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**STRENGTHENING DEVELOPING COUNTRIES'
CAPACITIES TO RESPOND TO HEALTH, SANITARY
AND ENVIRONMENTAL REQUIREMENTS**

A Scoping Paper for Central America: The Experience of Costa Rica

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on the basis of papers by national experts

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Index

I. INTRODUCTION.....	4
II. SECTORS	9
A. Poultry	9
1. Poultry health norms	11
2. The Animal Health Problem of Central American Poultry Trade	11
3. Hazard Analysis and Critical Control Point (HACCP).....	14
B. Fisheries.....	16
1. Turtle excluder devices (TEDs)	16
2. Handling of the situation in Costa Rica	22
3. Compliance with HACCP requirements.....	24
4. Costs of compliance: tests.....	25
C. Organic products.....	25
1. Characteristics of the sector.....	25
2. National organic standards and regulations	26
3. Organic certification.....	27
5. Cost of Certification.....	27
6. Efforts to become included in the EU “equivalent third country” list (Art. 11.1)	28
7. Harmonization of organic food regulations	30
8. Conclusions.....	30
III. CONCLUSIONS	32
A. Environmental requirements.....	32
B. SPS measures	34
C. Structural problems.....	35
IV. A GENERAL STRATEGY	37
A. Actions at the national level.....	38
1. Pro-active approaches	38
2. Standard-setting.....	39
3. Capacity building	39
4. Industry cooperation.....	40
5. Government	40
6. National seal	40
B. Actions at the international level	41
1. Cooperation.....	41
2. Technical assistance	41
3. Equivalence.....	42
4. Participation in international standards setting processes.....	44
5. Preferences for organic products	45

ACRONYMS

CBI	Centre for the Promotion of Imports from Developing Countries (the Netherlands)
CINPE	Center for Economic Policy on Sustainable Development (Costa Rica)
CIT	Court of International Trade (United States)
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
ESA	Endangered Species Act (United States)
FDA	Food and Drug Administration
GDP	Gross Domestic Product
HACCP	Hazard Analysis Critical Control Point
INCOPESCA	Instituto Costarricense de Pesca
MAG	Ministry of Agriculture and Livestock (Costa Rica)
MEA	Multilateral Environmental Agreement
MOU	Memorandum of Understanding
NGO	Non-Governmental Organization
NMFS	National Marine Fisheries Service (United States)
TED	Turtle Excluder Device
SMEs	Small and medium-sized enterprises
SPS	Sanitary and Phytosanitary
TBT	Technical Barrier to Trade
TNC	Transnational corporations
USDA	US Department for Agriculture
WTO	World Trade Organization

I. INTRODUCTION

1. Whereas tariffs and quantitative restrictions facing food and agricultural products are being reduced as a result of agricultural negotiations in the World Trade Organization (WTO), the use of environmental standards and sanitary and phytosanitary (SPS) measures has increased. Changes in consumer preferences and increased competition in the food sector have contributed to this development. Food safety rules have emerged first at the national and regional levels, but a wide range of international standards on health and food safety have been developed and such standards are increasingly important in international trade. Consumers are demanding all year round products, which traditionally were only available seasonally. They are also demanding a variety of products that are not always available locally. Consumers benefit from vast improvements in the quality and frequency of transport. Fresh products from anywhere can be delivered to consumers everywhere. As this increases the risk of pests and diseases being transmitted across borders, safeguards are needed to protect human health and the environment. However, an SPS measure that is implemented with a wider objective than simply protecting health can be a very effective protectionist tool that is especially difficult to challenge because of its technical nature.

2. Two instruments negotiated under the Uruguay Round address these problems. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) attempts to address the balance between food safety standards and trade interests. In other words it attempts to address the resolution of conflicts between the right of exporting countries to market access and the right of importing countries to maintain certain health and safety standards. In cases where there is doubt as to the appropriateness or proportionality of certain measures the SPS Agreement should provide clear indications to determine whether or not the measure is primarily a barrier to trade or primarily a measure to protect health. The other instrument is the Agreement on Technical Barriers to Trade (TBT). The TBT Agreement deals with technical standards and regulations, some of them non-mandatory, for industrial and agricultural products. The general philosophy of both agreements is to ensure that these measures do not create unnecessary obstacles to trade. The ultimate objective is to make it harder for WTO members to use such measures to protect domestic industry from foreign competitors.

3. The average import tariff in Central America has come down from 50 to 8 percent. In developed countries the average import tariff is less than 4 per cent. The agricultural sector is still characterized by a complicated system of subsidies for production and exports, tariff peaks, and some quotas. However, all sectors are now under WTO disciplines, and these kind of trade barriers are to be eliminated in ongoing and future trade negotiations. Whereas trade negotiators from developing countries are

pushing for the further opening of these sectors from a “tariff and quotas” point of view, they must be aware that norms and regulations that were thought of as falling within the realm of domestic policies should be expected to take a new center stage. The potential benefits of globalization through trade liberalization will not reach developing countries if they are not able to adjust to this new reality.

4. There is no specific WTO agreement on environmental standards and regulations. Environmental requirements can be technical standards (TBT Agreement), SPS measures (SPS Agreement), exceptions under article XX of GATT, or trade measures stemming from non-trade agreements negotiated in other forums, in particular multilateral environmental agreements (MEAs). The Committee on Trade and Environment (CTE) has been examining “the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them” (“item 6” of its work programme). This issue has also been highlighted in paragraph 32(i) of the Doha Ministerial Declaration.

5. This scoping paper examines the implications of health, sanitary and environmental requirements in international markets for exports of Central America, in particular Costa Rica. It also examines trading conditions for organic agricultural products. The objective is to make recommendations for future trade negotiations and for designing strategies, at national and international levels, to strengthen the capacities of Central American countries to respond to health- and environment-related requirements and opportunities as well as to improve their insertion into the world trading system. The project conducted studies on the following sectors:¹

- *Poultry*, which is a case of application of SPS regulations against specific avian diseases and HACCP, in a context of intra-Central America trade and trade with the United States;²
- *Fisheries*, with emphasis on shrimps, subject to environmental measures as well as HACCP and stringent testing requirements;³
- *Organic products*.⁴

6. The three cases examined are different in scope. In the poultry industry there are different degrees of tariff protection practically everywhere, but the presence of animal diseases and sanitary requirements make it extremely difficult to guarantee free trade. Therefore domestic and international prices are distorted. This in turns creates new problems, which aggravate the initial protectionist stances in this sector. It is important to

¹ Eduardo Gitli and Randall Arce, *Considerations on the International Marketing of International Products in Central America. Some Ideas on Costa Rica*, March 2001.

² Eduardo Gitli, Randall Arce and Eliana Villalobos, *Central America and the International Trade of Poultry Products*, August 2001

³ Max Valverde, *Sanitary and environmental barriers to trade in fisheries. The case of Costa Rica*, July 2001.

⁴ Roxana Salazar, *Barriers to organic agriculture: the case of Costa Rica*, July 2001

emphasize that this is a case where a country that has a comparative advantage (e.g. Costa Rica) in the poultry industry cannot profit from it because of SPS measures in potential export markets. There is a clear violation of comparative advantage, which may lead to the conclusion that being able to comply with SPS measures is becoming more important for ensuring market access than being an efficient producer.

7. Trade in fisheries presents a case of environmental barriers, which are those creating most of the noise, but testing and HACCP requirements also have important implications for exports.

8. Trade in organic products presents a similar problem. Under current laws an imported good cannot be labeled “organic” unless a domestically recognized certifier has certified it, whether national or foreign. This is the case for a “norm” i.e. a non-mandatory standard, which is related to the labeling of the products. If the product is not accepted as formally certified, the importer may switch the labels, and if the product satisfies normal USDA regulations it may be introduced in the importing market without further problems. But the way in which the system is being implemented taking into account the type of exporters (generally small) makes it difficult to reap the benefits of producing under environmentally sound technologies.

9. When obstacles to trade under the form of discriminatory rules or complex certification systems get themselves projected into trade they are more difficult to discuss and to negotiate than tariffs and quotas. While high tariffs may impede commerce, there is a starting point to discuss, because generally they are transparent. But how is it possible to reach an agreement when the importing country states that it will not discuss health security issues? They will only report their decisions. There is always the alternative to take the subject to the WTO dispute settlement mechanism. For a small country such an intense “lawyer consuming” event is a complicated matter. Besides most of the cases are in “gray areas”.

10. The three cases under review, while sometimes mixing tariff and non-tariff barriers, strengthen the point that a better insertion in the world trade system implies a lot more than allegedly “modern” or new generation agreements. Without strong mechanisms of international cooperation, negotiators awareness and domestic association between private and public sectors and specific public investments to be able to comply with the standards and guidelines set by the importing countries, the alleged comparative advantages will not work (as with the poultry industry in Costa Rica).

Is there a real basis for health and environmental concerns?

11. More than 200 known diseases are transmitted through food.⁵ The causes of food-borne illness include viruses, bacteria, parasites, toxins and metals. The symptoms range from mild gastro-enteritis to life-threatening neurological, hepatic, and renal syndromes.⁶ The World Health Organization (WHO) has estimated that, in some countries, mortality due to food-borne and water-borne diseases could be responsible for between one third and a half of the total number of deaths.⁷ Thus, standards and regulations to protect human and animal life are essential.

12. As trade grows exponentially, there is increased concern about its effects on the transmission of diseases across borders. Food safety standards have become more stringent, in particular in developed countries. Exporters from developing countries need to comply with all requirements imposed by the national authorities of importing countries. Consumer and environmental groups, industry associations and other stakeholders often exercise pressure for increasingly stringent standards.⁸ Exporters from developing countries can perceive certain environmental and SPS measures as a means to exclude their products, avoid competition and protect the national industries of developed nations. Such a possibility cannot be ruled out.

13. Just as food safety standards, environmental requirements tend to respond to legitimate objectives, but may also be used as a means to protect domestic industry. Deterioration in the environment is quite visible throughout the world, mainly in the big cities. Global warming, depletion of the ozone layer and other environmental problems have significant environmental, economic and social impacts. In some cases, such as loss of biodiversity, environmental damage may be irreversible. Yet, as there are different rates of return for future environment conditions, preferences for environmental measures may vary in accordance with levels of economic and cultural development. It is easier to agree about pesticide residuals than about the need to save turtles or crocodiles from extinction. In the first case there is an immediate threat to human life or health. In the second case, in poor countries there may be a short-term trade-off between conservation and feeding people. The distinction between what is “right” and what is “wrong” is blurred.

⁵ Bryan, Florence, *Diseases transmitted by foods*. Atlanta: Centre for Disease Control; 1982. Cited by Food and Agriculture Organization (FAO) in *The state of world fisheries and aquaculture*, Part I. 2000, available at www.fao.org.

⁶ Mead, Paul, *et al*, *Food-Related Illness and Death in the United States*. Centre for Disease Control and Prevention, Atlanta, Georgia, USA, www.cdc.gov/ncidod/eid/vol5no5, p. 1.

⁷ FAO Committee on Fisheries, Sub-Committee on Fish Trade, Sixth Session, Bremen, 3-6 June 1998, Report on important recent events concerning trade in fisheries products, para. 24.

⁸ Centre for the Promotion of Imports from Developing Countries, *Eco Trade Manual*. February 1996, p. 19.

14. What is important to remember when judging a standard is the subjective intent behind it and the fact that measures must be proportionate to their intended objective in such a way as to be as least trade restrictive as possible. For example under the SPS Agreement, WTO Members remain free to set whatever human, plant and animal health and safety standards that they consider appropriate to their domestic circumstances. These are the “easy cases”, which become more complex when we refer to levels of pollution nationally allowed, which depend on the physical features of the country and the habitants preferences. Besides, the sheer idea of foreign trade is based, since Ricardo’s early writings in national differences “in climate”, which today we would call “environment”.

