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Sanitary, Phytosanitary and Technical Barriers to Trade in the Economic Partnership Agreements between the European Union and the ACP Countries

By **Denise Prévost,**
Maastricht University, Institute for Globalisation and International Regulation

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Some of the more general discussion of SPS and TBT measures in this paper draws upon an earlier publication by this author, namely: Denise Prevost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension* (Wolf Legal Publishers, Nijmegen) 2009. This author retains full copyright of this publication.

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LIST OF ABBREVIATIONS AND ACRONYMS

ACP	African, Caribbean and Pacific countries
CAC	Codex Alimentarius Commission
CARICOM	Caribbean Community
CENELEC	European Committee for Electrotechnical Standardization
EAC	East African Community
EBA	Everything-but-Arms
EC	European Community
EDF	European Development Fund
EPA	Economic partnership agreement
ESA	Eastern and Southern Africa
EU	European Union
GDP	Gross domestic product
GLOBALGAP	Global Partnership for Good Agricultural Practices (previously EUREPGAP)
GSP	Generalized system of preferences
HACCP	Hazard analysis and critical control point
IAF	International Accreditation Forum
IECEE	Worldwide System for Conformity Testing and Certification of Electrical Equipment
IMF	International Monetary Fund
IPPC	International Plant Protection Convention
ISO	International Organization for Standardization
KEPHIS	Kenyan Plant Health Protection Convention
LDC	Least-developed country
MRL	Maximum residue level
NAFTA	North American Free Trade Agreement
OIE	World Organisation for Animal Health
REACH	Registration, Evaluation and Authorization of Chemicals
RPTF	Regional Preparatory Task Force
RTA	Regional trade agreement
SADC	Southern African Development Community
SPS	Sanitary and phytosanitary
TBT	Technical barriers to trade
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

FOREWORD

Regional trade agreements (RTAs) have become a distinctive feature of the international trading landscape. Their number has increased significantly in recent years, as WTO Member countries continue to negotiate new agreements. Some 200-odd agreements have been notified to the WTO, but the real number may be higher, as some are never notified to the multilateral bodies, and many more are under negotiation. As a result, an increasing amount of trade is covered by preferential arrangements, prompting many analysts to suggest that RTAs are becoming the norm rather than the exception.

Many regional pacts contain obligations that go beyond existing multilateral commitments, and others deal with areas not yet covered by the WTO, such as investment and competition policies, as well as with labor and environment issues. Regional and bilateral agreements between countries at different stages of development have become common, as have attempts to form region-wide economic areas by dismantling existing trade and investment barriers, an objective that figures prominently in East Asian countries' trade strategies.

Yet, the effects of RTAs on the multilateral trading system are still unclear. This is also true with respect to their impact on trade and sustainable development. RTAs represent a departure from the basic non-discrimination principle of the WTO and decrease the transparency of global trade rules, as traders are subject to multiple, sometime conflicting, requirements. This is particularly the case in relation to rules of origin, which can be extremely complex and often vary in different agreements concluded by the same country. Also, the case that WTO-plus commitments enhance sustainable development has yet to be proven. Indeed, it is not even clear whether RTAs enhance or hinder trade.

However, developed and developing countries alike continue to engage in RTA negotiations, and this tendency seems to have intensified recently, helped by the slow pace of progress in the multilateral trade negotiations of the Doha Round. Countries feel the pressure of competitive regional liberalization and accelerate their search for new markets. Thus, while most countries continue to formally declare their commitment to the multilateral trading system and to the successful conclusion of the Doha negotiations, for many, bilateral deals have taken precedence. Some countries have concluded so many RTAs that their engagement at the multilateral levels is becoming little more than a theoretical proposition.

Thus, the effort to gain a better understanding of the workings of RTAs and their impact on the multilateral trading system is a key concern of trade analysts and practitioners. Current WTO rules on regional agreements, mainly written in the late 1940s, do not seem well equipped to deal with today's web of RTAs. Economists dispute whether RTAs create trade, and political scientists try to explain the resurgence of RTAs using a mix of economic, political and security considerations. In some cases, the fear of losing existing unilateral non-reciprocal trade preferences provides the rationale for launching RTA negotiations, as in the case of the Economic Partnership Agreements (EPAs) negotiations between the European Union and its former colonies in the group of African, Caribbean and Pacific (ACP) countries. Many worry about the systemic impact of RTAs and question whether they are "building blocks" to a stronger and freer international trading system or in fact are "stumbling blocks" that erode multilateral rules and disciplines.

It is in this context that ICTSD has decided to initiate a research, dialogue and information programme aimed at filling the knowledge gaps and gaining a better understanding of the evolving reality of RTAs and their interaction with the multilateral trading system.

Dr Denise Prévost's paper, entitled "Sanitary, Phytosanitary and Technical Barriers to Trade in the Economic Partnership Agreements between the European Union and the ACP Countries," is a contribution to this programme. The paper sets out a common vision on issues that could constitute sanitary, phytosanitary and technical barriers in EPAs and investigates how abusive use of these provisions could be an obstacle to market access. The study also promotes experience-sharing among different ACP regions in terms of drawing up negotiating positions. The issues covered include:

- the EPAs' disciplines on traditional barriers to market access, including tariffs and quotas;
- provisions addressing non-traditional barriers to trade in the WTO agreements and the various EPAs;
- technical regulations standards and conformity assessments procedures;
- sanitary and phytosanitary measures;
- the relationship between the EPAs' rules on non-traditional barriers to trade and those in the WTO agreements period.

The author concludes that much can be done through the EPAs to considerably reduce the trade-restrictive effects of how the EU frames and applies technical barriers to trade or sanitary, phytosanitary regulations, and determines the compliance with them. In this way, the EPAs could be useful tools to address the deficiencies of the WTO agreements, facilitating the implementation of provisions that are of particular interest to ACP countries (such as transparency, equivalence and regionalization) through detailed procedural guidelines and institutional arrangements. In addition, strengthened provisions on technical assistance (containing clear budgetary commitments and disbursement mechanisms) could go a long way toward addressing the supply-side constraints that limit the ability of ACP countries to take advantage of the increased market access potential of the EPAs.

We expect that this paper, which deals with one of the most difficult and technical complex issues related to RTAs, together with the others in this series on regional trade agreements, will clarify some of the many questions posed by RTAs and help promote a better understanding of the workings of RTAs and how these agreements interact with the multilateral trading system.

Ricardo Meléndez-Ortiz
Chief Executive, ICTSD

1. INTRODUCTION

Economic growth has been called the "engine of development as a whole" since the *Agenda for Development* was presented in 1994 by former UN Secretary-General Boutros Boutros-Ghali. Further, he expressly recognized that the "expansion of international trade is essential to economic growth and is an integral part of the economic dimension of development."[1] This forms the context within which the interim/final Economic Partnership Agreements (EPAs) between the European Union (EU) and the African, Caribbean and Pacific (ACP) countries must be seen.[2]

This paper is premised on the significance of the commitment of the European Council to ensure that EPAs are development instruments.[3] This commitment can be seen as the touchstone against which they are to be assessed. It also takes into account the aims set out in the Cotonou Agreement, under which EPA negotiations should further "the progressive removal of barriers to trade between the Parties, in accordance with the relevant WTO rules" and "improving current market access for the ACP countries through, inter alia, a review of the rules of origin."[4] It thus reflects on the development potential of the EPAs by examining whether they effectively improve the opportunities for ACP countries to have access to the EU market, provide avenues to diminish dependence on preferences and promote regional integration within ACP groupings.

The question arises as to whether trade liberalization through elimination of traditional forms of trade barriers, namely tariffs and quotas, as largely provided in the interim and final EPAs, is sufficient by itself to increase market access and thereby to promote development. It is argued here that, to be truly effective in increasing trade opportunities for ACP countries, the efforts to liberalize trade in the EPAs must also encompass rules that address non-traditional barriers to trade in a manner that is appropriate to the particular situation of the ACP countries in order to be supportive of development. By doing so, the EPAs could go further than the existing disciplines of the World Trade Organization (WTO) on these types of trade barriers, taking advantage of the closer ties and deeper integration that exists between the EU and the ACP countries than between the 153 Members of the WTO.

1.1 EPA Disciplines on Traditional Barriers to Market Access: Tariffs and Quotas

Traditionally, a barrier to market access that particularly affects agricultural and food products (which are of significant export interest to many ACP countries)[5] is that of high tariffs, arising from tariff peaks and tariff escalation.[6] Although the average incidence of tariffs on agricultural exports from developing countries is low, "tariff peaks" which are significantly higher than the average are applied to certain commodities of importance to developing countries. For example, horticultural products and poultry products (both examples of high-value perishable products) are typically subject to tariff peaks.[7]

The term "tariff escalation" refers to the levying of higher tariffs on goods at more advanced stages of processing. The tariffs applied by many countries increase greatly by level of processing, resulting in limited market access for processed foods.[8] A 2003 World Bank study notes that "the protection rates for food processing in industrial countries are extremely high – far above those of any manufacturing subsector."[9] It argues that tariff escalation with regard to semi- and fully processed agricultural products is "strikingly antidevelopment"[10] as it penalizes investors in developing countries who seek to add value to production for export. This high level of protection for processed food and agricultural products is regarded as explaining many developing countries' failure to diversify their exports towards processed products and to penetrate developed country markets in this area.[11]

Tariff peaks and escalation are addressed in the EPAs through the provision of duty-free market access to products from the ACP countries.[12] This will bring the greatest benefits with respect to a limited range of food and agricultural products

that were subject to high taxes, especially rice, table grapes, beef and citrus fruits.[13] With regard to customs duties, the EU has agreed to eliminate all its customs duties on exports of the ACP Parties to the EPAs, except rice and sugar, which are subject to transitional regimes.[14] The ACP countries will progressively eliminate customs duties on EU products but may exclude certain sensitive products. Fees and charges other than customs duties applied by Parties to an EPA must be limited to the approximate cost of services rendered.[15]

Another traditional barrier to market access is the use of quotas to limit importation. However, the EPAs eliminate, to a large extent, the use of quotas in EU-ACP trade. Each EPA contains an article, entitled "Prohibition on quantitative restrictions," which provides, in closely similar wording, that all prohibitions or restrictions on import or export between the Parties, other than customs duties, taxes, fees and other charges, whether made effective through quotas, import or export licenses or other measures, shall be eliminated upon the entry into force of the agreement and that no new such measures shall be introduced.[16]

In short, traditional trade barriers to the EU market in the form of tariffs and quotas are effectively eliminated by the provisions of the interim and final EPAs, which currently provide for duty-free, quota-free market access for the majority of ACP exports (except rice and sugar) as of 1 January 2008.[17]

However, the elimination of tariffs and quotas does not significantly improve the existing export opportunities for products from low-income ACP countries. Least-developed ACP countries already enjoyed duty-free, quota free market access to the EU for most products under the latter's Everything-but-Arms (EBA) regime, and other developing countries benefited from the preferential tariffs applied under the EC's Generalized System of Preferences (GSP). Consequently, the market access gains for most ACP countries from the EPA disciplines on tariffs and quotas are limited. It has been noted in a 2008 World Bank paper that these types of preferences have met a "very weak supply response" from many ACP countries in the past and that "this is unlikely to change unless supply constraints are ameliorated."[18]

Clearly, therefore, the potential for significant market access improvements lies mostly in addressing the supply-side constraints caused by non-traditional barriers to market access, which take the form of regulatory requirements and administrative procedures. It is therefore useful to examine the provisions of the EPAs that address such barriers to trade in order to establish the extent to which the EPAs effectively increase market access opportunities for ACP exports to the EU. If the supply-side constraints that arise from problems of compliance with regulatory requirements and procedural rules are not dealt with, the potential benefits of increased ACP exports to the EU will not materialize.[19]

1.2 Non-Traditional Barriers to EU-ACP Trade

1.2.1 Introduction

To address the question of whether the EPAs significantly improve market access opportunities for exports from ACP countries, and thereby contribute to economic growth and development, it is necessary to examine whether the EPAs effectively tackle non-traditional market access barriers, such as regulatory and administrative requirements for access to the EU market faced by ACP countries.[20]

There are two broad types of non-traditional market access barriers, which may be of a regulatory or procedural nature. These can usefully be categorized as barriers that take the form of:

(1) technical barriers to trade; and

(2) sanitary and phytosanitary measures.

Technical barriers to trade (TBT) is the term used to refer to technical regulations and standards. These measures lay down substantive requirements relating to product characteristics or their related processes and

production methods. They also include labelling requirements applicable to products, processes and production methods. The difference between technical regulations and standards is that the former are mandatory while the latter are not.

Sanitary and phytosanitary measures (SPS) can be seen as a subcategory of technical regulations in that they may also take the form of regulations or standards, laying down product-related requirements. However, the subcategory of SPS measures is defined according to the purpose of the measure, namely the protection of human or animal health against risks in food or feed; the protection of human, animal or plant health against risks from pests or diseases of plants or animals; and the protection of the territory of a country against other damage from the entry, establishment or spread of pests. This subcategory of technical regulations is often addressed separately in trade agreements.[21]

Both SPS and TBT measures include not only substantive regulatory requirements, but also the conformity assessment procedures used to determine compliance with these regulations or standards. Examples of such procedures are testing and inspection requirements, certification requirements and systems for prior approval of certain products. These procedural or administrative requirements can form, in themselves, significant barriers to trade.

The difference in the market access effects of regulatory and administrative or procedural requirements on countries at different levels of development is clear. The capacity of a particular country (in terms of both the necessary public infrastructure and private industry resources) to meet the relevant regulatory and administrative requirements it faces on its export markets will determine its access to those markets. In addition, the reputation that an exporting country has established with respect to compliance, quality management and effective regulation, will play an important role in ensuring the trust of the importing country in its ability to meet these requirements.[22] Thus, the initial conditions from which countries operate are crucial; the better the existing regulatory infrastructure, public certification and control systems and private industry leadership, the less additional costs it will face in meeting regulatory and administrative requirements. Consequently, regulatory requirements may create opportunities for those market operators able to meet the requirements to increase their market shares and improve their competitive positions.

Therefore, in discussing the trade effects of non-traditional barriers to trade in the form of regulatory and procedural or administrative requirements on ACP countries, care should be taken to avoid broad generalizations. The heterogeneity of ACP countries must be remembered, as it impacts on the ability of these countries to overcome the trade-restrictive effects of such requirements by adapting to new requirements and securing market share. A 2005 World Bank report notes that some countries have been able to meet the challenge posed by higher standards on export markets.[23] It points to the example of Kenya, whose food industry has responded to the food safety standards in the EU by accelerating the adoption of modern supply-management techniques and engaging in collaboration with the public sector. As a result, Kenya is able to supply fresh vegetables and salad greens to major European supermarket chains.[24]

While certain ACP countries, such as Kenya, have succeeded in adjusting to the particular regulatory requirements they face on the EU market, sometimes with the help of EU technical assistance programmes, such as the Pesticides Initiative Programme, many countries at lower levels of development have encountered serious difficulties in doing so. This may have significant consequences for their trade.

It is, therefore, useful to examine in more detail non-traditional market access barriers and their potential effect on trade and development in the ACP regions. Both of the main categories of non-traditional barriers to trade will be

discussed in turn, to establish their relevance as barriers to exports from ACP countries, before turning in Section 2 to examine the provisions in the EPAs that address these non-traditional barriers to trade.

1.2.2 Technical barriers to trade

Take the form of requirements for products that serve certain policy goals, such as consumer health and safety, environmental protection, animal welfare and prevention of deceptive practices. As mentioned above, these barriers may be mandatory "technical regulations" (e.g. the proposed EU labelling requirements to inform consumers of the possible risks of hair-dye products),[25] or voluntary "standards", including technical specifications for electronic equipment, standardized packaging guidelines laid down by national bureaus of standards, codes of good manufacturing practice or private sector requirements (e.g. CENELEC standards for electronic devices, GLOBALGAP standards for agricultural production, Tesco's Nature's Choice requirements for food quality or the Forest Stewardship Council's standard for sustainable timber). In addition, the procedural requirements of testing, inspection and certification to determine compliance with the relevant technical regulations or standards may, in themselves, be barriers to trade. The latter are commonly termed "conformity assessment procedures" (e.g. the EC's inspection structures for the registration of geographical indications).[26]

Although TBT measures most often pursue legitimate policy goals, and are thus an essential part of the sovereign authority of governments, they may be designed in such a manner as to serve to protect domestic producers from foreign competition, being more trade restrictive than necessary to achieve their policy objectives. Such measures may form significant barriers to trade.

Technical barriers to trade can have an important impact on ACP exports. In a paper submitted by the World Bank and the International Monetary Fund (IMF) to the WTO Working Group on Trade, Debt and Finance, it is reported that technical standards have become a key concern for developing countries with regard to market access.[27] Similarly, in the São Paulo Conclusions of UNCTAD XI, express reference was made to the difficulties developing countries face in meeting standards and requirements on the markets of developed countries.[28] The 2005 report of the Blair Commission for Africa noted that the greatest concern of African countries with regard to trade is the need to meet product standards.[29] In addition, several World Bank studies show the difficulties technical requirements create for developing country exports to developed countries, particularly in the food and agricultural sector.[30]

It is therefore clear that, to the extent that such product requirements or standards are not the least-trade-restrictive means to achieve the relevant policy objective, they need to be disciplined in trade agreements, including the EPAs, in order to achieve market access gains.[31]

However, disciplining TBTs is a delicate task that requires striking a careful balance between respect for the legitimate policy objectives of the measure, on the one hand, and the objective of trade liberalization through the prevention of disguised protectionism, on the other. This task is further complicated by the importance of trust in achieving the necessary balance. As stated by Baldwin, Evenett and Low:

> … reducing the protectionist content of product regulation without lowering regulatory quality requires trust; the liberalising governments must believe that the other government is capable of establishing and enforcing highly technical rules in a transparent and credible manner. This "trust issue" plays an important role in understanding why TBT liberalisation is so different to tariff liberalisation.[32]

Consequently, more is needed than just disciplines to distinguish legitimate technical requirements from those used as a form of disguised protectionism and to diminish the trade restrictive effects of legitimate TBT

measures. Concerted efforts must also be made to improve the capacity of exporting developing countries to enact, enforce and check compliance with technical regulations and standards. Whether these objectives are met by the rules in the WTO's Agreement on Technical Barriers to Trade or those in the EPAs will be examined in Section 2.2 below.

1.2.3 Sanitary and phytosanitary measures

As stated above, SPS measures are those requirements that aim to protect human, animal or plant life or health, or the territory of a country, against food-borne risks or risks from pests or diseases of plants and animals. They may lay down requirements for food or agricultural products (such as requirements regarding permissible additives in processed foods) or for the processes by which these products are made (such as hygiene requirements for abattoirs).

Examples of SPS requirements for access to the EU market are its Hazard Analysis and Critical Control Point (HACCP)[33] requirements for food business operators[34] and its maximum residue levels (MRLs) for pesticides in food and feed.[35]

These regulations are usually accompanied by rules regarding conformity assessment procedures, which are control mechanisms to check compliance with the relevant requirements. These may take various forms, such as certification systems, random sampling and testing procedures, systems for prior approval of additives and pre-shipment inspections. They may be imposed on products within the domestic market, for example requirements regarding veterinary inspections of cattle within the national territory, or on products crossing borders, either at the time of importation or exportation.[36] For example, customs officials in the importing country may be required to detain imported fruit shipments for purposes of point-of-entry sampling and testing for levels of pesticide residues, or certification requirements may be laid down according to which competent officials in the exporting country may verify that hygiene requirements were met by the abattoirs where the exported meat was processed. An example of an EU conformity assessment procedure is contained in the EU's regulation on official controls to verify compliance with its food and feed law.[37] As noted in a 2007 report by PricewaterhouseCoopers, onerous EU procedures for inspection have been reported to cause costly delays, both in the fisheries sector in the Southern African Development Community (SADC) countries and in the horticultural sector in the Eastern and Southern Africa (ESA) region. The impact of these delays is particularly grave in the case of fresh products, which must reach the consumer promptly.[38]

Sanitary and phytosanitary measures serve a particularly important public policy objective, namely the protection of the life or health of humans, animals or plants. As such, the right of governments to take SPS measures is universally recognized, as is their discretion in setting the level of protection against SPS risks that they aim to ensure in their territories.

However, it is clear that SPS requirements have an important impact on exports of ACP countries in the agricultural sector (both primary and processed products), a sector of great importance to many of these countries.[39] This impact is particularly strong for those countries at lower levels of development and with lower compliance capacity, as explained above. SPS requirements may be a significant market access barrier for food and agricultural products, thereby reducing export earnings and affecting rural livelihoods. In addition, SPS requirements could be misused for protectionist purposes, thereby undermining the gradual gains in the liberalization of agricultural trade pursued under the WTO's Agreement on Agriculture.[40]

According to the World Bank, despite that fact that most agricultural production is absorbed by the domestic market, agricultural exports can produce faster growth than demand on the local market. This is because the international market provides opportunities for growth without the constraint, which exists on the

domestic market that increased production would lead to sharply lower prices.[41]

However, although developing countries have almost doubled their share of world trade in manufactured products since 1980, their share in agricultural trade has stagnated at 30 percent.[42] Moreover, sales to other developing countries accounted for 56 percent of growth in developing country agricultural trade.[43] Middle-income developing countries have managed to increase their share in the agricultural market by exporting to other developing countries and by diversifying to non-traditional exports, such as seafood, cut flowers and processed foods.[44] Low-income countries have, instead, experienced a decline in their share of world agricultural trade.[45] Aggravating the vulnerability of low-income countries to problems related to trade in agricultural products is the fact that many of these countries rely on a limited range of commodities for their export earnings.[46] As reported by PricewaterhouseCoopers in 2007, the economies of ACP countries are characterized, to a greater or lesser degree, by "a high level of dependence on very few primary products or services".[47] These countries are particularly vulnerable to market barriers against those agricultural products in which they trade.

Many opportunities for economic growth and poverty reduction through export trade exist through diversification in the agri-food sector.[48] Due to population increases, mainly in developing countries, demand for food is increasing significantly. In addition, the progressive liberalization of agricultural trade achieved under the auspices of the WTO will gradually reduce traditional trade barriers in this sector. Finally, increased affluence of consumers in developed, but also increasingly developing, countries drives demand for diverse and high-value agri-food products, such as fresh fruit and vegetables and processed foods.[49]

Diversification of low-income country food and agricultural exports from traditional bulk agricultural commodities (such as grains, coffee, tea and cocoa) to high-value perishable products (horticultural products, meat and diary) and processed agri-food products holds potential for great gains in trade earnings.[50] This is due to the fact that these products are less vulnerable to price volatility and are rapidly gaining market share.[51] The expanding demand for high-value and processed foods goes hand-in-hand with growing incomes in developed (and now some developing) countries, year-round demand for fresh produce, the increasing prevalence of small households, and the expansion of women's participation in the workforce.[52]

The recognition of the potential benefits of diversification is reflected, for example, in the new strategy pursued by Mauritius to reduce the impact on its economy of the reform of the EC's sugar regime.[53] Mauritius's agricultural exports are dominated by sugar,[54] the main market for which is the EC.[55] The sugar exports of Mauritius, until recently, benefited from the guaranteed high prices provided under the Sugar Protocol to the Cotonou Agreement with the EC.[56] The sugar sector in Mauritius will be affected significantly by the reforms, as production costs of sugar in Mauritius are twice as high as in the rest of the world.[57] The loss of export earnings following the reform of the EU's sugar regime poses great challenges to the economy of Mauritius and to its development situation. Mauritius has recognized the need to diversify its agricultural exports to diminish its dependence on preferential arrangements for sugar exports, but has faced serious constraints to increasing crop production due to the lack of suitable land and labour, the insufficiency of irrigation facilities, the increasing cost of energy and the need for pest and disease control.[58] As a result, Mauritius has identified the policy objective of becoming an agro-processing hub in the region by importing agricultural products from other countries, such as Madagascar and Mozambique, in its region and processing and re-exporting these products.[59] Mauritius has particular attributes that give it an advantage in this area. For example, it has existing know-how and technology in agro-processing; some of its agro-processing firms are already producing under international franchises and it

has modern infrastructure at ports and airports (warehouses, cold rooms and processing centres).[60] By making use of synergies with other countries in the region and taking advantage of its technology, infrastructure and communications facilities, Mauritius aims to make its domestic agro-processing industries more competitive and better able to exploit export opportunities.[61]

The importance of processed products for trade in agricultural products was confirmed by the WTO's *World Trade Report* of 2004, which found that exports of processed agricultural products increased significantly faster than exports of unprocessed or semi-processed agricultural products in the period 1990-2002.[62] Currently, developed countries have captured the greatest part of trade in this rapidly expanding sector.[63] The 14 largest agricultural exporters evinced a strong shift towards processed agricultural products.[64] Similarly, agricultural trade is shifting away from traditional bulk products, such as dried gains and pulses, toward high-value, perishable products, like fresh fruit and vegetables, meat, diary and fish.[65] While most of this trade is accounted for by developed countries, the more advanced and prosperous developing countries have been able to take advantage of this trend by shifting production to these sectors.[66] Trade diversification in the agri-food sector has the potential to be a catalyst for growth also in low-income countries, if they can overcome the supply side constraints they face with respect to trade in this area.

Diversification of developing country agricultural exports to high-value and processed food products brings with it not only the potential for increased prosperity, but also new risks of non-traditional trade barriers.[67]

A particular form of trade barrier affecting exports of agri-food products to the EU, especially high-value fresh and processed products, is its SPS requirements. In fact, a survey conducted in 2004 indicates that many developing countries consider SPS measures the most important barrier to their agricultural exports to the EU, exceeding in importance traditional market barriers, such as tariffs and quantitative restrictions.[68] The importance of SPS measures as market barriers can be partly attributed to the lack of resources,[69] both technical and financial, in many developing countries to address sanitary and phytosanitary risks, even on a basic level (such as by prevention of filth and decomposition).[70] These problems are even greater with regard to high-value fresh and processed agri-food products.[71] Processed food products destined for sale directly to consumers are subject to stricter sanitary requirements than food exports destined for further processing.[72] Similarly, high-value perishable products are more strictly regulated than traditional agricultural exports, as they are more vulnerable to infection by pathogens than traditional bulk products.[73] Many concerns have been raised about the legitimacy of these strict requirements.[74] Those ACP countries that lack the capacity to meet these stricter SPS requirements may be hindered in their diversification efforts. For example, as noted by PricewaterhouseCoopers in a 2007 report:

> … the main obstacle to exports to the EU from Western Africa is the lack of local cooling capacity … In the Pacific region, infrastructure to process fish would contribute to development and value added. … In the ESA region, development in the horticulture sector is constrained by a lack of laboratory facilities and accreditation bodies.[75]

Therefore, the success of the export diversification initiatives of ACP countries to the high-value, fresh and processed food sector, such as that of Mauritius as mentioned above will depend on the ability of these countries to meet the SPS requirements of the EU. This is recognized by the Mauritian strategy paper, which notes that a serious constraint to exploiting the possibilities to become a regional agro-processing hub is the poor sanitary and phytosanitary conditions in the region.[76] The strategy paper emphasizes the importance of establishing and vigorously enforcing international norms in Mauritius and in countries in the region where Mauritian

agro-processors will source their inputs as essential prerequisites for achieving success in this initiative.[77]

Studies have been conducted to attempt to quantify the impact of SPS standards on developing country trade in general.[78] Quantification has proved difficult due to the paucity of available data and the difficulty in ascertaining and measuring these effects.[79] Nevertheless, some estimates have been made with the use of econometric models,[80] and they show that the strict SPS requirements of developed countries have proved very costly for countries at lower levels of development. These costs are generated both by the losses suffered owing to rejection of products and their subsequent destruction or diversion to less lucrative markets and by investments made to meet the relevant SPS requirements.[81]

Supply side constraints in meeting SPS requirements are exacerbated by the differences in SPS requirements and regulatory regimes between the EU and the ACP countries. Faced with more pressing health concerns[82] and other competing development priorities,[83] many low-income ACP countries often do not prioritize SPS regulation as an area of government spending.[84] The EU, on the other hand, tends to maintain high levels of SPS protection, in keeping with its technological and financial capabilities as well as the demands of its consumers and agricultural industries. The proliferation of SPS regulations and standards in the EU in recent decades is a reflection of these differences.

Four main factors can be identified as creating an impetus for the rise in the number of SPS requirements in the EU and in general.

First, there is an increase in the number and variety of potential risks contained in food and agricultural products. This can be partly ascribed to changes in the nature of traded products. There is growing demand for processed food products, and thus more possibilities for contamination at various stages of the processing chain. Risks are compounded by increasing use of new technologies in agriculture and food processing, such as pesticides, additives and genetic modification. In addition, as discussed above, trade in high-value perishable products is on the rise, and these products are more vulnerable to infection by pathogens than traditional bulk products, such as dried grains and pulses. Changes in the sources of traded products also play a role in the increased risk of importation of unsafe food, pests or diseases.[85] Consumer tastes, especially in developed countries, are increasingly international, so that demand for foreign food products is growing, and seasonal fruits and vegetables must be provided year round. There has consequently been growth in imports from developing countries whose domestic SPS infrastructures are often perceived as inadequate to address sanitary and phytosanitary risks. As a result of these developments, there has been a proliferation of SPS regulations and private standards to deal with the increase in volume, variety, sources and technical sophistication of food and agricultural products being traded.

Second, regulators and economic operators in the agri-food sector have to respond to the elevation in consumer expectations and demands with regard to food standards in the EU. Due to increased affluence in the EU, consumers are willing to pay more for a higher level of health protection. Consumer awareness of food-related risks is also on the rise in the EU, where education levels are high and consumer advocacy groups have the resources to identify and publicize health risks. Increased consumer concerns with regard to food safety, quality, environmental impact and animal welfare have also led to progressively stricter and more comprehensive EU regulation and more demanding private requirements by European supermarket chains. In addition, as life expectancy has greatly increased in EU countries, the long-term health effects of chemicals and contaminants in food are more significant, prompting higher consumer demands in this area. The emergence of precautionary approaches to risk regulation can be seen as a response to elevated consumer demands.

Third, EU regulators are faced with pressure from the agriculture and food industry lobbies in the face of increased competition due to progress in agricultural liberalization. The first hard-won steps toward liberalizing this traditionally protected sector were taken in the Uruguay Round negotiations, resulting in the Agreement on Agriculture.[86] The subsequent ongoing agricultural trade liberalization mandated by the Agreement on Agriculture,[87] and now the subject of torturous negotiations in the context of the Doha Round of trade negotiations,[88] aims to dismantle the wall of traditional protectionist measures (tariffs, export subsidies and domestic support) shielding domestic producers from competition. The agricultural industry therefore seeks to convince regulators to put in place non-tariff barriers in the form of SPS regulations. In many European countries the domestic industry provides significant input into the regulatory process, resulting in SPS regulations that favour domestic producers or reflect their best practices.

Fourth, advances in science and technology have contributed to the creation of comprehensive regulatory systems and control mechanisms in developed countries, such as those in the EU. Great strides have been made in scientific knowledge of the causes of risks, particularly with regard to microbiological contaminants in food and plant and animal pests and diseases. This has made it possible to regulate effectively against an increasing array of identified risk factors. The substantial progress made in technological capacity to test for the presence of risk-causing elements, such as bacteria, chemicals and metabolites, has made it possible to lay down extremely strict requirements and to ensure that these are met through ever-stricter conformity assessment mechanisms.

As a result of these developments, the number and stringency of SPS regulations adopted by the EU is steadily increasing, and market access for food and agricultural products from ACP countries is being greatly reduced. Swazi citrus exports and Namibian bone-in lamb exports are among those that have faced serious SPS barriers to trade with the EU.

Consequently, in order for trade agreements such as the EPAs to be truly supportive of development, it is necessary to discipline effectively importing countries' use of SPS measures. As such disciplines act on the interface of two vitally important but conflicting interests, namely the protection of health and the liberalization of agricultural trade, they must strike a very delicate balance between these two interests. In particular, the relevant rules must reduce the trade restrictive effect of SPS requirements without endangering the ability of importing countries to enact and enforce regulations that are necessary to protect human, animal and plant life and health in their territories. In addition, they must promote capacity building to enable developing countries to meet the legitimate SPS requirements of their trading partners. The question of whether these objectives are met by the WTO's SPS Agreement or by the EPAs will be examined below.

2. PROVISIONS ADDRESSING NON-TRADITIONAL BARRIERS TO TRADE IN THE WTO AGREEMENTS AND THE VARIOUS EPAS: A COMPARISON

2.1 Introduction

Disciplines to address non-traditional market access barriers are to be found mainly in two WTO agreements negotiated in the Uruguay Round. As the EC, all its Member States and most ACP countries are WTO Members, they are bound to give effect to these disciplines. It is therefore useful to examine the relevant provisions of these WTO agreements, and the concerns raised regarding these provisions, as the framework against which to assess whether the rules in the EPAs to deal with non-traditional market access barriers represent an improvement on the existing multilateral disciplines.

In the Uruguay Round negotiations leading up to the WTO agreements that address non-traditional barriers to market access, developing countries evinced a new willingness to engage actively and make reciprocal concessions in order to gain concessions in areas of particular interest, including agriculture. Developing countries undertook to bind themselves, as part of a "single undertaking" to broad-ranging disciplines, encompassing rules not only on traditional trade barriers, but also on non-traditional barriers to trade in the form of regulatory measures and administrative procedures, for example the TBT Agreement and the SPS Agreement. The implementation of these new disciplines entails progressively higher compliance costs, in the form of legislative reform and the creation of the necessary institutional infrastructure, the less developed a country is. Instead of negotiating exemptions from these rules, as they had in past negotiating rounds, developing countries called for a new form of special treatment, in the form of longer transition periods, consideration for their special positions and the provision of technical assistance.[89] However, these provisions in the relevant agreements are either non-binding or are framed in such open terms as to be practically unenforceable. Expectations with regard to special and differential treatment and technical assistance have therefore not been met.[90] As noted by Finger and Schuler: "The developing countries have taken on bound commitments to implement in exchange for unbound commitments of assistance".[91]

Developing country WTO Members regard special treatment as the *quid pro quo* for the extensive obligations they undertook in the Uruguay Round, and therefore consider the inadequate implementation thereof a cause for concern. Consequently, the lack of implementation of the special treatment provisions by developed country WTO Members and the high compliance costs for developing country Members of implementing the disciplines of these new agreements led to growing dissatisfaction with the asymmetrical costs and benefits of the multilateral trading system as reflected in the outcome of the Uruguay Round.

Therefore, as will be seen below, various concerns have been raised by developing countries with regard to the implementation of the relevant agreements addressing non-traditional barriers to trade. These implementation concerns relate to the failure of developed countries to fully and faithfully implement certain provisions of these agreements, including those provisions on special and differential treatment of, and technical assistance for, developing countries. Implementation concerns also have been raised with regard to the difficulties encountered by developing countries in complying with their own obligations under those Uruguay Round agreements as they create disciplines for national regulatory systems.[92] These agreements address "behind-the-border" areas of regulatory policy and require significant investments to build up the required regulatory infrastructure. The implementation concerns of developing countries formed a key aspect of the discussions leading to the launch of the Doha Development Round of negotiations

at the WTO.[93] The implementation discussion centred on the "rebalancing" of the Uruguay Round agreements to address the asymmetry in the results obtained.

The lack of implementation of provisions on special and differential treatment and technical assistance has been a factor limiting the benefits that developing countries might have reaped from the market access gains resulting from the Uruguay Round agreements on non-traditional barriers to market access, due to the fact that developing countries face supply-side constraints. These constraints mean that many developing countries cannot take full advantage of increases in market access opportunities, as they lack the capacity to respond to these opportunities.[94] For this reason, increased market access does not necessarily translate into increased exports from developing countries. In order for trade liberalization to result in real economic growth for developing countries, increased market access must go hand-in-hand with effective technical assistance and capacity building to ensure that developing countries have the means to take advantage of market access gains.[95] However, due to the fact that the references to technical assistance in the Uruguay Round agreements are couched in hortatory terms, they have fallen short of addressing supply-side constraints.[96]

A look will now be taken at the main disciplines, contained in the relevant WTO agreements, on each of the categories of non-traditional barriers to market access, set out in Section 1 above. These will be used as the background against which to view the relevant provisions of the various EPAs to determine whether the latter are more effective in improving market access for ACP countries by promoting implementation of useful disciplines and addressing the supply-side constraints of these countries.

