi (2007), 'Equivalence and Mutual Recognition Agreements: India's Experiences', available on-line at:
<http://www.qcin.org/html/nqc/2nd_anual_quality_conclave/downloadpdf.php?downloaded=Equivalence%20and%20MRA%20-%20Shashi%20Sareen.pdf>, viewed on 1 December 2007.

Sharma, Devinder (2005), 'Food safety bill may hurt hawkers', available at:
<<http://www.indiatogether.org/2005/feb/dsh-safefood.htm>> (viewed on 10 December 2007).

Taneja, Nisha (2007), 'Trade Possibilities and Non-Tariff Barriers to Indo-Pak Trade', *ICRIER Working Paper200*, New Delhi.

The Hindu Business Line (2008), 'India seeks market access from Australia for farm products', 19 January.

UNCTAD (2004), *Trade and Environment Review 2003*, United Nations Conference on Trade and Development, United Nations, New York and Geneva.

UNCTAD (2006), *Trade and Environment Review 2006*, United Nations Conference on Trade and Development, United Nations, New York and Geneva.

USAID (2005), *South Asian Free Trade Area: Opportunities and Challenges*, United States Agency for International Development.

Veggeland, Frode (2006), 'Trade Facilitation through Equivalence and Mutual Recognition: The EU Model', Norwegian Agricultural Research Institute, Oslo.

Wiig, Arne and Ivar Kolstad (2003), 'Lowering barriers to agricultural exports through technical assistance', *Working Paper 2003:8*, Chr. Michelsen Institute, Norway.

World Bank and UNIDO (2007), *Pakistan's Agrobased Exports & Sanitary And Phyto-Sanitary (SPS) Compliance*, a Report prepared jointly by the World Bank and UNIDO.

WTO (1998), G/SPS/GEN/85 of 23 July.

WTO (2000), G/SPS/GEN/210 of 6 November.

WTO (2000b), G/SPS/GEN/212 of 7 November.

WTO (2001a), G/SPS/GEN/232 of 28 February.

WTO (2001b), G/SPS/GEN/250 of 14 May.

WTO (2001c), G/SPS/GEN/244 of 27 April.

WTO (2001d), WT/MIN(01)/DEC/1 of 20 November.

WTO (2003a), G/SPS/GEN/427 of 13 October.

WTO (2003b), G/SPS/GEN/378 of 31 March.

WTO (2004), G/SPS/R/32 of 6 February.

WTO (2005), G/SPS/GEN/597 of 10 October.

WTO (2006a), G/SPS/GEN/656 of 7 March.

WTO (2006b), G/SPS/GEN/676 of 31 March.

WTO (2006c), WTO Dispute Settlement: One-Page Case Summaries (1995-September 2006), 2006 Edition.

WTO (2006d), G/SPS/GEN/648 of 24 March.

WTO (2006e), WT/TPR/M/160 of 3 March.

WTO (2006f), WT/TPR/M/160/Add.1 of 27 September.

WTO (2006g), TN/TF/W/121 of 4 July.

WTO (2006h), TN/TF/W/122 of 4 July.

WTO (2007a), G/SPS/NNA/11 of 21 February.

WTO (2007b), G/SPS/ENQ/21 of 21 of February.

WTO (2007c), 'Trade Policy Review: India', WT/TPR/S/182, 18 April.

WTO (2007d), WT/TPR/M/182/Add.1 of 20 July.

WTO (2007e), G/SPS/GEN/204/Rev.7 of 6 February.

WTO (2007f), G/SPS/GEN/204/Rev.7/Add.1 of 6 February.

WTO (2007g), G/SPS/GEN/521/Rev.2 of 27 February.

WTO (2007h), WT/TPR/M/177/Add.1 of 30 April.

WTO (2007i), G/SPS/GEN/204/Rev.7/Add.2 of 7 February.

Tables and Boxes

Table 1
Issues Raised against India in SPS Committee
Meetings between 1995 and 2006

Issue Number	Description of the Measure	Country Raising the Issue
61	Import restrictions on bovine semen	Canada, EC
62	Restrictions on import of live horses	EC
185	Restrictions due to avian influenza	EC
186	Phytosanitary import restrictions	USA, EC
192	Non-notification of various SPS measures	USA
200	Ban on food grade wax	USA
240	Biotech labelling and import approval process regulations	USA

Source: WTO (2007), G/SPS/GEN/204/Rev.7 of 6 February.

Table 2
National Enquiry Points and National Notification Authority for SPS in India

SPS Issue	National Enquiry Points	National Notification Authority
Food safety related issues	Assistant Director-General (PFA), Ministry of Health and Family Welfare, Department of Health, Nirman Bhavan, New Delhi	Trade Policy Division, Ministry of Commerce and Industry, Udyog Bhavan, New Delhi
Animal health and related issues	Director (Trade), Department of Animal Husbandry, Dairy & Fisheries, Ministry of Agriculture, Krishi Bhavan, New Delhi	
Plant health or phytosanitary issues	Deputy Secretary, Plant Protection, Dep. of Agriculture & Cooperation, Ministry of Agriculture, Krishi Bhavan, New Delhi	

Sources: WTO (2007), G/SPS/ENQ/21 of 21 of February (for National Enquiry Points) and WTO (2007), G/SPS/NNA/11 of 21 February (for National Notification Authority).

