

# ACP–EU Economic Partnership Agreements: Sanitary and Phytosanitary Measures

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## Introduction

The scope and requirements of food safety (sanitary and phytosanitary – SPS) measures are increasingly replacing tariff barriers as the main concern of African, Caribbean and Pacific (ACP) countries seeking to export to the European Union (EU). The ACP countries are beneficiaries of preferential access to the EU market under the Cotonou Agreement and the Generalised System of Preferences (GSP), in particular the Everything But Arms (EBA) initiative for least-developed countries (LDCs). However, they find the increasing coverage and sophistication of many of these SPS measures are preventing them from gaining maximum advantage from such arrangements. The primary reason for this is the inadequate level of human, financial and technical resources that ACP countries can provide to satisfy EU importers that all food exported meets the level of safety required by these SPS measures.

The increased presence of SPS on the international trade scene has been driven by the increasing awareness and concern for food safety among European consumers, particularly about the presence of chemicals and various food additives in their food. This has been exacerbated by several food alarms (e.g. BSE, Avian flu, etc.) and to a certain extent by the resultant European Commission's (EC's) actions to tighten up and harmonise an EU food-safety regime that had developed in a piecemeal fashion over 40 years.

SPS is consequently not a passing issue but one that needs to be recognised as presenting new twenty-first-century challenges to the twentieth-century regulatory mechanism of the World Trade Organization (WTO) generally and its related SPS

Agreement specifically. SPS is a fundamental element of the negotiations on economic partnership agreements (EPAs) foreseen under the Cotonou Agreement between the ACP groupings and the EU, as it directly affects ACP exporters' ability to avail themselves of any opportunities that may arise.

This chapter looks at the challenges to be faced in changing the parameters within which SPS measures are introduced and managed in the context of the EPA negotiations, and suggests several strategies that might be useful in achieving mutually beneficial EPAs between the ACP regions and the EU. Maintenance of the *status quo* in relation to SPS and the current trading environment runs the risk that ACP–EU trade may not be able to benefit as intended from any new arrangements.

## International trade negotiations on SPS

### *WTO and Doha issues*

SPS measures deal with food safety and animal and plant health standards. The WTO does not set the standards. The WTO SPS Agreement encourages member countries to use standards set by international organisations (e.g. Codex Alimentarius; International Office of Epizootics – OIE; and International Plant Protection Convention – IPPC), but also allows members to set their own standards. These standards can be higher than the scientifically agreed ones, but the Agreement says that they should be based on scientific evidence, should not discriminate between countries, and should not be a disguised restriction to trade.

The provisions strike a balance between two equally important objectives: helping governments

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protect consumers and animal and plant health against known dangers and potential hazards; and avoiding the use of health and safety as protectionism in disguise. Considerable discussion has taken place over the years as to whether the SPS Agreement is in practice comprehensive enough in its coverage to achieve its stated objectives and the extent to which its wording allows the major issuers of SPS standards, such as the EU, to exceed internationally accepted norms.

The following issues are among those raised in the lead up to the 2001 Ministerial Conference in Doha. Most were raised in the preparations for the Seattle Conference in 1999 but not necessarily under the same recognisable headings. Broadly they come under a heading of 'Implementation of the Uruguay Round Agreement' and represent SPS issues that need to be tackled if a successful Doha Round is to be achieved.

### ***Equivalence***

The basic premise of this is that countries accept that the object of SPS measures is to ensure that the risk presented by the ultimate product presented for consumption by consumers is at an acceptable level. Coupled with this is the recognition that different measures could be equivalent in providing the same level of health protection against risks of disease or contamination. The SPS Agreement (Art. 4) requires governments, under certain conditions, to recognise other governments' equivalent measures. The problem that faces developing countries (DCs) in particular is how to establish to importing countries' satisfaction that their domestic systems do deliver the same level of safety as the importing countries' own arrangements.

In the WTO, DCs say that developed countries are not doing enough to accept that the actions they are taking on exported goods, in particular in respect of inspection and certification procedures, are equivalent to importing countries' own, as they do in practice provide the same level of health protection.

Much of the problem lies not so much in the reality of whether the health protection levels are the same, but in the inability of DCs to provide sufficient scientific evidence to support the contention and convince the importing countries' authorities.

The question of just how much evidence is required and its precise nature and level of sophistication is not specified in the SPS Agreement and forms a formidable barrier to the achievement of equivalence recognition in the area of SPS.

### ***Regionalisation***

Article 6 of the SPS Agreement requires governments to recognise regions within other countries as being safe sources of imports for food and animal and plant products, instead of basing their measures entirely on national boundaries. The regions concerned can extend beyond (straddle) a single country's borders as well as be contained within a country.

The adaptation to regional conditions is key relevance to DCs, especially large countries where geographical, environmental and epidemiologic conditions may vary considerably between regions. The cost of eradicating pests and diseases from particular areas and of obtaining acceptable scientific proof of achievement presents a formidable barrier to countries benefiting from Art. 6.

The Committee has so far failed to agree on whether it would be useful to develop guidelines that would define what is required, with the consequence that there is no work programme on implementing 'regionalisation'. Latin American countries broadly favour guidelines. Some others such as the US would prefer to leave the task to the OIE and IPPC, with their technical and scientific expertise. The EU supports the development of guidelines, but is concerned that this might encourage countries to delay implementing regionalised measures until the guidelines are agreed.

### ***Special and differential treatment***<sup>1</sup>

Special and differential treatment (SDT) is part of the WTO Doha Development Agenda and, under the 1 August, 2004 General Council decision (sometimes called the 'July 2004 package'), the SPS Committee has to report back to the General Council by July 2005.

The WTO SPS Agreement includes provisions relating to SDT in respect of SPS measures. Art. 10 states that 'where the appropriate level of SPS protection allows for the phased introduction of new

SPS measures, longer time frames for compliance should be accorded on the products of interest to developing country members so as to maintain opportunities for their exports.' It further indicates that, 'with a view to ensuring that developing country members are able to comply with the provisions of this Agreement the Committee is enabled to grant such countries, upon request, specified, time limited exceptions in whole or in part from the obligations under this Agreement, taking into account their financial, trade and development needs.' Art. 9.1 and 9.2 supplement these provisions by providing that members must facilitate the provisions of technical assistance to developing countries and must consider providing technical assistance where this is necessary.

