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A Developing Country Perspective for Development Agenda on the Meandering Pathways from Doha to Cancun

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Research and Information System for the Non-Aligned and Other Developing Countries

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IMPLEMENTATION ISSUES IN SPS: A DEVELOPING COUNTRY PERSPECTIVE FOR DEVELOPMENT AGENDA ON THE MEANDERING PATHWAYS FROM DOHA TO CANCUN*

by

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September 2003

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*Writing of this paper has benefited from valuable inputs provided by distinguished participants at the UNCTAD – Ministry of Commerce – UNDP Sponsored National Symposium on "Trade and Globalisation: The Agenda Towards Cancun 2003" during 18-19 August 2003 at New Delhi. Special thanks are due to Dr Kamal Malhotra, UNDP and Dr Veena Jha, UNCTAD for incisive comments and encouragements. However, authors are responsible for views expressed with the usual disclaimer.

CONTENTS

Implementation Issues in SPS: A Developing Country Perspective for Development Agenda on the Meandering Pathways from Doha to Cancun

I. An Overview

The implementation issues, as is commonly referred to in the WTO literature, are those negotiated obligations agreed upon as part of UR Agreements but have created imbalances in reaping meaningful and lasting benefits of multilateral trade by the developing countries. Needless to say, these imbalances are rooted in the lack of implementation of many commitments and obligations, in large measures, on the part of developed countries and that caused many difficulties to the developing countries.[1] Realizing primacy of these difficulties being faced by the developing countries, the Doha Ministerial frontally addressed a series of such outstanding implementation issues for speedy resolution.

The Sanitary and Phytosanitary (SPS) measures have a distinct mandate flowing out from the Para 6 of the Doha Declaration. "**…** no country should be prevented from taking measures for the protection of human, animal or plant life or health **…** subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries **…**". The work programme mandate under Para 12 of the Doha Declaration on "Implementation-related issues and concerns", in fact, laid out the detailed six points action plan for implementation of SPS measures. The implementation points are:

(1) Longer time-frame for developing countries to comply with other countries' new SPS measures.
(2) "Reasonable interval" between publications of a country's new SPS measure and its entry into force.

[1] A developing country perspective focussing on Africa is well illustrated in Jensen,Michael Friis (2002) "Reviewing the SPS Agreement: A Developing Country Perspective", CDR Working Paper # 02.3, February, Center for Development Research, Copenhagen, Denmark. For a SAARC centered stock taking see Karki, Tika Bahadur (2002) 'Sanitary and Phytosanitary (SPS) Measures in SAARC Countries', SAWTEE&CUTS-CITEE Discussion Paper, South Asia Watch on Trade, Economics and Environment (SAWTEE), Kathmandu, Nepal and CUTS, Jaipur.

(3) Equivalence (Article 4) – Steps to make it easier.
(4) Review of SPS Agreement.
(5) Developing countries' participation in setting international SPS standards – special emphasis to least developed countries.
(6) Financial and Technical assistance focussed on least-developed countries.

It is reported (WT/MIN (01)/17) that all of these six issues were expected to be implemented immediately under the two-track solution as elaborated in Para 12(a) and (b).[2] However, a close look at these issues does indicate their procedural nature. For instance, it is claimed that Point Nos. (1), (2) and (4) under track-I have been implemented immediately. The stipulation in this resolution, i.e. Track-I, specify the process in principle (Para 12(a)). Accordingly, such outstanding items should be addressed in the relevant negotiating body established by the Trade Negotiations Committee (TNC). Point No. (3), as we shall see below, much to the consternation of the developing countries, has got entangled into procedural as well as substantive maze. On the other hand, Point Nos. (5) and (6) appears to be the common theme in many other Doha mandated issues and are constrained by the budgetary considerations as well as available capacities in countries and international organizations (WTO, 2002, G/TBT/W/172-27 February (02-0972)). These issues though reported resolved, many procedural level glitches still remain. Undoubtedly, the developing countries appear at the receiving end. In the following section these concerns have been taken up for a detailed analysis.

[2] Para 12 of Doha Declaration:

> "12. We attach the utmost importance to the implementation-related issues and concerns raised by members and are determined to find appropriate solutions to them. In this connection, and having regard to the General Council Decisions of 3 May and 15 December 2000, we further adopt the Decision on Implementation-Related Issues and Concerns in document WT/MIN(01)/17 to address a number of implementation problems faced by members. We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action."

II. What is implemented?

For clarification, it needs to be recalled that the first two points pertains to the transparency clause (Article 7 and Annex B) of the SPS agreement. It is an obligation to all WTO member countries to *publish* all sanitary and phytosanitary measures and *notify* changes to SPS measures. The development challenge indeed appears to be the ambitions expressed in standards escalation and standards divide. But the linking mechanism to these challenges is through the time period allowed to the developing countries for implementation.

(a) Time-frame and Reasonable Interval

The implementation decision as referred above on the longer time frame for developing countries is 6 months and the decision on 'reasonable interval' between publication and entry into force is to be six (6) months. Both these time periods require to be benchmarked with SPS related notifications issued after the Doha Declaration came into force, say January 2002. A fair amount of confusion in the implementation is discernible. The perplexity is further compounded by the fact that no document or practice is available to assess whether or not these two decisions are indeed implementable or have been implemented. Clarity is also required on the question whether or not both these time periods are mutually exclusive, as it would then have different implications in the developing countries.

The available information does not provide either any emphatic explanation to a positive implementation of these decisions or clarity on the mutuality or otherwise of the decisions. For instance, US notified about 323 SPS proposals during the years 2000 and 2001. In this about two-third were concerned with revisions of pesticide residue limiting measures. And since it was a revision of the existing measure, already in force, the implementation decisions are inoperative. This is borne out by the fact that the US in October 1996 (G/SPS/GN/4) notified WTO about the newly adopted Food Quality Protection Act (FQPA) following approval by the US Congress in August 1996.

The rule making sovereign process in the US is established under the Administrative Procedures Act of 1946 (APA). This statute governs all federal agencies including the regulatory agencies charged with SPS measures. The final publication in the Federal Registry of the final rule after incorporating suggestions/comments, if any, can become effective immediately, within few weeks or in the case of major new rules substantially longer period may be allowed (G/SPS/GEN/311-18 March 2002). These three options according to the domestic statute requires to be compared with the WTO decisions on the implementation Point Nos. (1) and (2).