Table 3
Issues Raised by India in SPS Committee Meetings between 1995 and 2006

Issue Number	Description of the Measure	Country Maintaining the Measure
39	Maximum levels for certain contaminants (aflatoxins) in foodstuffs	EC
96	Geographical BSE risk assessment classification	EC
223	Import requirements for Indian mangoes	Japan

Source: WTO (2007), G/SPS/GEN/204/Rev.7 of 6 February.

Box 1

Textual Proposals by India under the Trade Facilitation Negotiations of the Doha Round

Proposal on GATT Article VIII

- For border clearance of goods, and in particular for clearance of agriculture and food products, member states of a customs union shall adopt the same border procedures. This shall include adoption of same standards including specifications, terminologies and definitions, inspection, sampling and test methods.
- All documentation requirements relating to import clearance shall be uniform for all member states of a customs union.
- Norms for authorized trader status shall be applied uniformly by all member states of a customs union.
- A customs union shall generally apply a harmonized risk management system across the entire customs union.
- In case of rejection of a food consignment on account of failure to meet certain standards, an option shall first be given to the exporter to return the rejected goods to the exporter; only upon failure by the exporter to exercise this option within a reasonable period of time, can a different course of action, including destruction of goods, be considered by the appropriate authority of the importing Member.

Technical Assistance

- Most of the proposals are aimed at improving border clearance procedures through procedural improvements. This may not require specific technical assistance. Some other proposals are more in the nature of systemic issues and may not again require any significant amount of technical assistance and capacity building. There may however be need to organize Workshops at the international level to apprise the border clearance officials of the requirements in force. We are open to discuss these issues.

Proposal on GATT Article x

Import Alert/Rapid Alert

Import alert/rapid alert is a border control mechanism adopted by some countries as well as customs unions to monitor and ensure the quality of imported food product. This is operated by issuing a notification to all member states of a customs union/or to all ports of a country, as well as to the exporter, in case of detection of contaminated imports or import of products not meeting the required standards. As a result of such alert, a predetermined number of subsequent export consignments of the same exporter are subject to hundred per cent inspection at the border of that country/every port of a customs union.

The following disciplines shall apply to a system of import alert/rapid alert:

- In order to ensure that the application of a system of import/rapid alert does not by itself create a barrier to trade, it shall be imposed across a customs union only if based on uniform standards and applied uniformly by all of its member states.
- A notification against a country/exporter under a system of import/rapid alert restricting or prohibiting imports shall be issued only after it has been established on the basis of positive evidence that imports from the country/exporter concerned have not fulfilled the prescribed objective standards.
- A notification issued under a system of import/rapid alert restricting or prohibiting imports shall not be maintained if circumstances giving rise to it no longer exist, or if changed circumstances can be addressed in a less trade restrictive manner. Circumstances giving rise to import/rapid alert would be deemed to no longer exist if [six] successive consignments imported from the country/exporter concerned, after the issuance of import/rapid alert fulfilled the prescribed objective standards.
- Announcement of termination of an import/rapid alert shall be made through a public notice to be issued no later than [15 days] after a decision has been taken to terminate the import/rapid alert.
- The speed and standard of publicity of de-notification of such alert shall equal the level applied at its issuance.

Box 1 contd...

Detention

- In case imported goods are detained for inspection by customs or any other authority of a Member country, information regarding such detention shall be provided to the importer or his authorized agent promptly.

Test Procedures

- In case of the first test of a sample having shown an adverse finding, each Member conducting such a test shall grant the concerned importer or the exporter or their authorized agent the right to a second confirmatory test.
- A clear procedure shall be laid down for such a confirmatory test including a validated test method.
- A list of accredited laboratories shall be published where confirmatory tests can be carried out.
- For a customs union, the results of a confirmatory test carried out in one member state of a customs union shall be valid for and be accepted in all other member states of the customs union.

Appeal Mechanism

- There shall be a mechanism for redress of adverse findings of inspection authorities, in particular for inspection decision relating to food items, at the import points of a customs union.
- In order to ensure quick and uniform appellate decisions, appeals against findings of inspection authorities at the level of a member state of a customs union shall be heard and decided at the customs union level.
- Such appellate decisions shall be binding on the inspection authorities of all member states of a customs union.

Technical Assistance

- Some proposals would require establishing new procedures or an institutional system to improve transparency. Some of these requirements can be met in tandem with implementation of other proposals. We are open to a discussion on needs of Technical Assistance and Capacity Building.

Sources: For proposals on Article VIII, WTO (2006g).
For proposals on Article X, WTO (2006h).