2.2 Technical Regulations, Standards and Conformity Assessment Procedures

As noted in Section 1.2.2 above, TBT measures, whether in the form of technical regulations, standards, or conformity assessment procedures, can significantly restrict trade. They are therefore subject to disciplines in both the relevant multilateral trade agreement (the WTO TBT Agreement)[97] and in regional trade agreements, such as the EPAs.

The rules typically found in multilateral and regional trade agreements that aim to liberalize TBT measures can take various forms. Principally, they focus on:

- ensuring that the TBT measures applied are necessary to achieve a legitimate policy objective, and are the least trade restrictive way of doing so;
- promoting the harmonization of national TBT requirements around international or regional standards;
- reducing the difficulty, cost and delay arising from conformity assessment procedures, including through mutual recognition of testing and certification;[98]
- requiring transparency of TBT measures (e.g. advance notification of draft TBT measures, with the opportunity for submission of comments, and prompt publication of adopted TBT measures);
- providing, in some cases, for institutional cooperation by means of a contact point for exchange of information, the designation of competent authorities to check the implementation of technical requirements and/or the establishment of a committee to provide a forum for consultations between the trading partners to discuss their concerns regarding each other's TBT measures and attempt to find an agreed solution;
- encouraging cooperation with, or the provision of technical assistance to, developing countries.

The WTO TBT Agreement incorporates these types of disciplines, among others, on TBT measures. The main obligations of the TBT Agreement are briefly set out below and examined against the

provisions of the various EPAs (summarized in Appendix 1). This comparison is aimed at determining whether the EPAs contain additional disciplines on TBTs beyond those already set out in the TBT Agreement and, if so, the extent to which they are effective in minimizing the trade restrictive effect of TBT measures.

As seen from the summary table in Appendix 1, all but two of the interim EPAs between the EU and ACP country groupings have Chapters dealing with TBTs. Of these EPAs, two (the CARIFORUM EPA and the SADC EPA) deal with TBT measures in separate Chapters devoted purely to this issue.[99] Another four (the EPAs with Côte d'Ivoire, Ghana, the Central African Party[100] and the Pacific countries) do so in a joint Chapter covering also SPS measures.[101] This is a less useful approach as the particularly delicate conflicting interests balanced by rules on SPS measures, namely health and agricultural liberalization, justify a different approach to that applied to TBT measures.[102] The two EPAs that contain no provisions disciplining TBT measures — that with the ESA countries and that with the Economic Commission for Africa (EAC) countries — do refer to TBT measures in a *rendez-vous* clause, in which Parties agree to continue negotiations in this area.[103]

It is useful to examine the provisions of the relevant EPA Chapters in more detail, to determine the extent to which they are useful in reducing the trade restrictive effect of TBT measures, beyond that achieved by the WTO TBT Agreement.

2.2.1 Reaffirmation of WTO disciplines

All six of the EPAs that address TBT measures refer expressly to the rights and obligations contained in the WTO TBT Agreement, and reaffirm the commitment of the EU and ACP signatories to the principles and objectives of this Agreement.[104] It is interesting that both the Central African EPA and the Pacific EPA extend the application of the rules of the WTO TBT Agreement to those EPA Parties that are not WTO Members, and would thus otherwise not be bound by these disciplines. Although, the three current ACP Parties to both these EPAs (Cameroon, Fiji and Papua New Guinea) are all WTO Members, one would expect that these provisions were drafted with the expectation that other countries in these regional groupings that are not WTO Members[105] will sign on to the EPAs in future, and thus be brought under the disciplines of the TBT Agreement as part of their EPA obligations.

In the case of the Pacific EPA, the application to non-WTO Members is softened by the recognition by the EC of the capacity constraints such countries may face with regard to compliance in the short term. In addition, this EPA refers to the application of the special and differential treatment provisions of the TBT Agreement to EPA parties, both those that are WTO Members and those that are not.

Aside from the reaffirmation of the rules of the TBT Agreement, the EPAs contain additional provisions, addressing specific issues that relate to TBT measures. These deserve closer attention, and comparison with the WTO TBT Agreement, to establish whether they represent an improvement to the existing rules of the latter Agreement and thereby increase market access opportunities for ACP exports.

2.2.2 Necessity and least trade restrictiveness

TBT measures may be used as disguised forms of protectionism, by unnecessarily restricting market access for imports beyond what is justified by their public policy objectives. The WTO TBT Agreement is aimed at preventing such misuse by requiring that TBT measures not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.[106] This obligation is reinforced by the requirement that technical regulations not be "more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create".[107] A non-exhaustive list of legitimate objectives is provided, including national security, environmental protection, and the protection of human, animal or plant life or health, but other policy objectives than those listed (for example animal welfare and labour standards) could be covered by this provision.

In determining whether a technical regulation or conformity assessment procedure is not more trade restrictive than necessary, the risks of non-fulfilment are a relevant consideration.[108] Clearly a more trade-restrictive measure would be seen as "necessary" when the risks addressed by the measure are grave (for example risks to human health) than when they are less serious (for example risks of consumer misinformation). Thus, an element of proportionality between means and ends can be read into the "necessity" requirement.

These provisions of the TBT Agreement are keys to weeding out disguised protectionist measures from among legitimate public policy regulations. While the EPAs do not refer specifically to these disciplines nor build upon their terms, they are included in those rules of the TBT Agreement reaffirmed in general by the relevant EPAs, as noted in Section 2.2.1 above. Therefore, they can be regarded as an inherent part of the obligations in the EPAs that address TBT measures for all EPA Parties that are WTO Members as well as for the Parties to the Central African and Pacific EPAs that are not WTO Members, as discussed above.

2.2.3 Harmonization

Harmonization of technical requirements is beneficial to exporters as it reduces the burden of compliance with a plethora of requirements across different export markets. It enables exporters to maximize economies of scale by being able to access several markets through compliance with a single set of technical requirements.[109] As a result, many multilateral and regional trade agreements encourage parties to harmonize their technical requirements.

The harmonization of technical regulations and standards within free-trade regimes typically relies on international standard setting to generate norms. International standard setting refers to the process of establishing a single regulatory standard to be applied by all Parties to the particular free-trade system. This harmonized standard can be set by the decision-making bodies of the free-trade organization itself, as in the case of the EC for its 27 Member States. Alternatively, the standard can be set by existing, authoritative international standard-setting organizations, such as the International Organization for Standardization (ISO), that are independent of the trade regime but relied upon in the relevant rules thereof, as is the case in the rules of the WTO and NAFTA on TBT measures.

However, harmonization of technical requirements is not always feasible or desirable. It has been noted that the "one-size-fits-all" approach inherent in harmonization ignores the fact that regulatory policies and institutions differ for good reasons. They reflect varying circumstances, including comparative costs which differ with levels of development.[110] They also reflect legitimate differences in local conditions and consumer preferences. Sally argues that harmonization "pollutes" the international trading system by intruding too far into regulatory competence.[111] Similarly, Mayeda regards international harmonization as "largely an ineffective tool for dealing with development issues" due to its failure to recognize the need for countries to enact legislation and develop institutions that are suited to their own domestic situations.[112]

Consequently, trade agreements typically encourage Parties to harmonize their technical requirements around international standards, but allow for deviation from these standards when they are not feasible or practicable for the importing country.

This is the case with the WTO TBT Agreement. It requires WTO Members to base their technical regulations, standards and conformity assessment procedures on relevant international standards that exist or are imminent.[113] Harmonization is further encouraged by means of the rebuttable presumption that a technical regulation that is based on an international standard, and that is aimed at one of the legitimate objectives expressly listed in the Agreement,[114] does not create an unnecessary obstacle to trade.[115] This presumption is useful to a regulating Member whose TBT measure is challenged in a dispute

settlement proceeding. Thus, it serves to motivate Members to base their TBT measures on international standards.

However, the TBT Agreement contains an exception to the harmonization obligation where such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objective pursued by the TBT measure (for example due to fundamental climatic or geographical factors or technological problems).[116] The WTO's Appellate Body has clarified that for a TBT measure to be based on an international standard, it does not have to entirely conform to the international standard, but only be applied as the "principal constituent or fundamental principle" for enacting the TBT measure.[117] Further, it has noted that an international standard would be regarded as "effective" if it has the capacity to accomplish all the objectives pursued by the measure, and would be "appropriate" if it were suitable for the fulfilment of all such objectives.[118] This flexibility is increased with respect to developing countries in the TBT Agreement's Article on special and differential treatment of developing country Members. In particular, this provision recognizes that these Members should not be expected to use international standards as a basis for their technical regulations, standards or test methods where these are "not appropriate to their development, financial and trade needs".[119]

The harmonization obligations of the TBT Agreement are among those reaffirmed in the EPAs.[120] The EPAs themselves do not go further in providing stricter obligations regarding harmonization around international standards. While five of the six EPAs that cover TBT measures have provisions dealing, to a greater or lesser extent, with harmonization, these provisions are mostly focused on the agreement to cooperate in the relevant international standard-setting organizations.[121] The SADC EPA also expressly states that Parties agree to identify and implement, for priority products and sectors, mechanisms among those supported by the TBT Agreement, including the promotion of harmonization towards international standards whenever possible in areas of mutual interest, and the use of such standards in the development of technical regulations, standards and conformity assessment procedures.[122] This does not strengthen the promotion of harmonization but only amounts to an additional reaffirmation of the harmonization rules of the TBT Agreement when it comes to priority products and sectors.

Aside from international harmonization, intra-regional harmonization may also be sought in a trade agreement. Such harmonization may be more easily achieved, and may be more appropriate, due to the greater homogeneity of a regional group. In the EPA with the Central African Party, which, as stated above,[123] has Cameroon as its sole EPA Party, the latter undertakes an obligation to harmonize its TBT measures intra-regionally within four years of the entry into force of that EPA.[124] In addition, the Central African States agree on the need to harmonize their import conditions for products originating in the EC.[125] This provision does not currently have much effect while there is only a single EPA party of the Central African region. However, should further Central African States join this EPA, they would be obliged to harmonize their TBT measures intra-regionally within four years of the entry into force of the EPA, for EC-originating products. The EPAs with Côte d'Ivoire and Ghana incorporate under the areas for cooperation, including through technical and financial assistance, identified in their provisions, the adoption of regionally harmonized technical regulations, standards or conformity assessment procedures on the basis of international standards.[126]

Regional harmonization among the ACP Parties to an EPA has the advantage of promoting regional integration, as it facilitates the movement of products between these countries. Thus, exporters in the participating ACP parties can take advantage of a broader market where their products need to meet a single set of requirements. This is less the case when regional harmonization is focused on products that originate in the EC, as is the

case with the Central African EPA. This works to facilitate market access for EC exporters to the Central African region, but only benefits those Central African exporters that produce the same products as those originating in the EC, which would then also enjoy harmonized technical requirements for exports to the other EPA countries of the Central African region. Other intra-regional exports of Central African countries do not benefit from harmonized technical requirements within the region. With respect to exports to the EU, although not mentioned in the EPAs, ACP countries already benefit from the largely regionally harmonized technical regulations and standards that result from the EU's Single Market. Thus, they have to comply with a single set of requirements for access to the 27 Member States of the EU.

Furthermore, some level of harmonization as between the EU and ACP Parties to the EPAs is promoted in two cases, namely those of the SADC EPA and the Pacific EPA. Both of these EPAs refer to the development of "common views and approaches" by the Parties, with respect to technical regulatory practices (including transparency, consultation, proportionality, use of international standards, conformity assessment and market surveillance).[127] These common views and approaches are, clearly, something less than harmonization of substantive TBT requirements or standards, reflecting the difficulty of harmonization between Parties as divergent in capacity and priorities as the EC and the various ACP countries.

Aside from the problem related to the suitability of international standards for different situations in the various parties to a trade agreement, another problem with harmonization of technical requirements around international standards relates to the process of international standard setting. The international standards on which harmonization is based, most often, do not truly reflect the interests of all the countries that are parties to the relevant free-trade agreement. This is because of "the nature of global regulatory standard-setting processes".[128] There is no global government provider of international regulatory standards that weighs up costs and benefits to all stakeholders. Instead, as Drahos points out, harmonized standards are developed by imperfect international institutions, whose standard-setting procedures involve "contests of principles between complex alliances of state and non-state actors with different mechanisms at their disposal".[129] Economic and political strength plays a role in this process, and international regulators are subject to capture by influential interest groups.[130] Multinational food and agrochemical companies wield a great deal of political power behind the drive towards the international harmonization of standards. This power is used to influence the positions of states in the standard-setting process in order to achieve outcomes that benefit such companies.

The relative power of actors within international institutions shapes the standards that are the outcome of the standard-setting procedure. Actors such as countries at lower levels of development are often underrepresented in international standard-setting bodies or lack the resources to effectively promote their interests.[131] Those countries and industry interest groups that do have the financial, technical and human resources to participate effectively in the glut of committees where the international standard-setting work is done "end up defining the level of public goods"[132] provided by harmonized standards. High-income participants, including the EC, have become adept at using the international standard-setting process to pursue their trade interests.[133] It has been noted that for industrial countries "international standards have followed rather than shaped national standards".[134] This is often due, in large part, to the strength of their existing regulatory systems.[135]

In fact, much critical attention has been focused on the standard-setting process in

the international standard-setting bodies and the problems that countries at lower levels of development face with regard to effective participation therein.[136] The constraints that limit the ability of these Members to promote their interests in the international standard-setting process are manifold. First, lack of resources often leads to inadequate attendance by less-developed countries at meetings of the standard-setting bodies, particularly the subsidiary committees where the real standard-setting work is done. As a result, the opportunities for these countries to influence the standard-setting process are limited. Second, even when delegates are sent to the relevant meetings, the lack of mechanisms for coordination between government departments and for consultation with stakeholders at national levels may mean that the positions of these countries at meetings of the standard-setting bodies are often ill-informed. Third, the lack of regulatory experience and infrastructure of some of these countries may make it difficult for their delegates to evaluate the implications of the standards being discussed. Fourth, in many countries at lower levels of development, weak regulatory capacity makes it difficult to collect the technical data necessary to provide adequate input into the standard-setting process. As a result, the standards that are set may not reflect the specific conditions in these countries, including their production methods.

This pitfall of harmonization is reflected in the outcome of international standard-setting procedures. International standards often do not take account of developing country preferences and resource constraints.[137] Instead, the harmonization process can be described as a best-practices approach under which developed country regulatory practices "are compared and debated at organization meetings, after which the most attractive ones are selected and then recommended to regulators throughout the globe".[138]

While this has the positive result of allowing developing countries to benefit from the regulatory experience and technical expertise of developed countries and of spreading high-quality technical requirements across the world, it has a downside as well. The deficient participation and influence of developing countries in elaborating the harmonized standards often means that the resulting standards are inappropriate for their situations, technically or financially unachievable for them or absent in areas most useful for them.[139] Examples of areas of particular interest to certain developing countries where standards are lacking are spices and exotic fruits. Critics have noted that international standard setting tends to focus on income-sensitive products, such as energy drinks, and that the risk management solutions reflected in the standards are resource-intensive.[140] Harmonisation, it is argued, has been harnessed by industry interests in developed countries to generate "complex, rigid and costly standards … to realise their protectionist aims".[141]

Such international standards are of little use to Members at lower levels of development. This is ironic when one bears in mind that one of the objectives of international harmonization was to provide developing countries that lack the capacity to develop their own regulations with standards they can usefully draw upon. Henson notes that: "[d]eveloping countries regard international standards as a resource-efficient approach to establishing technical regulations at the national level, which reflect current scientific knowledge and facilitate international trade".[142] He therefore emphasizes the serious consequences of the inability of developing countries to participate effectively in international standard setting for the appropriateness of the resultant standards for developing countries.[143] This problem has led to limited use of international standards by those countries for which harmonization was expected to hold the most benefits. As stated in the WTO's 2005 World Trade Report:

> Contrary to expectations, countries with scarce resources and limited capacity do not necessarily have the largest share of adopted international standards. In fact, resource constraints seem to restrict poor countries' integration into the international standardization system as much if not more than they restrict their own standardization activities.[144]

Despite these flaws, harmonization of standards is growing in importance and will "require developing countries to rethink the ways in which they regulate for the provision of public goods".[145] There are new limits on the regulatory choices available to developing countries. This is particularly the case for technical regulations and standards now that the disciplines of the TBT Agreement provide a strong incentive for WTO Members, particularly those at lower levels of development, to align their requirements with international standards.[146] This calls for a concerted effort to increase the extent of the influence of countries at lower levels of development in the international standard-setting processes.

Recognition of the importance of effective participation in international standard setting is reflected in the TBT Agreement, which requires Members to "play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards".[147] In recognition of the fact that resource constrains may mean that full participation is not feasible for all countries, the provision on special and differential treatment of developing countries in the TBT Agreement includes an obligation for WTO Members to "take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organised and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members".[148] Due to the flexibility in the wording of this obligation, however, it has been inadequately implemented to date. A question arises concerning whether the EPAs represent an improvement on this situation.

The EPAs do reflect a realization of the need for ACP countries to receive assistance to improve the extent of their participation in international standard setting. Reference to cooperation in international standard setting in the EPAs, therefore, in most cases, goes hand in hand with mandating the facilitation of participation by the representatives of ACP countries in the meetings and work of the international standard-setting bodies.[149] However, no specific details on how participation will be facilitated are given. In addition, no concrete budgetary commitment has been made for this purpose. Therefore, the EPAs do not seem to redress effectively the inadequacies of the relevant provisions of the TBT Agreement in this regard.

2.2.4 Equivalence and mutual recognition agreements

An alternative to harmonization, in situations where differences between Parties makes the adoption of harmonized standards unfeasible or impracticable, is the use of the recognition of equivalence of differing TBT measures, including in mutual recognition agreements. This does not require harmonization of the content of technical regulations, standards or conformity assessment procedures but only requires that the differing TBT measures of the exporting country be recognized as equivalent in effectiveness to those of the importing country and thus sufficient to grant access to the latter's markets. Mutual recognition agreements may be concluded to embody such recognition of equivalence in reciprocal form.[150] This is a useful way to eliminate the trade-restrictive effect of differing technical requirements, while respecting the right of countries to impose diverging requirements that are in line with their particular situations and regulatory capacities.

Equivalence and mutual recognition agreements may relate to technical requirements themselves or to the process for assessing conformity with those requirements. Examples of the latter are where countries agree to recognize the certification by each other's Competent Authorities of compliance with the prescribed technical requirements, or to accept as accurate the test results achieved by each other's laboratories in demonstrating compliance with technical requirements. In some cases this can take the form of an international or regional agreement creating a conformity assessment system. Examples of these are the Worldwide System for Conformity Testing and Certification of Electrical Equipment (IECEE) and the International Accreditation Forum (IAF).

The WTO TBT Agreement tries to promote equivalence by requiring WTO Members to "give positive consideration" to accepting as equivalent the technical regulations and conformity assessment procedures of other Members, if these adequately fulfil the legitimate objectives of their own regulations or procedures.[151] Unfortunately, practice has shown that many WTO Members require "sameness" rather than equivalence (equal effectiveness in meeting the objective) of TBT measures, and thus the rules on equivalence in the TBT Agreement are poorly implemented. WTO Members are further encouraged in the TBT Agreement to engage in negotiations for the conclusion of mutual recognition agreements in respect of the results of each other's conformity assessment procedures.[152] However, currently very few mutual recognition agreements have been concluded by WTO Members. This inadequate implementation of the relevant rules is not surprising in view of the weakness of the hortatory wording used.

None of the EPAs contains obligations concerning the recognition of equivalence in general. Only one EPA, namely that with the SADC region, makes express provision for mutual recognition agreements.[153] This EPA notes the agreement of the Parties to identify and implement mechanisms among those supported by the TBT Agreement that are most appropriate for priority issues or sectors, including the consideration, in due course, of mutual recognition agreements in sectors of mutual interest. This clearly does not lay down an obligation to negotiate such agreements but only to consider doing so in sectors that are a priority for the Parties. It, therefore, evinces the same shortcoming as the provision on equivalence in the TBT Agreement.

Mutual recognition, while not expressly termed as such, is implicit in the EPA with the Central African Party. This EPA provides that, pending intra-regional harmonization, existing import conditions shall apply on the basis that an EC product legally placed on the market of a Central African state may legally be placed on the market of any other Central African state without further restrictions or requirements. This obligation on the Central African EPA Parties, once more than one Central African State signs this EPA, will require them to recognize each other's technical requirements for importation as sufficient to guarantee access to their individual markets, but only for products originating in the EC. Therefore the market access gains of this mutual recognition obligation are limited to EC exporters. It is difficult to see why such a limited application was foreseen for this provision. Once Central African Parties have enough confidence in each other's technical import requirements to mutually recognise them in respect of EC products, it would not seem logical not to do so in respect of products produced within the Central African region. Otherwise, they would deny their own exporters the advantage of economies of scale in the region.

2.2.5 Conformity assessment procedures

As noted above, not only the substantive technical requirements imposed by the EU, but also the procedures in place to establish conformity with these requirements can create formidable barriers to market access. For this reason, rules disciplining such procedures are

useful in reducing the trade- restrictive effect of TBT measures.

The WTO TBT Agreement contains detailed rules on conformity assessment procedures. As noted elsewhere in Section 2, it extends the obligations of non-discrimination,[154] least-trade restrictiveness,[155] harmonization,[156] transparency[157] and equivalence[158] to such procedures.

In addition, the TBT Agreement contains specific rules fleshing out some of these obligations to minimize the procedural burden of conformity assessment. First, unnecessary procedural delays are addressed by the TBT Agreement. In particular, WTO Members are obliged to ensure that conformity assessment procedures are undertaken as expeditiously as possible, that applications are promptly examined for the completeness of the documentation, that deficiencies are clearly communicated to the applicant and that the results of the assessment are communicated to the applicant as possible.[159] Second, fees imposed for conformity assessment must be equitable in relation to such fees charged for like domestic products.[160] Third, efforts are made to restrict the administrative burden of conformity assessment procedures by limiting information requirements imposed to what is necessary to assess conformity and determine fees, by requiring that the siting of conformity assessment facilities not be such as to cause necessary inconvenience to applicants and by obliging WTO Members, when product specifications are changed after conformity has been assessed, to limit the conformity assessment procedure for the modified product to what is necessary to determine whether adequate confidence exists that the product still meets the applicability technical regulations or standards.[161] Fourth, additional transparency obligations are imposed, namely that the standard processing period for conformity assessment procedures is published,[162] and that an applicant is informed of the specific anticipated processing period for his/her application upon request.[163] Finally, WTO Members are required to put into place a review procedure for complaints regarding conformity assessment and to take corrective action when a complaint is justified.[164]

These rules of the TBT Agreement are among those reaffirmed by the EPAs that address TBT measures. However, very little is added by the EPAs themselves to the existing disciplines in this area. Aside from very general references to conformity assessment in the provisions on transparency and consultations[165] and those on areas for cooperation or collaboration,[166] no specific provisions aim to reduce further the trade restrictive effect of conformity assessment procedures between EPA Parties. This may be seen as a missed opportunity as harmonization of conformity assessment procedures, or the recognition of the equivalence of testing, inspection and certification could be more actively pursued between regional partners than is the case at the WTO level. If such efforts go hand in hand with technical assistance to improve the capacity of the ACP EPA Parties in this area, the trade-barrier effect of these procedures could be minimized without reducing the EC's ability to achieve its regulatory objectives.

2.2.6 Transparency and information exchange

A significant, though often underestimated, obstacle to trade that arises from TBT measures is their lack of transparency. The significance of transparency disciplines lies in two main areas, which could be called the *ex ante* and the *ex post* effects of transparency.

The *ex ante* effect of transparency can be described as follows. Exporters in a particular country are affected by regulatory decisions taken by regulators in their trading partners, yet they traditionally have no say in the decision-making process involved. Foreign regulators take into account national priorities and interests when making decisions regarding technical regulations, standards and conformity assessment procedures. This raises the problem that Robert Keohane has called the "external accountability gap"[167] in describing the situation that arises in a globalizing world

where the impact of the actions of a state no longer coincide with its jurisdiction but go beyond it, affecting the lives of persons outside it.[168] Imposing *ex ante* transparency obligations on regulating countries ensures that exporting countries are informed of proposed new or amended TBT measures and that affected foreign traders have the opportunity, through their governments, to raise concerns regarding these proposals and to have these comments taken into account in the regulatory process.

The second important aspect of transparency lies in its *ex post* effects. An important hurdle to exporters is the paucity of information that is available regarding the technical requirements that they must comply with on their export markets and how conformity with these requirements is to be assessed. TBT measures are often complex and subject to change, as a result of which exporters have no certainty that their products will have access to the markets of the country of destination. Obtaining necessary information regarding the TBT requirements they have to comply with is often a costly and burdensome process for exporters. Transparency obligations requiring prompt publication of adopted TBT measures are crucial in facilitating market access for exporters by greatly reducing the cost and difficulty of obtaining information on their trading partners' technical requirements.

The WTO TBT Agreement already contains extensive transparency obligations with respect to both advance notification of draft TBT measures with sufficient time for comments for other WTO Members[169] and prompt publication of adopted TBT measures providing a reasonable period for adaptation to new requirements.[170] Only where technical regulations are adopted to address urgent problems of health, safety, environmental protection or national security, may a Member deviate from the advance notification requirements.[171] In such cases, the Member must still notify the TBT measure upon its adoption and allow for comments from other Members.[172] However, concerns have been raised with regard to the implementation of these provisions. Some notifications provide insufficient information to assist Members in assessing the implications of the draft measure for their exports or they provide inadequate comment or adaptation periods.[173] To facilitate effective implementation of the transparency obligations of the TBT Agreement, the WTO TBT Committee has agreed on non-binding guidelines and a recommended format for notifications.[174]

Another obstacle to the enjoyment by some Members of the full benefits offered by the transparency obligations of the TBT Agreement is their lack of capacity to monitor the great numbers of notified and published TBT measures to identify areas of trade concern for their exporters.[175] To assist in this regard, the WTO Secretariat has developed the Technical Barriers to Trade Information Management System, which is a freely available electronic source of comprehensive information on TBT measures. It allows users to search for and download information on the TBT measures that WTO Members have notified.[176]

Four of the six EPAs that address TBT measures reaffirm the transparency obligations of the TBT Agreement.[177] As the remaining two EPAs (those with Côte d'Ivoire and Ghana) include a general article reaffirming the obligations of the TBT Agreement, as noted above, the transparency obligations of this Agreement are included.

The question arises concerning whether the EPAs create any additional disciplines or procedures on transparency and consultations that improve upon the existing WTO rules. The specific provisions on transparency and consultations in the various EPAs will therefore be examined.

The CARIFORUM EPA contains a "best-endeavour" commitment by the Parties with respect to the advance notification obligation. It provides that Parties agree to endeavour to inform each other at an early stage of proposals

to introduce or change technical regulations or standards that are especially relevant to trade between the Parties.[178] A similar "best-endeavour" provision is contained in the Pacific EPA.[179] This does not add much to the existing advance notification obligations of the TBT Agreement, aside from focusing on those TBT measures that are especially relevant to trade between the Parties. The CARIFORUM EPA further notes the agreement of the Parties to identify products for which they will exchange information with a view to collaborating so that these products meet the TBT requirements for access to each other's markets.[180] This allows a Party to focus its transparency efforts on those products that are a particular priority for the other Party, and to exchange the necessary information to facilitate market access for these products.

In addition the CARIFORUM EPA notes the agreement of the Parties to enhance communication and exchange of information on TBT matters, particularly on ways to facilitate compliance with each other's TBT measures and to eliminate unnecessary barriers to trade.[181] Similarly, in the EPAs with Côte d'Ivoire and Ghana, Parties agree to exchange information with the aim of cooperating to ensure that their products comply with the technical regulations and standards subject to which they may access each other's markets. The Pacific EPA, along the same lines, requires Parties to provide the necessary information to facilitate access to information on TBT-related measures and their implementation and enforcement to avoid or resolve any difficulties between the Parties that may arise from such measures.[182] These provisions could indeed be a useful addition to the existing transparency obligations, if they are faithfully implemented, since often the problem for exporters lies in lack of information on ways to meet the technical requirements of a trading partner. Directing the exchange of information to the facilitation of compliance and the resolution of market access difficulties therefore aims to address this problem.

Further, the CARIFORUM EPA and the EPAs with Côte d'Ivoire and Ghana commit Parties to written notification, as soon as is reasonably possible, of import bans imposed for health or environmental reasons.[183] The EPAs with Côte d'Ivoire and Ghana specify that this notification take place "in a spirit of collaboration and with the aim of addressing the relevant health or environmental problem". These provisions are more limited than the TBT Agreement's obligation of prompt publication,[184] which covers all adopted TBT measures, but they improve transparency with respect to the measures they do cover (import bans for health or environmental purposes) by requiring direct written notification to the other Parties rather than mere publication, which may be limited to an official government gazette. This more focused notification ensures that the other Parties to the EPA become aware of the adopted bans, even if they lack the capacity to keep track of all officially published TBT measures. A broader obligation of direct notification is contained in the EPA with the Central African Party. It covers all "topics agreed to be of potential importance" to the trade relations between the Parties.[185]

The SADC EPA explicitly recognizes the importance of effective mechanisms for consultation, notification and information exchange on TBT matters, in accordance with the TBT Agreement.[186] It notes Parties' agreement to identify and implement mechanisms supported by the TBT Agreement that are most appropriate for priority products and sectors.[187] These include the exchange of information and the identification and implementation of appropriate mechanisms for particular issues or sectors; the intensification of collaboration (to facilitate access to their respective markets) by increasing mutual knowledge and understanding of their respective systems in the field of technical regulations, standards, metrology, accreditation and conformity assessment; and the identification and organization of sector-specific interventions on technical regulations and conformity assessment with a view to facilitating under-

standing of and access to their respective markets. Once again, these provisions allow a focus of concerted efforts for transparency and collaboration on priority products and sectors with a view to facilitating market access in these areas. They are useful in promoting familiarity of the trading partners with each others' systems of technical regulation and conformity assessment, rather than only with specific TBT measures. A similar provision is contained in the Pacific EPA, but in the latter case it applies to TBT measures in general and does not focus on priority products and sectors.[188]

The EPAs with Côte d'Ivoire and Ghana and the Central African Party oblige Parties to inform each other of changes to technical regulations, a matter already covered by the notification obligation of the TBT Agreement.[189] More important, Parties to the EPAs with Côte d'Ivoire and Ghana agree to cooperate with a view to rapidly alerting each other when new regional rules might have an impact on mutual trade.[190] Should TBT measures be promulgated on a regional level, therefore, this provision would extend the transparency obligations to such measures. The Pacific EPA provides for EC cooperation with initiatives of the Pacific states to establish an efficient notification mechanism at the regional level.[191]

Transparency is most effective when it is complemented by mechanisms to address the concerns that arise with the notified or published TBT measures. The following discussion will shed light on the question of whether adequate institutional arrangements are provided in the EPAs to facilitate information exchange and consultations for the prompt and amicable resolution of disputes concerning TBT measures.

2.2.7 Institutional arrangements

An important tool to diminish the trade-restrictive effects of technical regulations, standards and conformity assessment procedures, which goes hand in hand with transparency and consultation obligations, is the creation of institutional mechanisms to facilitate their implementation.

One such institutional arrangement is the identification of recognized bodies, known as "Competent Authorities", responsible for the implementation of the agreed rules on TBT matters, which is useful in reducing administrative costs and delays. Often, designated Competent Authorities are also responsible for monitoring the enforcement of technical requirements and the assessment of conformity therewith in respect of both exports and imports. Consequently, their designation is usually subject to the agreement of the other Party, since the latter's trust in the competence and reliability of such an Authority is essential.

In addition, bodies and procedures may be established through which information regarding technical requirements can be obtained and through which concerns can be discussed and resolved. Such a body is often called a "Contact Point" or an "Enquiry Point". Further, a body, sometimes termed the "National Notification Authority", may be established to bear responsibility for compliance with notification obligations.

Three EPAs, those with Côte d'Ivoire, Ghana and the Central African Party, provide for the identification of Competent Authorities for TBT (and SPS) matters, responsible for the implementation of the provisions of the EPA Chapter dealing with these matters.[192] Appendix II of each of these EPAs sets out, in general terms, the Competent Authorities of the Parties and obliges Parties to inform each other of any significant changes to the listed Competent Authorities. Amendments to Appendix II of these EPAs may be adopted by the EPA Committee.[193]

The Competent Authorities of the ACP EPA Parties are subject to the approval of the EU. As Doherty and Campling point out, this entails public sector costs in complying with the accreditation and legislative requirements as well as recurring costs in maintaining the

system, in particular the costs of operating laboratory and inspection services.[194]

Appendix II of the three relevant EPAs notes that, for the ACP EPA Parties, the Competent Authority is vested in the signatory ACP states for imports to and exports from their territories. However, for the EC Party, the competence is shared between the Member States of the EC and the EC Commission. As regards exports to the ACP EPA Parties, the EC Member States are responsible for monitoring production conditions and requirements, including statutory inspections and the issuing of health (or animal welfare) certificates confirming compliance with the agreed standards and requirements. As regards imports from the ACP EPA Parties, the EC Member States are responsible for monitoring the imports' compliance with the EC's import conditions. The EC Commission is responsible for overall coordination, inspections/audits of inspection systems and the necessary legislative action to ensure the uniform application of standards and requirements within the Single European Market.

The WTO TBT Agreement requires Members to ensure that an Enquiry Point exists to answer all reasonable queries from other Members and interested parties in other Members, as well as to provide the relevant documents with regard to their TBT measures.[195] In addition, each Member must designate a single central government authority to implement its notification obligations with regard to technical regulations and conformity assessment procedures.[196]

The CARIFORUM EPA is the only one among the EPAs that makes express provision for the designation of Contact Points by the Parties in respect of TBT matters.[197] In addition, this EPA notes the agreement of Parties to channel information exchange on TBT matters through regional Contact Points to the maximum extent possible. Typically, Contact Points provide a one-stop source of information on a Party's technical requirements, and can be approached for copies of the relevant technical regulations, explanations on their application, guidelines for conformity assessment requirements and similar useful information to facilitate compliance. In addition, comments on notified draft measures can be sent to the regulating Party's Contact Point. This facilitates information exchange by avoiding the difficulty of identifying which among the plethora of government departments and other bodies responsible for technical regulations, standards and conformity assessment procedures should be approached in respect of a specific measure. Although the remaining EPAs do not make provision for the designation of Contact Points for TBT matters, the EPA Parties that are WTO Members and thus bound to the TBT Agreement (and those to whom the obligations of the TBT Agreement have been extended in the relevant EPA, as discussed above) are obliged to create an Enquiry Point as required under the TBT Agreement as discussed above.

Channelling information even further through regional, rather than national, Contact Points as is done in the CARIFORUM EPA could facilitate matters even more for exporters. However, it would require a high degree of institutional coordination among the members of the region to ensure that the regional Contact Point has ready access to the necessary information and has efficient channels of communication with the relevant national authorities. Such a system is more feasible in regional groupings that already have common institutional mechanisms, such as the CARIFORUM countries through CARICOM, and the EC, than in more loosely integrated regional ACP groupings.

Once information has been exchanged with regard to TBT measures, it is useful to have institutional mechanisms in place whereby concerns regarding TBT measures can be discussed with a view to achieving an amicable solution. Consultations between the trading partners may go a long way to reducing the trade-barrier effect of technical requirements by allowing adaptation in response to concerns raised. In addition, an

institutional forum for discussions on TBT matters can have a broader purpose than allowing for consultations on trade concerns related to specific measures. It can create an opportunity for sharing experiences and learning, as well as for improving and refining existing rules. Therefore, it is interesting to examine to what extent such institutions are provided for, either at multilateral level under the TBT Agreement or at the regional level under the EPAs.

The WTO TBT Agreement establishes the TBT Committee, composed of representatives of all Members.[198] This Committee aims to afford Members the opportunity to consult each other on any matters related to the operation of the TBT Agreement or the furtherance of its objectives. The Committee meets three or four times a year, providing a regular forum where Members can raise trade concerns regarding notified or adopted TBT measures.[199] For example, an issue that has been discussed extensively in meetings of the TBT Committee is the EU regulation on the Registration, Evaluation and Authorization of Chemicals (REACH). Several WTO Members have criticized the REACH regulation as untransparent, overly complex and unnecessarily restrictive to trade.[200] Discussions on this issue have taken place in several meetings of the TBT Committee, and the EC has had to provide clarifications and further information to address the concerns of other Members. In addition, discussions at the TBT Committee enable Members to become acquainted with each other's regulatory systems and underlying approaches which, in turn, facilitates compliance and builds the trust necessary for enhanced implementation of mechanisms, such as mutual recognition.

