

**A PROPOSAL TO EVALUATE THE LEGITIMACY OF SANITARY AND TBT  
MEASURES IN BRAZIL**

**(Draft Report)**

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*Ongoing Paper prepared for presentation at the International Agricultural Trade  
Research Consortium Winter Meeting, San Diego, CA, December 4-6, 2005*

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# **A PROPOSAL TO EVALUATE THE LEGITIMACY OF SANITARY AND TBT MEASURES IN BRAZIL**

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## **1. Introduction**

Many of the current formal and informal international trade disputes derive from sanitary and technical barriers. Countries that loose in these processes, in general, argue that such barriers are no more than impediments to trade to benefit certain interest groups. Countries that impose them claim that those measures are needed to ensure human, animal and plant health, food safety and territory security, consumer and environmental protection, among others. This issue is particularly relevant to developing countries because they are in disadvantage in terms of information and trained personnel necessary to the negotiation processes when compared to developed countries. In addition developing countries are in economic disadvantage to meet the sanitary and technical requirements that developed countries impose (Barros et al, 2001).

The Sanitary and Phytosanitary Agreement and the Technical Barriers to Trade Agreement created during the Uruguay Round (1986-1994) have not been able to prevent the disputes among countries. First comes the question of whether or not one barrier is legal according to both of these agreements. If it is legal, then the next problem is how to tell political or economic interests from welfare and environmental issues. Are there legitimacy criteria that could clarify the reasons behind the disputes and help to reduce the volume and increase the solution speed of these conflicts? It is a hard task because, as Roberts et al (1999) emphasize, some technical and sanitary measures even when considered commercial barriers can result in gains of social welfare.

Of course the benefits and costs of solving the disputes vary from case to case, so that some relevance criteria could help countries to decide how much to invest in such disputes. In sum, how restrictive to trade is the barrier? What should be the negotiating priorities?

## **2. Objectives**

This ongoing research project aims to propose a few criteria, which may serve as public policy instruments to identify the relevance, the legality, and consistency of the technical and SPS measures. What are the basic elements to deal with the legitimacy question? Is it possible to tentatively establish a weighting system of such elements to obtain a checklist to be used by policymakers and trade negotiators?

### **3. Concepts and misconceptions**

The sanitary and technical barriers are included in the large group of non-tariff barriers: instead of imposing a tariff, countries choose to create policies or measures that prevent or increase the trade costs. Although some authors suggest to limit them to those created by official (government) initiative, any measure- public or private - which restricts trade flows can be considered a barrier. The dominant issue is the huge controversy regarding the legitimacy of these measures: are they adopted with strict commercial purposes (to shield domestic producers from international competition) or due to scientifically grounded health and environmental concerns?

Technical and Sanitary barriers are supposed to be adopted to correct market failures. According to Roberts et al. (1999) authorities might choose to adopt a technical trade barrier if it is judged that market incentives alone has not produced the efficient amount of food safety. In this case, technical trade barriers can be welfare-enhancing.

According to Bhagwati (1984), a key point from the theory of distortions and welfare is that the optimal policy will correct the market failure as close as possible to the source of the distortion (Roberts et al., 1999). Although the public-good dimensions associated with legitimate technical barriers are universally acknowledged, even well-intentioned measures can restrict trade and lower the net welfare.

Roberts & Unnevehr (2004) worked on the SPS Agreement negotiation to provide a framework for determining the legitimacy of SPS measures and for resolving potential trade conflicts. Notification of proposed changes in regulation enables trading partners to raise questions or objections to the notified changes and these complaints provide some evidence of the extent to which new regulations have created barriers to trade.

The TBT Agreement does not define a “TBT” per se (Popper et al, 2004). Rather, it defines acceptable behavior and specifies that technical measures must be applied in a nondiscriminatory fashion. It recognizes the legitimacy of trade-affecting technical measures in some instances and sets ground rules for establishing and maintaining them. Unlike the SPS, the TBT Agreement treats the so-called “sound science” as an element for consideration, but not a fundamental basis for establishing policy. The absence of more rigorous requirements for risk assessment under the TBT Agreement leaves considerable room for maneuver in determining the acceptability of regulations, standards, and conformity assessment procedures, including necessity.

