Balancing trade and health in the SPS Agreement: the development dimension

Summary

Introduction

The link between free trade and measures for the protection of health is not new, but has been recognised since the commencement of trading activities between newly emerged city-states in the fourteenth century. Today, however, the proliferation of health measures, on the one hand, and the great advancements in trade liberalisation, on the other, mean that the interaction between these two policy areas has assumed critical importance.

The exponential increase in the speed and volume of trade and in the diversity of traded products in the last fifty years, and the accompanying proliferation of health risks and SPS measures, has meant that the international trade regime, currently embodied in the rules of the World Trade Organisation (WTO), has had to find new ways of mediating the conflict between free trade and health protection. Acting on the interface of globalised trade and globalised health risks, is the WTO's *Agreement on the Application of Sanitary and Phytosanitary Measures* (*SPS Agreement*). It reflects a negotiated balance between the competing goals of the liberalisation of trade in the food and agricultural sector and the protection of health by national governments.

Developing-country Members of the WTO have a significant interest in the way in which these two competing societal aims are balanced in the *SPS Agreement*. On one side, as agricultural products often form an important part of the merchandise export trade of developing-country Members, they are concerned with gaining market access in this sector in order to earn the foreign revenue necessary to meet their development needs. Hard-won achievements in liberalising trade in agricultural products can easily be undermined by the misuse of SPS measures for protectionist purposes. Developing-country Members thus depend on effective disciplines in international trade rules to prevent this. On the other side, one should not forget the fact that developing-country Members are also important importers of food and agricultural products, and face sanitary and phytosanitary risks from imported products. In this respect, they have an interest in being allowed sufficient flexibility by international trade rules to enact SPS regulations appropriate to their needs and capabilities. It is therefore important to recognise that the interests balanced in the *SPS Agreement* are those of conflicting societal goals of importance to both developed and developing-country Members, rather than competing developed and developing country interests. Nevertheless, the mechanisms used to achieve this balance in the *SPS Agreement* may have a disparate impact on Members at different levels of development.

This book analyses the implications of the rules of the *SPS Agreement* for WTO Members at different levels of development. More specifically, it evaluates the tools used by the *SPS Agreement* to achieve a balance between the often competing goals of trade liberalisation and health protection from the perspective of Members at lower levels of development. In doing so, it elucidates what can be seen as the 'development dimension' of the *SPS Agreement.* The 'development dimension' of this Agreement can be seen as composed of two distinct, but interrelated elements, which are determinative for the impact of the *SPS Agreement* on the trade and health interests of Members at different levels of development. These two complementary elements are: (1) the limits of policy space

defined by the general disciplines of the *SPS Agreement*, and their effect on developing-country Members as agri-food exporters and SPS regulators; and (2) special treatment for developing-country Members in the *SPS Agreement*.

1. The SPS Agreement on the interface between globalised trade and globalised health

Understanding the impact of the disciplines used in the *SPS Agreement* to achieve a balance between trade and health objectives on Members at different levels of development necessitates a grasp of the context within which this Agreement functions. This context encompasses the twin processes of the globalisation of trade and the globalisation of health. Therefore, Part I of this book provides the background necessary for a full understanding of the research problem, and the development focus adopted therein, by examining the parallel processes of globalisation in the area of trade and in the area of health, in order to situate the *SPS Agreement* in this context.

It does so firstly by examining, in Chapter 1, the changing role of developing countries in the world trading system to determine why an examination of the development dimension of international trade rules, and more specifically on the *SPS Agreement*, is urgently needed. The progressive integration of developing countries into the trading system is referred to as the *globalisation of trade* for purposes of this book. This process has to be seen in the normative framework provided by the emerging recognition of the 'right to development'. This framework serves to establish, on the one hand, the importance of trade as an engine for economic growth in the service of development and the responsibility of the international community to create favourable conditions to facilitate this growth. On the other hand, the right to development clarifies that development is more than economic growth. Instead, development entails the progressive realisation of all human rights. This means that mechanisms to promote development, including through trade liberalisation, may not come at the cost of other human rights such as the right to life, health and safe food. Consequently, the *SPS Agreement*, which plays an important role in liberalising agricultural trade, cannot achieve its trade objectives through disciplines that would undermine the ability of Members to protect life and health in their territories.

Secondly, Chapter 2 of Part I sketches the historical developments relating to the recognition of the *globalisation of health* in the face of transboundary health risks and the initiatives for international cooperation in this regard. The globalisation of trade has brought with it the international spread of threats to human, animal and plant life and health. The evolution in the strategies to deal with this problem has been determined to some extent by developments in scientific understandings of risk. Science has formed the basis both for common understandings that support international cooperation, and for national strategies to mitigate risk. The failure of purely national approaches as well as international regulatory approaches to provide an effective strategy in the face of globalised risk, has led to a new, multifaceted approach to risk management. This involves both national and international initiatives in both public and private arenas. These complex governance structures for the protection against SPS risk form the backdrop for the operation of the *SPS Agreement*. Acknowledging the achievements made on international level in setting

voluntary harmonised standards, the *SPS Agreement* incorporates these standards into its rules, while allowing for deviation. Reflecting the view of science as a neutral and universally valid benchmark for SPS regulation that prevailed at the time of its negotiation, the *SPS Agreement* requires scientific justification for non-harmonised measures.

The dual aspects of the process of globalisation discussed in Chapters 1 and 2 are brought together, and related to the core theme of this book, in Chapter 3 of Part I by means of an examination of the importance for developing country trade of regulations and standards imposed to address globalised health risks. The proliferation of SPS requirements to mitigate risks from traded products has important implications for trade in the agri-food sector, particularly for countries at lower levels of development. These countries are often largely dependent on agricultural exports for their foreign revenue earnings. Hard-won gains in the liberalisation of agricultural trade achieved through rules on traditional trade barriers can be undermined by the trade restrictive effects of SPS measures. As these measures predominate in the areas of high-value fresh produce and processed food products, the possibilities for developing countries to diversify their exports to these lucrative markets are greatly restricted. While many SPS measures are legitimate efforts to address health risks, they may be more trade restrictive than is necessary to achieve their objectives. In addition, the danger exists that SPS measures may be misused for protectionist purposes.

The *SPS Agreement* acts to address this problem. Situated on the interface of globalised trade and globalised health, this Agreement aims to balance the often conflicting goals of trade liberalisation and health protection. The mechanisms it uses to do so are a reflection of the historical developments outlined above.

2. National and international SPS regulation and standard setting

The evaluation of the 'development dimension' of the *SPS Agreement* conducted in this book is fully cognisant of the fact that developing-country Members are not a monolithic group. Instead, development takes place on a continuum, along which there may be great divergences in economic resources, regulatory capacity, export interests and health status. All these factors play a role in determining the impact of the *SPS Agreement* on particular Members, and the question of how workable its rules are for the relevant Member. An analysis of the implications of the *SPS Agreement* for developing-country Members must therefore take into account these divergences.

In order to do so, Part II of this book examines the factual context for the operation of the *SPS Agreement* as embodied in national and international systems for SPS regulation and standard setting, with a particular focus on the impact of differences in levels of development of Members for the functioning of these systems.

Chapter 1 of Part II introduces SPS regulation by addressing specific issues that are necessary to grasp for a full understanding of the thesis of this book. It starts by setting out the normative framework within which SPS regulation occurs, as reflected in international human rights law. Then, in order to facilitate understanding of the role played by the level of development of a country in its regulatory choices, this Chapter undertakes a

brief law-and-economics analysis of SPS regulation. This analysis highlights the divergent costs and benefits of SPS regulation for countries at different levels of development. Finally, Chapter 1 sets out the role and limits of science in the SPS regulatory process. This theoretical discussion sets the stage for the factual analysis conducted in the following Chapters of Part II.

Chapter 2 of Part II examines the great differences in national SPS systems by means of four illustrative examples of WTO Members in different income categories and in different geographical regions, namely Australia, Mauritius, Jamaica and Bangladesh. These examples show that while vast differences exist in SPS regulatory systems between developed and developing countries, there are also significant differences *among* developing-country Members. Clearly, some developing countries have been more successful than others in upgrading their SPS systems and securing access to the markets of their trading partners. Nevertheless, two general conclusions can be drawn regarding differences in SPS regimes according to level of development. First, the *level* of SPS protection exhibits marked differences, being substantially higher in more developed countries due to better technological capacity, higher consumer demands, and more developed regulatory infrastructure. Second, the *regulatory focus* differs. Less developed countries tend to rely on product requirements, which are enforced by means of testing and inspections by government authorities at the point of exit or entry. Product requirements are usually easier to comply with as they leave the means of compliance up to the producer and are typically based on objective, testable properties that can be more readily ascertained. By contrast, developed countries are increasingly, especially in the area of food safety, moving towards *process* requirements, such as those embodied in the Hazard Analysis and Critical Control Point (HACCP) system. Process requirements oblige the producers themselves to take responsibility for ensuring that the entire production chain, 'from farm to fork' meets certain standards of hygiene and safety. These process requirements entail a systems-wide approach to SPS issues, which necessitates significant technical expertise, supporting infrastructure and control systems.