These provisions should in theory ease the problems which DCs face in meeting EU SPS measures. However, there exists generally dissatisfaction relating to the degree to which SPS issuers such as the EU have in practice complied with the spirit as well as the wording of these provisions. The obligation 'must consider providing' has been regarded as being ineffective and a later slightly stronger amendment (at the Doha WTO Ministerial Conference) to

'should provide' is generally regarded as unlikely to change the situation.

The latest decision on special treatment<sup>2</sup> strengthens importing countries' commitments to provide an opportunity for exporting DCs to seek revisions or ask for technical assistance when new or revised measures affecting imports are proposed or introduced. Whatever additional 'special and differential treatment' is then agreed will be publicised as a supplement (or 'addendum') to the document that originally announced the new measure.

The outcome could take a number of forms. The new or proposed measure could be revised for imports from all WTO members. The importing country could provide technical assistance to the exporting DC to help it meet the new requirements. Special treatment could also be given to exports from DCs, such as a longer period to adjust, or the outcome could be a combination of these.

### ***SPS and the Cotonou Agreement***

The Cotonou Agreement (Art. 48) reaffirmed the parties' commitment to the SPS Agreement annexed

#### **Box 1. Sources of SPS-related assistance**

The International standard setting bodies have substantial programmes related to SPS capacity building. For instance:

- The IPPC have developed a diagnostic tool, the Phytosanitary Capacity Evaluation, to help identify countries' capacity and identify needs for assistance available (see [www.ippc.int](http://www.ippc.int));
- The OIE provides financial support for the participation of the Chief Veterinary Officer of its member countries in OIE standard setting bodies.

The WTO, FAO, OIE and WHO have also been involved in the establishment of trust funds by Codex, IPPC and OIE to assist in the more effective participation of developing countries in their standard setting activities.

Other organisations such as the World Bank, IICA,

UNIDO and UNCTAD also have substantial programmes related to SPS.

The Standards and Trade Development Facility (STDF) was established following the commitment made by the Heads of the WHO, FAO, WTO and OIE and the World Bank at the Doha WTO Ministerial Conference to explore new technical and financial mechanisms to promote the efficient use of resources in SPS related activities. The STDF is administered by the WTO with the stated aim of promoting capacity building projects related to SPS. There is also a database (see <http://stdfdb.wto.org>)

The EU has a range of technical assistance programmes targeted at helping ACP countries, notably the Fish Support Programme and the Pesticides Initiative Programme. In addition, EU member states contribute widely to bilateral projects.

See also <http://agritrade.cta.int/infosources/sps.htm>

to the WTO Agreement, taking account of their respective levels of development. Furthermore, the parties undertook to reinforce coordination, consultation and information as regards notification and application of proposed SPS measures, in accordance with the WTO SPS Agreement, whenever these measures might affect interests of either party.

A very important element of the Cotonou Agreement is that it foresees the replacement of the non-reciprocal trade preferences regime of the Lomé Conventions with a new WTO-compatible trade regime between the EU and ACP countries, the economic partnership agreements (EPAs).

EPAs are free trade agreements (FTAs) that will, among other things, involve the acceptance of the principle of reciprocity of trade between the EU and ACP producers of agricultural produce. The actual level of reciprocity and its timetable for implementation are, however, issues for negotiation – although the remaining time available to reach an agreement (until the end of 2007) raises problems of its own. It is unlikely that any waiver of this date can be obtained. Consequently, what is to be achieved has to be achieved within this relatively narrow window. This indicates a need for an element of prioritisation and targeting of the issues to be discussed.

The issue of SPS is highly relevant to the discussions on reciprocity, as a level playing field will not exist between EU and ACP producers if the latter are either unable to meet the SPS requirements or the cost of so doing renders their production uncompetitive. This has implications not just for exports to the EU, but also for competition and market share in the domestic market, be it national or regional.

A report by PriceWaterhouseCoopers (2004) on the 'Sustainable Impact Assessment of the EPAs' reinforces these concerns, not only for the present situation, but also for the future development of ACP economies into participants in the global trading environment. The report notes that, with regard to the reciprocal obligations of EPAs, 'the ACP countries maintain relatively high tariffs on food products, the removal of which could increase the imports of EU products'. It further points out that 'where these products compete with domestic production, they could further discourage the development of processing and manufacturing capacity in

ACP countries in export-oriented and other industries'.

It seems clear that unless local industries and support infrastructure are allowed and/or helped to become SPS compliant, the prospects for countries to benefit from domestically owned secondary processing and diversification of export profile will be small. Whilst it is arguable that EU-based firms may buy up local firms having such potential and therefore expansion/diversification will occur, this will have the effect of simply turning ACP countries into supply bases for the EU consumer.

In this context, it is worth noting the power of the EU supply chains. These not only exert increasing control over suppliers' operations (SPS and others), but they have traditionally relied on EU sources for SPS compliance evidence such as certification, codes of practice, standards, etc. A continuation of this situation will possibly prevent the development of the local market supply potential and customers for such services. In particular, these activities are likely to restrict the development of local codes of practice and standards, which when benchmarked to international counterparts can substantially lower the costs of SPS compliance to local producers.

Many would contend that this runs contrary to the development aspects of the Cotonou Agreement. Liberalisation is of course necessary in today's market and investment is a desirable side effect of such action. However, the liberalisation (reciprocity) of the ACP markets should avoid eliminating the potential for locally owned and governed sectoral development. SPS is a central consideration in this respect because the cost of meeting SPS increases significantly when moving up the value chain. This relates not only to finance and equipment, but also to the SPS-related technical and human resources and supportive infrastructure (such as accredited laboratories) and conducive legislation that are required.

ACP capacity is generally regarded as being inadequate to accommodate the increasing level of EU food safety measures, particularly as regards to local certification, testing, inspection, etc. The Cotonou Agreement recognises that ACP countries may need assistance to overcome their capacity deficiencies.

However, the time that is left before EPAs are to become a reality (1 January, 2008) leaves insufficient time for any significant capacity building to be achieved. The issue of how long a period can be negotiated before it is desirable from the ACP viewpoint for reciprocity to be fully in effect consequently becomes closely attached to the question of how long it will take for individual ACP countries to become as SPS compliant/sufficient as their EU competitors. As the ACP countries are unable to achieve this by themselves, this in turn becomes related to the question of how much assistance the EU is willing to make available and within what timescale.