Against this backdrop we find that during the year 2002 (January-December) USA submitted a total of 221 notifications, largest number by any member of WTO. Out of this, 125 (55%) were routine notifications either for information or comments of the members. The average time, if allowed, was a mere three weeks. Remarkably, 96 (45%) of these proposals did not require to be allowed any reasonable time as they were either Addenda, Corrigendum, Revisions of the already existing rule in force or could be due to some Emergency measures warranted by exigencies. Similarly, the European Union, another major group credited with larger notifications, did not allow in about 49 per cent cases, any reasonable time period as per the decision on the SPS implementation concerns finding mention in the Doha Declaration.

As a further illustration of the confusion on these decisions, US submitted a notification (G/SPS/N/USA/541- 02-0179 dated 15 January 2002) entitled "Food Security Guidance". Since this was an announcement regarding the "*Availability*" of guidance documents on food security issues the *proposed date of adoption* and the *proposed date of entry into force* were mentioned as *"to be determined"*. Subsequently, it has been announced that "Food Security and Bioterrorism Act" will become operative from December 2003 (24-25 June 2003: twenty-seventh regular SPS committee meeting agenda notes). Thus we find that implementation decisions on *time frame* and *reasonable time interval* is, in fact, going in a circular direction without any concrete outcome. Such absence of tangible and genuine efforts at engagement with the ground level realities of the developing countries requires to be factored in during the stock taking of Doha mandates at Cancun. Although,

it may be pointed out that the recommended procedures for implementing the transparency obligations of the SPS Agreement (Article 7) have been revised (G/SPS/7/Rev.2 dated 2 April 2002), the wide gap between the precept and the practice is what should form the focus.

(b) Equivalence

The SPS Committee (WTO, G/L/592) consciously adopted a 'Programme for Further Work' regarding the implementation of Equivalence (Article 4). In that respect, the issue of equivalence (Article 4), being substantive in addition to procedural, still holds out for a lot of discussion. In fact, the SPS Committee meeting on 24 June 2003 adopted on an *ad referendum* basis a set of six recommendations (G/SPS/W/128/Rev.3 dated 2 July 2003). The rich discussion addressed the issue of appropriate level of sanitary or phytosanitary protection (ALOP) and requested the "three sister" institutions for strengthening the equivalence determination between the importing and exporting members. For instance, the draft "*Codex Guidelines on the Judgement of Equivalence of Sanitary Measures Associated with Food Inspection and Certification Systems*" as also the "*Codex Guidelines for the Development of Equivalence Agreements Regarding Food Import and Export Inspection and Certification Systems*" have been relevant. On the animal health side, the "*OIE Guideline for Reaching a Judgement of Equivalence of Sanitary Measures*" is well recognized by the SPS Committee. The "*Interim Commission on Phytosanitary Measures*" (ICPM) at IPPC is requested to consider the "Equivalence" and provide clarification on plant pests and diseases.

Again taking the illustration of USA, we found that about 1080 establishments were granted equivalence in 2002 for "meat and poultry" product imports into US. Most of the countries, except Japan, belonged either to the NAFTA grouping (92.5%) or the Western Hemisphere (7%) or the Pacific region. No Asian, of course with the exception cited above, or African countries managed to get equivalence for exporting "meat and poultry" products to USA. Even in the case of Japan only four (4) establishments were granted equivalence in 2002 (Chart 1 and 2). Perhaps these figures explain why the concerns on equivalence has remained to be a live and yet vague even at the cross roads to Cancun.