These differences in SPS regimes have notable consequences for the impact both of SPS measures themselves and of the *SPS Agreement* on Members at different levels of development. The illustrative case studies provided identify, by means of the discussion of practical examples, various problems faced by developing-country Members in complying with SPS measures in developed-country markets. These problems reflect the fact that the difficulty and costs of compliance are directly related to the extent of the gap between the existing domestic SPS regime and the SPS requirements in foreign markets. Several factors play a role here, such as weak domestic SPS regulation, inadequate public infrastructure, unreliable compliance assessment and certification, insufficient dissemination of information on SPS requirements abroad, and poor laboratory equipment and staff. However, it would be an over-generalisation to state that middle- and low-income Members are entirely incapable of meeting SPS requirements on their export markets, or of upgrading their SPS systems to protect their territories from SPS risks. Examples are provided in Chapter 2 of success stories in this respect. It is, nevertheless, important to note the central role played by technical and financial support from the importing Member in some of these situations. This puts those Members that face capacity constraints in the area of SPS regulation in a very dependent position.

The differences in the legal and institutional capacity for SPS regulation between Members at different levels of development, illustrated by the selected Members used as examples in Chapter 2, have a bearing on the way in which the *SPS Agreement* impacts on them. These examples of divergent SPS regulatory systems therefore provide the factual context for the later discussion of the provisions of the *SPS Agreement*.

The factual context within which the *SPS Agreement* operates also includes *international* systems for the elaboration of SPS standards. These are discussed in Chapter 3 of Part II. Divergence in national SPS regulations is an impediment to trade as it reduces the possibilities to exploit economies of scale. Therefore harmonisation around international standards is promoted by free trade regimes, including by the WTO in the *SPS Agreement*. However, internationally-set standards cannot mirror the diversity of circumstances in countries around the world. Instead, they reflect a compromise position accepted by the delegates of the countries present and active in the standard-setting process, and developed according to the procedures of the relevant standardising body. An examination of the institutional structure and standard-setting procedures of the international bodies referenced in the *SPS Agreement* shows that they are such that the participation of developing-country Members is limited. This is due to the fact that the structures and procedures do not sufficiently take into account the resource and capacity constraints of countries at lower levels of development. While improvements have been made in this situation in recent years, developing-country Members still tend to be most widely represented in *plenary* sessions of the relevant standard-setting bodies, where standards are initiated and adopted. However, their participation in technical committees where scientific evidence is discussed and standards are prepared, and even more so in the scientific bodies that conduct the risk assessments on which standards are based, often leaves much to be desired. This is a significant problem as it is at this technical level that participation can be most effective. This inadequate participation is often due to the lack of human and financial resources necessary to ensure attendance of the plethora of committee meetings by well-prepared specialists in the areas in which standards are set. In addition, the lack of effective national infrastructures for the evaluation of draft standards, the collection of information from national stakeholders and the formulation of positions is identified as a problem.

International standard-setting is therefore dominated by developed-country Members, resulting in standards that are often not appropriate for Members at lower levels of development. This is problematic as the latter Members depend most on international standards as a basis for national regulation. More work is needed, not only in the form of simplification and improvement of the standard-setting procedures of the relevant bodies, but also in the form of efforts to build the capacity of Members at lower levels of development to participate effectively in these procedures. Here, once again, technical assistance has an important role to play.

The factual context provided by an examination of national SPS regulation and international SPS standard setting in Part II shows the great need for technical assistance of developing-country Members in order to build SPS capacity. However, there is a danger in seeing technical assistance as a magic bullet solution, assuming that developing-country Members can and should meet any SPS-related obligation as long as they are provided with technical assistance to do so. Technical assistance is not an alternative to

analysing whether the disciplines of the *SPS Agreement* are appropriate for developing-country Members to implement. It can address some of the costs of implementation, but cannot take away the long term disadvantages of the application of inappropriate disciplines. Consequently, it is essential to begin by assessing whether the substantive rules and procedural mechanisms of the *SPS Agreement* are appropriate for developing-country Members. This is the aim of the detailed examination conducted in Parts III and IV of this book.

3. The rules balancing trade and health in the SPS Agreement

Several of the substantive obligations of the *SPS Agreement* aim to set the limits of the policy space left to Members in the area of SPS regulation, by combining the traditional trade disciplines found in the GATT 1994 with new scientific disciplines and by encouraging harmonisation. These disciplines together function as a filter, to distinguish measures legitimately aimed at health protection from measures that are a disguised form of protectionism. In this way, the *SPS Agreement* tries to balance the often competing interests of trade liberalisation and health protection.

The question arises whether the substantive rules in the *SPS Agreement* that aim to achieve this balance are appropriate for Members at lower levels of development. The criteria used to answer this question are those set out in the Introduction to this book, namely whether the relevant rules effectively increase market access opportunities for WTO Members at lower levels of development; and whether they leave these Members sufficient policy space for SPS regulation. Viewed in the light of the normative framework provided by the concept of the 'right to development', set out in Part I, the importance of assessing the ability of the *SPS Agreement* to promote agri-food trade without endangering the protection of health in less developed Members is evident. Herein lies the development dimension of the *SPS Agreement*.

It is apparent from the overview of the negotiating history set out in Chapter 1 of Part III that the regulatory model embodied in the substantive disciplines of the *SPS Agreement* is that to be found in the proposals of the most active participants in the negotiations, namely key developed-country Members and the Cairns Group. The Agreement closely reflects best regulatory practices in developed-country Members. While the ideal of improving the practice of SPS regulation among Members through such best-practice disciplines is, in itself, laudatory, there is a danger that a model of regulatory practice that is unworkable for less-developed Members has been created.

The examination, in Chapters 2 to 5 of Part III, of the relevant substantive disciplines of the *SPS Agreement* that define the limits of policy space available to Members for SPS regulation leads to two related conclusions. The first is that the balancing objective of the *SPS Agreement* is unmistakeably reflected in the way in which these substantive provisions are framed. While there are aspects of the interpretation of these provisions that do not fully give effect to the careful balance embodied in their terms, and leave room for improvement, the provisions themselves seem appropriate to address the sensitive trade/health conflict in a way that promotes the liberalisation of agri-food trade while

respecting the right of Members to regulate against SPS risks. However, the second conclusion that is evident from the discussion of the relevant substantive rules of the *SPS Agreement* is that these rules impose a regulatory model that is currently not achievable for many Members at lower levels of development. Neither are these Members able to use these substantive rules effectively to procure market access for their products.

The fact that most Members at lower levels of development have not been challenged in dispute settlement proceedings under the *SPS Agreement* to date, should not create the impression that their inability to comply with some of the disciplines of the *SPS Agreement* has no real consequences for them. Many instances of non-compliance by these Members with the regulatory obligations of the Agreement *have* been challenged in the multilateral forum of the SPS Committee, or in bilateral discussions between Members. In these situations, it is often difficult for the regulating Member to justify its measure, other than to refer to its capacity constraints. This leaves less-developed Members vulnerable to pressure by other Members to settle other SPS conflicts in ways unfavourable to them.

Aside from the particular aspects of the interpretation of the substantive rules of the *SPS Agreement*, identified throughout Part III, that leave scope for improvement, it is difficult to see how changes can be made to address developing-country constraints without skewing the careful balance sought by the Agreement. The rules themselves seem appropriate for the fulfilment of their function of allowing sufficient room for Members to regulate in a manner that gives effect to their policy priorities in the area of SPS risk, while disciplining such regulation to eliminate the possibilities for disguised protectionism and to reduce the adverse trade effects of legitimate measures. Nevertheless, the very real problem of the constraints that less-developed Members face in complying with, and benefiting from, these rules cannot be disregarded.

The question arises to what extent provisions of the *SPS Agreement* other than those discussed above ameliorate this problem by taking account of the capacity constraints of Members at lower levels of development, both in respect of compliance with the disciplines of the Agreement and in respect of enforcement of these disciplines against other Members in order to gain market access. This question is addressed in Parts IV and V of this book.

4. Procedural and institutional mechanisms under the SPS Agreement

Alone, the substantive disciplines of the *SPS Agreement* discussed above would not be sufficient to achieve significant gains in market access for food and agricultural products from developing-country Members. These Members lack the scientific and technical capacity to identify instances of non-compliance with the complex regulatory disciplines of the *SPS Agreement*, and to formulate effective challenges in this regard. In addition, many legitimate SPS regulations that pass muster under the relevant substantive disciplines of the *SPS Agreement* nevertheless form significant trade barriers. This is particularly so for Members that face capacity constraints in keeping track of new and changed measures, understanding their implications and proving their compliance with SPS requirements (including by demonstrating the equivalence of their own SPS requirements, or by gaining

recognition of the pest- or disease-free status of their territories or of regions within their territories). Additionally, substantive disciplines on their own are not useful without effective tools to monitor their implementation, resolve conflicts between Members with regard to these disciplines and, if necessary, enforce compliance therewith. The rules of the *SPS Agreement* that address these institutional and procedural matters are discussed in Part IV. These institutional and procedural provisions have an important impact on the effectiveness of the *SPS Agreement* in achieving its goals.