## Relevance of SPS issues to ACP countries

### *Key issues*

Whilst much discussion centres around the impact of individual SPS measures (such as traceability, pesticide maximum residual levels – MRLs, etc.), the core issue relates to the operation of the umbrella under which all SPS measures take place – the WTO SPS Agreement. Considerable concern exists that, in its present form, the SPS Agreement is unclear in certain areas and consequently does not provide a reliable foundation stone on which a successful EPA can be established. Unless the ACP countries can be certain of the SPS objectives they are expected to achieve and be sure that these cannot be arbitrarily moved and/or interpreted by standard setters such as the EU, it becomes difficult for them to agree. There are several interrelated constituents of this ongoing concern, which were highlighted by Grant Isaac (2004).

The first issue relates to the power of the SPS Agreement. A legitimate SPS measure confers on a member the unilateral right to ban any type of product from any source, and this right cannot be challenged under international trade law. The second issue is associated with the ambiguity surrounding the wielding of the Agreement's power: essentially, there remains uncertainty as to what constitutes a legitimate SPS measure.

The inalienable right of members to protect human, animal or plant safety and health is enshrined in the SPS Agreement and accordingly, if

a legitimate justification exists, members may restrict or prevent imports through the use of mandatory sanitary and phytosanitary measures. In fact, there are three important provisions of the SPS Agreement – differing from traditional trade principles – that support the unilateral establishment of SPS measures by members.

1. First, members may discriminate against imports because of the presence of risks in the exporting country (Art. 2.3). The SPS Agreement recognises that different regions with different geographical conditions and agronomic practices face different incidences of pests and disease. Hence, members are not required to grant either national treatment or most favoured nation (MFN) status to agricultural exporters whose products may contaminate the domestic food supply.
2. Second, members may also establish domestic SPS measures higher than accepted international standard if there is **legitimate justification** to do so. Generally, international trade agreements commit members to adopt international standards if available; however, the SPS Agreement permits members to establish even higher standards. Consequently, the SPS Agreement creates a regulatory floor but not a regulatory ceiling.
3. Third, members may establish provisional measures based on precaution, in the event that there is insufficient scientific evidence to conduct an appropriate risk assessment. They must also follow this up with efforts to obtain evidence for a more objective assessment of the risk 'within a reasonable time' (Art. 5). This effectively provides the unilateral right under the WTO to impose trade barriers that cannot be challenged by other members.

### **Issue 1 – Ambiguities within the SPS Agreement**

Although at first glance it may appear that the provisions in the SPS Agreement are well specified, leaving little room for controversy; there are several important sources of ambiguity that are at the heart of many problems DCs have relating to SPS and trade with the EU.

**Ambiguity 1** While the non-discrimination provisions limit the focus of trade rules to ‘like products’, it is obvious that some SPS-related risks may, in fact, be associated not with the end-use characteristics of a product, but rather with the processes and production methods (PPMs) employed. Indeed, this is at the heart of the WTO trade disputes over beef hormones and genetically modified crops (Isaac and Kerr, 2003a).

**Ambiguity 2** According to the Agreement’s Art. 5:7, members may adopt temporary, precautionary bans to prevent the introduction of risks when sufficient scientific evidence is absent. The problem here does not lie with this provision, but rather with how to remove the provision once it is triggered. The SPS Agreement is silent on the steps that need to be taken by a member country that has lost international market access because trading partners have invoked this provision. Greater clarification is required in the SPS Agreement on how long is ‘temporary’ and on the quantity and type of scientific evidence that is deemed sufficient.

**Ambiguity 3** The SPS Agreement sets a regulatory floor but not a ceiling. Members are committed to both the international harmonisation of SPS measures and the mutual recognition of measures employed by other members. With respect to mutual recognition, a member is committed, in principle, to granting equivalence to the SPS measures adopted by an exporting country ‘if the exporting Member objectively demonstrates to the importing Member that its measure achieve the importing Member’s appropriate level of sanitary or phytosanitary protection’ (Article 4.1). The problem is that – provided that the national treatment provision is met – the Agreement is silent on the limits for countries to have their regulations substantially above those of other member countries. Therefore, while there is a minimum level of SPS measures that must be met, is there a maximum defining the point that importing member countries cannot legitimately expect potential exporting members to achieve?

**Ambiguity 4** This is associated with the role of socio-economic consideration in risk assessment. The SPS Agreement permits members to establish SPS measures based on scientific risk, as well as on

broader assessments of risk such as relevant economic factors, including (Art. 5:3):

- ‘the potential damage in terms of loss of production or sales in the event of entry, establishment or spread of the disease or pest;
- the costs of control or eradication in the territory of the importing Member; and
- the relative cost-effectiveness of alternative approaches to limiting risks’.

Trade agreements traditionally avoid such socio-economic assessments because of the subjectivity complications associated with them. However, the SPS Agreement recognises that imported risks to human, animal and plant safety and health are likely to have socio-economic impacts that can be significant. The inclusion of this article raises ambiguity about how socio-economic assessments may be worked into the **legitimate justifications** based on sufficient scientific evidence. None of the international scientific organisations deferred to by the WTO provide much scope for socio-economic assessments, so it is unclear how and when they may be included in a legitimate fashion.

## **Issue 2 – Inadequate capacity building**

A second major issue relates to the capacity building necessary to meet the EU SPS requirements. The increase in the technical level of requirements and the nature of the mechanisms needed to meet them now constitute a significant barrier to exporters. In many instances large importing chains are using their influence to insist on compliance with SPS measures that are strictly only required by EU law within its own geographical boundaries (e.g., traceability). This imposes an additional burden on the small producers who make up a large proportion of ACP suppliers.

Despite the assistance that is available from the EU and other organisations (see Box 1), there remains an inadequate knowledge about how to easily access what is available. Concern also exists that what is available is in itself basically inadequate to the size of the task. This situation exists alongside the limited ability of some countries to actually obtain and absorb the assistance in the time frame that the EPA

negotiators have available. Also in some instances it is not purely SPS-related assistance that is needed, but indirectly related infrastructural upgrading such as transport infrastructure that allows samples to be sent to laboratories for testing within a specific and reliable time frame.

A related problem is that, whilst some project assistance that is available may rectify an institutional deficiency (e.g. a modern laboratory), these sometimes are of limited value as they are not subsequently operated on a revenue-effective basis or the demand at national level is insufficient to sustain the level of technical resources needed over time. A regional approach to some of these areas would be cost productive.