15. Under current conditions, environmental restrictions may be related to article XX of the GATT or to the TBT agreement, because as such, environmental provisions are included in the WTO under somewhat indirect approaches⁹.

16. In either case standards may be –willingly or *unwillingly*- serving as a restriction to trade. We may then have serious problems, and it is necessary to draw a mixed strategy of domestic policies and international action to prevail. In most cases, standards are not a protectionist device and it is important to have a flexible institutional framework to solve problems when they arise.

17. The SPS and TBT Agreements provide guidelines to determine whether an SPS or TBT measure is protectionist in nature or responds to a legitimate concern. With regards to SPS measures, WTO Members have the right to adopt SPS measures that are necessary to protect health, provided that they are consistent with the provisions of the SPS agreement. This right is qualified in 3 ways:

- SPS measures should only be applied to the extent necessary;
- They should be based on scientific principles and not maintained without sufficient scientific evidence (except as provided for in Article 5.7); and
- SPS measures may not be applied in a manner, which would constitute a disguised restriction on international trade. (Articles, 2.2 and 2.3. Article 5.7)

⁹ In a landmark decision on the turtle-shrimp dispute in 1998, the Appellate Body of the WTO, referring to the article XX(g) of the GATT on the exceptions based on conservation of non-renewable natural resources (the turtles) brought a series of arguments that make us think that environmental issues are somehow included in the WTO agreements: i) the inclusion of live beings into the concept of natural resources, ii) the fact that turtles were protected under another multilateral agreement (CITES), iii) that the same regulations applied to US ships. Therefore, the Appellate Body introduced the term “environmental legitimate objectives”, which makes an interesting turn of events for the WTO (E. Gitli and C. Murillo, “Factores que desalientan la introducción del tema ambiental en las negociaciones comerciales”, in M. Araya (ed), *Comercio y Ambiente: Temas para avanzar el diálogo*, OEA, Washington, 2000.

allows for temporary exceptions to this basic obligation, but only when the relevant science is unavailable or insufficient).

18. The TBT Agreement covers all technical regulations, voluntary standards and conformity assessment procedures except when these are SPS measures as defined by the SPS Agreement.

19. An additional *rule of the thumb* can be proposed to judge whether measures fulfill legitimate environmental or health objectives or may have been taken primarily for protectionist reasons. If the answer to any of the following questions is affirmative, SPS and/or environmental measures are more likely to be used as an instrument to restrict trade.

- Are there other visible pressures stemming from the private sector to protect the domestic industry of the importing country?
- What part of the domestic market in the importing country is provided by local supply? If such market shares are significant but declining, protectionist pressures are more likely to emerge.
- Are other trade measures (such as antidumping measures) already applied to the product concerned, including in other countries?

II. SECTORS

A. Poultry

20. International trade in poultry products is subject to a series of tariff and non-tariff barriers and often appears to elude the rules of the MTS, resulting in very particular and fragmented markets.

21. The poultry industry must comply with SPS measures and other requirements in order to gain access to international markets. These include the recognition of Newcastle-free regions or countries (Newcastle is an exotic disease affecting birds), and certified implementation of Hazard Analysis Critical Control Point (HACCP) approaches.

22. Exports of poultry products by Central American countries are very small and basically confined to trade within the region. Costa Rica, the principal poultry exporter, sells to several countries in and outside the region. It has been targeting the US market. El Salvador, the second largest exporter, does not export poultry products to markets outside Central America. Nicaragua and Panama export very low levels of poultry to other countries in the region. This could explain why only Costa Rica has made efforts to be declared Newcastle V- free, a requirement to enter the United States market. In the case

of other countries, the entrepreneurial sector seems to be primarily concerned about maintaining its “hegemony” in the domestic market. Producers seem to feel that the internal market is large enough to develop their businesses, and do not wish to be exposed to international competition.

23. The domestic poultry industry in Central America is heavily concentrated in two or three firms in each country, which can satisfy the local market needs and even export if there is an open market. The share held by poultry production within Central American countries’ gross domestic product (GDP) is estimated between 1 and 2.5 per cent. The poultry sector represents between 9 and 15 per cent of agricultural GDP in different Central American countries. Foreign trade represents a very small share of Central American apparent consumption, i.e. an average of only 1 per cent.

24. US domestic prices for whole chicken meat are not substantially different from those in Central America, but the dark meat (thighs and legs) is considerably cheaper whereas breasts are more expensive because of demand conditions. In Central America the situation is the opposite. One would thus expect Central American countries to specialize in exporting breasts and the US producers to export thighs and legs. However, since the US market is closed for Central American poultry meat (for sanitary reasons), such trade flows may not result. If Central American countries open their markets to US exports they risk to be inundated by cheaper US legs and thighs, but they will find no market outlet for breasts unless they reduce prices and this will drive a big part of the local producers out of the market. There is thus pressure to keep markets closed. Producers argue that the absence of free trade in international markets results in artificial price differentials in poultry meat (dark parts against white parts). Therefore, they justify high tariffs for “poultry parts”. In Costa Rica legs and thighs have a tariff of 154 per cent, compared to 40 per cent for whole chicken. With some exceptions, this is the general trend in Central American Countries (and most of the world). In the United States tariffs are around 12 to 15 per cent in the US, but SPS measures exclude certain countries from the market. If a true real price-arbitrating international market could be achieved, prices of different parts of the chicken would tend to converge.

25. Poultry products have been excluded from most regional free trade agreements (FTAs). Such is the case of the Costa Rica-Mexico FTA and, more recently, the Chile-Costa Rica FTA. This indicates the degree of sensitivity liberalization holds for regional poultry producers. Negotiations between Central America and the Dominican Republic leading to a FTA show the same treatment for poultry products, that is, they have been bilaterally excluded from the treaty. Nonetheless, Costa Rica and the Dominican Republic negotiated a quota established solely by the latter to be applied to chicken breast imports incoming from the former, with a preferential tariff of 12.5%. This represents half the general tariff applied to all other countries. In the case of the Mexico-Nicaragua FTA, chicken meat has been included in the agreement, although Nicaragua’s sector

argues that the country was left at a disadvantage, fundamentally due to the cost of raw materials and the fast overtaking and presence of large US companies in Mexico.

26. Regarding the Central America-Dominican Republic FTA, Nicaragua's position is noteworthy. This country decided not to ratify the agreement after negotiations concluded in 1999, because it considered that opening the Dominican market of certain agricultural products was completely unsatisfactory to the interests of Nicaragua. Regardless, should the treaty be ratified, Nicaragua would be ensured of preferential quotas for its chicken meat in this market. Guatemala did not include poultry products in its FTA negotiations with the Dominican Republic.

1. Poultry health norms

27. Poultry trade is regulated, first, by general disciplines defined by the OIE (World Organization for Animal Health), recognized as an international standardization body in the SPS Agreement. This office has classified diseases into two groups, according to their epidemiological characteristics. Diseases from List A are the ones with the most impact on international trade, because they have great disseminating power and are especially noxious, may extend beyond national borders, and their socioeconomic and health repercussions may be very serious, and their impact on international animal and animal product trade is quite relevant. Avian Influenza, highly pathogenic, and Newcastle disease are included in this list. Hence the importance of being free of them if a country wishes to trade in poultry products. List B designates transmissible diseases that are relevant from an economic and/or sanitary viewpoint at the national level and the repercussions on international trade on animals and animal products are considerable. These diseases are usually the subjects of an annual report.

28. One of the most important concepts evolving as a consequence of the presence of diseases that hinder trade in certain products is that of *regionalization* or *free areas*. This designation, contained in the SPS Agreement, has been instrumental for international trade since its implementation, because it suggests that countries must have the opportunity to export from areas declared free from a particular plague or disease, or from areas with low incidence of the disease, even if the disease should exist somewhere else within the country. This concept represents a leap forward regarding some countries' policies, where zero risk tolerance used to be a common practice. In order to be declared plague or disease-free, countries are required to undergo a lengthy process of data collection for pertinent analysis and evaluation.

2. The Animal Health Problem of Central American Poultry Trade

29. One of the fundamental requirements for exporting poultry products to the United States is for a country to be declared Newcastle-free. In order to enjoy this status,

countries must undergo lengthy process. For example, it took Costa Rica 5 to 8 years and at least \$1 million in expenditures to be declared Newcastle free¹⁰. The process involved different stages of joint and individual efforts among representatives from the corresponding governmental institutions (Ministry of Agriculture and Livestock, MAG, in Costa Rica), entrepreneurial sectors, and the United States Department of Agriculture (USDA) through its Animal and Plant Health Inspection Service (APHIS). The declaratory enables Costa Rica to enter the list of countries eligible to export live birds, poultry meat and by-products to the US.¹¹

- Preparation of a Handbook for preventing, controlling and eradicating Newcastle disease, to be used in case of an outbreak.
- Preparation of the Handbook on Procedures for Regulating Imports of poultry products and sub-products in Costa Rica.
- Seminar – Rehearsal of a Newcastle outbreak for official and poultry industry veterinarians, with USDA participants.
- Answering and translating the USDA-APHIS questionnaire required to apply for the Newcastle-free declaratory (it was sent to Washington on June 1993 and obtained US approval on September 1993).
- Several informative talks including varied teaching aids for small, medium and large poultry producers.
- Preparation and publication of informative brochures for producers, aimed at keeping them watchful of the disease.
- Visit from the USDA-APHIS authorities, in February 1994, who in turn met with the Newcastle Commission in order to evaluate progress in the declaratory. On April 1994, the USDA sent its report on its previous visit to Costa Rica.
- National Sampling of backyard birds (in high-risk areas such as those near the northern border, located in areas containing large poultry farms and near the Juan Santa Maria International Airport) and industrial enterprises including laying hens.

¹⁰ Estimation made by the Costa Rican Executive Manager of the Chamber of Poultry Producers.

¹¹ In 2000, the countries declared Newcastle-free by the USDA where Australia, Canada, Chile, Costa Rica, Denmark, Fiji, Finland, France, Great Britain (England, the Isle of Man, Scotland and Wales), Greece, Iceland, Luxembourg, New Zealand, Ireland, Spain, Sweden and Switzerland (Code of Federal Regulations 9CFR94.6).

- Implementation of the Epidemiological Vigilance sampling in poultry breeding farms and backyard birds in hazard-prone areas.
- Serological Laboratory Diagnosis.
- The study included sampling of 426 farms, of which 17 were industrial enterprises, 405 were households with backyard birds and 4 were other sorts of birds. A total of 3,065 birds were sampled nationwide.

Costa Rica unilaterally declared itself Newcastle-free on 26 April. However, it had to wait one additional year for official recognition by the United States. This came about on 6 June 1997, when the United States published the inclusion of Costa Rica in the list of eligible countries.

Source: Vargas (1996) and USDA-APHIS (1997).

30. HACCP has not yet been widely implemented in Costa Rica. Therefore, one of the requisites for exporting to the United States has not been fulfilled yet. In fact, according to a communication from the USDA, this country does not expect any significant changes in imports of poultry products from Costa Rica as a result of Costa Rica having been declared Newcastle free (USDA-APHIS 1997).

31. After having been declared Newcastle-free, Costa Rica began formal procedures to prove compliance with HACCP.¹² To achieve this goal, the country must comply with a series of forms or protocols previous to an inspection of the production plants by USDA officials. Sources from the MAG told the research team (in 2001) that the protocols had been submitted more than two years earlier, in 1998, while others said that they were sent in the first months of the year 2000. United States sources informed the researchers that the documents had actually been sent by the end of that same year and that inspections from the USDA were therefore retarded. Finally, the research team found out that official communication of the remittance was sent from Costa Rica on 18 December 2000. It specifies that the first protocol was submitted on June 16, 2000.¹³ Thus, it seems as though delays in accreditation of Costa Rica for HACCP are due to the time that took the countries' authorities to submit the protocols. But Costa Rican producers and national authorities insist that the problem was owed to the fact that each time they complied with a requirement, there came a new one and that delays came from new requests for information and criteria for inspections that were not contemplated before.

