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Sanitary and Phytosanitary Measures and Non-tariff Barriers to Trade under the WTO and Cotonou Agreements

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1. INTRODUCTION

The days when agriculture was somehow excluded from many of the disciplines of international trade law ended with the Uruguay Round. The Uruguay Round achieved two things. It introduced new disciplines on market access, domestic subsidies and export subsidies and volumes for agricultural products. At the same time it removed the "fig leaf" behind which, since after the Second World War, agriculture had been shielding itself from the impact of the GATT.

The Uruguay Round agreements were designed to increase agricultural trade. As trade increases there is an increasing need to address the issue of health and safety. If WTO members could replace one set of non-tariff barriers such as variable levies or quotas with other non-tariff barriers such as standards then the achievement of the Agreement on Agriculture would be undermined.

The trade aspects of health and safety are addressed in the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement)[1] and the Agreement on Technical Barriers to Trade (the TBT Agreement).[2] The object of these agreements is to determine when barriers to trade based on health and safety standards should be considered as compatible or incompatible with trade rules.

This brief article addresses these consequences of these Agreements within the context of trade in agricultural products between ACP countries and the EC.

2. The WTO Agreement on the application of Sanitary and Phytosanitary Measures

2.1. The aim of the SPS Agreement

The aim of the SPS Agreement is to set out a series of rules within which WTO Members can set health and safety standards. The object is not to limit the right of Members to set a standard which they consider to be the appropriate standard for their citizens. Rather the object is to provide a series of rules by which these health and safety standards should be set and enforced. And

[1] The Agreement on the Application of Sanitary and Phytosanitary Measures, see on http://www.wto.org, "SPS Agreement".
[2] The Agreement on Technical Barriers to Trade, see on http://www.wto.org, "TBT Agreement".

further, a series of presumptions in relation to their compatibility with the “right” of free movement.

2.2. Article XX of the GATT 1947

Food safety was not an unknown issue in international law prior to the SPS Agreement. There are a number of international organisations established to regulate problems of the spread of pests and diseases and to set food standards.

Article XX (b) of the original GATT Agreement in 1947 covered sanitary and phytosanitary measures impinging on trade.[3] This article allowed GATT contracting parties to impose standards *“necessary to protect human, animal, or plant life or health”* which would otherwise be incompatible with market access commitments so long as *“such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or as a disguised restriction on international trade”*.

However, Article XX had “no teeth”. There was no definition of the criteria by which to judge “necessity,” and there was no specific procedure for settling disputes on such matters. The attempt in the Tokyo Round to improve this situation through a technical barriers to trade agreement in 1979 known as the Standards Code also failed. Though a dispute settlement mechanism was introduced and countries were encouraged to adopt international standards, relatively few countries signed the code, and a number of basic issues were still unresolved.

2.3. Basic right of a Member to adopt SPS measures

Unlike the rules governing the GATT, the SPS Agreement goes beyond the general principle of non-discrimination and provides a system that gives WTO Members specific rights and obligations in relation to SPS measures.

The key to the SPS Agreement is the right of WTO Members to set the health and safety standards they deem appropriate but to do so in a way which least hinders continued trade.

The basic system of the SPS Agreement is simple. WTO Members remain free to set whatever human, plant and animal health and safety standards that they consider appropriate to their domestic circumstances. Article 2 of the SPS Agreement begins by stating that WTO Members have the right to adopt SPS measures that are necessary to protect health, provided that they are consistent with the provisions of the SPS Agreement. However, this right is qualified in three ways:

[3] For the GATT 1947, 1994 and all other WTO Agreements as well as subsequent "understanding" documents in either word or pdf formats, see http://www.wto.org/english/docs_e/legal_e/final_e.htm.

1) SPS measures should only be applied to the extent necessary to achieve their objective;
2) they should be based on scientific principles and not maintained without sufficient scientific evidence (except as provided in Article 5.7); and
3) SPS measures may not be applied in a manner which would constitute a disguised restriction on international trade.

2.3.1. What measures are covered by the SPS Agreement?

To fall under SPS Agreement's provisions, a measure must first of all have the subjective intent to protect human, animal or plant life or health.[4] Once this intent has been established, two additional criteria must be met. First, the measure must aim to protect against either food-borne risks or against pest or disease related risks. Generally, the first of these types of risk refers to human or animal life or health and the latter refers to plants. The second additional requirement that needs to be met for the SPS Agreement to apply is that the measure needs to *"directly or indirectly affect international trade"*.[5]

The SPS Agreement does not set out any specific SPS measure *per se*. It operates by mandating general procedural requirements for the setting of such standards. This skeleton system aims to ensure that any SPS measure is scientifically based and protects against actual health risks and is not a disguised non-tariff barrier to trade.

