

Committee on Sanitary and Phytosanitary Measures

**POSSIBLE ACTIONS FOR THE SPS COMMITTEE REGARDING
SPS-RELATED PRIVATE STANDARDS**

Note by the Secretariat¹

Revision

1. The SPS Committee has been discussing the issue of SPS-related private standards since June 2005, when Saint Vincent and the Grenadines raised a specific trade concern regarding EurepGAP (now called GLOBALGAP) requirements for bananas destined for sale in the United Kingdom.² Since then this issue has been discussed regularly at SPS Committee meetings. A list of all SPS Committee documents referring to private standards can be found in the Annex.
2. In an effort to bring more structure and concrete examples to its discussions on SPS-related private standards, the SPS Committee decided in October 2008 to undertake a three-step study, which would be led by an ad hoc working group.³
3. As the first step of this process, the Secretariat circulated a Questionnaire on SPS-related Private Standards on 5 December 2008.⁴ The questionnaire sought information from Members regarding products and markets of concern, the relevant private and international standards, trade effects, costs of compliance, and a number of related elements.
4. As the second step, a compilation of replies summarizing the information contained in the 40 responses received from 22 Members was circulated on 15 June 2009.⁵ The individual responses, including responses received after the circulation of the compilation of replies⁶, can be consulted through the WTO Members' website.⁷ Most of the responses reiterated a number of concerns regarding private standards, which had already been raised on various occasions at the SPS Committee. Some responses also underlined the positive and trade facilitating impact of private standards.

¹ This document has been prepared under the Secretariat's own responsibility and is without prejudice to the positions of Members or to their rights or obligations under the WTO.

² G/SPS/GEN/766; specific trade concern no. 219.

³ G/SPS/R/53, para. 132.

⁴ G/SPS/W/232.

⁵ G/SPS/GEN/932.

⁶ Barbados and Trinidad and Tobago submitted responses after the circulation of the descriptive report. Argentina also provided additional information, complementing its two original responses.

⁷ Please click on this address: http://members.wto.org/WTO_resources/SPS/SPS-Private-Standards_tri.htm. All responses are available in English and Spanish as these are the working languages of the 30 Members participating in the SPS Committee's ad hoc working group on private standards.

5. The compilation of replies was discussed, in particular by the ad hoc working group on private standards⁸, during the SPS Committee's meetings held in June and October 2009. In addition, a number of Members submitted written comments on the compilation following the SPS Committee meetings. While some Members found the report to be a useful basis for the SPS Committee's deliberations, others raised concerns about the limitations of the report, especially with regard to the accuracy, precision and scope of some of the data provided in the replies to the questionnaire. For example, some replies were found to be very general and lacking specificity and others went beyond SPS issues to include references to quality, environmental and social standards. A revised version of this compilation was circulated on 10 December 2009 taking into account comments from Members.⁹

6. As the third step, the Secretariat was requested by the working group to prepare a document identifying possible actions by the SPS Committee and/or Members regarding SPS-related private standards. The first version of the document was circulated on 20 October 2009¹⁰, drawing upon the SPS Committee's discussions on the topic, Members and observers' specific written contributions, and the compilation of replies, keeping in mind its limitations. It was discussed during the meetings of the ad hoc working group on private standards and of the SPS Committee in October 2009.¹¹ In addition, Switzerland and MERCOSUR members (Argentina, Brazil, Paraguay, and Uruguay) submitted written contributions on this topic following the circulation of the Secretariat document.¹² The Chair of the SPS Committee invited Members to submit written comments on the Secretariat document by 16 December 2009, indicating in particular any sequencing they would like to see in discussing the possible actions identified. Subsequently, the Secretariat received written comments from nine Members and one observer organization and issued a first revision of the document for discussion during the SPS Committee and the ad hoc working group meetings in March 2010.¹³ A second revision, incorporating comments made in the context of the March 2010 meetings and subsequently by eight of the Members of the ad hoc working group, was circulated in June 2010. This third revision has been prepared in light of Members' oral and written comments and the Committee Chair's conclusions from the ad hoc working group meeting held in June 2010.

7. In light of the concerns raised regarding some of the examples in the compilation of replies, this document does not purport to provide a substantive analysis of the matter but rather focuses on possible actions that could be taken by the SPS Committee and/or Members to identify the benefits of SPS-related private standards and address their negative effects on market access, especially for producers and exporters in developing countries. Identification of possible actions in this context is without prejudice to the views of Members regarding the scope of the SPS Agreement.

8. The working group has identified twelve possible actions. Annex I includes a compilation of these actions, along with an indication of the reactions from members of the working group to these.

⁸ See paras. 119-145 of G/SPS/R/51, paras. 4-7 of G/SPS/W/230, and paras. 122-137 of G/SPS/R/53 regarding the establishment of the working group.

⁹ G/SPS/GEN/932/Rev.1.

¹⁰ G/SPS/W/247.

¹¹ G/SPS/R/56, paras. 155-175.

¹² G/SPS/GEN/967 and G/SPS/W/249, respectively.

¹³ G/SPS/GEN/247/Rev.1.