¹² It is important to point out that some of the people we consulted indicated that the fact that the entrepreneurial sector did not seek earlier implementation of the HACCP, implies that expectations of exporting to the US were not a priority for the sector.

¹³ Specifically, on December 18, the following formularies were submitted: *Regulations for Meat and Poultry Products Inspection, Slaughter/Processing, Compulsoriness Questionnaire, Health Questionnaire, Animal Disease Questionnaire*. In turn, the questionnaire *Criteria for Assessing the Adequacy of the Residue Control Program* was submitted on June 16, 2000.

3. Hazard Analysis and Critical Control Point (HACCP)

32. HACCP was documented in the United States at the beginning of the 1970s¹⁴ and food industries in the European Union and the United States started to use it in the 1980s. The Codex Alimentarius Commission has recognized the HACCP as a requisite for food treatment. In a recent communication, the Commission states that:

“The Hazard Analysis Critical Control Point System (HACCP) was conceived as a way of ensuring food safety. Governments are responsible for encouraging the industry to apply the HACCP system to analyse potential hazards, identify the points where these can be controlled and describe process parameters and their critical limits, as well as follow-up procedures. Operators are trained to control the part of the process they are responsible for, to follow-up the efficacy of their controls and to adopt adequate corrective measures in the case of deviations.” (FAO, 1999).

33. HACCP was introduced into the US poultry sector in 1996 to avoid contamination, through identification and control of certain points of the production process prone to contamination hazards (USITC, 1998:16). The system is now generally used in the entire US poultry industry.

Box 2

Procedure Required to Export Meat and Chicken to the United States

The United States requires that poultry products exported to its market must have been produced under standards equivalent to its own regarding safety, wholesomeness, and labeling. The authorities responsible for enforcing these measures are the United States Department of Agriculture (USDA) and the Food Safety Inspection Service (FSIS). The FSIS oversees products such as livestock, sheep, pigs, goats, horses and all poultry products. The latter include all processed products including more than two or three percent poultry meat as a basic ingredient.

The competent authorities in the United States must approve both countries of export and plants. The process to declare a country eligible involves the evaluation of information requested from the country, followed by on-site inspection. The evaluation covers the exporting country's laws and regulations, focusing on five key hazard areas, such as contamination, disease, processing, residues and economic fraud. If the result is satisfactory, in the next stage a US technical team visits the country in order to carry out an exhaustive evaluation of equipment, laboratories, training programs, inspection systems, and an inspection of plants. Once this phase is concluded, if the FSIS deems the system “equivalent” to that of the US, the country becomes eligible for exporting poultry meat to the US. Periodical inspections will take place later on to ensure continuity of this equivalence between both countries.

¹⁴ NASA first used HACCP in 1958 to ensure sanitary conditions for food taken into space.

Once the country holds a stamp of approval it may export poultry meat to the United States, subject to import inspection requirements. One of them concerns labeling. Import inspections require labels on the containers as well as labels detailing the product. The latter must comply with requirements for household products.

Certified export plants must have their labeling approved before they prepare the product for export. Labels must be in English and include name of the product, establishment number and country of origin, name and address of the manufacturer or distributor, net amount, list of ingredients and handling instructions. Large shipments do not require pre-approval, but they are inspected at the port of entry. For meat and chicken shipments, the FSIS requires (i) an original certificate from the country of origin, indicating that the product was inspected by the national inspection service and is eligible for export to the US; (ii) import inspection report and form (FSIS form 9540-1).

Afterwards, through the Automated Import Information System, country, plant and product are examined to determine whether they may be exported to the US. This may have two alternative results. First, it can be concluded that preliminary inspection was sufficient and no further inspection is required (cases with a good history record). Second, a series of inspections may be required including detailed checking of net weight of packages, examining container conditions, searching for defects in the products, laboratory analysis of product composition, microbiological contamination, residues, species. In conducting these inspections, a certain amount of product is randomly selected and examined by FSIS import inspectors. When product samples are sent to FSIS laboratories for analysis, the shipment is usually released before test results are received. However, if the plant had previous violations or a problem is suspected, the shipment is held until laboratory results are known. When a shipment passes inspection, each shipping container is stamped with the official mark of inspection and released into U.S. commerce. From this point, the shipment is treated as domestic product.

If a shipment does not meet U.S. requirements, the containers are stamped "U.S. Refused Entry," and within 45 days must be exported, destroyed, or--with the approval of FDA--converted to animal food.

Source: USDA. Food Safety and Inspection Service, *Importing Meat and Poultry to the United States: A Guide for Importers and Brokers* (<http://www.fsis.usda.gov:80/OA/ptograms/import.htm>), September 20, 1999.

Cost Rican import requirements

34. In December 2000 the Costa Rican government modified import requirements for poultry products, which were required to be free of (a) Newcastle disease, (b) avian influenza, (c) *Salmonella pullorum*, (d) typhoid fever and (e) ornithosis. Also, a requirement was introduced obliging processing plants and slaughterhouses to undergo official inspection and obtain authorization to export poultry meat. They now also need official certification from the competent authorities in their own country stating that poultry products are apt for human consumption. Finally, plants must be inspected and approved by the corresponding Costa Rican authorities.

35. The new requirements came into force on 1 January 2001, and since then poultry imports from the United States have been suspended. The US has argued that this measure is unjustified, because previously inspections from the USDA sufficed. However Costa Rican authorities point out that the new legislation is to be applied and that plants

exporting to Costa Rica therefore are to be inspected by national (Costa Rican) authorities.

B. Fisheries¹⁵

36. Costa Rica is a minor player in world fisheries trade. Approximately 80 per cent of the Costa Rican fishing fleet consists of small boats. In 2000 Costa Rica exported US\$103.4 million. This represented an important decrease in relation to 1999. While some products, such as fresh, frozen and preserved fish, improved their performance, there was a decline in shrimp exports.

37. The United States has applied several environmental-related trade measures to Costa Rican exports of fisheries products. For example, between 1992 and August 2000 Costa Rica could not export tuna to the United States as a result of the well-known dolphin conservation measures taken by the United States against tuna producing countries. Despite the long period, Costa Rica was not really in a hurry to negotiate the standard, since most of the national production is destined to the Central American or European market.¹⁶ This was the case even before the trade measure. This contrasts with the shrimp situation, where most of the exports go to the US market.

1. Turtle excluder devices (TEDs)

38. The United States enacted legislation in 1987, which became fully operational in 1990, to protect an associated species harmed during shrimp catching operations: turtles. This legislation affected international shrimp trade and took the form of an environmental trade measure. It led to a dispute under the WTO Dispute Settlement Understanding and has had important repercussions in the Costa Rican catching techniques.

39. Generally speaking, it is true that an environmental trade measure consists of a restriction on international trade with the purpose of promoting an environmental objective.¹⁷ However, there are several types of environmental trade measures, or more correctly, trade measures that can be used for promoting environmental purposes. Each of these is subject to different disciplines. In general, environmental trade measures can be broken into import prohibitions, export prohibitions, taxes and tariffs, standards (product-process), sanctions, subsidies and conditionalities.¹⁸ In the case at hand, the

¹⁵ This part draws heavily on one of the papers prepared for UNCTAD as part of the Central American Component of the Project on Standards and Trade by Max Valverde.

¹⁶ See www.procomer.com

¹⁷ See Charnovitz, Steve, *A Taxonomy of Environmental Trade Measures*. 6 Georgetown International Environmental Law Review, 1993, p. 2.

¹⁸ Charnovitz, Steve, *The Environment vs. Trade Rules: Defogging the Debate*. 23 Environmental Law 475, 1993, p. 490.

measure taken by the US is a process standard¹⁹ distinguishing between products that are 'alike'.²⁰ Consequently, according to GATT case law such measures are considered as quantitative restrictions disguised as domestic requirements. Such regime will fall under GATT Article XI.²¹ A process standard found to violate that rule could still be justified under Article XX, as the recent WTO case law has proved.²² The non-compliance with this standard resulted in the entry denial to the US market.

40. Pursuant to the United States Endangered Species Act (ESA) of 1973, all sea turtles that occur in US waters were listed as endangered or threatened species. The drowning of sea turtles in shrimp trawls was identified as a serious problem in the 70's. In 1980, the National Marine Fisheries Service (NMFS) unveiled a solution to the problem: the turtle excluder device (TED). Finally, in 1987 the United States issued regulations pursuant to the ESA that required all United States shrimp trawlers to use TEDs or tow-time restrictions in specified areas where there was a significant mortality of sea turtles associated with shrimp harvesting.²³

41. After delays due to challenges in state and federal courts, the 1987 Regulations became fully effective in 1990 and were modified to require the use of TEDs at all times and in all areas where shrimp trawling interacts in a significant way with sea turtles. In the beginning, these regulations affected only US operations and boats. However, environmental groups filed judicial complains according to which turtles should be protected outside the US borders due to their highly migratory nature. Several environmental organisations acted as plaintiffs: the Earth Island Institute, the American Society for the Prevention of Cruelty to Animals, the US Humane Society and the Sierra Club. In addition to the environmental arguments, there were also commercial concerns. The US shrimp fishing industry complained that fishing operations in countries exporting to the US were not subject to these requirements, placing them at a competitive disadvantage with trawlers based abroad. Therefore, the Georgia Fisherman's

¹⁹ Process standards set regulations concerning how a product is harvested or produced. These standards are unrelated to the final characteristics of the product itself. It goes without saying that border verification is more difficult and reliance in some type of certification is required. Some could regard it as an import restriction. Nevertheless, technically speaking an import prohibition, to qualify as such, should have no internal counterpart. If it did, then the obstacle would not be an external one, but an internal regulation or standard. Since the US enacted the same prohibition for its nationals, we are in the presence of a process standard. Non-compliance causes import refusal.

²⁰ Likeness is expressed by reference to physical similarity.

²¹ *United States – Restrictions on Imports of Tuna*, Report of the Panel, GATT Document DS21/R (3 September 1991), at 5.11-5.15; *United States – Restrictions on Imports of Tuna*, GATT Document DS29/R (16 June 1994), (not adopted), at 5.8-5.9; see also *United States – Standards for Reformulated and Conventional Gasoline* AB-1996-1, 29 April 1996, adopted 20 May 1996, WTO Document WT/DS2/AB/R at 5.19; *United States – Taxes on Automobiles*, GATT No. DS31/R (11 October 1994), (not adopted), at 5.52-5.54.

²² *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, WT/DS58/RW 15 June 2001, paras. 5.138-5.144.

²³ Hereafter the "1987 Regulations" (52 Federal Register 24244, 29 June 1987).

Association Inc. decided to join the cause and acted as plaintiff with the environmental groups.²⁴

42. There were immediate anxieties from developing countries for the trade impact and the effects on competition. One of the few NGO websites to mention a possible benefit to the US industry is that of Friends of the Earth. According to them, “[s]ome might argue that this is a case of 'green protectionism' (i.e. using an environmental measure to protect a domestic industry). However, given the fact that this measure left imports of shrimps from aquaculture, non-sea turtle areas and non-trawler areas unimpeded, the US shrimp fishing industry still faced ample competition. Thus the claim this is a case of 'green protectionism' is probably erroneous.”²⁵

43. This statement is not completely accurate. It is true that aquaculture shrimp, non-sea turtle areas and non-trawler areas were unrestrained. It is also true that some big exporters like Ecuador (19% of the US market in 1995) produced mostly through unaffected aquaculture techniques.²⁶ Nonetheless, at the time it was estimated that as much as 30% of U.S. shrimp imports were going to be affected by the restriction.²⁷ If we take into account that U.S. fishing vessels only supply a third of the shrimp consumed in that country,²⁸ we can understand that a potential 30% reduction in import competition is not negligible.

