

NOTES ON CONSISTENCY IN RISK MANAGEMENT

The following notes were prepared by the delegation of **Australia**, at the request of the Secretariat, to facilitate discussion of this issue at the meeting of the Committee on 29-30 March 1995.

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**Background**

1. Article 5.5 of the Agreement on the Application of Sanitary and Phytosanitary Measures requires as follows:

"With the objective of achieving consistency in the application of the concept of appropriate level of sanitary and phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves."

2. Essentially Article 5.5 means that the sanitary and phytosanitary measures which a WTO Member adopts should reflect a consistent approach to the management of assessed risks. The assessment of risks is required by Article 5.1:

"Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health ..."

**Issues for consideration**

3. The SPS Agreement envisages that the measures put into place and maintained by a Member will either be based on international standards, guidelines or recommendations or they must be based on risk assessment and a consistent approach to management of assessed risks. The management of assessed risks will generally take the form of setting a standard or applying some other measure which will ensure that the Member's appropriate level of sanitary or phytosanitary protection is achieved.

4. It is clear that the test of consistency in risk management plays a crucial role in ensuring that SPS measures are not used as arbitrary or unjustified barriers to trade. If such consistency were not required, it would be open to a Member to arbitrarily establish the appropriate level of protection in an individual instance, so as to protect a domestic industry against import competition whenever there is assessed to be a pest, disease or other risk, however small, associated with the imported product.

5. Consequently there are two main issues for consideration:
  - (i) What methods and procedures can be adopted by Members to ensure (or at least to assist) their achievement of the objective of consistency in risk management?
  - (ii) What criteria or tests can be applied *ex post* to indicate whether consistency has been achieved?

Examination of these issues should lead to some suggestions on how guidelines might be developed as anticipated in Article 5.5.

#### **Approaches at the national level**

6. Various means could be used by a Member to promote consistency in its management of sanitary or phytosanitary risk.

7. Firstly, the relevant authorities of the Member government could define and publish general statements concerning the policy objectives of the Member's sanitary or phytosanitary measures. Usually such statements will be qualitative rather than quantitative, but nevertheless they can serve to guide the consistent implementation of policy over time while also increasing the transparency of the sanitary/phytosanitary régime to other countries.

8. Secondly, the Member's authorities could adopt a standard approach to risk assessment. The standard approach would involve systematically working through a defined series of steps which would cover, *inter alia*, the specific matters mentioned in paragraphs 5.2 and 5.3 of the SPS Agreement. Ideally the methodology for risk assessment adopted by a Member should parallel the methodology used and/or recommended by relevant international standard-setting organizations, but it would not be necessary for all Members to use the same methodology. For certain kinds of assessment it may be possible to use quantitative methods, which would assist consistency in the establishment of measures.

9. The use by a Member of a standard approach to risk assessment would allow the presentation of results and advice to the risk management decision makers in a consistent manner.

10. Thirdly, a Member could establish mechanisms to ensure that there is a high degree of consultation and coordination between those making risk management decisions or recommendations in the different fields of sanitary/phytosanitary control, for example, as between the authorities responsible for animal quarantine and those responsible for plant quarantine, to facilitate a consistent approach.

11. Fourthly, it could be helpful for a Member to establish a protocol for the making of risk management decisions which required, *inter alia*, consideration of whether the proposed decision was consistent with previous decisions to establish measures, particularly those measures most directly comparable. It might also be helpful for the relevant authorities to consider what the authorities of other countries had decided to do to manage similar risks in similar circumstances - for example, in establishing a quarantine measure to address risks created by the outbreak of an animal disease of major significance in a country which traded relevant products to a number of other countries.

12. Fifthly, a Member might choose to establish a source of independent expert advice on the application of SPS measures whose mandate would include commenting on the consistency of risk management as reflected in measures.

13. Finally, a Member could establish a mechanism for ensuring that measures already in place are reviewed by the responsible authorities at appropriate intervals and adjusted if they reflect risk management which is no longer in accordance with the national norm.

#### **Approaches at the international level**

14. Although all of the Members of the WTO have the obligation of managing sanitary/phytosanitary risks in a consistent way, it may on occasion occur that one Member may not be satisfied that this obligation has been fully met by another Member, in respect of a particular measure. In the first instance the Member who is not satisfied may seek an explanation of the reasons for the measure, in accordance with paragraph 5.8 of the SPS Agreement. Ultimately the Member may choose to resort to the formal WTO procedures for consultation and dispute settlement. The key question is how it may be determined in such circumstances whether there has been inconsistency in the management of risk.

15. The perception of inconsistency may arise because, for example, a Member may have chosen to base some of its measures in a particular field (such as tolerances for pesticide residues in foodstuffs) on relevant international standards, but to use a more conservative measure (i.e. a tolerance less than the relevant Codex standard) in a certain instance. Another example might be where a Member has adopted a much more restrictive attitude than other Members to trade in a commodity with which a certain animal disease risk is associated, even though the Member's animal quarantine régime is ordinarily in accordance with other, like countries' régimes.

16. Even if there is no comparison which can be drawn with international standards or with the practices of third countries, an exporting Member may feel that the measure applied by an importing Member with respect to a particular commodity which could be traded between the two parties is unduly restrictive in its approach to controlling assessed SPS risk by comparison with the approach taken by the importing Member in respect of other commodities in trade between the two parties.

17. In the case of any of these examples the Member may be able to point to specific reasons why it has adopted its measures. These explanations may demonstrate that the perceived inconsistency is attributable to factors other than the risk management decision. Such factors could include the availability of new scientific evidence about the nature or extent of the SPS risk involved, or some specific aspect of the situation in the importing country.

18. If explanation along these lines cannot be provided, it is conceivable that a WTO dispute settlement panel may ultimately have to adjudicate on whether there is strong evidence of inconsistency of risk management, contrary to the provisions of Article 5 of the SPS Agreement. Several of the tests which might be applied by a panel are foreshadowed in the preceding paragraphs.

#### **Other issues**

19. One other matter which needs to be addressed in association with the topic of consistency in risk management is how the burden of proof is distributed between the parties to a disagreement. This paper has not addressed that issue.

20. Nor has the paper addressed how to take into account "the exceptional character of human health risks to which people voluntarily expose themselves". In this context it will also be relevant to consider whether, and how, consistency is achievable between the management of risks to human health and the management of risks to animal and plant life or health.

**Recommendations**

21. It is suggested that the Committee on Sanitary and Phytosanitary Measures might:
- (i) Consider and discuss the issues raised in relation to the implementation of paragraph 5.5 of the Agreement;
  - (ii) Identify those aspects of the topic on which further work is required;
  - (iii) Decide how that work is to be carried out.