SPS measures are one of the very few types of measures that have the potential to directly benefit or harm the consumer. Because of this fact, the trade context of SPS regulation is more complex and, on the economic side, the cost/benefit analysis to judge the efficacy of such regulations is more difficult to make. For this reason, the SPS Agreement is more specific and stricter than many of the other WTO Agreements and, in particular, the GATT 1994.

2.3.2. Standards based on science

Although WTO Members do have a certain degree of flexibility with regard to SPS measures, Article 2 of the SPS Agreement provides that measures not based on scientific principles are not valid within the terms of the Agreement. Article 2.2 of the SPS Agreement provides that:

> *"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..."*

[4] See Agreement on the Application of Sanitary and Phytosanitary Measures, Annex A., § 1.
[5] See SPS Agreement, Art. 1.1.

This Article is the central pillar of the SPS Agreement. For example, even though WTO Members may establish a *"zero risk"* standard of SPS protection, that determination and the measure itself must still be based on science.[6]

The one exception to this basic obligation appears in article 5.7 of the SPS Agreement, which establishes a temporary precautionary principle as part of the Agreement.

2.3.3. Standards based on international standards

Because scientific agreement is a rarity, WTO Members are encouraged in Article 3 of the SPS Agreement to harmonize their measures by conforming to international standards, guidelines or recommendations, where they exist. Many international bodies develop international SPS standards. Three are expressly mentioned in the text of the SPS Agreement: in the field of food safety, the Codex Alimentarius Commission (Codex);[7] for animal health standards, the International Office of Epizootics (OIE)[8] and for plant health, another UN/FAO organization, the Secretariat of the International Plant Protection Convention (IPPC).[9]

If a country bases its food standards on an international standard accepted by one of these three organisations, it is presumed that the standard is based on science, is proportionate to the objective and, if it restricts trade that it is compatible with WTO rules.[10]

2.3.4. Standards based on risk assessment

Some consumers and governments are not satisfied with some Codex standards. If a WTO Member chooses to ignore an international standard and decide for itself what level of protection is appropriate, there is obviously no presumption of conformity, but so long as WTO Members follow certain rules, they may deviate from international standards without violating the SPS Agreement. Specifically, WTO Members must be sure that any more-stringent

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[6] See *EC-Hormones*, (Panel Report WT/DS26/R/USA, adopted 18 August 1997, Appellate Body Report WT/DS48/AB/R, adopted 16 January, 1998, EC Measures Concerning Meat and Meat Products) Appellate Body Report, §§ 184 and 186.

[7] For the Codex Alimentarius Commission, see http://www.fao.org/WAICENT/faoinfo/economic/ESN/codex/Default.htm.

[8] For the International Office of Epizootics (OIE), see http://www.oie.int/overview/a_oie.htm.

[9] For the IPPC Homepage, see http://www.fao.org/WAICENT/FaoInfo/Agricult/AGP/AGPP/PQ/En/IPPCe.htm

[10] According to the *EC-Hormones* Appellate Body Report, for a WTO Member to enjoy the presumption, the measure must be very close to the available international standards. If a WTO Member can only *base* its SPS standards on the relevant international standards, then it will be subject to full scrutiny, especially concerning whether it is based on science and a risk assessment.

measures can be scientifically justified and are based on risk assessments as provided for in Article 5 of the Agreement which states:

> *"Members should 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."*

The Article 5 risk assessment requirement should be read together with Article 2.2, which states that SPS measures should be based on science, not maintained without sufficient scientific information and only applied to the extent necessary.[11]

Annex A (4) of the SPS Agreement recognizes two distinct types of risk assessment. The first applies to SPS measures whose aim is to protect against the establishment or spread of a pest or disease. The second applies to any measures designed to protect humans and animals from so-called "food-borne" risks.

2.3.5. The principle of non-discrimination

Article 5.5 of the SPS Agreement aims to achieve consistency in the application of appropriate levels of protection that WTO Members choose to adopt through their SPS measures. Article 5.5 prohibits discrimination between similar products or situations when assessing risk. It obliges WTO Members to:

> *"… avoid arbitrary or unjustifiable distinctions in the levels they consider to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade."*

This language aims to prevent WTO Members from maintaining different levels of protection for different products that, in reality, pose a similar risk to health. There is no distinction here, as there is in other parts of GATT law about discrimination based on the origin of products. Article 5.5 applies equally to imported and domestic products.