44. Notwithstanding, one of the tests mentioned in the introduction, paragraph 17, gives us an important clue on what would happen later. In a former study, a group of researchers from the Center for Economic Policy on Sustainable Development (CINPE), based in Costa Rica, established that the group of countries potentially affected by the new measures represented approximately 75% of *domestic consumption* in the US²⁹. This explains the ambiguous position of the US government in this matter. At the beginning administration officials did not pay much attention to the new rules, but as pressure mounted they hardened their controls. Even so, they looked out for different ways to solve the problem, at least with the Latin American suppliers, not so with the Asian, which was the greatest mistake they made. In the case of the tuna embargo the US administration behaved more strictly, but in this case there was a powerful American fleet.

²⁴ See *Earth Island Inst. v. Christopher*, 913 F. Supp. 559 (Ct. Int'l Trade 1995).

²⁵ See http://www.foei.org/activist_guide/tradeweb/turtle.htm, Friends of the Earth.

²⁶ Aquaculture provides 90% of Ecuadorian shrimp exports. See Skou, Lene. *Rules to protect sea turtles could block shrimp imports*, April 30, 1996 Journal of Commerce, p. 4.

²⁷ See Skou, Lene, *Rules to protect sea turtles could block shrimp imports*. April 30, 1996 Journal of Commerce, p. 4.

²⁸ See Samocha, Tzachi, *More seafood, please*. Journal of the American Society of Agricultural Engineers Review, Volume 6, number 4, April 1999, pp. 11-12.

²⁹ See, Conejo, C., Díaz, R. Furst E., Gitli, E. and Vargas, L, *Comercio y Ambiente: el caso de Costa Rica*, CINPE, Heredia, 1996. Study prepared for UNCTAD.

45. Section 609 provides that shrimp harvested with technology that may adversely affect certain species of sea turtles protected under US law may not be imported into the US, unless the President annually certifies to the Congress: (a) that the harvesting country concerned has a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the US, and that the average rate of that incidental taking by the vessels of the harvesting country is comparable to the average rate of incidental taking of sea turtles by US vessels in the course of such harvesting; or (b) that the fishing environment of the harvesting country does not pose a threat of incidental taking to sea turtles in the course of such harvesting.

46. The United States issued guidelines in 1991 and 1993 for the implementation of Section 609.³⁰ Pursuant to these guidelines, Section 609 was applied only to countries of the Caribbean/Western Atlantic. In September 1996, the United States concluded the Inter-American Convention for the Protection and Conservation of Sea Turtles with a number of countries of that region.³¹ As mentioned, environmental groups complained that turtles should be protected outside the US borders and elevated the protest to the US Court of International Trade (“CIT”).³²

47. It is worth noting that the US Department of State, wary of the diplomatic implications, had counter-argued that the Congress may have sought some degree of international protection for turtles, but it didn't want to disrupt global markets or unhinge diplomatic relations, a position that was effectively overruled.³³ The tougher U.S. line stems from a series of far-reaching decisions by the CIT. In December 1995 the CIT found the 1991 and 1993 Guidelines inconsistent with Section 609 insofar as they limited the geographical scope of Section 609 to shrimp harvested in the wider Caribbean/Western Atlantic area. Then, it directed the US Department of State to prohibit, as of May 1st 1996, the importation of shrimp or shrimp products wherever harvested in the wild with commercial fishing technology, unless otherwise certified by a US agency.

In April 1996, the Department of State published revised guidelines to comply with the CIT order of December 1995. The new guidelines extended the scope of Section 609 to

³⁰ See 56 Federal Register 1051, 10 January 1991 and 58 Federal Register 9015, 18 February 1993.

³¹ The Convention entered into force on May 1st, 2001. As of 15 May 2001, the Convention has nine parties: Brazil, Costa Rica, Ecuador, Honduras, Mexico, The Netherlands, Peru, Venezuela, and the United States. Costa Rica ratified the Convention on May 14th, 2000. To implement this international and other national commitments for the conservation of sea turtles, Costa Rica also adopted on May 8, 1998, together with Nicaragua and Panama, the Co-operative Agreement for the Conservation of Sea Turtles of the Caribbean Coast of Costa Rica, Nicaragua and Panama. An important part of it is the execution of a Regional Management Plan for the Caribbean coast of these countries.

³² The CIT has jurisdiction over unfair trade practices and other import issues.

³³ See Skou, Lene. Op. Cit., p. 4.

shrimp harvested in all countries.³⁴ On November 25th 1996, the CIT clarified that shrimp harvested by manual methods that did not harm sea turtles, by aquaculture and in cold water, could continue to be imported from non-certified countries.³⁵ The 1996 Guidelines provided that certification could be granted by 1 May 1996, and annually thereafter to harvesting countries other than those where turtles do not occur or that exclusively use means that do not pose a threat to sea turtles “only if the government of [each of those countries] has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of sea turtles in the course of commercial shrimp trawl harvesting that is comparable to that of the United States and if the average take rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting.”

48. For the purpose of these certifications, a regulatory program must have included a requirement that all commercial shrimp trawl vessels operating in waters in which there was a likelihood of intercepting sea turtles used TEDs at all times. TEDs had to be comparable in effectiveness to those used by the United States. Moreover, the average incidental take rate had to be deemed comparable to that of the United States if the harvesting country required the use of TEDs in a manner comparable to that of the US program.

49. India, Malaysia, Pakistan, Thailand asked in January 1997 for the establishment of a Dispute Settlement Panel against the US under the WTO Dispute Settlement Procedures. A number of countries submitted third party statements.³⁶ Costa Rica participated as a third party to the dispute but chose not to submit a statement. The Panel ruled against the United States since Section 609, as was being applied, was a measure conditioning access to the US market for a given product on the adoption by exporting Members of conservation policies that the US considered to be comparable to its own in terms of regulatory programs and incidental taking.³⁷ Then, it mentions “... it appears to us that, in light of the context of the term “unjustifiable” and the object and purpose of the WTO Agreement, *the US measure at issue constitutes unjustifiable discrimination between countries where the same conditions prevail and thus is not within the scope of measures permitted under Article XX.*”³⁸

³⁴ See 61 Federal Register 17342, 19 April 1996, Section 609(b)(2).

³⁵ See *Earth Island Institute v. Warren Christopher*, 948 Fed. Supp. 1062 (CIT 1996).

³⁶ Australia, China, Ecuador, European Communities, Hong Kong and Nigeria acted as third parties in both the first and second instances. El Salvador, Guatemala, Japan, Philippines, Singapore and Venezuela acted as interested third parties only during the first instance, while Mexico only participated during the second instance.

³⁷ See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, at 7.48.

³⁸ *Ibid* at 7.49

50. On July 13th 1998, the United States appealed certain issues of law and legal interpretations in the Original Panel Report.³⁹ The Appellate Body issued its Report on October 12 1998.⁴⁰ It found that Section 609 qualified for provisional justification under Article XX (g), but that it failed to meet the requirements of the chapeau of Article XX, as it was applied in a manner that constituted arbitrary and unjustifiable discrimination.

51. The Appellate Body opposed the text of Section 609 on the one hand and the implementing guidelines and the practice of the United States authorities on the other hand: the former only provided that conservation programs should be comparable, whereas the latter required them to be essentially the same as the US programme. Furthermore, the Appellate Body opposed the application of a uniform standard throughout the US territory, which was acceptable, and the application of the same uniform standard to exporting countries, which was not.⁴¹ Also, the US had granted a longer “phase-in” period for Latin American countries. Besides, some differences in the level of efforts made by the United States to transfer successfully TED technology to exporting countries were found.

52. In response to all this processes, the United States instituted a range of procedural changes in the manner in which it makes certification decisions under Section 609. It issued the 1999 Revised Guidelines, introducing modifications.⁴² The process is more predictable and transparent, providing opportunities for rebuttal and appeal. For example, the Department of State now notifies governments of shrimp harvesting nations on a timely basis of all pending and final decisions and provides them with a meaningful opportunity to be heard and to present any additional information relevant to the certification decision. Even prior to that Appellate Body’s ruling, on August 28 1998 the Department of State reinstated the policy of permitting importation of shrimp harvested with TEDs in countries not certified under Section 609.⁴³ For instance, Australia has been granted permission to export shrimp from the Northern Prawn Fisheries and the Spencer Gulf even though Australia as such is not certified under Section 609.⁴⁴

³⁹ See WT/DS58/11, 13 July 1998.

⁴⁰ See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, adopted on 6 November 1998, WT/DS58/AB/R (hereafter the “Appellate Body Report”).

⁴¹ See Appellate Body Report, para. 5.9.

⁴² See US Department of State, *Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*. Federal Register, Vol. 64, No. 130, 8 July 1999, Public Notice 3086, pp. 36949-36952.

⁴³ See US Department of State, *Notice of Proposed Revisions the Guidelines for the Implementation of Section 609 of Public Law 101-162, Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*. Federal Register Vol. 64, No. 57, 25 March 1999, Public Notice 3013, pp. 14481-14485.

⁴⁴ See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to article 21.5 by Malaysia, WT/DS58/RW, June 15th, 2001, para. 5.124.

53. Nevertheless, on July 19th 2000, the CIT issued a decision that found that this policy violated that statute on its face.⁴⁵ The US Executive Branch did not agree with the court's interpretation, and the issue is currently under review by the US Court of Appeals of the Federal Circuit. This appellate process will take considerable time to reach any conclusion. In the meantime, the United States plans to maintain its current policy.⁴⁶ In its ruling, however, the CIT refused to issue an injunction to reverse that policy as it deemed that the evidence was insufficient to show that the policy was harming sea turtles.

54. Malaysia considered that this decision obliged the US to continue applying the guidelines in a way contrary to the Dispute Panel findings and recommendations. Therefore, it requested the establishment of a dispute settlement body. This body issued its report on 15 June 2001.⁴⁷ It concluded that the US is now applying Section 609 in a manner that no longer constitutes a means of unjustifiable or arbitrary discrimination.⁴⁸ It then went on to state that Section 609 violates GATT's article XI, but it is justified under article XX(g).

2. *Handling of the situation in Costa Rica*

55. Costa Rica has prior legislation concerning turtles. For example an old 1948 law prohibits the killing of turtles and their egg commerce.⁴⁹ Costa Rica is also a signatory of international conventions dealing with this species, for instance, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁵⁰ CITES recognizes all seven species of marine turtles as threatened with extinction and lists these species in Appendix I of CITES.

56. Until 1995 there were no problems with shrimp exports to the US. We should point out that the 1991 US Guidelines limited the geographical scope of the import ban imposed by Section 609 to countries in the wider Caribbean/western Atlantic region,⁵¹ and granted these countries a three-year phase-in period that in practice got extended beyond that. Also, in 1994 the Caribbean countries initiated co-operative efforts with the US by negotiating the Inter-American Convention for the Protection and Conservation of Sea Turtles. The real problem began in 1995 when the US CIT extended the

⁴⁵ See Turtle Island Restoration Network v. Robert Mallett, 110 Fed. Supp. 2d 1005 (CIT 2000).

⁴⁶ See United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to article 21.5 by Malaysia, WT/DS58/RW, June 15th, 2001, para. 3.150.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, para. 5.137.

⁴⁹ See Article 28 of the Fish and Marine Hunting Law No. 190, 1948.

⁵⁰ Adopted on 3 March 1973 and entered into force on 1 July 1975, with 152 parties as of 15 May 2001. Appendix I include all species threatened with extinction, which are or may be affected by trade. Trade in these species is subject to strict regulation through both import and export permits. See www.cites.org.

⁵¹ Specifically, Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guyana and Brazil.

geographical scope of the ban and directed the US Department of State to prohibit, no later than May 1st 1996, imports from all countries not certified.

