

## Committee on Sanitary and Phytosanitary Measures

### AD HOC CONSULTATIONS AND RESOLUTION OF TRADE CONCERNS

Note by the Secretariat<sup>1</sup>

#### I. INTRODUCTION

1. Among the issues raised in the Second Review of the Operation and Implementation of the SPS Agreement was the use of ad hoc consultations, as well as of specific trade concerns. This paper summarizes the main proposals that have been made in this regard in the context of the Second Review, and provides some background information regarding the manner in which these issues have been addressed to date.

2. Article 12.2 of the SPS Agreement provides that:

The Committee shall encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary or phytosanitary issues. The Committee shall encourage the use of international standards, guidelines or recommendations by all Members and, in this regard, shall sponsor technical consultation and study with the objective of increasing coordination and integration between international and national systems and approaches for approving the use of food additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs.

3. The Committee has undertaken this task in essentially three ways: through a regular agenda item on specific trade concerns; through agenda items on specific issues such as equivalence or private standards; and through the development of a mechanism for using the Good Offices of the SPS Chairperson.

#### II. SPECIFIC TRADE CONCERNS

4. A substantial part of each meeting of the SPS Committee is devoted to the consideration of specific trade concerns raised by Members. A catalogue of these concerns is contained in document G/SPS/GEN/204 and revised annually.<sup>2</sup> The first part of the document contains a summary of the concerns raised, including the number of new issues raised each year, trade concerns by subject (food safety, animal health, plant protection or other), participation of Members in raising or supporting new trade concerns, the number of specific concerns for which a resolution has been reported, etc. A complete list of the specific trade concerns, including the Member(s) raising the issue and the Member(s) maintaining the issue is also provided in the first part of the document. Each specific trade concern is given a unique identifying number.

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<sup>1</sup> 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.

<sup>2</sup> The most recent revision, Revision 7, contains all specific trade concerns raised from 1995 through 2006.

5. The Rules of Procedure of the Committee do not explicitly identify specific trade concerns, however the Committee has applied the procedure for matters relating to notifications also to the raising specific trade concerns at Committee meetings. According to the Working Procedures of the Committee<sup>3</sup>

"Notice of meetings of the Committee and a draft agenda shall be issued at least 10 days prior to the date of the meeting. It shall be open to any Member to request, in writing to the Secretariat, the inclusion of items under the proposed agenda up to, but not including, the day on which the notice convening the meeting is to be issued.

"Matters relating to notifications, including notifications considered at previous meetings, can be raised or reverted to in the course of any meeting. A Member which proposes to raise any matter relating to a particular notification in the course of a meeting shall give notice of its intention to the notifying Member concerned and the Secretariat, together with an outline of its concerns, as far as possible in advance of the meeting."

6. An airgramme is sent to Members approximately one month prior to each regular meeting, with a reminder of the relevant dates. This airgramme states that:

Members proposing to raise other matters relevant to the implementation of the Agreement, including any matter relating to a particular notification, are requested to give notice to the other Member(s) concerned and to the Secretariat, together with an outline of the matter to be raised, as far as possible in advance of the meeting, and in any case no later than noon on [11 days prior to first day of the regular meeting].

7. In practice, when requesting the inclusion of a specific trade concern on the agenda for a specific meeting, some Members provide copies to the Secretariat of their correspondence with the other Member(s) concerned regarding the inclusion of the item on the agenda. In other cases, Members provide copies to the other Member(s) concerned of their request to the Secretariat for inclusion of the specific trade concern on the agenda. In those cases where it is not apparent that the other Member(s) concerned has been duly informed, the Secretariat may remind the requesting Member of the requirement to inform other concerned trading partners. Unfortunately, Members do not always provide an outline of their specific concerns.

8. In many cases, bilateral consultations are scheduled in the margins of meetings of the SPS Committee to discuss the specific concern, and at times this has resulted in sufficient progress being made towards the resolution of the issue that the requesting Member may withdraw the item from the agenda of the meeting.

9. During this agenda item, the Chairperson will first give the floor to the Member who is raising the specific trade concern, then invite any other Members who wish to comment on the matter to take the floor, before finally giving the floor to the Member maintaining the measure. Any Member may also circulate a document which provides more detailed information regarding the matter, either in advance of or at the time of the Committee meeting. The discussion of the issue is summarized in the report of the Committee meeting, and also included in the subsequent revision of the catalogue of specific trade concerns (G/SPS/GEN/204).

