

Committee on Sanitary and Phytosanitary Measures

CLARIFICATION OF PARAGRAPH 7 OF THE DECISION ON EQUIVALENCE

Note by the Secretariat¹

Revision

On the basis of discussions and suggestions made during the informal meeting of the SPS Committee on 23 May 2003, the Recommendations in paragraph 9(b) and 9(d) have been revised. Paragraph 8 has also been revised to reflect adoption of the recommendation on equivalence during the OIE General Session of May 2003.

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1. Paragraph 7 of the Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures (the "Decision on Equivalence", G/SPS/19) states that:

"When considering a request for recognition of equivalence, the importing Member should analyze the science-based and technical information provided by the exporting Member on its sanitary or phytosanitary measures with a view to determining whether these measures achieve the level of protection provided by its own relevant sanitary or phytosanitary measures."

2. When this Decision was adopted, some Members noted that further work was required to explore the relationship between the level of protection provided by the importing Member's own measures and what it required from imported products. Other Members noted that Article 5.5 of the SPS Agreement addressed the issue of consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection (ALOP), and that the Committee had adopted Guidelines to Further the Practical Implementation of Article 5.5 (G/SPS/15). The Committee's Programme for Further Work on Equivalence (G/SPS/20) foresees consideration of a draft text clarifying the provisions of paragraph 7 for the first informal and regular meetings of 2003.

3. Several Members addressed this concern in oral and written contributions, including Argentina (G/SPS/W/117) and Australia (G/SPS/GEN/331). Argentina stressed that, for the purposes of determining equivalence, the exporting country had to demonstrate that its sanitary or phytosanitary measures achieved the same appropriate level of protection as that provided by the relevant measures of the importing country. According to Argentina, paragraph 7 of Decision G/SPS/19 clarified Article 4 of the SPS Agreement, which refers to an exporting Member objectively demonstrating that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection.

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.

4. Argentina indicated that, in some situations, an importing Member's sanitary or phytosanitary measure may not achieve its own ALOP. When determining equivalence in such a situation, in order to avoid discrimination, the importing Member should not compare an exporting Member's measure to its ALOP, but to the level of protection actually attained by the importing Member's own measure. According to Argentina, paragraph 7 had the objective of ensuring that the principle of non-discrimination, as reflected in Articles 2.3 and 5.5 of the SPS Agreement, was applied in the determination of equivalence.

5. Australia highlighted the fact that the text of paragraph 7 did not precisely correspond with the text of Article 4 of the SPS Agreement. According to Australia, in most instances no difficulty would arise, because the level of protection achieved by the importing Member's measures would be the same as the importing Member's ALOP. Where there was a disparity between the ALOP required by the importing Member and the level achieved by its own measures, however, difficulties could arise. Australia suggested overcoming these difficulties by recognizing the primacy of the SPS Agreement, so that paragraph 7 could not be interpreted inconsistently with Article 4.

6. Australia furthermore raised the issue of how to judge whether an exporting Member's measure reliably achieved the ALOP of an importing Member. Since many Members did not clearly state their ALOP, some practical means for comparing measures might be necessary to determine equivalence. Australia suggested that the importing Member should specify an objective basis for comparison of alternative measures. Noting that paragraph 2 of the Decision required an importing Member to provide certain information, Australia suggested that importing Members could be encouraged to provide such an objective basis for comparison as part of the "additional information" referred to in paragraph 2. For example, an importing Member could state that equivalence would be demonstrated if the exporting Member provided evidence that its measure resulted in a sanitary or phytosanitary risk no higher than that resulting from application of the importing Member's own measure.

7. At its meeting on 2-6 December 2002, the Codex Committee on Food Import and Export Inspection and Certification Systems (CCFICS) forwarded draft Guidelines on the Judgement of Equivalence of Sanitary Measures Associated with Food Inspection and Certification Systems to the Codex Alimentarius Commission for final adoption in June/July 2003.² According to these draft Guidelines, the determination of equivalence would be based on an objective basis for comparison. On the subject of the objective basis of comparison, the draft Guidelines state:

"15. Since the sanitary measures applied by an importing country have the purpose of achieving its ALOP, an exporting country may demonstrate achievement of the importing country's ALOP by demonstrating that the measures it proposes as equivalent have the same effect, relative to the achievement of the importing country's ALOP, as the corresponding sanitary measures applied by the importing country by using an objective basis of comparison.

"16. The importing country should, at the request of the exporting country, specify as precisely as possible an objective basis for comparison of the sanitary measures proposed by the exporting country and its own measures. Dialogue between the exporting and importing country will assist in the development of understanding and, desirably, agreement on the objective basis for comparison. Supporting information to be provided by the importing country may include:

² See the Report of the Eleventh Session of the Codex Committee on Food Import and Export Inspection and Certification Systems, contained in ALINORM 03/30A, available from the Codex website (<http://www.codexalimentarius.net>).

- (a) the reason/purpose for the sanitary measure, including identification of the specific risks that the measure is intended to address;
- (b) the relationship of the sanitary measure to the ALOP, i.e., how the sanitary measure achieves the ALOP;
- (c) where appropriate, an expression of the level of control of the hazard in a food that is achieved by the sanitary measure;
- (d) the scientific basis for the sanitary measure under consideration, including risk assessment where appropriate;
- (e) any additional information that may assist the exporting country in presenting an objective demonstration of equivalence."
(footnote omitted)

8. The OIE recommendation on the Judgement of Equivalence of Sanitary Measures Relating to International Trade in Animals and Animal Products (draft described in G/SPS/W/119) takes a similar approach. The sequence of steps to be taken in judgement of equivalence includes that "the importing country explains the reason for the measure(s), in terms which would facilitate comparison with an alternative sanitary measure(s) ...".

Recommendation

9. It is recommended that the Committee agree the following clarification of paragraph 7:
- (a) The Committee notes that conscientious implementation of the Guidelines to Further the Practical Implementation of Article 5.5 (G/SPS/15) will assist Members in determining equivalence.
 - (b) The Committee further notes that the relationship between the level of protection provided by the importing Member's own measures and what it requires from imported products has been explicitly addressed in the draft Codex Guidelines on the Judgement of Equivalence of Sanitary Measures Associated with Food Inspection and Certification Systems.³ The Committee agrees that Members should consider the Codex approach of establishing an "objective basis for comparison" when determining the equivalence of SPS measures, especially in the food safety area. The Committee notes that the OIE recommendation on the Judgement of Equivalence of Sanitary Measures Relating to International Trade in Animals and Animal Products also recognizes the importance of facilitating comparison of the exporting and importing Members' measures. The Committee encourages the FAO/WHO Codex Alimentarius Commission and the Office International des Epizooties to ensure that the recognition of the importance of facilitating comparison of the exporting and importing Members' measures is maintained in any elaboration of guidance by these organizations.

³ The Committee recognizes that the Codex Guidelines for the Development of Equivalence Agreements Regarding Food Import and Export Inspection and Certification Systems are also relevant in this regard.

- (c) The Committee requests that the Interim Commission on Phytosanitary Measures (ICPM) take into consideration the Decision on Equivalence and this clarification in its future work on judgement of equivalence with regard to measures to address plant pests and diseases.
 - (d) The Committee agrees that where the "objective basis for comparison" demonstrates that the level of protection achieved by the importing Member's sanitary or phytosanitary measure differs from its appropriate level of protection, the importing Member should resolve this difference independently of the procedure for determination of equivalence.
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