2.3.6. What factors should be looked at when assessing risk?

The SPS Agreement in Articles 5.1-3 provides rules that WTO Members must follow when making risk assessments. Article 5.2 provides a list of what WTO Members should take into account. It includes: available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest or

[11] See *Australia-Salmon*, (Panel Report WT/DS18/R, adopted 12 June 1998, Appellate Body Report WT/DS18/AB/R, adopted 20 October, 1998, Australia – Measures Affecting Importation of Salmon (from Canada)), Appellate Body Report, §§ 137-138.

disease-free areas; relevant ecological and environmental conditions and quarantine or other treatment. The main issue arising from dispute settlement activity has been whether or not this list is exhaustive, or if other factors, especially non-scientific factors such as the precautionary principle or consumer concern, may also be considered in a risk assessment.

Article 5.7 of the SPS Agreement provides an exception to the obligation to base all SPS measures on risk assessments. This exception, however, has been read very narrowly in the case law and does not limit a WTO Member's obligations to the rest of the SPS Agreement.

WTO Members may provisionally adopt SPS measures so long as certain conditions are met. First of all, the relevant scientific information has to be insufficient; and secondly, the measure must be adopted on the basis of available pertinent scientific information.[12]

Furthermore, WTO Members may maintain provisional measures under Article 5.7 so long as:

1) WTO Members seek to obtain the additional information necessary for a more objective risk assessment; and
2) WTO Members review the SPS measure accordingly within a reasonable period of time.

2.4. The SPS Agreement and the promotion of trade

Even though the SPS Agreement recognizes the basic right of WTO Members to set their appropriate SPS measures, which could in turn result in barriers to trade, two other concepts in the SPS Agreement are designed to promote trade. These are the concept of harmonization and equivalence.

Under the SPS Agreement, WTO Members are firstly encouraged to harmonise standards. In fact, where standards are the same in the different WTO Members, they clearly cannot result in barriers to trade. If it is not possible to reach agreement on the harmonisation of standards, WTO Members are then encouraged to accept other standards as being equivalent to their own.

Article 4 of the SPS Agreement provides that WTO Members must accept the SPS measures of other Members as equivalent, even if these measures differ from their own or from those used by other WTO Members trading in the same product. The exporting country must objectively justify to the importing country that its measures achieve the importing WTO Member's appropriate level of protection.[13] For this reason, the SPS Agreement provides that exporting countries shall give importing countries *"reasonable access for the purpose of inspection, testing and other relevant procedures"*. WTO Members are further obligated to enter into consultations with the aim of achieving bilateral and

[12] This information may include *'that from the relevant international organizations as well as from SPS measures applied by other members'*.
[13] See SPS Agreement, Article 4.1.

multilateral agreements on recognition of equivalence of specified SPS measures.[14]

2.5. Provisions relating to developing countries

Articles 9 and 10 of the SPS Agreement contain provisions related to developing countries. These provisions principally exist as recognition that less developed WTO Members will have difficulty meeting the obligations of the SPS Agreement. They also seek, by ensuring cooperation between WTO Members, to facilitate harmonization of worldwide SPS standards and governmental transparency.

Article 9.1 requires WTO Members to agree to facilitate the provision of technical assistance to developing countries either bilaterally or through the appropriate international organizations to help them adjust to and comply with the obligations of the SPS Agreement. Similarly, Article 10 instructs WTO Members to take account of the special needs of developing countries and to give them longer time frames for compliance.

Article 10 also provides that the SPS Committee may grant such countries, upon request, specified time-limited exceptions from obligations under the SPS Agreement, considering the financial, trade and development needs of those countries.[15] Finally, Article 10.4 directs WTO Members to encourage and facilitate the active participation of developing countries in the relevant international organizations. This last provision is particularly important because the international organizations mentioned in the SPS Agreement set their standards by the vote of each member country's delegates.

Article 14 of the SPS Agreement provided for delays in complying with SPS rules and principles for 5 years for least-developed countries (until 2000), and 2 years for other developing countries (until 1997). This delay was intended to give developing countries the time necessary to adopt international standards or otherwise develop their national sanitary and phytosanitary regulatory framework on the basis of scientific principles. During this grace period, their sanitary and phytosanitary measures directly or indirectly affecting trade flows could not be challenged under WTO rules.

2.6. Control, inspection and approval procedures

In order to streamline international trade and the working of the SPS Agreement, Article 8 provides that WTO Members must follow certain rules (found in Annex C) with respect to any procedures to check and ensure the fulfilment of SPS measures.

[14] See ibid., Art. 4.2; see also, Annex B, § 3 (d), providing that WTO Members are obliged to publish any such membership or arrangements concerning their enquiry points.
[15] See SPS Agreement, Article 10, § 3.