9. In light of its work thus far, the working group recommends that the SPS Committee consider:

- (a) endorsing Actions [1 through 5]; and
- (b)(i) [giving further consideration to the remaining actions] OR
- (b)(ii) [asking the working group to give further consideration to the remaining actions] OR
- (b)(iii) [suspending discussion on the remaining actions at this time].

ANNEX I

COMPILATION OF POSSIBLE ACTIONS

Action 1: The SPS Committee should develop a working definition of SPS-related private standards and limit any discussions to these.

1. It is apparent from the discussions in the WTO and from the literature on this issue that private standards play an increasingly important role in international trade and pose new challenges as well as opportunities for producers and exporters. They cover safety, quality, labour, social and environmental issues and can affect a wide range of products.

2. Given its mandate, the SPS Committee should focus any discussions solely on SPS-related private standards, most of which are currently in the area of food safety. However, some Members have expressed concerns that the discussions have covered issues beyond SPS-related private standards. One of the reasons for this is that many private standards include food safety as well as other requirements, making it more difficult to single out the SPS-related requirements and determine whether any trade effects can be attributed directly to these. At the same time, producers and exporters do not necessarily focus on the distinction between SPS versus TBT measures or public versus private standards, but rather on whether they are able to fulfill all the requirements imposed by the importers.

3. Given its mandate, the SPS Committee would limit any discussions to:

Requirements which are established and/or adopted by non-governmental entities to fulfill one of the four objectives stated in Annex A, paragraph 1 of the SPS Agreement and which may affect international trade. These four objectives are:

- (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; and
- (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

These requirements may include, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animal or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

4. This proposed action appears to enjoy substantial support among participants in the working group so as to ensure a common understanding within the SPS Committee. However, one delegation opposes spending additional Committee resources on the development of a working definition.

Action 2: The SPS Committee should regularly inform the Codex, OIE and IPPC regarding relevant developments in its consideration of SPS-related private standards, and should invite these organizations to likewise regularly inform the SPS Committee of relevant developments in their respective bodies.

5. One of the concerns raised regarding SPS-related private standards has been that they sometimes deviate from the standards established by the international standard-setting bodies (ISSBs) referenced in the SPS Agreement, which are the Codex Alimentarius Commission (Codex), the World Organization for Animal Health (OIE), and the International Plant Protection Convention (IPPC). For example, in the area of food safety, some retail schemes have been identified as having maximum residue limits (MRLs) which are more restrictive than those set by Codex. In the area of animal health, examples of private standards with more trade-restricting BSE¹ requirements than those of the OIE have been provided.

6. Given the interlinkages between SPS-related private standards and the standards developed by Codex, OIE and IPPC, these bodies would benefit from regular information exchanges on this topic. In addition, the Secretariats of the four organizations should inform each other regarding their work in this area, keeping in mind that the scope of work on private standards in the international standard-setting bodies may not be the same as that of the SPS Committee.

7. The Codex Alimentarius Commission had considered extensively the issue of private standards for the first time during its 32nd session (CAC32, July 2009)² on the basis of a paper commissioned by the FAO and the WHO on the impact of private food safety standards on the food chain and on the public standard-setting process.³ The Commission did not support the conclusions of the paper and was of the opinion that Codex standards should be benchmarks for private food safety standards. The Commission agreed to monitor developments in the WTO and work in cooperation with the OIE and the IPPC to consult on a common position on this matter. The Commission also agreed that a further study be conducted to analyze the role, cost and benefits of private standards for consideration by the Executive Committee and the Commission.

8. A new study⁴ was prepared by the FAO and WHO and considered during the 33rd Session of the Codex Alimentarius Commission (Geneva, 5-9 July 2010).⁵ The main conclusions of the paper were that there was a tendency for individual firm standards to be more stringent than relevant Codex standards without scientific basis, whereas collective food safety standards were largely consistent with Codex. A general exception to this related to traceability requirements. Private food safety standards were, however, more prescriptive than Codex standards in stating how food hygiene requirements should be met. Since the standards in most cases were prepared with extremely limited opportunity for developing country input, the prescriptions contained within the standards were often inappropriate in developing country contexts and difficult or impossible to apply in small-scale food businesses in developing countries. The cost of certification disproportionately penalized small-scale producers and multiple certification requirements were a major problem that should be avoidable given that there are minimal differences among many of the existing standards.

¹ Bovine Spongiform Encephalopathy.

² ALINORM 09/32/REP, paras. 246-271.

³ ALINORM 09/32/9D-Part II: The Impacts of Private Food Safety Standards on the Food Chain and on the Public Standards-Setting Process, Paper prepared for FAO/WHO by Spencer Henson and John Humphrey.

⁴ CX/CAC 10/33/13.

⁵ ALINORM 10/33/REP, paras. 218-243.

9. Some delegations welcomed the paper as more balanced than the report discussed at CAC32 while others were of the opinion that the paper seemed to favour private standards and put the onus on developing countries to meet these standards. The Chairperson concluded that legal trade implications of private standards were best dealt with in the WTO while Codex, FAO and WHO should engage with global private standard-setting bodies and encourage their participation in Codex as observers. The Chairperson noted the willingness of FAO to make closer contact with private standards organizations. The Commission agreed to refer the matter to regional coordinating committees to conduct further analysis of the problems encountered with private standards and to make recommendations for follow up by the next session of the Commission. The analysis should include the financial burden especially on small and medium-sized enterprises (SMEs) due to proliferation of private standards. Private standard-setting bodies should be encouraged to limit the number of audits and to work more cooperatively amongst themselves.