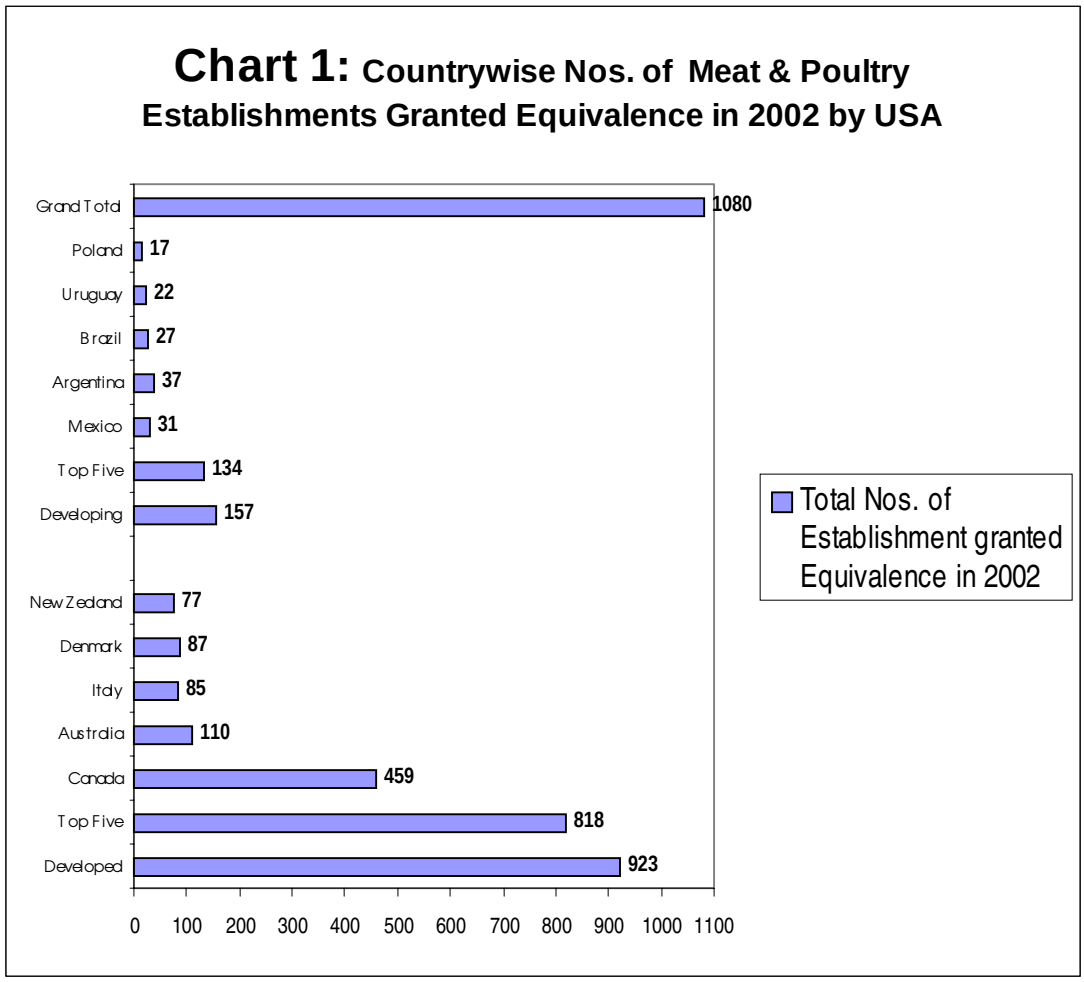


Chart 1: Countrywise Nos. of Meat & Poultry Establishments Granted Equivalence in 2002 by USA
Grand Total
Poland
Uruguay
Brazil
Argentina
Mexico
Top Five
Developing
New Zealand
Denmark
Italy
Australia
Canada
Top Five
Developed
1080
17
22
27
37
31
134
157
77
87
85
110
459
818
923
0
100
200
300
400
500
600
700
800
900
1000
1100
Total Nos. of Establishment granted Equivalence in 2002

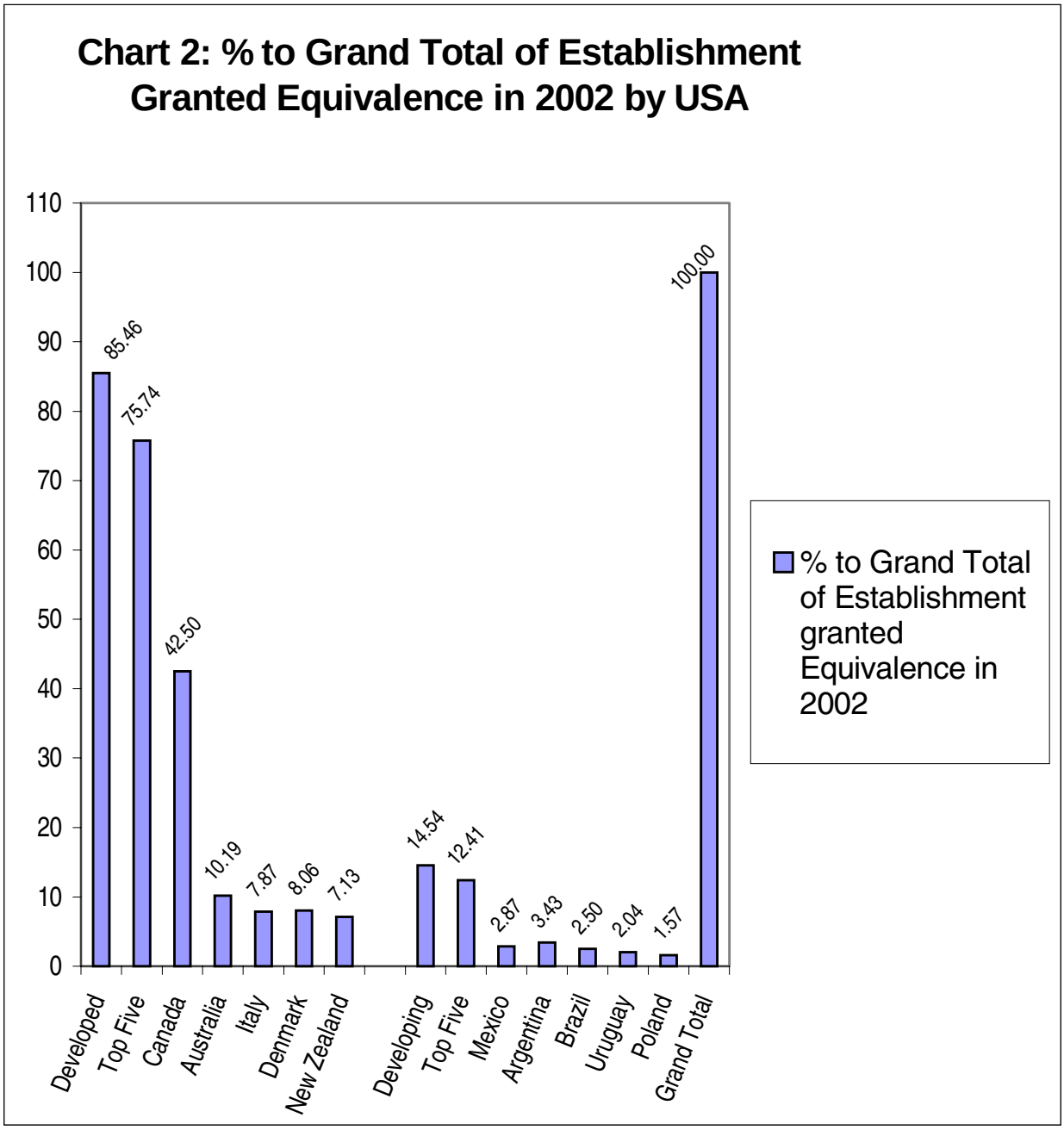


Chart 2: % to Grand Total of Establishment Granted Equivalence in 2002 by USA
110
100
90
80
70
60
50
40
30
20
10
0
85.46
75.74
42.50
10.19
7.87
8.06
7.13
14.54
12.41
2.87
3.43
2.50
2.04
1.57
100.00
Developed
Top Five
Canada
Australia
Italy
Denmark
New Zealand
Developing
Top Five
Mexico
Argentina
Brazil
Uruguay
Poland
Grand Total
% to Grand Total of Establishment granted Equivalence in 2002

The sum total of this ***ad referendum*** is two-fold. First, members have to get into a close consultation process with the three international standards organization, namely, Codex, OIE and IPPC. Secondly, in case of a difference in objectively assessing equivalence based on the guidelines, the importing member is expected to resolve this difference independently of the procedures laid down for determination of equivalence.

It is important to recall that most of the food safety standards in the developed importing countries are higher than those recommended by the international agencies (Codex, OIE, IPPC) and that OECD countries have submitted two out of every three notifications between the period the SPS agreement came into force in 1995 and end 2001.[3] Thus, the implementation issue of equivalence (Article 4) gets linked to the notification of SPS measures (Article 7) as well as the participation of the developing countries in standard setting exercise. However, when procedure for determination of equivalence is to be independently resolved, the leverage to be gained by the developing countries is not a matter of speculation.