For Popper et al. (2004), technical measures could enhance the flow of goods by providing reassurance to potential foreign purchasers. However, frequently technical measures generate additional obstacles to exporters by raising the costs of producing export-oriented goods. To the extent that such measures discriminate against foreign producers or is more trade restrictive than needed to fulfill a legitimate policy objective, it may constitute a technical barrier to trade.

Barros et al. (2002), analyzing the evolution of notifications since 1995, concluded that developed countries have had more intense participation in the international regulation than the developing countries. In addition, sanitary and technical measures may be adopted by a large number of countries even though they are not listed as references by international institutions. These rules do not reflect, necessarily, any effort of adjustment to the technological, economic or social conditions of developing countries (Miranda et al, 2004, Miranda, 2001). Indeed, Procopio Filho (1994) identified cases in which sanitary and environmental requirements are perceived essentially as means to influence (reduce) trade prices.

As for the technical requirements from importers, Ferraz Filho (1997) observed that in Brazil animal slaughtering and electrical material sectors are the most directly affected and that, according to a OCDE study, costs of conformity to technical standards can add up to between 2% and 10% of the total production costs.

Inter-country regulatory heterogeneity imposes costs for producers who must comply with multiple regulatory regimes (Roberts et al, 1999). Harmonization - stated by SPS Agreement - could help to reduce the unintended trade-restrictive consequences, but

only to the point permitted by taste and income as well as technological and economic differences among nations. Roberts et al. (1999) also point out that regulatory heterogeneity can result from differences in objectively assessed risk factors by importing countries as well as differences in cultural norms and experiences.

#### **4. Solution proposals**

Roberts et al. (1999) proposed definitions and a classification scheme to provide a conceptual foundation to evaluate technical trade barriers, to guide the specification of economic models and to provide policymakers and analysts with a framework to help in discussion and negotiations processes. Technical barriers are first classified by policy instrument (total or partial bans mandatory specifications or information requirements) and scope (domestic or universal), so that they could be evaluated as if they were standard trade barriers. Three basic elements are considered to affect the economic impacts of changes in technical measures: a) the case where there is no valid rationale for the barrier; b) supply shifts that might result from changes in policy if the barrier has a significant technical basis, and c) demand shifts that might result from changes in policy if the barrier has a significant technical basis (Roberts et al., 1999)

Then, as a second step, a classification by regulatory goal indicates how their effects differ from standard barriers. How and why domestic demand and supply schedules could change as a result of the success or failure of a technical measure in correcting the market inefficiency? These potential changes can determine whether a measure is welfare-reducing or welfare-enhancing. A classification of regulatory goals emerges from recognizing three broad societal objectives of technical measures that restrict trade: protecting the economic interests of producers, protecting the health and economic interests of consumers, and protecting the environment. Considering the three objectives, measures may also be divided into two other classes: risk-reducing measures and non-risk reducing.

A question to stress out is the analysis of the compatibility objective, considering non-risk reducing measures. According to Roberts et al. (1999), compatibility refers to the capacity of products to function in association with others, such as mandatory

dimensions of produce containers that ensure compatibility with handling equipment. Some product incompatibilities may in fact enhance welfare if they emerge from the development of superior technology that leads to product differentiation, or in response to heterogeneity in consumer preferences. Other product incompatibilities, however, result from autonomously developed, divergent national standards, which can increase production costs and reduce variety in the marketplace. Manufacturing different products for different markets may prevent firms from realizing economies of scale in the production of these products, which may lead some firms to choose to exit some markets.

This last point is very important to be considered in a checklist about legitimacy in sanitary and technical barriers to trade. According to interviews with sugarcane Brazilian experts, the sugar exporters have been trying to meet all the requirements on sugar specifications even when they differ from the *Codex Alimentarius* references, in order to avoid losing their clients. However, this implies a lot of effort to deal with facilities and processing lines adaptations and economies of scale are certainly being lost.

