



SANITARY & PHYTOSANITARY (SPS) MEASURES: DISCUSSION PAPER FROM BRAZIL

FIFTH REVIEW

Submission from Brazil

The following communication, received on 5 June 2018, is being circulated at the request of the Delegation of Brazil.

On the occasion of the Fifth Review of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) Brazil would like to promote the discussion of some topics previously addressed in the Special Session of the Committee on Agriculture (RD/AG/57). Based on Members' reactions to this paper, Brazil will consider possible next steps.

1 BACKGROUND

1.1. Regulatory issues have been increasingly highlighted as a key element of the international trade architecture. The SPS Agreement provides a solid base for the treatment of regulatory issues in the area of trade in agricultural products, but it is necessary to reinforce its features to ensure the attainment of its objectives.

1.2. The core element of the SPS Agreement is the science-based approach. This approach needs to be reinforced, in a clear and precise way, so that SPS measures are not applied in a manner which would constitute an arbitrary and unjustifiable discrimination or a disguised restriction on international trade. SPS measures without sufficient risk-based scientific evidence should not be maintained by Members.

1.3. By bridging differences, the SPS Committee has been capable to deliver on relevant issues over the past two decades, and this has contributed significantly to the implementation of the SPS Agreement. However, the Committee has been facing challenging scenarios in the past few years, as illustrated by the difficulties to adopt the Fourth Review of the Agreement (G/SPS/62), which was scheduled to be concluded in October 2014, and to move forward since July 2015 on the Catalogue of Instruments (G/SPS/63), finally adopted in March 2018.

1.4. Taking into account the need to maintain the balance between the right to protect human, animal or plant life or health, and the need to minimize the negative effects on trade of SPS measures, the following issues are presented for discussion, with a view to contributing to possible concrete results:

2 SCIENTIFIC JUSTIFICATION (ARTICLE 2.2) AND RISK ASSESSMENT

2.1. The link between the obligation to base SPS measures on science, contained in Article 2.2 of the SPS Agreement, and the more specific obligation to "ensure that SPS measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health", contained in Article 5.1, has been recognized by the Dispute Settlement Body in a number of cases (EC-Hormones, US/Canada-Continued Suspension, EC-Biotech, Australia-Salmon, US-Poultry). Article 2.2, under the title "Basic Rights and Obligations", is the light under which to

read the other provisions of the Agreement, and risk assessment under 5.1 has unmistakably to be conducted following this overarching principle and is the means by which scientific justification is attained.

2.2. A clear reaffirmation of this would strengthen the scientific basis of the SPS Agreement, thereby limiting the use of SPS measures as an arbitrary and unjustifiable discrimination or a disguised restriction on international trade.

3 EQUIVALENCE (ARTICLE 4)

3.1. Article 4.2 gives a clear-cut message regarding Members' obligation to "enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures". However, this obligation is seldom implemented and, according to the SPS Information Management System, only two notifications of recognition of equivalence have been submitted since the adoption of the Decision on the Implementation of Article 4 (Equivalence) of the SPS Agreement (G/SPS/19/Rev.2).

3.2. To improve the implementation of Article 4, Members should recognize the importance of the Decision (G/SPS/19/Rev.2), commit to follow its provisions and reinforce the commitment of their countries to enter into consultations when requested, following Article 4.2 and the procedures described in the Decision itself.

4 ASSESSMENT OF RISK AND DETERMINATION OF THE APPROPRIATE LEVEL OF SANITARY OR PHYTOSANITARY PROTECTION (ARTICLE 5)

4.1. Science must be the foundation of SPS measures. Establishing science-based SPS measures is of paramount importance to the proper functioning of the multilateral trading system. Nevertheless, the increase of SPS measures that are not based on international standards, guidelines and recommendations or that have inadequate scientific justification is a point of concern raised by many Members in the SPS Committee and other contexts (G/SPS/GEN/1143/Rev.2). These measures often unduly restrict trade and seem to be associated with objectives that are not legitimate under international trade rules.

4.2. Article 5 is one of the main pillars of the SPS Agreement. The SPS Agreement requires Members to base their measures on risk assessment, a scientifically based process, consisting of (i) hazard identification, (ii) hazard characterization, (iii) exposure assessment, and (iv) risk characterization, and distinct from "risk management", according to the Codex Alimentarius Procedural Manual. Members could discuss guidelines to ensure that the factors to be taken into account on risk assessment, as provided for in Articles 5.2 and 5.3, are appraised in ways supported by scientific evidence and methods. In addition, although Members may base an SPS measure on divergent or minority views, when there is scientific critical mass on a certain subject, these opinions should only be accepted as the basis of SPS measures if they are from respected and qualified sources and have the necessary scientific and methodological rigour.

4.3. Concerning Article 5.7, conflicting jurisprudence recommends an effort to arrive at a common understanding about its function as a derogation to the obligation of following scientific evidence in the formulation of SPS measures. Members could discuss ways to avoid abuse of its use, for instance by: (i) agreeing that notification of corresponding provisional measures specify that they are taken under Article 5.7, with the opportunity for the adopting Member to state its views on the insufficiency of scientific evidence in relation to the issue that gave origin to the measure; (ii) defining the procedural steps necessary, given the impossibility, in this case, of establishing a proper risk assessment, and reaffirming that applicable principles of Article 5, such as provided for in 5.4 and 5.6, for example, remain valid; (iii) agreeing that, as a derogation to the general rule, it is up to the Member invoking Article 5.7 to present the evidence that scientific knowledge is insufficient in relation to the matter at stake, that the measure is based upon available information, and that the Member has sought additional information and reviewed the measure accordingly within a reasonable period of time.

5 REGIONALIZATION (ARTICLE 6)

5.1. The effective implementation of Article 6 is currently limited by several issues, such as:

- The substantial investments needed to achieve and maintain the status of pest or disease free areas, or areas of low pest or disease prevalence (particularly for developing countries);
- The different requirements adopted by the competent international organizations (particularly OIE) and importing Members.

5.2. Achieving international recognition may not facilitate trade if Members do not accept a pest or disease status recognized by the pertinent international organizations. To help resolve these challenges, Members could consider the option of automatically recognizing a disease status granted by the OIE. Similar recognition by the IPPC should be encouraged. Recent jurisprudence on the issue ("Russia-Pigs") recognizes the key role the Agreement attributes to international organizations on the matter.

5.3. The automatic recognition of the OIE's (and eventually the IPPC's) status would not require any modification of the SPS Agreement, since such a provision can be considered as covered by Articles 6 and 3.2. To avoid any doubt in interpretation, Members could collectively declare that they accept a status recognition by the relevant international organization as an objective demonstration under 6.3.