10. A side event on private standards was organized by the FAO and WHO on the session-free day of the Commission on 8 July 2010.

11. The Codex Secretariat had prepared an analysis of the speed of the Codex standard-setting process which had been mentioned as one reason for the proliferation of private standards. This analysis was discussed at the 63th Session of the Executive Committee (CCEXEC63) in December 2009⁶ and a further study taking into account setting of numerical standards and work management approaches of different committees was discussed at the 64th Session of the CCEXEC in June/July 2010.⁷ The Committee concluded that the analysis contained in the working document had been positive, showing that Codex work in general was progressing much better than was the prevailing impression and that this message should be actively communicated to all relevant parties. The Committee concluded further that the analysis had helped to identify work-management approaches of Codex Committees that facilitate advancement of texts in the Codex step process. The Committee recommended that Codex Committees consider adopting the good practices identified.

12. OIE members adopted a resolution regarding the implication of private standards in the international trade of animals and animal products in May 2008.⁸ This resolution asks the Director General of the OIE, among others, "to work with relevant public and private international organizations with the objective that concerns of Members are taken into consideration and that private standards, where used, are consistent with and do not conflict those of the OIE."

13. The OIE Secretariat has provided regular updates to the SPS Committee and submitted a document entitled "Considerations Relevant to Private Standards in the Field of Animal Health, Food Safety, and Animal Welfare".⁹ An OIE *ad hoc* working group was established to consider private standards in the areas of animal health and welfare. This group met in October 2009 to review the results of a questionnaire sent to members and relevant organizations and to prepare recommendations for future action by the OIE. The group's report¹⁰ was reviewed by the Terrestrial Code Commission in February 2010 and was published as an annex to the Commission's report in March 2010, including the complete report of the OIE questionnaire.¹¹

14. As most of the 68 OIE members responding to the questionnaire recommended that the OIE work more closely with private standard setting organizations in an effort to avoid negative effects of

⁶ CX/EXEC 09/63/8.

⁷ CX/EXEC 10/64/4.

⁸ Resolution No. XXXII..

⁹ G/SPS/GEN/822.

¹⁰ Executive summary at http://www.oie.int/eng/normes/en_executive%20summary.pdf

¹¹ http://www.oie.int/tahsc/eng/en_reports.htm, page 701.

private standards, the OIE convened a meeting with private organizations, with the participation of the WTO Secretariat, on 16 February 2010 to exchange information and consider possible next steps.

15. At the OIE 78th General Session (23-28 May 2010) the private sector's views on private standards were presented by a representative of the not-for-profit global alliance for a Safe Supply of Affordable Food Everywhere (SSAFE). In the related General Session Resolution No. 26¹², members recommended that the OIE maintain and strengthen appropriate links and dialogue with relevant global private standard-setting bodies and global private industry organizations, with the aim of encouraging the compatibility of private standards with OIE standards and fostering communication with national governments and consumers on the safeguards offered by official standards. The Final Report of the 78th General Session is available on the OIE website at http://www.oie.int/eng/OIE/actes/en_rfinal.htm.

16. Following the recommendations of Resolution 26, in September 2010 the OIE convened a meeting with some global standard-setting bodies and other stakeholders to discuss future collaboration. The report of this meeting will be released in October as an annex to the report of the Terrestrial Code Commission's September meeting. Information on OIE activities relating to private standards for sanitary safety and animal welfare may be found at: http://www.oie.int/eng/normes/en_Implications%20of%20private%20standards.htm.

17. There has been limited discussion of private standards at the IPPC.

18. The WTO Secretariat has provided updates on the SPS Committee's deliberations on SPS-related private standards during the annual meetings of the Codex, OIE and IPPC,¹³ and participated in informal meetings at the OIE on this matter.

19. This proposed action appears to enjoy substantial support among participants in the working group.

Action 3: The SPS Committee invites the Secretariat to inform the Committee on developments in other WTO fora which could be of relevance for its discussions on SPS-related private standards.

20. Private standards play an increasingly important role in international trade and may become a subject of discussion in various formal or informal WTO fora. While such discussions are likely to go beyond SPS issues, there could also be linkages. For example, a private standard could contain both TBT as well as SPS-related requirements or its environmental requirements could cover SPS aspects. Also, horizontal concepts such as transparency could be considered. In this context, it would be beneficial for the SPS Committee to keep abreast of relevant developments in the WTO.

21. There has thus far been limited discussion on the issue of private standards in the TBT Committee. During the March 2009 TBT Workshop on the Role of International Standards in Economic Development, several participants expressed concerns about the proliferation of private standards that could result in unnecessary barriers to trade and create confusion in the marketplace.¹⁴

¹² Resolution No. 26 "Roles of public and private standards in animal health and animal welfare".