It is useful to examine whether the EPAs provide institutional mechanisms to promote the resolution of problems regarding TBT measures through consultations. The SADC EPA merely recognizes the importance of effective mechanisms for consultation, but does not oblige Parties to create such mechanisms.[201] However, it does create a Trade and Development Committee, which has among its tasks the provision of coordination and consultation on TBT issues.[202] The CARIFORUM EPA and the Pacific EPA oblige Parties to inform and consult with each other as early as possible, where a TBT problem arises that may affect trade between the Parties.[203] This should be done with a view to obtaining a mutually agreed solution. However, as no provision is made for consultation procedures in the CARIFORUM EPA, it would seem that this is left to bilateral arrangements on an ad hoc basis. The Pacific EPA allocates the task of providing consultation and coordination on TBT issues to the Trade Committee established under that agreement.[204] The Pacific EPA further notes that nothing in the relevant Chapter impairs the rights of Parties under other international agreements, including the right to resort to good offices or dispute settlement. Therefore, the WTO dispute settlement system remains available to the Parties to address technical barriers to trade under WTO rules.

It has been recommended that technical working groups be established under the EPAs to:

> … advance the regulatory dialogue and promote cooperative responses to sharing information and improving technical capacity as necessary to help ensure that the gains available through the EPAs are not hampered by obstacles that can be overcome through increasing cooperation, awareness and capacity building. In many cases, gains can best be achieved through cooperative regulatory dialogue that takes place in conjunction with improved institutional arrangements and development cooperation.[205]

Aside from consultative mechanisms to resolve disputes regarding specific TBT measures, institutions are needed to address more general TBT-related topics and to ensure the effective implementation of the disciplines relating thereto. Clearly, a body where discussions can be held on general TBT-related issues and where improvements to existing rules

can be agreed can be valuable. In addition to consultations on specific trade concerns, the WTO TBT Committee provides a forum for discussions on important TBT matters of general relevance and for the periodic review of the operation of the TBT Agreement. For example, in 2008-2009, an exchange of experiences by Members was conducted in the TBT Committee on issues including good regulatory practice, conformity assessment procedures, transparency, technical assistance and special and differential treatment. The TBT Committee organized a workshop on good regulatory practice on 18-19 March 2008 to improve Members' understanding of the contribution of good regulatory practice to the implementation of the TBT Agreement.[206]

The Trade and Development Committee and the Trade Committee established under the SADC and Pacific EPAs respectively,[207] are institutional bodies with broad tasks with regard to the administration of the EPAs and the attainment of their objectives. As noted above, consultations on TBT issues are expressly within their mandates. In addition, these Committees are entrusted with the task of identifying and reviewing priority sectors and products for cooperation on TBT matters, as well as the task of making recommendations for the modification of the EPA provisions on TBT measures, if necessary. In the remaining EPAs, the functions of the administration of the EPAs and the fulfilment of the tasks referred to in the relevant EPAs are in the hands of the EPA Committees created under their provisions.[208] While no express mention of TBT issues is made in the latter EPAs, one may assume that TBT-related issues that are necessary to the operation of the EPAs come within the authority of these Committees and can be discussed in that institutional context.

2.2.8 Cooperation and technical assistance

As previously noted, the expansion of rules in trade agreements beyond issues of tariffs and quotas into areas of regulatory activity, brings with it new problems. The ability of countries to comply with, and benefit from, such rules depends on their 'starting position.'[209] In other words, the existing situation in a country, such as the strength of its regulatory system, its infrastructure and its human and financial resources will affect the impact of regulatory disciplines on that country, its ability to comply with these rules and its ability to use those disciplines against other countries to gain market access.[210]

It is therefore necessary to find ways to ensure that agreements laying down regulatory disciplines, including the EPAs and the WTO TBT Agreement, address the capacity constraints faced by developing countries, such as the ACP countries. If the capacity of these countries to benefit from the rules in the trade agreements, and to comply with the regulatory requirements of their trading partners, is not improved, the provisions of these agreements will be of limited benefit to them.

It is currently widely acknowledged that technical assistance is crucial for developing countries to be able to implement those trade agreements requiring regulatory capacity and infrastructure or to enforce their disciplines and to comply with the regulatory requirements of their trading partners. Without such assistance, the costs of compliance with such agreements could outweigh the benefits of trade liberalization gains. For this reason, secure, predictable and effective provision of technical and financial assistance is indispensable in the case of trade rules involving regulatory disciplines.[211]

The WTO TBT Agreement makes provision for technical assistance to developing country Members.[212] Upon request, WTO Members are obliged to provide advice or technical assistance (on mutually agreed terms) in TBT-related matters, including for the establishment of national standardizing, regulatory and conformity assessment bodies, participation in international standard setting, and compliance with the TBT requirements and access to the conformity assessment systems of the importing Member. However, critical

comments have been made regarding the inadequacy of the implementation of these provisions to date. The question arises as to whether stronger or more effective provisions on technical assistance have been included in the EPAs.

The Chapters on TBT measures in the EPAs with the CARIFORUM and SADC countries, Côte d'Ivoire, Ghana and the Central African Party contain provisions on cooperation or technical assistance.[213] In fact, capacity building to identify and address TBT trade barriers and to comply with TBT requirements are among the objectives of the Chapters dealing with TBT measures in each of the EPAs.[214] For example, under the objectives of the Pacific EPA, it is stated that "Parties shall cooperate with a view to reinforcing regional integration and promoting the capacity of private and public sectors to comply with TBT-related measures".[215] However, most of these provisions are vague and unenforceable, containing only hortatory statements or best-endeavour commitments to development cooperation.

Several of the EPAs make provision for the identification of priority products or sectors, which will be the focus of cooperation. This allows Parties to concentrate the often limited technical assistance resources on areas of particular importance to the trade between them. To the extent that the priority products are determined by the exporting ACP EPA Parties, this may also contribute to ensuring that the technical assistance provided is needs driven, rather than donor driven. The CARIFORUM EPA provides that Parties agree to identify products for which they will exchange information with a view to collaborating so that these products comply with the technical requirements for access to each other's markets.[216] The SADC EPA empowers the Trade and Development Committee to identify and review the priority sectors and products and the resulting areas for cooperation.[217] Appendix IA to the SADC EPA lists priority products for regional harmonization within SADC and Appendix IB lists priority products for export from SADC to the EC. The EPAs with Côte d'Ivoire and Ghana provide, in Appendix I, for the identification of priority products by Ghana and the Ivory Coast and their notification to the EPA Committee for adoption. In the EPA with the Central African Party, Appendix IA lists priority products for regional harmonization within Central African states and Appendix IB lists priority products for export from Central African states to the EC. The Pacific EPA mandates the Trade Committee to identify and review the priority sectors and products and the resulting areas for cooperation.[218] Appendix IIIA to this EPA lists priority products for export from the Pacific states to the EC and Appendix IIIB lists priority products for trade among Pacific states.

The EPAs with the CARIFORUM states, the SADC states, Côte d'Ivoire and Ghana expressly recognize the importance of cooperation in the area of technical regulations, standards, metrology, accreditation and conformity assessment.[219] Specific areas for cooperation are identified in each EPA, aside from the one with the Pacific countries. The CARIFORUM EPA specifies the following four areas for cooperation: the establishment of arrangements for expertise sharing, including training, to ensure adequate and enduring technical competence of the relevant standard-setting, metrology, accreditation, market surveillance and conformity assessment bodies in the CARIFORUM region; the development of expertise centres within CARIFORUM for assessment of goods for access to the EC market; the development of the capacity of CARIFORUM enterprises to meet regulatory and market requirements; and the development and adoption of harmonized technical regulations, standards and conformity assessment procedures based on relevant international standards.[220] The SADC EPA lists similar areas for cooperation, but includes further the development of mutual understanding between the relevant bodies in the territories of the Parties, the need for strengthening regional cooperation and to

take account of priority products and sectors and the development of TBT Enquiry and Notification Points within the SADC region.[221] The EPAs with Côte d'Ivoire and with Ghana focus on cooperation to improve the quality and competitiveness of priority products for Côte d'Ivoire and Ghana and access to the EC market, including through assistance measures (particularly financial assistance) in: establishing a framework for the exchange of information and sharing of expertise between the Parties; the adoption of regionally harmonized technical regulations, standards and conformity assessment procedures on the basis of international standards; strengthening public and private stakeholder capacity to comply with EC standards, regulations and measures and to participate in international authorities; and developing capacity for conformity assessment and access to the EC market. The EPA with the Central African Party limits its reference to cooperation to those priority products identified in Appendix I. In particular, for products listed in Appendix IA as priorities for regional harmonization, Parties agree to cooperate with a view to strengthening regional capacity within the signatory Central African states and control capacity in such a manner as to facilitate trade between the signatory Central African states; and for products listed in Appendix IB as priorities for export from the Central African states to the EC, Parties agree to cooperate with a view to improving the competitiveness and quality of their products.

Some of the EPAs also explicitly refer to cooperation with a view to facilitating the participation of representatives from the ACP EPA Parties in international standard-setting bodies, as noted in Section 2.2.3 above.[222]

While the identification in the EPAs of specific areas for cooperation, and especially particular priority products and sectors as a focus for collaboration efforts, has the potential to ensure that technical assistance is directed towards areas where capacity is sorely lacking and towards products of particular export importance for the ACP countries, this benefit is undermined by the absence of specific mechanisms for delivery of TBT-related technical assistance and for monitoring the effectiveness of such assistance. In addition, no particular budgetary commitment is made in this area. Instead, technical assistance to give effect to the cooperation provisions with respect to TBT matters will primarily fall within the general development cooperation budget under the Cotonou Agreement.[223] Concerns have been raised by some ACP countries that the new cooperation priorities set out in the EPAs will lead to a diversion of financial assistance from existing areas of cooperation,[224] and there have been calls for firm commitments for additional financing for the identified cooperation objectives and for improvements to the quality and effectiveness of the aid granted.[225]

The general framework for financing development cooperation under the Cotonou Agreement comprises the European Development Fund (EDF) with its national and regional programmes.[226] The 10th EDF (2008-2013) makes available EUR 21,966 million and also includes all ACP trade capacity building programmes, such as "Trade.com", a support facility for ACP countries amounting to EUR 50 million. This facility includes support for the preparation of pilot projects for institutional capacity building to address technical barriers to trade. EPA implementation is also supported by aid-for-trade packages and other development policies of the EC Member States.[227] In addition, the creation of an EPA regional fund is agreed to coordinate support in order to help to finance effectively the priority measures intended to build productive capacity.[228] The detailed rules for the operation and management of the EPA regional fund are to be decided by the relevant EPA region and assessed by the EC.[229] The Cotonou Agreement includes provisions regarding a performance review to assess the extent to which commitments and disbursements have been realized and the results and impact of the aid provided. The review will contribute to a decision on the amount of the financial cooperation after 2013.[230]

The 2007 joint Aid-for-Trade Strategy of the EU has a special section on ACP needs with respect to regional integration and the EPAs. A commitment is made by the European Commission and the Member States to increase by 50 percent the trade-related assistance for ACP needs. To this end, the EC Commission is working with the ACP countries and the EU Member States to develop "Regional Aid-for-Trade Packages" to support ACP regional integration efforts, including EPA implementation. The packages aim to provide a concrete EU financial response to the needs and priorities identified by the ACP countries and regions, including through national and regional development plans. Key areas of support are identified and matched in each EPA region with appropriate responses by actors including the ACP, the EC Commission, the EU Member States and other donors.[231]

A good example of the possibilities of more concrete commitments to development cooperation on specific priority areas, such as those identified in the TBT Chapters of the relevant EPAs, is provided by the CARIFORUM EPA. Among others it sets out the main areas in which capacity building is needed in provisions on cooperation in specific sectoral chapters, including (as set out above) particular areas for cooperation on TBT matters. Moreover, a Regional Preparatory Task Force (RPTF), pending provisional application of the EPA (when these tasks will be taken over by the EPAs' own institutions, primarily the Trade and Development Committee), has been mandated to translate each sectoral cooperation provision, including that on TBT matters, into specific proposals for sectoral assistance programmes with a budgetary outline and a time line to define and prioritize development cooperation activities.[232] The RPTF is also collaborating with other possible interested donors. Such concrete initiatives would be welcome in the remaining EPAs.

2.3 Sanitary and Phytosanitary Measures

The second type of regulatory barrier to trade addressed in several of the EPAs is that of SPS measures. As discussed in Section 1.2.3 above, while these measures serve vital public policy objectives, they can act as a formidable barrier to agri-food trade, an area of critical importance for poverty alleviation in many least-developed and other low-income countries. This area has been highlighted in UNCTAD's 2008 report on economic development in Africa as a significant obstacle to African trade.[233]

Consequently, efforts are commonly made in multilateral and regional trade agreements to discipline, often by a separate set of rules to those addressing TBT measures, the use of SPS measures in ways that can affect trade. Such disciplines may include:

- the obligation to limit the application of SPS measures to what is necessary to achieve the importing country's chosen level of health protection and to apply the least trade-restrictive measure reasonably available; and an obligation to ensure that SPS measures are scientifically justified;

- the promotion of harmonization of national SPS requirements around international or regional standards;

- the obligation on importing countries to recognize the equivalence of different SPS measures of exporting countries that achieve the same level of health protection;

- the promotion of adaptation or adjustment of the SPS measures imposed by an importing country to take account of the specific SPS conditions (especially the prevalence of pests or diseases) occurring in the region of export or import of the product;

- the creation of rules to minimize the trade restrictive effect of conformity assessment procedures, including testing, inspection and prior approval systems;

- the obligation of transparency with respect to draft and adopted SPS measures (e.g. advance notification of proposed SPS measures, with sufficient opportunity for comments, and prompt publication of adopted SPS measures).

- the establishment of institutional arrangements to facilitate the implementation of SPS disciplines; create channels for the exchange of information; and provide a forum for consultations to resolve amicably any SPS difficulties that arise;

- the promotion of co-operation with, or the provision of technical assistance to, developing countries.

As noted above, the WTO has an agreement specifically dedicated to addressing sanitary and phytosanitary trade barriers, the SPS Agreement.[234] It covers SPS measures by WTO Members that may directly or indirectly affect international trade.[235] SPS measures are defined as those measures (broadly defined as including laws, decrees, regulations, requirements and procedures) that are applied to protect human or animal life or health from risks from additives, contaminants, toxins or disease-carrying organisms in food and feed; to protect human, animal or plant life or health or the territory of a Member from risks of the entry, establishment or spread of pests or diseases of plants or animals.[236] If a measure is an SPS measure falling under the scope of application of the SPS Agreement, it falls outside the coverage of the TBT Agreement (even if it takes the form of a technical regulation, standard or conformity assessment procedure).[237] As the SPS Agreement contains a distinct set of rules, including those setting out scientific evidence requirements, from those in the TBT Agreement, it is important to establish whether a particular regulation falls within the definition of an "SPS measure" and is thus subject to the SPS Agreement, or falls outside this definition and is instead subject to the TBT Agreement.

The rules of the SPS Agreement explicitly recognize the right of all WTO Members to take SPS measures to protect human, animal or plant life or health in their territories, but create limits to the exercise of this right to avoid disguised protectionism. In this way, the SPS Agreement aims at achieving a delicate balance between the recognition of the right of governments to protect health in their territories, on the one hand, and the promotion of agri-food trade liberalization on the other.

As seen from the summary table in Appendix 2, all but two of the interim EPAs between the EU and ACP country groupings have Chapters dealing with this type of non-traditional trade barrier. Of these EPAs, only two (the CARIFORUM EPA and the SADC EPA) deal with SPS issues in separate Chapters,[238] and as mentioned above, four do so in a joint Chapter covering also TBT measures (the EPAs with Côte d'Ivoire, Ghana, the Central African Party and the Pacific countries).[239] As the provisions in the latter four EPAs dealing with SPS measures are largely identical to those dealing with TBT measures discussed above, only brief reference will be made to them here. It should be recalled, however, as pointed out above, that SPS measures merit special attention and are therefore more usefully addressed by a separate set of rules than jointly with TBT measures. The remaining two EPAs, namely that with the ESA countries and that with the EAC countries, refer to SPS measures in a *rendez-vous* clause, in which Parties agree to continue negotiations in this area.[240]

It is useful to examine the provisions of the relevant EPA Chapters in more detail, to determine the extent to which they are useful in reducing the trade restrictive effect of SPS measures, beyond what is currently achieved by the WTO's SPS Agreement.

2.3.1 Reaffirmation of WTO disciplines

As was the case with regard to the EPA provisions on TBT measures, all six of the EPAs that address SPS measures refer expressly to the rights and obligations contained in the WTO's SPS Agreement and reaffirm the commitment of the EU and ACP signatories to the principles and objectives of this Agreement.[241]

Once again, it is interesting to note that both the EPA with the Central African Party and the Pacific EPA extend the application of the rules of the SPS Agreement to those EPA Parties that are not WTO Members (none of the signatories at present), and would thus otherwise not be bound by these disciplines. In the case of the Pacific EPA, the application to non-WTO Members is subject to the recognition by the EC of the capacity constraints that such countries may face with regard to compliance in the short term. In addition, this EPA refers to the application of the special and differential treatment provisions of the SPS Agreement to EPA parties, both those that are WTO Members and those that are not.[242]

Aside from the reaffirmation of the rules of the SPS Agreement, the EPAs contain additional provisions, addressing specific issues that relate to SPS measures. These deserve closer attention to establish whether they add to the existing WTO disciplines and thereby improve the market access opportunities for ACP exports by diminishing the trade restrictive impact of the EU's SPS requirements.

2.3.2 Necessity, least trade restrictiveness and scientific basis

One of the key disciplines of the SPS Agreement, among those reaffirmed by the relevant EPAs, is the requirement that SPS measures be applied "only to the extent necessary to protect human, animal or plant life or health".[243] This necessity requirement is further fleshed out in the obligation on WTO Members to ensure that their SPS measures "are not more trade restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility".[244] These rules aim to ensure that WTO Members do not overreach their health objectives in the SPS measures they apply. While the level of health protection to be achieved is entirely up to the importing WTO Member, if alternative SPS measures that are less trade restrictive are reasonably available and achieve the chosen level of protection, Members must opt for these less-trade-restrictive alternatives.[245]

In addition, it is crucial to establish whether an SPS measure applied is truly aimed at sanitary or phytosanitary protection, in order to distinguish such measures from disguised forms of protectionism. The SPS Agreement therefore requires that an SPS measure be based on a risk assessment as defined in Annex 1.4 of the SPS Agreement.[246] Proof of an actual risk, not merely a hypothetical risk, to human, animal or plant life of health must therefore be shown scientifically in order to differentiate between legitimate SPS regulation and disguised protectionism.

The SPS Agreement, however, is fully cognizant of the fact that science does not always provide definite answers regarding the prevalence and magnitude of possible health risks. It therefore allows WTO Members to impose SPS measures on a temporary basis where the scientific evidence on the risk at issue is insufficient.[247] These measures are commonly known as "precautionary measures". They are intended to take account of the prevalence of uncertainties in scientific evaluations of risk, particularly in areas as complex as human, animal and plant health. In such cases, WTO Members must seek to obtain the additional information necessary for a risk assessment and must review their SPS measure within a reasonable period. The SPS Agreement neither set outs when scientific evidence will be deemed "insufficient" enough to trigger the application of this exemption nor defines how long such a temporary measure may be kept in place. These matters have been clarified in the WTO case law, which establishes that scientific

evidence is insufficient if it does not allow the conduct of a risk assessment as required under Article 5.1 of the SPS Agreement,[248] and that the length of the "reasonable period" within which a precautionary measure must be reviewed depends on the difficulty of obtaining the additional necessary information to conduct a risk assessment.[249] While it would be useful for exporting countries, linking the "reasonable period" for review artificially to a specific time limit would compromise the ability of a Member to keep an SPS measure in place as long as necessary for a scientific assessment to clearly establish the presence or absence of a risk. This would undermine the careful balance sought in the SPS Agreement between the right of governments to protect health on their territories and the need to liberalize agri-food trade.

These core disciplines of the SPS Agreement are not explicitly addressed in the EPAs. However, they form part of the obligations reaffirmed in the six EPAs that contain Chapters dealing with SPS barriers to trade, as noted above. They are therefore an inherent part of the EPA disciplines on SPS measures in respect of those EPA Parties that are also WTO Members, as well as any non-WTO Member Parties to the Central African and Pacific EPAs.

2.3.3 Harmonization

Vast differences exist in the SPS regulatory systems of the EU and those of the various ACP countries, leading to differing SPS requirements on various export markets. These differences can be ascribed to the divergent economic, ecological, institutional, cultural, social and legal contexts in which they occur. For example, a country with a largely pest-free status may have sophisticated quarantine requirements in place, whereas a country whose territory is already teeming with pests may not regard this as a priority. Similarly, the EC, with its generally affluent, risk-averse citizens may choose to impose rigorous farm-to-fork requirements for the production process of food products, while a particular ACP country whose citizens face food shortages or risks from infectious diseases may rather set out simpler food-safety requirements aimed at the final food product and focus its financial resources on poverty alleviation and basic sanitation. Diverging SPS requirements are thus a reflection of the diversity in both capacity and policy priorities that exists in different countries and can be seen as a natural outcome of the exercise of sovereign regulatory authority by governments.

However, as in the case of technical requirements discussed above, regulatory diversity in the area of SPS requirements has long been recognized to constitute a significant trade barrier. Differences between domestic SPS requirements in an ACP country and those on the EC market can act as non-tariff barriers to trade by subjecting ACP producers to additional requirements to access the EC market, beyond those that they have to meet in the country of production. When producers are further faced with a multiplicity of SPS requirements in the different export markets, meeting all these requirements will be even more burdensome and costly, thus reducing efficiency gains and preventing the realization of economies of scale, as noted above. The promotion of harmonization of SPS requirements aims to address this problem.

Harmonization initiatives in the area of SPS regulation have a long history. Hand in hand with the expansion of trade in food and agricultural products came the increasing awareness of the trade restrictive effect of divergent national SPS requirements and of the need to promote their harmonization. Already in 1903, the International Dairy Federation drew up standards for international trade in milk and milk products.[250] Other commodity organizations took similar initiatives. In the 1930s, under the auspices of the International Institute for Agriculture, several conventions establishing uniform rules for particular commodities were adopted.[251] This trend has grown beyond efforts by specific commodity interest groups. After the Second World War, regional initiatives to harmonize food

regulations were launched, such as the development of a Latin American Food Code and the Codex Alimentarius Europeaus.[252] Currently, free-trade regimes, such as the European Community,[253] North American Free Trade Agreement (NAFTA) and the WTO, promote SPS harmonization as part of their trade liberalization disciplines.

However, unlike the EC, the WTO has no supranational regulatory authority and further lacks the expertise and institutional capacity, including the existence of scientific committees, to draw up its own SPS standards as a basis for harmonization. For these reasons, the WTO looks to other authoritative international bodies to set the harmonized standards that are used as benchmarks in the provisions of the relevant agreements. The SPS Agreement specifically references three international standard-setting bodies,[254] namely, in the area of food safety, the Codex Alimentarius Commission (CAC); in the area of animal health, the International Office of Epizootics (OIE), now called the World Organisation for Animal Health;[255] and in the area of plant health, the Secretariat of the International Plant Protection Convention (IPPC).[256] These three bodies are recognized as the leading international forums for the drafting of SPS standards and the coordination of information on SPS matters.[257] The CAC, OIE and IPPC were established in an era when regulatory cooperation in the area of SPS risks was seen as a technical, rather than a politically charged, exercise. As a result, the procedural rules for standard setting were flexible and broad, reflecting the informal, cooperative nature of the standard-setting process. The secretariats of these bodies were small and their budgets minimal. In addition, the national delegates participating in the standard-setting bodies were generally government-employed scientists or technocrats, rather than diplomats or private sector representatives.

The CAC, OIE and IPPC consequently operated in relative obscurity and their decisions were not the subject of much political concern.[258] This was primarily because adoption of the standards they set was purely voluntary. Now, the SPS Agreement has given added significance to the international standards set by the CAC, OIE and IPPC. Although still not making them formally binding, it has increased the stakes of WTO Members in these standards.[259] The promotion of the adoption of the harmonized standards by the SPS Agreement has increased the importance and visibility of these international standard-setting bodies.[260] New attention is being focused on international standard setting by states, industry and consumer groups and the result has been a politicization of their activities. These bodies are now adjusting to their new role vis-à-vis the international trading system, resulting in significant changes in their policies and functioning.[261]

While relying on the standards set by the relevant international bodies, the SPS Agreement does not lay down any procedural requirements for the setting of such standards. The standard-setting bodies referred to in the SPS Agreement have widely differing membership, decision-making structures and rules about public participation and transparency. However, the standards set in these bodies are given equal status, as benchmarks against which WTO Members' SPS requirements are assessed, by the rules of the SPS Agreement. The sole criterion is whether the relevant standard was set by an international standard-setting body referenced in the SPS Agreement or open to all WTO Members and identified as relevant by the SPS Committee.

Therefore, similar problems arise for SPS harmonization under the WTO SPS Agreement as those identified above in the discussion of TBT harmonization. These relate to the difficulty of establishing common SPS requirements that are appropriate for countries with different health priorities and regulatory capacities and take into account problems of participation of less-developed countries in the international standard-setting processes.

Due to its fundamental principle that countries have the sovereign right to choose the level of SPS protection they wish to guarantee in their territories, the harmonization provisions of the WTO SPS Agreement promote, but do not oblige, harmonization of SPS measures around international standards.[262] WTO Members are encouraged to conform their SPS measures to international standards by means of a presumption that such conforming measures are consistent with all the obligations of the SPS Agreement, which creates a 'safe harbour' for harmonized SPS measures.[263] Thus, Members that adopt harmonized SPS measures are presumed to comply also with the scientific justification requirements of the SPS Agreement, a significant advantage in case of a challenge in dispute settlement proceedings. However, respecting the right of Members to set their own levels of health protection, the SPS Agreement leaves Members free to deviate from international standards where this is scientifically justified or in order to achieve a higher level of protection. In both cases, a risk assessment fulfilling the requirements set out in the SPS Agreement is required as a basis for the deviating measure.[264]

The harmonization disciplines of the SPS Agreement are among those reaffirmed in the EPAs.[265] As is the case with regard to harmonization of TBT measures, also in the case of SPS measures the EPAs themselves do not lay down stricter harmonization obligations than those in the SPS Agreement. The EC therefore remains free to pursue levels of SPS protection higher than those reflected in internationally recognized standards, provided it can justify its deviating SPS measures by means of a risk assessment.

Five of the six EPAs that cover SPS measures address harmonization explicitly, but these provisions are rather limited. The SADC EPA merely reaffirms the principles and objectives of the three international standard-setting bodies active in the area of SPS standards, namely the CAC, the IPPC and the OIE, but sets out no further harmonization obligations.[266] Such a reaffirmation of the principles and objectives of the CAC, IPPC and OIE is also to be found in the CARIFORUM EPA and the EPAs with Côte d'Ivoire and Ghana.[267] Broadly speaking, these three standard-setting bodies aim to protect human, animal or plant health from risks from food/feed or pests/diseases, while minimizing interference with trade in food and agricultural products.[268] They do so by elaborating voluntary international standards around which states may choose to harmonize their national SPS regulations. No obligation to harmonize can thus be derived from the reference in the relevant EPAs to these international bodies' objectives and principles.

The remaining references to international harmonization in the EPAs focus on cooperation in the relevant international standard-setting organizations[269] and on the facilitation of the participation of the ACP EPA Parties in the work of these organizations.[270] This reflects an awareness of the need to address the capacity constraints faced by ACP countries in participating in this work, but does not go further to specify how participation should be facilitated or what budgetary resources will be devoted to this objective.

Regional harmonization of SPS requirements is also promoted by some of the EPAs. As previously noted, regional harmonization furthers economic integration in an ACP region by facilitating trade between the participating states. It also enables EC exporters to access the markets of the EPA Parties in the relevant ACP region by complying with a common set of SPS requirements, thus lowering costs. The CARIFORUM EPA notes Parties' agreement on the importance of establishing regionally harmonized SPS measures, both within the EC and between CARIFORUM states, and Parties agree to cooperate to achieve this objective.[271] The SADC EPA notes Parties' agreement to cooperate in facilitating regional harmonization of SPS measures and the development of appropriate regulatory frameworks within and between the SADC

states, to enhance intra-regional trade and investment. A much stronger provision on regional harmonization is contained in the EPA with the Central African Party (currently only Cameroon as stated above), in which the latter undertakes to harmonize its SPS measures intra-regionally within four years of the entry into force of the EPA.[272] In addition, for products originating in the EC, import conditions in the Central African states will be harmonized and pending such harmonization, mutual recognition of SPS requirements will apply between these states. As already noted above, this provision will become relevant once more Central African states become party to this EPA. However, the limitation of such mutual recognition to EC products can be criticized.

2.3.4 Recognition of equivalence

Differences between Members with regard to local climatic and geographical conditions, consumer preferences and technical and financial resources, may sometimes make it difficult or even undesirable to harmonize SPS measures.[273] In such cases, the resulting variety of SPS measures, even those that comply with substantive disciplines such as those in the SPS Agreement, can significantly hinder trade.

However, the negative impact of divergent measures can be limited by the recognition that it is possible for different SPS measures to achieve the same level of protection (i.e., be equally effective in reducing risk) and thus by allowing imports of products that comply with different, but equally effective, SPS measures.[274] As a result, it is possible for importing countries to rely on the SPS requirements and control and inspection systems in place in exporting countries, even where these may be different from their own, when they have been demonstrated to achieve the level of protection against risk as the measure imposed by the importing country. This is known as the recognition or acceptance of equivalence. As noted by Scott: "Equivalence is key to permitting the maintenance of regulatory diversity, while at the same time promoting market integration".[275]

The recognition of equivalence can take various forms, ranging from formal agreements recognizing the equivalence of sanitary and phytosanitary systems; to agreements of equivalence for specific products; or acceptance, on an *ad hoc* basis, of the equivalence of specific technical aspects of certain sanitary and phytosanitary measures. Equivalence may be recognized for inspection and control systems; processing techniques; or product requirements.[276] An example of equivalence recognition in respect of inspection and control systems is provided by the EU's recognition of the Kenyan Plant Health Inspectorate Services (KEPHIS) for approving operations to check conformity with the EU marketing requirements for fresh fruit and vegetables.

The recognition of equivalence is a useful method of eliminating the trade restrictive effect of SPS measures in the absence of harmonization.[277] By recognising divergent SPS measures as equivalent to their own, where these meet their appropriate levels of protection, importing countries can avoid creating unnecessary trade barriers while continuing to provide the level of protection they deem appropriate. This is of particular importance to developing countries, as their SPS measures and food safety systems often differ from those in place in importing developed countries, due to the developmental and technological constraints they face. If their measures nonetheless achieve the level of protection aimed at by the importing country, they should be recognized as equivalent.[278]

An important, but often overlooked, benefit from the recognition of equivalence is the opportunity for technical learning and assistance it provides. Efforts towards establishing equivalence of SPS measures are based on close cooperation and exchange of information at the technical level by regulatory officials. This enables the regulatory authorities of the exporting country

to gain expertise through obtaining detailed technical information regarding the particular regulatory systems in place in the importing country. Similarly, the importing country's officials become thoroughly familiar with the different regulatory system in place in the exporting country and may learn alternative approaches to risk regulation. In some cases, regulatory cooperation is institutionalized and leads to long-term relationships and sharing of information and best practices.[279]

The WTO SPS Agreement aims to promote the recognition of equivalence, both on an ad hoc basis and by means of formal equivalence agreements and in this way to minimize the trade barriers caused by divergent SPS measures.[280] Unlike the TBT Agreement, the SPS Agreement obliges Members to accept as equivalent different SPS measures that have been proven to achieve their chosen level of SPS protection.[281] However, in order for Members to be obliged to recognize the equivalence of other Members' SPS measures to their own, this provision requires that the exporting Member "objectively demonstrate" to the importing Member that its SPS measures achieve the latter's appropriate level of protection. The burden of proof is therefore clearly on the exporting Member, which must adduce proof of the efficacy of its measure in equally reducing the health risk posed by its exports. In addition, the exporting Member must allow reasonable access to the importing Member on request, to conduct its own inspections, tests and other procedures to verify that this is in fact the case. The SPS Agreement further encourages the conclusion of equivalence agreements between WTO Members by obliging Members to enter into consultations to this end upon request.[282] However, there is no obligation to actually conclude such agreements. This weaker requirement, as compared with that regarding the recognition of equivalence in general, attests to the difficulty of negotiating formal equivalence agreements, as opposed to the ad hoc recognition of equivalence with respect to specific products or measures.

If effectively implemented, the obligations regarding the acceptance of the equivalence of other WTO Members' SPS measures under the SPS Agreement could go a long way in reducing the barriers created by onerous, but legitimate, SPS measures. However, the implementation of Article 4 of the SPS Agreement to date leaves much to be desired. Despite the fact that the substantive obligations it lays down for WTO Members are clear and binding, the procedural aspects of the determination of equivalence are not. This weakness in the equivalence provision of the SPS Agreement has led to problems with its implementation. Thus, despite its many advantages, the recognition of equivalence does not often occur. Where equivalence is recognized, it is mostly between developed countries with sophisticated SPS regulatory systems and similar levels of SPS capacity.

The "objective" demonstration required for the recognition of equivalence under the SPS Agreement is expressly related to the ability of the measure of the exporting Member to meet the level of protection of the importing Member. While the equivalence provision of the SPS Agreement also expressly recognizes that different SPS measures can achieve the same level of protection, developing country Members have repeatedly raised the concern that developed-country Members demand 'sameness' rather than equivalence of SPS requirements and control and inspection systems.[283] This deprives Members of the flexibility in their choice of measures that Article 4 intends to achieve, undermining its effectiveness.

In addition, the difficulty of providing an objective basis for the demonstration of equivalence in the absence of procedural rules in the SPS Agreement led to lengthy and burdensome equivalence procedures being applied by Members. Often exporting Members have difficulty in ascertaining the level of protection their measures must meet in order to be recognized as equivalent, or cannot meet the level of scientific proof required by the

importing Member as objective demonstration of equivalence. Importing Members often do not give clear, scientifically justified, reasons for rejecting the equivalence of the measures imposed by an exporting Member. Further, the procedures and requirements for recognition of equivalence vary between importing Members, making it difficult for an exporting Member to access various markets even if it has obtained recognition of equivalence by one importing Member.

Efforts have been made by the WTO's SPS Committee to operationalize the provision on equivalence in the SPS Agreement through the establishment of non-binding guidelines for its implementation, known as the *Equivalence* Decision.[284] However, it is clear that the difficulty in obtaining recognition of equivalence of differing SPS requirements lies to a large extent in the lack of familiarity of an importing country with the SPS regulatory system of the exporting country and its effectiveness in addressing risk, and thus a lack of confidence that the level of safety aimed at by the importing country will be met. It can be expected that the necessary level of familiarity and trust can be more easily achieved between countries that have a long history of trade relations and close interaction in the context of a long-standing trade agreement, as well as a framework for capacity building to address concerns regarding SPS regulatory capabilities. Such a historical trading relationship exists between the EC and the ACP states. Stricter provisions on the recognition of equivalence could thus be appropriate in the EPAs than is the case in the SPS Agreement.

However, only two EPAs address the recognition of equivalence explicitly. The CARIFORUM EPA notes the Parties' agreement to consult to achieve bilateral agreements on the recognition of equivalence of specified SPS measures.[285] This is only an obligation of effort, not of result. In addition, it is limited to bilateral agreements between individual states rather than a regional agreement, which undermines efforts at regional integration and the building of SPS capacity on a regional level. Another limitation is the focus of the provision on specified SPS measures, rather than allowing for the recognition of equivalence in particular sectors or of regulatory systems. While recognizing the equivalence of specific SPS measures is a useful first step, it seems a pity to exclude the possibility of future discussions on broader recognition of equivalence from this provision entirely.

