

Committee on Sanitary and Phytosanitary Measures

**PROPOSED RECOMMENDED PROCEDURE TO ENCOURAGE AND FACILITATE
AD HOC CONSULTATIONS OR NEGOTIATIONS AMONG MEMBERS
UNDER THE SPS AGREEMENT (ARTICLE 12.2)**

Note by the Secretariat¹

Revision

INTRODUCTION

1. Article 12.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) states that: "The Committee shall encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary or Phytosanitary issues." The Working Procedures of the Committee, adopted by the Committee in March 1995, 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."²

2. In accordance with Article 12.7 of the Agreement, the Committee has carried out three reviews of the operation and implementation of the Agreement to date. In all Reviews, the Committee recognized the usefulness of the application of Article 12.2 to assist Members to reach mutually satisfactory solutions regarding sanitary and phytosanitary issues. In the First Review of the Operation and Implementation of the SPS Agreement, the Committee observed that "the use of Article 12.2 could be an effective means of satisfactorily resolving problems".³ (G/SPS/12, para. 24).

3. In the Second Review, the Committee recalled that ad hoc consultations among Members, as provided for in Article 12.2 of the Agreement, on specific sanitary and phytosanitary measures, otherwise referred to as the "good offices" of the Chair, had been used on several occasions since 1995. The Committee recalled that this was a useful route to facilitate agreement between Members and encouraged Members to take advantage of this option where appropriate. The Committee also adopted a recommendation encouraging Members "to make use of the possibility for ad hoc consultations, including through the good offices of the Chairperson of the SPS Committee, to facilitate the resolution of specific trade concerns".⁴

4. The Report of the Third Review describes the subsequent work by the Committee on this matter, including the submission by some Members of specific proposals for a procedure to enhance

¹ This document has been prepared under the Secretariat's own responsibility and is without prejudice to the position of Members or to their rights and obligations under the WTO.

² G/SPS/1, paragraph 5.

³ G/SPS/12, paragraph 24.

⁴ G/SPS/36, paragraphs 87-88.

the use of the good offices of the SPS Chairman. In adopting this report in March 2010, the Committee recommended that:

"Members should endeavour to expeditiously conclude this outstanding issue from the Second Review in a manner which facilitates the use of ad hoc consultations, including through the good offices of the Chairperson of the SPS Committee, for the resolution of specific trade concerns."⁵

5. To date, the good offices of the Chairperson, as provided for in paragraph 6 of the Working Procedures of the SPS Committee, has been used on three occasions. The first occasion was on the basis of a request from Argentina, Brazil, Chile, South Africa and Uruguay with respect to measures relating to citrus canker taken by the European Communities, in March 1998. The second occasion was on the basis of a request by the United States with respect to restrictions on wheat and oilseeds maintained by Poland, in November 1998. The most recent occasion was on the basis of a request by Canada with respect to import restrictions on bovine semen maintained by India, in March 2001. On each occasion, the Chairman informed the Committee with regard to the request.⁶

6. With a view to provide further guidance to Members on the procedure for ad hoc consultations according to Article 12.2, Argentina and the United States each circulated a proposal for the Committee's consideration.⁷ Subsequently, both Members introduced a joint proposal.⁸ Following the discussion of this matter at the SPS Committee meeting of 23-24 June 2009, the Secretariat was requested to prepare a revised proposal based on the Argentine-US joint proposal and addressing the concerns raised by other Members in the discussions.⁹ The "Recommended Procedure for Ad Hoc Consultations and Negotiations Among Members under the SPS Agreement (Article 12.2)" was circulated in September 2009 as G/SPS/W/243.

7. This proposal has been discussed at the Committee meetings of October 2009, March and June 2010, and revised after each meeting to take into account comments and suggestions received from Members.¹⁰ At the June 2010 meeting, Members were invited to submit any comments on the proposal by 30 July 2010. Comments on the draft text were received from Argentina, Canada and the United States, and the proposed additions and deletions are marked in this current revision. More general comments with regard to ad hoc consultations were submitted jointly by India, Norway, the Philippines and Switzerland on 30 July 2010, as a "non-paper". These comments have been circulated as an attachment to a fax from the Chairman of the SPS Committee, dated 13 September 2010.