¹³ For example, see Codex document CAC/32 INF/5, paras. 28-34 and OIE document 76 SG/10 regarding the Implication of Private Standards in International Trade of Animals and Animal Products.

¹⁴ G/TBT/W/310, para. 63.

22. In the context of the Fifth Triennial Review of the TBT Agreement, which was concluded in November 2009, the issue of private standards was raised for discussion.¹⁵ The relevant section of the report of the Fifth Triennial Review states the following¹⁶:

"The Committee notes that several Members have raised concerns regarding "private standards" and trade impacts thereof, including actual or potential unnecessary barriers to trade.¹⁷ The Committee also notes that other Members consider that the term lacks clarity and that its relevance to the implementation of the TBT Agreement has not been established. Without prejudice to the different views expressed, the Committee recalls that Article 4.1 of the TBT Agreement requires that Members shall take such reasonable measures as may be available to them to ensure that standardizing bodies accept and comply with the Code of Good Practice. The Committee further expresses the need to strengthen implementation of Article 4. In view of this, the Committee:

(a) *Recalls* its discussion in the Third Triennial Review¹⁸ regarding standards developed by bodies that are not commonly considered standardizing bodies;

(b) *Reiterates* its 1997 invitation to Members to share their experiences with respect to steps taken to fulfil their obligations under Article 4, and to exchange information regarding the reasons some standardizing bodies have not yet accepted the Code of Good Practice¹⁹; and

(c) With a view to facilitating an informed discussion on the development and use of standards in general, including with regard to standards developed by non-governmental bodies, Members are invited to *share their experiences* related to the implementation of the TBT Agreement, including the Code of Good Practice. Discussions will neither prejudice the role of the TBT Committee nor the scope of the TBT Agreement with respect to any issue that may arise."

23. The Committee on Trade and Environment held a workshop on Environment-Related Private Standards, Certification and Labeling Requirements in July 2009.²⁰ In addition to an introductory session and presentations on specific private standards, it considered the following topics: transparency and the standard development process, proliferation and harmonization, environmental impact and effectiveness, relevant rules and work in the WTO (SPS and TBT).

24. This proposed action appears to enjoy substantial support among participants in the working group.

¹⁵ G/TBT/W/318.

¹⁶ G/TBT/26, para. 26.

¹⁷ The Committee notes that the issue has been discussed in other fora.

¹⁸ G/TBT/13, para. 25.

¹⁹ G/TBT/1/Rev.9, p.21.

²⁰ Job(09)/136/Rev.1.

Action 4: [Once a definition of SPS-related private standards is agreed upon (as per Action 1),] Members are encouraged to communicate with entities involved in such standards in their territories to sensitize them to the issues raised in the SPS Committee and underline the importance of following international standards established by the Codex, OIE and IPPC.

25. The SPS Committee has been discussing the issue of SPS-related private standards since 2005. While Members are by now quite familiar with each other's concerns and positions on this issue, it is not clear to what extent entities involved in the development, application, certification, etc of SPS-related private standards are aware of the SPS Committee's discussions. The information sessions with the participation of representatives of such entities were useful in bringing to their attention some of the concerns raised in the SPS Committee as well as in updating the Committee on latest developments.

26. Given the multitude and diverse nature of entities involved in private SPS standards such as retail firms, producers, certifiers and NGOs, Member governments may be best placed to communicate with such entities as necessary. Such communication could be achieved through meetings or other means and encourage harmonization, mutual recognition of standards by private standard holders, cost reduction in the areas of compliance and certification, and further transparency and consultation mechanisms. It would also help Members build an understanding of the extent and functions of SPS-related private standards. One limitation that has been identified is that for some developing countries, such meetings might encompass only producers and exporters facing private SPS standards in their export markets and not those setting and applying such standards.

27. This proposed action appears to enjoy substantial support among participants in the working group.

Action 5: The SPS Committee should explore the possibility of working with the Codex, OIE and IPPC to support the development and dissemination of promotional materials underlining the importance of international SPS standards.

28. The responses to the Secretariat's questionnaire revealed that many producers and traders are not aware of the differences between public and SPS-related private standards. In an effort to provide further clarity on this issue and promote the use of international standards, the SPS Committee could explore the possibility of working with the Codex, OIE and IPPC to support the development and dissemination of promotional materials (such as brochures or videos). Such materials would underline the merits of science-based international standards, which, when adopted by Member governments and private schemes, serve to facilitate trade while ensuring safety.

29. A better global understanding would facilitate more informed commercial decisions by producers, which in turn may result in better returns. A better understanding may also improve the ability of producers to negotiate with those setting private standards on the content of these standards.

30. Such work should build on already existing materials.

31. This proposed action appears to enjoy substantial support among participants in the working group.

Action 6: Members are encouraged to exchange relevant information regarding SPS-related private standards among themselves to enhance understanding and awareness on how these compare or relate to international standards and governmental regulations, without prejudice to the different views of Members regarding the scope of the SPS Agreement.