Annex C of the SPS Agreement, § 1 provides nine specific obligations, which aim to create standard practices to be followed by WTO Members when checking for compliance with their domestic SPS measures. The provisions of Annex C oblige WTO Members to be fair, reasonable and non-discriminatory. For example, paragraph 1(a) of Annex C provides that all procedures related to control and inspection for compliance are *"undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products"*. Similarly, Annex C paragraph 1(i) provides that WTO Members must ensure that "a procedure exists to review complaints concerning the operation of such procedures and to take corrective action when a complaint is justified".

2.7. Administration

Article 12 of the SPS Agreement establishes a Committee to provide a regular forum for consultations. The SPS Committee exists to aid the implementation of the SPS Agreement and to encourage international harmonization by facilitating *ad hoc* consultations and negotiations among WTO Members on specific issues and by sponsoring technical consultations. With these goals in mind, the SPS Committee maintains close contact with the relevant international bodies and WTO Member governments.[16]

2.8. The SPS Agreement and current WTO negotiations

The SPS Agreement is not an issue for negotiation in the Doha Development Agenda. That being said the EC negotiating approach tries to link the multifunctional role of agriculture, the relationship between trade and environment, consumer protection, as well as human, plant and animal health. Consequently, the EC has proposed a re-examination of certain accords, such as the Agreement on Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade, which have been used both to legitimately guarantee safety measures and to levy protectionist non-tariff trade barriers. Some countries support the position of the EC, clarifying it through an understanding that would also send the right signals to consumers.[17] Others say this should be discussed in the SPS and Technical Barriers to Trade committees, and not in the agriculture negotiations.

3. The Agreement on Technical Barriers to Trade

3.1. General overview of the TBT Agreement

[16] See SPS Committee, Report on the Activities of the SPS Committee, 28 July 1999.
[17] G/SPS/GEN/132 of 21 July 1999.

Every country has technical regulations and industrial standards. These standard could be used as a protectionist tool. Thus standards can become obstacles to trade.

The Agreement on Technical Barriers to Trade tries to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles to trade. The Agreement on Technical Barriers to Trade was originally negotiated during the Tokyo Round of multilateral trade negotiations (1974-1979).

As it now stands, the TBT Agreement covers all technical regulations, voluntary standards and conformity assessment procedures except when these are SPS measures as defined by the SPS Agreement.[18]

Like the SPS Agreement the TBT Agreement recognizes countries' rights to adopt the standards they consider appropriate - for example, for human, animal or plant life or health, for the protection of the environment or to meet other consumer interests. Moreover, Members are not prevented from taking measures necessary to ensure their standards are complied with. In order to prevent too much diversity, the TBT agreement encourages countries to use international standards where these are appropriate, but it does not require them to change their levels of protection as a result.

3.2. Relationship between TBT and SPS Agreements

Some examples of the food related measures which fall under the TBT Agreement include the shape of food cartons, the labelling on cigarettes, pharmaceutical restrictions, specifications to ensure that farmers are protected from fertilizers and food quality standards.

Conversely, the SPS Agreement covers any measures which set acceptable levels of pesticide or veterinary drug residues, quarantine provisions, regulation of permitted levels of fertilizer residue in food and animal feed, regulations which prohibit or limit the types of acceptable food additives and regulations mandating labelling on food or animal feed that gives health, use or dosage information.

To distinguish whether a measure is regulated by the SPS or the TBT Agreement depends on the declared objective of the measure. The type of the measure is less important. If the measure is stated to be a sanitary or phytosanitary measure it comes within the SPS Agreement. If it does not come within the SPS Agreement then the standard automatically comes within the TBT Agreement.

However, just because a measure aims to protect health, this does not automatically mean that it will be covered by the SPS Agreement. For the SPS

[18] See WTO Agreement Series, Sanitary and Phytosanitary Measures, WTO, 1998 at 13; see also TBT Agreement, Article 1, para. 6, Annex 1.

Agreement to apply, it has to concern food or animal feed. For example, the standard warnings found on cigarette packaging would be covered exclusively by the TBT Agreement.

3.3. Similarities and key differences between the SPS Agreement and the TBT Agreement

Although the two agreements are similar in a number of ways, their substantive provisions are different. Both agreements instruct WTO Members to use international standards, but under the SPS Agreement, WTO Members are compelled to use these international standards unless they choose another measure justified scientifically and on an assessment of the possible risk. On the other hand, WTO Members may set TBT measures that deviate from the international standards for other reasons, including technological difficulties or geographical issues. Furthermore, SPS measures may only be applied to *"the extent necessary to protect human, animal or plant life or health, based on scientific principles and not maintained without sufficient scientific evidence"*,[19] while TBT measures may be applied and maintained for other reasons, including national security or to prevent deceptive practices.[20]

The SPS Agreement and the TBT Agreement exclude each other from their scope. Article 1.4 of the SPS Agreement states:

> *"Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade."*

Similarly, the TBT Agreement, in Article 1.5 excludes from its scope SPS measures.