In 1998, the Trade Policy Staff Committee (TPSC) published a set of questions to evaluate the consistency of foreign trade measures with the provisions of the SPS Agreement. This set of questions - "Information for Evaluation of the Consistency of Foreign Trade Measures with the Provisions of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures" - was developed by a subcommittee of the TPSC, to be used this as a tool to systematically collect and organize their information on issues (USDA, 1998). This set of questions include the following parts: a) Description of the SPS barrier; b) Market impact; c) Health objective of the measure; d) Scientific basis for the measure; e) Consistency of the measure; f) Transparency and other procedural issues; g) Previous or ongoing consultations; h) Comparable measures; and i) Other information.

Popper et al (2004) prepared a report for the USA National Institute of Standards & Technology (NIST), which provides a definitional context and proposes criteria for identifying TBT-like practices. These authors realized that in practice it is often difficult to discern WTO-inconsistency in relation to the TBT measures - considering all those factors analyzed to discriminate a barrier - from a legitimate (nondiscriminatory, minimally trade restricting and transparent) technical measure. They recommend the

development of a “checklist” to aid in TBT identification and presented a set of questions proposed by the literature on TBT.

- Is the measure or its enforcement purely cost-raising?
- Is the measure set at a level that is stronger than required to achieve a policy objective?
- Does the measure increase the profitability of domestic producers at the expense of foreign producers?
- Is there a legitimate and defensible rationale for preparing, adopting and applying standards, conformity assessment procedures or technical regulations that are not based on international standards, recommendations and guides?
- Was the measure introduced after imports began to take an appreciable share of the local market?
- Is the net effect of the technical regulation, conformity assessment procedure or standard to prevent foreign entrants into a national market?

In conclusion, Popper et al (2004) assert that if several answers to these questions are affirmative, there is evidence to propose a more detailed investigation about the trade effects of those measures.

## **5. Brazil’s experiences**

The Brazilian government created the “Exporter Alert”, a system located at the INMETRO site, that is the Brazilian Enquiry Point for the TBT Agreement. It aims to daily inform exporters in an electronic way about the notifications issued to WTO relating to the new technical regulations applied by countries and on products of interest. Another service provided by the Enquiry Point is the “Technical Barrier Report”, where

exporters report technical barriers to INMETRO, which analyze them and recommend procedures to follow and steps to be taken (INMETRO, 2005).

Even though the government is supplying this service, the complexity and large range of details of technical problems require the development of additional tools to systematize a methodology to identify the relevant technical barriers. This demands continuous studies of the nature and consequences of the barriers as they are raised.

## **6. Methodology**

The purpose of this study is to develop a checklist to analyze the legitimacy of technical and sanitary measures imposed on the Brazil's agribusiness products. The checklist will be applied to questions raised by the private sector or by the government regarding possible or effective trade barriers faced by specific commercial partners. The checklist will also be applied to measures notified by WTO members to SPS and TBT Committees.

The model consists of a checklist that encompasses three diagnoses, the results of which lead to a decision tree sketch to guide the government and the private sector about the nature of the measures under evaluation and actions that are recommended to taken. The main questions behind this checklist are:

- a) Is the measure subject to government action?
- b) Does the measure have significant impact on the trade and other economic variables of the affected country or sector?
- c) From the technical and scientific point of view, is the measure consistent and justifiable?
- d) Is the measure legal nationally and internationally?

Based on that, it is proposed that three diagnoses - in which the four mentioned questions should be answered - be carried out in parallel when facing the questions about the legitimacy of sanitary and technical measures. A weighing system for each type of answer is developed so that quantitative results are obtained for each diagnosis. Legitimacy indexes will be built so that the higher its value, the more illegitimate the measure is. Of course some specific relevant issues may demand especial treatment. For

instance, even if a technical regulation imposed by a trade partner is technically justifiable and in accordance to international agreements, it can be considered a priority for the government of a country if it jeopardizes the viability of the a domestic sector.