32. Members have raised a number of concerns regarding SPS-related private standards, including:

- the lack of a scientific basis for requirements;
- deviations from international standards or from official governmental requirements (for example, for maximum residue limits);
- the multiplicity of standards and the lack of harmonization among them;
- the costs of compliance and certification, especially with a multitude of standards;
- the lack of transparency, consultation and appeal mechanisms;
- the prescriptive, rather than outcome-based, operational procedures required by private standards, which disregards the concept of equivalence; and
- the disproportionate effect on small- and medium-sized producers and exporters in developing countries.

33. A number of positive aspects have also been mentioned, including:

- the facilitation of compliance with national and international standards, where private schemes take as a basis these standards and provide comprehensive guidance on achieving them;
- the promotion of best practices and productivity;
- improved brand reputation and facilitation of access to markets and credits; and
- the ability to address emerging risks in a rapid manner, fill gaps, and pave the way for eventual adoption of international standards.

34. With a view to enhancing understanding and awareness on international, governmental, and private SPS-related standards without creating an excessive burden, Members, observers, and the Secretariat could be encouraged to exchange information on this topic. This could include written or oral communications on any relevant conferences or studies on SPS-related private standards or on concrete experiences of exporters in meeting these.²¹

35. In addition, the Secretariat may be requested to organize ad hoc informal workshops²² with relevant stakeholders, including international organizations; entities developing, adopting and certifying private standards²³; as well as producers and/or exporters who need to meet these

²¹ Examples include the circulation of a communication by Switzerland entitled "Voluntary Standards" (G/SPS/GEN/967) and of an information note from the Global Food Safety Initiative (GFSI) through the Secretariat (G/SPS/GEN/1004).

²² Earlier information sessions include the STDF Information Session on Private Standards (http://www.wto.org/english/tratop_e/sps_e/private_standards_june08_e/private_standards_june08_e.htm) and the Joint UNCTAD/WTO Informal Information Session on Private Standards (http://www.wto.org/english/tratop_e/sps_e/private_standards_june07_e/private_standards_june07_e.htm).

²³ Potential invitees could include representatives of the ISO, Global Food Safety Initiative (GFSI), GlobalGAP, Chile GAP, New Zealand GAP, Thailand GAP, and SSAFE.

standards. Such workshops would be an opportunity for interested Members to highlight the concerns mentioned above and follow the latest developments in an evolving field.

36. To facilitate the participation of a larger number of delegations, such events could be held back-to-back with SPS Committee meetings. It should be underlined, however, that the SPS Committee would not endorse or support any particular entity participating in such meetings.

37. While a number of Members would like to see the SPS Committee play a role in addressing concerns related to SPS-related private standards, others are of the view that such standards are not covered by the SPS Agreement and that it is not for the governments of Members or the SPS Committee to interfere in the private contractual relations of firms, except when these result in deceptive practices or distortions of competition. In addition, some Members would prefer that the SPS Committee focus on its regular business. Moreover, concerns have been raised that if the exchange of information were associated with and facilitated by the Committee, it could be interpreted as an endorsement of SPS-related private standards. It has been suggested that such information exchanges take place among technical specialists in the context of meetings associated with the ISSBs or at the national level.

38. While this proposed action has enjoyed some support in the working group, several delegations have expressed concerns as described in the preceding paragraph.

Action 7: The SPS Committee should provide a forum for the discussion of specific trade concerns related to SPS-related private standards.

39. Under the agenda item on specific trade concerns, the SPS Committee meetings provide a forum for Members to raise concerns regarding specific SPS measures taken by other Members. Between 1995 and 2009, 290 such concerns were raised by Members. For each of these, there is at least one specific Member raising the issue and in most cases, one or more Members are identified as maintaining the measure of concern.²⁴

40. As stated earlier, Saint Vincent and the Grenadines raised a specific trade concern regarding EurepGAP (now GLOBALGAP) requirements for bananas destined for sale in the United Kingdom, first in June 2005 and then again in October 2006. No resolution of this concern has been reported. Systemic issues arising from SPS-related private standards have been on the agenda of the SPS Committee since then and a number of specific concerns have been highlighted in the context of the questionnaire circulated by the Secretariat. However, no other private standard-related concern has been raised under the SPS Committee's agenda item on specific trade concerns.

41. The SPS Committee could provide a practical forum for Members to raise specific trade concerns related to the application of SPS-related private standards. These could be raised under the standing agenda item on specific trade concerns. If many such concerns are regularly raised at the meetings, the SPS Committee could decide to establish a separate agenda item on SPS-related private standards. The Member on whose territory the entity that has developed or implemented the standard in question is located would then relay the concern raised to the private entity, seek explanations and revert back to the SPS Committee as appropriate.

42. The objectives would be to raise the level of communication between Members and entities which adopt SPS-related private standards, facilitate the understanding of the reasons underpinning a

²⁴ There have, however, been twelve instances to date where no specific Member maintaining the measures was specified. These concerns related, for example, to BSE-related restrictions, implementation of ISPM 15, and determination of MRLs at the national level.

standard, and allow exporting Members to try to find positive solutions to specific problems detected. Such specific trade concerns would be considered without prejudice to the different views of Members regarding the scope of the SPS Agreement.

43. Participants in the working group have expressed divergent views on this proposed action. In particular, some Members have raised concerns that such involvement could lead to the SPS Committee being perceived inappropriately as the body responsible for the resolution of such trade problems.