Whilst the EU has said that it will adopt a flexible and understanding attitude to the SDTs required in relation to the capacity-building needs of ACP countries, it nevertheless will only do so where the principle of SPS measures (consumer protection) are not eroded.

The above indicates that the EPA playing field on which negotiations are taking place includes some obstacles whose exact nature and role require clarification. This requires:

- (a) Clarification of precisely what the SPS Agreement allows the EU to do and the limitations and obligations that may be cited by ACP countries where specific measures are considered to exceed what is necessary for the adequate protection of health.
- (b) Identification and quantification of what ACP countries need at national and regional level, to meet EU SPS requirements and as a result be in a position to participate fully in a reciprocal trade agreement as envisaged under Cotonou.

### **Impact**

The requirement to meet SPS legislation is a horizontal barrier to all exports to the EU and is not subject to negotiation from any category of exporter irrespective of their status (LDCs, etc.). Any negotiation that takes place can relate only to the mechanisms (e.g. timing/phasing, assistance, etc.) of the introduction of the measure, not the principle.

The impact of these requirements necessarily

reflects the ability of individual countries to comply and the importance of the agricultural sector exports to the whole economy. In some instances exports might not be large in volume/value terms, but represent an important element of domestic employment – particularly in relation to small producers.

The impact also varies according to the export profile of countries/regions. Some countries' exports are more heavily oriented towards fruit and vegetable exports whilst others have a different dependency on meat and fish exports. For instance, in the first case the current review of acceptable pesticides (MRLs) by the EU and consequent withdrawal of many which are traditionally used by small ACP farmers/producers will impact severely on this sector. In the second case, the animal/meat/fish sectors have been highly regulated for many years and whilst the requirements are undoubtedly being increasingly enforced, the principal problem lies more with the increasing height of the entry barrier for any firm considering selling to the EU for the first time.

The impact of SPS measures generally, however, are a reflection of the extent to which they are enforced in practice. This enforcement has traditionally originated more at the EU end of the supply chain than at the point of origin, although there are notable exceptions among some ACP countries where exporters have taken a lead in compliance measures.

This situation is now changing significantly with the introduction of the Feed and Food control Regulation 882/04. This regulation is not in itself an SPS measure but by its nature requires that all EU SPS legislation be enforced (with respect to feed and food produce exported to the EU) to a particular standard by the national authorities of all exporting countries.

The regulation also effectively forces the private sector exporting plant product into much closer collaboration with the public sector Competent Authority in much the same way that already exists in the animal-related sector. The direct result of this is to raise the profile of the capacity building needs of ACP countries to ensure their exports are SPS compliant. This is because their institutional mechanisms (legislation, laboratories, inspection systems, etc.) to achieve this objective will be subject to examination and approval by the European Com-

mission's executive arm, the Food and Veterinary Office (FVO).

The cost of such capacity building encompasses the entire food control system and will require action at national and regional level, as well as involving greater support for non-state actors. Box 2 illustrates the coverage of what is generally recognised as the elements required of an effective Food Control System.

### **Possible areas of consensus**

At the broad level, all ACP countries already share an interest in obtaining agreement on SDTs as regards the phasing in of SPS measures (where this does not result in a risk to health) and on the necessity to obtain sufficient assistance to enable them to meet the capacity requirements of SPS (e.g. laboratories, modern legislation, certifiers, etc.).

At a more specific level, there is less awareness and discussion than is merited on two important areas where a broad consensus should be possible:

- that the WTO SPS Agreement be reviewed in relation to several areas of ambiguity and clarification included in the terms of any EPA to be signed; and
- the concept of equivalence provides a basis for the achievement of Mutual Recognition Agreements

between trading partners. It is therefore in the general interest of the ACP countries to identify specific sectors where recognition of equivalence in relation to Standards, Codes of Practice, etc., are likely to be successful.

### **Possible areas of divergence**

In general, the divergences of opinion within the ACP relate to the overall conduct of EPA negotiations and matters not specific to SPS. Where divergence does occur it is usually between sectoral interest groups and the regional organisation. Sectoral interests often attempt to argue for unachievable positions to be adopted, such as SDT requiring a lower standard for LDCs to meet because they are the most vulnerable in the export chain. Others argue for a moratorium of five years on the EU introducing SPS measures. Both of these demands are non-starters.

Other divergent areas tend to relate to issues such as the type of SPS functions that could be transferred to the regional level and the associated question of perceived reduction in sovereignty.

### **Summary**

- **The wording of the SPS Agreement is ambiguous and needs to be revised.**

#### **Box 2. Requirements to meet Regulation 882/04**

1. Modern food law and regulation
2. Co-ordinated food control management
3. Well-trained and effective inspection services
4. Accredited laboratory services
5. Effective information, education and training schemes
6. Institutionalised public and private sector co-operation

#### **Box 3. Principal WTO SPS Trade Concerns 1995–2004**

Animal health, particularly mad cow disease (BSE) and foot and mouth diseases, have dominated 10 years of discussions in the SPS Committee. The WTO 2004 Report notes that animal health and zoonoses account for 40% of concerns raised since 1995.

Over the decade, plant health accounted for 29% of all concerns, food safety 27% and other concerns such as transparency 4%.

The WTO Secretariat paper reports that developing countries have been participating actively. Over the period, 101 issues were raised by DCs (sometimes by several countries), compared to 143 raised by developed countries.

- ACP countries need capacity building especially in their Institutional Food Control Systems.
- Specific sectors could form the basis for equivalency agreements

## Relevance to the EU and its likely position

### *Key issues*

The EU seems primarily concerned that the issue of the capacity of ACP countries to meet SPS requirements is not allowed to delay the signing of EPAs beyond the timetable agreed to in the Cotonou Agreement.

The EC is also concerned that requests for additional resources to upgrade the capacity to meet SPS requirements generally and the Feed and Food Control Regulation specifically do not result in the allocation of funds that are not already agreed within the framework of Cotonou Agreement under the European Development Fund (EDF).

The EU wishes to avoid the discussion on trade reciprocity under EPA being linked to the provision of the capacity building which is required to ensure ACP exporters are not barred by their inability to meet SPS requirements.

With regard to equivalency agreements, the EU has indicated that it would, for the time being, have difficulties in entering into such agreements with ACP countries. This attitude is based on the EU's assessment that ACP states do not have the capacity to effectively test and certify products and thus do not have systems equivalent to those of the EU. The EU, however, does not exclude the possible conclusion of such agreements in the longer term.