57. Costa Rica decided neither to initiate litigation in the WTO nor to join the subsequent dispute.⁵² Instead, INCOPECA issued a Board Resolution requiring as of May 1st 1996 the use of TEDs for shore trawl shrimp fishing. In order to fish shrimp, INCOPECA has to grant a permit. After an inspection from US authorities, Costa Rica was certified for the first time that May 1996.

58. The fishermen's reluctance to use TEDs made enforcement more difficult. They set forth arguments not against the use of TEDs, but against the technical specifications by which they were being built. The main reason was that the TEDs required by the US were not suitable for the biological conditions of Costa Rican coasts. Based on their experience in the Gulf of Mexico, the US set bar spacing in 4 inches. However, the Costa Rican marine environment presents different circumstances. The main difference is that, opposed to the Gulf of Mexico, the Costa Rican shoreline receives water from short but highly torrential rivers. Therefore, there is an important amount of organic material carried by the rivers to the shoreline, where shrimp fishing takes place.

59. Imported from the US at a cost of \$300 each, TEDs were constantly obstructed by organic waste. Hence, TEDs were provoking economic losses and were not helping turtles since they could not escape. The escape gate normally got blocked up. This resulted in economic losses. First of all, jammed TEDs required more engine power in the trawling process, which translated into increased fuel costs. But most important, it was estimated that out of the total catch, 70% was waste and 30% shrimp. This fact made shrimp fishers unwilling to use TEDs. In April 1999, a US inspection team composed of technicians and representatives of the Department of State and the US Embassy, visited the port of Puntarenas and inspected six docked vessels and six while at sea. The team found serious problems on almost all of the six boats inspected at sea. Even more, when discussing the national enforcement program with the local fisheries personnel, the team found that the TEDs enforcement regime was not as comprehensive as possible.

60. Under those circumstances, Costa Rica began a series of diplomatic efforts in order to prevent a trade measure under Section 609. In spite of the efforts, Costa Rica was not certified to the US Congress. Therefore, the US communicated to the country that as of April 30, 1999 it could not longer export shrimp to the American market.⁵³ Yet, in that same communiqué, after a diplomatic intercession by the Costa Rican Ambassador in the

⁵² Costa Rica reserved its third party rights in accordance with Art. 10 of the WTO Dispute Settlement Understanding, but it did not submit any allegations, see Report of the Panel, at 6.

⁵³ May 4, 1999 communiqué from US Embassy Minister Richard Baltimore to Esteban Brenes, Costa Rican Agriculture Minister.

US to the Department of State, another inspection trip was scheduled for May 10.⁵⁴ This announced assessment went very well. As a result, on May 18 the Sub secretary of State certified to the US Congress Costa Rican shrimp operations as compliant with Section 609.⁵⁵ As a consequence, the country could reinstate shrimp exports.

61. After the crisis, Costa Rica initiated formal procedures to seek a modification of the TEDs' proportions. Two important studies were initiated in order to support this petition. These scientific studies led to a specific modification proposal by Costa Rica, the Tico-TED, more acceptable for the biological systems in the area.⁵⁶ The US Department of State finally agreed to a modification in the technical specifications of the TEDs, allowing on 16 August 2000 an increase in the escape holes of 2 inches, for a maximum distance between deflection bars of 6 inches (15.2 cms).

3. Compliance with HACCP requirements

62. According to US and EU regulations, all imported fish products sold in these markets must come from plants with a HACCP plan. These regulations make the entrepreneur (processor, trader) fully responsible for the quality of his product.

63. In relation to fish and other food products, the HACCP is basically a plan with preventive actions that the processor can apply to control those food identified safety hazards that are reasonably likely to occur. A HACCP plan shall be specific to: (1) each location where fish and fishery products are processed by that processor; and (2) each kind of fish and fishery product processed by the processor.

64. In relation to US practice, it is important to bear in mind that in many cases countries having signed a Memorandum of Understanding (MOU) with the FDA, are considered as having an equivalent inspection system to the U.S. system and they do not need plant inspections. But in the absence of an MOU, the importer should provide documentation proving that the products imported by the US were processed in accordance with the Federal Regulations. As a general rule, the on-site plant inspection is a necessary step.

65. Logically, the best way to ensure compliance with the HACCP regulation is to ensure conformity with FDA's assessment guidelines. They are compiled in "Fish and Fishery Products Hazard and Control Guide"⁵⁷ as well as the "Regulator's HACCP

⁵⁴ *Ibid.*

⁵⁵ May 20, 1999 US Embassy Minister Richard Baltimore communiqué to Esteban Brenes, Costa Rican Agriculture Minister.

⁵⁶ "Tico" is the gentile for a Costa Rican citizen. The Tico-TED reports a shrimp loss of only 10%, compared to a 40% loss reported when using the US design. See Marine Turtle Restoration Program Costa Rica, informative leaflet, (pretoma@racsaco.cr).

⁵⁷ US Food and Drug Administration Fish and Fisheries Product Hazards & Control Guide: Second Edition, January 1998, hereinafter "FDA's Guidelines".

Training Manual”. The problem is that sometimes inspectors deviate from the guidelines, introducing uncertainties in the system.

4. Costs of compliance: tests

66. After an inspection conducted in 2001, the EU required that Costa Rican authorities should implement a sanitary control of fishing vessels supplying whole as well as de-headed shrimps and fishery products to the on-land establishments. The corrective action suggested by the EU is basically an extension of the HACCP plan to fishing vessels and collecting centres. Up to now the HACCP plan has been a responsibility of processing plants. Compliance with sanitary standards may create a problem for small fishing vessels in Costa Rica. For example, sewage services on small and primitive boats still constitute a problem. We should mention the fact that 80% of the Costa Rican fishing fleet is categorized as “crafty”. Many vessels are just light barges with no space for refrigerating or sewage facilities on board.

67. High costs of mandatory tests required for exports are a problem. For sales in the domestic market, national authorities in Costa Rica require processing companies to conduct at least 16 histamine tests in official laboratories to control histamine risks. The corresponding costs may amount to some US\$500 a year. However, in the case of exports, the much larger number of compulsory tests required by the foreign authorities significantly increase costs. FDA rules require at least two tests per tonne of fish. A large Costa Rican processing plant can export an average of 15000 kilos of mahi mahi a week. Adherence with FDA regulations would thus require 30 tests per week, at a cost of US\$1000 weekly. This implies that in order to export, the company would have to incur a cost of US\$52.000 per year in histamine tests only, 14 times the costs for tests required for the domestic market. And this does not consider other microbiological and micro chemical tests required.

C. Organic products

1. Characteristics of the sector

68. Regional studies estimate that in Central America there were approximately 42 thousand hectares under, or in transition to, organic production in the year 2000. The largest area was in Guatemala (35 per cent), followed by Costa Rica and Nicaragua (*El Financiero* 17 June 2001). The organic movement is widely supported by aid agencies and NGOs, but until recently did not receive significant support from governments. At times organic agriculture is supported in the context of “fair-trade” initiatives. Some fair-

trade organizations claim that up to 80 per cent of the products (for example coffee) they buy from poor farmers is organic certified.⁵⁸

69. Since small producers have developed organic agriculture in a unsystematic manner, there is no strategy to promote a major agrarian re-conversion process. Governmental actions have been limited to isolated efforts by some departments or officials. Thus, there has been a shortage of mechanisms to support producers in areas such as research, access to specific markets, financing, training, choice of better techniques, certification and verification mechanisms, which could permit consolidation of organic agriculture as a fully viable option. Support has come primarily from NGOs⁵⁹ such as HIVOS, OXFAM and Pan Para El Mundo, through the promotion of partnerships and other forms of cooperation with small-scale farmers, financial assistance for certification and support for legislation in the different Central American countries.

70. Costa Rica has taken a lead in the development of organic agriculture, although the sector is not yet fully consolidated.⁶⁰ The area under organic production or in process of conversion was approximately 9400 hectares or 1.9 per cent of the total area under permanent cultivation. As much as 94 per cent of certified farms are of less than 5 hectares. There were more that 4000 organic producers and approximately 135 organizations of organic producers. Small producers, therefore, play a key role in advancing organic agriculture.

71. Recently, the Government and other stakeholders have become more actively involved in promoting organic production and exports.

2. National organic standards and regulations

72. In Costa Rica the publication of the Environmental Law (N° 7574) in 1995 provided a legal basis for organic farming. The Law establishes the general framework for organic production and certification, defining the role of the State in promotion, research and control. The National Program of Organic Agriculture was established in 1995 within the Ministry of Agriculture and Livestock (MAG). The 1997 Phytosanitary Law (N° 7664) further lays down requirements for the registration of operators, inspectors and inspection bodies, as well as the process for certification and approval of inspection bodies.

⁵⁸ See the case of TransFair in www.transfairusa.org

⁵⁹ Amador, Manuel. *Comercialización de productos orgánicos en la región centroamericana*. Research done for IICA, 2001.

⁶⁰ Amador, Manuel. Interview (July, 2001) recognizes that the region lacks sufficient legislation and regulations that may help consolidate the organic sector, and that there is a general shortage of basic information regarding production systems, certification and its importance. Local markets are practically non-existent.

3. Organic certification

73. Inspection bodies are approved according to comprehensive legislation, in accordance with 45011/ISO 65 standards and supervised by the component authority. Certification agencies must be accredited by MAG in order to carry on their activities. The requirement that a product that is certified locally must be also certified in the country of destination forces them to establish alliances with other certification agencies in those countries. As may be expected, due to the initial stages of certification processes in the country, there are only very few certification agencies that have been registered and are accredited to provide these services in Costa Rica.

74. ECO-LOGICA, the first local organic certification agency, is fully recognized by the MAG. It has certified close to 3000 producers, as well as 23 projects involving around 3500 producers. ECO-LOGICA has established strategic alliances with foreign certifiers such as QAI (Quality Assurance International-USA), OTCO (Oregon Tilth Certified Organic-USA) and ECOCERT (France). These alliances are being used as a mechanism to access foreign markets, as ECO-LOGICA is not yet internationally recognized. Certification requirements have been established in accordance with the guidelines of the Oregon Tilth Certified Company, and have been adapted to the agro-ecological and socio-economic conditions present in Costa Rica.

75. ECO-LOGICA provides services of inspection and certification of proceedings related to production of all agricultural products. It is also authorized to provide inspection services for QAI, Oregon Tilth and ECOCERT.

5. Cost of Certification

76. One of the constraints to organic farming in developing countries is the certification cost, which can be prohibitive for small producers. There is a clear conscience among producers that certification is necessary to be able to sell in international organic markets, but they are also concerned that in the absence of stable market conditions, certification can become an important economic barrier.⁶¹ The producer not only has to pay the fee of registering his productive unit as organic, but also has to pay a certification fee.⁶²

77. Certification is provided by private certification entities, both national and foreign. Its costs depend primarily on the size and location of the farm, and on the quality

⁶¹ Ibid. Also interview with Pedro Cussianovich.

⁶² According to people from APROCAM, an organic blackberry company, they have paid between \$3.000 and 10.000 yearly for the certification.

of the information provided by the producer.⁶³ Certification bodies may charge small producers less than they charge other producers. A local certification agency, ECO-LOGICA, has the support of HIVOS in order to provide economic support for the producers⁶⁴.

78. To export organic products multiple certifications may be required. For example, production has to be certified with an accredited national certification agency and with another agency depending on the country of destination.

79. Certification and associated costs may be a major problem for small producers. Different alternatives can be explored to address this problem. In the United States, for example, producers who sell less than \$5000 per year can produce a sworn statement in which they assure the fulfillment of organic certification requirements, without being compelled to obtain the certification itself. Retailers and farmers that offer a production with less than 70 per cent organic ingredients are also excluded from certification requirements.

80. Promoting group organization among small and medium scale farmers can help the transformation period by making it a more expeditious process, and at the same time it can enhance mutual benefits such as lower certification costs.