Action 8: The SPS Committee should develop guidelines on the implementation of Article 13 of the SPS Agreement.

44. Members are investing their time and resources to work on systemic and specific issues in the SPS Committee with the goal of facilitating trade and ultimately drawing benefits from the multilateral trading system. The increased prevalence of SPS-related private standards is perceived by some Members to undermine this investment and devalue the principles and relevance of the SPS Agreement and of the Codex, OIE and IPPC.

45. In this context, it has been suggested that developing guidelines regarding the implementation of Article 13, especially related to SPS-related private standards, could be one way to reinforce the key principles of the SPS Agreement, such as scientific justification, transparency and equivalence, in the private standards arena.

46. Article 13 reads:

"Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement."

47. There has been no further guidance to date from the SPS Committee regarding this Article. The disputes invoking the SPS Agreement have not referred to it either.

48. Members have differing views on whether the term "non-governmental entities" includes entities involved in the development, adoption, implementation, certification and enforcement of SPS-related private standards. Some argue that Article 13 applies only in cases where Members rely on the services of non-governmental entities to implement SPS measures.

49. The proposed guidelines could also shed light on the "reasonable measures as may be available to Members" to ensure that entities involved with SPS-related private standards comply with the "relevant" provisions of the SPS Agreement.

50. Specific proposals in this regard were put forth by India²⁵ and MERCOSUR members (Argentina, Brazil, Paraguay, Uruguay)²⁶ in the context of the Third Review of the Implementation of the SPS Agreement.

51. Participants in the working group have expressed divergent views on this proposed action. Some have indicated that it would be premature to develop guidelines before reaching a clear understanding on the meaning of the term "non-governmental" entities in relation to SPS-related private standards.

Action 9: The SPS Committee should develop a transparency mechanism regarding SPS-related private standards.

52. Transparency is one of the key principles of the SPS Agreement, requiring Members to notify their new or modified SPS regulations while they are in draft form so that others Members have an opportunity to comment on these and producers and exporters have time to adapt their production and/or processing methods as necessary. One of the concerns raised regarding SPS-related private standards has been that there are limited opportunities to provide comments during their development. In addition, it has been stated that it is very difficult to have an overview of the plethora of private standards. One tool for addressing this concern would be the development of a more formal transparency mechanism for SPS-related private standards through the SPS Committee.

53. If this proposal were to be pursued, it would have to be clarified which entities would have the responsibility to notify, what form notifications would take, and what status these notifications would have. Concerns have also been raised about the fact that Members may not necessarily be aware of SPS-related private standards developed by entities within their territories. In addition, such a mechanism would raise issues of time, cost, government jurisdiction, and intellectual property.

54. Participants in the working group have expressed divergent views on this proposed action.

Action 10: The SPS Committee should develop a Code of Good Practice for the preparation, adoption and application of SPS-related private standards.

55. Annex 3 of the TBT Agreement provides for a Code of Good Practice for the Preparation, Adoption and Application of Standards. It provides disciplines, including those related to non-discrimination, harmonization and transparency, for the preparation, adoption and application of standards (which are voluntary as opposed to mandatory) by central governmental, local governmental, non-governmental and regional standardizing bodies, all of which can formally submit their acceptance of the Code. Members are required to take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories accept and comply with the Code.

56. From 1 January 1995 until 1 February 2010, 162 standardizing bodies from 122 Members have accepted the Code of Good Practice, among them, 87 central governmental standardizing bodies, 64 non-governmental standardizing bodies, three statutory bodies, two parastatal bodies, three non-governmental regional bodies, one central governmental/non-governmental body, one central governmental/local governmental body and one autonomous body.²⁷

57. Unlike the TBT Agreement, the SPS Agreement does not contain a distinction between mandatory "technical regulations" and "voluntary standards". It only makes reference to SPS

²⁵ G/SPS/W/236.

²⁶ G/SPS/W/245.

²⁷ G/TBT/CS/2/Rev.16.

measures, which must be necessary for the protection of human, animal or plant life or health. In light of the concerns about some private standards which contain SPS requirements, a Code of Good Practice could provide guidance and a framework for the development, adoption, and certification of SPS-related private standards.

58. An SPS Code of Good Practice could take the form of an SPS Committee recommendation, or could be submitted through the Committee's parent bodies to the Ministerial Conference for adoption. Alternatively, given that a number of private standards contain SPS- as well as TBT-related elements, entities involved in private standards could be encouraged to sign on to the TBT Code of Good Practice. However, questions could arise as to whether the "non-governmental standardizing bodies" referred to in the TBT Code of Good Practice would cover the type of private standard-setting entities referred to in the SPS Committee discussions. Also, concerns have been raised regarding the fact that developing such a Code could endorse private standard-setting entities and undermine the primacy of the international SPS standards developed by the Codex, OIE and IPPC.

59. Participants in the working group have expressed divergent views on this proposed action.

Action 11: The SPS Committee should develop guidelines for the governments of WTO Members to liaise with entities involved in SPS-related private standards.