### *Feed and food regulation*

Over recent years, the FVO has developed its working methods and procedures in several important respects. It has moved away from the focus on standards in individual production establishments towards evaluating the performance of the relevant competent authority in the overall operation of national control system, especially its ability to transpose, implement and enforce EU legislative standards effectively.

The Feed and Food Controls Regulation 882/04

is a reflection of this policy and has been introduced to complement the umbrella Regulation 178/2002 which sets out the basic principles of food safety within the EU. Regulation 882/04 establishes how these basic principles will be interpreted, implemented and enforced in a harmonised manner by the EU and its member states' authorities through official controls of both EU-produced and imported feed and foods. Box 4 outlines the Regulation's provision.

Regulation 882/04 is highly relevant to the ACP as those countries' national authorities will be required to provide detailed information to the European Commission about their feed and food control systems and related guarantees that products destined for the EU meet EU safety standards or those considered to be equivalent. In many instances the existing elements of ACP countries institutional control system may not be considered adequate to provide the required level of confidence in their system. Box 2 shows some of the principal areas where countries may require assistance to upgrade the performance of their national control systems.

It will be a key aspect of the application of the new Food and Feed Control Regulation that 'equivalence' does not become interpreted in practice as 'sameness'. The European Commission has stated clearly that 'there is a need to take special account of the needs of developing countries' and, indeed, the Regulation itself provides (Article 47.2) that the information requested by the EC from third countries must be 'proportionate to the nature of the goods and may take account of the specific situation and structure of the third country and the nature of the products exported to the Community'.

Overall, the EC considers that the new system should help third countries to meet EU standards by clarifying the requirements and improving the transparency of the approval system.

However, it is accepted that there are a number of areas where problems for third countries can be envisaged and the Regulation therefore contains framework provisions to enable the EC to provide mechanisms and to fund activities that will assist DCs. These include:

- a possible phased introduction of certain specific requirements;

#### **Box 4. Scope of impact of Feed and Food Control Regulation 882/04**

- Regulation 882/04 specifically addresses Official Control systems and their operation by Competent Authorities to ensure that EU standards are met for all foods and feed exported to the EU.
- It applies to all third-country exports of any food or animal feedstuffs, whether derived from animals, fish or plant, to the EU.
- Current controls on the import of products of animal origin remain in place.
- A more harmonised approach to controls on imports of food and feed on **non-animal origin** will be introduced.
- The role of FVO is extended into the non-animal product sector.
- Third countries' authorities will have to provide detailed information about the structure and management of their Official Control systems.
- 'Guarantees' that products meet EU safety standards or those considered 'equivalent' will be required.
- Products of non-animal origin known to pose increased risks will be defined and be subject to increased controls prior to release into the EU market.
- The Regulation does not introduce new technical, safety or quality standards and must be considered in parallel with all existing EU legislation.
- Transitional measures will enable existing approvals to remain in force and for listed countries to retain access to the EU market pending their assessment under the new system.
- The Regulation provides a framework to help developing countries meet EU import requirements and enable the European Commission to fund activities that enhance food and feed safety.
- It does not directly address business operators; however, changes to Official Control regimes will impact indirectly on private operators, particularly in the non-animal product sectors, in respect of record-keeping and documentation.

- technical assistance projects;
- twinning projects between developing countries and member states;
- assistance in providing the required information (using EC experts) and development of guidelines to assist developing countries in organising official controls on products exported to the EU (those areas seen as priority areas);
- visits by EU experts to assist in the organisation of official controls; and
- participation of DC's control staff in training courses organised in the EU.

The EC has emphasised that transitional measures will enable approvals to remain in force and for listed countries to retain access to the EU market pending their assessment under the new system.

#### ***Review of EU Free Trade Agreements<sup>3</sup>***

As the definition of norms and standards is predetermined by the superior WTO rules, bilateral arrangements mainly focus on procedural issues. In this respect, a common characteristic of all recent EU free trade agreements (FTAs) is their emphasis on facilitating the application of the WTO SPS provisions through:

- fostering consistent application of WTO SPS measures by pursuing a common understanding of the existing WTO provisions; and
- harmonisation through consistency with WTO and mutual recognition provisions.

The EU FTAs differ in four main respects:

- the extent to which they reaffirm WTO rules;
- the emphasis on co-operation on SPS measures;

- the adoption of a general exception clause similar to GATT Art. XX; and
- the specification of technical assistance in SPS issues.

Only rarely do the agreements contain individual provisions that go beyond WTO commitments. These concern a limited number of product-specific supplements, procedural provisions on fixed item schedules or decision procedures, equivalence provisions and some specific objectives.

### **The Chile Agreement and SPS**

The trade provisions of the Association Agreement with Chile, to date the most recent FTA concluded by the EU in November 2002, stand out as the most advanced in EU bilateral agreements and are potentially the ones from which ACP negotiators can learn most. The Agreement recognises the importance of SPS in trade between the two signatories and contains comprehensive annexes, which specifically cover SPS measures applicable to trade in animals and animal products, plants, plant products and other goods, along with animal welfare. These set out procedures for dealing with problems raised by either party. These procedures, together with definitions of what is required in relation to equivalence and competency with respect to testing/ certification standards, etc., were agreed by the negotiators and enshrined in the annexes.

Consequently a much clearer and formulated understanding of what is required exists and neither party can arbitrarily introduce SPS-related measures which may be regarded as unfair or unsubstantiated by the other. Of particular importance is the inclusion of specific SPS-related technical assistance commitments.

### ***European Commission strategy***

Although the European Commission accepts the principle that the required level of food safety can be achieved by regulatory mechanisms that are not the same as exist within the EU, in practice it is likely that what is being sought is the establishment of food control systems that are a reflection of the EU's own arrangements. This has some logic as it is easier for the EU to deal with a number of FTAs that

have similar food control systems to its own. This also assists in any further integration that the EU would like to see between regions themselves at some time in the future.

The EC would therefore like to be able to control or at least steer ACP countries in the way that they upgrade their food safety systems. Because of resource constraints, the Commission is limited in its ability to tackle this task at the same time as the EPA negotiations and would prefer to see full discussion take place once the various regions have signed the Agreements. In the meantime, the EC is content to see and encourage some capacity building, but to deter widespread and possibly diverse spending on systems that may not be compatible with its own. Among the tactics to achieve this, are:

- To argue that adequate sources of funds for capacity building already exist and that there is no need to provide any extra at this time.
- To argue that the EDF funds provided under the Cotonou Agreement are at the disposal of the recipients and it is for them to establish their priorities for their use.
- To argue that there is no need to link the capacity building needs to the discussion on the timeframe for reciprocity in trade between the EU and the EPA regions. This can all be sorted out later once the EPAs have been signed.