First, Chapter 1 of Part IV discusses those provisions in the *SPS Agreement* under which mechanisms creating disciplines of an institutional or procedural nature on Members are established. These institutional or procedural disciplines leave undisturbed Members' policy choices within the bounds of the relevant substantive disciplines of the Agreement, but address the way in which these policies are achieved in order to minimise as far as possible their trade-restrictive effects. Often the procedural obligations in the *SPS Agreement* are combined with a substantive discipline, yet it is the procedural mechanism under the provision that is key to its potential in improving market access. It is useful to note that national procedures may be abused to prevent the achievement of the goals of the relevant substantive disciplines, thereby undermining the trade/health balance of the Agreement. In other words, in many cases it is not *what* is done but the *way* in which it is done that creates problems. These problems may be especially burdensome for Members at lower levels of development, due to their lack of resources to devote to compliance with complex procedural requirements on their export markets.

The *SPS Agreement* contains some rules dealing directly with procedures imposed by Members to check compliance with their SPS measures. These are contained in Article 8 and Annex C, which address control, inspection and approval procedures. The additional procedural mechanisms under the *SPS Agreement* aim to operationalise certain of its substantive obligations. The substantive obligations on Members in respect of the recognition of equivalence; the adaptation of their SPS measures to regional conditions; and transparency in respect of their SPS measures would achieve little without procedural arrangements to give them effect. Yet, the procedural aspects of the provisions on these matters in the *SPS Agreement*, aside from the provisions on transparency, are extremely weak. This has led to very poor implementation of the obligations on equivalence and regionalisation, rendering ineffective these provisions despite the significant potential they hold for market access improvements.

In order to realise the potential of the obligations on transparency, the recognition of equivalence and adaptation to regional conditions, the SPS Committee has adopted decisions setting out detailed procedural mechanisms. These decisions do not amend the substantive obligations, but instead provide guidelines for their effective implementation. Developed on the basis of concrete information provided by Members regarding their experiences in the relevant areas, and elaborated in technical discussions among SPS regulatory officials, these procedures illustrate the ability of the SPS Committee to find cooperative solutions to implementation problems.

A second category of procedural and institutional mechanisms, discussed in Chapter 2 of Part IV, covers those provisions in the *SPS Agreement* that deal with the institutions and procedures necessary at WTO level for the smooth and effective implementation of

the *SPS Agreement*. The proper implementation and operation of the *SPS Agreement* is ensured through two institutional and procedural avenues, that provided by the bargaining forum of the SPS Committee and that provided by the adjudicatory mechanism of the dispute settlement system. The provisions relating to the SPS Committee and to dispute settlement are essential in promoting and monitoring the implementation of the disciplines of the *SPS Agreement*, resolving conflicts between Members with regard to these disciplines and, if necessary, enforcing compliance therewith.

The question of whether Members' trade concerns with respect to the SPS measures of other Members are dealt with through multilateral discussions at SPS Committee meetings or instead through formal adjudication is not without significance. It is highly relevant for the manner in which the trade/health balance is struck, which is closely tied to the questions of who participates in framing the issues under discussion and who decides on the outcome of the dispute. These questions are particularly pertinent when one bears in mind the differences in opportunities for effective participation available to Members at different levels of development under each of the two mechanisms. The discussion in Part IV makes clear that, currently, alternative mechanisms to dispute settlement represent the best way forward in ensuring that developing-country Members benefit as fully as possible from the benefits offered by the disciplines of the *SPS Agreement*.

In particular, the discussion of the role and functioning of the SPS Committee shows much greater possibilities for participation of Members at lower levels of development than exist currently in the dispute settlement system. The specific trade concern mechanism of the SPS Committee has proved very effective in providing opportunities for Members to address the problems they face regarding the SPS measures of their trading partners in an inexpensive and constructive way. Most often, bilateral discussions on trade concerns placed on the agenda are held in the margins of SPS Committee meetings, and may resolve the matter. If not, discussions are held in the multilateral forum of the SPS Committee, which gives publicity to the trade concern, enables other Members to comment on the issue and support the trade concern raised. This could lead to the revision of the notified measure or to further bilateral consultations between the Members involved. It may also facilitate compliance with the SPS measure complained of by the Member raising the concern, through increased clarity on the requirements and ways to meet them, and in some cases by means of the provision of technical or financial assistance by the importing Member. In this way disputes can be resolved without recourse to the expensive, time-consuming and confrontational process of formal dispute settlement.

The SPS Committee not only affords Members with a forum for the discussion and resolution of specific trade concerns, but it also promotes regulatory learning and creates possibilities for building professional networks. It provides a mechanism for the monitoring of harmonisation that allows concerns regarding the lack of international standards or problems with existing standards to be raised and forwarded to the relevant international standard setting body. In addition, it plays a crucial role in addressing broader SPS concerns by promoting the implementation of particular disciplines in the *SPS Agreement* through developing and adopting non-binding procedural guidelines. The disciplines addressed, such as those on equivalence, adaptation to regional conditions, special and differential treatment and transparency, are particularly important for developing-country Members, as discussed above, in that they hold great potential for market access gains

while fully respecting the level of protection chosen by importing Members. The inclusive nature of the process leading up to the elaboration of these procedural guidelines, based on the collection of practical experiences of Members with the issue under discussion and discussions in formal and informal sessions of the Committee, is crucial to the value of the resulting guidelines. In addition, the practice of *ad referendum* decision-making of the SPS Committee is to be applauded for its effort to ensure the broadest participation possible, including by Members who are unable to attend the meeting where the guidelines are adopted.

Attendance and effective participation by Members at different levels of development in meetings of the SPS Committee varies greatly. As illustrated by the four Members used as examples in this book, high-income Members tend to participate actively and effectively in SPS Committee meetings and are represented by experts from their relevant ministries. However, many Members at lower levels of development do not have the resources to send an SPS official from their capitals, and are represented in meetings of the SPS Committee by diplomats from their missions in Geneva, lacking in the necessary technical knowledge. There are also some Members that are unable to send any representative to most SPS Committee meetings. This diminishes the potential of the SPS Committee to be a mechanism though which less-developed Members can resolve their trade concerns.

The dispute settlement mechanism of the WTO, through which non-compliance with the obligations of the *SPS Agreement* can be challenged by Members, is a great improvement above that existing under the GATT 1947. While a very small proportion of the SPS-related conflicts between Members result in the initiation of WTO dispute settlement proceedings, and even fewer actually proceed to adjudication, the importance of the dispute settlement system to SPS disputes should not be underestimated. The very existence of the dispute settlement system creates an incentive for Members against whose SPS measures concerns are raised to address these concerns through negotiated solutions. In addition, the clarifications developed by panels and the Appellate Body with regard to the provisions of the *SPS Agreement* are essential in establishing the legal framework within which Members address their SPS conflicts. These clarifications are taken up in decisions of the SPS Committee that elaborate procedural guidelines for the operationalisation of provisions of the *SPS Agreement*. Equally importantly, they inform discussions between Members, bilaterally but even more so in the multilateral forum of the SPS Committee, to resolve trade concerns. These have been referred to as 'settlements negotiated in law's shadow'.

The relatively weak participation in the dispute settlement system by Members at lower levels of development with respect to SPS issues attests to the high political and financial costs of dispute settlement for these Members and the limited chance of success they foresee. Constraints to effective participation arise in respect of both bringing an SPS dispute and mounting a successful defence in case of a challenge under the *SPS Agreement*. On the one hand, many developing-country Members may not have the resources to gather the scientific information necessary to bring a challenge under the *SPS Agreement*, in order to make a *prima facie* case of violation. On the other hand, the difficulties they face in complying with the regulatory disciplines of the Agreement mean that these Members are unlikely to be able to defend their SPS measures in case they are faced with a challenge. High-income Members have experienced serious difficulties in this regard in the

SPS disputes heard thus far. For less-developed Members the hurdle seems almost insurmountable. These Members may not have the resources to commission the necessary research and will therefore depend on the chance that there are already existing studies of relevance. The Advisory Center on WTO Law is a welcome development in providing much-needed assistance for developing-country Members' participation in WTO dispute settlement. However, without concerted efforts to build SPS capacity in developing countries, these Members are unlikely to overcome the remaining hurdles to effective participation in dispute settlement and thereby to influence the normative framework within which negotiations to address SPS issues occur.

Aside from the problems of participation, another aspect of the dispute settlement process that deserves special attention is that of the standard of review applied by the adjudicatory bodies. The standard of review in dispute settlement proceedings plays a significant role in the allocation of the authority to make policy choices balancing competing trade and health interests. It determines the extent to which the WTO adjudicatory bodies are entitled to interfere in Members' regulatory determinations. Currently, while panels customarily state that they will not conduct their own risk assessment or impose a particular scientific view on the regulating Member in reviewing the scientific evidence before them, in practice this is increasingly what they do. It is proposed in this book that a panel should limit its examination of the scientific evidence to the question whether the regulatory disciplines of the *SPS Agreement*, including the requirement that an SPS measure is based on a risk assessment as defined in the Agreement, have been complied with. It should stop short of completely reassessing the scientific evidence itself to determine the existence and extent of a risk. Such a limited review ensures that the regulating Member respects the balance struck in the rules of the *SPS Agreement* between its health concerns and the trade interests of other Members, but the review does not intrude too far into the regulatory competence of a Member by interfering unduly in its assessment of scientific evidence. This would make room for the diversity of priorities, consumer preferences and regulatory capacity that exists between Members at different levels of development to be reflected in the science policy choices incorporated into national risk assessments. This type of review would also reduce the disadvantage at which Members that lack scientific capacity find themselves in challenging or defending measures under the *SPS Agreement*. The current intrusive approach may skew the outcome of judicial review in favour of developed-country Members that have the resources to bring convincing scientific evidence and persuasive legal arguments in support of their positions.