The Pacific EPA notes the importance of operationalizing the equivalence provision of the SPS Agreement and reaffirms the Equivalence Decision of the WTO's SPS Committee.[286] In this EPA, the EC Party agrees to give "due consideration" to requests from Pacific states to examine the equivalence of their SPS measures in areas of particular export interest to the Pacific states. What form such due consideration may take is left unspecified. It would have been useful to establish procedures, within the framework for institutional cooperation of the EPA, for the request for the recognition of equivalence and the consideration of such request according to objective criteria and within specified time limits. These procedures could be an improvement on the non-binding guidelines established by the WTO's SPS Committee.

While equivalence is not mentioned explicitly, the EPA with the Central African Party does deal implicitly with this matter to a limited degree. In particular, this EPA provides that, pending regional harmonization among the Central African states, an EC product legally placed on the market of a Central African state has market access to the other Central African states without further restrictions or requirements.[287] As noted above, this entails the mutual recognition among Central African states of each other's SPS requirements as sufficient to achieve the SPS objectives of their own import conditions. Such mutual recognition is an example of the recognition of equivalence on a systems-wide basis, although unfortunately limited to products originating in the EC.

The recognition of the equivalence of different SPS measures is a useful way to diminish the trade-restrictive effect of divergent SPS requirements by preventing these divergences from constituting reasons to restrict importation, while not harmonizing them. The technique of equivalence, unlike harmonization, does not lead to the application of uniform regulatory requirements. Instead, the divergent regulations of other countries are simply accepted as equivalent to domestic SPS regulations even if they differ in content, provided that they achieve the same regulatory objectives. Thus countries cannot prohibit or restrict imports based solely on differences in regulatory measures. Concerted efforts in the EPAs to promote the use of the recognition of equivalence to diminish the trade restrictive effects of differences in SPS measures would thus have been valuable and feasible taking into account the longstanding relationship between the EC and the ACP countries and the mechanisms for technical assistance available within this relationship. Such an effort is exemplified by the Free Trade Agreement between the EU and Chile, which sets out in detail the steps and time line for a process for the demonstration and assessment of equivalence and identifies priority products in this regard.[288]

2.3.5 Adaptation to regional differences in pest or disease prevalence

SPS conditions, in particular the incidence of pests and diseases, are not determined by national borders.[289] This may be the case due to variations in climatic, environmental or geographic conditions within a country and/or due to the efforts of the regulatory authorities to eradicate a pest or disease from specific areas. However, since regulatory responsibility is circumscribed by national borders, countries are often treated as single entities for purposes of SPS measures. This may be justified where the SPS regulatory authorities or infrastructure in a particular country are inadequate to monitor, contain or provide safeguards against SPS risks, or when significant differences exist in the risk management choices made at the national level by different countries.[290] However, in many other cases, the application of country wide SPS measures has no justification beyond administrative ease of implementation for the importing country.

If importing countries were to adapt their SPS measures to the pest or disease conditions prevailing in the region of origin of the product, this could greatly improve market access possibilities. Such adaptation of SPS measures to regional conditions in the exporting country, commonly known as “regionalization” or “zoning and compartmentalization”, is especially significant for large developing countries, where conditions vary greatly from region to region, as the costs of eradicating a pest or disease or keeping pest- or disease-free status can be limited by focusing on specific areas.

In practice, however, it is common to ban products from an entire country where it has been established that a pest or disease of significance for the importing country occurs, even if its prevalence is limited to certain regions. In addition, sometimes importing countries do not adapt their measures to the pest- or disease status of an exporting country and impose SPS restrictions against countries that are in fact free of the pest or disease at issue. An example of this is the failure of the EC to recognize the status of South Africa as free of foot and mouth disease, despite the fact that this status was officially recognized by the OIE.[291]

SPS characteristics in importing countries are also of importance to take into account in establishing SPS measures. Some importing countries are already infested by the pest or disease their import restriction intends to keep out. However, it frequently occurs that the pest or disease status of the importing country is not taken into account in applying import restrictions. For example, the United States of America maintains import restrictions on goat imports due to the risk of scrapie, while the

presence of scrapie in US sheep is currently widespread.[292] In addition, the climactic and geographical conditions in the importing country may reduce the threat of introduction of a particular pest or disease, rendering their SPS measure superfluous.

To promote the adaptation of SPS measures to regional SPS conditions, including pest- or disease-prevalence, the SPS Agreement contains a provision on regionalization.[293] It requires WTO Members to ensure that their SPS measures are adapted to the sanitary or phytosanitary characteristics of the area of origin or destination of the product, whether an entire country, part of a country, or all or parts of several countries. In assessing these SPS characteristics of a region, Members must have regard for the level of prevalence of specific diseases or pests, the existence of eradication or control programmes and appropriate criteria or guidelines that may be developed by the relevant international organizations, among other things.

The relevant obligation of the SPS Agreement is made more concrete in its second paragraph, which deals with the most controversial aspect of adaptation to regional conditions, namely the recognition of areas that are free of pests of diseases[294] and areas where the prevalence of pests or diseases is low. It obliges WTO Members to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. An open list of factors that Members must consider in the determination of such areas is provided, including geography, ecosystems, epidemiological surveillance and the effectiveness of sanitary or phytosanitary controls.

However, the procedural requirements set out in the SPS Agreement for adaptation to regional conditions are very limited, similar to those provided for the recognition of equivalence. An exporting WTO Member that claims that regions within its territory are pest- or disease-free or have low pest or disease prevalence must provide the necessary evidence to "objectively demonstrate" this fact to the importing Member. For this purpose, it must give the importing Member reasonable access for inspection, testing and other relevant procedures. No further procedural disciplines are set out, leaving it open to Members to maintain complex and lengthy procedures in this regard.

Despite the potential of adaptation to regional conditions to limit the trade restrictive effect of SPS measures by facilitating the lifting of unnecessary SPS requirements with respect to pest- or disease-free regions or by adjusting strict requirements to take account of low pest- or disease prevalence, to date implementation of this obligation in the SPS Agreement has been very limited. This has been attributed not to a problem with the substantive obligations, but rather to the weakness of the procedural rules. National administrative procedures applied by importing WTO Members for recognition of pest- or disease-free areas have been criticized as being often untransparent, complex, lengthy and expensive, and lacking clearly defined time-limits for a response to a request.[295] In addition, the lack of consistency in the various administrative procedures applied by different importing Members for the acceptance of pest- or disease-free areas has been identified as a problem.[296] Further, it has been noted that inconsistencies exist in the application of procedures to different exporting Members. This may be due to factors that 'can either generate or erode importing Members' trust'[297] in the exporting Member's regulatory system, which influence an importing Member's acceptance of pest- or disease-free areas. This has often proved a difficulty for exporting Members at lower levels of development, in cases where their SPS regulatory regimes are underdeveloped and do not inspire confidence in importing Members. In the discussions on this issue at the SPS Committee, importing Members stressed the need for confidence in the SPS status of exporting Members and for the provision of accurate information in their evaluation of requests for recognition of free status.[298]

Members have noted that the uncertainties in the national procedures to obtain recognition of pest- or disease-free areas for market access threaten the sustainability of such areas. In view of the significant investments required to establish and maintain pest- or disease-free areas, the maintenance of these areas depends on the commercial gains that producers can achieve from trade resulting from pest- or disease-free status.[299] Therefore, market access is the main objective for investing in the establishment and maintenance of pest- or disease-free areas.

The inadequate implementation of the regionalization obligation led to five years of discussions within the SPS Committee and one year of work by the group of WTO Members working on this issue. These resulted in non-binding guidelines, known as the Decision on Regionalization, which were adopted on 15 May 2008.[300] This Decision specifies useful principles to govern adaptation to regional conditions, including: transparency;[301] avoidance of undue delays;[302] non-discrimination in the application of the recognition process;[303] consideration of relevant factors, such as the strength and credibility of the veterinary or phytosanitary infrastructure of the exporting Member,[304] any relevant knowledge of and prior experience with the authorities of the exporting Member,[305] and in cases where the request is being resubmitted, all information previously provided, if the continuing validity of the information has been verified by the exporting Member.[306] Members are further encouraged to notify the SPS Committee of their requests for, and determinations of, the recognition of pest- or disease-free areas or areas of low pest or disease prevalence.[307] While recognizing the right of WTO Members to determine their own administrative procedures for the evaluation of requests for recognition of pest- or disease-free areas or areas of low pest or disease prevalence, the Decision on Regionalization sets out nine steps that are typically part of such procedures.[308] It also expressly provides the possibility for an importing Member to apply an expedited process for the recognition of pest- or disease-free areas or areas of low pest or disease prevalence,[309] on the basis of consideration of factors including whether there has been official recognition by a relevant international organization of an area as a pest- or disease-free area or an area of low pest of disease prevalence; and whether, as a result of existing trade relations, the importing Member is familiar with the infrastructure and operation of the responsible veterinary or phytosanitary service of the exporting Member.[310]

There is great potential for the EPAs to improve upon the regionalization provisions of the SPS Agreement and the guidelines in the Decision on Regionalization, due to the long history of ACP exports of plant and animal products to the EU. This familiarity can fruitfully be tapped to provide the level of "trust" needed for the recognition of areas of no, or low, pest or disease prevalence. In addition, development cooperation can usefully be directed towards the establishment and maintenance of such areas, in accordance with the standards developed by the OIE and IPPC. Simple and effective procedures for the process of recognition could be incorporated into EPA rules. Such an initiative could follow the example of the Association Agreement between the EC and Chile, which contains detailed criteria for the establishment of the SPS status of a region, and sets out lists of relevant pests and diseases for this purpose.[311]

The extent to which the EPAs fulfil this potential bears examination. There is no reference to adaptation to regional conditions in the CARIFORUM EPA. In the SADC EPA, Parties are required to apply "zoning and compartmentalization" in defining import conditions, taking account of international standards.[312] These international standards are likely to refer to those of the OIE and IPPC with respect to the determination of the SPS status of particular regions. While this provision lays down a firm obligation, procedural guidelines to operationalize it are

absent. In addition, the SADC EPA creates the possibility for Parties to jointly propose and identify zones or compartments of defined SPS status to avoid trade disruption. This may be used to facilitate the identification of pest- or disease-free areas that extend across national boundaries. Once again, however, no procedural mechanisms, deadlines or objective criteria for assessment are set out.

The EPAs with Côte d'Ivoire, Ghana and the Central African Party provide only that Parties "may, on case-by-case basis" identify and propose areas with a defined SPS status.[313] This creates a no binding obligation on Parties to identify such areas or to take steps towards recognizing the SPS status of the areas proposed by another Party. In none of the EPAs are substantive criteria or procedural guidelines set out to ease the difficulties of recognition of the SPS status of particular regions or to specify the type of proof of SPS status to be furnished by the requesting Party. The EPAs with Côte d'Ivoire and Ghana do however improve transparency in this area by stating that Parties agree to inform each other when they apply the principle of pest- or disease-free areas or areas of low pest or disease prevalence as provided in the SPS Agreement.[314] Overall, however, the provisions on regionalization in the EPAs represent a missed opportunity to promote this useful mechanism for improved market access.

2.3.6 Control, inspection and approval procedures

As previously mentioned, procedures to check conformity of products or processes with SPS requirements can be extremely burdensome for ACP exporters. To deal with this problem, the WTO's SPS Agreement explicitly includes "testing, inspection, certification and approval procedures" within its definition of SPS measures,[315] with the result that these procedures are subject to all the relevant disciplines of the Agreement. In addition, the SPS Agreement deals specifically with control, inspection and approval procedures in a separate Article and Annex, obliging Members to comply with the provisions of the SPS Agreement with respect to these procedures and setting out additional rules for this type of trade barrier.[316] These additional rules broadly aim to ensure that control, inspection and approval procedures are not more lengthy and burdensome than is reasonable and necessary and that they do not discriminate against imports.

In particular, the first obligation imposed by the SPS Agreement on control, inspection and approval procedures seeks *inter alia* to avoid undue delays in their operation.[317] Lengthy control, inspection and approval procedures can have an important trade-restrictive effect, especially in the case of perishable products. In addition, in Members operating prior approval systems based on complex risk analysis procedures, procedures may go on for several years, during which market access is provisionally denied. For example, in *EC - Approval and Marketing of Biotech Products*, the complainants claimed that the EC's approval procedures for biotech products were carried out in a manner inconsistent with the obligation to ensure that such procedures are "undertaken and completed without undue delay". The Panel noted that what matters for purposes of this obligation is not the length of the delay, but rather whether there is a legitimate reason or justification for it.[318] This must be determined on a case-by-case basis. The Panel considered that Members applying approval procedures must be allowed to take the time reasonably needed to determine with adequate confidence that their SPS requirements are met. However, in this case the EC was found to violate the prohibition on undue delay. One important cause of delays in control, inspection and approval procedures is the information requirements imposed on an exporter, in order to demonstrate compliance with the SPS requirements of the importing Member. The SPS Agreement addresses this situation by requiring that information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of

the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs.[319]

Not only undue delays, but also discriminatory application of control, inspection and approval procedures are a cause for concern. The SPS Agreement deals with this by means of a prohibition on less favourable treatment of imported products than of like domestic products.[320] Further, it includes a non-discrimination rule, requiring no less favourable respect for the confidentiality of information about imported products provided in the context of control, inspection and approval procedures than applied for domestic products.[321] This respect must be in such a manner as to protect legitimate commercial interests. This obligation takes account of the fact that control procedures may require the submission of proprietary information, such as the disclosure of ingredients and processing methods.

Further, the SPS Agreement sets out rules that aim to improve transparency and due process in the operation of control, inspection and approval procedures.[322] This provision, according to the Panel in *EC – Approval and Marketing of Biotech Products*, contains "five separate, but related, obligations to be observed by Members in the operation of approval procedures".[323] These relate to: the publication or communication to applicants of the processing period of each procedure; the examination of the completeness of the documentation and the communication to applicants of deficiencies; the transmission of the results of the procedure; the processing of applications which have deficiencies; and the provision of information about the stage of a procedure and the provision of an explanation of any delay.[324]

In addition, there are situations when procedures for control and inspection, for example sampling and testing requirements, are applied in an excessive manner to individual specimens of the product involved. This may unnecessarily raise the cost and administrative burden of the procedure for exporters. To address this problem, the SPS Agreement obliges Members to ensure that requirements for control, inspection and approval of "individual specimens" of a product are "limited to what is reasonable and necessary".[325]

To avoid the use of high fees to render imports uncompetitive, a requirement of equitable application of fees imposed for the procedures at issue is set out in the SPS Agreement.[326] What is equitable is stated in relation to the fees charged to domestic producers and other WTO Members. The criterion of equity rather than no less favourable treatment in respect of fees seems to be intended to reflect the fact that actual costs of procedures may differ depending on the origin of the products (for example, if inspectors have to travel further to inspect a production site in a particular Member, or if the SPS status of a Member necessitates more controls and testing than that of another). Further, this provision states that the fees "should" be no higher than the actual cost of the service. This is purely hortatory and thus allows higher fees when considerations of equity would not prevent this. Read in the light of the special and differential treatment provision of the SPS Agreement that obliges Members to take account of developing country Members' needs in applying their SPS measures,[327] equity could be seen to require Members to consider applying differential fees for Members at different levels of development.[328]

Further, disciplines to minimize the trade effects of control, inspection and approval procedures are included in the SPS Agreement. In particular, Members are required to minimize inconvenience to applicants, importers, exporters and their agents by using the same criteria for imported and domestic products when it comes to decisions on the selection of product samples and the location of the facilities used for the relevant procedures.[329] Where a product's specifications have been changed after it has been through control and inspection procedures, the new procedure for

the modified product may not exceed what is necessary to establish whether adequate confidence exists that the product still meets the applicable SPS requirements.[330] Due process requirements are set out in the form of the obligation to have a review procedure for complaints regarding the operation of control, inspection and approval procedures and a procedure for corrective action where such complaints are justified.[331]

Finally, the SPS Agreement addresses systems for prior approval of food additives or for the establishment of tolerance levels for contaminants in food/feed. These systems amount to the imposition of a provisional import ban on products containing such additives or contaminants, pending the decision on approval or tolerance level. Sometimes such decision is greatly delayed, or never taken, as it depends on data brought by the industry itself. An example of such a system is that under the EC's Regulation on maximum residue levels (MRLs) for pesticides on plant and animal products, according to which 325 chemical substances are to be reassessed to set new MRLs. In all cases where a particular pesticide has not been assessed on a specific product, or where no data is available to prove that its residues pose no danger to consumer health, the MRL is set at 0.01 mg/kg (the enforceable default for zero residues). Many developing countries lack the technological or analytical capacity to comply with this MRL, leading to serious adverse effects on their agricultural and food exports.[332] The EC has indicated that the reassessment of these chemicals is based on scientific information brought by the pesticide industry, but as the industry has no interest in marketing some of the older pesticides used in certain developing countries, it is not keen to fund research in this regard. Thus, no risk assessment exists and no decision is taken, leaving the default MRL in place indefinitely.

The SPS Agreement addresses this situation only by means of a weak additional discipline, requiring WTO Members to "consider" conditioning market access in such cases on the relevant international standard, until a final determination is made.[333] This does little to ameliorate the market access problem caused by such systems.

The EPAs contain meagre references to conformity assessment procedures, and no reference at all to systems for prior approval. Provisions dealing with inspection, testing and certification are limited to those on cooperation and assistance.[334] While this may partly be explained by the fact that detailed rules on conformity assessment procedures already exist in the SPS Agreement, this cannot be said for prior approval systems. It is precisely these systems that create significant problems, and should be addressed by means of effective procedural disciplines in the EPAs.

2.3.7 Transparency and information exchange

Lack of transparency of regulatory measures, as noted above with respect to technical barriers to trade, also with regard to sanitary and phytosanitary measures greatly increases the adverse impact on trade of these measures. The requirement of transparency in respect of draft and adopted SPS measures and of their related documents and information could go a long way to diminishing the obstacles to trade caused by SPS measures by enabling adjustment of draft measures in response to comments by trading partners and by facilitating compliance with adopted measures, in the same way as with regard to TBT measures discussed in Section 2.2.6 above. In addition, transparency is essential in enabling countries to exercise their rights and police the implementation of the obligations under trade agreements dealing with SPS measures.[335] Lack of information regarding the existence, content and scientific basis of SPS measures makes it difficult for countries whose exporters are faced with SPS barriers to trade to determine whether they have legal grounds to challenge these measures in terms of the applicable disciplines. Transparency with regard to SPS measures aims to ensure that Members obtain full information about

these measures in order to identify whether they are consistent with the rules of the relevant trade agreement or not. It also makes it possible for traders to be well informed as to SPS measures affecting their exports and to lobby their governments to take action in this regard. Consequently, exporting countries can try to resolve their trade concerns in bilateral or multilateral discussions with the relevant importing country or proceed as a last resort to dispute settlement procedures under the relevant trade agreement.

To this purpose, the WTO SPS Agreement contains transparency provisions. These provisions comprise, broadly speaking, three categories of transparency obligations: the obligation to publish promptly all adopted SPS measures, with the provision of a reasonable period for adaptation to the new measures;[336] the obligation to notify, in advance, draft SPS regulations to the WTO with a sufficient comment period;[337] and the requirement to provide, upon request, an explanation for the reasons behind an SPS measure.[338]

In 1996 the SPS Committee established detailed Recommended Notification Procedures, to facilitate compliance by Members with their notification obligations.[339] These recommended procedures contain guidelines for notifications under both the normal and the urgent procedure, including specific formats to be used for routine and emergency notifications. The formats are useful in that they specify the information that a Member should provide in each notification, and present this in a standardized form. These guidelines have been revised three times to address Members' concerns regarding issues such as the period for comments on notified measures, the timing of notifications, the provision of documents relating to a notification, the handling of comments on notifications, the use of addenda, corrigenda and revisions to notifications, and the notification of measures that conform to international standards.[340] They now cover all transparency obligations and are known as the *Recommended Transparency Procedures*. These procedural guidelines have been successful in increasing the number of SPS measures being notified, and improving greatly the content of notifications. It is impossible to determine how many potential trade disputes have been resolved to date through informal bilateral consultations following the notification of draft measures, or by making use of the other transparency mechanisms created by the SPS Agreement, such as the possibility to request information from the national Enquiry Point. However, it seems likely that the majority of SPS issues between trading partners are addressed in this way, with greater or lesser degrees of success.

Despite the advances achieved by the Recommended Transparency Procedures, serious problems remained. The inadequate implementation of the transparency provisions of the SPS Agreement was raised in the run-up to the Seattle Ministerial Conference. India emphasized the problems caused by this poor implementation for developing country Members.[341] It noted that SPS measures are often developed in a non-transparent manner and that developing country Members invariably are not given an adequate opportunity to respond to the proposed measures. Further, referring to the obligations in the SPS Agreement to provide a reasonable interval between the publication of an SPS measure and its entry into force,[342] and to grant longer time frames for compliance for developing country Members,[343] it pointed out that:

> The basic purpose of these provisions is to provide sufficient time to producers in developing countries to adopt their products to the requirements of new regulations. In practice, compliance of these provisions by countries introducing new measures has been largely non-existent.[344]

The Implementation Decision adopted in 2001 at the Doha Ministerial Conference aims to address the problem of short compliance periods by providing that each of these two periods should be at least six months.[345] However, problems remain with the inadequate implementation of these and

other transparency obligations. In 2007, the WTO Secretariat undertook a review of the level of implementation of the transparency obligations of the SPS Agreement. This review indicated that in the period June-August 2007, while 73 percent of notifications submitted provided a comment period, the average period they allowed was only 40 days. In addition, 22 percent of notifications submitted did not provide a comment period at all. A remaining 5 percent provided a comment period that ended before the date of circulation of the notification.[346]

Not only are the comment periods and adaptation periods provided by Members often inadequate, but other aspects of notifications are also in need of improvement. The SPS Agreement requires Members to indicate the products covered by their notifications. According to the Recommended Transparency Procedures, in order to ensure a clear indication of the product, this should be done by indicating the tariff item number of the product as contained in the notifying Member's national schedule of commitments.[347] However, Members rarely do so.[348] In addition, very few notifications identify the Members or regions most likely to be affected by the notified regulation, despite the encouragement to do so in the Recommended Transparency Procedures.[349] In addition, contrary to the obligation in of the SPS Agreement to identify the parts of the proposed regulation that deviate in substance from international standards, where possible,[350] very few notifications do so.[351]

Implementation problems relate not only to notifications and publication of measures, but also to requests for information. The frequent lack of responses to the requests by Members for information under this obligation of the SPS Agreement was highlighted by the EC in 1999.[352] In addition, there are often lengthy delays in responding to requests for information. In 2007, a survey by the Secretariat indicated that the time taken to respond to queries varied between 1 and 60 days.[353] Members have also indicated difficulty in obtaining access to full texts of regulations. While it was recognized that national SPS websites could facilitate such access, the costly nature of this option for certain developing country Members and least-developed country Members was noted. Some Members suggested that the Secretariat provide assistance in this regard.[354]

Some of the implementation problems relating to the transparency provisions of the SPS Agreement do not relate, strictly speaking, to the difficulty of enforcing or complying with these provisions, but rather to the capacity constraints that limit the benefits that Members at lower levels of development can derive from them. Among these constraints are institutional problems, such as the insufficient coordination between government ministries,[355] limiting the flow of information regarding notified draft SPS regulations and undermining the possibilities for framing responses that reflect national positions. Also, capacity constraints in managing the great inflow of notifications have been identified.[356] In addition, weak links with private sector stakeholders have been recognized as a challenge,[357] having the effect that information on new or changed SPS measures is not promptly communicated to producers,[358] reducing their opportunities to adjust to the new requirements in a timely manner or to communicate their concerns with the new measure to their government so that these may be taken on board in discussions with the notifying Member. Some transparency problems have their source in deeper capacity problems going to the core of the SPS Agreement, namely the weakness of scientific capacity in some less-developed Members. As noted by Wolfe:

> Without a scientific establishment at home able to understand the technical basis of another country's notification, it is hard to know whether it should be challenged in the committee, especially when hundreds of new notifications arrive every year.[359]

This indicates that efforts to address implementation problems relating to the transparency obligations of the SPS Agreement by improving the institutions and procedures

for transparency, while necessary, will not be sufficient on their own. They must be supported by concerted efforts to address underlying problems with inadequate SPS regulatory capacity.

The EPAs contain rather extensive provisions on transparency and exchange of information on SPS matters. Four of the EPAs, those with the CARIFORUM, SADC, Central African and Pacific countries, specifically reaffirm the commitments under the transparency obligations of the SPS Agreement.[360] Further, the enhancement of communication and information exchange on SPS matters affecting inter-Party trade and the establishment of mechanisms for information exchange is agreed to in the CARIFORUM EPA.[361] In addition, early notification of proposed new or changed SPS measures that are especially relevant to trade between the Parties is provided for in the CARIFORUM and Pacific EPAs,[362] with the SADC EPA going further to note the agreement of the Parties to create an "early warning system" to ensure that SADC Parties are informed in advance of new EC SPS measures that may affect their exports to the EU.[363] More general obligations on Parties to inform each other of, or exchange information on, changes to SPS requirements that may affect trade between them are included in the SADC EPA, the EPAs with Côte d'Ivoire and Ghana and the EPA with the Central African Party.[364]

Transparency obligations within regional trade agreements can usefully reflect the regional dimension. Agreement to cooperate to rapidly alert each other of new regional SPS measures that may impact inter-Party trade is provided for in the EPAs with Côte d'Ivoire and Ghana.[365] Another reference to regional transparency is found in the EPA with the Pacific states, in which the EC agrees to cooperate with the Pacific states' initiatives to establish an efficient notification system at the regional level.[366]

Four EPAs extend the transparency obligations to information sharing regarding SPS risks. This goes further than the transparency obligations of the SPS Agreement, which are limited to Members' SPS measures, and covers epidemiological surveillance on animal diseases and information exchange on plant pests of known and immediate danger to the other Party.[367] This openness regarding threats to trading partners from SPS risks in the form of pests or diseases of plants or animals is valuable in building trust between the EPA Parties regarding each other's ability to monitor their domestic SPS situation and to cooperate to avoid the spread of SPS risks without waiting for the importing country to impose trade restrictions.

As previously noted, the existence of a consultation mechanism to resolve concerns arising from notified measures is very useful. Several provisions in the EPAs expressly refer to the importance of effective consultation mechanisms with respect to SPS measures,[368] or the aim of prompt exchange of information in facilitating collaboration to address the relevant SPS problem and avoid or resolve difficulties that may arise between the Parties.[369]

The CARIFORUM EPA notes the Parties' agreement to consult on ways to facilitate trade and reduce unnecessary administrative requirements, in the absence of harmonization or the recognition of equivalence.[370] In addition, the CARIFORUM EPA contains an obligation on Parties, where an SPS problem that may affect trade between them arises, to inform and consult each other, as early as possible with a view to finding a mutually agreed solution.[371] In the SADC EPA a commitment is made to use "appropriate consultations with a view to avoiding undue delays and finding an appropriate solution in conformity with the WTO SPS Agreement" where a Party considers that another Party has taken SPS measures likely to affect the former's market.[372] The Pacific EPA similarly lays down an obligation on Parties, where an SPS measure results in a barrier to trade, to inform and consult each other as early as possible with a view to finding a mutually agreed solution.[373] However, this EPA clarifies that the rights of Parties under other international agreements to resort to good offices or dispute settlement are not hereby impaired.

The consultation provisions in the abovementioned EPAs are useful in promoting dialogue and cooperative solutions to SPS problems. It is now useful to examine whether these provisions are fleshed out by the creation of institutional arrangements to support consultations and thus facilitate the amicable resolution of SPS disputes.

2.3.8 Institutional arrangements

Provisions establishing institutional bodies and/or procedures to promote the implementation of SPS disciplines, including those on transparency and consultations, are essential in operationalizing these disciplines. Such institutional arrangements facilitate compliance by designating organs responsible for particular tasks and creating clearly ascertainable points of contact for trading partners to approach for information on SPS matters or to initiate discussions.

The WTO SPS Agreement obliges WTO Members to create the necessary institutional infrastructure for the implementation of their transparency obligations. Members must designate a single authority, commonly known as the National Notification Authority, as responsible for implementing the notification procedures at a national level.[374] This authority must be a central government body. Most often Members designate as their National Notification Authority an existing government department or agency with responsibilities in sanitary or phytosanitary matters or a government department responsible for disseminating information.[375] Even if SPS responsibilities are divided among several government departments, only one National Notification Authority may be designated. The National Notification Authority need not have SPS experts on its staff, but it must have access to or relationships with the technical experts responsible for drafting SPS regulations.[376] The WTO Secretariat should be informed of the designation or change of a Member's National Notification Authority,[377] and it regularly updates and circulates lists of these authorities to all Members.[378]

The responsibilities of the National Notification Authority include ensuring that a notice of proposed regulations is published at an early stage; notifying other Members through the WTO Secretariat of proposed SPS regulations at an early stage, preferably using the recommended format;[379] providing copies of the proposed regulations, upon request; and ensuring that comments received on notified regulations are handled correctly.[380]

Not all National Notification Authorities have effective links with the technical officials that are responsible for drafting and amending SPS measures. This makes it difficult for them to provide accurate information in the notification of a proposed measure, and to ensure that the comments they receive from interested Members with regard to the notified measures are properly taken into account. In 2006, Australia, New Zealand and the United States noted the need to address the question of how the SPS Committee can best assist the Members that have not designated an Enquiry Point or National Notification Authority in doing so, and how it can better ensure that the Enquiry Points that have been identified are operational and working to further the full implementation of the Agreement.[381] They urged the Committee to initiate a detailed study of these and other transparency related problems. In their responses to the Secretariat's questionnaire on the operation of Enquiry Points and National Notification Authorities, Members indicated a strong preference for enhanced interaction between Members' bodies to facilitate information sharing and the development of best practices. Twinning[382] or mentoring arrangements were suggested.[383]

Also as part of the institutional infrastructure necessary for transparency, the SPS Agreement obliges each Member to ensure that one national Enquiry Point exists.[384] The aim of the Enquiry Point is to provide a single contact point to enable Members to easily obtain information regarding SPS matters without having to identify and approach the agency responsible for the relevant matter.[385] This Enquiry Point need not be a government

body, but may also be an independent agency. It must be able, however, to obtain the necessary answers from the relevant national bodies in order to reply to the requests for information received. Therefore, it needs to have established relationships with the relevant sanitary and phytosanitary officials to facilitate prompt access to the requested information. Most commonly Members designate an existing standards information office or the government department that is most concerned with responsibilities falling under the SPS Agreement as their Enquiry Point.[386] Once again, the WTO Secretariat should be kept informed of the designated authority,[387] and it maintains an updated list of Enquiry Points, which it circulates to Members.[388] The responsibilities of a Member's Enquiry Point are to provide answers to all reasonable questions from other Members as well as provide relevant documents regarding: any adopted or proposed SPS regulations in its territory; the risk assessment basis for the measure; the determination of the appropriate level of protection; control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures in its territory; and the Member's (or its relevant bodies') membership of and participation in international or regional SPS systems as well as bilateral or multilateral agreements within the scope of the SPS Agreement.[389] Requested copies of documents must be supplied to other Members at the same price as to nationals.[390] In the *Handbook on Transparency* prepared by the WTO Secretariat, Members are encouraged not to charge for requested documents, as a gesture of goodwill, taking into account that it is not very cost-effective to recover the small amounts involved.[391]

The EPA with the SADC countries is the only body that provides for the identification of Contact Points for SPS matters. It requires Parties to exchange the names and addresses of Contact Points with SPS expertise to facilitate communication and the exchange of information.[392] It is to be recommended that Parties designate the same bodies they have identified as their Enquiry Point under the SPS Agreement as their SPS Contact Point under the SADC EPA to avoid overlapping competences and duplication of work.

As mentioned in Section 2.2.7 above, Competent Authorities are in some cases designated as the institutions through which the relevant EPA disciplines on regulatory measures are to be implemented, and which may carry out tasks relating to information exchange and consultations. All six EPAs that cover SPS barriers to trade provide for the designation of Competent Authorities.

The CARIFORUM EPA notes the agreement of Parties to designate Competent Authorities[393] and channels consultations to resolve SPS problems through the Competent Authorities of Parties.[394] It obliges the Competent Authorities of Parties, where an SPS problem that may affect inter-Party trade arises, to inform and consult each other as early as possible with a view to finding a mutually agreed solution. In addition, in line with the higher degree of regional integration in the CARIFORUM grouping, this EPA notes the agreement of Parties to conduct information exchange on SPS matters through a regional body representing the Competent Authorities as far as possible.[395]

The SADC and Pacific EPAs designate the SPS authorities of the Parties as the Competent Authorities and require Parties to inform each other of the identity of their Competent Authorities or any changes thereto.[396]

The EPAs with Côte d'Ivoire and Ghana and that with the Central African Party provide for the identification of Competent Authorities for SPS and TBT matters jointly, responsible for the implementation of the provisions of the EPA Chapter dealing with these matters.[397] As noted in Section 2.2.7 above, Appendix II of each of these EPAs broadly sets out the Competent Authorities of the Parties.[398] Any significant changes to the listed Competent Authorities must be notified, and amendments to Appendix II may be adopted by the EPA Committee.[399]

Aside from bodies to facilitate the implementation of disciplines on SPS measures, including the obligations of transparency, it is useful to establish a forum for multilateral discussions on issues of SPS concern, to promote regulatory learning among participating officials and opportunities for the resolution of trade disputes.[400] For this purpose, the WTO SPS Agreement creates the SPS Committee.[401] The SPS Committee is composed of representatives of all WTO Members. Members are free to determine the composition of their delegations to the meetings of the SPS Committee as they see fit. The SPS Committee has created a mechanism whereby Members can raise specific trade concerns they have with each other's SPS measures.[402] The discussions could lead to the revision of the notified measure or to further bilateral consultations between the Members involved. Sometimes technical or financial assistance may be provided to facilitate compliance with the contested measure. Through the use of the specific trade concerns mechanism, disputes can often be resolved without recourse to the expensive and time-consuming process of formal dispute settlement.[404] In addition, Members learn from each other and obtain clarity with regard to the operation of the different SPS regimes in place in other Members. As aptly put by Scott:

> In a significant number of cases, the back and forth contestation and reasoned justification leads to a change in behaviour of Member States. Not only does it serve to induce compliance in situations where this was otherwise lacking, but it also serves to elucidate what it is that compliance demands.[405]

In addition to the direct benefits of the specific trade concerns mechanism in relation to the amicable resolution of disputes, indirect benefits are reaped from this mechanism. These flow from increased familiarity of Members with each other's regulatory systems due to the regular contact and sharing of experiences between Members' officials. Members may gain confidence in the regulatory capacity of the alternative SPS regimes maintained by other Members. This confidence has an impact on issues such as the recognition of equivalence and of pest- or disease-free areas. Another indirect benefit relates to improvements in SPS governance. Cooney and Lang view the specific trade concern mechanism as well suited to problem-centred information exchange. This is valued by the adaptive approaches to governance that are needed in complex systems, as are SPS systems.[406]

However, many ACP countries are not in a position to make full use of the opportunities provided by the SPS Committee for regulatory learning and amicable dispute resolution. Overall, the number of specific trade concerns raised at meeting of the SPS Committee by ACP countries is markedly low, accounting for only 10 of the 277 trade concerns raised until 2008.[407] This may be due to the fact that those countries that do not have the resources to send an SPS expert from their capital are represented in meetings of the SPS Committee by diplomats from their mission in Geneva, lacking in the necessary technical knowledge or having insufficient information regarding the SPS concerns of national exporters.[408] For example, Kenya reportedly rarely sends a representative from its capital. On a few occasions, staff members from Kenya's permanent mission in Geneva have attended SPS Committee meetings.[409] Often, however, Kenya is not represented at meetings of the SPS Committee at all.[410] Unusually, in 2001 and 2002 a Kenyan official from the capital attended the SPS Committee meetings where EC requirements regarding cut flowers were on the agenda, as this product is of significant export interest to Kenya. At this meeting, the Kenyan official supported expressions of concern raised by other Members regarding measures notified by the EC with regard to cut flowers.[411] There are also some ACP countries that are unable to send any representative to most SPS Committee meetings.[412]

Establishing a committee for regular consultations at the regional level, within the context of the EPAs, could address some of the problems of participation that arise with respect to the WTO's SPS Committee. It could not only lower the costs of participation by locating the committee meetings within the relevant EPA region, but also facilitate closer regulatory interaction and deeper levels of learning due to the smaller number of delegates involved and the greater possibilities for fruitful discussion in such a context. Further, the existence of a development cooperation framework between the EPA Parties[413] would make the linkage in such regional discussions between identified SPS concerns and the provision of technical assistance and capacity building a logical step to resolving difficulties faced by ACP EPA Parties.