60. The SPS Committee is the forum convening WTO Members to focus on systemic and specific implementation issues arising from the SPS Agreement. At the same time, the governments of WTO Members need to consult regularly with their domestic stakeholders, be they governmental or non-governmental, export or import-oriented, regarding the implementation of the SPS Agreement. In an effort to facilitate the exchange of information between the governments of Members and entities involved with SPS-related private standards in their territories, the SPS Committee could develop guidelines for Members. Such guidelines could underline the importance of relaying the concerns raised in the SPS Committee to these entities and of encouraging the application of the key principles of the SPS Agreement, such as the need for a scientific basis for measures, harmonization, equivalence, etc.

61. Some Members may wish to develop their own guidelines for the development and certification of private standards or encourage entities developing SPS-related private standards to develop their own codes of good practice.²⁸

62. Some Members have suggested that it would be more effective to strengthen communication between producers/manufacturers of exporting countries and entities involved with SPS-related private standards in importing countries. It has also been pointed out that difficulties faced by Members regarding SPS-related private standards should be addressed globally. Some Members have suggested that ISSBs are better-placed to develop guidelines given the specifics involved. In this context, reference has been made to the recent work of the OIE in this area.

63. Participants in the working group have expressed divergent views on this proposed action.

²⁸ A document submitted by Switzerland entitled "Voluntary Standards" (G/SPS/GEN/967) outlines the Swiss Government's strategy for ensuring that private voluntary standards contribute positively to sustainable development and that they do not operate as unnecessary barriers to trade.

Action 12: The SPS Committee should seek clarification as to whether the SPS Agreement applies to SPS-related private standards.

64. A number of factors have led to the proliferation of private standards and associated certification schemes which contain SPS-related requirements. These include the high profile of a number of food safety scares and problems of confidence in some regulatory agencies; legal requirements on companies to demonstrate "due diligence" in the prevention of food safety risks; growing attention to "corporate social responsibility" and a drive by companies to minimize "reputational risks"; globalization and vertical integration of supply chains; and the expansion of supermarkets nationally and internationally.

65. The SPS Agreement was negotiated during the Uruguay Round (1986-1994) as part of the Single Undertaking. At the time, one of the main concerns of the negotiators was to ensure that the expected reduction of tariffs and elimination of quantitative restrictions would not be circumvented by governments through the use of protectionist measures disguised as sanitary or phytosanitary measures. It is not clear whether the proliferation of SPS-related private standards, due mainly to the factors listed above, was anticipated at the time and no explicit reference to "private standards" is included in the text of the Agreement.

66. Members have differing views as to whether the SPS Agreement applies to SPS-related private standards. Article 1.1 states that the Agreement applies to "all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade" (emphasis added) without explicitly limiting this application to SPS measures taken by government authorities. Likewise, the definition of an SPS measure in Annex A(1) and the accompanying illustrative list of SPS measures does not explicitly limit these to governmental measures. On the other hand, other provisions of the SPS Agreement explicitly refer to measures "taken" (Article 2.1), "established" (Article 5.6), "maintained" (Articles 2.2 and 5.6) or "adopted" (Article 5.7) by a Member. It is also not clear whether the certification requirements necessary to demonstrate compliance with SPS-related private standards would be within the scope of Article 8 and Annex C of the Agreement. Moreover, as elaborated under Recommendation 8, Members have differing views regarding to what extent Article 13 applies to entities involved with SPS-related private standards.

67. The SPS Committee could pursue further work in clarifying the relationship between private standards and the SPS Agreement. This work could be based on specific written submissions from Members, which could be based on their own legal views or views developed by legal entities they have consulted.²⁹ Alternatively, the SPS Committee could instruct the Secretariat to seek a legal opinion on this question from a qualified legal entity, for consideration by this Committee.

68. If Members were to reach consensus on a decision, for example clarifying the scope of Article 13, this could be forwarded to the Council for Trade in Goods and eventually to the General Council and/or the Ministerial Conference for formal adoption. This work could be undertaken in the context of a periodic review of the Agreement. In accordance with Article 12.7 of the SPS Agreement and the decision of the Fourth Session of the Ministerial Conference, Members are instructed to review the operation of the SPS Agreement at least once every four years.

69. Article 12.7 also states that "Where appropriate, the Committee may submit to the General Council for Trade in Goods proposals to amend the text of this Agreement having regard, *inter alia*, to the experience gained in its implementation." Unlike an agreement on the clarification of a particular provision, any formal amendment of the text of the SPS Agreement would presumably need to be pursued in accordance with Article X of the Marrakesh Agreement Establishing the World Trade Organization.

²⁹ See G/SPS/GEN/802.

70. Apart from any initiative of the SPS Committee, the extent of the applicability of the SPS Agreement to SPS-related private SPS standards could also be the subject of deliberations of a dispute settlement panel established under the WTO's Dispute Settlement Understanding.

