

UNDUE DELAYS

Communication from Uruguay

The following communication is being circulated at the request of the delegation of Uruguay.

I. QUESTION AT ISSUE

1. The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) establishes that Members' sanitary and phytosanitary measures, including decisions on the recognition of equivalence and on the recognition of regionalization, specific entry conditions and control, inspection and approval procedures, must all be based on an assessment of risk (Article 5) or on relevant international standards (Article 3).

2. It is, however, common for potential importers, when faced with a request from an exporter for the entry of a particular product, to claim that the results of the corresponding sanitary or phytosanitary risk assessment are unavailable (or have not been updated) and that they are therefore not in a position to respond to such a request immediately. It is also often the case that no relevant international standard exists. Potential importers therefore "take their time" conducting such risk assessments and, in the meantime, prohibit or restrict trade in the goods concerned.

3. The experience of many exporting Members over the nine years' implementation of the SPS Agreement is that the time taken by importers to respond is very often unduly long.

4. Moreover, two further difficulties often add to the problem of excessively long time-limits:

(a) The importer usually asks the exporter for specific information in order to carry out the risk assessment, or for specific evidence of his sanitary or phytosanitary status, or for access in order to conduct inspections, checks or other procedures. Such requests are very often excessive and out of all proportion to the objective pursued.

(b) The administrative procedures for decision-making by the importer tend, in a number of cases, to lack transparency.

5. The above-mentioned difficulties (excessively long time-limits, exaggerated requests for information and non-transparent procedures) mean that the exporter is in fact confronted with a situation of trade restriction or prohibition which is extremely detrimental to his economic interests and prevents him from planning and managing his production and export strategies in a predictable and certain manner.

II. BACKGROUND

6. The SPS Agreement does not lay down specific rules governing the above situation. For example, it fails to establish the time-limit within which an importer should respond to a reasonable request for information.

7. Article 5.7 and paragraph 1 of Annex C, corresponding to Article 8, (see the Annex to this document) lay down some rules on time-limits, requests for information and transparency in relation to the respective subject-matter of each Article (provisional measures and control, inspection and approval procedures), although the scope of key terms, such as "reasonable period of time", "without undue delay", "promptly", "as soon as possible" and "information requirements are limited to what is necessary", is not defined in the Agreement.¹

III. WHAT NEXT? POSSIBLE WAYS FORWARD

8. Given the lack of specificity in the SPS Agreement with regard to these issues and the absence of relevant international standards, guidelines and recommendations, the only recourse currently available to affected exporting Members is the WTO dispute resolution procedure, as was the case in the aforementioned dispute.

9. Uruguay is of the opinion that, in order to rectify this situation and conduce to predictability and legal certainty, it would be better if this problem were discussed and resolved by the WTO Committee on Sanitary and Phytosanitary Measures, rather than being left to be settled by means of panel and/or Appellate Body reports. Uruguay therefore urges Committee Members to discuss the situation to which an exporter is subjected when an importer restricts or prohibits trade, contending that the sanitary or phytosanitary conditions under which the entry of a particular product from that origin would be permitted have yet to be decided upon.

10. The Committee could develop certain general guidelines in this regard, in particular on time-limits, requests for information and transparency. The Committee could then ask the relevant international organizations (World Organization for Animal Health (OIE), Interim Commission for Phytosanitary Measures (ICPM) and Codex Alimentarius Commission (CAC)) to reflect such general guidelines in their work and to consider the possibility of developing specific relevant standards, guidelines and recommendations.

¹ In the dispute *Japan - Measures Affecting Agricultural Products* (WT/DS76), the Appellate Body established the following in 1999:

"In our view, what constitutes a "reasonable period of time" has to be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review *and* the characteristics of the provisional SPS measure. In the present case, the Panel found that collecting the necessary additional information would be relatively easy. Although the obligation "to review" the varietal testing requirement has only been in existence since 1 January 1995, we agree with the Panel that Japan has not reviewed its varietal testing requirement "within a reasonable period of time"."

ANNEX

Article 5.7:

11. "In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time." (Emphasis added)

Paragraph 1 of Annex C "Control, Inspection and Approval Procedures":

12. "Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:

- (a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;
- (b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;
- (c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs;"

(Emphasis added)