However, none of the EPAs establishes a committee to deal exclusively with SPS matters. Two EPAs, those with the SADC and Pacific countries, allocate competence to provide a forum for consultations, exchange of information coordination and cooperation on SPS issues to the Trade and Development Committee and the Trade Committee respectively.[414] These Committees are further competent to monitor and review the implementation of the EPA chapter dealing with SPS matters and to make recommendations for its modification. In addition, these Committees are entrusted with the task of identifying and reviewing priority sectors and products for SPS cooperation. It is useful to note that the SADC Trade and Development Committee is also responsible for monitoring the development cooperation procedures in the relevant EPA in general and making recommendations in this regard.[415] The remaining EPAs do not allocate tasks with regard to SPS matters to any specific committee, but it may be expected that these tasks would fall under the general competence of the EPA Committees tasked with the implementation of the relevant EPAs.[416]

While these provisions in the EPAs do create an institutional forum for discussion, the general nature of such a forum, and thus also of the delegates sent to participate in its meetings, greatly diminishes the opportunities for a high level of technocratic discussions among expert participants as well as the possibilities for network building and regulatory learning through regular contact between these SPS regulatory officials. Fortunately, the possibility is created in the CARIFORUM, SADC and Pacific EPAs for the establishment of special technical groups or special committees to deal with specific matters within the competence of these Committees, under which SPS groups may be created.[417]

2.3.9 Cooperation and technical assistance

The impact of the EU's SPS requirements on exporting ACP countries depends on the capacity of those countries and their producers to comply with those requirements and on the significance of the agricultural sector for export revenue earnings in that country. The trade barrier effect of SPS requirements for many low- and middle-income ACP countries is due to the lack of financial resources and skilled manpower to establish and maintain effective SPS systems, hindering them from meeting the EC's SPS requirements. In many cases, the significant gap between the SPS systems in ACP countries and the EC's SPS requirements means that large investments are needed if market access to the EU is to be gained. The cost for ACP countries to meet increasingly stringent EU SPS requirements is therefore often high. These costs include those needed for upgrading the regulatory infrastructure, improving laboratory testing facilities, strengthening control and inspection systems and implementing reliable certification schemes. Also the demonstration of equivalence or of the SPS status of a region requires a high level of SPS regulatory capacity.

An example of constraints in meeting EC SPS requirements is provided by the application of HACCP requirements by the EC to the entire production chain in the fisheries sector.[418] This has created huge compliance problems for various African and CARIFORUM countries,

whose fisheries industries are largely composed of artisanal fishermen.[419]

It is widely recognized that mechanisms developed to deal with developing country constraints in complying with SPS requirements of importing countries should not jeopardize the right of the latter to impose scientifically justified measures necessary to prevent risks to human, plant or animal life or health that they consider unacceptable.[420] To do so would lead to risks of harmful effects on human health and agricultural production in importing countries and be counterproductive. It would fuel consumer fears, leading to a decrease in demand for products originating in developing countries, and harm the reputation of such exporting countries by casting doubts on their regulatory capacities.[421] It is therefore important that the tools used to address the special problems faced by developing countries respect the delicate balance between the competing objectives of promoting trade liberalization and respecting the right of importing countries to protect health in their territories.

The WTO SPS Agreement takes account of the special position of developing country Members by means of provisions on technical assistance and on special and differential treatment.[422] With respect to technical assistance, WTO Members agree to facilitate its provision to developing country Members, either bilaterally or through appropriate international organizations, to allow them to adjust to, and comply with, SPS requirements in their export markets.[423] The forms such assistance may take are broadly defined to include advice, credits, donations and grants in the areas of processing technologies, research and infrastructure. Further, where an importing Member's SPS measure would require substantial investment from an exporting developing country Member, the former must consider providing technical assistance to allow the developing country to maintain and expand its market access opportunities for that product.[424] The special and differential treatment provisions require WTO Members, when preparing and applying SPS measures, to take account of developing countries' special needs and where possible grant longer time frames for compliance with their SPS measures to developing country Members.[425] In addition, Members should encourage and facilitate active participation by developing country Members in the international standard-setting bodies.[426]

However, the weak wording of these provisions of the SPS Agreement, and their conservative interpretation in the case law thus far, has led to poor implementation.[427] To improve this situation, in 2004, the SPS Committee adopted a decision to promote transparency regarding the provision of special and differential treatment by amending the Recommended Transparency Procedures for SPS measures.[428] New steps have been added to the notification procedure, requiring a Member that has notified a new or revised SPS measure to submit an addendum to its notification in the case that special or differential treatment or technical assistance is requested. This addendum must set out specifically what was requested and specify the special treatment that was provided, or if none was provided, it must give reasons why not.

Work on operationalizing the special provisions for developing countries in the SPS Agreement forms part of the negotiation agenda of the WTO Doha Development Round,[429] but little progress has been made thus far. In its 2005 report, the SPS Committee noted a strong resistance by many Members to changes in the text of the SPS Agreement and indicated an emerging broad consensus to actively seek alternative, concrete avenues to fulfil the mandate before undertaking specific changes in the text of the SPS Agreement.[430] It reiterated the major concern repeatedly raised that modification could result in changes to the balance of rights and obligations established by the SPS Agreement. Examples of this alternative approach are the outcomes of the work done in the SPS Committee to improve compliance with the procedural rules on transparency,

equivalence and regionalization, discussed above. Another example is the concerted attention currently given in the SPS Committee to the question of how to improve the provision of technical assistance by WTO Members and through international initiatives.[431]

A 2005 report by the World Bank characterizes the level of technical assistance in the area of SPS capacity building as "extremely modest given the significance of the challenges (and opportunities) facing developing countries".[432] In discussions at the WTO, developing country Members have complained that, despite the provisions in the SPS Agreement, they most often do not receive technical assistance to facilitate adjustment to SPS measures that affect their trade. Further, the prevalent reactive approach to technical assistance, where assistance is only provided once an exporting Member has already lost market access due to an SPS trade barrier, has been criticized by Members.[433] In addition, long delays between allocation of funds and their actual provision are common, frustrating attempts at long-term planning.[434] The lack of certainty and predictability in the provision of technical assistance aggravates this problem.[435]

Another often-heard complaint is that bilateral technical assistance is frequently geared towards furthering the interests of the donor country.[436] This perception was given voice in an aptly-worded comment by a representative of an African country that received SPS-related technical assistance: "[T]hey want us to understand SPS so that we will import more chicken".[437] This remark powerfully captures the prevailing idea that the strategic interests of developed countries, rather than real needs in developing countries, underlie decisions on bilateral technical assistance.[438] A 2005 World Bank report confirms this view.[439] Even where donor-driven technical assistance does not directly conflict with the interests of the recipient Member, "in a world of limited resources, technical assistance in one area can divert human and material resources from others that may be of greater priority".[440]

Several of the EPAs explicitly recognize the importance of "cooperation" on SPS matters.[441] In the SADC EPA, this cooperation is stated to include that between the SPS institutions of the SADC EPA states and the corresponding EC institutions.[442] The CARIFORUM EPA includes development cooperation, in general, as one of the basic principles of that agreement.[443] It sets out the development of capacity for compliance with internationally recognized SPS requirements as one of the priorities for development cooperation.[444] Similarly, the EPA with the Central African Party lists among the priority areas for capacity building and cooperation the promotion of diversification and competitiveness through improvement of SPS standards and certification.[445]

The provision of SPS-related technical assistance by the EC focuses on the ACP region, accounting for 74 percent of SPS-related technical assistance to this region in 2002-2006 (or 97 percent if aid by EC Member States is included). Currently,[446] three main EU initiatives are in place to assist ACP counties in this regard, including the Fish Support Programme, the Pan-African Programme for the Control of Epizootics and the Pesticides Initiative Programme.[447] These EC initiatives concentrate on particular areas of SPS capacity, namely pesticides, fisheries and animal health. In fact, one of the most successful capacity building projects in Senegal was the upgrading of fisheries production processes to meet EC HACCP requirements.[448] In addition, the Trade-Com programme mentioned in Section 2.2.8 above prepares pilot projects for building institutional capacity to address SPS (and TBT) barriers to trade, and the Better Training for Safer Food programme provides specific training for officials of exporting developing countries to familiarize them with EC food safety requirements.[449]

It has been noted with regard to trade capacity building in general that: "[a]s the development objectives of developed countries (as donors) overlap with their commercial interests (as trading powers) they may be prone to decide

what type of assistance to provide according to their own interests rather than those of the recipient countries".[450] There is, therefore, a need to ensure that technical assistance by the EC is demand-driven, focusing on the priorities of the beneficiary ACP country. As recommended by the World Bank study mentioned above, developing countries need to be assisted in making their own strategic decisions with regard to how to respond to new SPS measures, including possibly challenging those measures or negotiating changes.[451] In order to effectuate this, there needs to be a willingness on the part of donor countries to look beyond their own interests in providing technical assistance. As noted by Michel Kostecki, "ownership" by the beneficiary is the most important feature of the new approach to technical assistance. This new approach focuses on the idea of partnership between the donor and the beneficiary.[452]

A precondition for needs-driven capacity building is the determination by ACP countries of their capacity needs. It has been noted that the paucity of demand-driven requests for technical assistance is partly due to institutional capacity constraints.[453] In addition, there is a need for "effective prioritizing and planning mechanisms"[454] within the recipient countries themselves. The input of various relevant government agencies and the private sector is essential in the determination of national priorities. As many developing countries, including ACP countries, do not have effective channels in place for inter-agency coordination or for communication with the private sector,[455] assistance may be needed already at this level. It is important to do the groundwork in this regard, since without it the assistance provided may be a wasted effort. The ITC/Commonwealth Secretariat report mentioned above notes:

> For example sophisticated laboratory equipment may have been provided even though the recipient country does not have the means or is unwilling to commit to provide the skilled human resources to operate it, essential maintenance, consumables and so forth. Indeed it is possible for export capacity to be developed that is beyond the needs of developing country exporters. Not only does this waste scarce technical assistance, but it can tie developing countries into longer term resource demands to maintain this capacity. This underlines the need for technical assistance to be 'appropriate' and problem-focused.[456]

The question, therefore, arises as to whether the EPAs address this concern by providing for needs-driven technical assistance and capacity building. Each of the relevant EPAs identifies specific priority areas for SPS cooperation, and in some cases priority products and sectors in this regard are listed as well. For example, the CARIFORUM EPA lists reinforcing regional integration; establishing expertise-sharing arrangements on SPS matters and training of regulatory personnel; capacity building for CARIFORUM firms to meet SPS requirements; and facilitating participation of CARIFORUM states' representatives in meetings of the CAC, OIE and IPPC as areas for cooperation.[457] The CARIFORUM EPA however does not set out priority products or sectors for cooperation. The priority areas for capacity building indicated in the SADC EPA are: capacity for SPS control (including inspection, certification and supervision) in the public and private sectors; capacity for the maintenance and expansion of market access by SADC states; technical capacity to implement and monitor SPS measures and promote the use of international standards; support for SADC EPA states' participation in international standard-setting bodies; promotion of cooperation on the implementation of the SPS Agreement (particularly with regard to Enquiry Points and notification and international standard-setting bodies); and development of capacity for risk analysis, harmonization, compliance testing, certification, residue monitoring, traceability and accreditation, taking into account the identified priority products and sectors.[458] Such priority products or sectors

are identified by the Trade and Development Committee.[459] The EPAs with Côte d'Ivoire and Ghana focus on cooperation including through assistance measures to improve the quality and competitiveness of their products and market access to the EC. In this regard, the following areas are identified: establishing a framework of information exchange and expertise sharing between the Parties; adoption of regionally harmonized SPS measures based on international standards; strengthening public and private capacity to comply with EC SPS requirements and to participate in international bodies; developing capacity for conformity assessment for access to the EC market.[460] These EPAs provide that the EPA Committee will adopt a list of priority products for export from Côte d'Ivoire or Ghana to the EC, on the basis of identification of such products by Côte d'Ivoire or Ghana within three months of signature of the relevant EPA.[461] The EPA with the Central African Party notes agreement to cooperate in two areas: for products listed in Appendix IA as priorities for regional harmonization, Parties agree to cooperate with a view to strengthening regional capacity within the signatory Central African states and control capacity in such a manner as to facilitate trade between the signatory Central African states; and for products listed in Appendix IB as priorities for export from the Central African states to the EC, Parties agree to cooperate with a view to improving the competitiveness and quality of their products. No details are given on specific areas of cooperation that would contribute to such improvement, however.

In some cases, pooling resources to build the necessary capacity on a regional level, for example in the form of regional laboratories and expert committees to set harmonized regional standards, can be most cost- effective. Three of the EPAs, namely those with the CARIFORUM, SADC and Pacific countries, make provision for this in their SPS chapters, and refer explicitly to cooperation in strengthening regional capacity on SPS matters and in promoting intra-regional harmonization.[462]

None of the provisions on SPS-related cooperation in the various EPAs creates a specific mechanism for financing such cooperation or for disbursing aid or monitoring its effectiveness. Instead, as noted above with regard to TBT measures, the framework for financing of SPS capacity building falls primarily under the general development cooperation regime of the Cotonou Agreement, as supplemented by additional financing from the EU's Aid-for-Trade Strategy, the above mentioned specific SPS assistance programmes and the contributions of EU Member States. Mechanisms, such as that established under the CARIFORUM EPA described in Section 2.2.8 above, to determine specific budgets and time lines for achievement of the cooperation objectives set out in the SPS provisions of the EPAs would go a long way towards operationalizing these cooperation provisions.

3. RELATIONSHIP BETWEEN THE RULES ON NON-TRADITIONAL BARRIERS TO TRADE IN THE EPAS AND THOSE IN THE WTO AGREEMENTS

As has been seen from the discussion above, the WTO's TBT and SPS Agreements contain disciplines governing technical regulations, standards, sanitary and phytosanitary measures as well as the administrative and procedural rules in place to determine conformity with these measures. The rights and obligations contained in these WTO agreements are applicable to all WTO Members, including the EC and most ACP countries, and can be enforced using the WTO's dispute settlement system.

The reaffirmation of the rules of the TBT and SPS Agreements in the various EPAs is therefore unnecessary from a legal perspective, but does serve to highlight the intention of the EPA Parties that SPS and TBT measures continue to be disciplined by the comprehensive set of rules contained in these agreements, in addition to those rules contained in the EPAs. Challenges between WTO Members, even those that are EPA Parties, brought in terms of the TBT and SPS Agreements may only be heard before the WTO panels or Appellate Body, due to the exclusive jurisdiction that the WTO dispute settlement system has with respect to the WTO agreements.[463] Several of the EPAs recognize this in their dispute settlement Chapters, providing that the EPA arbitration bodies shall not arbitrate disputes under the WTO agreements.[464]

This situation is different when the obligations in the relevant WTO agreements are taken up, and form part of, the EPAs. An example of such a provision is that in Article 41 of the EPAs with Côte d'Ivoire and Ghana, in which Parties agree to inform each other, in accordance with the SPS Agreement, of SPS measures they take.[465] In such cases, a challenge may be brought in terms of a provision of the specific EPA that incorporates a WTO obligation. Such an action is without prejudice to the ability of an EPA Party that is a WTO Member to choose to bring an action under the relevant provisions of the WTO agreements before the WTO dispute settlement system, as is recognized in the EPAs themselves.[466] However, to limit the potential for incoherence and conflicting decisions by the different adjudicators on the same matter, the EPAs provide that once an EPA Party has instituted dispute settlement proceedings under either the EPA or the WTO, it may not institute dispute settlement proceedings regarding the same measure in the other forum until the first proceedings have ended.[467] Should an EPA Party, nevertheless, in breach of this provision, bring an action before a WTO panel while an action on the same measure is pending before an EPA arbitration body, the WTO panel would have no authority to refuse to hear this case.[468]

In addition, as noted in Sections 2.2.1 and 2.3.1 above, two of the EPAs, that with the Central African Party and that with the Pacific countries, extend the disciplines of the TBT and SPS Agreements to non-WTO members that are EPA Parties, with respect to trade relations between the EPA Parties.[469] If non-WTO Members in those two EPA regions sign on to these EPAs, the provisions of these two WTO agreements will become applicable to them through the relevant provisions in the EPAs. This, of course, does not mean that the affected EPA Parties would become WTO Members or that breaches of the obligations set out in the TBT and SPS Agreements could be challenged through the WTO dispute settlement system. Access to this system is limited to WTO Members.[470] Instead, the provisions of the TBT and SPS Agreements are incorporated by reference in the EPAs themselves, and any violation can be challenged using the dispute settlement mechanism provided in these EPAs.[471] One would expect that reference would be had to the existing WTO case law interpreting the relevant provisions, when such disputes are heard within the relevant EPA system, although there is no such obligation, in order to promote legal certainty and security for the countries involved.

As noted in the discussion above, some provisions in the various EPAs dealing with TBT or SPS measures go further than the relevant WTO agreements. They create supplementary disciplines to promote deeper integration between the EPA Parties than can be agreed at the WTO level. While, as set out above, these additional disciplines are currently rather limited and do not make full use of the potential provided by the regional character of the EPAs and the historical relationship between the EC and the ACP countries to create rules that are more effective than those of the WTO in addressing non-traditional barriers to trade, some steps forward have been taken. An example of this is Article 57 of the CARIFORUM EPA, in which Parties, in addition to confirming their commitment to the transparency provisions of the SPS Agreement, agree to inform each other at an early stage of new or changed SPS measures that are especially relevant to trade between them. This is a step forward from the advance notification requirement of the SPS Agreement. Such additional disciplines fall clearly outside the WTO framework and can be enforced only through recourse to the dispute avoidance and settlement provisions of the relevant EPAs.

Therefore, the relationship between the WTO TBT and SPS Agreements, on the one hand, and the EPAs, on the other, can be said to be one of complementarity. The EPAs incorporate by reference, and build upon, the relevant WTO disciplines. It is to be hoped that in the ongoing negotiations towards final EPAs greater strides will be taken in this respect by means of concerted efforts to address the inadequacies of the WTO agreements and thereby to promote greater market access.

4. CONCLUSION AND RECOMMENDATIONS

As has been seen from the discussion above, non-traditional barriers to trade in the form of SPS and TBT measures have greatly increased in importance, overtaking the relevance of tariffs and quotas in EU - ACP trade. These barriers, which typically take the form of regulatory requirements and administrative procedures to determine conformity, can be formidable obstacles to ACP access to the EU market.

The WTO's *SPS* and *TBT Agreements* contain useful disciplines to diminish the trade-restrictive effect and protectionist potential of these measures. However, several inadequacies have been identified which could be more effectively addressed in a regional trade agreement between a limited number of parties that have a long history of trade and cooperation, as is the case with the EPAs between the EU and the ACP groupings. Therefore, to be truly supportive of development, the EPAs must address effectively the non-traditional barriers to trade that take the form of SPS and TBT measures in a manner that goes beyond the WTO rules and takes full advantage of the closer integration between the EPA Parties.

In their current form, as has been discussed above, the EPAs fall short of their promise. Unlike the Association Agreement between the EU and Chile, the EPAs neither contain detailed provisions on SPS and TBT measures nor set out procedural guidelines for operationalizing key disciplines in these areas. A hopeful sign in this regard is the recent proposal on SPS matters in the context of the negotiations under the EPA with the ESA countries. This proposal takes on board certain useful aspects of the SPS section of the EU-Chile Association Agreement, including those dealing with precautionary measures, SPS measures stricter than those embodied in international standards and equivalence, and thus represents the most promising rules on SPS matters in the EPAs thus far.[472]

An additional disappointing feature of the EPAs in their current form is the fact that the much-needed development cooperation that is essential in building the capacity of ACP countries to address supply-side constraints in these areas has been left to often vague statements of objectives and priorities without firm budgetary commitments or mechanisms for timely and predictable disbursements. This gives cause for concern.

Several recommendations can be made to improve the potential benefits of the EPAs in reducing non-traditional barriers to ACP exports to the EU. It is generally accepted that the achievement of the regulatory objectives of the EU's SPS or TBT import requirements cannot be threatened by trade disciplines, as this would risk undermining the delicate balance that must be maintained between sovereign policy space and trade liberalization. The EU will therefore continue to pursue high levels of protection through strict regulatory standards responsive to its citizens' demands and in line with its resource capacity. Concerns regarding the true policy objective of the relevant measures (including the scientific justification for non-harmonized SPS measures), their necessity, and the question of whether they are the least trade restrictive measures available, can in principle be pursued under the relevant WTO agreements (the TBT Agreement and the SPS Agreement), within the institutional fora provided there under or in dispute settlement. The EPAs have reaffirmed these WTO agreements, and EPA Parties (in some cases also those that are not WTO Members) are bound to the obligations contained therein.

However, much can be done through the EPAs to address the way in which the EU's TBT or SPS regulations are framed and applied and the manner in which compliance is determined and certified to considerably reduce their trade-restrictive effect. In this way, the EPAs could be useful tools to address the deficiencies of the WTO agreements, facilitating the implementation of provisions that are of particular interest to ACP countries (such as transparency, equivalence and regionalization)

through detailed procedural guidelines and institutional arrangements. In addition, strengthened provisions on technical assistance (containing clear budgetary commitments and disbursement mechanisms) could go a long way toward addressing the supply-side constraints that limit the ability of ACP countries to take advantage of the increased market access potential of the EPAs.

Some specific recommendations can be made in this regard:

- equivalence agreements should actively be pursued as part of the ongoing negotiations on the interim EPAs in selected areas. These could focus on particular priority products (for example fishery products) or on specific aspects of the regulatory regimes of the ACP Parties (for example certification of conformity). In addition, detailed procedural steps, bound to concrete time lines, should be agreed to facilitate the recognition of equivalence *ad hoc* or through mutual recognition agreements. These may follow the guidance developed by the WTO's SPS Committee in this respect, but be incorporated into the EPAs and thus entail binding obligations. It is important that these obligations not be limited in application to products originating in the EU, but apply to all EPA parties, to enable ACP countries to benefit from the economies of scale generated by such obligations. Investments are likely to be needed to ensure that the relevant products or regulatory systems meet the levels of protection chosen by the EU and comply with its regulatory objectives, and therefore real commitments in respect of development cooperation may be essential. However, once achieved, the recognition of equivalence will grant the relevant ACP exports a crucial competitive advantage on the EU market, without any reduction in the level of protection secured on the EU market;[473]

- the achievement of official recognition by the EU of the pest or disease status of particular ACP regions should be a negotiating objective. Where possible, such recognition should be pursued on the basis of the guidelines laid down by the OIE and IPPC. In addition, detailed procedures and objective criteria should be agreed for future requests for recognition of pest or disease status and could focus on priority products and specific pests or diseases. Once again, a point of departure may be the guidelines set out by the WTO's SPS Committee, in its Decision on Regionalization, but the procedural steps and substantive criteria should be made binding through incorporation into the text of the EPAs;

- technical committees should be set up under the EPAs to deal with TBT and SPS barriers to trade. These committees should create a forum for expert officials of the EPA Parties to engage in discussions on specific concerns raised by such non-traditional barriers to trade and to come to cooperative solutions, including through adjustments to the measures at issue or through technical or financial assistance to facilitate compliance;

- specific development cooperation commitments and mechanisms for their implementation should be negotiated for each of the EPA chapters in which non-traditional barriers to trade are addressed. Such commitments should focus on priority areas identified by the ACP beneficiaries themselves and set out budgets and time lines for their achievement. Without clear budgetary commitments, it is unlikely that the supply-side constraints that limit the ability of the ACP EPA Parties to benefit fully from the potential for increased market access of the EPAs will be overcome.

If, in this way, concerted efforts are made to fully exploit the potential of the EPAs as tools to address the supply-side constraints to ACP exports by creating effective rules on non-traditional barriers to trade, including substantive SPS and technical requirements and administrative procedures for the assessment of conformity with these requirements, the EPAs may truly become instruments for development.

ENDNOTES

1 Boutros Boutros-Ghali, *An Agenda for Development*, UN Doc. A/48/935 (United Nations, Geneva), 6 May 1994, 53.

2 The EU has signed a final EPA with the CARIFORUM countries (encompassing Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Surinam, and Trinidad and Tobago). Further, it has concluded interim EPAs with various regional groupings of ACP countries. In particular, an interim EPA has been concluded with the East African Community (EAC) (Kenya, Uganda, Tanzania, Rwanda and Burundi) and six of the Eastern and Southern African (ESA) countries (the Comoros, Madagascar, Mauritius, Seychelles, Zambia, Zimbabwe). The ESA countries that did not initial the interim EPA (Djibouti, Ethiopia, Eritrea, Malawi and Sudan are all least- developed countries (LDCs). An interim EPA has also been concluded with two of the Pacific countries (Papua New Guinea and Fiji). The other Pacific countries, Kiribati, Samoa, Salomon Islands, Tuvalu and Vanuatu are LDCs and benefit from the Everything-but-Arms (EBA) regime of duty-free quota-free market access to the EU. The remaining non-LDCs Pacific countries (Cook Islands, Tonga, Marshall Islands, Micronesia, Niue, Palau and Nauru) did not join the interim EPA but have benefitted from the EU's Generalised System of Preferences since 1 January 2008. Another interim EPA is in place with four of the SADC countries (Botswana, Lesotho, Mozambique, Namibia and Swaziland). Of the remaining SADC members, South Africa has a separate trade agreement with the EU, the Trade, Development and Cooperation Agreement of 1999, and Angola is an LDC and thus has duty-free, quota-free market access to the EU under the EBA regime. The other six SADC members (the Democratic Republic of Congo, Madagascar, Malawi, Mauritius, Zambia and Zimbabwe) are negotiating EPAs in other regional configurations. Two individual EPAs have been signed with two members of the West African region, Côte d'Ivoire and Ghana. The rest of the West African region is largely made up of LDCs, which benefit from the EBA scheme. The exceptions are Cape Verde (no longer classified as an LDC as of 1 January 2008 but continues to benefit from the EBA regime for another 3 years) and Nigeria (which decided not to enter into an interim EPA and benefits from the regular EU Generalised System of Preferences. Finally, an interim EPA has been signed with one Central African Party, Cameroon. The rest of the Central African region is largely made up of LDCs that have duty-free access to the EU under the EBA regime. The exceptions are Congo and Gabon which have enjoyed the benefits of the regular EU Generalised System of Preferences (GSP) since 1 January 2008. See European Commission, *Update: Economic Partnership Agreements*, Brussels, 23 March 2009.

3 Council of the European Union, *Council Conclusions on the Economic Partnership Agreement,* 2831st External Relations Council Meeting, 19-20 November 2007, para. 1.

4 See Article 37.7 of Part 3, Title II of the *Cotonou Agreement*.

5 Agriculture forms an important sector in the economies of many developing countries, in terms of both income generation (GDP) and employment. A 2003 report by the World Bank notes that agriculture accounts for about 25 percent of GDP in low-income countries and 15 percent in middle-income countries. Together with agro-related industries and food-related services, the share goes up to 25 to 40 percent of GDP. This report further points out that agriculture is the largest employer in developing countries, employing 60 percent of the labour force in low-income countries and 25 percent in middle-income countries. *Global Economic Prospects 2004: Realizing the Development Promise of the Doha Agenda* (World Bank, Washington D.C.), 2003, 103. Further, the importance of

the agricultural sector in effective poverty alleviation is emphasised in the 2008 World Development Report of the World Bank, which notes: "Cross-country estimates show that GDP growth originating in agriculture is at least twice as effective in reducing poverty as GDP growth originating outside agriculture". World Bank, *World Development Report 2008: Agriculture for Development* (World Bank, Washington D.C.), 2008, 6. See also United Nations Conference on Trade and Development, *Development and Globalisation: Facts and Figures* (United Nations, Geneva and New York), 2004, para. 28.

6 The above-mentioned FAO report notes in this regard: "Tariff escalation, in particular, constitutes a major barrier to market access for most of the processed agricultural exports of developing countries" Food and Agriculture Organization, *The State of Agricultural Commodity Markets* (United Nations, Rome), 2004, 27. A recent World Bank report notes, with reference to trade barriers in the agricultural sector: "High-income countries have higher nontariff barriers, greater tariff escalation and dispersion, and much higher maximum tariffs than low-income countries; that is, they protect certain sectors much more than others. Many of these protected sectors and goods are of special interest to developing country exporters". Roumeen Islam and Gianni Zanini, *World Trade Indicators 2008: Benchmarking Policy and Performance* (World Bank, Washington D.C.), 2008, xix.

7 Food and Agriculture Organization, *The State of Agricultural Commodity Markets* (United Nations, Rome), 2004, 22.

8 *Global Economic Prospects 2004: Realizing the Development Promise of the Doha Agenda* (World Bank, Washington D.C.), 2003, 104. The problem of tariff escalation as a hurdle to developing countries increasing the degree of processing of key agricultural products has also been noted in a recent UNCTAD report. See United Nations Conference on Trade and Development, *Development and Globalisation: Facts and Figures* (United Nations, Geneva and New York), 2004, 76. It is also referred to in the 2005 report of the Economic Research Service of the USDA as a significant problem for agricultural trade. This report illustrates the issue of tariff escalation with reference to the example of cocoa and cocoa products. While the major importers of agricultural products (Australia, Canada, the EU, Japan and the US) have tariffs of 0-1 percent on cocoa beans, their tariffs on chocolate and other cocoa products is 15-57 percent. As a result, developing country trade shares range from 96 percent for cocoa beans to only 8 percent for chocolate. Anita Regmi *et al.*, *Market Access for High-Value Foods,* Agricultural Economic Report No. 840 (United States Department of Agriculture, Washington D.C.), February 2005, 5-9.

9 Global Economic Prospects 2004: Realizing the Development Promise of the Doha Agenda (World Bank, Washington D.C.), 2003, 111.

10 *Ibid.*, 123.

11 United Nations Conference on Trade and Development, *Development and Globalisation: Facts and Figures* (United Nations, Geneva and New York), 2004, 76. This point is also made by the Economic Research Service of the USDA. Anita Regmi *et al., Market Access for High-Value Foods*, Agricultural Economic Report No. 840 (United States Department of Agriculture, Washington D.C.), February 2005, 5. This limited access to global markets for high-value and processed products is despite the fact that, for domestic consumption, the shift to processed and high-value products is reported to be broad based, across regions and among a large majority of developing countries. WTO Secretariat, *World Trade Report 2004: Exploring the Linkage between the Domestic Policy Environment and International Trade* (World Trade Organization, Geneva), 11 June 2004, 18, available at: www.wto.org/english/news_e/pres04_e/press378_annex_e.pdf. In fact, the domestic markets for high-

value agricultural products are among the fastest growing in most developing countries, led by livestock products and horticulture. World Bank, *World Development Report 2008: Agriculture for Development* (World Bank, Washington D.C.), 2008, 12.

12 Tariff peaks and tariff escalation are currently being addressed in the context of the agriculture negotiations in the Doha Round at the WTO. In the context of the Doha negotiations on agricultural trade, the text adopted by the General Council on 1 August 2004 (commonly referred to as the "July Package") proposes that "tariff escalation be addressed through a formula to be agreed". General Council, *Doha Work Programme. Decision Adopted by the General Council on 1 August 2004*, WT/L/579, circulated on 2 August 2004, Annex A para. 36. The Doha Ministerial Declaration calls for "substantial improvements in market access" for agricultural products. Ministerial Conference, *Doha Ministerial Declaration. Adopted on 14 November 2001*, WT/MIN(01)/DEC/1, circulated on 20 November 2001, para 13. The July Package reaffirms the commitment to substantial improvements by providing: "Substantial overall tariff reductions will be achieved as a final result from negotiations". While allowing the designation of specific sensitive products, the July Package provides that: "[t]he principle of substantial improvement" will apply to each product. General Council, *Doha Work Programme. Decision Adopted by the General Council on 1 August 2004*, WT/L/579, circulated on 2 August 2004, paras 28, 29 and 32. The latest revision of the draft modalities for agriculture circulated by the Chairperson of the Special Session of the Committee on Trade in Agriculture on 19 May 2008 contains a three-tiered formula for tariff reductions, requiring greater percentage of reductions in higher levels of tariffs, thereby aiming to reduce tariff peaks. In addition, it requires additional tariff reductions for listed "tariff escalation products" and "tropical and diversification products". Committee on Trade in Agriculture, Special Session, *Revised Draft Modalities for Agriculture*, TN/AG/W/4/Rev.2, circulated on 19 May 2008, paras 3, 79-85, 134-135, and Annexes D and G.

13 See Christopher Stevens *et al. The New EPAs: Comparative Analysis of their Content and the Challenges for 2008. Final Report*, Overseas Development Institute and the European Centre for Development Policy Management, Maastricht, 31 March 2008, 66.

14 See for example Article 14 of the EPA with the CARIFORUM countries, Article 12 of the EPA with Côte d'Ivoire, Article 12 of the EPA with Ghana, Article 20 of the EPA with Central African countries (Cameroon), Article 25 of the EPA with SADC countries, Article 11 of the EPA with ESA countries, Article 10 of the EPA with EAC countries, and Article 11 of the EPA with the Pacific countries.

15 See for example Article 13 of the EPA with the CARIFORUM countries, Article 11 of the EPA with Côte d'Ivoire, Article 11 of the EPA with Ghana, Article 18 of the EPA with Central African countries (Cameroon), Article 22 of the EPA with SADC countries, Article 10 of the EPA with ESA countries, Article 9 of the EPA with EAC countries, and Article 7 of the EPA with the Pacific countries.

16 See for example Article 26 of the EPA with the CARIFORUM countries, Article 18 of the EPA with Côte d'Ivoire , Article 18 of the EPA with Ghana, Article 22 of the EPA with Central African countries (Cameroon), Article 25 of the EPA with SADC countries, Article 17 of the EPA with ESA countries, Article 17 of the EPA with EAC countries, and Article 22 of the EPA with the Pacific countries.

17 Rice and sugar are subject to transitional regimes which allow a longer liberalization period and, in the case of sugar, an import surveillance mechanism and specific automatic safeguards. For example, market access for rice from CARIFORUM countries will be duty

free and quota free after a two-year transition period ending on 31 December 2009. In 2008 and 2009 a rice quota applies, for which the in-duty quota will be eliminated. For CARIFORUM sugar, duty-free, quota-free market access will be granted as from 1 October 2009, subject to a transitional automatic safeguard mechanism until 30 September 2015. See 'EU-Cariforum Partnership Agreement: An Overview' European Commission Information Paper, July 2008.

18 See Paul Brenton *et al., Economic Partnership Agreements and the Export Competitiveness of Africa*, World Bank, May 2008, 3.

19 See Christopher Stevens *et al., The New EPAs: Comparative Analysis of their Content and the Challenges for 2008. Final Report*, Overseas Development Institute and the European Centre for Development Policy Management, Maastricht, 31 March 2008, 67.

20 The importance of regulatory requirements and standards for trade in general is reflected by the fact that the theme of the WTO's 2005 World Trade Report is the link between trade, standards and the WTO. WTO Secretariat, *World Trade Report 2005: Exploring the Links between Trade, Standards and the WTO* (World Trade Organization, Geneva), 30 June 2005.

21 For example, as discussed below, the WTO addresses TBT measures and SPS measures in two separate agreements, the *TBT Agreement* and the *SPS Agreement*. These Agreements are mutually exclusive, since according to Article 1.5 of the *TBT Agreement* this agreement does not apply to SPS measures as defined in the *SPS Agreement*.

22 A 2008 World Bank paper notes, with regard to the effectiveness of negotiations to address SPS trade barriers, that: "countries or industries that are known or perceived as having their "house in order" are much more effective in carrying out SPS-related diplomacy than countries/industries known for problematic systems and past deficiencies in compliance". Luz B Diaz Rios and Steven Jaffee, *Barrier, Catalyst, or Distraction? Standards, Competitiveness, and Africa's Groundnut Exports to Europe,* Agriculture and Rural Development Discussion Paper 39 (World Bank, Washington D.C.), January 2008, 69.

23 Poverty Reduction & Economic Management Trade Unit and Agriculture and Rural Development Department, *Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports,* Report no. 31207 (World Bank, Washington D.C.), 10 January 2005, 86-88.