It has been argued that the 'normative vacuum' in which the *SPS Agreement* is currently interpreted has led to the strong focus on science, and the concomitant heavy reliance on the opinions of panel experts in assessing the science, by panels in reviewing the SPS measures of Members. Science is seen as providing a neutral and universal benchmark against which SPS measures can be tested to distinguish SPS protection from disguised protectionism. It is submitted here that consideration of the international law context within which the *SPS Agreement* functions, in particular international human rights norms relating to the rights to life, health, safe food and development, in addressing the rights and obligations laid down in the *SPS Agreement* is essential. It could operate to provide the urgently needed normative framework to guide WTO adjudicators in striking a more appropriate balance between the competing goals of trade liberalisation and

health protection. The recognition of this normative basis for interpretation, on which they can rely to enhance the legitimacy of their decisions, may make panels less inclined to continue their current intrusive approach to the review of the scientific basis for Member's SPS measures. It may also make them more willing to use the flexibilities in the *SPS Agreement* to allow for the consideration of developing-country Members' constraints in the application of the scientific disciplines on regulation, to ensure that the *SPS Agreement* does not operate to undermine the protection of health in these Members.

5. Special provisions for developing countries in the SPS Agreement

WTO agreements creating disciplines for behind-the-border regulatory regimes, such as the *SPS Agreement*, necessitate the recognition of differences in capacity of Members across different levels of development. As noted in Part I of this book, the expansion of trade rules beyond issues of tariffs and quotas into areas of regulatory activity, brings with it new problems. The ability of Members to comply with, and benefit from, such rules depends on their 'starting position.' In other words, the existing situation in a Member, 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 Member, and its ability to use those disciplines against other Members to gain market access. It is therefore necessary to find ways to ensure that WTO agreements laying down regulatory disciplines, such as the *SPS Agreement,* are development friendly. To meet this objective, they should leave sufficient space for countries to pursue their development policies through national regulation, while at the same time create clear and workable rules that developing countries can use to gain market access. This difficult balance is not only achieved in the generally applicable substantive disciplines and procedural arrangements under the *SPS Agreement*, but is also contributed to by provisions providing special treatment for developing-country Members.

The extent to which the *SPS Agreement* addresses developing-country constraints, either through providing special flexibilities in the rules for developing-country Members or in the form of provisions on technical assistance to support developing-country Members' compliance efforts is examined in Chapters 1 and 2 of Part IV.

Chapter 1 looks at the special and differential treatment (SDT) provisions of the *SPS Agreement*. It establishes that, although implementation of SDT in the *SPS Agreement* has been disappointing to date, real possibilities exist for panels and the Appellate Body to take a more progressive approach than that adopted by the Panel in the *EC – Approval and Marketing of Biotech Products* dispute, to operationalise SDT provisions through effective treaty interpretation. These possibilities arguably allow for the recognition that several provisions contain enforceable obligations that give effect to the general policy of consideration for the special needs of developing countries, thereby ensuring that the negotiated rights enshrined in these provisions are not rendered illusory. The WTO adjudicatory bodies should shoulder their responsibility to apply the SDT provisions effectively, in the light of the circumstances of each case.

If Members recognise that most of the existing SDT provisions could be operationalised by effective treaty interpretation in dispute settlement proceedings, the basis for the current deadlock in the Doha Development Round negotiations to strengthen the SDT provisions in the *SPS Agreement* falls away. Members are then left with two options. They can leave the fleshing out of SDT provisions to panels and the Appellate Body, on a case-by-case basis as they are faced with claims such as that of Argentina in *EC – Approval and Marketing of Biotech Products*, or instead they can reach political agreement on the nature and extent of these obligations.

Nevertheless, the limits of SDT should not be forgotten. New or strengthened SDT provisions cannot be framed in a way that would undermine the careful balance between trade and health objectives that is the core purpose of the *SPS Agreement.* This would be the case both if Members were to be obliged to allow market access to developing-country products that do not meet their chosen level of protection, thus compromising these Members' policy autonomy in the area of SPS protection; and if the disciplines of the *SPS Agreement* were to be relaxed for developing-country Members allowing protectionist SPS measures taken by these Members to slip through. The need to avoid such undesirable results means that SDT, even if strengthened within these limits, will in many cases be an insufficient instrument to resolve the problems that developing countries face. Thus, technical assistance assumes greater importance as a tool to help developing-country Members overcome their constraints.

It is currently widely acknowledged that technical assistance is crucial for developing-country Members to be able to implement those WTO agreements requiring regulatory capacity and infrastructure, such as the *SPS Agreement*. Without such assistance, the costs of compliance with such agreements could outweigh the benefits from trade liberalisation 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. The extent to which the technical assistance provisions in the *SPS Agreement* contribute to securing this result is examined in Chapter 2 of Part V.

The current provisions on technical assistance in the *SPS Agreement* are loosely worded and difficult to enforce. As a result, the provision of SPS-related technical assistance leaves much to be desired. Discussions on ways to strengthen these provisions have proved fruitless. In many cases this can be ascribed to the unrealistic nature of the proposals made, making the imposition of SPS requirements with adverse effects on developing-country Members' exports conditional on granting cost-free technical assistance upon request. This would have enormous budgetary implications, impossible to determine in advance, and would risk undermining the regulatory autonomy of importing Members. Nevertheless, the concerns underlying these proposals cannot be discounted. The experience of developing-country Members with the voluntary provision of technical assistance has been disheartening. It is therefore not surprising that they are seeking real commitments from their developed trading partners in the area of technical assistance.

An examination of a few illustrative examples of technical assistance initiatives in place shows that the current approach is fragmented and lacking in coherence. Bilateral technical assistance tends to reflect donor interests and areas of concern, resulting in a disregard for the priorities of beneficiaries. Recent efforts to develop tools to assist developing

countries to identify their capacity needs are useful, but must be coupled with the appropriate response to ensure that the project truly builds capacity in the beneficiary in a sustainable manner. Currently, political considerations rather than objective criteria determine which technical assistance projects are supported by donors. The lack of predictability resulting from the voluntary nature of assistance provided currently makes long-term planning difficult. Multilateral efforts are characterised by inefficiencies and overlaps. The limited mandate of some organisations in the area of technical assistance means that additional efforts in the area of technical assistance result in widening its reach but not deepening its impact. Concerted efforts are needed not only in the areas of training and funding of participation in SPS-related fora, but also in respect of building technical and scientific capacity and infrastructure. Without the latter, participation will not bring the desired results.

The Standards and Trade Development Facility (STDF) represents an important step forward in coordinating the plethora of technical assistance initiatives. It creates a cooperative framework of partners with a wide range of high-level technical expertise and significant financial resources. In addition, making use of complementarities with needs-assessment mechanisms, it ensures that the priorities and capacity needs of beneficiary countries are an integral part of the framing of a project. Consequently, it is in a position to provide needs-driven and expert assistance. The STDF's new approach is to reduce its focus on actually funding projects and turn its attention to the coordination aspect of its mandate. It aims to use its project preparation grants to facilitate the securing of funds and assistance from its partner institutions and other donors. This may indeed be a more efficient use of its unique capacities to promote coordination in technical assistance. It is to be hoped that the work of the STDF will fulfil the potential it has for turning *ad hoc* technical assistance projects into coherent and needs-driven capacity building programmes in developing countries. For this to occur, however, donors must show a new willingness to make multi-annual commitments to funding the STDF. Without such commitment, the lack of certainty regarding sustained funding makes the development of a long-term strategy difficult.

It is argued in this book that the answer lies in a new, more effective approach to SPS-related assistance that is more in line with the current understanding of 'capacity building'. In other words, what is needed is effective, predictable and needs-driven assistance that creates capacity in a sustainable manner. Real commitments must be made to the provision of such assistance. The acceptability of binding commitments towards financing a new technical assistance mechanism will, in turn, depend on the willingness of developing-country Members to accept differentiation across levels of development, reflecting differences in regulatory capacity and dependence on agricultural exports. This would mirror the reality of development, which is a continuum.

Innovative research is urgently needed to identify the necessary conditions for such a mechanism. While research in this area lies beyond the scope of this book and the expertise of its author, there is much room for useful contributions to thinking in this respect from other disciplines. Here an important input can be made by rigorous study, based on empirical research and economic analysis and taking into account the lessons of political science.