In relation to the removal of ambiguities with the WTO SPS Agreement, the EC's overall aim is to preserve its right to introduce whatever SPS measures that it deems necessary. It is therefore likely to prevaricate over any suggestions for reviews that might lead to measures that could restrict its current less-restricted remit under the SPS Agreement. Nevertheless, it may be open to clarification of its attitude to some of the ambiguities in the SPS agreement within the context of an EPA, given the precedent of how SPS was tackled in the EU–Chile Agreement.

### ***Summary***

- **The Feed and Food Regulation poses formidable capacity building requirements.**

**Table 1. SPS provisions in EU free trade agreements**

	MED	TDCA	Mexico	Chile
<b>Confirmation of WTO provisions</b>				
Reaffirmation of WTO SPS Agreement	-	√	√	√
Co-operation on SPS measures	√	√	√	√
Harmonisation of standards as an explicit target	√*	√	√	√
Protection of health and life as a general exception similar to GATT ART. XX	√	√	√	√
Explicit provision of technical assistance on SPS matters	-	-	-	√
<b>Individual supplements beyond WTO provisions</b>				
Product-specific provisions or amendments	√ for Israel (cut flowers)	-	-	-
<b>Procedural specifics**</b>				
Establishment of a joint management committee	-	-	√	√
Detailed process of equivalence determination	-	-	-	√
Guidelines for conducting equivalence determination	-	-	-	√
Time schedules and provisions on internal reporting and consultation	-	-	-	√
Operationalising administrative provisions for imports	-	-	-	√
Requirements for information exchange	-	-	-	√
Provisional approval of certain establishments without prior inspection	-	-	-	√
Specific objectives	-	-	-	√ animal welfare

\*Only in the agreements with Israel, Algeria, the Palestinian Authority and Lebanon.

\*\*For the MED agreements and the TDCA, these specifics are either currently being negotiated as part of supplemental technical annexes or such provisions have just been adopted. Nevertheless, they are not an explicit part of the FTA itself. This is true only for Mexico and Chile.

Source: Rudloff and Simons (2004).

- The EU–Chile FTA has lessons for treatment of SPS in EPAs.
- The EC appear unwilling to provide additional finance outside that already committed in the EDF under the Cotonou Agreement.

### Options for the ACP countries

The EU cannot be challenged on its right to protect its citizens from potentially harmful food. This is irrespective of whether countries that supply the food lack the capacity to meet the standard being established.

The primary focus of attention must therefore be

on the mechanics of the measure being required rather than on the basic principle. This involves looking at what the EU is doing and identifying whether it is in accordance with the WTO SPS Agreement. The SPS Agreement contains areas of ambiguity that allow the EU to introduce measures that, whilst not at variance with the wording of the Agreement, nevertheless can arguably be viewed as being contrary to the underlying intention, i.e. not to interfere unnecessarily with international trade.

The second focus must be on identifying and costing what the ACP countries need to do to actually comply with the EU SPS legislation. This requires a move away from the broad generalisations that

obscure the real requirements. It is clear that not all countries need the same degree of help, particularly in product areas such as animal exports where considerable compliance has already been achieved. Some element of prioritisation must be introduced to permit the principal blockages in the supply system to be tackled on a timely and cost-effective basis.

The third focus should be on identifying how to ensure that:

- assistance for the selected capacity building is forthcoming;
- the assistance is commensurate with the actual needs; and
- the assistance should not divert resources from the previously allocated priority targets such as poverty relief. In view of the size of the task, it is difficult to imagine how this could not include additional funds beyond those already committed by the EDF.

To achieve the above it may be necessary to establish strong linkages between the actual upgrading of compliance capacity and the timetable for implementation of reciprocity.

### Preparatory strategies

Although the option of negotiating a lower level of compliance for ACP countries is not available, some related areas do exist that would contribute to finding solutions to the underlying problems created by SPS measures. These are:

- Identifying what capacity building is needed at the national level and what might be transposed to the regional level (e.g. reference laboratory).
- Preparing a cost breakdown in respect of what is needed and incorporating this into the negotiations.
- Identifying existing SPS-related standards, codes of practice, etc., which could form the basis for the negotiation of Mutual Recognition Agreements with the EU.
- Identifying what time scale is required to meet the

requirements of the Feed and Food Regulation 882/04 and negotiating appropriate phasing-in periods. This possibility of phasing in SPS and related requirements is an important element to be actively pursued in negotiations. Provision specifically exists for such phasing in under the Regulation and for account to be taken of the ability of countries to comply.

In addition, it must be recognised that the EU is in a powerful position as a member of the WTO and representing a bloc of 25 countries. It should be strongly encouraged to use its influence to have the ambiguities that exist in the SPS Agreement examined and clarification obtained. Such clarification would help ACP countries in respect of:

- What needs to be done to have a precautionary action lifted and a clear time limit established for such 'temporary' action to last without further and more substantive scientific evidence being provided of the action's validity. The level and content of the additional evidence should also be specified.
- Whether a ceiling can be established which limits the extent to which EU SPS legislation can exceed international norms in any specific area.

However, such clarification will take time and whilst this is being sought in the wider forum of the WTO, it will be beneficial for ACP negotiators to request clarification of the EU interpretation of particular issues which cause problems in the context of the EPAs. Such clarification and any related commitments could be annexed to the EPA as in the precedent of the EU–Chile Agreement.

Given the limited time frame available, however, care should be taken to select issues where agreement might reasonably be expected to be achieved before the entry into force of EPAs on 1 January, 2008. Among candidates for such consideration might be:

- Consultation procedures that include a requirement for the provision of a high level of scientific justification where SPS measures exceed international norms. It should be made clear when the drivers of the measure is genuine risk to health and where it relates to a socio-economic con-

sideration such as the cost of eradication and/or production losses in the importing country.