10. A number of specific trade concerns are raised only once, while others may be raised repeatedly at meetings of the SPS Committee. (Some issues have been raised as many as 15 times.)

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<sup>3</sup> G/SPS/1, paragraphs 2 and 3.

Members are requested to inform the Committee regarding the resolution of any specific trade concerns previously raised.

11. In the context of the Second Review, several proposals were made to improve and increase the use of this mechanism for resolving specific trade concerns. Suggestions included:

- (a) providing more time for consideration of specific trade concerns at meetings of the Committee;
- (b) establishing specific processes and procedures, as well as timeframes, to ensure the expeditious resolution of trade concerns;
- (c) informing other Members of steps taken and of results; and
- (d) facilitating the more active participation of developing and least-developed country Members.

12. Another suggestion was to establish a process whereby a Member would first request an explanation and justification for a measure through Article 5.8<sup>4</sup>, followed by the exchange of documents and perhaps questionnaires, and bilateral meetings. Should this not resolve the issue, the concern could be raised as a specific trade concern in a meeting of the Committee, and if the problem persists, the Member concerned may seek the Chairman's good offices.

### III. CONSIDERATION OF SPECIFIC ISSUES

13. Over the years, the Committee has included the consideration of specific issues as part of the agenda of its regular meetings. It was through this mechanism that the Committee has addressed issues arising from the implementation of certain provisions of the SPS Agreement, such as Article 5.5 (consistency – G/SPS/15), Article 4 (equivalence – G/SPS/19/Rev.2), Article 7 (transparency – G/SPS/7/Rev.2), Article 10 (special and differential treatment – G/SPS/35), Article 12.4 (monitoring the use of international standards – G/SPS/11/Rev.1) and has more recently considered the implementation of Article 6 (Regionalization). Previous agenda items have included, for example, "Risk assessment - general approach and description of actual cases of risk assessment"; "Identification of practices for exchange of information"; and "Development and application of pesticide limits". The inclusion of the issue of "Private and commercial standards" is a more recent example.

14. The ability of any Member to suggest that the Committee consider, as part of its agenda, any specific issue provides another mechanism for "ad hoc consultations or negotiations among Members on specific sanitary or phytosanitary issues", as foreseen in Article 12.2. Although no formal procedure has been adopted in this regard, a Member who is interested in including a specific issue on the agenda of the next Committee meeting normally makes the proposal to the Committee, providing an explanation or justification for this request. The requested agenda item is included in the provisional agenda for the next meeting, adopted by the Committee at the closure of each meeting. Frequently the Member(s) who have requested inclusion of a specific trade issue will submit a background document to the Committee in advance of the meeting at which the issue will be considered, to help focus the discussions of the Committee, or the Secretariat may be requested to prepare a background document. The Committee will determine what further action, if any, it will take on the specific issue in light of the proposals of Members and the discussions in the meeting.

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<sup>4</sup> "When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure."

15. Presently, this approach is being used to address a number of the specific issues identified in the Second Review of the operation and implementation of the SPS Agreement, including the use of ad hoc consultations and the relationship between the SPS Committee and Codex, IPPC and OIE.

#### IV. GOOD OFFICES OF THE SPS CHAIRPERSON

16. The Rules of Procedure for the SPS Committee provide that:

With respect to any matter which has been raised under the Agreement, the Chairperson may, at the request of the Members directly concerned, assist them in dealing with the matter in question. The Chairperson shall normally report to the Committee on the general outcome with respect to the matter in question.<sup>5</sup>

17. The "good offices" of the SPS Chairperson have been solicited by Members on three distinct occasions. In 1997, Argentina, Chile, the European Communities, South Africa and Uruguay requested the Chairperson's assistance with respect to measures relating to citrus canker taken by the European Communities. The European Communities informed the Committee of these consultations at its meeting of March 1998 (GEN/204/Rev.7/Add.3, paras. 99-102). Most of the Members involved in the consultations subsequently informed the Committee that this issue had been resolved.

18. In 1998, the "good offices" of the Chairperson and of the Secretariat were requested by the United States and by Poland with respect to restrictions on wheat and oilseeds maintained by Poland. At the meeting of the Committee in November 1998, the Chairperson informed the Committee of this request and of the consultations which he had organized between the interested Members regarding tolerance levels for weed seed, particularly of the genus *Ambrosia* (G/SPS/GEN/204/Rev.7/Add.2, paras. 447-448). The United States and Poland subsequently reported that this issue had been resolved.