Conclusion

This book examines the 'development dimension' of the *SPS Agreement* by evaluating the impact of the disciplines used in this Agreement on WTO Members at lower levels of development. In particular, it assesses whether the *balance* achieved by these disciplines between the often competing goals of trade liberalisation and health protection is 'appropriate' for less-developed Members in the sense that it effectively increases their market access opportunities while leaving these Members sufficient policy space for SPS regulation. The analysis conducted to address this question in Parts I to V gives rise to the following conclusions.

The globalisation of trade, including the growth in the participation of less-developed countries, has brought with it increased threats of international spread of risks to human, animal and plant life and health. Acting on the interface between the parallel processes of the globalisation of trade and the globalisation of health, the *SPS Agreement* is best seen as a negotiated instrument embodying new ways to mediate the trade/health conflict. The normative framework provided by the emerging 'right to development' establishes the importance of ensuring that, in doing so, the *SPS Agreement* promotes agri-food trade without endangering the protection of health.

The question whether this objective is achieved cannot be answered with easy generalisations regarding the impact of the *SPS Agreement* on market access and regulatory autonomy in developing-country Members. A factual examination of the SPS regulatory systems of selected WTO Members at different income levels, and with different trade and health priorities, makes clear that any analysis of the impact of the *SPS Agreement* on developing-country Members must be informed by a realisation of the heterogeneity of this group. A similar conclusion flows from a factual examination of the institutions and procedures through which the international standards used as benchmarks in the *SPS Agreement* are developed, and the participation of Members at different income levels therein. Consequently, while specific difficulties can be identified as deriving from the level of development of certain Members, linked to their SPS regulatory capacity and their financial and technical constraints, these difficulties do not affect all developing-country Members or not all to the same extent.

With this *caveat* in mind, the legal analysis of those substantive provisions of the *SPS Agreement* that discipline the way in which WTO Members exercise their SPS regulatory autonomy leads to two main conclusions. First, although these disciplines reflect a regulatory model currently not achievable for many less-developed Members, the solution to this problem does not seem to lie in weakening the rules. To do so would skew the delicate trade/health balance in the *SPS Agreement,* to the detriment of *all* Members. Second, the opportunities that do present themselves to ameliorate the difficulties with the relevant substantive disciplines faced by various Members at lower levels of development seem to lie most often in addressing the problems of interpretation and application of these rules in dispute settlement. Most importantly, it is recommended that panels, in interpreting the *SPS Agreement*, relinquish their heavy reliance on science as a seemingly objective and universal touchstone for distinguishing SPS protection from trade protectionism, and their accompanying intrusive approach to the review of the scientific basis for Members' SPS measures. Instead, it is suggested that panels would do better

to recognise the normative basis for interpretation of the *SPS Agreement* provided by international human rights law, on which they can rely to enhance the legitimacy of their decisions. This may make panels more inclined to use the flexibilities inherent in disciplines of the *SPS Agreement* in order to achieve the trade/health balance aimed at by the Agreement in a manner more appropriate to the capacities of less-developed Members.

Greater opportunities for enhancing the benefits of the *SPS Agreement* for less-developed Members, while reducing its costs, arise from the institutional and procedural rules contained in the Agreement and the procedural arrangements developed by the SPS Committee to operationalise its provisions. These procedures address several of the implementation problems faced by many less-developed Members, yet do so without undermining the trade/health balance achieved by the relevant substantive disciplines. Great strides have been taken in this regard by the SPS Committee and this work is continuing. Yet many hurdles remain to the full realisation of the potential benefits of the *SPS Agreement* by Members at lower levels of development. These hurdles are rooted in the capacity constraints of these Members, which limit their ability to enforce their rights and comply with their obligations under the Agreement.

The special provisions in the *SPS Agreement* that aim to take account of developing-country constraints, namely the rules on SDT and those on technical assistance leave much to be desired. Both their weak terms and the ineffectual interpretation given to them in dispute settlement have contributed to the disappointing implementation of these provisions to date. In the case of the SDT provisions, the possibilities for strengthening them through negotiated revisions or interpretation are clearly limited by the need to avoid skewing the trade/health balance of the *SPS Agreement*. Consequently, SDT is an inadequate instrument to resolve the problems that developing countries face. Instead, technical assistance assumes greater importance as a tool to help developing-country Members overcome their constraints. What is needed is a new, more effective approach to SPS-related assistance that is more in line with the current understanding of 'capacity building', which refers to a mechanism for effective, predictable and needs-driven assistance that creates capacity in a sustainable manner. Here the academic community can play an essential role in identifying the necessary conditions for such a mechanism.

Samenvatting

Inleiding

In de laatste vijftig jaar zijn de snelheid en omvang van de handel exponentieel toegenomen en is ook de diversiteit van de verhandelde producten gegroeid. Dat heeft een verdere verspreiding van gezondheidsrisico's met zich meegebracht. Het internationale handelsregime, dat is neergelegd in de regels van de Wereldhandelsorganisatie (WTO), heeft daarom nieuwe manieren moeten vinden om het belang van vrije handel en het belang van bescherming van de gezondheid tegen elkaar af te wegen. De WTO *Agreement on the Application of Sanitary and Phytosanitary Measures* (Overeenkomst inzake sanitaire en fytosanitaire maatregelen - *SPS Overeenkomst)* bevindt zich op het raakvlak van de geglobaliseerde handel en geglobaliseerde gezondheidsrisico's. De overeenkomst weerspiegelt een onderhandeld evenwicht tussen concurrerende doelen: liberalisering van de handel in de voedsel- en landbouwsector en bescherming van de gezondheid door nationale overheden.

Ontwikkelingslanden die Lid van de WTO zijn (hierna: 'ontwikkelingslanden') hebben een aanzienlijk belang bij de manier waarop deze twee concurrerende maatschappelijke belangen in de *SPS Overeenkomst* met elkaar in evenwicht worden gebracht. Aangezien landbouwproducten niet zelden een aanzienlijk deel van de uitvoerhandel in goederen van ontwikkelingslanden vormen, proberen deze landen toegang te krijgen tot de markt van deze sector om buitenlands kapitaal ter verwerven dat nodig is om hun ontwikkelingsbehoeften te bevredigen. Hard bevochten verworvenheden behaald bij het liberaliseren van de handel in landbouwproducten kunnen gemakkelijk worden aangetast door misbruik van SPS maatregelen voor protectionistische doeleinden. Om dit te verhinderen zijn ontwikkelingslanden afhankelijk van effectieve regels in internationaal handelsrecht. Anderzijds moet niet worden vergeten dat ontwikkelingslanden ook belangrijke importeurs van voedsel en landbouwproducten zijn en worden geconfronteerd met sanitaire en fytosanitaire risico's die geïmporteerde producten met zich meebrengen. In dit opzicht hebben ontwikkelingslanden er belang bij dat internationaal handelsrecht voldoende flexibiliteit biedt voor het vaststellen van SPS regelgeving die aansluit bij de behoeften en capaciteiten van die landen. Het is daarom belangrijk te onderkennen dat de belangen die in de *SPS Overeenkomst* in evenwicht zijn gebracht, belangen zijn van strijdige maatschappelijk doelen die zeer relevant zijn voor zowel ontwikkelde landen als ontwikkelingslanden. Niettemin kan het mechanisme dat wordt gebruikt om dit evenwicht in de *SPS Overeenkomst* te bereiken van uiteenlopende invloed zijn al naar gelang het ontwikkelingsniveau van de WTO Leden.

Dit onderzoek analyseert de gevolgen van de regels van de *SPS Overeenkomst* voor WTO Leden met verschillende ontwikkelingsniveaus. Het evalueert meer in het bijzonder de instrumenten die door de *SPS Overeenkomst* worden gebruikt om een evenwicht te bereiken tussen gezondheid en handel, zodat kan worden bepaald of zij geschikt zijn voor minder ontwikkelde WTO Leden. De "ontwikkelingsdimensie" van de *SPS Overeenkomst* wordt zo verduidelijkt.

1. De SPS Overeenkomst op het snijvlak van geglobaliseerde handel en gezondheid

De *SPS Overeenkomst* functioneert binnen de context van de parallel lopende globaliseringprocessen van handel en gezondheid. In Deel I wordt de *SPS Overeenkomst* in deze context geplaatst. In Hoofdstuk 1 van Deel I wordt de veranderende rol van ontwikkelingslanden in het wereldhandelssysteem onderzocht om zo te kunnen vaststellen waarom een onderzoek van de ontwikkelingsdimensie van de *SPS Overeenkomst* dringend noodzakelijk is. Het normatieve kader dat wordt geboden door de opkomende erkenning van het recht op ontwikkeling dient er enerzijds toe het belang vast te stellen van handel als de motor van economische groei ten dienste van ontwikkeling en van de verantwoordelijkheid die de internationale gemeenschap draagt om gunstige voorwaarden te scheppen om deze groei mogelijk te maken. Anderzijds maakt het recht op ontwikkeling duidelijk dat ontwikkeling niet alleen economische groei, maar tevens een geleidelijke realisering van alle mensenrechten, met inbegrip van het recht op leven, gezondheid en veilig voedsel, met zich mee brengt. De *SPS Overeenkomst,* die een belangrijke rol speelt in de liberalisering van de handel in landbouwproducten, kan dus zijn handeldoeleinden niet realiseren met behulp van regels die het vermogen van WTO Leden tot het beschermen van leven en gezondheid op hun grondgebied nadelig beïnvloeden.