Unlike the SPS Agreement, which requires a scientific justification and a risk assessment, the TBT Agreement's test is one of non-discrimination. Discrimination is tolerated under the SPS Agreement (unless it is *"arbitrary or unjustifiable"*) because protecting domestic human, plant and animal health, is by its very nature, a discriminatory task.

Both Agreements encourage transparency by providing that WTO Members must give advance notification of proposed measures and by requiring WTO Members to establish so called *"enquiry points"*.[21] WTO Members must ensure that one *"enquiry point"* exists and provides answers to all reasonable questions from other interested WTO Members.[22]

4. SPS and TBT measures in the Cotonou Agreement

[19] See SPS Agreement, Article 2, para. 2.
[20] See TBT Agreement, Article 2, para. 2.
[21] See SPS Agreement, Annex B, para. 3; see also, TBT Agreement, Article 10.
[22] See SPS Agreement, Annex B and TBT Agreement, Article 10. Both agreements provide lists of specific information that must be included on the WTO Member's enquiry point.

4.1. General overview

In June 2000, the European Community and its Member States and 71 African, Caribbean and Pacific States signed a Partnership Agreement in Cotonou, Benin.[23] This Agreement replaced the Lomé Convention, which has provided the structure for trade and cooperation between the EU and the ACP since 1975. The Cotonou Agreement sets out the general framework for ACP-EU development cooperation relations for the next twenty years, subject to revision every 5 years.

The Parties to the Agreement acknowledge the growing importance of new areas related to trade in facilitating progressive integration of the ACP States into the world economy. Therefore, they agree to strengthen their cooperation in these areas by establishing full and coordinated participation in the relevant international fora and agreements.

What can be seen from these provisions is that the WTO Agreements regulating the use of sanitary and phytosanitary measures or measures which may be technical barriers to trade which determine compliance with the Cotonou Agreement. There are no exceptions. As will be seen below all the Cotonou Agreement attempts to do is to replicate the WTO Agreements and give "flesh" to the WTO Agreements' exhortations to assist developing countries in relation to the introduction and enforcement of standards.

4.2. The Cotonou Agreement and sanitary and phytosanitary measures

Article 48 of the Cotonou Agreement[24] addresses the issue of Sanitary and Phytosanitary measures. The right of each Party to adopt or to enforce sanitary and phytosanitary measures necessary to protect human, animal or plant life or health was recognised, subject to the requirement that these measures do not constitute means of arbitrary discrimination or a disguised restriction to trade. The commitments of the Parties under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures were reaffirmed, taking account of their respective level of development.

The Parties further undertook to reinforce coordination, consultation and information as regards notification and application of proposed sanitary and phytosanitary measures, in accordance with the SPS Agreement whenever these measures might affect the interests of either Party. They also agreed on prior consultation and coordination within the Codex Alimentarius, the International Office of Epizootics and the International Plant Protection Convention, with a view to furthering their common interests.[25]

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[23] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou, Benin, on 23 June 2000. See on http://www.acpsec.org/gb/cotonou/accord1.htm.

[24] Part 3 "Cooperation strategies", Title II "Economic and Trade Cooperation", Chapter 5 "Trade-Related Areas".

[25] See supra nn. 8-10.

The Parties agreed to strengthen their cooperation with a view to reinforcing the capacity of the public and the private sector of the ACP countries in this field.

4.3. Cooperation in the field of standardisation under the Cotonou Agreement

The Parties also agreed to cooperate more closely in the field of standardisation, certification and quality assurance to remove unnecessary technical barriers and to reduce differences between them in those areas, so as to facilitate trade. In this context, they reaffirm their commitment under the Agreement on Technical Barriers to Trade, annexed to the WTO Agreement.

According to Article 47 of the Cotonou Agreement, cooperation in standardisation and certification shall aim at promoting compatible systems between the Parties and in particular include:

- measures, in accordance with the TBT Agreement, to promote greater use of international technical regulations, standards and conformity assessment procedures, including sector specific measures, in accordance with the level of economic development of ACP countries,
- cooperation in the area of quality management and assurance in selected sectors of importance to the ACP States,
- support for capacity building initiatives in the ACP countries in the fields of conformity assessment, metrology and standardisation,
- developing functioning links between ACP and European standardisation, conformity assessment and certification institutions.