The future of 'equivalence' agenda is not very bright since domestically there are reports emanating in USA that indicate of growing pockets of resistance to new food security legislation following 9/11 incidence as intrusive.[4] The onus on transnational food companies is perceived to be too heavy with the existing infrastructure and personnel. In case of the developing country governments that negotiate equivalence work, the budgetary allocations from a declining fiscal resources and away from more pressing priority areas bodes ill as well. For the SPS equivalence infrastructure in these countries are already pressing on the seams.

[3]OECD(2002) "Sanitary and Phytosanitary Measures and Agricultural Trade: A Survey of Issues and Concerns Raised in the WTO's SPS Committee", Joint Working Party on Agriculture and Trade (JT00129244). Com/TD/AGR/WP(2002)21/Final.

[4] Pear, Robert (2002), "Food Industry's Resistance Stalls Bill to Protect Food: Lobbyists Call Antiterror Measure Intrusive", The New York Times, 16 April and Waterfield, Larry (2003) "Security guidelines demand too much, United fears", The Packer online, 4 October (http://www.thepacker.com/icms/_dtaa2/content/2002-122228-627.asp).

The future efforts of developing countries are going to be stymied because of the federal court reversal of an equivalence decision granted by the Animal Plant and Health Inspection Services (APHIS) to citrus imports from Argentina.[5] APHIS had decided that the "system approach" of the Argentina plant health inspection service, SENASA, was indeed providing ALOP and therefore provided "negligible" risk to US plant health. This legal precedence of challenging the competent authority in a court of law could be a handy tool in the hands of importing country's trade associations and could be used anytime. The developing countries are ill equipped to address such legal complexities. The "best endeavor" attempts of Para 12, therefore, is no solace to the ground realities of the developing countries.

(c) Remaining three Implementation Issues

It was decided that a review of SPS agreement would be carried out every fourth year or earlier if the members through the ministerial desired so. The first review was carried out in 1999. With reference to the participation of developing countries in standard setting and the financial and technical assistance, some problems of seams between various bodies is emerging to be a major constraint. A case in point is the problem of inter-agency coordination (WTO, 2002, G/SPS/GEN/332-24 June (02-3478)). Be that as it may, a focussed attention to these two issues is not visible. Thus it has become one of the important factors in the development challenges.

It is recognized that technical assistance and capacity building format has to change their focus from merely to provide better understanding of WTO rules to actually implement the SPS agreement. The "walking the talk" ambience is sadly missing. The Doha Development Agenda Trade Capacity Building Database (TCBDB), interestingly, was launched by WTO and OECD Secretariats in November 2002. With this as the apex body with the DG, WTO as the main pivot, a seamless Trade Related Technical Assistance and Capacity Building (TRTACB) activities have been built up. The SPS related Technical Assistance and Capacity Building (TACB) activities come under the broad group Trade

[5] Waterfield, Larry(2001) "Federal Judge reverses decision allowing Argentina citrus imports", The Packer, 8 October 2001.

Policy and Regulation in TCBDB. The data indicate that TBT and SPS related TACB activities though increased in 2002 to 237 from 143 in 2001, the value declined to US$ 58 million in 2002 from US$ 127 million. The decline perhaps is attributable to the periodicity of the programming cycle of IDA loans.[6]

The technical assistance and capacity building efforts suffer from excessive centralization and inappropriateness of the training menu. Both these dimensions are compounded by a poor and inadequate financial flows for the efforts.

SPS agreement recognizes a stellar role for three institutions for providing technical expertise. These institutions are Codex Alimentarius Commission (CAC), a body jointly set up by FAO and WHO, International Plant Protection Convention (IPPC) hosted by FAO and the International Animal Health Organization called Office International des Epizooties (OIE) an inter-governmental organization.

The financial health of FAO in particular and UN bodies in general in the past decade have been under scrutiny for possible revival packages. Against this backdrop a centralized "Global Food Safety Fund" or 'Standards and Trade Development Facility' will have innumerable first charges before genuine concerns of the developing countries get to the agenda for consideration. An effective decentralized framework, indeed, requires proper engagement for addressing the ground realities.

The capacity building menu is directly proportional to the institutional health and financial stability. A new beginning in the capacity building menu is imminent and the Cancun ministerial must make genuine efforts and give the required impetus. The required new thrust under an effective decentralized framework must consider the trinity of food science, food safety and trading regime already existing in the member countries. The menu must have options for cooperative adaptation rather than authoritative adoption.

[6]Details are available at:
(http://www.wto.org/english/tratop_e/devel_e/teccop_e/wto_oecd_report03_e.doc).

II.1 Export of "Egg Powder" from a Developing country to Developed Countries: Case of EU Enthusiasm

The case study of Egg Powder export is illustrative of the fact how the six implementation issues have been addressed in the last one year when associated activities in respect of the Doha mandate attained pace. An Indian consignment of "Egg Powder" was rejected in the EU because the destination market included additional element known as MRPL or "minimum required performance limit" in May 2003. The rejection based on this additional criteria, MRPL, was not known to the Indian establishment. Obviously, here the questions of *time frame* and *reasonable time interval* between the announcement and the adoption/coming into force do arise. The additional element formed part of the foundational EC directive 96/23/EC on measures to monitor certain substances and residues thereof in live animals and animal products and it was for the first time that the egg powder consignment was subjected to such an examination. The issue of transitional period and reasonable time interval also was circumvented on the ground that the commission Decision 2002/657/EC of August 2002 was in fact, implementing the Council Directive 96/23/EC. Thus establishing criteria and procedures for the validation of *analytical methods* to ensure the *quality and comparability of analytical results* generated by official laboratories came into practice for the first time. In March 2003 this Decision for establishing minimum required performance limits (MRPL) of analytical methods to be used for substances for which no permitted limit has been established was amended by Decision 2003/181/EC setting MRPLs for certain residues in foods of animal origin.

The establishments whose consignment was rejected had a valid equivalence issued by the EU. And yet there was a "Rapid Alert' issued in EC as a routine that went to all importing countries. However when the consignment was declared to be meeting the additional element of MRPL, the 'Rapid Alert' was neither withdrawn nor importing countries de-alerted. The loss of reputation and increases in costs both implicit and explicit in this whole episode is going to take a long time to recover.