Hoofdstuk 2 van Deel I schetst de historische ontwikkeling van de erkenning van de globalisering van gezondheid in het licht van grensoverschrijdende gezondheidsrisico's en initiatieven op het gebied van internationale samenwerking in dit verband. In dit Hoofdstuk staat de rol van wetenschappelijke ontwikkelingen op het totstandkoming van nieuwe veelzijdige benaderingen ten aanzien van risicobeheer in ontwikkelingslanden, waarmee complexe bestuursstructuren zowel op nationaal als op internationaal niveau gemoeid zijn, centraal. Dit vormt de achtergrond voor de werking van de *SPS Overeenkomst*. De *SPS Overeenkomst* erkent de vorderingen die zijn gemaakt op internationaal niveau met betrekking tot de vrijwillige harmonisatie van normen. Deze normen zijn opgenomen in de regels van de *SPS Overeenkomst*, maar afwijking van de norm is mogelijk. De *SPS Overeenkomst* weerspiegelt de ten tijde van de onderhandelingen heersende opvatting dat wetenschap een onpartijdige (neutrale) universele maatstaf biedt voor SPS regulering en schrijft wetenschappelijke onderbouwing voor als het gaat om niet-geharmoniseerde maatregelen. De twee aspecten van dit globaliseringproces die werden besproken in Hoofdstukken 1 en 2, worden in Hoofdstuk 3 samen in verband gebracht met het kernthema van het boek met de bestudering hierin van het belang van regulering en normering inzake geglobaliseerde gezondheidsrisico's voor de handel van ontwikkelingslanden.

2. Nationale en internationale SPS regulering en normstelling

Bij de evaluatie van de ontwikkelingsdimensie van de *SPS Overeenkomst*, wordt rekening gehouden met het feit dat ontwikkelingslanden geen monolithische groep vormen. Ontwikkeling vindt plaats in een continuüm, waarin er grote verschillen kunnen zijn in economische middelen, regelgevingscapaciteit, exportbelangen en gezondheidsniveaus.

Al deze factoren spelen een rol bij het vaststellen van de invloed van de *SPS Overeenkomst* op bepaalde WTO Leden en op de vraag hoe werkbaar de regels voor het betreffende Lid zijn. Bij de analyse van de gevolgen van de *SPS Overeenkomst* voor ontwikkelingslanden dient daarom met deze verschillen rekening te worden gehouden.

Het is om die reden dat in Deel II van dit boek de feitelijke context van de werking van de *SPS Overeenkomst* zoals neergelegd in nationale en internationale SPS reguleringen normeringstelsels wordt onderzocht, waarbij bijzondere aandacht wordt besteed aan de invloed van niveauverschillen tussen de WTO Leden op het functioneren van deze stelsels.

Hoofdstuk 1 van Deel II beschrijft het normatieve kader waarbinnen SPS regulering plaatsvindt, namelijk het internationale recht inzake de rechten van de mens. Vervolgens wordt in dit Hoofdstuk een korte rechtseconomische analyse van SPS regulering gemaakt voor een beter begrip van de rol die het ontwikkelingsniveau van een land speelt bij de keuze van regulering. Tot slot worden de rol en de grenzen van de wetenschap in het SPS reguleringsproces uiteengezet. Deze theoretische bespreking bereidt de weg voor de feitelijke analyse die in de daaropvolgende hoofdstukken van Deel II wordt uitgevoerd.

Hoofdstuk 2 van Deel II onderzoekt de aanzienlijke verschillen tussen de nationale SPS stelsels aan de hand van vier illustratieve voorbeelden van WTO Leden in verschillende geografische gebieden: Australië, Mauritius, Jamaica en Bangladesh. Uit deze voorbeelden blijkt dat, hoewel er enorme verschillen bestaan tussen de SPS reguleringstelsels van ontwikkelde landen en die van ontwikkelingslanden, er ook significante verschillen op dit gebied zijn tussen ontwikkelingslanden *onderling*. Deze verschillen in SPS regimes hebben aanmerkelijke gevolgen voor de impact van zowel SPS maatregelen als de *SPS Overeenkomst* zelf op WTO Leden met verschillende ontwikkelingsniveaus. Zij vormen daarom de feitelijke context voor de latere bespreking van de bepalingen van de *SPS Overeenkomst*.

Tot de feitelijke context waarbinnen de *SPS Overeenkomst* functioneert, behoren eveneens de *internationale* stelsels voor de uitwerking van SPS normen. Deze worden besproken in Hoofdstuk 3 van Deel II. De normen die gesteld worden op internationaal niveau, kunnen de diversiteit aan omstandigheden die onder de landen in alle delen van de wereld bestaat, niet weergeven, maar in plaats daarvan laten zij het compromis zien dat werd gesloten door de afgevaardigden van de landen die actief waren bij de totstandkoming van de normen. Onderzoek naar de institutionele structuur en normstellingsprocedures van de internationale organen waarnaar in de *SPS Overeenkomst* wordt verwezen, laat zien dat zij van dien aard zijn dat deelname door ontwikkelingslanden beperkt is. Dit is te wijten aan het feit dat deze structuren en procedures onvoldoende rekening houden met de beperkte middelen en capaciteit in landen met een lager ontwikkelingsniveau. Internationale normstelling wordt daardoor gedomineerd door de ontwikkelde landen, hetgeen heeft geleid tot normen die vaak niet geschikt zijn voor WTO Leden met een lager ontwikkelingsniveau.

De feitelijke context die een onderzoek naar SPS regulering op nationaal niveau en SPS normstelling op internationaal niveau biedt, toont een grote behoefte bij ontwikkelingslanden aan technische ondersteuning bij het opbouwen van SPS capaciteit. Het is echter gevaarlijk om ondersteuning te zien als een wondermiddel door aan te nemen dat

ontwikkelingslanden in staat zijn elke SPS-gerelateerde verplichting na te komen en dat ook zouden moeten doen zolang zij daarbij maar worden voorzien van de nodige ondersteuning. Die technische ondersteuning is geen alternatief voor het uitvoeren van een analyse met betrekking tot de vraag of de regels van de *SPS Overeenkomst* geschikt zijn voor implementatie door ontwikkelingslanden. Het is daarom essentieel te beginnen met de vraag of de materieelrechtelijke regels en de procedurele mechanismen van de *SPS Overeenkomst* geschikt zijn voor ontwikkelingslanden. Dit is het doel van het gedetailleerde onderzoek dat ten grondslag ligt aan Delen III en IV.

3. Regels in de SPS Overeenkomst die evenwicht aanbrengen tussen handel en gezondheid

Verscheidene materieelrechtelijke verplichtingen in de *SPS Overeenkomst* hebben tot doel grenzen te stellen aan de beleidsruimte van WTO Leden waar het SPS regulering betreft door middel van het samenvoegen van de traditionele handelsdisciplines van GATT 1994 en nieuwe wetenschappelijke disciplines, en door harmonisatie te stimuleren. Al deze regels samen fungeren als een filter waarmee gezondheidsbeschermende maatregelen kunnen worden afgescheiden van maatregelen die een verhulde vorm van protectionisme zijn. Op die manier tracht de *SPS Overeenkomst* een evenwicht bereiken tussen de - vaak tegengestelde - belangen van handelsliberalisering enerzijds en bescherming van de gezondheid anderzijds.

De vraag of deze materieelrechtelijke regels in de *SPS Overeenkomst* die dit evenwicht trachten te bewerkstelligen, geschikt zijn voor WTO Leden met een lager ontwikkelingsniveau, wordt behandeld aan de hand van de vraag of de toepasselijke regels daadwerkelijk de kansen op markttoegang vergroten voor minder ontwikkelde WTO Leden en of ze deze Leden voldoende beleidsruimte laten voor SPS regulering. Gezien in het licht van het normatieve kader dat door het begrip ‘recht op ontwikkeling’ wordt gevormd, zoals is uiteengezet in Deel I, is het belang van het evalueren van het vermogen van de *SPS Overeenkomst* om de handel in landbouw- en voedsel producten te stimuleren zonder de bescherming van de gezondheid in minder ontwikkelde landen in gevaar te brengen, evident. Daarin ligt de ontwikkelingsdimensie van de *SPS Overeenkomst* besloten.

Uit het overzicht van de onderhandelingsgeschiedenis besproken in Hoofdstuk 1 van Deel III blijkt duidelijk dat het reguleringsmodel als neergelegd in de materieelrechtelijke regels van de *SPS Overeenkomst* kan worden teruggevonden in de voorstellen van de meest actieve deelnemers aan die onderhandelingen: de belangrijkste ontwikkelde landen en de Cairns Group. De Overeenkomst weerspiegelt de ‘best regulatory practices’ in ontwikkelde landen vrij precies, zodat het gevaar bestaat dat een model van een reguleringspraktijk is opgesteld dat niet werkbaar is voor minder ontwikkelde WTO Leden.