24 Global Economic Prospects 2004: Realizing the Development Promise of the Doha Agenda (World Bank, Washington D.C.), 2003, 115.

25 Draft Commission Directive amending Council Directive 76/768/EEC, concerning cosmetic products, for the purpose of adapting Annex III thereto to technical progress.

26 See Panel Report, *EC – Trademarks and Geographical Indications*, paras 7.512-7.513, where the WTO Panel held that these inspection structures were "conformity assessment procedures" as meant under the definition of the *TBT Agreement*.

27 Debt and Finance Working Group on Trade, Market Access for Developing Country Exports -Selected Issues. Paper Prepared Jointly by the Staff of the International Monetary Fund and the World Bank, WT/WGTDF/W/14 (World Trade Organization, Geneva), 18 October 2002, para. 19. This report notes that, "SPS and other technical requirements have been viewed by developing country trade officials as a greater constraint on their ability to export than tariffs and quantitative restrictions…".

28 United Nations Conference on Trade and Development, *Eleventh Session, 13-18 June 2004. Draft São Paulo Consensus*, TD/L.380 (United Nations, Sao Paulo), 16 June 2004, para. 64, available at: www.unctad.org/en/docs/tdl380_en.pdf.

29 Blair Commission for Africa, *Our Common Interest*, March 2005, 268.

30 John S. Wilson, The Post-Seattle Agenda of the World Trade Organization in Standards and Technical Barriers to Trade: Issues for Developing Countries (World Bank, Washington D.C.), 1999; Tsunehiro Otsuki *et al.*, Saving Two in a Billion: A Case Study to Quantify the Trade Effect of European Food Safety Standards on African Exports (World Bank Development Research Group, Washington D.C.), 2000; John S. Wilson, International Trade: Standards, Technical Regulations, and Global Reform (World Bank, Economic Development Institute, Washington D.C.), 1997; Tsunehiro Otsuki *et al.*, A Race to the Top? A Case-Study of Food Safety Standards and African Exports, Report No. 2563 (World Bank, Washington D.C.), 2000; Steven Jaffee *et al.*, Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports, 31207 (World Bank, Poverty Reduction & Economic Management Trade Unit and Agriculture and Rural Development Department, Washington D.C.), 10 January 2005; Steven Jaffee and Spencer Henson, Standards and Agro-Food Exports from Developing Countries: Rebalancing the Debate, 3348 (World Bank, Geneva), June 2004.

31 See in this regard Richard Baldwin, Simon Evenett and Patrick Low, 'Beyond Tariffs: Multilateralising Deeper RTA Commitments' paper presented at the WTO-HEI Conference on *Multilateralisimg Regionalism*, 10-12 September 2007, Geneva, Switzerland, 7.

32 Richard Baldwin, Simon Evenett and Patrick Low, 'Beyond Tariffs: Multilateralising Deeper RTA Commitments' paper presented at the WTO-HEI Conference on *Multilateralisimg Regionalism,* 10-12 September 2007, Geneva, Switzerland, 8.

33 HACCP is a system used to ensure food safety by analysing potential hazards, identifying the points in the production process where they can be controlled and setting up process parameters and their critical limits to achieve this control, as well as follow-up procedures. The HACCP method was first used by the US National Aeronautics and Space Administration (NASA) to ensure the safety of food taken into space. Food Safety Unit of the Programme of Food Safety and Food Aid, *HACCP: Introducing the Hazard Analysis and Critical Control Point System*, WHO/FSF/FOS/97.2 (World Health Organization, Geneva), 1997, 1.

34 Regulation (EC) No 852/2004 of the European Parliament and the Council of 29 April 2004 on the hygiene of foodstuffs.

35 Regulation (EC) No 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC Text with EEA relevance.

36 One example of conformity assessment at the time of exportation is the requirement by the importing country of export certificates. Horton notes that export certificates serve to show that a supplier meets certain requirements and are based on the expectation that the certifying body (either a government authority or officially recognized non-governmental organization) will conduct inspections or tests to substantiate the accuracy of the information on the certificate. Linda R. Horton, 'Food from Developing Countries: Steps to Improve Compliance', *Food and Drug Law Journal* 53, 1998, 139-171, 147.

37 Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules.

38 See PricewaterhouseCoopers, *Sustainability Impact Assessment of the EU-ACP Economic Partnership Agreements – Key Findings, Recommendations and Lessons Learned"* (Paris, PricewaterhouseCoopers), May 2007, 73-74.

39 The importance of the agricultural sector in effective poverty alleviation is emphasized in the 2008 *World Development Report* of the World Bank. This Report notes: "Cross-country estimates show that GDP growth originating in agriculture is at least twice as effective in reducing poverty as GDP growth originating outside agriculture". World Bank, *World Development Report 2008: Agriculture for Development* (World Bank, Washington D.C.), 2008, 6. In addition, it is widely recognized that the agricultural sector is particularly important for the livelihoods of the poorest people in developing countries. The fact that 73 percent of the poor in developing countries live in rural areas means that improvements in the agricultural sector are significant for the alleviation of poverty. The FAO reports that 2.5 billion people in the developing world depend on agriculture for their livelihoods. See Food and Agriculture Organization, *The State of Agricultural Commodity Markets* (United Nations, Rome), 2004, 6. Along the same lines, the 2005 Human Development Report notes, "More than two-thirds of all people surviving on less than $1 a day live and work in rural areas, either as smallholder farmers or as agricultural labourers. Unfair trade practices systematically undermine the livelihoods of these people, hampering progress towards the [Millennium Development Goals] in the process". United Nations Development Programme, *Human Development Report 2005. International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (United Nations, New York), 2005, 129.

40 The *Agreement on Agriculture* is among the agreements resulting from the Uruguay Round of trade negotiations. It takes the first steps towards liberalizing the agricultural sector, which is traditionally among the most protected sectors in international trade. The *Agreement on Agriculture* imposes disciplines on traditional barriers to trade in this sector, namely tariffs, domestic support and export subsidies. These disciplines could be undermined if complementary rules were not in place to prevent the use of regulatory requirements for disguised protectionst purposes.

41 Global Economic Prospects 2004: Realizing the Development Promise of the Doha Agenda (World Bank, Washington D.C.), 2003, 109.

42 *Ibid.*, 104 and 110.

43 Agricultural exports of developing countries to other developing countries increased from 31 to 43 percent of their total agricultural exports in the period 1990-2002. Agricultural imports of developing countries from other developing countries increased from 37 to 47 percent in the same period. See WTO Secretariat, *World Trade Report 2004: Exploring the Linkage between the Domestic Policy Environment and International Trade* (World Trade Organization, Geneva), 11 June 2004.

44 *Global Economic Prospects 2004: Realizing the Development Promise of the Doha Agenda* (World Bank, Washington D.C.), 2003, 104. This report points out that growth in non-traditional exports has exceeded growth in traditional commodities by 3:1.

45 *Ibid.*

46 According to a 2004 FAO report, more than 50 developing countries, including most LDCs, depend on three or fewer commodities for more than half their exports. Food and Agriculture Organization, *The State of Agricultural Commodity Markets* (United Nations, Rome), 2004, 6. This point was also made in a non-paper by Kenya, Uganda and Tanzania

circulated by the Committee on Trade and Development in 2003. See Committee on Trade and Development, *Non-Paper on the Need for Urgent Action in WTO to Deal with the Crisis Situation Created by the Long-Term Trend Towards Decline in Prices of Primary Commodities to the Trade and Development of Developing Countries Which Are Heavily Dependant on Their Exports. Communication from Kenya, Uganda and Tanzania,* WT/COMTD/W/113, circulated on 19 May 2003, para. 3.

47 See PricewaterhouseCoopers, *Sustainability Impact Assessment of the EU-ACP Economic Partnership Agreements - Key Findings, Recommendations and Lessons Learned"* (Paris, PricewaterhouseCoopers), May 2007, 79.

48 The following three factors are noted in a recent World Bank study. Poverty Reduction & Economic Management Trade Unit and Agriculture and Rural Development Department, *Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports,* Report no. 31207 (World Bank, Washington D.C.), 10 January 2005, 3.

49 Food and Agriculture Organization, *The State of Agricultural Commodity Markets* (United Nations, Rome), 2004, 15.

50 Murphy notes: "Profits from international agricultural trade are increasingly in processed and higher value-added products. Exports from fisheries in developing to developed countries are now often worth more than the combined value of net exports of coffee, tea, cocoa, bananas and sugar". Sophia Murphy, *Securing Enough to Eat* (International Institute for Sustainable Development, Winnipeg), January 2005, 6.

51 A report of the Economic Research Service of the USDA notes that global trade in high-value foods (including horticultural products and processed foods) increased from 48 percent of world agricultural trade in 1976 to 75 percent in 1994. However, due to market access problems this growth has slowed down, reaching only 79 percent of world agricultural trade in 2002. Anita Regmi *et al., Market Access for High-Value Foods*, Agricultural Economic Report No. 840 (United States Department of Agriculture, Washington D.C.), February 2005, 1.

52 These factors are noted in the *World Trade Report* 2004. This report also attributes the growth of trade in processed agricultural goods to the fact that processed goods have more possibilities for intra-industry trade and for product differentiation. For example, while two countries that produce cocoa beans are unlikely to trade this product between each other, if they produce chocolate bars of different types, they could trade these products to cater for different consumer tastes. WTO Secretariat, *World Trade Report 2004: Exploring the Linkage between the Domestic Policy Environment and International Trade* (World Trade Organization, Geneva), 11 June 2004, 16-17.

53 Mauritius initialled the interim EPA between ESA countries and the EC on 4 December 2007. The new arrangements under the EPA agreements are given effect to in *Council Regulation applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements,* 14970/1/07 REV 1, Brussels, 18 December 2007.

54 Sugar accounts for 16 percent of Mauritius's merchandise export earnings and 10 percent of its total foreign exchange earnings, amounting to USD 350 million in 2006. *Trade Policy Review Body, Trade Policy Review: Mauritius - Report by the Secretariat* WT/TPR/S/198, circulated on 19 March 2008, Part IV para. 19. See also International Trade Centre of UNCTAD/WTO, *Trade Competitiveness Map*, Exports of Mauritius, 2005.

55 Mauritius enjoyed a duty-free quota of 507, 000 tons for sugar exports to the EC under the Sugar Protocol to the *Cotonou Agreement*. Another 16,000 tonnes had preferential access under the Special Preferential Sugar Agreement. The latter agreement was replaced by the Complementary Quantity (CQ) system on 1 July 2006. In 2006/07, Mauritius exported 487,000 tonnes under the Sugar Protocol, which applied a guaranteed price of EUR523.70 per tonne till 30 June 2006. This price is scheduled to decrease according to the following schedule: EUR496.80 (1 July 2006 - 30 September 2008); EUR434 (1 October 2008 - 30 September 2009); and EUR335 (as of 1 October 2009). See Trade Policy Review Body, *Trade Policy Review: Mauritius - Report by the Secretariat* WT/TPR/S/198, circulated on 19 March 2008, Part IV paras 20-21 and 52. See also Trade Policy Review Body, *Trade Policy Review: Mauritius - Report by the Government,* WT/TPR/G/90, circulated on 5 October 2001, paras 12-14.

56 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 (the *Cotonou Agreement*). The *Cotonou Agreement*, which replaced the successive Lomé Conventions between the EU and the ACP states, provides zero customs duties to almost all industrial products and lower than normal customs duties to agricultural products from ACP countries (Art. 1 of Annex V). Special regimes for bananas and sugar are established in the Banana Protocol and Sugar Protocol to the *Cotonou Agreement*.

57 Trade Policy Review Body, *Trade Policy Review: Mauritius - Report by the Secretariat* WT/TPR/S/198, circulated on 19 March 2008, para. 23.

58 Ministry of Agro-Industry and Fisheries of the Republic of Mauritius, *Strategic Options in Crop Diversification and Livestock Sector 2007-2015 (Consultative Draft)* (Republic of Mauritius, Port Louis), August 2007, 2.

59 Committee on Sanitary and Phytosanitary Measures, *The Mauritian Experience with the SPS Agreement from the Indian Ocean Perspective,* G/SPS/GEN/526, circulated on 25 October 2004, para. 12. See also Ministry of Agro-Industry and Fisheries of the Republic of Mauritius, *Strategic Options in Crop Diversification and Livestock Sector 2007-2015* (Consultative Draft) (Republic of Mauritius, Port Louis), August 2007, 122, available at: http://www.areu.mu/files/pub/areunssp.pdf, visited on 10 January 2008. This policy document notes that neighbouring countries such as Madagascar and Mozambique have abundant unexploited land resources, very cheap labour resources and climactic conditions conducive to year-round crop cultivation. In addition, some crops (e.g. potatoes) that cannot be grown in Mauritius in specific periods can be grown in these same periods in these countries, thus ensuring a regular supply.

60 *Ibid.,* 177.

61 Similarly, Mauritius is trying to develop its fishery sector. As it does not have a large continental shelf, local fish production does not contribute significantly to GDP in Mauritius. However, Mauritius is actively engaged as a landing and processing site for fishery products and 40 percent of its fishery exports in 2006 were in fact re-exports of landed fish. The economic contribution of these "seafood hub" activities to the economy of Mauritius was reported by the Minister of Agro-Industry and Fisheries Arvin Boolell to be USD 250 million in 2006. Mauritius intends to expand its capacity to act as a seafood hub. See Speech by Dr. the Hon. Arvin Boolell, Minister of Agro Industry and Fisheries, to the National Assembly on 13 November 2007, presenting the *Fisheries & Marine Resources Bill (Second Reading)*, obtained from: http://www.gov.mu/portal, visited on 10 January 2008.

62 According to this report, processed agricultural products accounted for 42 percent of global agricultural trade in 1990, and 48 percent in 2001-2. *Ibid.*, 16.

63 Food and Agriculture Organization, *The State of Agricultural Commodity Markets* (United Nations, Rome), 2004, 26. This report notes that developing country shares in world exports of processed agricultural products actually decreased from 27 percent in 1981-1990 to 25 percent in 1991-2000, and for LDCs this decrease was from 0.7 to 0.3 percent in the same period.

64 These are countries whose agricultural exports were in excess of USD 6 billion in 2002, except for Brazil and Chile. However, while no overall link was found between income levels of countries and their share of processed agricultural products, the 'World Trade Report 2004' found that all countries that have a low share of processed goods are low or lower-middle income countries. These countries' share of processed goods in their agricultural exports is less than 15 percent. Examples are Sri Lanka, Cameroon, Pakistan and Zimbabwe. WTO Secretariat, *World Trade Report 2004: Exploring the Linkage between the Domestic Policy Environment and International Trade* (World Trade Organization, Geneva), 11 June 2004, 17.

65 A 2005 World Bank study notes that 50 percent of agri-food exports of developing countries is made up of high-value products (fresh and processed fruits and vegetables, fish, meat, nuts and spices), while traditional agri-food exports (coffee, tea, cocoa, sugar, cotton and tobacco) continue to decline. Poverty Reduction & Economic Management Trade Unit and Agriculture and Rural Development Department, *Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports*, Report no. 31207 (World Bank, Washington D.C.), 10 January 2005, 1. See also *Global Economic Prospects 2004: Realizing the Development Promise of the Doha Agenda* (World Bank, Washington D.C.), 2003, 115.

66 The FAO notes that developing countries other than the LDCs have more than doubled the share of horticultural, meat and diary products in their exports, while reducing reliance on tea, coffee, cocoa and raw materials from over 55 percent to 30 percent between 1960 and 2000. However, the dependence of LDCs on traditional products has actually increased from 59 percent to 72 percent in the same period. Food and Agriculture Organization, *The State of Agricultural Commodity Markets* (United Nations, Rome), 2004, 11.

67 This point is made by Murphy in Sophia Murphy, *Securing Enough to Eat* (International Institute for Sustainable Development, Winnipeg), January 2005, 6.

68 This study involved a survey of all countries classified as low- and middle-income countries by the World Bank that were Members of the WTO and/or the Codex Alimentarius Commission in March 1999. The results are based on a 72 percent response rate. See Spencer Henson *et al.*, 'How Developing Countries View the Impact of Sanitary and Phytosanitary Measures on Agricultural Exports', in *Agriculture and the New Trade Agenda: Creating a New Global Trading Environment for Development*, M.D. Ingco and L.A. Winters (eds.) (Cambridge University Press, Cambridge), 2004, 359-375, 361-362. Henson *et al.* report that other technical requirements (such as labelling and compositional requirements) were also regarded as important but that tariffs and quantitative restrictions were seen as less important. A possible reason for this suggested by the authors is the fact that many developing countries benefit from preferential market access to EU markets, thus decreasing the relevance of traditional market barriers.

69 For example, with regard to African countries, the Blair Commission for Africa report notes, "Health standards such as sanitary and phyto-sanitary (SPS) standards can be serious barriers to trade…It is not unwillingness to meet these standards that is the problem, nor disagreement with their rationale. The problem is that poor countries in Africa are not equipped to meet these standards". Blair Commission for Africa, *Our Common Interest*, March 2005, 278.

70 Information on US border inspections shows that the main reasons for the rejection of products from Africa, Asia, Latin America and the Caribbean are microbiological contamination, filth and decomposition This information is referred to by Henson *et al.* who point out that only the US systematically collects this type of information and makes it publicly available. Spencer Henson *et al.*, 'How Developing Countries View the Impact of Sanitary and Phytosanitary Measures on Agricultural Exports', in *Agriculture and the New Trade Agenda: Creating a New Global Trading Environment for Development,* M.D. Ingco and L.A. Winters (eds.) (Cambridge University Press, Cambridge), 2004, 359-375, 361. The WHO Regional Office for Africa reports that a large part of rejections of African exports by the U.S. are due to "lack of basic food hygiene". Of reasons for import detentions, microbiological contamination accounts for 41.3 percent, filth for 17.8 percent and mould for 6.3 percent. See WHO Regional Office for Africa, 'Developing and Maintaining Food Safety Control Systems for Africa - Current Status and Prospects for Change', presented at the *FAO/WHO Second Global Forum of Food Safety Regulators*, Conference Room Document 32 (Food and Agriculture Organization and World Health Organization, Bangkok, Thailand) 12-14 October 2004, Table 1.

71 The USDA Economic Research Service reports that SPS requirements are stricter with regard to high-value (including processed) products than with regard to traditional bulk products. This is ascribed to their ready-to-eat and perishable nature and the fact that they require specialized handling, packaging and shipping. For this reason, and due to the diversity in such SPS requirements, suppliers may prefer to manufacture high-value food locally rather than engage in export trade in these products, thereby affecting trade. Anita Regmi *et al.*, *Market Access for High-Value Foods,* Agricultural Economic Report No. 840 (United States Department of Agriculture, Washington D.C.), February 2005, 3.

72 The UNCTAD Secretariat reports that, "issues such as tariff escalation and sanitary and phytosanitary regulations make it difficult for developing countries to increase their export income". United Nations Conference on Trade and Development, *Assuring Development Gains from the International Trading System and Trade Negotiations. Background Note by the UNCTAD Secretariat for the 11th Session, 13-18 June 2004*, TD/397 (United Nations, São Paulo), 4 May 2004, para. 28.

73 It is interesting to note that since the entry into force of the WTO*SPS Agreement* the largest number of notifications of SPS measures there under relate to live animals, meat and animal products (63 percent). This figure increases to 74 percent if notifications of measures applying to fish and seafood, dairy products and eggs are included. The next largest category of notifications relate to horticultural products, namely fresh fruit and vegetables (12 percent). Bulk agricultural products account for only 7 percent of notifications, most of which relate to restrictions on genetically modified products. Anita Regmi *et al.*, *Market Access for High-Value Foods,* Agricultural Economic Report No. 840 (United States Department of Agriculture, Washington D.C.), February 2005, 10-11.

74 These SPS requirements make up by far the largest part of specific trade concerns raised before the WTO's SPS Committee to date. SPS measures affecting fully-processed products

account for 50 percent of all trade concerns raised, measures on semi-processed products for 37 percent and measures on horticultural products for 11 percent. By contrast, measures on primary products account for a mere 2 percent of trade concerns raised. *Ibid.*, 12.

75 See PricewaterhouseCoopers, *Sustainability Impact Assessment of the EU-ACP Economic Partnership Agreements – Key Findings, Recommendations and Lessons Learned"* (Paris, PricewaterhouseCoopers), May 2007, 80.

76 *Ibid.*, 122.

77 *Ibid.*, 123.

78 An assessment of the various methodologies employed for the measurement of the effect of non-tariff barriers to trade in the food and agricultural sectors was conducted under the auspices of the OECD in 2001. See OECD Food Agriculture and Fisheries Directorate, *Measurement of Sanitary, Phytosanitary and Technical Barriers to Trade*, 17-18 September 2001.

79 MacLaren mentions two difficulties in economic analysis of technical barriers to trade in the agri-food sector. These are first that the use of these measures may lead to more, rather than less, efficient market outcomes. The second is that "the time dimension introduced by the spread and effects of imported diseases cannot be ignored…[T]he time profiles of costs and benefits are different and …the future stream of costs (and benefits) is uncertain and perhaps irreversible". Donald MacLaren, *Some Issues in the Economic Analysis of Technical Barriers to International Trade in Agri-Food Products,* Research Paper Number 663 (University of Melbourne, Department of Economics, Melbourne), December 1998, 2. Similarly, in a study quantifying the effect of Japan's phytosanitary trade barrier to apple imports from the US, Calvin and Krissof note that, "While measuring [the technical barrier's] tariff-rate equivalents and determining the welfare impacts of removing barriers are simple concepts, the empirical application is complex and the results are highly dependent on a number of simplifying assumptions". Linda Calvin and Barry Krissof, 'Technical Barriers to Trade: A Case Study of Phytosanitary Barriers and U.S.-Japanese Apple Trade', *Journal of Agricultural and Resource Economics* 23 (2), 1998, 351-366, 364.

80 For example, Otsuki, Wilson and Miravat have estimated the effect of European food safety requirements for exports from African countries. Tsunehiro Otsuki *et al.*, 'Measuring the Effect of Food Safety Standards on African Exports to Europe', in *The Economics of Quarantine and the SPS Agreement*, Kim Anderson, *et al.* (eds.) (Centre for International Economic Studies, Adelaide), 2001. For discussions on the quantification of the effects of standards see also Keith E. Maskus *et al.*, *Quantifying the Impact of Technical Barriers to Trade: A Framework for Analysis,* Report No. 2512 (World Bank, Washington D.C.), December 2000. See further the following conference papers Neil Gandal, 'Quantifying the Trade Impact of Compatibility Standards and Barriers - an Industrial Organization Perspective', presented at the *Workshop on Quantifying the Trade Effect of Standards and Regulatory Barriers: Is it possible?* (World Bank, Washington D.C.) 27 April 2000; T. Ademola Oyejide *et al.*, 'Quantifying the Trade Impact of Sanitary and Phytosanitary Standards: What Is Known and Issues of Importance for Sub-Saharan Africa', presented at the *Workshop on Quantifying the Trade Effect of Standards and Regulatory Barriers: Is it possible?* (World Bank, Washington D.C.) 27 April 2000; Mattias Ganslandt and James R. Markusen, 'Standards and Related Regulations in International Trade: A Modeling Approach', presented at the *Workshop on Quantifying the Trade Effect of Standards and Regulatory Barriers: Is it possible?* (World Bank, Washington D.C.) 27 April 2000;

Keith E. Maskus and John S. Wilson, 'Quantifying the Impact of Technical Barriers to Trade: A Review of Past Attempts and the New Policy Context', presented at the World Bank *Workshop on Quantifying the trade effect of standards and technical barriers: Is it possible?* (World Bank, Washington D.C.) 27 April 2000.

81 Horton mentions the various costs for developing countries from rejection of products at the border. She notes that these costs are not limited to value of product but include transportation and other export costs. In addition, costs of compliance with SPS requirements are also significant for developing countries and include the costs of upgrading production systems, quality control and certification systems. See Linda R. Horton, 'Food from Developing Countries: Steps to Improve Compliance', *Food and Drug Law Journal* 53, 1998, 139-171.

82 Examples of more immediate health issues faced by many developing countries are the need for clean drinking water, good medical care, the fight against AIDS etc.

83 Non-health related development priorities include, for example, education and housing.

84 The WHO Regional Office for Africa has noted that many countries in Africa "do not have adequate food security, so having effective food control systems appear not to be a priority, resulting in little or no attention to food legislation, its administration and enforcement. This has often resulted in the importation of substandard food items as well as trade rejections of food exports". See WHO Regional Office for Africa, 'Developing and Maintaining Food Safety Control Systems for Africa - Current Status and Prospects for Change', presented at the *FAO/WHO Second Global Forum of Food Safety Regulators,* Conference Room Document 32 (Food and Agriculture Organization and World Health Organization, Bangkok, Thailand) 12-14 October 2004, 1.

85 W.C.K. Hammer, 'Food Trade and Implementation of the SPS and *TBT Agreement*s: Current Status of Food Trade, Including Food Quality and Safety Problems', presented at the *Conference on International Food Trade Beyond 2000: Science-Based Decisions, Harmonization, Equivalence and Mutual Recognition* (Food and Agriculture Organization of the United Nations, Melbourne Australia) 11-15 October 1999, 1.

86 'Agreement on Agriculture', in The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (World Trade Organization, Geneva), 1994, 39-68.

87 *Ibid.*, Art. 20.

88 Ministerial Conference, *Doha Ministerial Declaration. Adopted on 14 November 2001*, WT/MIN(01)/DEC/1, circulated on 20 November 2001, paras 13-14. The work programme set out in the Ministerial Declaration with regard to agriculture aims at substantial improvements in market access; reductions, with a view to phasing out, of export subsidies; and substantial reductions in trade-distorting domestic support.

89 Edwini Kwame Kessie, 'Developing Countries and the World Trade Organization: What Has Changed?' *World Competition* 22 (2), 1999, 83-110, 84.

90 As stated by the UNCTAD Secretariat, "Since the integration into the [international trading system] of developing countries has increasingly involved aligning their policies and standards with those of developed countries, there a number of expectations have been implicit in the participation of developing countries in the ITS: (a) that their development, financial and trade needs and circumstances would be fully 'integrated' into the framework of rights and obligations; (b) that adequate international support and assistance, technical and financial, would be readily available, as structural and

adjustment support; (c) that their own liberalization and structural adjustment would be reciprocated, especially by developed-country partners; (d) that international markets would be less imperfect and distorted and would allow developing country enterprises to compete fairly and make best use of efficiencies generated by economic reform; (e) that enhanced and stable preferential market access in areas of developing countries' inherent and emerging comparative advantage in commodities, manufactures and services would be realized in their major markets; and (f) that their vulnerabilities and inadequacy of bargaining power would be redressed". United Nations Conference on Trade and Development, *UNCTAD XI - the Spirit of Sao Paulo*, TD/L.382 (United Nations, Sao Paulo), 17 June 2004, para. 6.

91 Micheal J. Finger and Philip Schuler, 'Implementation of Uruguay Round Commitments: The Development Challenge', *The World Economy* 23 (4), 2000, 511-525, 514.

92 See J. Michael Finger, *The Doha Agenda and Development: A View from the Uruguay Round* (Asian Development Bank, Manila), August 2002, 9-10.

93 The discussions on implementation issues in Special Sessions of the General Council finally resulted in the drafting of the *Decision on Implementation Related Issues and Concerns* (the *Implementation Decision*), which was adopted at the Doha Ministerial Conference on 14 November 2001. Ministerial Conference, *Implementation-Related Issues and Concerns. Decision of 14 November 2001,* WT/MIN(01)/17, circulated on 20 November 2001. With regard to outstanding implementation issues, the *Implementation Decision* refers to paragraph 12 of the Doha Ministerial Declaration, which notes the utmost importance of these issues and sets out a two-track work programme for addressing them. On some issues, a negotiating mandate was agreed, whereas on others the issue was referred to the appropriate WTO body, which was obliged to take it up as a matter of priority and report to the Trade Negotiations Committee by the end of 2002 for appropriate action.

94 De Feyter points out that sub-Saharan African countries "struggle with the inadequate domestic supply response to existing market opportunities". Koen De Feyter, *World Development Law: Sharing Responsibility for Development* (Intersentia, Antwerp), 2001, 97.

95 The UNCTAD Secretariat, in its background note to UNCTAD XI, notes, "In the context of limited resources, developing countries have difficulty giving priority to the resources required for trade success when some pressing development priorities (e.g. combating widespread poverty, illiteracy, hunger and malnutrition and pandemics) legitimately claim a large part of their institutional attention and budgetary allocation. Unless adequate support and phase in are provided for integration into the [international trading system], the costs of integration may far outweigh the benefits". United Nations Conference on Trade and Development, *Assuring Development Gains from the International Trading System and Trade Negotiations. Background Note by the UNCTAD Secretariat for the 11th Session, 13-18 June 2004,* TD/397 (United Nations, São Paulo), 4 May 2004, para. 22.

96 In his recommendations for the Doha Round negotiations on the basis of the Uruguay Round experience with technical assistance, Finger advises, "Do not trust trade ministers when they talk about money, they do not have any". He refers to the fact that trade ministers and ministries do not have authority or even influence within their governments to dispose of the necessary sums of money for technical assistance". J. Michael Finger, *The Doha Agenda and Development: A View from the Uruguay Round* (Asian Development Bank, Manila), August 2002, 38.

97 'Agreement on Technical Barriers to Trade', in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (World Trade Organization, Geneva), 1994, 138-162.

98 As noted by Baldwin, Evenett and Low, one way of doing so is through mutual recognition agreements with regard to testing facilities in particular sectors. Richard Baldwin, Simon Evenett and Patrick Low, 'Beyond Tariffs: Multilateralising Deeper RTA Commitments' paper presented at the WTO-HEI Conference on *Multilateralisimg Regionalism,* 10-12 September 2007, Geneva, Switzerland, 8-9.

99 See Title II Chapter 6 of the CARIFORUM EPA and Title II Chapter IV of the SADC EPA.

100 As pointed out in note 2 above, the interim EPA signed with Central Africa has only one Central African party, namely Cameroon. It is therefore referred to as the 'EPA with the Central African Party' in this paper.

101 See Title III Chapter 4 of the individual EPAs with Côte d'Ivoire and Ghana, Title III Chapter 4 of the EPA with the Central African Party and Part II Chapter 5 of the Pacific EPA.

102 This realization motivated negotiators in the WTO Uruguay Round to address SPS measures in a separate agreement to that dealing with TBT measures. Unlike the *TBT Agreement*, the *SPS Agreement* calls for scientific evidence of a health risk to justify the measures falling within its scope of application, and recognises the autonomous right of WTO Members to deviate from international standards in its provisions on harmonization. By contrast, the *TBT Agreement* only requires TBT measures to be justified by their necessity to achieve a legitimate objective, yet it obliges Members to harmonise their TBT measures on the basis of international standards, unless these are ineffective or inappropriate to achieve the legitimate objective sought by the measure at issue.

103 See Article 37 of the EPA with the EAC countries and Article 53 of the EPA with the ESA countries. In addition, Article 3.1(c) of the EAC EPA and 3.1(b) of the ESA EPA set out the objective "to establish the framework, scope and principles for further negotiation on trade in goods, including … technical barriers to trade".

104 See Article 44 of the CARIFORUM EPA, Article 48 of the SADC EPA, Article 36 of the EPAs with Côte d'Ivoire and Ghana, Article 41 of the EPA with the Central African Party and Article 36 of the EPA with the Pacific countries.

105 In the Central African region, Equatorial Guinea, Sao Tomé and the Republic of Congo (Brazzaville) are not WTO Members. In the Pacific region, Samoa, Vanuatu, Tuvalu, Kiribati and East Timor are not WTO Members.

106 See Article 2.2 of the *TBT Agreement* with regard to technical regulations; Article 5.1.2 of the *TBT Agreement*, with regard to conformity assessment procedures; and paragraph E of the Code of Good Practice for the Preparation, Adoption and Application of Standards, in Annex 3 to the *TBT Agreement* (hereinafter the Code of Good Practice) with regard to standards.

107 See Article 2.2 of the *TBT Agreement*.

108 See Article 2.2 of the *TBT Agreement* with regard to technical regulations; Article 5.1.2 of the *TBT Agreement*, with regard to conformity assessment procedures (referring to the risks of non-conformity). No provision specifies the risks to be taken into account with regard to standards.

109 Economies of scale refer to the phenomenon where increases in the scale of production (for example due to access to foreign markets) typically lead to a corresponding decrease in the costs of production per unit, since fixed costs are shared over a larger number of units. This is particularly the case when there are high fixed costs of production and small marginal costs. Where the product has to be adapted to different requirements on the various export markets, these economies of scale are reduced or lost.

110 Razeen Sally, *Whither the World Trading System? Trade Policy Reform, the WTO and Prospects for the New Round*, No. 76 (Timbro, Stockholm), 2002, 29. Sally argues that harmonization "slams the door on healthy, competitive, bottom-up national experiments with policies and institutions tailored to differing circumstances".

111 *Ibid.*

112 Graham Mayeda, 'Developing Disharmony? The SPS and *TBT Agreement*s and the Impact of Harmonization on Developing Countries', *Journal of International Economic Law* 7 (4), 2004, 737-764, 740. It is useful to note here that the harmonization disciplines of the *TBT Agreement* do not oblige Members always to adopt international standards, but instead they provide a possibility for deviation from international standards under specific conditions.

113 See Article 2.4 of the *TBT Agreement*, with regard to technical regulations; Article 5.4 of the *TBT Agreement*, with regard to conformity assessment procedures; and paragraph F of the Code of Good Practice, with regard to standards.

114 See Article 2.2 of the *TBT Agreement*, which contains a non-exhaustive list of legitimate objectives.

115 See Article 2.5 of the *TBT Agreement*, with regard to technical regulations.

116 *Ibid.* Note that the exception in respect of conformity assessment procedures does not mention the criterion of effectiveness.

117 See Appellate Body Report, *EC – Sardines*, para. 7.110.

118 *Ibid.* para. 288.

119 See Article 12.4 of the *TBT Agreement*.

120 The six EPAs that contain provisions on TBT issues all reaffirm the rights and obligations of the *TBT Agreement*, as discussed above, including those on harmonization.

121 See Article 50 of the CARIFORUM EPA, Article 53 of the SADC EPA, Article 36 and Article 42 of the individual EPAs with Côte d'Ivoire and Ghana.

122 See Article 53 of the SADC EPA.

123 See note 2 above.

124 See Article 46 of the EPA with Central Africa (Cameroon).

125 See Article 46 of the EPA with Central Africa (Cameroon).

126 See Article 43 of the EPAs with Côte d'Ivoire and Ghana.

127 See Article 53 of the SADC EPA and Article 40 of the Pacific EPA. Note that this obligation is qualified in the SADC EPA by the phrase "where appropriate", which is not the case in the Pacific EPA.

128 Peter Drahos, 'The Regulation of Public Goods', *Journal of International Economic Law* 7 (2), 2004, 321-339, 338.

129 *Ibid*.

130 Donna Roberts *et al*., 'Sanitary and Phytosanitary Barriers to Agricultural Trade: Progress, Prospects and Implications for Developing Countries', in *Agriculture and the New Trade Agenda - Creating a Global Trading Environment for Development*, M.D. Ingco and L.A. Winters (eds.) (Cambridge University Press, Cambridge), 2004, 329-358, 341.

131 This comment was made by India in the run up to the Seattle Ministerial Conference meeting in 1999. General Council, Preparations for the 1999 Ministerial Conference. Proposals Regarding the Agreement on Sanitary and Phytosanitary Measures in Terms of Paragraph 9(a)(I) of the Geneva Ministerial Declaration. Communication from India, WT/GC/W/202, circulated on 14 June 1999, para. 1.

132 Peter Drahos, 'The Regulation of Public Goods', *Journal of International Economic Law* 7 (2), 2004, 321-339, 338. Drahos notes that this is one reason why big business is such an influential actor in food standards regulation, *inter alia*. In addition, Drahos points to the fact that some states and businesses can draw upon mechanisms of economic coercion not available to other actors. Here one can think of the threat of withdrawal of financial or technical assistance to developing countries that do not support the donor state's position in standard-setting bodies.