- The right to suggest alternate approaches to limit risk, particularly where socio-economic reasons are the driver of SPS+ measures rather than any real increase in the level of risk to consumers.
- When precautionary action is taken without adequate scientific evidence, a time limit for the production of such evidence to be established together with stipulations as to the level and nature of such evidence.
- The right to receive technical and/or financial assistance to meet the requirements of specific SPS compliance measures. An action timetable could be agreed that might differ according to a region's needs.

## Recommendations for an 'ideal' agreement on SPS in EPAs

### *The problems to be overcome*

The EPA negotiations have a fundamental problem to overcome in relation to SPS: EPAs require reciprocity but this is only achievable in practice if both parties are in a position to trade.

The Cotonou Agreement clearly states that no country should be worse off under its provisions than previously. At present many ACP countries are not in a position to fully meet the SPS requirements of the EU either with regard to the Feed and Food Regulation's institutional needs or to the increasingly stringent and technical nature of control measures such as traceability, HACCP, etc. on the private sector. The root of this problem is considered by the author to lie in two areas:

- The SPS Agreement is flawed in that, among other aspects, it allows individual countries to introduce measures that go beyond what the rest of the world regard as 'safe'. Thus, traders have to contend with constantly moving/diminishing goals. It is perhaps understandable why some ACP observers query whether the policies underlying some of these measures are a type of disguised protectionism – which the SPS Agreement forbids.

- The SPS measures being introduced are based on the ability of developed countries of the EU to meet them. Where a problem exists assistance is made available to enable the new measures to be met. The ability of exporting countries in the developing world to meet these same requirements is seldom taken into account to any significant degree. Whilst some assistance is available to the ACP to help meet SPS measures generally, it is not anywhere near commensurate with what is made available to the ACP's competitors within the EU-25.

### *Views and recommendations of the author*

Given that the ACP countries lack the human, financial and technical resources to equalise this position, then a continuation of the present practice must inevitably lead to a diminution of ACP–EU trade. Alternatively, trade may continue but only under the auspices of EU-based supply chains that have acquired the producers who can no longer afford to remain independent.<sup>4</sup> At best the practices will ensure that export trade for ACP countries is limited to the basic commodity level and raise even higher the existing hurdle to firms developing up the value chain.

The previous sections indicated some of the changes that need to take place to enable the negotiators to achieve a level playing field and where the rules of the game do not provide an opportunity for advantage to the strongest player. Having said that, however, it is necessary to recognise that such changes take time and a strategy must be developed that both recognises and uses this. The example of how the negotiators in the EU–Chile Agreement tackled the problems of SPS through enshrining procedural agreements and definitions together with commitments to specific technical assistance in annexes is considered to be highly relevant.

Within this context the following are some thoughts that are intended to help focus minds on what the author sees as useful core issues.

1. It is necessary for the negotiating parties to recognise that the issue of SPS has the potential to deny them what they each want, i.e. the EU to have EPAs signed on time and the ACP countries

- to ensure that sufficient assistance is obtained to enable them to compete on level terms.
2. It must also be recognised that the time scale left for negotiation is now insufficient to allow the necessary level of capacity building to take place even if the funding be made available immediately. Consequently, it must be a fundamental aim of the ACP negotiators to obtain written agreement to very specific capacity building to be provided over a specific time scale that is itself linked to the opening up of particular market segments (reciprocity).
  3. These negotiations are the ideal time to press for the inclusion of equivalency arrangements for particular sectors (see the EU–Chile FTA). These sectors should be selected with care and be responsive to any short-term upgrading that might be needed. Such equivalency acceptance would confer considerable competitive advantage *vis-à-vis* non-ACP competitors on the EU market.
  4. Within the EPA a mechanism should exist to correct the imbalance of treatment between the poor and struggling exporter and those better off. For example, whilst inspection charges are undoubtedly necessary in the EU, in many instances they impact disproportionately on some exporters – such as small producers – and can make their produce (often multi-element consignments) uncompetitive on the EU market. Such a mechanism could facilitate a refund of such charges and would be in line with the development aims that are also incorporated into the Cotonou Agreement.
  5. Each EPA should include a consultation structure that, among other things, enables its members to have an early input into any new SPS measures likely to affect them. This membership must include representatives of the non-state actors likely to be affected and who in the past have not had adequate channels to put forward their views. The terms of reference of such a structure should make it clear that the intention of both parties to the EPA is that SPS measures are to be formulated, introduced, and implemented in ways that are least harmful to developing countries, whilst not detracting from the proven need for the desired level of protection of the EU consumer.
  6. Where the precautionary principle is invoked by the EU, technical or other assistance must be made available to those countries affected on a scale that is adequate to prove or disprove the perceived risk on a very short time scale. The obligations of the imposing country should also be made clear in respect of time limits for appropriate scientific validation of the action and the scope and nature of such evidence. This would limit the sometimes prolonged disruption of trade that currently follows an exporting country's inability to challenge adequately EU precautionary action.
- Finally, it is worth noting that EPAs are intended to be more than just FTAs and to have the capacity to deal with wider trade-related issues. The Lomé Conventions regime was widely seen to have failed to live up to expectation because of the lack of capacity of DCs to take advantage of its provisions. This situation has not changed and failure to adequately address the root problems relating to SPS issues in the context of the run up to EPAs must effectively nullify a major intended advantage of the new Agreement over its predecessor.

### ***Implications for international trade discussions***

Given the significant unilateral power it confers and the ambiguity associated with how this unilateral power is appropriately wielded, it is clear that many of the problems in agricultural trade negotiations in future years will increasingly relate in some way to the WTO SPS Agreement. The agricultural trade policy issue arising from this and which needs urgent attention is that the agricultural trade liberalisation efforts – stalled by traditional issues of domestic subsidies, export subsidies and market access disciplines – may be unable to take on the complex challenge of SPS trade disputes unless modifications are made.

Clarifying what constitutes a **legitimate justification** for an SPS-related market entry barrier will also ensure that such barriers are not simply being used as disguised protectionism. Bringing the SPS Agreement fully into the negotiating agenda of the

WTO Committee on Agriculture would begin to deal explicitly with the SPS market entry issues that are so relevant to the ACP countries.

### **Summary**

- Capacity constraint to tackle SPS issues can prevent EPAs functioning as intended.
- Insufficient time exists for sufficient capacity building prior to the EPA timetable for signing.
- Watertight conditions need to be written into the EPAs linking the implementation of reciprocity to the provision of appropriate sectoral assistance.
- The WTO SPS Agreement will continue to create problems in global agricultural trade and should be referred to the Committee on Agriculture as this sector is of fundamental importance to the ACP.
- Clarification of how the EU interprets some of the ambiguous areas of the WTO SPS Agreement should also be sought within the EPA negotiations and this, together with negotiated procedural safeguards, should be enshrined within the EPAs.