19. In 2001, Canada and India requested that the Secretariat provide "good offices" to facilitate discussions with respect to import restrictions on bovine semen maintained by India, due to BSE-related concerns. Canada informed the Committee of these consultations in March 2001 (G/SPS/GEN/204/Rev.7/Add.2, paras. 319-327). Although Canada and India initially reported resolution of the problem, Canada subsequently indicated that some further difficulties had arisen.

20. Although no formal procedures have been developed regarding the use of the Chairperson's (or Secretariat's) "good offices", in these three cases similar procedures have been followed. First, all parties to the issue must agree to request the "good offices". This request can be made informally or in writing, directly to the Chairperson or through the Secretariat. Secondly, the Chairperson will consult with the Members who have made the request to determine an appropriate time and place for a meeting. These meetings may be held at the WTO premises, or elsewhere if suitable for all involved. At the meetings, the Chairperson has requested factual information from the Members regarding the issue at hand, and has suggested possible actions which the Members may take to resolve the problem. The meetings are informal and the suggestions of the Chairperson are not binding. The Members are requested to keep the Chairperson informed of any progress that may be made in resolving the problem, and may request additional meetings facilitated by the Chair. Following the consultations, the Chairperson - or the Members involved - inform the Committee, orally, of the use of the Chairperson "good offices" and of progress in resolving the trade problem.

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<sup>5</sup> G/SPS/1, paragraph 6.

## **V. ARTICLE 5.8**

21. As noted in paragraph 14 above, it has been suggested that the Committee could elaborate a procedure whereby a Member could first request an explanation and justification for a measure through Article 5.8, followed by the exchange of documents and perhaps questionnaires, and bilateral meetings. Should this not resolve the issue, the concern could be raised as a specific trade concern in a meeting of the Committee, and if the problem persists, the Member concerned may seek the Chairman's good offices.

22. Article 5.8 provides that:

When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure.

23. The Committee has not elaborated any procedure regarding the implementation of Article 5.8, and there is no obligation for the Members concerned to inform the Chairperson or the Secretariat of their recourse to Article 5.8. Nonetheless, the Secretariat has been informed in several instances by a Member that they are soliciting an explanation for a measure with reference to Article 5.8. In most of these cases, the Member has requested such justification formally, in writing, directly of the Member maintaining the measure, and has provided a copy of this request to the Chairperson and Secretariat. In most of these cases, the responding Member has also provided a copy of their response to the Chairperson and Secretariat.

24. In some cases, the request for justification with reference to Article 5.8 has followed the raising of this matter as a specific trade concern in a Committee meeting; in other cases the Article 5.8 request has preceded the raising of a specific trade concern, or the issue has not been brought to the agenda of the SPS Committee.

## **VI. CONCLUSIONS**

25. A number of mechanisms exist by which the Committee – or the Chairperson – can facilitate ad hoc consultations or negotiations among Members on specific SPS issues, as provided in Article 12.2. The most commonly used of these mechanisms is the inclusion of specific trade concerns on the agenda of the SPS Committee.

26. The participation of representatives from the Codex, IPPC and OIE in the meetings of the Committee also provides an opportunity for technical clarifications of some issues, or suggestions for further actions that may be taken at the technical level, including within the context of the work of the standard-setting bodies.

27. The Committee should also be aware that some Members have tabled proposals in the context of the Non-Agricultural Market Access negotiations with regard to procedures for facilitating the resolution of non-tariff measures (see TN/MA/W/11/Add.8, TN/MA/W/68/Add.1 and JOB(07)/57). These proposals would establish a procedure whereby the relevant WTO committee (which might include the SPS Committee) would designate a facilitator (or expert) to assist the Members concerned to rapidly resolve problems arising due to a non-tariff measure which prohibits or restricts trade in goods. These proposals, if eventually adopted by Members, might thus create another mechanism for addressing specific SPS trade concerns within the SPS Committee.

28. In light of the concerns raised by Members in the context of the Second Review of the operation and implementation of the Agreement, and in light of the experience of Members since 1995, the Committee may wish to consider whether it would be useful to elaborate additional mechanisms for addressing specific issues, or whether the development of more detailed procedures for the use of the existing mechanisms is warranted.

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