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Committee on Sanitary and Phytosanitary Measures

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## FOURTH REVIEW OF THE OPERATION AND IMPLEMENTATION OF THE AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

### TRANSPARENCY UNDER THE SPS AGREEMENT (ARTICLE 7 AND ANNEX B)

*Submission by Chile, the European Union, Morocco and Norway*

The following communication, received on 13 March 2014, is being circulated at the request of the Delegations of Chile, the European Union, Morocco and Norway.

## 1 INTRODUCTION

1.1. As part of the Fourth Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement), pursuant to the provisions of Article 12.7 of the SPS Agreement, the Secretariat has invited Members to identify issues they wish to consider in the context of the review and to make submissions on this issue by 14 March 2014.<sup>1</sup>

1.2. At the SPS Committee meeting of October 2013, the European Union (EU) proposed to the Committee to review the implementation of the transparency provisions of the SPS Agreement, including the possibility of further developing the "Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement" (Recommended Procedures) in effect since 1 December 2008.<sup>2</sup>

1.3. To follow up the discussion at the October 2013 meeting of the SPS Committee, the European Union submitted on 17 December 2013 a general communication on transparency (Article 7 and Annex B of the SPS Agreement).<sup>3</sup>

1.4. Chile, the European Union, Morocco and Norway share the opinion that transparency is one of the cornerstones of the World Trade Organisation (WTO) and a fundamental tool for the effective implementation and application of the rights and obligations of Members under the SPS Agreement. This principle, which allows interested Members to become acquainted with the SPS measures adopted by other Members, serves to mitigate regulatory obstacles that may arise among trading partners through greater clarity, predictability and reliability of information. If, and when, correctly applied, transparency in the SPS field facilitates international trade and helps to avoid disputes.

1.5. Transparency provisions in relation to the SPS Agreement have already been discussed during previous reviews. This led to a number of recommendations being adopted which are now being applied with varying levels of success.

<sup>1</sup> G/SPS/W/270.

<sup>2</sup> G/SPS/7/Rev.3.

<sup>3</sup> G/SPS/GEN/1293.

1.6. The latest set of Recommended Procedures entered into force more than five years ago.<sup>4</sup> They remain the reference for best practice for notification procedures and are followed, in the main, by the vast majority of Members.

1.7. With the accession of new Members to the WTO and the rapidly growing overall number of SPS notifications<sup>5</sup>, some issues – treated in the Recommended Procedures - are becoming crucially important in order to adequately meet the following transparency provisions in practice:

- a. the quality and completeness of the information provided in the notification;
- b. the timeliness of the publication of regular and emergency notifications;
- c. interactions with trading partners (handling of comments); and
- d. availability to other Members, at any given time, of all measures adopted and proposed by a WTO Member.

1.8. Each of the transparency aspects mentioned above may be further improved without creating new obligations or increasing the administrative burden for WTO Members. Efforts should focus on providing precise information at an early stage, allowing, if needed, for a real regulatory dialogue to take place before the measure is adopted and enters into force. During this process, trading partners should be kept properly informed of all SPS measures in force at any one time.

## **2 NOTIFICATION OF MEASURES**

2.1. In accordance with the SPS Agreement and the Recommended Procedures, Members shall notify changes in their SPS measures that are:

- a. generally applicable, i.e. excluding individual permits and approvals addressed to a single business operator;
- b. the content of which is not substantially the same as the content of an international standard, guideline or recommendation; and
- c. are expected to have a significant effect on trade in a specific product, group of products or products in general, between two or more Members.

2.2. Furthermore, Members are encouraged to notify those regulations that are based on, conform to, or are substantially the same as an international standard, guideline or recommendation.

2.3. An analysis of all the notifications issued between 15 September 2012 and 15 September 2013 shows that nearly half of the regular notifications did not identify the relevant international standard, guideline or recommendation.<sup>6</sup> This omission impacts on the quality and completeness of the information provided in the notification.

2.4. Proper identification of the relevant international standard, guideline or recommendation and a clear indication whether the notified measure conforms or deviates from it (and if so, how and why), will assist in the monitoring of the use of international standards.

## **3 PROVISION OF INFORMATION**

3.1. Where international standards exist and the proposed measures deviate from them substantially, the notifying Member should clearly signal this to its trading partners and explain how and why the proposed measures deviate from the relevant international standard (details in box 8 of the template for regular notifications and in box 9 of the template for emergency notifications). It has been observed that some notifications were incorrectly presented as measures conforming to an international standard, guideline or recommendation when this was not the case. This could be misleading and should be looked into.

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<sup>4</sup> G/SPS/7/Rev.3.

<sup>5</sup> Over 16,000 notifications since 1995 till the end of 2013; this calculation is based on information provided in G/SPS/GEN/804/Rev.6, page 3, point 3.6.

<sup>6</sup> G/SPS/GEN/804/Rev.6, page 9, point 3.21.

3.2. There is a need for the information provided in a notification to be clear and comprehensible.

3.3. Availability of translations of notified documents into official WTO languages is a matter of concern. According to point 26 of the Recommended Procedures, "developed country Members shall, if requested, provide copies of such documents or, in case of voluminous documents, a translation of a summary, in one of the three WTO working languages".

3.4. Translations should be of an appropriate quality and should be provided within a reasonable timeframe. If only summaries are available they should include all relevant information on the measure affecting trading partners, in particular, identifying the parts which deviate from international standards, guidelines or recommendations.