### 6.1. Diagnosis of the trade impact of the measures

This diagnosis evaluates whether a measure is worth questioning from the economic point of view. Sanitary or technical regulation with null or insignificant impacts to trade and to the productive system of exporting countries could be immediately included in a minor priority category even if when it lacks scientific basis or lies outside of SPS and TBT provisions.

What is the relevance of the goods affected by the new regulation or by the procedures of conformity assessment? What are the direct and indirect costs that the new measure might bring? How does the regulation affect Brazil's competitiveness compared to other suppliers in the international market?

The diagnosis will be carried out through a list of questions (checklist 1), the answers to which will be weighted as indicated in table 1.

Table 1 – Weighing system for Checklist 1

Level of impact	Weigh*
No impact	0
Low impact	1
Medium impact	2
Large impact	3
Total impact	4 (Special case)

\* The higher the number of points, the higher would be the priority in questioning to WTO.

The indicator obtained from this diagnosis, associated with descriptive statistical analysis, will be used to measure the economic importance of a trade barrier for governmental intervention objectives.

In order to form the checklist 1, a two-part survey is carried out: the first one is related to general features of the relevant markets, and the second one to the profile of the exporting firms and their perception about the impacts of the measure.

**a. General data for the market diagnose**

- a) Is the affected product/sector relevant for the Country Trade Balance?
- b) What is the market-share of the affected country in the country that proposed the regulation.
- c) Is the affected good considered strategic for the Trade Balance in the future (considered the private view)? Are there any future official plans for producing or exporting the good?
- d) What is the importance of the product/sector in terms of employment?
- e) What is the regional importance of the product/sector for the country?
- f) What is importance of the good within the production structure in the country that proposed the sanitary or technical measure? What is the trade relevance of the good for the proponent of the measure?

**b. Specific data to diagnose the economic impact on the firm/sector**

- a) Is the measure a technical or sanitary regulation, or a regulation on conformity assessment, or a standard? In this later case, is it compulsory or voluntary?
- b) Is the measure specific for a good or does it apply to several sectors?
- c) Does the measure consist in a new requirement or does it have already been set for a long time but was not perceived before?
- d) Does the measure reduces exports, total or partially? Or does it only make it more difficult in some way?
- e) Does the measure affect the current market prices?
- f) Does the measure affect a sector exports as a whole or only some firms?
- g) How long does the affected firm/sector trade the product with the country proposing the measure?
- h) What is the impact of the measure on the firm/sector exports?
- i) The measure does not have effects on the current firm/sector exports but has expected impacts on the potential exports? How relevant is the impact on future exports?

- j) Does the measure cause additional production costs? What is the estimated impact on the total costs?
- k) Does the measure lead to facility adjustment cost? What is this impact on the total costs?
- l) Does the measure generate delays in the custom procedures or in the whole commercialization process (due to increasing complexity of bureaucracy requirements)?
- m) Is there a previous notice or a proposed progressive schedule for adjustment to facilitate its compliance to the new requirement?

## 6.2. Diagnosis of the Legality of the measures

This diagnosis is related to the legal and juridical international aspects considering the basic principles and provisions established by the WTO and the TBT and SPS Agreements. The objective is to verify if the analyzed measures are close or far from following the good practices proposed by the SPS and TBT Agreements.

The criteria for the legality analysis are reached from the answers that compose the Checklist 2. Table 2 shows the proposed weighs for these answers.

Table 2 – Weighing system for Checklist 2

<b>Level of not-compliance in relation to</b>	<b>Weigh*</b>
Completely legal	0
Close to legality	1
Close to illegality	2
Completely ilegal	3
Special case	4

\* In the proposed grade, the higher the number of points, the higher would be the priority in a questioning to WTO.

In certain cases a sufficient condition to judge technical or sanitary measures as illegal may easily be established: for instance, when discrimination against an specific country is identified, that hurts the basic principle of Non-Discrimination of WTO, and therefore it could be characterizing the measure as illegitimate.

Checklist 2 highlights criteria like transparency, non-discrimination, national treatment, scientific basis availability, all necessary to comply with the SPS and TBT Agreements principles.