133 Mattli and Büthe cite the following early statement of the US Federal Trade Commission with regard to international standards and the power struggles that underlie them: "[A]lthough the considerations of the standard tend to be expressed in rather technical language, behind this façade of engineering jargon, what is actually happening is an economic fight, often of the most savage type imaginable because the states are so high". US Federal Trade Commission, *Standards and Certification: Proposed Rules and Staff Report* (Washington D.C.) 1978, 94, cited in Walter Mattli and Tim Büthe, 'Setting International Standards: Technological Rationality or Primacy of Power', *World Politics* 56 (1), 2003, 1-42, 1.

134 David G. Victor, 'Risk Management and the World Trading System: Regulating International Trade Distortions Caused by National Sanitary and Phytosanitary Policies', in *Incorporating Science, Economics, and Sociology in Developing Sanitary and Phytosanitary Standards in International Trade: Proceedings of a Conference*, National Research Council Board on Agriculture and Natural Resources (ed.) (National Academy Press, Washington D.C.), 2000, 118-169, 133. David Victor makes this point specifically with regard to the standards of the Codex Alimentarius Commission, but it can be extended generally to international standards. A useful example is provided by the discussion by Sara Poli of the way in which the EC defends its interests within the international standard-setting process of the Codex Alimentarius Commission. Sara Poli, 'The European Community and the Adoption of International Food Safety Standards within the Codex Alimentarius Commission', *European Law Journal* 10 (5), 2004, 613-630.

135 Walter Mattli and Tim Büthe posit (with reference to technical standards set by the International Organization for Standardization and the International Electro-technical Commission) that historical institutional legacies in national systems "play a critical though largely accidental role" determining who sets the international standards agenda (the "first-movers") and who bears the cost of switching to the international standards (the "second movers"). Walter Mattli and Tim Büthe, 'Setting International Standards: Technological Rationality or Primacy of Power', *World Politics* 56 (1), 2003, 1-42, 4.

136 The issue of *effective participation* should be distinguished from that of *membership* in the international standard-setting organizations. In fact, a large majority of WTO Members, including most developing countries, are members of several of the relevant international standard setting bodies.

137 In this regard, David Leebron calls harmonization a "Procrustean response" to international trade, making an apt analogy with the myth of Procrustes. Procrustes tied all travellers to his bed: if they were shorter than the bed, he stretched their limbs to make them fit; if they were longer than the bed he lopped off the excess length of their limbs. David W. Leebron, 'Lying Down with Procrustes: An Analysis of Harmonization Claims', *in Fair Trade and Harmonization: Prerequisites for Free Trade?*, Jagdish N. Bhagwati and Robert E. Hudec (eds.), vol. 1 (MIT Press, Cambridge), 1997, 41-117, 41 note 41.

138 David Zaring, *Informal Procedure, Hard and Soft, in International Administration,* IILJ Working Paper 2004/6 (Institute for International Law and Justice, New York University School of Law, New York), 2004, 4. Zaring makes this observation in the context of international harmonization in the area of financial regulation. However, it holds true more broadly, including in the TBT area. Sally has stated that harmonization initiatives at the WTO are, at worse, "tantamount to an OECD standards harmonization agenda". Razeen Sally, *Whither the World Trading System? Trade Policy Reform, the WTO and Prospects for the New Round,* No. 76 (Timbro, Stockholm), 2002, 29.

139 Jonathan Macey criticizes this proselytization achievement as being nakedly imperialistic. See Jonathan Macey, 'Regulatory Globalization as a Response to Regulatory Competition,' *Emory Law Journal* 52, no. 3, (2003),1353-1379:1353-1354, as referred to by Zaring, David Zaring, *Informal Procedure, Hard and Soft, in International Administration,* IILJ Working Paper 2004/6 (Institute for International Law and Justice, New York University School of Law, New York), 2004, 4.

140 Donna Roberts *et al.*, 'Sanitary and Phytosanitary Barriers to Agricultural Trade: Progress, Prospects and Implications for Developing Countries', in *Agriculture and the New Trade Agenda - Creating a Global Trading Environment for Development*, M.D. Ingco and L.A. Winters (eds.) (Cambridge University Press, Cambridge), 2004, 329-358, note 29.

141 Razeen Sally, *Whither the World Trading System? Trade Policy Reform, the WTO and Prospects for the New Round,* No. 76 (Timbro, Stockholm), 2002, 28. Sally sees this as "an attempt to iron out asymmetries in other countries' domestic institutions and raise their costs out of line with comparative advantages", which has an effect the same as classic protectionism.

142 Spencer Henson *et al.*, *Review of Developing Country Needs and Involvement in International Standards Setting Bodies* (Centre for Food Economics Research, Department of Agricultural and Food Economics, University of Reading, 2001, para. 37.

143 *Ibid.*

144 WTO Secretariat, *World Trade Report 2005: Exploring the Links between Trade, Standards and the WTO* (World Trade Organization, Geneva), 30 June 2005, 87. This report points out that due to the costly nature of effective participation in the international standard-setting process, as well as of setting up the necessary infrastructure, it may be less resource intensive for a developing WTO Member to develop its own national standards in isolation, or to simply adopt the standards of its main trading partner. An example given is that of Namibia, where the manufacturing sector relies upon South African standards.

145 Peter Drahos, 'The Regulation of Public Goods', *Journal of International Economic Law* 7 (2), 2004, 321-339, 337. Drahos makes this point with regard to harmonized standards for excludability in the context of intellectual property protection under the TRIPS. However, it holds true also for TBT measures since the coming into force of the *TBT Agreement*.

146 David Vogel claims that the *SPS* and *TBT Agreement*s "reflect the political strength of internationally oriented firms, who increasingly favor international standards". David Vogel, 'Food Safety and International Trade', in *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Harvard University Press, Cambridge/London), 1995, 150-195, 190.

147 See Article 2.6 of the *TBT Agreement*, with regard to technical regulations; Article 5.5 of the *TBT Agreement*, with regard to conformity assessment procedures; and paragraph G of the Code of Good Practice, with regard to standards.

148 See Article 12.5 of the *TBT Agreement*. Further Article 12.6 requires Members to take such reasonable measures as may be available to them to ensure that international standardising bodies consider, and if practicable prepare, international standards concerning products of special interest to developing countries.

149 See Article 50 of the CARIFORUM EPA, Article 53 of the SADC EPA and Article 42 of the EPAs with Côte d'Ivoire and Ghana.

150 Martin Doherty argues that mutual recognition is best seen as a vehicle for regulatory cooperation, based on harmonization, equivalence or external agreed-upon criteria (correspondence on file with author).

151 See Article 2.7 of the *TBT Agreement*, with respect to technical regulations; and Article 6.1 of the *TBT Agreement*, with respect to conformity assessment procedures.

152 See Article 6.3 of the *TBT Agreement*.

153 See Article 53 of the SADC EPA.

154 See Articles 5.1.1 and 5.2.1 of the *TBT Agreement*.

155 See Article 5.1.2 of the *TBT Agreement*.

156 See Article 5.4 - 5.5 of the *TBT Agreement*.

157 See Articles 5.6-5.9 and 7.2 of the *TBT Agreement*.

158 See Article 6 of the *TBT Agreement*.

159 See Article 5.2.1 of the *TBT Agreement*.

160 See Article 5.2.5 of the *TBT Agreement*.

161 See Articles 5.2.3, 5.2.6 and 5.2.7 of the *TBT Agreement*.

162 See Article 5.2.2 of the *TBT Agreement*.

163 See Article 5.2.2 of the *TBT Agreement*.

164 See Article 5.2.8 of the *TBT Agreement*.

165 See Article 49.2 and 49.3 of the CARIFORUM EPA.

166 See Article 51.1 and 51.2(a) and (d) of the CARIFORUM EPA, Articles 53 and 55 of the SADC EPA, Articles 43.1 and 43.2(b) of the EPAs with Côte d'Ivoire and Ghana.

167 Robert Keohane, 'Global Governance and Democratic Accountability', in *Taming Globalization: Frontiers of Governance*, David Held and Mathias Koenig-Archibugi (ed.) (Polity Press, Cambridge), 2003, 130-159, 141.

168 Scott addresses the question whether judicial review of SPS regulations in the WTO could be seen as a way to mitigate the accountability gap identified by Keohane, "and hence to reinforce democracy in an age where the concept of statehood no longer captures all dimensions of power". See Joanne Scott, *European Regulation of GMOs: Thinking About 'Judicial Review' in the WTO*, Jean Monnet Working Paper 04/04 (Jean Monnet Program, New York), 2004, 13, available at: www.jeanmonnetprogram.org/papers/04/040401.pdf.

169 See Articles 2.9, 2.10, 5.6, 5.7 of the *TBT Agreement* and paragraphs J and L of Annex 3 of the *TBT Agreement*. The advance notification obligation applies when an international standard does not exist or the relevant TBT measure deviates from an existing international standard, and where the measure may have a significant effect on trade between TO Members. This obligation is made more lenient in cases of urgency.

170 See Articles 2.11 and 5.8 of the *TBT Agreement* and paragraph O of the Code of Good Practice in Annex 3 of the *TBT Agreement*.

171 See Articles 2.10 and 5.7 of the *TBT Agreement* and paragraph L of the Code of Good Practice in Annex 3 of the *TBT Agreement*.

172 See Articles 2.10.1-3 and 5.7.1-3 of the *TBT Agreement* and paragraph L of the Code of Good Practice in Annex 3 of the *TBT Agreement*.

173 Due to the absence of specified time periods in the *TBT Agreement*, the TBT Committee recommended in 1995 that the normal time limit for comments on notified technical regulations and conformity assessment procedures should be 60 days, and that that any Member able to provide a time limit beyond 60 days was encouraged to do so. In 2008, while Members allowed an average of 58.1 days for comments, 136 notifications either did not specify a comment period, or stated it as non applicable or provided a comment period which had already lapsed. See Committee on Technical Barriers to Trade, *Fourteenth Annual Review of the Implementation and Operation of the TBT Agreement. Note by the Secretariat,* G/TBT/25, circulated on 4 March 2009, para. 12.

174 See Committee on Technical Barriers to Trade, *Decisions and Recommendations adopted by the Committee since 1 January 1995. Note by the Secretariat. Revision*, G/TBT/1/Rev.8, circulated on 23 May 2002.

175 In 2008 alone, WTO Members made 1251 new notifications of TBT measures. In the period since the entry into force of the *TBT Agreement* on 1 January 1995 until 31 December 2008, 10 026 notifications have been submitted.

176 This database is available at: http://tbtims.wto.org.

177 See Article 48 of the CARIFORUM EPA, Article 52 of the SADC EPA, Article 45 of the EPA with the Central African Party and Article 40 of the Pacific EPA.

178 See Article 48 of the CARIFORUM EPA.

179 See Article 40 of the Pacific EPA.

180 See Article 49 of the CARIFORUM EPA.

181 See Article 49 of the CARIFORUM EPA.

182 See Article 39 of the Pacific EPA.

183 See Article 49 of the CARIFORUM EPA and Article 41 of the EPAs with Côte d'Ivoire and Ghana.

184 See Articles 2.11 and 5.8 and paragraph O of the Code of Good Practice in Annex 3 of the *TBT Agreement*.

185 See Article 45 of the EPA with the Central African Party (Cameroon).

186 See Article 52 of the SADC EPA.

187 See Article 53 of the SADC EPA.

188 See Article 40(4) of the Pacific EPA.

189 See Article 41 of the EPAs with Côte d'Ivoire and Ghana and Article 45 of the EPA with the Central African Party (Cameroon).

190 See Article 41 of the EPAs with Côte d'Ivoire and Ghana.

191 See Article 40 of the Pacific EPA.

192 See Article 39 of the EPAs with Côte d'Ivoire and Ghana, and Article 43 of the EPA with the Central African Party (Cameroon).

193 An EPA Committee is established by Article 73 of the EPAs with Côte d'Ivoire and Ghana, and Article 92 of the EPA with the Central African Party (Cameroon). The composition, organization and functioning of the EPA Committee is determined by the Parties, and it takes its decisions by consensus. The EPA Committee is responsible for the administration of all areas covered by the relevant EPA and for carrying out all the tasks set out in the relevant EPAs.

194 See Martin Doherty and Liam Campling, *Comparative Analysis of SPS Issues in Canned Tuna Products in Mauritius/the Seychelles and Thailand: Follow up Study*, Regional Trade Facilitation Programme, 31 October 2007, 6.

195 See Article 10.1 of the *TBT Agreement*. Where for legal or administrative reasons a WTO Member establishes more than one Enquiry Point, it must provide complete and unambiguous information on the scope of responsibility of each of these Enquiry Points, under Article 10.2. In respect of TBT measures adopted by non-governmental or regional bodies, Article 10.3 of the *TBT Agreement* contains the softer obligation on a WTO Member to "take such reasonable measures as may be available to it" to ensure that one or more Enquiry Points exist that can answer reasonable enquiries from other Members and interested parties and provide the necessary documents.

196 See Article 10.10 of the *TBT Agreement*. Where for legal or administrative reasons a WTO Member establishes more than one notification authority, it must provide complete and unambiguous information on the scope of responsibility of each of these authorities to other Members, under Article 10.11.

197 See Article 49 of the CARIFORUM EPA.

198 See Article 13 of the *TBT Agreement*.

199 A compilation of specific trade concerns raised in the TBT Committee since 1995 can be found in WTO official document G/TBT/GEN/74/Rev.1.

200 See for example the comments of several Members in the latest minutes of the meeting of the TBT Committee, Committee on Technical Barriers to Trade, *Minutes of the Meeting of 18-19 March 2009,* G/TBT/M/47, paras 167-203.

201 See Article 60 of the SADC EPA.

202 See Article 54 of the SADC EPA. The Trade and Development Committee is composed of representatives of the Parties, normally at senior officials' level, according to Article 96 of the SADC EPA.

203 See Article 49 of the CARIFORUM EPA and Article 39 of the Pacific EPA.

204 See Article 41 of the Pacific EPA. According to Article 68, the Trade Committee is composed of representatives of the Parties. It shall establish its rules of procedures and be co-chaired by a representative of the EC Party and a representative from the Pacific states.

205 See PricewaterhouseCoopers, *Sustainability Impact Assessment of the EU-ACP Economic Partnership Agreements - Key Findings, Recommendations and Lessons Learned"* (Paris, PricewaterhouseCoopers), May 2007, 87.

206 A summary report of the workshop on good regulatory practice is contained in WTO official document G/TBT/W/287; and the Chairman's Report on the workshop to the TBT Committee is contained in WTO official document G/TBT/M/44, Annex 1.

207 See Article 96 of the SADC EPA and Article 68 of the Pacific EPA.

208 See Article 230 of the CARIFORUM EPA (creating an EC-CARIFORUM Trade and Development Committee with general competence) and Article 73 of the EPAs with Côte d'Ivoire and Ghana and Article 92 of the EPA with the Central African Party (establishing EPA Committees with general competence). See also the provisions on the Joint Council in Articles 93-95 of the SADC EPA.

209 Hoekman notes that the adjustment burden of resource-intensive trade agreements containing regulatory disciplines falls mostly on developing countries, since the rules in such agreements mostly reflect best practices in developed countries. While this point is made in relation to the WTO Agreements, it is valid more generally to trade agreements addressing regulatory trade barriers. Bernard Hoekman, 'Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment', *Journal of International Economic Law* 8 (2), 2005, 405-424.

210 Low reports that 24 WTO Members have no representation in Geneva, and many others have too few staff to deal adequately with all the issues on the agenda at the WTO. Patrick Low, 'Is the WTO Doing Enough for Developing Countries?' in *WTO Law and Developing Countries,* George A. Bermann and Petros C. Mavroidis (eds.) (Cambridge University Press, Cambridge), 2007, 324-358, 339.

211 Finger points out that while traditional trade liberalization concessions, in the form of tariff reductions or the removal of quotas, benefit both the country making the concession and the countries receiving the concession in real economic terms, this is not the case for "New Area" concessions. By "New Area" Finger means concessions that involve significant implementation costs for policy and institutional reform. Real economics provides no guarantee that the concession giver will benefit from "New Area" concessions. Finger notes that, "to make development sense, New Area reforms must *be packaged* with capacity-building. Not just the capacity to participate in WTO business in Geneva, capacity as well for the relevant commercial activities. …This point was clearly made by an African whose

government had been provided with technical assistance on Sanitary and Phytosanitary (SPS) implementation by one of the WTO's powerful members: *they want us to understand SPS so that we will import more chicken"*. J. Michael Finger, 'The Uruguay Round North-South Bargain: Will the WTO Get over It?' in *The Political Economy of International Trade Law. Essays in Honor of Robert E. Hudec*, Daniel L. M. Kennedy and James D. Southwick (eds.) (Cambridge University Press, Cambridge), 2002, 301-310, 305.

212 Article 11 of the *TBT Agreement*.

213 Article 51 of the CARIFORUM EPA, Article 55 of the SADC EPA, Articles 42 and 43 of the EPAs with Côte d'Ivoire and Ghana, and Article 47 of the EPA with the Central African Party (Cameroon).

214 Article 45 of the CARIFORUM EPA, Article 49 of the SADC EPA, Article 37 of the EPAs with Côte d'Ivoire and Ghana, and Article 40 of the EPA with the Central African Party (Cameroon).

215 These objectives are listed in Article 34 of the Pacific EPA.

216 Article 49 of the CARIFORUM EPA.

217 Article 54 of the SADC EPA.

218 Article 41 of the Pacific EPA.

219 Article 51 of the CARIFORUM EPA, Article 55 of the SADC EPA, and Article 43 of the EPAs with Côte d'Ivoire and Ghana.

220 Article 51 of the CARIFORUM EPA.

221 Article 55 of the SADC EPA.

222 See Article 50 of the CARIFORUM EPA, Article 53 and 55 of the SADC EPA and Article 42 of the EPAs with Côte d'Ivoire and Ghana.

223 See Article 7.3 of the CARIFORUM EPA, Article 8.2 of the SADC EPA, Article 4.2 of the EPAs with Côte d'Ivoire and Ghana, Article 7.2 of the EPA with the Central African Party and Article 69.3 of the Pacific EPA. Despite the addition of a "development chapter" in some EPAs, and the listing of development cooperation priorities in various substantive chapters, no commitment is made on EU development resources. The EU's refusal to negotiate development resources as part of the EPAs is based on the arguments that the *Cotonou Agreement* already regulates development aid and this is channelled through the EDF, and that the EPAs only replace the trade chapters of the Cotonou Agreement while the rest of this agreement continues to apply. See Christopher Stevens *et al*. The New EPAs: *Comparative Analysis of their Content and the Challenges for 2008. Final Report*, Overseas Development Institute and the European Centre for Development Policy Management, Maastricht, 31 March 2008, 101.

224 See Barbados Ministry of Foreign Affairs, Addressing CARIFORUM's Development Priorities in the EPA: A Barbados Perspective, available at: http://www.foreign.gov.bb, visited on 15 July 2009, where it is stated, "CARIFORUM and other ACP regions successfully argued that EPA implementation should not be at the expense of traditional projects in education, health care and housing. Therefore, the EC subsequently agreed that, in addition to the EU-funded Regional Indicative Programmes (RIPs), other sources of funding would be identified". Among these other funding sources are the EC's Aid-for-Trade strategy, which commits the EU and its Member States to two billion euros a year on trade-related

technical assistance. Around 50 percent of the additional assistance that forms part of this strategy has been earmarked for ACP countries. See Council of the European Union, *EU Strategy on Aid for Trade*, 15 October 2007.

225 As noted in a report of 2008 of the Overseas Development Institute and the European Centre for Development Policy Management, the ACP regions have called for firm legal guarantees by the EU in the EPAs for the provision of development funding beyond that provided in the EDF. In addition, the need to better the predictability and timeliness of EDF assistance has been raised repeatedly. See Christopher Stevens *et al*. *The New EPAs: Comparative Analysis of their Content and the Challenges for 2008. Final Report,* Overseas Development Institute and the European Centre for Development Policy Management, Maastricht, 31 March 2008, 101.

226 Part 4 of the *Cotonou Agreement* sets out the provisions on development finance co-operation. The Cotonou Agreement expires in 2020. Annexe 1B of the Cotonou Agreement contains the multi-annual financial framework for 2008-2013.

227 Council of the European Union, *Economic Partnership Agreements - State of Play and Orientation Debate - Background note from the Presidency,* 9318/09, Brussels, 12 May 2009. See also Article 7.5 of the CARIFORUM EPA, Article 8.3 of the SADC EPA, Article 4.3 of the EPAs with Côte d'Ivoire and Ghana, and Article 7.3 of the EPA with the Central African Party (Cameroon).

228 See Article 8.5 of the SADC EPA, Article 4.5 of the EPAs with Côte d'Ivoire and Ghana and Article 9 of the EPA with the Central African Party (Cameroon).

229 See Article 9 of the EPA with the Central African Party (Cameroon).

230 This review will be undertaken on the basis of a proposal prepared by the Commission in 2010. See para. 7 of Annex 1B of the *Cotonou Agreement*.

231 See European Commission, Directorate General for Trade, *Fact sheet on the Interim Economic Partnership Agreements: An Overview of the Interim Agreements*, Brussels, 27 January 2009. This overview notes, "The regional strategies and indicative programmes of the 10th EDF are an important basis for that work, but the packages should allow channelling of resources from EU Member States to support ACP regional integration."

232 See European Community - Caribbean Region, *Regional Strategy Paper and Regional Indicative Programme 2008-2013*, drawn up in accordance with Articles 8 and 10 of Annex IV to the *Cotonou Agreement*. See also European Commission, *Information Paper: EU-CARIFORUM Economic Partnership Agreement - An Overview,* Brussels, July 2008.

233 UNCTAD, *Economic Development in Africa. Export Performance Following Trade Liberalization: Some Patterns and Policy Perspectives,* UNCTAD/ALDC/AFRICA/2008 (United Nations, New York/Geneva), 2008, 49-50.

234 'Agreement on the Application of Sanitary and Phytosanitary Measures', in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (World Trade Organization, Geneva), 1994, 69-84.

235 See Article 1.1 of the *SPS Agreement*.

236 See Annex A1 (a) to (d) of the *SPS Agreement,* which defines SPS measures.

237 See Article 1.5 of the *TBT Agreement*.

238 See Title II Chapter 7 of the CARIFORUM EPA and Title II Chapter V of the SADC EPA.

239 See Title III Chapter 4 of the individual EPAs with Côte d'Ivoire and Ghana, Title III Chapter 4 of the EPA with Central African Party and Part II Chapter 5 of the Pacific EPA.

240 See Article 37 of the EPA with the EAC countries and Article 53 of the EPA with the ESA countries. In addition, Article 3.1(c) of the EAC EPA and 3.1(b) of the ESA EPA set out the objective "to establish the framework, scope and principles for further negotiation on trade in goods, including … sanitary and phytosanitary measures". It is useful to note that a draft text on SPS issues has been proposed by Zambia in the context of the EPA negotiations with the ESA countries. This draft incorporates some useful aspects of the provisions on SPS measures in the EU-Chile Association Agreement. This information was provided by Martin Doherty (correspondence on file with author) and will soon be published as an ICTSD paper entitled "The Importance of SPS Measures to Fisheries Negotiations in EPAs".

241 See Article 52 of the CARIFORUM EPA, Article 56 of the SADC EPA, Article 36 of the EPAs with Côte d'Ivoire and Ghana, Article 41 of the EPA with the Central African Party and Article 36 of the EPA with the Pacific countries.

242 The provisions on special and differential treatment in the *SPS Agreement* are discussed in Section 2.3.9 below.

243 See Article 2.2 of the *SPS Agreement*.

244 See Article 5.5 of the *SPS Agreement*.

245 See Panel Report, *Australia – Salmon*, para. 8.182; Panel Report, *Australia – Salmon (Article 21.5 – Canada),* paras 7.150-7.153; and Panel Report, *Japan – Agricultural Products II,* paras 8.103-8.104.

246 See Article 5.1 of the *SPS Agreement*. Note that this requirement is deemed complied with where an SPS measure conforms to an international standard (see further Section 2.3.3 below).

247 See Article 5.7 of the *SPS Agreement*.

248 See Appellate Body Report, *Japan – Apples*, para. 179.

249 See Appellate Body Report, *Japan – Agricultural Products II*, para. 93.

250 Peter W.B. Phillips, 'Food Safety, Trade Policy and International Institutions', in *Governing Food: Science, Safety and Trade,* Peter W.B Phillips and Robert Wolfe (eds.) (McGill-Queen's University Press, Montreal), 2001, 27-48, 29.

251 The International Institute for Agriculture (IIA) was the forerunner of the UN Food and Agriculture Organization (FAO). Mariëlle Masson-Matthee, *The Codex Alimentarius Commission and Its Standards,* Doctoral Thesis, Maastricht University, Faculty of Law (T.M.C. Asser Press, Maastricht), 2007, 14. Mariëlle Masson-Matthee mentions the following examples of conventions adopted under the IIA: the *Brussels Convention for the Marking of Eggs*, adopted 10 December 1931 and the *Rome Convention on the Unification of Sampling and Analysis Methods for Cheese*, adopted 26 April 1934. She also notes that proposals on the initiative of the International Dairy Federation with regard to various milk products were presented for adoption in 1939 but their adoption was hindered by the outbreak of the Second World War.

252 *Ibid.*, 15. Masson-Matthee notes that the *Codex Alimentarius Europeaus* was based on the earlier *Codex Alimentarius Austriacus,* the 1897 food code of the Austro-Hungarian empire. In 1958, an initiative of the International Commission on Agricultural Industries

and the Permanent Bureau of Analytical Chemistry led to the creation of the Council of the Codex Alimentarius Europeaus with the mandate to establish a European food code. This Council later proposed that, in order to expand participation, the FAO should take over its work. This eventually led to the proposal by the FAO in 1961 for the establishment of the Codex Alimentarius Commission.

253 The success of the harmonization of regulations in promoting free trade is evinced by the experience of the European Community, where the promulgation of common standards applicable to all Member States in various areas of consumer and environmental protection, together with the mutual recognition of standards among Member States, have facilitated the free movement of goods and thus the creation of the Single Market in Europe. Product safety regulation at European Community level provides a good example of this strategy. The European Community replaced national regulations setting product safety standards with sophisticated regulatory frameworks at European Community level, "which have now reached the point of almost comprehensively covering the whole range of technical goods and other products". Christian Joerges, 'Scientific Expertise in Social Regulation and the European Court of Justice: Legal Frameworks for Denationalized Governance Structures', in *Integrating Scientific Expertise into Regulatory Decision-Making: National Traditions and European Innovations,* Christian Joerges, *et al.* (eds.) (Nomos, Baden-Baden), 1997, 295-323, 298.

254 These three international bodies are expressly named in Annex A.3(a)-(c) of the *SPS Agreement*, under the definition of "international standards, guidelines and recommendations". They are the only three standard-setting bodies mentioned by name in the *SPS Agreement*. Annex A3(d) refers, for matters not covered by the three mentioned organizations, to "appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee".

255 As this organization is based in Paris, it was mostly referred to by its French name *Office International des Epizooties*. Thus its acronym is OIE. This acronym has been maintained despite the fact that the organization has now changed its name to the World Organisation for Animal Health.

256 Although standard setting in the area of plant health is carried out by the bodies set up under the auspices of the Secretariat of the IPPC, in co-operation with regional plant protection organizations operating within the framework of the IPPC, the acronym IPPC is commonly used to refer to these bodies.

257 Terence P. Stewart and David S. Johanson, 'The *SPS Agreement* of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics', *Syracuse Journal of International Law and Commerce* 26, 1998, 27-53, 28 and fn 24.

258 *Ibid.*, 28.

259 The disciplines regarding harmonization of SPS measures around international standards are contained in Article 3 of the *SPS Agreement*.

260 On the effects of the *SPS Agreement* on the Codex Alimentarius Commission, see H. Michael Wehr, 'Update on Issues before the Codex Alimentarius', *Food and Drug Law Journal* 52, 1997, 531-536.

261 Terence P. Stewart and David S. Johanson, 'The *SPS Agreement* of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics', *Syracuse Journal of International Law and Commerce* 26, 1998, 27-53, 29.

262 This is in contrast to the approach taken in the *TBT Agreement*, which as pointed out above in principle obliges countries to harmonise their TBT measures around international standards, except where such standards are inappropriate or ineffective.

263 See Article 3.2 of the *SPS Agreement*. This provision was recognised to be an incentive for harmonization in Appellate Body Report, *EC - Hormones*, para. 102.

264 See Article 3.3 of the *SPS Agreement,* as interpreted in Appellate Body Report, *EC - Hormones*, para. 175.

265 The six EPAs that contain provisions on SPS measures all reaffirm the rights and obligations of the *SPS Agreement,* as discussed above, including those on harmonization.

266 See Article 56 of the SADC EPA.

267 See Article 52 of the CARIFORUM EPA, and Article 36 of the EPAs with Côte d'Ivoire and Ghana.

268 See for example the purpose set out in the *Statues of the Codex Alimentarius Commission,* Article 1(a) and the IPPC's *Mission Statement* formulated in Commission on Phytosanitary Measures, Business Plan 2007-2007, (IPPC, Rome), 29 March 2007.

269 See Article 56 of the CARIFORUM EPA, Article 64 of the SADC EPA, and Article 42 of the individual EPAs with Côte d'Ivoire and Ghana.

270 See Article 59 of the CARIFORUM EPA, Article 64 of the SADC EPA, and Article 42 of the individual EPAs with Côte d'Ivoire and Ghana.

271 See Article 56 of the CARIFORUM EPA.

272 See Article 46 of the EPA with the Central African Party (Cameroon).

273 For example, the prevalence of particular pests or diseases may differ, as may climatic conditions that may be more or less conducive to the proliferation of pests or the spread of diseases. In addition it has been noted that developing countries may face rather different developmental and technological conditions which also result in differences in SPS measures. Simonetta Zarrilli, *WTO Sanitary and Phytosanitary Agreement: Issues for Developing Countries*, 3 (South Centre, 1999, 17.

274 Digby Gascoine, 'Harmonisation, Mutual Recognition and Equivalence - How and What Is Attainable?' presented at the *Conference on International Food Trade Beyond 2000: Science-Based Decisions, Harmonization, Equivalence and Mutual Recognition* (Food and Agriculture Organization of the United Nations, Melbourne Australia) 11-15 October 1999, para. 23.

275 Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary,* Oxford Commentaries on the GATT/WTO Agreements (Oxford University Press, Oxford), 2007, 164.

276 Committee on Sanitary and Phytosanitary Measures, *Equivalence: Consideration of Article 4 of the SPS Agreement : Summary of Informal Discussions on Equivalence. Second Report by the Chairman*, G/L/445, circulated on 21 March 2001, para. 4.

277 This may be the case either where no international standards exist in the specific area or where a Member deviates from existing international standards with scientific justification, for example where they do not achieve the level of protection chosen by the importing Member. In these cases, where the *SPS Agreement* does not result in harmonization of measures, the principle of equivalence could nevertheless result in open markets. It should be noted that the SPS Committee has emphasised that equivalence does not replace the need for the development and use of international standards. Committee on Sanitary and Phytosanitary Measures, *Equivalence - Note by the Secretariat,* G/SPS/W/111, circulated on 4 July 2001, para. 3. See also David G. Victor, 'The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment after Five Years', *Journal of International Law and Politics* 32 (4), 2000, 865-938, 878. Victor refers to the similar concept of "mutual recognition" in the context of the EC single market which "created a strong market-opening dynamic by allowing legal production from any European country into any other European national market". In this regard he refers to Linda Horton, 'Mutual Recognition Agreements and Harmonization', *Seton Hall Law Review* 29, 1998, 692-735, 708-729.

278 In the meetings of Members in the SPS Committee regarding equivalence, it was stressed that the purpose of equivalence is to facilitate trade and that the recognition of equivalence should enhance developing country access to export markets, including those in developed countries, by allowing them to meet the importer's chosen level of protection by means of alternative measures. Committee on Sanitary and Phytosanitary Measures, *Equivalence: Consideration of Article 4 of the SPS Agreement : Summary of Informal Discussions on Equivalence. Second Report by the Chairman,* G/L/445, circulated on 21 March 2001, para. 7.

279 On this issue Scott notes that equivalence "serves to induce a healthy destabilization of the sometimes false premises underpinning established approaches to regulation. It opens up measures to contestation, and encourages ongoing policy learning on the basis of information exchange, and dissemination of best practice". *Ibid.*

280 See Article 4.1 of the *SPS Agreement*.

281 It is interesting to contrast the clear obligation in Article 4 of the *SPS Agreement,* which actually requires the recognition of equivalence when certain requirements are met, with the weaker equivalence provision in Article 2.7 of the *TBT Agreement*, which requires only that Members "give positive consideration" to accepting as equivalent the technical regulations of other Members, if they are satisfied that they adequately fulfil the objectives of their own regulations. The latter is only an obligation of conduct.

282 See Article 4.2 of the *SPS Agreement*.

283 Committee on Sanitary and Phytosanitary Measures, *Equivalence: Consideration of Article 4 of the SPS Agreement : Summary of Informal Discussions on Equivalence. Second Report by the Chairman,* G/L/445, circulated on 21 March 2001, para. 5.

284 Committee on Sanitary and Phytosanitary Measures, *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, G/SPS/19, circulated on 24 October 2001. This decision was adopted ad referendum. The Ministerial Conference at Doha took note of this Decision. Ministerial Conference, *Implementation-Related Issues and Concerns. Decision of 14 November 2001*, WT/MIN(01)/17, circulated on 20 November 2001, para. 3.3.

285 Article 56 of the CARIFORUM EPA.

286 Article 37 of the Pacific EPA.

287 Article 46 of the EPA with the Central African Party (Cameroon).

288 See Article 7 and Appendices 5 and 6 of Annex IV to the *Agreement Establishing an Association between the European Community and its Member States, of the one Part, and the Republic of Chile,* of the other Part, 2002.

289 Loppacher and Kerr note that: "[i]n the science of animal disease control, international boundaries are artificial constructs – mere lines on a map that have no bearing on the dynamics of a disease in an animal population". Laura J. Loppacher and William A. Kerr, 'The Efficacy of World Trade Organization Rules on Sanitary Barriers: Bovine Spongiform Encephalopathy in North America', *Journal of World Trade* 39 (3), 2005, 427-443, 433.

290 Loppacher and Kerr state that: "…border measures, while sub-optimal from an animal management strategy, may provide the best line of defense when faced with an incompetent foreign regulatory regime". Further, they note that in the absence of agreement between countries on the best risk management strategy, country-wide border measures are justified. See *Ibid.*, 436.

291 Committee on Sanitary and Phytosanitary Measures, *The Failure of the European Communities to Amend EC Directive 2001/661/EC Allowing the Import of Bone in Meat from Ovine/Caprine Species from Countries Zoned Free from Foot and Mouth Disease without Vaccination. Communication from South Africa,* G/SPS/GEN/373, circulated on 26 February 2003.

292 European Commission, *Report on United States Barriers to Trade and Investment* (European Commission, Brussels), December 2003, 33, available at: http://trade-info.cec.eu.int/doclib/docs/2003/december/tradoc_115383.pdf, visited on 3 January 2004.

293 See Article 6 of the *SPS Agreement*.

294 Annex A.6 of the *SPS Agreement* defines a pest- or disease-free area as an area, which can be all or part of a country or of several countries, as identified by the competent authorities, in which a pest or disease does not occur. This area may adjoin an area where the pest or disease does occur, but is subject to regional control measures such as protection, surveillance or buffer zones that confine or eradicate the pest or disease. An area of low pest- or disease prevalence is defined as an area, which can be all or part of a country or of several countries, as identified by the competent authorities, in which a pest or disease occurs at low levels and is subject to effective surveillance, control or eradication measures.

295 See for example Committee on Sanitary and Phytosanitary Measures, *Peru Initiates a Process for the Declaration and Recognition of Areas Free from and of Low Prevalence of Fruit Flies Certitis Capitata and Anastrepha Spp. Communication from Peru*, G/SPS/GEN/417, circulated on 1 August 2003. It has been stated that the time taken to recognize an area free from a certain pest or disease can vary from a few months to several years.

296 While some Members have no established guidelines, other Members have procedures with a number of stages.

297 Committee on Sanitary and Phytosanitary Measures, *Issues on the Application of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures. Background Document. Note by the Secretariat. Revision,* G/SPS/GEN/640/Rev.1, circulated on 14 September 2006, para. 7.