4.4. Negotiation on new ACP-EC Trade Agreements

The Cotonou Agreement includes *"a commitment to agree"* on several new ACP-EC reciprocal trade agreements that are compatible with WTO rules and will replace the present non-reciprocal preferential arrangement.

Under the trade provisions of the Cotonou Agreement the EC and the ACP have agreed to enter into negotiations on a WTO compatible trade regime not later than September 2002.[26] The precise configuration of the Partnership Agreement remains to be determined. There remains within the ACP group a strong view that the partnership or at least significant elements of the trade agreements should be negotiated on an ACP wide basis. The preferred position of the EC has been for the negotiation of regional economic partnership agreements in the various sub-regions of the ACP where members feel they wish to proceed with a GATT Article XXIV compatible free trade agreement.

Negotiations between the EC and the ACP with a view to concluding Economic Partnership Agreements (EPAs) began at the end of September 2002.

[26] Cotonou Agreement, Article 37.1.

The European Commission maintains that EPAs should be subject to the overall objectives of the Cotonou Agreement and contribute in particular to the objectives of poverty eradication, sustainable development and the gradual integration of ACP countries into the world economy. Among other issues, EPAs will cover trade related areas. Negotiations will cover mutual recognition agreement for various standards and the negotiation of equivalency agreement for Sanitary and Phytosanitary standards.

What can be seen once again from this review of the negotiating mandate for the new ACP Trade Agreements is that with regard to SPS and TBT measures the starting point will be compliance with WTO law. In effect this means that it will only by the WTO Agreements which will determine the rights and obligations under the new ACP trade arrangements. In terms of the standards to be met and the enforcement of those standards ACP exporters to the Community will be in the same position as all exporters. The only difference may be the introduction of a separate institutional structure to allow the settlement of disputes. But even this institutional aspect would have to apply WTO rules.

5. Are there Barriers to Trade based on EC Standards?

In general most EC SPS standards are based on international standards or where not they are based on scientific evaluations in line with the WTO Agreement. However there are some notable problems. These are more to do with institutions and history than the standards themselves. These problems will be looked at in this section.

We will not examine the issue of the use of hormones in beef production. The EC's ban on the use of these substances has been condemned in WTO dispute settlement and the EC is subject to retaliatory suspensions of concessions. The reason for the finding that the EC's standards were WTO incompatible is that they were not based on an appropriate scientific risk assessment. In practice the ban had been introduced to limit increased beef production in the EC and not as a scientifically based health and safety measure.

5.1. Genetically Modified Organisms

Genetically modified organisms (GMOs) and genetically modified micro-organisms (GMMs) can be defined as organisms (and micro-organisms) in which the genetic material (DNA) has been altered in a way that does not occur naturally by mating or natural recombination.

While it may be argued that GMOs are not always (or even typically) disease-carrying, disease causing, or otherwise toxic, it is likely that any measure that has the purpose of restricting the use of GMOs in foodstuffs or as part of food production would fall within the definition of a SPS measure, whether the motivation for the measure was human or animal health, or safety or protection of the environment. However, in relation to the latter issue, protection of the

environment, there would be legal arguments to show that the EC's GMO measures should be reviewed under the TBT Agreement.

It should be noted however that packaging and labelling requirements are included within the definition of SPS measures only where they are *"directly related to food safety"*.

The EC has a regulatory system for the authorisation of the use of, and trade in, genetically modified organisms. However, the EC has not been implementing these rules. Nor has it complied with them. The EC has in fact introduced a moratorium on all further decision making. A number of applications for use are in the pipeline and the EC has missed the deadlines for dealing with these applications. The reasons for this are as much political as scientific.

It can be strongly argued that the failure to comply with its own rules for political reasons is to go against the strict provisions of the SPS Agreement that all decisions must be based on scientific evidence. The EC has failed to decide on certain dossiers on the basis of politics not science.

5.2. The precautionary principle

The EC justifies its position in connection to GMOs on the basis of the precautionary principle. Much has been made of the precautionary principle in EC law and policy and in WTO law. This principle has been accepted into European Law and practice. However, it is not clear how it will be implemented. This principle has not been incorporated into WTO law.

In the Hormones case the Panel found that this principle was not a principle of international law and that, even though it did find reflection in Article 5.7 of the SPS Agreement, the WTO Agreements in general should not be interpreted subject to this principle.[27]

The question must then be asked whether the use of the precautionary principle in itself or in particular circumstances may or may not be a breach of the SPS or TBT principles. The EC is clearly concerned that a measure based on precaution and not science could fall foul of the SPS Agreement and is actively promoting the acceptance of the precautionary principles as an overriding principle of international law.