- a) To what extent the proponent complied with all the legal requirements to implement the measure: proper deadlines to consult on the notifications, fair deadlines to implement the measure and the level of compliance to the comments and criticisms from the other WTO members?
- b) Does the measure discriminate between the foreign suppliers and the domestic producers?
- c) Does the measure discriminate among foreign suppliers?
- d) Is there a scientific support for the measure proposition in the international references organisms (recognized by the WTO system, like *Codex Alimentarius*, OIE or IPPC)?
- e) Does the measure refer to food safety, animal, human or plant health, environmental protection or others legitimate objectives? Or does the measure refer to the category of the “Other cases”?

### **6. 3. Diagnosis of technical & scientific consistency of the measures**

This third analysis examines the technical and scientific aspects that are used as justification for those measures, the level of their essentiality in terms of risk level for human, animal and plant health, and for the environment. It is evident the importance of international institutions of reference like the *International Plant Protection Council* (IPPC), the *Office International des Epizooties* (OIE) and the *Codex Alimentarius*. In the case of TBT the absence specialized institutions is a severe limitation; anyhow no scientific basis are supposed to support technical measures.

A third Checklist is suggested to establish criteria for technical and scientific consistency. This approach adds to the two former presented in this paper that leads to a legitimacy level identification. Table 3 describes the weighs for the legal contestability of the measure.

Table 3 - Weighing system for Checklist 3

<b>Level of consistency</b>	<b>Weigh*</b>
Highly consistent	0
Medium consistency	1
Low consistency	2
Totally inconsistent	3
Special Case	4

\* In the proposed grade, the higher the number of points, the higher would be the priority in a questioning to WTO.

The third checklist is designed to identify the consistency level of the measures, considering even the credibility level of the scientific and technical aspects that support these measures. It is interesting to divide this analysis into two groups, given by the motivation behind the sanitary or technical measure proposal:

- i. The causal factor involves risk to human, animal or plant health and environmental protection; and
- ii. The causal factor involves the prevention of deceptive practices and other objectives.

Some relevant questions in the checklist are:

- a) Considering the item “i” above, what is the risk level of not complying with the proposed measure?
- b) Is there scientific proof of this risk level and of the necessity of applying the measure? What is the credibility level or the degree of scientific convergence about the researches that support the proposed measure? Is the scientific basis recognized internationally, or only in a domestically context? Is there a consensus about that matter?
- c) Are there lower cost alternative measures related to technological and financial aspects, or even already adopted by the affected countries and that can guarantee the same level of required security?
- d) Is the technology and other items required available to implement the measure? What are costs or difficulties related to the compliance to the firm/sector/exporting country?

- e) Does the measure propose a new sophisticated technology, not based on scientific evidence of its importance? Is there an evidence of its essentiality to guarantee lower risks for human, animal, plant or environment protection?

## **7. Final comments**

This work intends to propose a systematic method to identify and rank the sanitary and technical measures, according to trade impacts, legality and consistency features.

The three suggested diagnoses must result in three quantitative indicators of the legitimacy of the measure. It is important to keep in mind, for instance, that a certain measure can be very far from legality and yet be judged totally unquestionable if based on scientific knowledge widely accepted by scientific community.

Another relevant note is that a measure may be considered highly illegitimate and yet, for political reasons, be ignored by the government. Therefore, any technical analysis will be always submitted to the public interests and to the current political convenience.

Several data sources may be useful to reply to the checklists, beginning with statistics databases, official and non-official, national and international. Literature surveys may provide information about recent scientific findings and also the international law advances. Continuous consultation with experts from private or public departments and firms may be a source of consolidated knowledge about the issue that is being studied. Stakeholders (economic agents as the exporters and importers) are essential sources of useful information as well.

## **Acknowledgments**

The authors acknowledge the contributions of the International Economics research team at CEPEA-ESALQ/USP, in developing related projects on TBT: Mirian Bacchi, Heloísa Burnquist, Sérgio Rangel e Luciana Silveira.

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