298 Committee on Sanitary and Phytosanitary Measures, *Issues on the Application of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures. Background Document. Note by the Secretariat. Revision,* G/SPS/GEN/640/Rev.1, circulated on 14 September 2006, paras 4-5. The EC has stated in this regard that: "the ultimate decision to recognize remains with the importing Member and very much depends on the trust in the competent authority of the exporting Member. This trust builds on the veterinary/ phytosanitary system in place and previous experience with the exporting Member. Consequently, the recognition process varies from one case to another, hence the need for predictability and transparency". Committee on Sanitary and Phytosanitary Measures, *Comments on the Background Document on Issues in the Application of Article 6 of the SPS Agreement (G/SPS/GEN/640). Communication from the European Communities,* G/ SPS/W/190, circulated on 30 May 2006, para. 6.

299 Committee on Sanitary and Phytosanitary Measures, *Regionalisation. Communication by Peru,* G/SPS/GEN/607, circulated on 6 December 2005.

300 Committee on Sanitary and Phytosanitary Measures, *Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures,* G/SPS/48, circulated on 16 May 2008.

301 Paragraph 4 of the *Regionalization Decision* provides that Members should publish the basis for recognition of pest- or disease-free areas and areas of low pest or disease prevalence, as well as a description of the general procedures, including the information generally required to evaluate requests and a contact point to which requests can be addressed. Paragraph 7 provides more generally that "Members should endeavour to maintain transparency in all aspects of the recognition process".

302 *Regionalization Decision*, para. 5.

303 *Regionalization Decision*, para. 6.

304 *Regionalization Decision,* para. 8. This provision further states that the exporting Member's veterinary or phytosanitary authorities should be able to "demonstrate their ability to maintain freedom from specified pests or diseases to encourage confidence on the part of the importing Member".

305 *Regionalization Decision,* para. 9.

306 *Regionalization Decision*, para. 10.

307 *Regionalization Decision*, para. 34.

308 *Regionalization Decision*, paras 20-31 setting out steps A to I.

309 An expedited process is stated to "involve exclusion of one or more stages or some parts of a stage of the importing Member's general process for the recognition of pest- or disease-free or areas of low pest or disease prevalence". *Regionalization Decision*, para. 32.

310 *Regionalization Decision*, para. 32(a)-(d).

311 See Article 6 and Appendices III and IV to Annex IV to the to the *Agreement Establishing an Association between the European Community and its Member States, of the one Part*, and the Republic of Chile, of the other Part, 2002.

312 See Article 60 of the SADC EPA.

313 See Article 40 of the EPAs with Côte d'Ivoire and Ghana and Article 44 of the EPA with the Central African Party (Cameroon). In this regard the former EPAs refer expressly to Article

6 of the *SPS Agreement* and the latter EPA requires account to be taken of international standards.

314 See Article 41 of the EPAs with Côte d'Ivoire.

315 See Annex A.1 of the *SPS Agreement*.

316 See Article 8 and Annex C of the *SPS Agreement*.

317 See Annex C.1(a) of the *SPS Agreement*.

318 Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras 7.1496-7.1498.

319 See Annex C.1(c) of the *SPS Agreement*.

320 See Annex C.1(a) of the *SPS Agreement*.

321 See Annex C.1(d) of the *SPS Agreement*.

322 See Annex C.1(b) of the *SPS Agreement*.

323 Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1574.

324 Panel Reports, *EC – Approval and Marketing of Biotech Products,* para. 7.1574.

325 See Annex C.1(e) of the *SPS Agreement*.

326 See Annex C.1(f) of the *SPS Agreement*.

327 See Article 10.1 of the *SPS Agreement*.

328 Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary*, Oxford Commentaries on the GATT/WTO Agreements (Oxford University Press, Oxford), 2007, 221-222.

329 See Annex C.1(g) of the *SPS Agreement*.

330 See Annex C.1(h) of the *SPS Agreement*.

331 See Annex C.1(i) of the *SPS Agreement*.

332 See Committee on Sanitary and Phytosanitary Measures, *Specific Trade Concerns. Note by the Secretariat. Addendum,* G/SPS/GEN/204/Rev.8/Add.2, circulated on 27 March 2008, para 169.

333 See Annex C.1 of the *SPS Agreement*.

334 See Article 64 of the SADC EPA, which includes as priority areas for cooperation capacity building for inspection, certification, supervision and control as well as for testing residue monitoring and accreditation; Article 43 of the EPAs with Côte d'Ivoire and Ghana, which refer to cooperation and assistance to develop capacity for conformity assessment; and Article 47 of the EPA with the Central African Party (Cameroon), which identifies strengthening control capacity as an area for cooperation for priority products for regional harmonization within Central African states.

335 Scott refers to this as the "all-important accountability function" of transparency, which operates to enable other Members to evaluate and contest proposed SPS regulation. Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary*, Oxford Commentaries on the GATT/WTO Agreements (Oxford University Press, Oxford), 2007, 192-193.

336 See Article 7 and Annex B.1 and B.2 of the *SPS Agreement*.

337 See Article 7 and Annex B.5-10 of the *SPS Agreement*.

338 See Article 5.8 of the *SPS Agreement*.

339 Committee on Sanitary and Phytosanitary Measures, *Recommended Notification Procedures*, G/SPS/7, circulated on 11 June 1996.

340 Committee on Sanitary and Phytosanitary Measures, *Recommended Notification Procedures. Revision*, G/SPS/7/Rev.1, circulated on 26 November 1999; Committee on Sanitary and Phytosanitary Measures, *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement* (Article 7). Revision, G/SPS/7/Rev.2, circulated on 2 April 2002; Committee on Sanitary and Phytosanitary Measures, *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement* (Article 7) as of 1 December 2008. Revision, G/SPS/7/Rev.3, circulated on 20 June 2008.

341 General Council, *Preparations for the 1999 Ministerial Conference. Proposals Regarding the Agreement on Sanitary and Phytosanitary Measures in Terms of Paragraph 9(a)(I) of the Geneva Ministerial Declaration. Communication from India,* WT/GC/W/202, circulated on 14 June 1999.

342 See Annex B.2 of the *SPS Agreement*.

343 See Article 10.2 of the *SPS Agreement*.

344 *Ibid.*, para. 1.

345 Ministerial Conference, *Implementation-Related Issues and Concerns. Decision of 14 November 2001*, WT/MIN(01)/17, circulated on 20 November 2001, paras 3.1 and 3.2.

346 Committee on Sanitary and Phytosanitary Measures, *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement : Note by the Secretariat,* G/SPS/GEN/804, circulated on 11 October 2007, Table 3.

347 The national schedule of commitments of each Member contains its tariff bindings, usually classified according to the Harmonised System of Tariff Classification (HS) developed by the World Customs Organisation. In such cases the HS chapter and heading number of the products covered should be provided in the notification of an SPS regulation.

348 Committee on Sanitary and Phytosanitary Measures, *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement : Note by the Secretariat*, G/SPS/GEN/804, circulated on 11 October 2007, para. 16.

349 *Ibid.* This report indicates that in June-August 2007, only 16 percent of notifications identified a group of countries or region affected. Others refer generally to “all countries” or “all trading partners”.

350 Annex B.5(c) of the *SPS Agreement*.

351 Committee on Sanitary and Phytosanitary Measures, *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement: Note by the Secretariat,* G/SPS/GEN/804, circulated on 11 October 2007, Figure 5. This overview indicates that 13.3 percent of notifications refer to CAC standards, 9 percent to OIE standards, 8 percent to IPPC standards and the remaining 69.8 percent do not refer to international standards at all. In some cases this may be due to the fact that no relevant international standards exist, but it is unlikely that this is the situation in almost 70 percent of cases.

352 Committee on Sanitary and Phytosanitary Measures, *Implementation of the SPS Agreements - Trade Concerns. Submission by the European Communities at the Meeting of 7 - 8 July 1999,* G/SPS/GEN/132, circulated on 21 July 1999. In this document, the EC lists eighteen requests for information it made under Article 5.8 of the *SPS Agreement,* some made on bilateral basis and some in the form of documents circulated to all Members to draw the attention of the SPS Committee to its questions to a particular Member. Of the listed requests, only two had received an answer.

353 This data was taken from 58 responses by Members to a questionnaire circulated by the Secretariat. Committee on Sanitary and Phytosanitary Measures, *Analysis of Replies to the Questionnaire on the Operation of Enquiry Points and National Notification Authorities. Note by the Secretariat. Revision,* G/SPS/GEN/751/Rev.1, circulated on 18 June 2007, para. 23.

354 Committee on Sanitary and Phytosanitary Measures, *Workshop on Transparency Held on 15 - 16 October 2007. Note by the Secretariat,* G/SPS/R/47, circulated on 8 January 2008, para. 34.

355 Committee on Sanitary and Phytosanitary Measures, Summary of the Meeting of 18-19 October 2007. Note by the Secretariat, G/SPS/R/46, circulated on 2 January 2008, para. 41(b).

356 *Ibid.*, para. 41(e). As indicated in the Secretariat's analysis of replies to its questionnaire on the operation of Enquiry Points and National Notification Authorities, this area is one where Members have strongly indicated the need for technical assistance and guidance from best practices. Committee on Sanitary and Phytosanitary Measures, *Analysis of Replies to the Questionnaire on the Operation of Enquiry Points and National Notification Authorities. Note by the Secretariat. Revision*, G/SPS/GEN/751/Rev.1, circulated on 18 June 2007, para. 11(b). This has also been identified as a problem in Vinod Rege *et al.*, *Influencing and Meeting International Standards: Challenges for Developing Countries. Volume I: Background Information, Findings from Case Studies and Technical Assistance Needs* (International Trade Centre UNCTAD/WTO and Commonwealth Secretariat, Geneva), 2003, 66.

357 Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting of 18-19 October 2007. Note by the Secretariat*, G/SPS/R/46, circulated on 2 January 2008, para. 41(c).

358 Vinod Rege *et al.*, *Influencing and Meeting International Standards: Challenges for Developing Countries. Volume I: Background Information, Findings from Case Studies and Technical Assistance Needs* (International Trade Centre UNCTAD/WTO and Commonwealth Secretariat, Geneva), 2003, 66.

359 Robert Wolfe, 'Regulatory Transparency, Developing Countries and the WTO', *World Trade Review* 2 (2), 2003, 157-182, 169.

360 See Article 57 of the CARIFORM EPA, Article 60 of the SADC EPA, Article 45 of the EPA with the Central African Party and Article 40 of the Pacific EPA.

361 See Article 58 of the CARIFORM EPA and Article 40 of the Pacific EPA.

362 See Article 57 of the CARIFORM EPA and Article 40 of the Pacific EPA.

363 See Article 61 of the SADC EPA.

364 See Article 58 of the CARIFORM EPA, Article 60 of the SADC EPA, Article 41 of the EPAs with Côte d'Ivoire and Ghana and Article 45 of the EPA with the Central African Party (Cameroon).

365 See Article 41 of the EPAs with Côte d'Ivoire and Ghana.

366 See Article 40 of the EPA with the Pacific states.

367 See Article 61 of the SADC EPA, Article 41 of the EPAs with Côte d'Ivoire and Ghana, and Article 45 of the EPA with the Central African Party (Cameroon).

368 See Article 60 of the SADC EPA.

369 See Article 57 of the CARIFORM EPA, Article 41 of the EPAs with Côte d'Ivoire and Ghana and Article 39 of the Pacific EPA.

370 See Article 56 of the CARIFORM EPA.

371 See Article 58 of the CARIFORM EPA.

372 See Article 63 of the SADC EPA.

373 See Article 39 of the Pacific EPA.

374 See Annex B.10 of the *SPS Agreement*.

375 WTO Secretariat, *How to Apply the Transparency Provisions of the SPS Agreement* (World Trade Organization, Geneva), September 2002, para. 9.

376 *Ibid.*, para. 11.

377 The *SPS Agreement* does not expressly oblige Members to notify the Secretariat of this designation. However, this seems logical to read the "designation" obligation as including the requirement that the WTO Secretariat be informed of such designation. In this line, the *Recommended Transparency Provisions* encourage Members to do so, and specify further that it would be useful to include particular contact information of the designated authorities. Committee on Sanitary and Phytosanitary Measures, *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7) as of 1 December 2008*. Revision, G/SPS/7/Rev.3, circulated on 20 June 2008, para. 5.

378 These can be found in the G/SPS/NNA/* series of official WTO documents.

379 The *Recommended Transparency Procedures* adopted by the SPS Committee contain recommended formats for routine and emergency notifications.

380 WTO Secretariat, *How to Apply the Transparency Provisions of the SPS Agreement* (World Trade Organization, Geneva), September 2002, para. 8.

381 Committee on Sanitary and Phytosanitary Measures, *Second Review of the Operation and Implementation of the SPS Agreement. Review of the Implementation of Transparency Provisions. Communication from Australia, New Zealand and the United States,* G/SPS/W/197, circulated on 13 June 2006, paras 4-5.

382 Twinning refers to an arrangement whereby an Enquiry Point or National Notification Authority in a less-developed Member is paired with the corresponding body in a developed-country Member, in order to benefit from technical advice and knowledge sharing from the latter.

383 Committee on Sanitary and Phytosanitary Measures, *Analysis of Replies to the Questionnaire on the Operation of Enquiry Points and National Notification Authorities. Note by the Secretariat. Revision,* G/SPS/GEN/751/Rev.1, circulated on 18 June 2007, para. 11(a). A mentoring mechanism was developed in 2008.

384 See Annex B.3 of the *SPS Agreement*.

385 WTO Secretariat, *How to Apply the Transparency Provisions of the SPS Agreement* (World Trade Organization, Geneva), September 2002, para. 15.

386 *Ibid.*, para. 18.

387 As is the case with the National Notification Authorities, there is no express obligation in the *SPS Agreement* to keep the WTO Secretariat informed as to which body has been designated as the Enquiry Point of a Member. However, as the aim of an Enquiry Point is to provide a single contact point to which questions and requests for documentation can be addressed, making available the contact details of the designated Enquiry Point is essential to the fulfilment of this objective. Effective treaty interpretation therefore seems to require notification of the designated Enquiry Point and its contact details to other Members, most easily done by notifying the WTO Secretariat which will circulate the information to all Members. To this end, the *Recommended Transparency Provisions* encourage Members to inform the Secretariat of their designated Enquiry Point and its contact information. Committee on Sanitary and Phytosanitary Measures, *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7) as of 1 December 2008. Revision*, G/SPS/7/Rev.3, circulated on 20 June 2008, para. 5.

388 These can be found in the G/SPS/ENQ/* series of official WTO documents.

389 See Annex B.3 (a)-(d) of the *SPS Agreement*.

390 See Annex B.4 of the *SPS Agreement*. Delivery costs may however differ from those charged to nationals.

391 WTO Secretariat, *How to Apply the Transparency Provisions of the SPS Agreement* (World Trade Organization, Geneva), September 2002, para. 85.

392 See Article 63 of the SADC EPA.

393 See Article 55 of the CARIFORM EPA.

394 See Article 58 of the CARIFORM EPA.

395 See Article 55 of the CARIFORM EPA.

396 See Article 59 of the SADC EPA and Article 38 of the Pacific EPA.

397 See Article 39 of the EPAs with Côte d'Ivoire and Ghana, and Article 43 of the EPA with the Central African Party (Cameroon).

398 As noted in Section 2.2.7 above, Appendix II of the three relevant EPAs notes that, for the ACP EPA Parties, the Competent Authority is vested in the signatory ACP states for imports to and exports from their territories. For the EC Party, instead, the competence is shared between the Member States of the EC and the EC Commission. As regards exports to the ACP EPA Parties, the EC Member States are responsible for monitoring production conditions and requirements, including statutory inspections and the issuing of health or welfare certificates confirming compliance with the agreed standards and requirements. As regards imports from the ACP EPA Parties, the EC Member States are responsible for monitoring the imports' compliance with the EC's import conditions. The EC Commission is responsible for overall coordination, inspections/audits of inspection systems and the necessary legislative action to ensure the uniform application of standards and requirements within the Single European Market.

399 An EPA Committee is established by Article 73 of the EPAs with Côte d'Ivoire and Ghana, and Article 92 of the EPA with the Central African Party (Cameroon). The composition, organization and functioning of the EPA Committee is determined by the Parties, and it takes its decisions by consensus. The EPA Committee is responsible for the administration of all areas covered by the relevant EPA and for carrying out all the tasks set out in the relevant EPAs.

400 Both the WTO's *SPS Agreement* and the EPAs provide the possibility for SPS disputes to be referred to a dispute settlement mechanism. Usually this is a last resort for countries that cannot reach an amicable solution to a dispute through discussions, either bilaterally or in a multilateral/regional forum for consultations. As the discussion of the dispute settlement mechanisms provided for lies beyond the scope of this paper, this will not be discussed further here.

401 See Article 12 of the *SPS Agreement*.

402 See Article 12.2 of the *SPS Agreement*. To give effect to this mandate, at each of its regular meetings, the SPS Committee maintains a standing agenda item for the specific trade concerns of Members regarding SPS measures of other Members. The specific trade concerns are often raised in response to notifications of new or amended SPS measures received and circulated by the WTO Secretariat under the transparency provisions of Article 7 and Annex B. These specific trade concerns are compiled into a document by the Secretariat, by means of periodic revisions.

403 As noted by Joanne Scott: "The readiness of States to cooperate in problem-solving in the [SPS] committee, including in the provision of technical assistance to developing country Members, stands in contrast to the difficulties associated with formal attempts to re-draw the parameters of special and differential treatment for developing countries within the SPS frame". Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary,* Oxford Commentaries on the GATT/WTO Agreements (Oxford University Press, Oxford), 2007, 46.

404 Of the 277 trade concerns raised in the SPS Committee from 1995 to 2008, 76 have been reported resolved and a further 19 partially resolved. See Committee on Sanitary and Phytosanitary Measures, *Specific Trade Concerns. Note by the Secretariat. Revision,* G/SPS/GEN/204/Rev.9, circulated on 5 February 2009, para. 10.

405 *Ibid.*, 75.

406 Rosie Cooney and Andrew T.F. Lang, 'Taking Uncertainty Seriously: Adaptive Governance and International Trade', *European Journal of International Law* 18 (3), 2007, 523-551, 550. These adaptive approaches are called for in respect of complex systems due to the prevalence of uncertainty.

407 See Committee on Sanitary and Phytosanitary Measures, *Specific Trade Concerns. Note by the Secretariat. Revision*, G/SPS/GEN/204/Rev.9, circulated on 5 February 2009, 6-22. This report shows that only nine ACP countries have raised ten such trade concerns, all of which against EU SPS measures (maximum residue levels for pesticides, aflatoxins and ochratoxins; restrictions due to foot-and-mouth disease; restrictions in response to cholera outbreaks; EUREPGAP standards for bananas; the prohibition on medicinal use of kava-kava; and an incorrect rapid alert warning in respect of mangoes). The nine ACP countries involved are Côte d'Ivoire Cuba, Fiji, the Gambia, Papua New Guinea, Senegal, South Africa, St Vincent and the Grenadines and Tanzania. See also Christine Chemnitz and Doris Günther, *Ensuring Development Friendly Economic Partnership Agreements (EPAs):*

Recognition of SPS Measures within Negotiation Procedures, Deutsche Gesellschaft für Technische Zusammenarbeit, 2006, 4-5.

408 For example, Zimbabwe reports that it is represented by its Geneva-based trade representatives or other international officials in SPS Committee meetings, but that its veterinary experts from the capital have not been involved in SPS Committee meetings. Committee on Sanitary and Phytosanitary Measures, *Implementation of the SPS Agreement: Information for the Workshop on 31 March. Communication from Zimbabwe,* G/SPS/GEN/663, circulated on 28 March 2006, para. 2. Similarly, Uganda states that its attendance of SPS Committee meetings is irregular, and that when it does attend it is represented by Geneva-based trade representatives without any technical data or input from capital. Committee on Sanitary and Phytosanitary Measures, *Implementation of the SPS Agreement. Information for the Workshop on 31 March 2006. Communication from Uganda,* G/SPS/GEN/673, circulated on 31 March 2006, para. 1.

409 It should be noted that Kenya's mission in Geneva has only three persons working on WTO issues, all of whom have economic or business degrees. There is no legal expert among them, despite the fact that the WTO is a rules-based system and an understanding of legal issues is indispensable to ensure that Kenya enforces the market access rights available to it under WTO law. These three persons not only have to deal with all WTO issues, including negotiations, attendance of meetings etc, but also have to cover matters related to the World Intellectual Property Organization, the EU, bilateral donors, investors in Kenya and Kenyan investors in Europe. James Gathii, 'A Critical Appraisal of the Nepad Agenda in Light of Africa's Place in the World Trade Regime in an Era of Market Centred Development', *Transnational Law and Contemporary Problems* 13, 2003, 179-210, 202.

410 Vinod Rege *et al.*, *Influencing and Meeting International Standards: Challenges for Developing Countries. Volume II: Procedures Followed by Selected International Standard-Setting Organisations and Country Reports on TBT and SPS* (International Trade Centre UNCTAD/WTO and Commonwealth Secretariat, Geneva), 2004, 130.

411 Committee on Sanitary and Phytosanitary Measures, Specific Trade Concerns. Note by the Secretariat. Revision, G/SPS/GEN/204/Rev.3, circulated on 26 March 2003, paras 217-218. The EC notification addressed four harmful non-native organisms that were often found on certain products including cut flowers: *Amauromyza maculosa, Bemisia tabaci, Liriomyza sativae* and *Thrips palmi*. As most cut flowers were not subject to plant health checks but were a pathway for the organisms in question, the EC believed that control measures needed to be strengthened. Ecuador and Israel raised trade concerns on this matter at the SPS Committee meeting of 31 October - 1 November 2001. Kenya asked to receive a copy of the EC response to Ecuador's questions. The issue was raised again by Israel at the SPS Committee meeting of November 2002 and Kenya expressed its hope that a solution would be found to the problem. The European Communities agreed to bilateral consultations with Israel and Kenya. There has been no notification of an agreed solution resulting from such consultations thus far. See also Committee on Sanitary and Phytosanitary Measures, paras 45-48; Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 7-8 November 2002. Note by the Secretariat*, G/SPS/R/28, circulated on 5 February 2003, para. 178.

412 In 2006, the Gambia reported that the March 2006 meeting was the first SPS Committee meeting to which it had sent a representative. Committee on Sanitary and Phytosanitary Measures, *Implementation of the SPS Agreement. Information for the Workshop on 31 March 2006. Communication from Gambia,* G/SPS/GEN/664, circulated on 28 March 2006, para. 2.

413 A framework for development co-operation is provided for in Title II of Part III of the Cotonou Agreement between the EC and the ACP countries of the Cotonou Agreement.

414 See Article 62 of the SADC EPA and Article 41 of the Pacific EPA.

415 See Article 96.6(b) of the SADC EPA.

416 See Article 230 of the CARIFORUM EPA (establishing an EC-CARIFORUM Trade and Development Committee with general responsibility for the implementation of the relevant EPA), Article 73 of the EPAs with Côte d'Ivoire and Ghana (creating an EPA Committee responsible for the administration of all areas and implementation of all tasks covered under the relevant EPA), and Article 92 of the EPA with the Central African Party (creating an EPA Committee responsible for the administration of all areas and implementation of all tasks covered under the relevant EPA).

417 See Article 230.4(a) of the CARIFORUM EPA, Article 96.4 of the SADC EPA and Article 68.4(a) of the Pacific EPA.

418 The EC legislation applying HACCP to fish products is *Council Directive Laying down the Health Conditions for the Production and the Placing on the Market of Fishery Products*, No. 91/493/EEC (22 July 1991).

419 See Richard O. Abila, *Food Safety in Food Security and Food Trade. Case Study: Kenyan Fish Exports* (International Food Policy Research Institute, Washington D.C.), September 2003. Henson et al note that in Kenya these fisheries requirements have had significant consequences for persons, mainly women, whose livelihoods depend on processing the skeletons and other waste products produced by processing plants. Spencer Henson *et al.*, 'Food Safety Requirements and Food Exports from Developing Countries: The Case of Fish Exports from Kenya to the European Union', *American Journal of Agricultural Economics* 82 (5), 2000, 1159-1169, 1166. See also European Commission, Directorate General for Health and Consumers, *First Caribbean Training Session on EU Food Safety Standards,* Jamaica, 10-12 June 2008. The training session focused on fishery products as they form the most important sector of EU – CARIFORUM trade as regards SPS issues.

420 Committee on Sanitary and Phytosanitary Measures, *Report on Proposals for Special and Differential Treatment. Adopted by the Committee on 30 June 2005*, G/SPS/35, circulated on 7 July 2005, para. 5.

421 *Ibid.*

422 See Articles 9 and 10 of the *SPS Agreement*.

423 See Article 9.1 of the *SPS Agreement*.

424 See Article 9.2 of the *SPS Agreement*.

425 See Article 10.1 and 10.2 of the *SPS Agreement*. The "longer time-frame for compliance" referred to in Article 10.2 of the *SPS Agreement* was specified to mean normally a period of not less than 6 months in by the WTO Ministerial Conference. See Ministerial Conference, *Implementation-Related Issues and Concerns. Decision of 14 November 2001,* WT/MIN(01)/17, circulated on 20 November 2001, para. 3.1.

426 See Article 10.4 of the *SPS Agreement*.

427 The WTO Panel in *EC - Approval and Marketing of Biotech Products* held that the obligation to "take account" of developing country needs in Article 10.1 of the *SPS Agreement* merely requires WTO Members "to consider along with other factors before reaching a

decision" the needs of developing countries. This obligation, according to the Panel, does not prescribe a particular result to be achieved, and notably does not provide that the importing Member must invariably accord SDT where a measure may lead to a decrease, or slower increase, in developing country imports. See Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1620.

428 Committee on Sanitary and Phytosanitary Measures, *Procedure to Enhance Transparency of Special and Differential Treatment in Favour of Developing Country Members. Decision by the Committee of 27 October 2004,* G/SPS/33, circulated on 2 November 2004.

429 See the mandate set out in Ministerial Conference, *Doha Ministerial Declaration. Adopted on 14 November 2001,* WT/MIN(01)/DEC/1, circulated on 20 November 2001, para. 44.

430 See Committee on Sanitary and Phytosanitary Measures, *Report on Proposals for Special and Differential Treatment: Adopted by the Committee on 30 June 2005,* G/SPS/35, circulated on 7 July 2005, para. 4.

431 In January 2008, the WTO Secretariat requested Members to provide information on SPS-related technical capacity building projects that could be regarded as "good practice", by means of the provided questionnaire. As only seven Members responded to this request (Australia, Canada, Chinese Taipei, Costa Rica, the EC, Sweden and Switzerland) the deadline for the request for information was extended to 30 April 2008. Committee on Sanitary and Phytosanitary Measures, *Request for Information on Good Practice in SPS-Related Technical Cooperation. Note by the Secretariat*, G/SPS/GEN/816, circulated on 18 January 2008; Committee on Sanitary and Phytosanitary Measures, *Request for Information on Good Practice in SPS-Related Technical Cooperation. Extension of Deadline. Note by the Secretariat. Addendum,* G/SPS/GEN/816/Add.1, circulated on 20 March 2008. On the basis of responses, field research will be undertaken in the beneficiary and a separate questionnaire circulated to determine the beneficiary's assessment of the project. The information gathered in this way will be used to identify best practices in technical assistance and presented in a workshop.

432 Steven Jaffee *et al.*, *Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports,* 31207 (World Bank, Poverty Reduction & Economic Management Trade Unit and Agriculture and Rural Development Department, Washington D.C.), 10 January 2005, 119.

433 Committee on Sanitary and Phytosanitary Measures, *Report on Proposals for Special and Differential Treatment. Adopted by the Committee on 30 June 2005*, G/SPS/35, circulated on 7 July 2005, para. 21.

434 Vinod Rege *et al.*, *Influencing and Meeting International Standards: Challenges for Developing Countries. Volume I: Background Information, Findings from Case Studies and Technical Assistance Needs* (International Trade Centre UNCTAD/WTO and Commonwealth Secretariat, Geneva), 2003, 70.

435 Committee on Sanitary and Phytosanitary Measures, *Report on Proposals for Special and Differential Treatment. Adopted by the Committee on 30 June 2005,* G/SPS/35, circulated on 7 July 2005, para. 21. This is the underlying concern leading to the calls for mandatory technical assistance provisions in the *SPS Agreement*.

436 In the discussions in the SPS Committee on strengthening technical assistance, Members characterised much of the technical assistance received as "supply-driven" and "determined to a greater extent by the policy interests of the donor than the specific needs of the recipient". *Ibid.*

437 J. Michael Finger, 'The Uruguay Round North-South Bargain: Will the WTO Get over It?' in *The Political Economy of International Trade Law. Essays in Honor of Robert E. Hudec,* Daniel L. M. Kennedy and James D. Southwick (eds.) (Cambridge University Press, Cambridge), 2002, 301-310, 306.

438 This concern is also reflected in United Nations Development Programme, *Human Development Report 2005. International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (United Nations, New York), 2005, 11. While emphasizing the importance of capacity building for trade, this report notes that "[u]nfortunately, there is an unhealthy concentration on capacity building in areas that rich countries consider strategically useful".

439 Steven Jaffee *et al.*, *Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports,* 31207 (World Bank, Poverty Reduction & Economic Management Trade Unit and Agriculture and Rural Development Department, Washington D.C.), 10 January 2005, 116.

440 Gregory Shaffer, 'Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?' *Wisconsin International Law Journal,* 2005, 651.

441 See Article 59 of the CARIFORUM EPA, Article 64 of the SADC EPA, Article 43 of the EPAs with Côte d'Ivoire and Ghana. The Pacific EPA, in Article 36, only refers to the Parties agreement to apply the special and differential treatment provisions of the *SPS Agreement,* where necessary and possible, to trade between them, including to those Parties that are not WTO Members.

442 See Article 64 of the SADC EPA.

443 See Article 7 of the CARIFORUM EPA.

444 See Article 8(v) of the CARIFORUM EPA.

445 Article 5(c) of the EPA with the Central African Party (currently only Cameroon).

446 Committee on Sanitary and Phytosanitary Measures, *Background Document from the Standards and Trade Development Facility for the Global Review of Aid for Trade: Note by the Secretariat,* G/SPS/GEN/812, circulated on 22 November 2007, paras 18 and 20.

447 The Fisheries Support Programme (42 million euros) was started in 2002 to address ACP exporters' difficulties with compliance with the new EC Regulation 2001/4, which came into effect in 2003. The Pesticides Initiative Programme (30 million euros) was started in 2001 in response to the problems of compliance of ACP exporters with EU maximum residue levels for pesticides in fruit and vegetables. The Pan-African Programme for the Control of Epizootics (77 million euros) is focused on the Central African region and aims to strengthen capacity in this region to monitor and control animal diseases. See Christine Chemnitz and Doris Günther, *Ensuring Development Friendly Economic Partnership Agreements (EPAs): Recognition of SPS Measures within Negotiation Procedures*, Deutsche Gesellschaft für Technische Zusammenarbeit, 2006, 12-13.

448 Committee on Sanitary and Phytosanitary Measures, *Background Document from the Standards and Trade Development Facility for the Global Review of Aid for Trade: Note by the Secretariat,* G/SPS/GEN/812, circulated on 22 November 2007, paras 18 and 20.

449 See Christine Chemnitz and Doris Günther, *Ensuring Development Friendly Economic Partnership Agreements (EPAs): Recognition of SPS Measures within Negotiation Procedures,* Deutsche Gesellschaft für Technische Zusammenarbeit, 2006, 13.

450 Committee on Sanitary and Phytosanitary Measures, *Background Document from the Standards and Trade Development Facility for the Global Review of Aid for Trade: Note by the Secretariat,* G/SPS/GEN/812, circulated on 22 November 2007, paras 18 and 20.

451 Steven Jaffee *et al.*, *Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports*, 31207 (World Bank, Poverty Reduction & Economic Management Trade Unit and Agriculture and Rural Development Department, Washington D.C.), 10 January 2005, 120.

452 Michel Kostecki, *Technical Assistance Services in Trade-Policy: A Contribution to the Discussion on Capacity-Building in the WTO*, Resource Paper No. 2 (International Centre for Trade and Sustainable Development, Geneva), November 2001, 6.

453 Committee on Sanitary and Phytosanitary Measures, *Report on Proposals for Special and Differential Treatment. Adopted by the Committee on 30 June 2005,* G/SPS/35, circulated on 7 July 2005, para. 21.

454 Vinod Rege *et al.*, *Influencing and Meeting International Standards: Challenges for Developing Countries. Volume I: Background Information, Findings from Case Studies and Technical Assistance Needs* (International Trade Centre UNCTAD/WTO and Commonwealth Secretariat, Geneva), 2003, 89.

455 The problem of lack of internal communication and coordination between the various experts and bodies active in the area of SPS was highlighted in Gonzalo K. Ríos 'Technical Assistance Needs of Developing Countries and Mechanisms to Provide Technical Assistance', presented at the *Conference on International Food Trade Beyond 2000: Science-Based Decisions, Harmonization, Equivalence and Mutual Recognition* (Food and Agriculture Organization of the United Nations, Melbourne, Australia) 11-15 October 1999, para. 9.

456 Vinod Rege *et al.*, *Influencing and Meeting International Standards: Challenges for Developing Countries. Volume I: Background Information, Findings from Case Studies and Technical Assistance Needs* (International Trade Centre UNCTAD/WTO and Commonwealth Secretariat, Geneva), 2003, 89.

457 See Article 59 of the CARIFORUM EPA.

458 See Article 64 of the SADC EPA.

459 See Article 62 of the SADC EPA. The priority products for regional harmonization are listed in Appendix IA and those for export from SADC states to the EC are listed in Annex IB.

460 See Article 43 of the EPAs with Côte d'Ivoire and Ghana.

461 See Appendix I of the EPAs with Côte d'Ivoire and Ghana.

462 See Articles 56 and 59 of the CARIFORUM EPA, Article 64 of the SADC EPA and Articles 46 and 47 of the EPA with the Central African Party (Cameroon).

463 See Article 23.1 of the WTO's *Dispute Settlement Understanding*, as interpreted in Panel Report, *US-Section 301 Trade Act*, para. 7.43.

464 See Article 222.1 of the CARIFORUM EPA, Article 88.1 of the SADC EPA, Article 65.1 of the EPAs with Côte d'Ivoire and Ghana, Article 86.1 of the EPA with the Central African Party and Article 66.1 of the Pacific EPA.

465 See Article 41.2 of the EPAs with Côte d'Ivoire and Ghana.

466 See Article 222.2 of the CARIFORUM EPA, Article 88.2 of the SADC EPA, Article 65.2 of the

EPAs with Côte d'Ivoire and Ghana, Article 86.2 of the EPA with the Central African Party (Cameroon), Article 66.2 of the Pacific EPA.

467 See Article 222.2 of the CARIFORUM EPA, Article 88.2 of the SADC EPA, Article 65.2 of the EPAs with Côte d'Ivoire and Ghana, Article 86.2 of the EPA with the Central African Party (Cameroon), Article 66.2 of the Pacific EPA.

468 See Appellate Body Report, *Mexico - Taxes on Soft Drinks*, paras 40-57. Here the Appellate Body upheld the Panel's finding that it had no discretion under the WTO's *Dispute Settlement Understanding* (DSU) "to decline to exercise its jurisdiction in the case that ha[d] been brought before it", where the case was pending before a NAFTA panel. The reasoning given was that this would "seem to 'diminish' the right of a complaining Member to 'seek the redress of a violation of obligations'" under Article 23 of the DSU and to bring a dispute pursuant to Article 3.3 of the DSU.

469 See Article 41.1 of the EPA with the Central African Party and Article 36.2 of the Pacific EPA.

470 See Appellate Body Report, *US - Shrimp*, para. 101.

471 See Title IV of the EPA with the Central African Party and Part II of the Pacific EPA, setting out the rules on "Dispute Avoidance and Settlement". These rules provide for consultations, mediation and arbitration as forms of dispute settlement.

472 This proposal has not yet been made public. The information presented in this paper on its contents was obtained from Martin Doherty, who discussed the text of the proposal with Zambian negotiators at a ProInvest/Trinnex Workshop held in Lusaka in June 2009 (correspondence on file with author).

473 See Martin Doherty, *ACP-EU Economic Partnership Agreements: Sanitary and Phytosanitary Measures*, Discussion Paper No. 68, European Centre for Development Policy Management, October 2005, 23.

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