A large number of applications are lying with developed countries for granting 'equivalence' but no action (acceptance or rejection) is being taken. For instance, applications from India for providing equivalence, (egg powder establishments) has been with EU for the last 7-8 years. The EU is not able to consider these applications due to non-availability of staff. As an interim measure temporary 'equivalence' sometimes on an annual basis are granted. All these establishments have been set up as purely export oriented units (EOUs) and have been approved, though temporary, by the EU for exporting their products to EU countries. The issue of technical assistance and capacity building does not arise as it has been met already on an unilateral basis. The ground realities in EU therefore are entirely different that indeed are cause of concern while examining SPS implementation issues. These plants even after EU approval could recommence supply after a lot of procedural pinpricks that are not discussed at any institutional level.

In this context, illustrations can also be provided from the Shrimp export ban by EU from the developing countries in general and Bangladesh in particular. The classical African peanut export ban, again by EU, on account of *afflatoxin;* rejection of fish consignments from Kenya on account of bacterium which causes Cholera; are a few of the experiences that the developing countries are not able to forget while SPS implementation issues are under discussion.

II.2 Standards and Market Access

With the dismantling of tariff walls and removal of quantitative restrictions on imports the expectations of the developing country producers to send their farm produce to the developed country markets got a boost. Under the normal course only tariffs would be the sole element for a Southern product to reach a Northern market and vice versa. Considering the health and safety aspects many Northern markets under SPS measures impose additional conditions before the products could enter their borders. The legitimate SPS measures in that sense may impede access to markets. The standards led constraints in accessing the developed country markets, as analyzed in the preceding section, brought in the implementation concerns at the Doha Ministerial.

A recent report[7] quoting the official revised report indicate that since 1999 non-tariffs measures enforced by USA remained the highest constituting 87 per cent share in the total number of cases of NTMs imposed at 8-digit level of commodity classification. The US agency APHIS brings out an annual SPS Accomplishment Report that classifies market operations across borders into three categories for US agricultural products.[8]

Understandably, focus of SPS accomplishment is on exports and the three types of SPS standards led market access facilitation are retaining, expanding and opening. When the existing overseas market is retained in the face of application of SPS measures, it is categorized as retaining. Expanding involves increasing the openness and enlargement of area in an existing market. When a new market is accessed for the first time after establishing SPS credibility and that was earlier a closed market is called opening. The accomplishment since carried out with specific reference to SPS measures do present an interesting picture. Table II.2.1 below summarizes the export and import accomplishments in a balance sheet fashion. The SPS accomplishments are also viewed first in terms of numbers before ascribing values to the export or imports. It is reported that since 1997 fiscal year, 407 export issues cumulatively adding upto about US $10.6 billion have been the SPS accomplishment.

Table II.2.1: USA Exports and Imports subject to Standards and Market Access

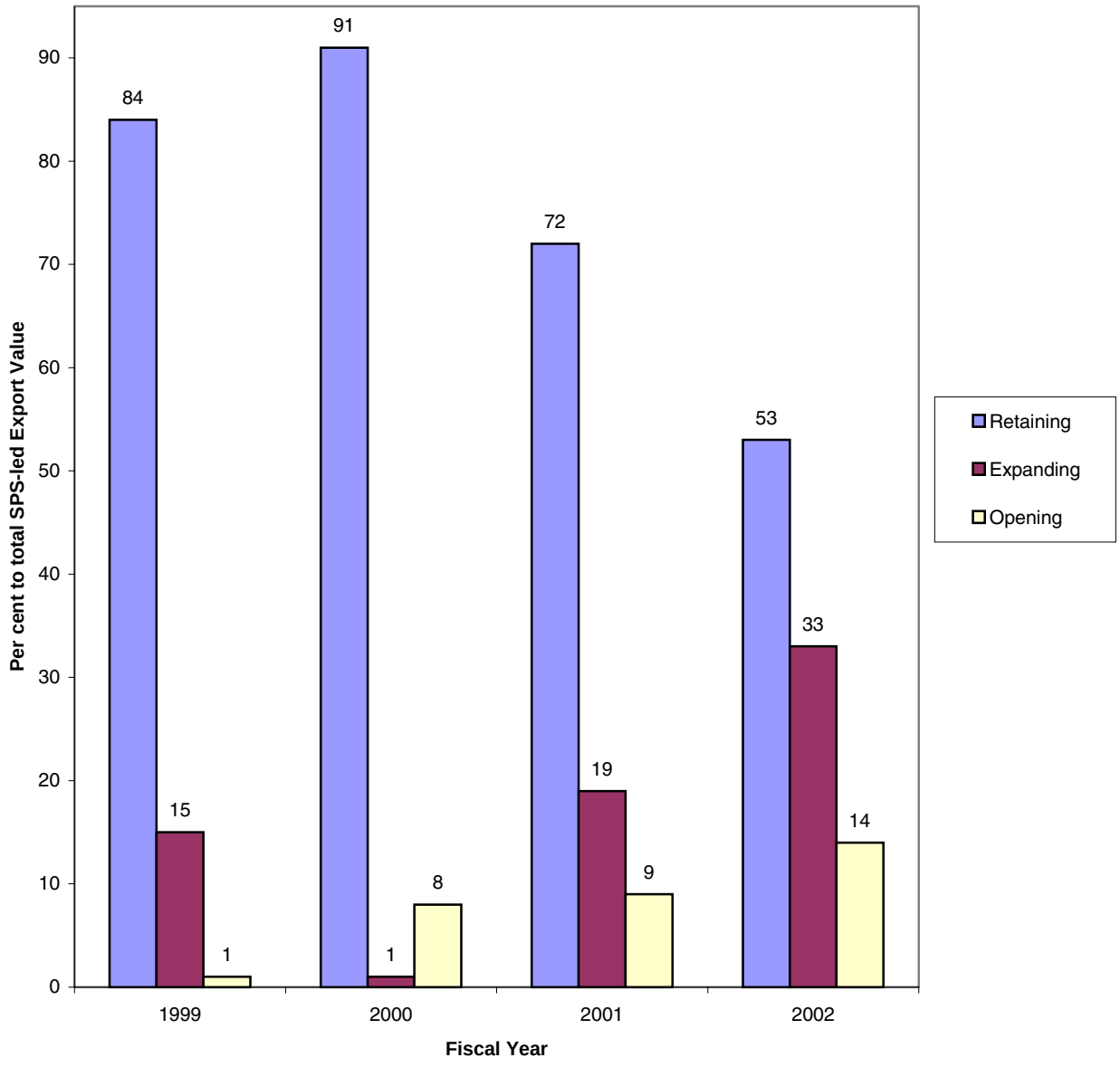
Standards led Market Access Faciliation	Exports (percent to total value)				Imports (million US $)			
	1999	2000	2001	2002	1999	2000	2001	2002
Retaining	84%	91%	72%	53%	-	-	-	-
Expanding	15%	1%	19%	33%	-	-	37.435	42.806
Opening	1%	8%	9%	14%	-	-	-	-
Total Nos. of SPS Cases	53	67	58	76	-	-	-	-