3.5. The mechanism for Members to inform each other of the availability of unofficial translations of notified SPS measures into one of the official WTO languages, which was established by the SPS Secretariat in 2004, requires practical implementation. From the date of its creation in 2004 until mid-September 2013, only 17 supplementary SPS notifications containing unofficial translations were circulated – only one of which was in 2013.

3.6. There is a lack of clarity with respect to qualifying measures as trade facilitating (footnote 5 in the Recommended Procedures). Due to differing interpretations, practices with respect to classifying a measure as trade facilitating vary substantially among Members.

#### 4 TIMING OF NOTIFICATIONS

4.1. According to paragraph 5(a) of Annex B of the SPS Agreement and Chapter B of the Recommended Procedures "Members shall publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with a proposal to introduce a particular regulation". As confirmed by the SPS Secretariat in its annual report on transparency, compliance with this provision is neither monitored nor reported.<sup>7</sup>

4.2. It has been noted that a significant number of regular notifications still indicate a date of entry into force of the relevant measure which is prior to the date of the notification itself. Furthermore, these notifications often concern measures that are not trade facilitating or measures that differ from international standards.

4.3. Establishing a 60-day comment period was one of the recommended practices agreed by the SPS Committee, in 1996, in the very first Recommended Procedures.<sup>8</sup> It is well known that the recommendation was established in order to allow all trading partners sufficient time to become acquainted with the measures notified by other Members and for a regulatory dialogue, if appropriate, to be held.

4.4. A recent analysis by the SPS Secretariat indicates that one out of four regular notifications did not provide a comment period, without providing a reason for this.<sup>9</sup> Even though there is no recommendation in the Recommended Procedures to provide such a justification, having such an explanation would go a long way to helping to understand why the 60-day recommended period is not observed. Furthermore, extensions of the comment periods are often granted on a bilateral basis to the requesting Member alone, while this is not automatically offered and communicated to all Members through the WTO system.

4.5. Emergency notifications of SPS measures (in accordance with paragraph 6 of Annex B of the WTO SPS Agreement) are another key area where current practices should also be reviewed. The template for the notification of emergency measures offers the possibility to describe the nature of the urgent problem(s) and the reason for the urgent action (in box 8). The lack of a common understanding of what exactly constitutes an emergency notification or how it should be treated, tends to mean that current notification practices vary substantially among Members. It has been noted that occasionally the justification for the emergency is quite unclear and the reason for the urgency is not duly justified. Often the notification is also issued long after the emergency is

<sup>7</sup> G/SPS/GEN/804/Rev.6, page 13, point 5.1.a.

<sup>8</sup> G/SPS/7, page 5, point 11.

<sup>9</sup> G/SPS/GEN/804/Rev.6, page 10, point 3.30.

announced and little opportunity is given to the affected Members to react to the notification or to mitigate the conditions that gave rise to the emergency.

4.6. Emergency measures shall not be maintained endlessly. If they are introduced based on the available pertinent information, on a provisional basis as foreseen in Article 5, paragraph 7 of the SPS Agreement, the Member imposing the measure should obtain additional information necessary for a more objective assessment of the risk and review the SPS measure accordingly "within a reasonable period of time". If, due to the circumstances, an emergency measure is transformed into a "regular" measure, after an objective, scientific assessment of risk, a new notification – as yet not foreseen in the Recommended Procedures – could be recommended to allow the transformed measure to be brought to the attention of other Members.

## 5 HANDLING OF COMMENTS

5.1. The provisions of Chapter E of the Recommended Procedures regarding the handling of comments received to a particular notification are rather general. While the Recommended Procedures foresee the development of a regulatory dialogue to resolve SPS issues using existing tools and other instruments offered by the SPS Agreement, it is nevertheless often not the case in practice.

5.2. It is not sufficient to merely provide a comment period to trading partners. The comments received ought to indeed be taken into account, integrated into the legislative work, responded to, and if not accepted, then a justification should be provided. The whole process shall take place within reasonable deadlines that should be further specified in the Recommended Procedures. This aspect is currently not being monitored nor reported by the SPS Secretariat.<sup>10</sup> Some Members also follow parallel processes to liaise with trading partners, often abandoning the WTO route once the initial notification is made, thus not replying within the WTO framework to comments made.

5.3. The mechanism to make comments available to other Members also has the potential to be reinforced.<sup>11</sup> This was already proposed by Egypt during the 3<sup>rd</sup> Review in 2010 and deserves the further reflection of the Committee.<sup>12</sup>

## 6 COMPREHENSIVE INFORMATION ABOUT SPS MEASURES IN FORCE

6.1. Availability, at any given time, of all SPS measures adopted by any Member is another area of concern. The difficulties created by the insufficient access to such information pose a major obstacle to international trade.

6.2. It happens sometimes that a Member, due to the comments received, decides to postpone a draft measure for a long time, or to not adopt it at all, but this decision is not communicated via the WTO notification system to all Members.

6.3. Often Members do not make information on their SPS measures easily available to the public via, for example a dedicated website, with lists and summaries of applicable SPS import conditions. In addition this information is not kept updated in real time.

## 7 CONCLUSION

7.1. The above constitutes a preliminary and not an exhaustive list. Clearly there are other transparency provisions in the Recommended Procedures which may also merit being looked into.

7.2. Chile, the European Union, Morocco and Norway welcome suggestions related to the transparency provision of the SPS Agreement that other Members may wish to submit for consideration under the 4<sup>th</sup> Review.

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<sup>10</sup> G/SPS/GEN/804/Rev.6, page 13, point 5.1.d.

<sup>11</sup> G/SPS/7/Rev.3, page 5, point 32.

<sup>12</sup> G/SPS/53, page 8, point 41.