5.3. The use of agrochemicals

Most WTO Members require that before an agrochemical can be used in agricultural production it must be authorised. This is the situation in the EC. Each Member has its own system. These authorisation processes are long and costly.

[27] *EC-Hormones,* WT/DS26/R (August 18, 1997), WT/DS48/R (August 18, 1997), WT/DS26/AB/R (January 16, 1998), WT/DS48/AB/R (January 16, 1998), WT/DS26/ARB (12 July 1999), WT/DS26/ARB (July 12, 1999).

The agro chemical companies themselves underwrite the cost of the authorisation process. In most cases it is only the commercial enterprise which is allowed make the application for authorisation to use as it is the commercial enterprise which has the knowledge in relation to the product

A commercial enterprise will only invest in this process if it believes that the investment can be recouped in sales of the product itself on that market. As each market has its own distinct authorisation process this can means repeated investment costs in different markets. If there is no potential market for the product an application for use will not be made.

If an agrochemical is developed to address a particular agricultural production problem such as a disease or a pest or a weed it will only have a potential market where that pest or disease or weed is prevalent. There will be no market for the agrochemical product where there is no problem. Typically a tropical problem will not be a temporal problem.

When an agrochemical is authorised for use then the authorisation process not only looks at whether it is safe in itself but also as to its safe use. This will include setting levels for residues on the product itself. Where a product is not authorised most WTO Members set default levels for residues. Any trace of the non authorised product is a breach of that Members SPS rules.

The combination of these practical considerations is that agrochemicals which are authorised for use in tropical or developing countries are often not authorised for use in temporal markets. Strict residue levels apply and the agricultural product cannot be sold in the temporal market.

To a degree the SPS Agreement provides for this situation in that Article 4 provides for recognition of equivalence. Unfortunately this article has not given rise to many agreements and the underlying problem remains. It is not clear that this is a legal problem. It is clear however that it is a significant factor in trade between tropical and temperate climates.

5.4. Pesticide residues

The Community has in place a regime permitting the setting, on a scientific basis, of pesticide residue levels (MRLs) protecting adequately the whole consumer population, including infants, and being based on a shared responsibility between the Community and the Member States. However, this system has only been in place since the early 1990s. Prior to that date pesticide residues were regulated at the Member State level.

As most pesticide and agro chemicals predate the 1990s, most pesticide residue levels (MRLs) are not harmonized at European Community level and Member State law still applies. The question that immediately arises is whether the EC could be considered in breach of its WTO commitments for allowing different MRLs at Member State level while the EC Directives call for the

harmonization of the level of protection and the EC has committed to harmonize its standards to those developed internationally by the relevant technical and scientific bodies.

The EC law requires that to goods released for free circulation within the internal market should be given equal status throughout the Community and benefit from EC's free movement rules. As a result, a good imported into an EC Member State where there is a low MRL (let's say Germany, for example) should freely circulate within the internal market and be sold in another Member State (Belgium, for example), even if the Belgian MRL is set at a much higher level. However, this does not happen. EC Member States retain the right to restrict the free movement of good on the basis of health standards.

It would be easy to argue, that a stricter MRL imposed by Belgium on a given product would make it illegal for the goods to be imported via the port of Antwerp. However, if the same goods were to be imported via the port of Hamburg, they would be put into free circulation in the EC internal market through Germany (where the MRL is less strict) and could then be freely moved and sold onto the Belgian market (under EC free movement of goods rules). The logical weakness and legal flaw of this paradox are evident.

In real life this is not simply a paradox, but the unfortunate reality. Importers are often obliged to resort to this "port shopping" to be able to put given goods in free circulation in the EC market. This is always a costly exercise and a clear burden on their ability to do trade with the EC or with some of the EC Member States. It should not be the case and, in as much as this is trade restrictive or unnecessarily cumbersome and administratively burdensome, it could amount to a breach of WTO obligations by the EC (under the SPS Agreement and GATT Articles III, VIII, X and XXIV).

5.5. HACCP (Hazard Analysis at Critical Control Points)

EC Directive 93/43[28] lays down general rules of hygiene for foodstuffs and procedures to ensure verification and compliance with these rules.

"Food Hygiene" is defined as including all measures necessary to ensure the safety and wholesomeness of food at all stages of production right through to offering for sale and supply to the consumer. Preparation, manufacture, processing, packaging, storing, transportation, distribution, handling and offering for sale or supply to the consumer must be carried out in a hygienic manner.

In order to bring Community legislation into line with the principles of food hygiene laid down in the Codex Alimentarius and to clarify responsibilities of food operators, it is proposed that the HACCP principles prescribed by that

[28] Council Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs. OJ L 208, 5/09/1995, p. 20.

organisation be introduced, revising the rules set out in Directive 93/43/EEC.[29] The implementation of these principles would, if adopted, be mandatory for all operators of food establishments. The operators will have to live up to their responsibilities and have to adjust their already existing HACCP system to the new rules in the Directive or need to design a specific monitoring programme.