Zoals te lezen is in Hoofdstukken 2 tot 5 van Deel III, laat de analyse van de toepasselijke materieelrechtelijke regels van de *SPS Overeenkomst* die de grenzen bepalen van de beleidsruimte van WTO Leden voor het reguleren van SPS aangelegenheden, zien dat de doelstelling van de *SPS Overeenkomst* evenwicht aan te brengen, duidelijk zichtbaar is in de manier waarop deze materieelrechtelijke bepalingen zijn geformuleerd. Hoewel er

aspecten zijn aan de interpretatie van deze bepalingen die het zorgvuldige evenwicht dat besloten ligt in hun voorwaarden niet volledig tot zijn recht laten komen, lijken de bepalingen zelf geschikt om het gevoelige conflict tussen handel en gezondheid aan te pakken op een manier die liberalisering van de handel in landbouw- en voedselprodukten stimuleert en tegelijkertijd het recht van WTO Leden eerbiedigt om regelgeving op te stellen met betrekking tot SPS risico's. De regels laten echter een reguleringsmodel zien dat op dit moment niet haalbaar is voor vele WTO Leden op een lager ontwikkelingsniveau. Evenmin zijn deze WTO Leden in staat om deze materieelrechtelijke regels te gebruiken om daadwerkelijk toegang tot de markt te verkrijgen voor hun producten.

Afgezien van de specifieke interpretatieaspecten van de materieelrechtelijke regels in de *SPS Overeenkomst*, die in Deel III worden geïdentificeerd en die voor verbetering vatbaar zijn, lijkt het niet mogelijk om veranderingen aan te brengen ten einde de problemen van ontwikkelingslanden te verhelpen zonder het evenwicht dat door de Overeenkomst wordt nagestreefd, te verstoren. Niettemin verdient het zeer reële probleem van de beperkingen waarmee de minder ontwikkelde landen kampen bij de nakoming van deze regels en het genieten van de voordelen ervan, meer aandacht.

De vraagt rijst in hoeverre andere bepalingen van de *SPS Overeenkomst* dan die hierboven besproken dit probleem kunnen verminderen. Deze vraag wordt behandeld in de Delen IV en V van dit boek.

4. Procedurele en institutionele mechanismen op grond van de SPS Overeenkomst

Op zichzelf genomen kunnen de materieelrechtelijke regels van de *SPS Overeenkomst* die hierboven werden besproken, niet voldoende zijn om aanzienlijke vorderingen te maken ten aanzien van toegang tot de markt voor voedsel- en landbouwproducten afkomstig uit ontwikkelingslanden. Dit is te wijten aan hun beperkte vermogen deze regels toe te passen. Daar komt bij dat materieelrechtelijke regels op zich geen nut hebben als er geen effectieve instrumenten bestaan voor het toezicht op de implementatie ervan, voor het oplossen van geschillen tussen WTO Leden over deze regels én, waar nodig, voor het afdwingen van de naleving ervan. De regels uit de *SPS Overeenkomst* die deze institutionele en procedurele zaken beheersen, worden besproken in Deel IV.

Hoofdstuk 1 van Deel IV beschrijft de bepalingen in de *SPS Overeenkomst* krachtens welke de mechanismen worden vastgesteld die regels van institutionele of procedurele aard opleggen *aan WTO Leden*. Deze institutionele en procedurele regels laten het beleid van WTO Leden ongemoeid zolang het blijft binnen de grenzen van de toepasselijke materieelrechtelijke regels van de Overeenkomst; zij zijn gericht op de manier waarop dit beleid wordt uitgevoerd, met het oog op het zo klein mogelijk houden van de handelsbeperkende gevolgen van dat beleid. Het verdient te worden opgemerkt dat nationale procedures misbruikt kunnen worden om te voorkomen dat de doelen die door de toepasselijke materieelrechtelijke regels worden gesteld, worden bereikt, waardoor het in de Overeenkomst aangebrachte evenwicht tussen handel en gezondheid wordt verstoord. De *SPS Overeenkomst* bevat een aantal regels die rechtstreeks betrekking hebben

op procedures die door de WTO Leden worden opgelegd om naleving van hun SPS maatregelen te controleren. Voorts bevat de *SPS Overeenkomst* procedurele mechanismen die bedoeld zijn om bepaalde materieelrechtelijke verplichtingen te operationaliseren, namelijk die met betrekking tot erkenning van gelijkwaardigheid, aanpassing van SPS maatregelen aan regionale omstandigheden en transparantie. Gezien de rudimentaire aard van deze procedurele regels, heeft de SPS Commissie niet-bindende besluiten genomen die gedetailleerde aanvullende procedurele mechanismen bevatten. Deze procedures, die werden ontwikkeld aan de hand van door WTO Leden verstrekte specifieke informatie over hun ervaring op relevante gebieden en die werden bewerkt in besprekingen van technische aard tussen SPS regelgevingsambtenaren, zijn een voorbeeld van het vermogen van de SPS Commissie om in gezamenlijk oplossingen voor uitvoeringsproblemen te vinden.

In Hoofdstuk 2 van Deel IV worden vervolgens de bepalingen in de *SPS Overeenkomst* besproken met betrekking tot de organen en procedures die nodig zijn om *op WTO-niveau* de *SPS Overeenkomst* zonder al te veel problemen effectief te kunnen implementeren. De bepalingen aangaande de SPS Commissie en geschillenbeslechting zijn essentieel voor het bevorderen en bewaken van de implementatie van de regels uit de *SPS Overeenkomst*, het oplossen van geschillen tussen WTO Leden aangaande deze regels, en waar nodig het afdwingen van de naleving van deze regels.

De bespreking van de rol en het functioneren van de SPS Commissie laat veel ruimere mogelijkheden zien voor deelname van WTO Leden met een lager ontwikkelingsniveau dan er tot op heden zijn in het kader van geschillenbeslechting. Het specifieke bezwaarmechanisme van de SPS Commissie is zeer effectief gebleken in de zin dat het mogelijkheden voor WTO Leden schept hun problemen met SPS maatregelen die door hun handelspartners werden genomen op een goedkope, constructieve manier aan te pakken. De discussies in de SPS Commissie verruimen de kennis van regelgevingtechnieken bij nationale ambtenaren. Bovendien schept de SPS Commissie de mogelijkheid professionele netwerken op te bouwen en speelt zij een cruciale rol waar het de meer algemene SPS bezwaren betreft door implementatie van bepaalde regels uit de *SPS Overeenkomst* te stimuleren door middel van het ontwikkelen en aannemen van niet-bindende procedurele richtlijnen. Er zijn echter grote verschillen onder de WTO Leden, al naar gelang hun ontwikkelingsniveau, voor wat betreft hun aanwezigheid bij en daadwerkelijke deelname aan bijeenkomsten van de SPS Commissie. Dit verkleint het potentieel van de SPS Commissie om als mechanisme te fungeren voor minder ontwikkelde WTO Leden bij het oplossen van hun handelsproblemen.

Het geschillenbeslechtingssysteem van de WTO, dat het mogelijk maakt voor WTO Leden te klagen over niet-nakoming van de verplichtingen vervat in de *SPS Overeenkomst*, is een hele verbetering ten opzichte van het systeem dat bestond onder de GATT 1947. Weliswaar wordt voor een zeer klein gedeelte van de geschillen over SPS maatregelen tussen WTO Leden overgegaan tot het instellen van een WTO geschillenbeslechtingsprocedure, en nog minder vaak komt het tot een rechterlijke beoordeling, maar het belang van het geschillenbeslechtingssyteem voor SPS geschillen moet echter niet worden onderschat. Het motiveert WTO Leden tegen wier SPS maatregelen bezwaren zijn gerezen, om deze bezwaren op te lossen door middel van onderhandelingen. Voorts is de uitleg van bepalingen uit de *SPS Overeenkomst* door WTO panels en de Beroepsinstantie essentieel

voor het vaststellen van het juridische kader waarbinnen de WTO Leden hun SPS geschillen behandelen. Deze uitleg wordt niet alleen meegenomen in de besluiten van de SPS Commissie die een uitwerking bevatten van procedurele richtlijnen voor de operationalisering van de bepalingen uit de *SPS Overeenkomst*, zij zijn ook een uitgangspunt bij discussies tussen WTO Leden rondom SPS-gerelateerde handelsproblemen. Men spreekt in dit verband ook van 'settlements negotiated in law's shadow'.

De betrekkelijk bescheiden deelname van WTO Leden met een lager ontwikkelingsniveau aan het geschillenbeslechtingssysteem voor SPS zaken is een indicatie van de hoge politieke en financiële kosten die geschillenbeslechting met zich meebrengt voor deze Leden en van hun opvatting dat de kans op een goede afloop beperkt is. Een ontwikkeling met betrekking tot de zeer nodige hulpverlening aan ontwikkelingslanden in WTO geschillenbeslechting die moet worden toegejuicht, is het Advisory Center on WTO Law. Zonder een gezamenlijke inspanning om de SPS regelgevingscapaciteit in ontwikkelingslanden op te bouwen, zullen deze WTO Leden echter naar alle waarschijnlijkheid de overige belemmeringen voor effectieve deelname niet kunnen overwinnen.

