

**INDONESIA – RESTRICTIONS ON THE ENTRY OF MILK PRODUCTS
BECAUSE OF FOOT-AND-MOUTH DISEASE**

Submission by Argentina

A. INTRODUCTION

1. As a result of the outbreak of foot-and-mouth disease (FMD) in the Argentine Republic in 2001, unjustified sanitary measures have led to foreign market access restrictions on a number of Argentine products.

2. Among these measures is the current ban on exports of milk products to Indonesia, which is inconsistent with Articles 2.2, 3.3, 5.1, 5.6, 7 and related Articles of the SPS Agreement, the reasons for which are set out below.

B. DISCIPLINES DERIVING FROM THE SPS AGREEMENT

3. This section provides a brief description of the disciplines deriving from the SPS Agreement that are relevant to the case in question:

(a) Scientific evidence – Risk assessment

4. One of the fundamental principles of the SPS Agreement is that sanitary and phytosanitary measures should be based on sufficient scientific evidence (Article 2.2) in order to ensure that they are not used as unjustified restrictions on trade. On the basis of the objectivity provided by science, the application of this type of measures is thus disciplined in order to avoid discretionary application by Members that would unjustifiably restrict international trade.

5. This basic principle is intrinsically related to the obligation to base sanitary and phytosanitary measures on an assessment of risks (Article 5.1). Indeed, this relationship between the two concepts (scientific evidence and risk assessment) has been widely recognized in WTO precedent.

(b) Harmonization

6. Another principle enshrined in the SPS Agreement is the widest possible harmonization of sanitary and phytosanitary measures, on the basis of international standards, guidelines and recommendations where they exist. To that end, both the preamble to the SPS Agreement and Article 3.1, 3.4 et seq. refer to harmonization as a trade facilitation instrument and encourage Members to participate in international technical fora (CODEX, OIE, IPPC) in order to promote the development and review of standards.

7. Article 3.2 of the SPS Agreement stipulates that sanitary and phytosanitary measures which conform to the international standards and guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of the SPS Agreement and the GATT 1994. This presumption of consistency is a

premium granted by the SPS Agreement to Members that base their measures on international standards.

8. If Members should decide to depart from the standards provided by the international rules of reference in order to establish a sanitary or phytosanitary measure, the presumption of consistency disappears, and the Member in question must provide sufficient scientific evidence (including the corresponding assessment of risks) to justify the measure it wishes to introduce (in accordance with Article 3.3 of the SPS Agreement).

9. Finally, it is important to point out that according to past WTO legal rulings, both the panels and the Appellate Body consider the said provisions as the scientific parameters to be taken into account in settling disputes over whether or not a sanitary or phytosanitary measure is consistent with the obligation set out in the SPS Agreement.

(c) Proportionality

10. Article 5.6 of the SPS Agreement requires Members to adopt proportionate measures. This principle is respected when, within the range of suitable alternative measures to achieve the appropriate level of protection, Members implement the measure which is the least trade restrictive.

C. INTERNATIONAL ANIMAL HEALTH CODE OF THE INTERNATIONAL OFFICE OF EPIZOOTICS (OIE)

11. The international reference body in the field of animal health is the International Office of Epizootics (OIE). The Office approved the International Animal Health Code (hereinafter "the OIE Code"), Chapter 2.1.1 of which sets out the regulations relating to foot-and-mouth disease.

12. To begin with, the said Chapter sets out the conditions governing the categorization of countries/zones according to their sanitary status. It goes on to establish the products and by-products considered to present a risk of transmitting the FMD virus. Finally, it lays down the requirements to be imposed by the sanitary authorities of the importing country with respect to FMD, taking into account two variables: the sanitary status of the product's country of origin and the sanitary risk posed by the product in question.

13. Details are provided below of the requirements that may be imposed by the sanitary authorities of countries importing milk products, depending on the sanitary status of the product's country of origin:

Article 2.1.1.25

When importing from FMD free countries or zones (where vaccination either is or is not practised), Veterinary Administrations should require:

for milk and milk products intended for human consumption and for products of animal origin (from FMD susceptible animals) intended for use in animal feeding or for agricultural or industrial use

the presentation of an international veterinary certificate attesting that these products come from animals which have been kept in the country or zone since birth, or which have been imported from an FMD free country or zone (where vaccination either is or is not practised).

Article 2.1.1.26

When importing from FMD infected countries or zones, Veterinary Administrations should require:

for milk and cream

the presentation of an international veterinary certificate attesting that:

(1) these products:

(a) originate from herds or flocks which were not subjected to any restrictions due to FMD at the time of milk collection;

(2) the necessary precautions were taken after processing to avoid contact of the products with any potential source of FMD virus.

Article 2.1.1.27

When importing from FMD infected countries or zones, Veterinary Administrations should require:

for milk powder and milk products

the presentation of an international veterinary certificate attesting that:

(1) these products are derived from milk complying with the above requirements;

(2) the necessary precautions were taken after processing to avoid contact of the milk powder or the milk products with any potential source of FMD virus.

D. ANALYSIS OF LEGAL CONSISTENCY

14. The access restrictions imposed by the Indonesian authorities are inconsistent with the disciplines derived from the SPS Agreement, for the following reasons:

(a) Harmonization – Scientific evidence.

15. As mentioned in section C, various articles of the OIE Code stipulate that the sanitary authorities of importing countries **must** accept milk products, if the sanitary authority of the exporting country is able to provide certification of the requirements that have been expressly introduced, which vary depending on the sanitary status of the product's country of origin.

16. In spite of this, the Indonesian authorities have prohibited the entry of milk products from Argentina, without giving the National Agriculture and Food Quality and Health Service (SENASA) the opportunity to certify the requirements set forth in the aforementioned Articles.

17. As already stated, Members may depart from international parameters if they can supply sufficient scientific evidence to justify the measure in question. In this case, the Indonesian authorities have not produced any evidence to justify imposing stricter requirements than those provided for in the OIE regulation, which means that the draft resolution is inconsistent with Article 3.3 of the SPS Agreement.

18. Similarly, the lack of scientific evidence means that there is a clear inconsistency with the obligation laid down in Articles 2.2 and 5.1 of the SPS Agreement.

(b) Proportionality

19. Argentina considers that the ban on imports of milk products is disproportionate to the objectives pursued, as the Indonesian authorities have an alternative measure at their disposal which is less restrictive to trade while nevertheless ensuring the appropriate level of protection and there is no evidence to suggest otherwise.

20. This measure is the acceptance of the various certification alternatives, duly described in section C (pursuant to the OIE Code).

21. Consequently, the Indonesian restrictions are inconsistent with Article 5.6 of the SPS Agreement.

E. REQUEST BY ARGENTINA

22. In view of the above, Argentina requests the Indonesian Government to provide sufficient scientific evidence to support its departure from the international reference parameters, in conformity with Article 3.3 of the SPS Agreement; failing this, it should follow the recommendations provided in the aforementioned OIE International Animal Health Code.