To the extent that the EC's HACCP rules are not in line with international standards it could be argued that the EC is in breach of its WTO commitments. However the EC would be able to show that the EC's standards are based on science. It would be a question for evaluation.

5.6. Traceability

The EC considered it necessary to establish a system of traceability within food businesses so that targeted and accurate withdrawals can be undertaken or information given to consumers or control officials, thereby avoiding the potential for unnecessary wider disruption in the event of food safety problems.

Traceability defined by Article 3(15) of Regulation 178/2002 as *"the ability to trace and follow a food, feed, food-producing animal or substance intended to be, or expected to be incorporated into a food or feed, through all stages of production, processing and distribution".*[30]

Regulation 178/2002/EC sets out general principles and requirements of food law.[31] It introduces certain principles that must allow improving tracing, in particular the registration of food businesses by the competent authority and the allocation of a registration number to each of them. A second obligation for food business will be to ensure that adequate procedures are in place to withdraw food from the market where such food presents a risk to the health of the consumer.

The Community system of traceability is designed to cover the complete food chain from the farm to table. This will apply from 1 January 2005 on. However, as a legal requirement, the traceability requirement for each operator covers only one step forward and one step backward in the supply chain.

All EC food imports including importers from ACP countries will have to comply with these requirements. However, it is not obvious that these provisions infringe the EC's commitments within the WTO and thus traders will have to adapt to them if they want to continue selling into the EC market.

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[29] There is a Proposal for a Directive of the European Parliament and of the Council repealing Directive 93/43 on the hygiene of foodstuffs (Document COM (2000) 438 final of 14 July 2000). It is expected to be adopted in the first half of 2003.

[30] Regulation 178/2002/EC of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 1/2/2002, p. 1.

[31] Regulation 178/2002/EC entered into force on 21 February 2002. However, Article 65 states that a number of articles, including Article 18 setting out the requirements for traceability, shall apply from 1 January 2005.

The question in relation to the WTO compatibility of the EC's traceability rules is as follows. Is the imposition of these exact standards disproportionate to the aim that is sought to be achieved? Could something less restrictive be implemented. There is nothing in the EC's rules dealing with the issue of mixing. Mixing is a common feature in trade from developing countries. Often individual farms will not make exportable quantities. In this situation mixing will take place in markets or in warehouses. Is the failure of the EC to cater for this a breach of its proportionality obligations?

5.7. Informal barriers to trade imposed by retailers

In the mid 1990s environmental and social NGOs concerned with development began promoting certain standards that they sought to impose on traders from developing countries. In essence the standards were Western environmental standards and International Labour Organisation social standards. They had little success.

Then the NGO switched their attention to supermarkets. They reasoned that most traders had to sell their goods through the large retail chains. By imposing standards on retail chains they would in effect be imposing standards on the suppliers to the retail chains.

At first the retail chains resisted the pressure to adopt codes of conduct or standards and to impose them on their suppliers. The NGOs then commenced advertising campaigns against the retail chains for failure to respect certain standards. Pretty soon most retailers came on board.

Today many of the largest retailers impose standards in relation to environment protection and social issues on their suppliers. These standards are not government standards but informal standards.

The question is do they comply with WTO rules. The first problem to be addressed is the fact that in practice these standards are not based on government measures but are standards voluntarily adopted and imposed by all in the supply chain. The retailer voluntarily takes on the standard. The supplier to the retail chain does the same so that the goods can be placed on the shelves. These are not government measures. Yet there are just as effective.

The next issue to be addressed is what sort of standards are they? Do they come within the SPS or the TBT Agreement. Or are they outside the remit of the WTO as they deal with production processes and methods. In essence the two Tuna Dolphin and Shrimp cases[32] show that production processes and methods are outside the remit of the GATT.

[32] *US-Shrimp* (WT/DS58) and *Tuna-Dolphin GATT case* DS21, see on www.wto.org/english/envir and http://gurukul.ucc.american.edu/ted/TUNA.HTM.

In practice the legal responses to these questions will only come through dispute settlement which will depend on the facts of the case.

6. Conclusions

Trade in agricultural products between ACP countries and the EC is governed by WTO rules and not by specific rules set out in the Cotonou Agreement.

We are not aware of any specific problems in relation to trade in sugar or bananas other than the problem of different standards and different rules in different EC member states.

The main problems appear to be practical and institutional. These need to be addressed politically within the context of the ongoing free trade agreement negotiations.