Afgezien van de problemen met deelname, is er een ander geschillenbeslechtingsaspect dat bijzondere aandacht verdient. Dat is het aspect van de toetsingsnorm die wordt gehanteerd door de rechtsprekende organen. Tegenwoordig is het zo dat, hoewel panels als regel verklaren dat zij zelf geen risicobeoordeling zullen uitvoeren of een specifieke wetenschappelijke opvatting van reguleren zullen opleggen aan het regulerende WTO Lid bij het beoordelen van het voorliggende wetenschappelijke bewijsmateriaal, zij dit in de praktijk in toenemende mate toch doen. Voorgesteld wordt dat panels zich bij de bestudering van het wetenschappelijk bewijsmateriaal beperken tot de vraag of de reguleringsverplichtingen van de *SPS Overeenkomst*, met inbegrip van de eis dat een SPS maatregel gebaseerd moet zijn op een risicobeoordeling als omschreven in de Overeenkomst, in acht zijn genomen. Wat een panel niet zou moeten doen, is het wetenschappelijk bewijsmateriaal zelf volledig opnieuw beoordelen om het bestaan van een risico en de grootte ervan te kunnen vaststellen. Een dergelijke beperkte toetsing zorgt ervoor dat het regulerende WTO Lid het evenwicht eerbiedigt dat in de regels van de *SPS Overeenkomst* is aangebracht tussen zijn eigen zorgen betreffende de gezondheid en de handelsbelangen van andere WTO Leden. Zo'n toetsing, die een te grote bemoeienis met de beoordeling van het wetenschappelijk bewijsmateriaal vermijdt, beperkt de regelgevende bevoegdheid van een WTO Lid in mindere mate. Dit zou er voor zorgen dat de diversiteit aan prioriteiten, consumentenvoorkeuren en regelgevend vermogen onder de WTO Leden met verschillende ontwikkelingsniveaus tot uitdrukking worden gebracht in de keuzes voor wetenschapsbeleid neergelegd in nationale risicobeoordelingen. Een dergelijke toetsing zou tevens de nadelige positie verminderen van WTO Leden die niet beschikken over de nodige wetenschappelijk capaciteit bij het neerleggen van een klacht over of het verdedigen van maatregelen die zijn genomen in het kader van de *SPS Overeenkomst*. De huidige ingrijpende aanpak kan het resultaat van een rechterlijke toetsing doen uitvallen ten gunste van ontwikkelde landen die beschikken over de middelen om met overtuigend wetenschappelijk bewijs en sterke juridische argumenten hun standpunt te onderbouwen.

Er is wel aangevoerd dat het 'normatieve vacuüm' waarbinnen de *SPS Overeenkomst* momenteel wordt geïnterpreteerd, er toe heeft geleid dat er door panels die de SPS maatregelen van WTO Leden toetsen nogal wordt geconcentreerd op wetenschappelijk onderzoek

en zij in grote mate afgaan op de opvattingen van panel-deskundigen bij de beoordeling van maatregelen die door WTO Leden zijn genomen. De wetenschap wordt in te sterke mate gezien als een onpartijdige, universele maatstaf aan de hand waarvan SPS maatregelen kunnen worden beoordeeld teneinde SPS bescherming van verhulde vormen van protectionisme te onderscheiden. Het is van essentieel belang dat bij de behandeling van de rechten en verplichtingen uit de *SPS Overeenkomst,* de internationaal-rechtelijke context waarbinnen de *SPS Overeenkomst* functioneert, in aanmerking wordt genomen en in het bijzonder de normen die in het internationale mensenrechtenrecht met betrekking tot het recht op leven, gezondheid, veilig voedsel en ontwikkeling worden gehanteerd. Dit recht zou het zo dringend noodzakelijke normatieve kader kunnen vormen dat als leidraad kan dienen voor de rechterlijke instanties van de WTO bij het vinden van een geschikter evenwicht tussen de strijdige belangen van liberalisering van de handel en bescherming van de gezondheid.

5. Bijzondere bepalingen voor ontwikkelingslanden in de SPS Overeenkomst

In de Hoofdstukken 1 en 2 van Deel IV wordt onderzocht in welke mate de *SPS Overeenkomst* de beperkingen van ontwikkelingslanden aanpakt, hetzij door middel van het inbouwen van toegesneden flexibiliteit in de regels met betrekking tot ontwikkelingslanden of in de vorm van bepalingen met betrekking tot technische ondersteuning om zo de ontwikkelingslanden te helpen bij de naleving.

Hoofdstuk 1 behandelt de bepalingen uit de *SPS Overeenkomst* over bijzondere en gedifferentieerde behandeling van ontwikkelingslanden (*special and differential treatment* - SDT). Hoewel de implementatie van SDT bepalingen in de *SPS Overeenkomst* tot nu toe teleurstellend is geweest, bestaan er reële mogelijkheden voor de panels en de Beroepsinstantie om een meer vooruitstrevende houding aan te nemen dan die van het Panel in *EC - Approval and Marketing of Biotech Products* bij het operationaliseren van SDT bepalingen door middel van een effectieve verdragsuitleg. De rechtsprekende organen van de WTO moeten hun verantwoordelijkheid dragen en de SDT bepalingen effectief toepassen in het licht van de omstandigheden van de zaak. Nochtans moeten de grenzen van SDT niet uit het oog worden verloren. SDT kan niet zodanig worden toegepast dat dit het zorgvuldig aangebrachte evenwicht tussen handel en gezondheid -het hoofddoel van de *SPS Overeenkomst*- aan het wankelen brengt. SDT zal dus in vele gevallen een onvolledig instrument zijn om problemen waar ontwikkelingslanden mee kampen, op te lossen. En zo gaat technische ondersteuning een grotere plaats innemen als instrument om ontwikkelingslanden te helpen bij het overwinnen van hun beperkingen. De mate waarin bepalingen over technische ondersteuning uit de *SPS Overeenkomst* bijdragen tot het behalen van een resultaat, wordt onderzocht in Hoofdstuk 2 van Deel V.

De thans geldende bepalingen in de *SPS Overeenkomst* aangaande technische ondersteuning zijn vaag geformuleerd en lastig af te dwingen, met als gevolg dat het verschaffen van SPS-gerelateerde technische assistentie nogal wat te wensen overlaat. Onderhandelingen over manieren om deze bepalingen wat steviger te maken zijn op niets uitgelopen. Dit kan in vele gevallen worden toegeschreven aan het niet-realistische karakter van de gedane voorstellen. Niettemin moeten de zorgen die aan deze voorstellen ten grondslag liggen,

serieus worden genomen. De ervaring van ontwikkelingslanden met het op vrijwillige basis verlenen van technische ondersteuning is ontmoedigend te noemen. Het hoeft daarom niet te verbazen dat zij van hun ontwikkelde handelspartners verlangen dat zij zich daadwerkelijk committeren om technische ondersteuning te verlenen.

Onderzoek naar enkele voorbeelden van reeds genomen initiatieven op het gebied van technische ondersteuning laat zien dat er thans sprake is van een versnipperde aanpak zonder enige samenhang. Bilaterale technische ondersteuning weerspiegelt over het algemeen de belangen en aandachtsgebieden van het hulpverlenende land, waardoor er geen aandacht is voor de prioriteiten van de ontvangers. Onlangs gedane pogingen om instrumenten te ontwikkelen om ontwikkelingslanden bij te staan bij het identificeren van hun capaciteitsbehoeften zijn weliswaar nuttig, maar dienen te worden gerelateerd aan de gewenste reactie om te verzekeren dat het project werkelijk duurzame capaciteit opbouwt in het ontvangende land. Overwegingen van politiek aard in plaats van objectieve criteria bepalen heden ten dage wat voor soort technische assistentie wordt onderschreven door de donors. Het gebrek aan voorspelbaarheid dat voortkomt uit het vrijwillige karakter van de ondersteuning die thans wordt verleend, maakt lange-termijn planning moeilijk. Multilaterale pogingen worden gekenmerkt door inefficiëntie en overlap. Een gezamenlijke inspanning is vereist, niet alleen op het gebied van scholing en financiering van deelname in fora voor SPS aangelegenheden, maar ook met betrekking tot het ontwikkelen van technische en wetenschappelijke capaciteit en infrastructuur. Zonder dat laatste zal deelname niet het gewenste resultaat opleveren.

Er is behoefte aan een nieuwe, effectievere aanpak van SPS-gerelateerde ondersteuning die meer aansluit bij de huidige invulling van het begrip ‘capacity building’. Met andere woorden, effectieve, voorspelbare, op behoefte gerichte ondersteuning, die capaciteit op duurzame wijze tot stand brengt, is essentieel. Er moet sprake zijn van een daadwerkelijk verplichting tot het verschaffen van zulke bijstand. De aanvaardbaarheid van zulke verplichtingen, zal dan weer afhangen van de bereidheid van ontwikkelingslanden differentiatie naar ontwikkelingsniveau te aanvaarden, waarin de verschillen in regelgevingscapaciteit en afhankelijkheid van de export in landbouwproducten tot uitdrukking komen. Dit zou een afspiegeling zijn van het feit dat ontwikkeling een continuüm is.

Translation by Louise Rayar, Maastricht University