### **Possible options for negotiators**

It is worth emphasising a point that is sometimes overlooked. That is that the EPAs represent an entirely different playing field for ACP countries than has existed in relation to EBA and GSP. EPAs present an opportunity to actually negotiate with the EU rather than purely accept what the EU considers to be appropriate either in respect of tackling trade problems generally or allocations from the EDF in respect of SPS capacity building specifically. Negotiators should make the most of the leverage this provides to ensure that the problems raised for ACP countries by the EU food safety concerns and remedial measures (SPS) are accorded full consideration

and are not allowed to be sidelined as peripheral issues to be dealt with at a later date.

The options open to negotiators vary from ignoring SPS issues, leaving them to be discussed outside EPAs, to attempting to obtain firm commitment and clarifications in respect of all SPS problems and having these enshrined in EPAs.

In deciding what would be the most useful stance, it is important to recognise what is achievable within the time that is available. It is unrealistic to believe that agreement can be reached on all the SPS issues referred to in this paper. The reluctance of the EC itself to become formally committed to broad-ranging programmes of assistance within the terms of the EPAs is an important element, but more overriding is the fact that sufficient time does not exist for the luxury of trying for the perfect solution. Focus must therefore be on what is achievable. This must inevitably involve prioritisation and identification of those target issues that may be easier to achieve than others.

To assist this process a few possible options are suggested in Table 2. These outline several possible approaches but basically indicate that it may be preferable to set an objective of having some SPS issues dealt with within an EPA whilst attempting to obtain additional commitment to have the remaining issues (in particular capacity building for particular sectors) dealt with under the Cotonou development pillar. This approach places the focus on deciding what could and should be covered in the EPAs and recognises that some issues will inevitably have to be dealt with elsewhere.

These options are not intended to be definitive nor mutually exclusive, but to present an indicative menu from which different regions may select and/or adapt components that may be appropriate for their particular circumstances. The advantages and disadvantages of different options are similarly only presented as illustrations, as an in-depth examination of each is not practical in the context of the table.

**Table 2. Review of options**

Option	Advantages	Disadvantages
1. SPS issues are not dealt with under EPAs but under the Development pillar of Cotonou	Removes pressure for agreement within EPA timetable	Removes political influence and leverage available to negotiators and leaves decisions in hands of EU bureaucracy. Possibility of linkage to liberalisation of sectors also diminished
2. SPS issues are referred to in the EPA, enshrining the principle of support for capacity building but without any firm commitment	Relatively easy to negotiate and provides a platform for ongoing discussion	Loses the leverage that exists prior to signature and the absence of commitment renders this of little value in practical terms
3. As for Option 2, but including the establishment of consultation procedures on new measures and clarification of EU attitude to ambiguities in the WTO SPS Agreement	Avoids potentially difficult area of obtaining firm commitment for specific assistance within the time available and tackles important areas in advance of likely prolonged WTO deliberations	Obtaining commitment to specific capacity building may be more difficult outside the EPA and agreement as to what constitutes appropriate consultation procedures may raise difficulties at national and regional level
4. Selected issues are included in EPA with firm support measures detailed plus a commitment to additional assistance to be negotiated under the Development pillar of Cotonou	Allows the most important SPS barriers for individual regions to be tackled in a forum where they have most strength and if selected prudently should not impede the progress to signing	May create problems at national and regional level as to priorities
5. SPS issues are referred to in the EPA enshrining the principle of support for capacity building and making a commitment for assistance to be negotiated elsewhere within a timetable which is linked to the liberalisation of sensitive sectors	Allows ACP regions to prioritise and/or ringfence particular sectors until assistance has provided an effective SPS compliant environment within which sectors can develop their trade potential	More difficult to achieve as EC will resist such linkage and disagreements may occur within regions as to the appropriate time table
6. As in Option 5, but additionally equivalence agreements included for selected sectors	As in Option 5 and obtains advantage for particular sectors. Time exists for necessary assistance for marginal capacity building	As in Option 5 and the EC will be cautious in their approach to accepting equivalency evidence

## Endnotes

1. See WTO document G/SPS/GEN/543, [www.wto.org](http://www.wto.org)
2. See WTO document G/SPS/33 of 2 November 2004, [www.wto.org](http://www.wto.org)
3. This section summarises Rudolff and Simons (2004).
4. However, as mentioned earlier, the new EU Food and Feed

regulation puts the emphasis on the Competent Authorities and not any more on the individual export companies. This means that even companies that meet the food safety requirements could be in a situation where they would not be able to export, due to the possible inability of the Competent Authority to ensure that EU standards are met.

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## Information sources

- [www.acp-eu-trade.org](http://www.acp-eu-trade.org)
- AGRITRADE:  
<http://agritrade.cta.int>  
[http://agritrade.cta.int/food\\_safety/executive\\_brief.htm](http://agritrade.cta.int/food_safety/executive_brief.htm)  
<http://agritrade.cta.int/infosources/sps.htm>
- CAC – Codex Alimentarius Commission:  
[www.codexalimentarius.net/standard\\_list.asp](http://www.codexalimentarius.net/standard_list.asp)
- EU Expanding Exports Helpdesk: advice for developing countries exporting to the EU:  
<http://export-help.cec.eu.int/>
- EU food and veterinary inspections reports:  
[http://europa.eu.int/comm/food/fs/inspections/index\\_en.html](http://europa.eu.int/comm/food/fs/inspections/index_en.html)
- EU guidelines for importing from third countries:  
[http://europa.eu.int/comm/food/fs/inspections/special\\_topics/guide\\_thirdcountries\\_en.pdf](http://europa.eu.int/comm/food/fs/inspections/special_topics/guide_thirdcountries_en.pdf)
- FAO <http://www.fao.org>
- FAO International Portal on Food Safety, Animal & Plant Health:  
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- IPFSAPH (International Portal on Food Safety, Animal and Plant Health )  
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- IPPC (International Plant Protection Convention)  
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- OIE – World Organisation for Animal Health:  
<http://www.oie.int/>
- Standards and Trade Development Facility (Technical Assistance):  
[www.standardsfacility.org](http://www.standardsfacility.org)