Source: SPS Accomplishment Report Fiscal Year 2001&2002 at: http://www.aphis.usda.gov/is/tst/Publications/SPSreports/SPS2001.pdf and SPS2002.pdf.

[7] See Srinivasan, G.(2003) 'Trade negotiators must focus on non-tariff barriers', Business Line, 29 August. (www.thehindubusiness line.com/2003/08/29/stories/2003082901050400.htm.

[8] See www.aphis.usda.gov/is/tst/Publication.html for details.

Chart 3: SPS Export Accomplishment Value (%) by Category



It can be seen from the Table that US export thrust is better captured than the import from other countries. The point being made by the developing countries in accessing US market apparently get reinforced. The US exports in terms of number of cases have been more vigorous in increasing openness of the existing market during the four year period, 1999-2002. But in terms of value and number of SPS cases finally resulting into US exports are facing increasing pressure of quality audit in retaining the existing market. Opening of new markets is expectedly the smallest category of the SPS export accomplishments both in value terms and numbers.

In terms of imports the fragmentary information reveal that it is only the plant product that was allowed entry into US market which already had presence in the existing commodity space. The import accomplishment within the expanding category was a mere 17 per cent of exports in 2001 and only 6.1% of exports in 2002 fiscal. Thus, the US export accomplishment on account of SPS after the Doha Declaration in November 2001 grew faster than the import accomplishment due entirely to SPS facilitation.

The above-mentioned analysis indicate that the SPS norms have a distinct bias not only within the three categories of market access but also between exports and imports. The gravity of the problem indeed is real and weighs more heavily on the developing countries to gain access to US markets that has stringent SPS measures.

Similarly in the case of EU, when a food consignment is rejected the exporter is denied access to information about the method of testing even on specific request. Since there is no provision for appeal in the EU cargo norms, the cargo is not returned to the exporters.[9]

The ascendancy of SPS barriers is often practiced along with technical barriers to trade (TBT) for being more effective and stringent. For instance, the Singapore Consumer Protection (Safety Requirements) Regulations 2002 stipulates that all suppliers (domestic or foreign) of controlled goods in hardware sector must be registered with the Safety Authority. This authority insists on getting a certificate of Conformity Assessment Body

[9] Srinivasan, G.(2003) *ibid*.

before applying for registration of the product. Thus, the overt link between removal of tariffs on the one hand and increasing application of new forms of NTBs on the other hand is putting the market access discussion more into the Standards domain. The six point agenda identified in the Doha mandate is insufficient as well as inadequate to make a serious engagement with such ground realities.[10] Indeed the issue to be examined is to ask a question: Can there be fair outcomes without fair processes.[11]

[10] For details, see UNDP(2003), Making Global Trade Work for People, Earthscan P Publications Ltd., London and Sterling, Virginia, especially chapter 17, pp.309-315.
[11] UNDP(2003) *op cit*, pp.49-61.

III. Development Challenges

The challenges before the developing countries therefore are manifold as they approach the Cancun Ministerial. At the outset, it has become clear that active participation in both SPS Committee as well as standard setting international organizations is not only essential but financial provisions for subject matter specialist be provided for, as well. The moot point is how many developing country members can afford this inspite of the emphasis on technical assistance and capacity-building efforts.

Secondly, the *ad referendum* refers to "independently" resolving the difference between the importing and exporting member countries in case protocol laid down by the international organization fail to establish the equivalence of standards. Here, it is not clear what is meant by "independently". Perhaps, it could be either the DSB or any other body. None the less it is important to recall the time, money and energy of experts that needs to be expended to reach any logical conclusion. For instance, the SPS related disputes in the DSB provide a good example of how many issues of "scientific merit" and other legal complexities gets weaved into the arguments of both the exporting and the importing countries.

Notably, there are 84 SPS related disputes that have been reported in the WTO between October 1995 and July 2003. Amongst these the classic cases are the dispute between Japan and USA on importation of Apples from USA to Japan; fresh fruits and vegetables imports into Australia from the Philippines, Rice imports into EC from India, etc.

Further, prevailing situations in the developing countries can be gauzed from the fact that between 2001 and 2002 a record number of new SPS specific trade concerns have been raised since 1995. Interestingly, out of the 154 trade concerns related to SPS, raised between 1995-2002 only 28 meaningful solutions have been reported (G/SPS/GEN/204/Rev.3). There are at least 70 trade concerns that are at least a year or more old and search for amicable solution is still on.

In this context, illustrations can be provided from the Shrimp export ban by EU from the developing countries in general and Bangladesh in particular; African peanut export ban, again by EU, on account of *afflatoxin;* rejection of fish consignments from Kenya on account of bacterium which causes Cholera; EU ban on egg powder imports from India are a few of the experiences that the developing countries are not able to forget while SPS implementation issues are under discussion.

III.1 Standards Escalation

"Standards escalation" is yet another area that requires to be addressed in a concerted manner. While, there are no ambiguities regarding the desirability of SPS measures as a policy objective to protect the health of human, plants and animal lives and health, also these standards in themselves not amounting to be a trade barrier, their use and/or adoption in practice has been found to raise new obstacles to imports and to give protection to the domestic producer as trade barriers in the importing countries (Mehta and George 2002).[12] The diversity in impacts from the demand as well as the supply side, are the real issues and the 'standards escalation' in SPS measures needs to be appreciated in that perspective. The developing countries, being biodiverse, are mainly exporter of agricultural products in any form. While, standards escalation justifiably takes place on account of consumers well being, the firm size and investment in technology at the supply end for the developing countries are indeed posing big challenges.