81. Currently each certification body has its own principles, requirements and guidelines for certification. In addition, Governments are increasingly implementing regulations for organic production. Producers themselves believe that the main task is to define standards and organic agriculture certification schemes that secure product quality and the integrity of organic guarantee systems, while at the same time ensuring that import procedures and certification/accreditation do not adversely affect both the producer and the consumer.⁶⁵

6. Efforts to become included in the EU “equivalent third country” list (Art. 11.1)

82. European Union regulations stipulate that products can be imported as organic only if they have been produced in accordance with rules for organic production and are subject to inspection measures that are equivalent to EU organic regulations. Article 11 of Regulation 2092/91/EEC opens two ways to export organic products to the European

⁶³ Delgado, Geovanny, general manager of ECO-LOGICA, (interviewed on July 23, 2001) stated that the fixed cost is \$175 annual, plus \$100 for each day in the field and a percentage of 0.5% on annual sales. The daily cost is increased by travel, lodging and other expenditures. In general terms, the basic cost for the producer may be \$425. If done in groups, as proposed, the cost could be less. In some cases the buyer pays the certification costs.

⁶⁴ Delgado, Geovanny, *supra*.

Union. Paragraph 1 establishes a “third-country” list, indicating countries with which equivalence is established. Paragraph 6 determines that organic products from countries which are not on the “third-country” list can be marketed in the EU provided the importer submits documentation to confirm that the products are produced and certified according to rules equivalent to those of EU. Such authorization shall be valid only as long as these conditions are shown to be satisfied. Commission Regulation (EC) No 1788/2001 of 7 September 2001 defines detailed rules with regard to the certificate of inspection for imports from third countries under Article 11.6. For each consignment the approved authority or inspection body in the third country from where the goods are exported must produce an original “certificate of inspection for import of products from organic production”.

83. To export organic to the EU market, paragraph 11.1 clearly offers much easier conditions than paragraph 11.6. However, currently only six countries (among them Argentina) are on the “third-country” list. Over 70 developing countries, including Central American countries, export under Article 11.6.

84. Costa Rica has taken steps to be included in the “third-country” list. This would bring important advantages in terms of predictability and costs of exporting organic agricultural products.

85. In this connection, a EU inspection team visited Costa Rica in 2000. Some key findings were:⁶⁶

- The minimum requirements for organic farming laid down in Costa Rican legislation are, in general, equivalent to Council Regulation (EEC) N° 2092/91;
- The structure of the organic farming inspection and supervision system in Costa Rica is well developed, in spite of being rather recent. It is supported by comprehensive legislation;
- The inspection bodies are approved according to EN 4501/ISO 65 standards and supervised by the competent authority;
- Most of the producers are organized in groups;
- The global control of the organic system still shows some weaknesses and lack of consistency, partially due to the short accumulated experience;
- Parallel production is allowed in Costa Rica, unlike in the EU.

⁶⁵ Solano, Carlos. *Memoria: Simposio Nacional de Agricultores (as) Orgánicos y Opciones para el Desarrollo Alternativo*. VECO- COSTA RICA- PNUD – CEDECO- COPROALDE- MNC- PAN PARA EL MUNDO. 1a. ed. San José, 2001.

⁶⁶ European Commission. Health and Consumer Protection Directorate-General. Final Report on a mission carried out in Costa Rica from 6 to 10 November 2000, in the field of Organic Farming in Costa Rica.

86. The EU team recommended the following:

- The Costa Rican authorities should take appropriate measures to address certain inadequacies of the inspection system, in particular concerning parallel production, the national list of registered producers and processors and the competent authority's monitoring and supervision of organic production and exports;
- The Costa Rican authorities should make sure that inspection bodies set appropriate rules for group inspection and certification, and should verify their application, in order to guarantee the reliability and effectiveness of the control system;
- To European Commission should include Costa Rica in the equivalent third country list under Article 11(1) of Council Regulation (EEC) N° 2092/91, provided the Costa Rican authorities inform the Commission of the action taken and that the recommendations have been adequately followed

7. Harmonization of organic food regulations

87. Trade in organic food and the growth in organic agricultural production are hampered by the lack of harmonized regulations among potential trading partners. The adoption of international guidelines is an important first step in providing a harmonized approach to regulations in the organic food sector, thus facilitating trade in organic food,⁶⁷ but further efforts are needed. Arrangements for mutual recognition of national guarantee systems will reduce uncertainty regarding standards and the use of labels for imported organic products, protect the interests of consumers and producers, and facilitate international trade.

8. Conclusions

88. It has been proposed that Central American countries redefine and update the operational methods of agricultural business, aiming to substitute the already obsolete “poor agriculture” scheme by a “new agriculture” approach that focuses on markets, information, innovation, differentiation, and productivity.⁶⁸ Further incorporation of environmental considerations into production and marketing can improve the competitive

⁶⁷ International Federation of Organic Agriculture Movements (IFOAM) Basic Standards provide a framework for certification bodies and standardizing organizations worldwide to develop their own certification standards. The Codex Alimentarius Commission has developed guidelines for the production, processing, labeling and marketing of organically produced goods, See: Codex Alimentarius, Guidelines for the Production, Processing, Labelling and Marketing of Organically Produced Foods. GL 32 – 1999. See also: <http://www.fao.org/es/esn/codex/STANDARD/standard.htm>

⁶⁸ INCAE, *Supra*.

edge and increase the agricultural sector's potential as a generator of sustainable economic development.⁶⁹

89. However, for organic agriculture to become a viable alternative of agricultural production there is a need to develop a proper support system. Since there are no direct financial support strategies for organic farming, technological transfer, access to markets, training, access to financial sources, a proper legal framework, adequate certification mechanisms and appropriate political direction need to be developed.

90. Costa Rica does not have in place state-supported mechanisms that may benefit organic over conventional production. Conventional agriculture has an advantage over organic: there are benefits granted for the importation of some agro-chemicals for agriculture.⁷⁰ Organic producers, on the contrary, must incur in additional expenses to offer their products, such as registration, certification, and increased control and administration costs, for which they receive little or no compensation. The national regulations on organic agriculture do not mention economic incentive mechanisms. Consequently, the cost of the certification process becomes a significant burden for organic producers. The irony of this is that the cost of certification acts as a tax that must be paid by anyone that decides to change its production to organic.

91. As a result of a national non-traditional export promotion drive in the 1980s, agricultural production diversified into new products, but with the same old philosophy of the green revolution, using more and more synthetic agrochemical inputs. This transition was strongly subsidized, but only to promote exports, during 15 years. Renewed demand for safe and healthy food, as well as for safer working conditions in the agricultural sector, provides opportunities for organic agriculture. But most organic producers in Central America are small farmers with little knowledge of the exporting process and with no price premiums in the domestic market. There is an urgent need to develop policies in this connection, including with regard to subsidies or incentives, to promote the transition to organic agriculture. The farmers need favorable credit conditions, support in the transition period, and low cost certification alternatives. In addition, Costa Rica has to develop a national commitment to develop long-term policies in order to consolidate the organic production. Government action is often taken only when a severe problem arises (such as the restructuring of loans in sectors severely affected by low international prices or lack of competitiveness in the domestic market). With the growth of the organic sector in quantitative and qualitative terms, a national strategy is expected to bring about some improvements in national priorities and policies.

⁶⁹ Ibid.

⁷⁰ In Costa Rica pesticides have been subject to negligible import duties. There is a significant amount of product expressly exonerated from duties. The Agricultural Production Act, No. 7064 has a specific chapter dedicated to incentives for conventional agricultural producers. See the Regulations of the General Sales Tax Law, number 14082-H. According to Chapter 3 (Exemptions) : agricultural inputs, including pesticides, are exempted from the tax

III. CONCLUSIONS

92. Almost every new regulation implies some change in the production process and costs. In some cases this is seen as a normal and unavoidable part of exporting. In other cases a new regulation can be seen as an unjustified barrier to trade aimed at protecting competing industries. It is very difficult to draw a precise line between protection and protectionism. Strategies to deal with trade measures of trading partners vary from case to case. For example, the case study on fisheries indicates that the Government of Costa considered TED requirements by the United States as “part of the game”. However, in 1996 the Costa Rican government had strongly opposed United States textile quotas and Costa Rica had been the first WTO member to request the establishment of a panel, which ruled that the United States quotas breached the Agreement on Textiles.⁷¹

93. It could be suggested, at the risk of oversimplification, that when there is strong competition from domestic producers in the destination market it is more likely that environmental and sanitary regulation are perceived as disguised trade barriers.

A. Environmental requirements

94. In the case of shrimp, the Costa Rican authorities and exporters opted to focus on compliance with a new market requirement rather than contesting the measure. Compliance increased competitiveness vis-à-vis suppliers that were not in compliance. Some issues should nevertheless be raised. For example, in order to grant country certification, US regulations required all Costa Rican fisheries boats to comply with TED requirements. It did not make any difference if the fishing boats were operating in turtle free areas. Even when environmental norms and regulations can be defended from the point of view of the importing country, the importing country should not impose its criteria on *all* production units, independent of the market of destination of the products.

95. In relation to environmental trade regulations, developing countries have to understand that they are gaining legal recognition at the WTO level. Prior to the Shrimp-Turtle dispute, WTO case law took the view that environmental measures targeting non product related production methods were incorrectly distinguishing between products that were ‘alike’. Consequently, such measures were considered quantitative restrictions unjustifiable under GATT Article XX (exceptions). The Shrimp-Turtle case fundamentally changed this view. PPM-related trade measures continue to be considered

⁷¹ See Costa Rica, *Examen de las Políticas Comerciales. Informe del Gobierno*, WTO, April 9, 2000.

as a quantitative restriction. Yet, such measures can be justified under the environmental exceptions of GATT Article XX, paragraphs (b) and (g).⁷²

96. A country wanting to use the environmental exceptions in Article XX has three hurdles to overcome. It must first ascertain whether the policy purportedly embodied in the national measure serves to achieve one of the objectives established in paragraphs (b) and (g). These paragraphs comprise measures that are recognized as exceptions to substantive obligations established in the GATT, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. After succeeding in this, the country has to prove whether the national measure is necessary to achieve the policy objective. Finally, the issuing state must establish whether the measure complies with the chapeau of Article XX.⁷³

97. Once the above tests are met, the technical regulation must then pass the test of the chapeau of Article XX, which addresses *how* the law is applied. The three tests in the chapeau to be met are whether, in its application, the measure is arbitrarily discriminatory, unjustifiably discriminatory or constitutes a disguised restriction on trade. Although the Appellate Body did not try to define these terms, it arguably defined a number of criteria for *not* meeting the tests including:⁷⁴

- Unilateral actions. International efforts and standards should to be preferred;⁷⁵

⁷² See *United States – Import Prohibition of Certain Shrimp and Shrimp Products* – Recourse to Article 21.5 by Malaysia, WT/DS58/RW 15 June 2001, paras. 5.138-5.144. GATT Article XX states: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to pre-vent the adoption or enforcement by any contracting party of measures: ... (b) necessary to protect human, animal or plant life or health;... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;”

⁷³ See GATT Secretariat, *GATT/WTO Dispute Settlement Practice Relating to Article XX, Paragraphs (b), (d) and (g) of GATT*, WT/CTE/W/53, 30 July 1997, p. 5 and *United States – Standards for Reformulated and Conventional Gasoline AB-1996-1*, 29 April 1996, adopted 20 May 1996, WTO Document WT/DS2/AB/R, at 22.

⁷⁴ See The United Nations Environment Programme, Division of Technology, Economics and Trade Unit and the International Institute for Sustainable Development, *Environment and Trade, A Handbook*. 2000, p. 30.

⁷⁵ At informal meetings and symposia, US authorities have issued the argument that their TED requirements have a legal ground in the Convention on International Trade of Endangered Species (CITES), since most of sea turtles are included in its Appendixes. We should remember that CITES works by subjecting international trade in specimens of selected species to certain controls. There is a licensing system to import, export, and re-export listed species. This argument is unfounded by a very simple reason: CITES regulates trade in endangered species. In the Shrimp-Turtle case, turtles are not traded but incidentally killed. The TED regulation is aimed at incidental killing of sea turtles. Since turtles are not traded, CITES cannot apply. Besides, there is a multilateral control mechanism within the Convention. According to Article XIV, stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species are allowed for contracting parties, but only at a domestic level.