71. Participants in the working group have expressed divergent views on this proposed action.

ANNEX II

SPS Committee documents referring to private standards

Document Symbol	Date of distribution	Submitted by	Document title
G/SPS/W/247/Rev.2	15/06/2010	WTO Secretariat	Possible Actions for the SPS Committee Regarding Private SPS Standards - Note by the Secretariat - Revision
G/SPS/53	03/05/2010	WTO Secretariat	Review of the Operation and Implementation of the SPS Agreement – Report adopted by the Committee on 18 March 2010
G/SPS/W/247/Rev.1	05/03/2010	WTO Secretariat	Possible Actions for the SPS Committee Regarding Private SPS Standards - Note by the Secretariat - Revision
G/SPS/W/237/Rev.2	01/03/2010	WTO Secretariat	Review of the Operation and Implementation of the SPS Agreement - Draft Report of the Committee - Revision
G/SPS/W/249	23/12/2009	Argentina, Brazil, Paraguay, Uruguay	Private Standards
G/SPS/GEN/932/Rev.1	10/12/2009	WTO Secretariat	Effects of SPS-Related Private Standards – Compilation of Replies
G/SPS/GEN/967	20/10/2009	Switzerland	Voluntary Standards
G/SPS/W/247	20/10/2009	WTO Secretariat	Possible Actions for the SPS Committee Regarding Private SPS Standards
G/SPS/W/246	30/09/2009	Argentina, Brazil, Paraguay, Uruguay	Legal Framework for private standards in the WTO
G/SPS/W/245	15/09/2009	Argentina, Brazil, Paraguay, Uruguay	Third Review of the SPS Agreement - Guidelines on the Implementation of Article 13 of the SPS Agreement
G/SPS/GEN/932	15/06/2009	WTO Secretariat	Effects of SPS-Related Private Standards - Descriptive Report
G/SPS/W/237	08/05/2009	WTO Secretariat	Review of the Operation and Implementation of the SPS Agreement
G/SPS/W/236	17/04/2009	India	Third Review of the WTO/SPS Agreement

Document Symbol	Date of distribution	Submitted by	Document title
G/SPS/GEN/911	16/03/2009	Belize	Private and Commercial Standards - Statement at the Meeting of 25-26 February 2009
G/SPS/W/232	08/12/2008	WTO Secretariat	Questionnaire on SPS-Related Private Standards
G/SPS/GEN/891	08/12/2008	WTO Secretariat	Research and Researchers on Private Standards
JOB(08)/97	25/09/2008	WTO Secretariat	Private Standards and Practical Actions for the SPS Committee - Compilation of responses to the questionnaire
G/SPS/W/230	25/09/2008	WTO Secretariat	Private Standards - Identifying Practical Actions for the SPS Committee - Summary of Responses
G/SPS/R/50	24/07/2008	WTO Secretariat	Report of the STDF Information Session on Private Standards (26 June 2008)
G/SPS/GEN/865	11/07/2008	WTO Secretariat	Documents and Other Information on Private Standards
Job(08)/58	03/07/2008	WTO Secretariat	Private Standards - Identifying Practical Actions for the SPS Committee
G/SPS/W/225	18/06/2008	Uruguay	Terms of Reference for the Working Group on Private Standards
G/SPS/GEN/843	21/05/2008	Uruguay	Private Standards - Statement by Uruguay at the Meeting of 2-3 April 2008
G/SPS/GEN/822	25/02/2008	World Organization for Animal Health (OIE)	Considerations Relevant to Private Standards in the Field of Animal Health, Food Safety and Animal Welfare
G/SPS/GEN/802	09/10/2007	United Kingdom	Private Voluntary Standards within the WTO Multilateral Framework
G/SPS/GEN/792	05/07/2007	Ecuador	Private and Commercial Standards - Statement by Ecuador at the Meeting of 27 - 28 June 2007
JOB(07)/89/Rev.1	15/06/2007	United Nations Conference on Trade and Development (UNCTAD), World Trade Organization (WTO)	Joint UNCTAD/WTO Informal Information Session on Private Standards - Revision

Document Symbol	Date of distribution	Submitted by	Document title
G/SPS/GEN/761/Corr.1	09/03/2007	United Nations Conference on Trade and Development (UNCTAD)	Private Sector Standards and Developing Country Exports of Fresh Fruit and Vegetables - Communication from the United Nations Conference on Trade and Development (UNCTAD) - Corrigendum
G/SPS/GEN/766	28/02/2007	Saint Vincent and the Grenadines	Private Industry Standards
G/SPS/GEN/764	28/02/2007	Bahamas	Report by the Commonwealth of the Bahamas to the WTO-SPS Committee on Private Standards and the SPS Agreement : the Bahamas Experience
G/SPS/GEN/763	27/02/2007	Organization for Economic Co-operation and Development (OECD)	Private Voluntary Standards and Developing Country Market Access: Preliminary Results
G/SPS/GEN/761	26/02/2007	United Nations Conference on Trade and Development (UNCTAD)	Private Sector Standards and Developing Country Exports of Fresh Fruit and Vegetables
G/SPS/GEN/760	26/02/2007	United Nations Conference on Trade and Development (UNCTAD)	Typology of Global Standards
G/SPS/GEN/750	16/02/2007	International Organization for Standardization (ISO)	Submission by the International Organization for Standardization (ISO) to the SPS Committee Meeting - 28 February and 1 March 2007
G/SPS/GEN/746	24/01/2007	WTO Secretariat	Private Standards and the SPS Agreement