The case in point is well illustrated by the marine products export industries in Africa, Bangladesh, Thailand and India. Another instance is that of the export-oriented units of egg powder in India that had to shut down production due to a EU ban (Mehta, Saqib, George 2002).[13] These plants even after EU approval could recommence supply after a lot of procedural pinpricks that are not discussed at any institutional level. For example, while the EU standard is treated as a single entity representing all the EU members, any

[12]Mehta, Rajesh and J. George (2002) 'International Good Safety Regulations and Processed Food Exports from India: An Exploration into Research Agenda' – Proceedings Launching Workshop, RIS.

[13] Mehta, Rajesh, M. Saqib and J. George (2002) "Addressing Sanitary and Phytosanitary Agreement: A Case Study of Select Processed Food Products in India", RIS Discussion Paper # 39, New Delhi.

individual member may not be in complete harmony with this single entity. Thus, there is an imminent need for harmonization of measures within the EU.

Secondly, in the event of a problem an "Alert" is sounded and this information rightly is widely disseminated across the globe. On the other hand, when the cause of action for the alert is set right and resolutions are reached such information fails to get any visibility. The extent of damages to the exporter thus gets compounded. Similarly, EU has come up with a new norm called MRPL, namely, minimum rate of performance limit, in the animal feeds. The obvious focus is on limiting the use of "Nitrofen" based feed supplements and the approved Indian exporters of poultry products were caught unaware.

III.2 Standards Divide

That the "standards divide" indeed, is proving to be a bigger challenge for the developing countries following the standards escalation is real. The trigger applied at the demand side has been identified to be solely responsible for the widening divide (Wilson and Abiola 2003).[14] The solution to the problem from both the demand and the supply ends have been identified but inappropriately addressed. The supply side, albeit, selectively and hence at the micro level initiatives have far reaching implications if the demand side standards escalations are allowed without any engagement.

The appropriateness of resolution mechanism whether or not to have a combination of measures that would address inadequate capacity to meet the world trade standards for goods and a consistent and fair access to markets in the developed countries is an open ended one. We have already seen how the notification and equivalence issues remain unresolved till date. A wider and extensive empirical study based strategies are indeed required.

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[14] Wilson, John S. and Victor O. Abiola (2003) Standards & Global Trade: A Voice for Africa, The World Bank, Washington D.C.

The "standards divide" has many manifestations and sensitivity of the testing instruments is one of them. For instance, sensitivity to parts per million (ppm) level and parts per billion (ppb) levels is a glaring case. The marine sector provides a case in point in addition to the afflatoxin case in the case of peanuts and other cereals where the sampling procedure issue in addition is also a big problem. The pesticide residue, the maximum residue limit as well as the residual monitoring plan, traceability upto the producing farms, disease free zones/area, etc. are ground realities that the developing countries are determined to address. However, the orbit of technical assistance and capacity-building framework has to be widened to make a deeper engagement with these ground realities.

IV. Decentralized Alternative

A decentralized developing country centered approach could be the answer to address most of the supply side hard-core issues. In this respect, the regional cooperation and regional standards do provide a glimmer of hope. For instance, few countries in the developing and least developed categories do have some strategic endowments both in terms of scientific rigour and temper in the manpower as well as other infrastructure. These could be shared and utilized in a cost-effective manner to bridge the gap created by the "standards divide". The primary focus in such a decentralized approach is required to be given to the issue of "asymmetry in information". The six-point agenda item, for implementation issues as pointed out earlier falls far short of recognizing these ground realities.

Remarkably, a "special and differential treatment" (S&DT) window in the context of SPS measures is also being reckoned with in the run-up to the Fifth Ministerial in Cancun. In as much as the S&DT window being considered is an addendum to a notification that may be issued by any member the utility of the window is greatly reduced for the non-notifying members who are from the developing South. Fortunately, the SPS Committee has not reached any final decision on this window as it has found it prudent to encourage wider discussion and consultation. Taking a cue from this development, the fifth ministerial could be gainfully used by the developing countries to advance the developing country centered decentralized approach. The issue of "standards escalation" in its myriad manifestation needs to be addressed before giving into the temptations of S&DT box at this juncture.

The justification for a decentralized approach can be judged from the following illustration taken from the ground level data of the US border refusal of imports from India for the month of April 2003. (Also see the Box 1 on US Detention Practices)

During the month of April 2003, the USFDA refused permission at the border to import food products and the information is available at the OASIS website. During April 2003,

the total refusal of all commodities was 1620 in which the food products refusal was 1441.

Box 1: Border Detention/Refusal of Food Imports into USA

The US is probably the only country, which provides information on border detention of shipments based on pre-inspection basis. During May 1999-April 2000, total number of detentions by the US originating from all (52) countries were 9875. Out of 9875, 860 shipments originating from India were detained at the US border. This was the maximum number of shipments rejected by USFDA originating from a single country. Since this is not a proper measure of rejection rate, the number of detentions per $ one million imports from originating countries is also calculated. The range of this parameter was 0.1-11.0, while the rate for India (US $ shipments) was 4.5. To examine the rate of detention overtime, we estimated this parameter for recent months, i.e., September 2001-February 2002. Our result shows that the number of detentions per US $ one million has declined from 4.5 in 1999-2000 to 2.6 during 2001-2002. Similar estimates were also calculated for specific commodity groups of US imports from India, i.e. 'Shrimps & Tuna' and 'Mushrooms'. The detention rates for these sectors during 2001-02 were 1.3 and 56 respectively. It shows that the rejection rates of Indian 'Shrimps and Tuna' is lower than the all commodity overall average rate (2.6), while the corresponding rate of mushroom is significantly very high.

An analysis of reasons for detention indicates that a significant number of Indian consignments were rejected on account of multiple reasons. Whereas the all commodities average percentage of reasons was 1.35, the fish and marine products average percentage of reasons was 1.76. This indicates that fishery products on an average had been detained on the basis of at least two reasons. The three most commonly quoted reasons for rejection of fishery product were, Filthy, Salmonella and Insanitary. The main reason for detention of Mushroom consignments was pesticide residue.

Source: Mehta, Saqib and Geogre (2002).

The highest number of refusal (22.2 per cent to the total refusal in food products) was reported in the 'fishery/seafood' products category. Next came the Fruits and Vegetables products category at about 15.5 per cent. The human and animal drugs captured into seven categories though accounting for about 24 per cent of the refusal, the significance of traceability comes out more strongly. Besides, the drugs have some important ramifications even in the non-food sector and we have to analyse the reasons for refusal, which may be premature here.