Box 2

Select SPS Requirements Imposed by India

India has in place a number of SPS requirements. Imports of primary agricultural materials in India require a phytosanitary import permit, issued by the Department of Agriculture and Cooperation under the Plants, Fruit and Seeds (Regulation of Import into India) Order, 2003. The Plant Quarantine (Regulation of Import into India) Order was promulgated in 2003 (under the Destructive Insects and Pests Act, 1914). It has been amended several times, most recently in July 2006. Imports of plants or plant products into India (with the exception of those listed under Schedule VII of the Plant Quarantine (Regulation of Import into India) Order, 2003) require a permit issued under this Order. The permit is issued only after completion of a pest risk analysis. Each consignment is also required to be accompanied by a phytosanitary certificate issued by the relevant authority in the originating country. All imports of plants, plant material, and other plant products are to be carried out through designated sea and airports and land frontier stations. Quarantine facilities for plants and seeds are to be established at the importer's cost following guidelines prescribed by the Plant Protection Advisor. The period of quarantine is stated in the permit issued under the Plant Quarantine (Regulation of Import into India) Order. Samples of the imported products are examined by the relevant inspection authority (as listed in Schedule XI of the Order), and if found to be free of pests and diseases, are cleared to be imported. Any fumigation required must be carried out by an approved agency at the importer's cost. Appeals against decisions by the inspection authority may be made to the Plant Protection Advisor within seven days of communication from the inspection authority. However, the Plant Protection Division of the Department of Agriculture and Cooperation is allowed to relax conditions in the 'Plant Quarantine (Regulation of Import into India) Order 2003' in the public interest.

Imports of livestock and meat products are regulated, respectively, under the Livestock Importation Act, 1898 (last amended in 2001) and the Meat Food Products Order, 1973 and require an import permit issued by the Department of Animal Husbandry, Ministry of Agriculture. All imports of livestock are required to enter through designated ports.

The Drugs and Cosmetics Act, and its rules, which regulate the quality and safety of drugs (including those based on traditional Indian medicine) and cosmetics, is administered by the Central Drugs Standard Control Organization (CDSCO) in the Ministry of Health and Family Welfare. The overseas manufacturers' manufacturing sites and the drugs to be imported are registered under the provisions of the Drugs and Cosmetics Rules, 1945. All merchant importers and domestic manufacturers of drugs require import licences issued by the CDSCO. All drug imports are required to enter through designated ports of entry and must have a remaining shelf life of at least 60% from the date of import. Upon import, the Customs official may, if s/he has reasons, send a sample for testing to the CDSCO.

Source: WTO (2007c), at 53-56.

Box 3

Select Equivalence and Mutual Recognition Agreements Involving India

USA- Under an agreement between the Ministry of Commerce and the US Food and Drugs Administration (USFDA) in April 1988, USFDA has prescribed that for export to USA, black pepper, whole or ground, processed at EIAs' approved processing and packing centres and accompanied by Certificate of Inspection from EIAs will not be subject to automatic detention.

EC- European Commission has designated EIC as the competent authority for the certification of fish & fishery products (1997) and basmati rice being exported from India. In addition, designation of EIC as Competent Authority for the certification of egg products, honey, dairy products and poultry meat and meat products is in process.

Australia- Under an equivalence arrangement signed with Australian Quarantine Inspection Services (AQIS) in 2002, EIC certification of fish & fishery products is recognized by Australia and consignments which are accompanied by the health certificate issued by EIC, are subject to only random verification sampling at a rate not exceeding 5% of the shipments.

Sri Lanka- Sri Lanka Standards Institution (SLSI) through an Agreement signed in 2002, has recognized EIC's inspection and certification for the purpose of Import Inspection Scheme of Sri Lanka being operated by SLSI covering 85 products.

Korea- EIC through its four EIAs, namely, Mumbai, Kochi, Chennai and Kolkata have been recognized by Korea Food & Drug Administration (KFDA) for certifying various food products for export into Korea, based on an assessment of the testing procedures.

Turkey- EIC has been designated as the authorized agency to issue health certificates for export of food products, food packaging materials and stainless steel utensils to Turkey based on tests conducted on the products.

Italy – An Agreement has been signed on technical cooperation in marine sector

Singapore- An MRA has been signed with Singapore as a part of the CECA. The MRA covers four important sectors, i.e., food & agriculture, electric & electronic products (e&e), telecommunication equipments and drugs and pharmaceuticals. The arrangement in the food sector, covering egg products, dairy products and packaged drinking water is unilateral, with Singapore having granted equivalence to products originating from India and exported to Singapore. The e&e and telecom are bilateral arrangements.

Japan – EIC has been recognized as Competent Authority for poultry products based on an equivalence carried out by the Japanese health authorities.

China – An Agreement on acceptance of inspection certificate of EIC recognized inspection Agencies has been signed on 21 November 2006.

Nepal – Certification of EIC for food and agriculture products is accepted for import into Nepal without further testing at the importing end.

Others – which are in the offing and include Israel, Saudi Arabia, Mauritius, SAARC countries, France, Germany, UK, etc.

Source: Sareen (2007).