- A state cannot require another state to adopt specific environmental technologies or measures—different technologies or measures that have the same final effect should be allowed;
- When applying a measure to other countries, regulating countries must take into account differences in the conditions prevailing in those other countries;
- Before enacting trade measures countries should attempt to enter into negotiations with the exporting state(s);
- Foreign countries affected by trade measures should be allowed time to make adjustments; and
- Due process, transparency, appropriate appeals procedures and other procedural safeguards must be available to foreign states or producers to review the application of the measure.

98. It is interesting to note that the Appellate Body is basically stating the requirements of recognition of international standards, equivalence and transparency for process-related standards.

B. SPS measures

99. With regard to SPS measures, with the further liberalization of the agricultural sector through multilateral negotiations and regional agreements, certain trade barriers that were always present but unnoticed, now are increasingly subject of discussions. The core elements of the defensive international trade policy are changing very rapidly. In the past, the issue of SPS measures as potential barriers to trade was less important than today. There are several reasons for this: (a) the food sector was not fully integrated in the GATT disciplines and tariffs and quantitative restrictions were abundant; (b) foreign trade in food products was relatively small in relation to domestic GDP; and (c) the main importers were also producers or strongly related to the chain of processing, therefore standards were closely watched by TNCs.

100. The increase in imports and exports as well as in tourism makes it easier to transfer pests from one region to the other. The recent cases of the “foot-and-mouth” and the “mad-cow” disease illustrate the ease with which pests move from one place to the other. Problems may also arise between neighboring developing countries. Nations are increasingly aware of such risks. Developed countries, in particular, have introduced more stringent testing requirements and the activity of laboratories has expanded rapidly during the nineties. And what is occurring in the industrialized nations will also be

101. When there is a politically strong domestic industry competing with imports, the temptation exists to use SPS measures as a protectionist device. And even authentic and legitimate SPS measure may raise suspicion in the exporting country that it reflects nothing more than the interest of the importing country’s firms.

102. From the technical viewpoint, animal health measures established for poultry products on a regional level are justified because they prevent the spread of disease. This faces us with a situation where measures look after human, plant and animal health and therefore are justified within the WTO frame. The measures can not be dismissed as non-tariff trade barriers because if a country can prove it is disease-free, and at the same time complies with the HACCP, it should be able to export to its chosen destination. In this sense, there would be no discrimination among countries. On the contrary, the same measures would be imposed on all countries as a requisite to export their products, which would concur with the SPS Agreement.

103. The SPS Agreement states that transparency in the establishment of animal and plant health measures is a cornerstone to international trade evolution (Article 7 of the Agreement). Full knowledge of dispositions should help activate trade in a series of products. However, each country establishes its own health requirements within the frame of what is considered as an “adequate protection level” for the country, but this level is very hard to define. Thus, when one-country objects to another’s health requirement, the latter must simply justify why it feels this particular measure is necessary. That is, countries have a wide scope to define health protection measures they deem necessary, and under bad faith or retaliating conditions, they can become non-tariff barriers to trade.

104. On this point, the Agreement allows governments to impose import requirements, more stringent than international standards, and in the pertinent cases, they have to demonstrate scientifically exactly which international standards are deemed insufficient.

105. The important issue is that compliance with animal and plant health requirements implies increases in final costs, which may affect export competitiveness and could restrict access to certain markets. Therefore, technical and financial support from developed countries could help lessen the financial load posed by compliance with these requirements.⁷⁶ However, in the current frame of the Agreement, the probability of aid in this sense is very restricted.

C. Structural problems

106. There are several elements, which, although they are not costs in themselves, turn into restrictions. For example, the whole process of convincing both the entrepreneurial and the public sectors of the need to advance towards compliance is costly enough. The typical instability of high-ranking government posts bears a cost, also: generally, changes in government imply a change of direction. Thus, there are no long-term policies or a clearly defined, credible policy, either.

⁷⁶ For example, in Costa Rica a routine inspection on a national level to ensure the country is Newcastle-free costs approximately \$3000.

107. In short, we observe that the SPS Agreement offers some disadvantages to developing countries. First, because they generally lack the technical staff needed to deal with the decision-making process within the Committee on Sanitary and Phytosanitary Measures, so that most proposals come from developed countries. Second, developing countries' institutional capacity is limited by the scarcity of resources available to comply with export requirements for certain products, such as poultry. Third, technical and financial support from developed countries is conditioned to the need these countries may have for new suppliers, not necessarily to developing countries' desire to export the product.

108. Therefore, although health norms for trade in poultry products within Central America and to the US do present a scientific justification; it is also true that nothing guarantees the measures will not become non-tariff barriers to trade.

109. In the case of the TED requirements, there were considerable arguments at the international arena concerning the legality of this process standard since it was not related to the physical characteristics of the product. There is no ground for such a claim in relation to HACCP, since the Codex Alimentarius Commission recognized it as an internationally accepted standard.⁷⁷ The basic problem is compliance. The case studies on poultry and fisheries sectors indicate that problems in the use of HACCP in Costa Rica and other Central American countries have to be overcome to gain access to the US and EU markets. Problems with HACCP requirements must be seen in the light of the structure of production of Central American countries. When transnational corporations (TNCs) or large domestic companies handle the production or/and export process, HACCP is generally considered as part of the export business. However, when small and medium-sized enterprises (SMEs) dealing with the process of production and exports, the situation can be different.

110. There may be a kind of perverse shift in the structure of public expenditure to the extent that such expenditure is necessary to comply with very specific requirements emerging from external markets without this having a clear impact on overall competitiveness and export promotion. This kind of expenditure competes with efforts to improve social safety nets for structural adjustment or industrial policy. For example, according to the fisheries case study, INCOPECA admitted major enforcement

⁷⁷ Recognising the importance of HACCP to food control, the twentieth session of the Codex Alimentarius Commission, held in Geneva, Switzerland from 28 June to 7 July 1993, adopted *Guidelines for the application of the Hazard Analysis Critical Control Point (HACCP) system* (ALINORM 93/13A, Appendix II). The revised version of the *Recommended International Code of Practice - General Principles of Food Hygiene* [CAC/RCP 1-1969, Rev. 3 (1997)], adopted during the twenty-second session of the Codex Alimentarius Commission, held in Geneva from 23 to 28 June 1997, incorporates the *Hazard Analysis and Critical Control Point (HACCP) system and guidelines for its application* as Annex.

problems due to the lack of resources and low payments of inspection personnel. Addressing these issues should be a priority.

111. Yet public expenditure to strengthen compliance with specific requirements in external markets may serve as an export promotion device when not every country complies. Thus, for complying countries this acts as a sort of externality covered by the state. But it takes away resources that otherwise could be geared toward improving technology for the domestic exporting firms. If the (private) fisheries are forced by the market to increase their costs because of environmental rules, this may translate somehow into prices and exporting firms may not lose profits. But it is not clear how public expenditure may be recovered if this does not generate higher fiscal yields. If it is a new measure that does not generate new exports it may be seen as a new burden on the public budget. Therefore, an environmental measure geared towards a new requirement only to keep (already existing) exports going on, to increase welfare in the markets of developed countries will have a negative impact on developing countries, unless the environmental measure impacts highly on the domestic priorities of the exporting country.

IV. A GENERAL STRATEGY

112. As will be developed further below, certification is an increasingly important issue for marketing purposes. There will be social certification, as in “no sweatshop” or “fair trade” and environmental certification as in “dolphin safe” or in “organic produce”. But even more complicated will be the pyramid of accredited and fully recognized national certifications superseded by national seals suggesting that other nations’ certifications are accepted but not “good enough”. Therefore, each country will need to build its own strategy, which should be national and coordinated with the different segments of the private sector.

113. For a country like Costa Rica, which is known for being “environmentally healthy” a national seal could be an interesting opportunity to promote its products, but for other developing countries it will not be easy, because the national image does not sell well in the relevant markets.

114. When a developing country finds itself restricted by environmental or sanitary measures, where the political and organizational cost of changing domestic behavior is easy to bear, the best strategy is:

- To engage in international negotiations with the issuing country, leading either to international agreements or certification programs;

- To enact national legislation and regulation that, while taking into account the need to compensate net losers in the process, allow for a smooth administration of the systems;
- To participate in multilateral negotiations and to commit to the accepted norms, which is the case of the different FAO agreements;
- To engage in support of the local scientific community in the country to study the new rules proposed, their logic and possible alternatives to reach the same objectives under different systems to achieve substantial equivalence;⁷⁸ and
- To rally the private sector in support of the necessary strategies to overcome the problem, although this may backfire when the domestic private sector considers that the current status is safer for them.

A. Actions at the national level

1. Pro-active approaches

115. Central American countries should adopt pro-active approaches to environmental quality and good sanitary conditions that are increasingly important factors determining competitiveness in the process of globalization. The private sector should fully understand that the process of globalization will continue and that the quality of the national insertion into a world is changing. A defensive stance is not the best way of dealing with the new realities. For example, efforts to continue excluding the poultry sector from the process of global and regional trade liberalization, such as the FTAA, may not pay off in the long run. The sector should be prepared to compete both in international markets as well as at home when this sector will be liberalized. Therefore, efforts to improve sanitary conditions and avoid the Newcastle disease should be strengthened. This example should be generalized to include other sectors.

116. Developing countries should seek to focus on preventive rather than corrective actions. Therefore, they must anticipate and seek to influence new standards. Thus, developing countries should insist on a strict application of the WTO notification mechanisms. They should also ensure that the private sector adjusts to new conditions. In accordance with their obligations under the SPS and TBT Agreements, developing countries should create and support national enquiry points and promote dissemination of information on new standards and regulations in export markets to the private sector. Finally, while WTO notification mechanisms are important, developing countries should

⁷⁸ For example, technical studies made by two independent groups of national experts concluded that the American technical specifications for the TED (4 inches width) were not suitable for the Costa Rican shoreline, which receives water from highly torrential rivers and that it was possible to augment the width. An arrangement was achieved for a 6 inches Costa Rican TED to avoid killing turtles when catching shrimps.

take advantage of private initiatives, such as the Centre for the Promotion of Exports from Developing Countries (CBI) to gather information and analyses on emerging standards and market trends.

2. Standard-setting

117. Setting domestic standards and creating conditions allowing developing country producers to compete successfully in international markets requires strong cooperation and sustained efforts by the Government and the private sector. The poultry case study shows that in order to be declared “Newcastle-free”, Costa Rica had to sustain a process over a total of 8 years, which includes a 5-year formal process of cooperation with US authorities. Similarly, continued efforts are necessary to introduce HACCP in the poultry and fisheries sectors.

118. Establishing national standards and regulations addressing SPS issues is very important. The preparation and enactment of standards in major markets are an indication of future requirements and new trends. One important question that the public and private sectors in developing countries have to address is the extent to which stringent standards in emerging in international markets should also be implemented at home, i.e. for sales in their domestic market. Some standards must by necessity be strictly applied throughout the country. For example, the fight against the Newcastle disease must necessarily be national (or “regional”). But in the case of the TED the certification should be on a firm or association basis. This argument should be strongly defended; as some countries are learning “the hard way” that forcing a whole country to abide by rules that could be in the interest of a few exporters could be costly⁷⁹.

3. Capacity building

119. Capacity building of public and private sectors is one of the most important features of the new universe of exports. In our modern globalized world the exporter should have the assurance that the public sector is supporting the building of knowledge and infrastructure where the private sector, for reasons of scale or externalities (being public goods) cannot produce results alone. For example (a) building laboratories necessary to certify products and processes, (b) staffing them, (c) bringing up information available for everyone. These are impossible tasks for individual firms. The government should work mainly through producers’ associations and complete the institutional arrangements through its own network.