The total number of refusals for India during April 2003 was 80 across all commodity groups in which the food products accounted for about 97 percent. Remarkably, about one-fifth of the refusal was on account of a single reason and the remaining (four-fifth) had multiple reasons. The all commodity average percentage of reasons is 1.67. The 'Bakery' product group had an average of about 4 reasons for refusal in the month of April 2003.

In this total picture, 'Filthy' was shown as the reason for the refusal action in about 31 per cent cases and was also the common factor in all the multiple grounds for refusal action. There are glaring cases of rejection that quote the reasons as 'under PRC' under Section 402(a)(4), 801(a)(3) for Adulteration. This is primarily defined as the "article appears to have inadequate processing in having been prepared, packed, or held under insanitary conditions whereby it may have been rendered injurious to health".

The USFDA has documented about 172 violation reasons for refusal that is all-pervasive and may not be restricted only to SPS measures. For instance, the 'Bakery' product case mentioned above had the following grounds:

Filthy:-	Section: 402(a)(3), 601(b),801(a)(3); Adulteration, consist in whole or in part of any filthy, putrid or decomposed substance.
List Ingre:-	Section: 403(i)(2), 801(a)(3); Misbranding, fabricated from two or more ingredients and the label does not list the common or usual name of each ingredients.
Lacks N/C:-	Section: 403(e)(2), 801(a)(3); Misbranding. Food in packed form appears to not have a label containing an accurate statement of the quantity of the contents in terms of weight, measure or numerical count and no variations or exemptions have been prescribed.
Nutrit Lbl:-	Section 403(g), 801(a)(3); Misbranding, article appears to be misbranded in that the label or labeling fails to bear the required nutrition information.
Unsafe Col.:-	Section: 501(a)(4)(B), 801(a)(3); Adulteration The article appears to be a color additive for the purposes of coloring only in or on drugs or devices, and is unsafe within the meaning of Section 721(a).
Yellow # 5:-	Section: 402(c), 403(m), 801(a)(3); Adulteration, Misbranding food appears to bear or contain the color additive FD&C yellow # 5 which is not declared on the label per 21 CFR74.705 under Section 721.

The point coming out more forcefully from this specific product category case of refusal by USA is that SPS measures, despite harmonization, equivalence, transparency and risk assessment clauses may not ensure a smooth flow for exports from developing countries through the borders into the developed country markets. This is a substantive issue of market access and SPS becomes a handy tool. For instance, Filthy category is a violation under sections: 402(a)(3), 601(b), 801(a)(3) and that is classified under generic Adulteration. The scientific merit of these violations notwithstanding, application to ethnic food products may not be fair to the ethnic consumers in particular in the developed country market. The refusals and detention at the border therefore *prima facie* appears to be not violative of the SPS measures in words but is trade restrictive

nevertheless. The proportionality of risk, as in the case of peanuts, is heavily stacked against the developing country exports.

The example of 'Bakery' product violation reasons example also indicate the legalistic dimensions in the standards in addition to the scientific merits. Are they being addressed in the implementation issues at the multilateral fora? Perhaps not.

V. Agenda for Developing Countries

Against the backdrop discussed above the agenda for developing countries should address both the procedural and substantive issues of SPS agreement *per se*. At the same time, we have seen above how other qualitative dimensions of cross cutting themes like the processing techniques, etc. gets crafted on the SPS platform for denying access to the markets. This three-pronged strategy in a regional cooperation framework requires to be explored.

As a first step, it has become important to reexamine the "scientific merit" argument of the food safety standards incorporated in the multilateral trade issues. The preceding sections have discussed and demonstrated how this is impeding the supply chain processes in the developing countries. At the same time, it is well recognized by now that trade barriers in the north developed markets are predominantly subsidies of various hues and tariff peaks along with tariff escalation. In as much stringency found in food product standards as also escalations of the same in the final finished products for domestic consumption in the developed country, the burden under the SPS regime gets transferred to the developing country producers and processor. The demand side induced SPS measures, as we have seen above, are having adverse impact on the supply side processes. Therefore, it is important for all developing country members to question the technical and economic feasibility of such a measure that overrides the international reference standards adopted by Codex. Thereby, the ambitions and processes of engagement with basic issues like, ALOP, Principles of Risk Analysis, Traceability, Precautionary Principle, etc. if to be initiated in right earnest must form part of the Cancun deliberations. Naturally, the linking mechanism is with the participation of the developing countries in the standard setting bodies as well as technical assistance and capacity building efforts. The Cancun ministerial has to have a serious discussion on this issue as what has happened in the past two years since Doha have skirted the developing country ground level conditions

The divergent national standards within EU members and other OECD countries is a good case in point to examine the interplay of various tariff and non-tariff barriers to

trade between the South and the North. In this context, the one strategy being recommended is the applicability of the Codex reference standards and for all trade purposes this becomes mandatory. While, the developing countries do get the benefit of harmonizing with one international standard, cost of impacts on them could be variable. Could this be a viable strategy for the developing countries may not be in the domain of fiction if regional cooperation and horizontal committees framework is effectively decentralized in stages by seeking increased and active participation and leadership within the developing countries. The leverage derived by the developing countries on the basis of *ad hoc* vertical committees and *ad referendum* needs to be understood and correctives brought in place.

The urgency can be justified on the ground that developing countries have a widely divergent agricultural production landscape where the onus lies on the small and marginal farmers. Imposing a process standard, like for instance, HACCP that has its origin in sending man to the moon, on these farmers is at odds with basic economic reasoning and existing alternatives within the domestic economy. Besides, there does not exist much difference between a consumer and the producer in a developing country thus the economic and technical justification takes a unique direction. On the other hand, the developed countries have a distinct consumer and producer segment where market forces demonstrate predictable functions in as far as the food safety standards are concerned.

In the final analysis, the agenda for the developing countries appears clearly to question the regulatory protectionism under the food safety standards, often exclusivist in nature and hence divergent in practice, being experienced in the developed countries for deriving trade advantages. A serious engagement with these issues is imminent. It has rightly been said that the best way to predict the future is to invent it. The developing countries have to seize this opportunity in Cancun to create a better future for themselves.

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