

**SECOND REVIEW OF THE OPERATION AND IMPLEMENTATION  
OF THE AGREEMENT ON THE APPLICATION OF SANITARY  
AND PHYTOSANITARY MEASURES**

Clarification of the Terms "Measures" and "Regulations"  
as contained in the SPS Agreement

*Submission by Canada*

The following communication, received on 17 March 2006, is being circulated at the request of the Delegation of Canada.

**I. INTRODUCTION**

1. The transparency provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) are a cornerstone to the effective implementation of the SPS Agreement. These provisions can facilitate Members in attaining a greater degree of predictability and clarity with respect to the adoption of sanitary and phytosanitary (SPS) measures by trading partners.

2. Clarification of the definition of terms was identified as a priority in the Second Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures (G/SPS/36). As part of the Work Programme for the Committee, Members agreed that the Committee should consider clarification of the terms "measures" and "regulations" as contained in the SPS Agreement. It is in this context that Canada submits this paper.

**II. DEFINITION OF TERMS**

3. The Preamble, Article 1 (General Provisions), Article 7 (Transparency), and Annex A (Definitions) of the SPS Agreement all utilize the term "measures". Article 1 states:

[t]his Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.

4. Article 7 obliges Members to "notify changes in their sanitary or phytosanitary measures and ... provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B."

5. Annex A defines a sanitary or phytosanitary measure to include:

all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

6. In comparison, Annex B (Transparency of Sanitary and Phytosanitary Regulations) of the SPS Agreement refers only to regulations in its title and throughout the text. Annex B, paragraph 1 states: "Members shall ensure that all sanitary and phytosanitary regulations<sup>5</sup> which have been adopted are published promptly ...". The footnote in Annex B, paragraph 1, qualifies regulations as "[s]anitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally".

7. Annex B, paragraph 2 states: "[e]xcept in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force ...". Annex B, paragraph 3 (Enquiry Points), paragraph 5 (Notification Procedures), and paragraph 6 each refer only to regulations, not measures.

8. The 2002 Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (G/SPS/7/Rev.2) outlines steps Members should follow to improve transparency of SPS regulations. However, a footnote immediately following the first reference to "regulation" states:

[t]he SPS Agreement uses the terms 'measures' and 'regulations' somewhat interchangeably when referring to any sanitary or phytosanitary measure such as laws, decrees, or ordinances applied to protect human, animal or plant life or health as defined under paragraph 1 of Annex A to the SPS Agreement.

9. Despite this reference to the apparent interchangeability in the use of the terms "measures" and "regulations", the distinction seen in the SPS Agreement, in particular between Article 7 and Annex B, may generate a degree of uncertainty regarding Members' obligations with respect to the transparency provisions of the Agreement. This uncertainty leads to Members failing to notify certain measures simply because they are not considered "regulations".

### III. JURISPRUDENCE AND THE TRANSPARENCY OF SPS MEASURES

10. With reference to the footnote in Annex B, paragraph 1, the Appellate Body in *Japan – Agricultural Products II* ruled that the list of instruments contained in the footnote was not exhaustive in nature and that:

[t]he scope of application of the publication requirement is not limited to 'laws, decrees or ordinances', but also includes, in our opinion, other instruments which are applicable generally and are

similar in character to the instruments explicitly referred to in the illustrative list of the footnote to paragraph 1 of Annex B.<sup>1</sup>

11. Measures to protect human, animal or plant life or health may have a significant effect on trade of other Members. It is for this reason that, under the SPS Agreement, notifications are used to inform other Members about new or changed regulations that may significantly affect their trading partners. It is logical, therefore, that the Appellate Body, in *Japan - Agricultural Products II*, focussed more on "applicability" than on "nature or type" when considering which sanitary or phytosanitary measures should be considered as regulations for the purposes of transparency. It is important for all SPS measures that are applicable generally to be notified to the World Trade Organization.

#### **IV. WAY FORWARD**

12. The transparency obligations are the cornerstone of the SPS Agreement, ensuring that there is clarity, predictability, and access to information about measures developed to protect human, animal or plant life or health. Despite the existence of jurisprudence in the form of an Appellate Body report, Canada sees significant benefit in a decision by the Committee to further clarify this issue, in the context of the current Review of the SPS Agreement. Such a Committee decision would recognize that, when referring to "regulations" in Annex B, the intent of the Agreement is to include measures that are applicable generally and may have a significant effect on trade of other Members.

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<sup>1</sup> Appellate Body Report on *Japan – Agricultural Products II*, paras. 105-107.