⁷⁹ This may be the case of the foot-an-mouth disease in Uruguay, in which case a non-vaccination policy was necessary to ensure the status of “country free of f-a-m disease”. This standard benefited only to those exporters to the U.S. and Europe, as neighbor countries and other customers accepted beef coming

4. Industry cooperation

SMEs should associate to pool their exports as a means of cost sharing. This will facilitate the process of being accepted in the destination markets. In these cases it will be easier and cost-effective to hire someone in charge of reviewing the entire HACCP process.

5. Government

120. The government should stand behind the domestic producers in supporting their efforts to certify enterprises. It has been shown that in many cases the inspector has a wide margin of interpretation for standards. In these cases a strong government posture may be a helpful complement for the producer efforts. In other words, trade negotiators should be aware of what is going on in the area of technical standards and SPS measures that create specific problems in order to solve them at a higher level in the trade community.

121. This matter was obvious in April 30, 1999, when the US communicated to Costa Rica that it could no longer export shrimps to the American market. But after a diplomatic intercession by the Costa Rican ambassador, another inspection visit was programmed for May 10 (only ten days). On May 18 Costa Rica was able to reinstate shrimp exports.

6. National seal

122. A national seal may be an important promotion mechanism for some countries, for example Costa Rica. This country has an international image of being ecologically friendly. It is the tourism destiny of hundreds of thousands of people annually attracted by this precise feature. They may distinguish this stamp seal and be an important source of product recognition. There is a growing trend towards the multiplication of certifying agencies, which are recognized in each country, but such proliferation makes increasingly difficult to point out the real differences among them. Even if you have a national certifying private firm with a good standard, with government approval, and even with international recognition, the certifying firms are unknown to the consumers in developed countries. A national "country-seal" may solve this obstacle, if it does not add to the firm's costs. On the other hand, such a move could unify the promotion costs and make it easier for the state to invest in it, because it would not come up in support of specific firms. Germany is working on such a scheme, which may even have a protectionist undertone. If the country authorities were forced to accept all the European certification firms, which are nationally accredited, a new way to distinguish local German products

form vaccinated animals. When the f-a-m disease arrived through Argentina, attacked all the herds, negatively affecting everybody.

would be to put a national seal on them vowing to comply with stricter standards. Some states in the U.S. (Florida, Maine and Texas) have enacted country-of-origin labeling laws for fresh produce (conventional or organic). Florida requires all imported fresh produce to be identified by the country-of-origin by, for example, marking each produce item or placing a sign or label adjacent to the bin. Maine requires country-of-origin labeling for fresh produce at the retail label when it has been imported from countries identified as having special pesticide violations (i.e., even after they were authorized by APHIS). Texas requires country-of-origin labeling for fresh grapefruit. In addition, labeling laws for fresh produce have been proposed in five other states: California, Connecticut, Oregon, Rhode Island and Virginia⁸⁰.

B. Actions at the international level

1. Cooperation

123. A review of the literature and the experience of the case studies indicate that many cases fall in gray areas, where measures to address environmental measures or threats to human or animal health are mixed with a chain of red tape and changing requirements that are perceived as unjustified. Such measures are hard to contest through the dispute settlement mechanism of the WTO. Grey area cases in particular are difficult to address without cooperation between importing and exporting countries. This points to the need for strengthened cooperation

2. Technical assistance

124. The SPS Agreement, in Article 9, paragraph 2, encourages developed countries to provide technical assistance:

“When substantial investments are required for a developing member country to comply with animal or plant health requirements posed by a developed member, the latter shall consider the possibility of giving technical assistance necessary to enable the developed country to maintain and increase its access opportunities for the product at hand”

The Agreement establishes the *possibility* of developed countries offering technical assistance to developing countries. Whether or not this will be done in practice is likely to depend on political will and need to import certain products. Some have noted that “much of the technical assistance is reactive – it is provided once compliance problems with the SPS Agreement have been identified – instead of being part of a strategy leading to

⁸⁰ See GAO, *Fresh Produce. Potential Consequences of Country-of-Origin Labeling*. United States General Accounting Office, Washington, April 1999.

improve the country's existing capacity.”⁸¹. Thus, developed countries' interest in assisting developing countries in complying with animal or plant health requirements may be limited to situations where other suppliers would be unable to satisfy demand. Under other conditions, what incentives could a developed country have to provide technical assistance to developing countries, if it does not really need them to supply the product?

125. In this regard, technical capacity installed in developing country becomes crucial, because the possibility of carrying out all the tests necessary in the long process of acquiring disease-free status depends on it. In this case, cooperation between private sector and government within the country is indispensable, as the Costa Rican case proves. Here, all expenses to finance a technical supervisor of procedures leading to the Newcastle-free declaratory were undertaken by the private sector. It would be interesting to think about the possibility of developed countries helping developing ones to increase their technical capability and face the process of disease-free declarations or to comply with requirements in general. Again, however, this would only be possible if developed countries needed more suppliers of the product at hand; otherwise, only the traditional structure of suppliers will continue to exist.

126. Besides changing the language of the SPS agreement with respect to technical assistance, it may be interesting to explore the possibility of establishing a multilateral fund to support implementation of Article 9. This would overcome the problem of asking a country to support imports in a protected sector. UNCTAD, UNIDO and/or the World Bank could administer such a special fund. It may be one way of using official development assistance to fully include developing countries in the benefits of free trade. This new deal could be negotiated under the next round of multilateral negotiations, as part of improved SPS and TBT agreements. The administration of this facility would be completely separated from the WTO and would be comprehensive, i.e. it would cover physical infrastructure as well as technical assistance. It would also emphasize regional components.

127. Central American governments could elaborate a proposal to create such a facility at regional level, which could take the form of a fund, managed by the Central American Bank of Economic Integration.

3. Equivalence

128. According to Article 4 of the SPS Agreement, WTO Members shall accept the SPS measures of other Members as equivalent, even if these measures differ from their

⁸¹ See Henson, S. and Loader, R, “Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements”, *World Development*, Vol. 29, No.1 pp 85-102.

own, if the exporting Member objectively demonstrates to the importing Member that its measures achieves the importing Member's appropriate level of phytosanitary protection. One problem is that equivalence is often being interpreted as "sameness".⁸² Such interpretation deprives Article 4.1 of its function, which is to recognize that different measures may achieve the same level of SPS protection and, therefore, countries can enjoy a certain level of flexibility regarding the kind of measures they adopt. This could be spelled out more clearly in the Article.⁸³

129. HACCP recognizes the concept of equivalence as follows: "... is in no way a binding set of requirements. Processors may choose to use other control measures, as long as they provide an equivalent level of assurance of safety for the product."⁸⁴ Yet in practice HACCP requirements in import markets may force specific changes in national legislation, imposing conditions that are *equal* rather than *equivalent* to those in importing countries.

130. To demonstrate an equivalent level of control is not easy. Costa Rica worked to promote a different TED that would provide the same end results. Nevertheless, the process took over a year. Such a process will normally require the presentation of scientific information or studies, which may be a burdensome task.

131. While helpful, equivalence is not a panacea. Under the SPS Agreement, any Member is free to establish the "appropriate level of protection." For example, the United States has argued, "In the end, the choice of the appropriate level of protection is a societal value judgment. The [SPS] Agreement imposes no requirement to establish a scientific basis for the chosen level of protection because the choice is not a scientific judgment".⁸⁵ So, even if a developing country achieves equivalent SPS regulations and enforcement capacity, an importing could decide for zero risk and this could adversely affect a specific product.

132. Also, even when standards are equivalent, the certification and accreditation process can still pose obstacles.

⁸² See Zarrilli, Simonetta, *Op. Cit.* See Fishery paper on TED AND HACCP examples.

⁸³ *Ibid.*

⁸⁴ See FDA Guidelines, p. 2. This Guide does not provide specific guidance to importers of fish for the development of required importer verification procedures, but it is mentioned that this need will be addressed in a future edition. Yet, the information contained in the text may prove useful for this purpose.

⁸⁵ See Administrative Action Statement accompanying "The Uruguay Round Agreements Act," (P.L. 103-465; December 8, 1994); at A.3.b. This statement describes significant administrative actions proposed to implement the Uruguay Round Agreements. It represents an authoritative expression by the US Administration concerning its views regarding the interpretation and application of the Uruguay Round Agreements, both for purposes of U.S. international obligations and domestic law. We should bear in mind that according to the SPS Agreement, "members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects."

4. Participation in international standards setting processes

133. Participation in international standard-setting processes is important because the resulting standards determine the requirements that developing countries exports will have to comply with. The Codex Alimentarius Commission is most important standardization body for food and agricultural products.

134. The Codex Alimentarius Commission was established in 1962 to recommend minimum food safety standards in order to protect public health and ensure fair trade practices in food trade. The establishment of the WTO have raised public awareness of Codex standards, because the Agreement on Sanitary and Phytosanitary Measures recognizes that trade measures based on them are considered *prima facie* WTO-consistent.

135. Codex's standards are supposed to be based on authoritative scientific evidence. However, as a consequence of its heightened role in the international trade context, Codex decision-making has become more politicized.⁸⁶ In addition, developing country participation at Codex meetings – and therefore their input into its standard-setting activities – remains insufficient. While Codex membership is open to all representatives from Member Nations and Associate members of FAO and WHO (presently 165 member countries representing 98 per cent of the world's population), in practice most delegates come from developed countries.⁸⁷ It can be argued that developing countries do not have the financial capacity to have a permanent representation in all the committees. In other cases, countries are simply not aware of the importance of these meetings and the potential health and trade effects of the standards adopted.

136. A Report made by the Ambio Foundation of Costa Rica⁸⁸ illustrates this case. Based on the attendance list of the 29th session of the Food Labeling Committee (Ottawa, 1 to 4 May), country participants were classified according to the country and stakeholder representation (i.e. Government, trading and consumers associations, producers, manufacturers, and others). Less than 50 countries, out of 144 participating in the WTO, were present. Out of a total of 211 delegates, 71 per cent were civil servants whereas 21 per cent represented the private sector. From the public sector delegates 42 per cent were from developing countries, whereas in the case of the private sector this was only 20 per cent. Costa Rica was the only Central American country with representatives from the private sector, with one producer and one representative of a consumer organization.

⁸⁶ Bridges between Trade and Sustainable Development, *ICTSD*, first issue, 2000.

⁸⁷ Ensuring Food Safety: it's a question of standards, Food Policy Briefing Paper, *Consumers International*, November 2000, No. 1, p. 1.

137. If Central America were to move away from being “standard-taker” and move towards becoming “standard-setter”, the creation of a regional Central American institution for standards would be important. This institution could then represent Central American countries, although this would not exclude the possibility for a specific country to participate directly. This would allow Central American countries to be fully informed about new developments and take part in relevant decisions in a cost-effective manner.

5. Preferences for organic products

138. Trade preferences in international markets could be a useful in promoting niche markets for organic agricultural products from developing countries. A problem, however, is that organic and conventional products are different only on account of the production process used. This may create problems to the extent that it involves non product related PPMs. However, a positive agenda to promote trade in organic agricultural products and hence environmentally preferable production methods needs to be explored, including in the context of trade negotiations. For example:

- Imports of organic products could be allowed over and above existing import quotas. Thus, imports of organic products, such as organic bananas imported into the European Union, would not be counted against traditional quotas;
- Under the system of tariff rates quotas, quota amounts subject to low or zero tariffs could be increased to allow for additional imports of organic products;
- In cases of tariff escalation, processed organic products could be accepted at the same tariff rate as the main input.

⁸⁸ Ambio, “Consumer participation in the Codex Alimentarius Commission: the case of the 29th session of the Food Labelling Committee”, Costa Rica, 2000.