⁵ See Section XII of the Report of the Third Review, G/SPS/53, paragraphs 116-126.

⁶ See G/SPS/GEN/204/Rev.10/Add.3, paras. 160-163; G/SPS/GEN/204/Rev.10/Add.2, paras. 588-589); and G/SPS/GEN/204/Rev.10/Add.2, paras. 398-406, respectively.

⁷ Argentina's proposal was circulated in March 2008, as document G/SPS/W/219. The United States' proposal was circulated in June 2008, as document G/SPS/W/227.

⁸ G/SPS/W/233.

⁹ See G/SPS/R/55, paragraphs 108-118.

¹⁰ See G/SPS/R/56, paras. 112-121, G/SPS/R/58, paras. 87-99, and G/SPS/R/59, paras. 90-113.

RECOMMENDED PROCEDURE TO ENCOURAGE AND FACILITATE ~~FOR~~ AD HOC CONSULTATIONS OR AND NEGOTIATIONS AMONG MEMBERS UNDER THE SPS AGREEMENT (ARTICLE 12.2)¹¹

Proposed Decision by the Committee

The Committee on Sanitary and Phytosanitary Measures ("the Committee"),

Having regard to paragraph 1 of Article 12 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("the Agreement");

Seeking to further encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary and phytosanitary issues, in accordance with the provisions of Article 12.2 of the Agreement;

Recalling that the Working Procedures of the Committee calls on the Chairperson of the Committee to assist Members to deal with any matter which has been raised under the Agreement, upon a request by the Members directly concerned;

Recalling that during the reviews of the operation and implementation of the Agreement, Members recognized the usefulness of application of Article 12.2, and encouraged the use of ad hoc consultations, including through the good offices of the Chairperson of the Committee, to facilitate the resolution of specific trade concerns;

Taking into account the ongoing negotiations of the Doha Development Agenda;

Decides as follows:

1. This procedure is intended to encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary or phytosanitary issues, with a view to assist Members to reach mutually satisfactory solutions, according to Article 12.2 of the Agreement.
2. This procedure does not add to nor detract from the existing rights and obligations of Members under the Agreement nor any other WTO Agreement. This procedure will not result in any legal interpretation nor constitute a modification to the Agreement itself¹² and is without prejudice to the right of a Member to determine its appropriate level of sanitary or phytosanitary protection against risks to human, animal or plant life or health.
3. This procedure is not intended to prejudice in any way the process or outcome of the work of other Committees, including the work those Committees are doing related to the Doha Development Agenda.

I. GENERAL CONSIDERATIONS

4. Any Member may at any time request consultations regarding any sanitary and phytosanitary measure(s) or related technical issue(s) falling under the scope of the Agreement. Members are encouraged to raise the issue(s) at a meeting of the SPS Committee as a specific trade concern prior to requesting consultations.

¹¹ Change in title proposed by Argentina.

¹² Change proposed by the United States.

5. Member participation in consultations is voluntary, ~~beyond participation in a first meeting.~~¹³
6. The decision of whether to participate in consultations, and all positions taken by Members during such consultations, will be without prejudice to the rights or obligations of a Member under the WTO Agreements.
7. The consulting Members, as well as all other participants in the consultation will treat as confidential the information submitted and positions taken during consultations, unless disclosure is consented to by the consulting Members.
8. The Members agree that consultations will be held in good faith.

II. PROCEDURE FOR ADDRESSING CONCERNS REGARDING SPS ISSUES

Step A: Request for Consultations

9. A Member (the "requesting Member") must request consultations with another Member (the "responding Member") in writing in a WTO working language. The request will: (1) refer to the measure(s) or technical issue(s) to be consulted on; and (2) state the reasons for requesting consultations as well as any preliminary questions and concerns regarding the measure(s) or technical issue(s), including possible effects on trade, as well as, if any, relevant provision(s) of the Agreement and existing international standards, guidelines or recommendations adopted by the pertinent international organizations as referred to in the Agreement. In addition to sending the request to the responding Member, the requesting Member will send the request to the Secretariat and the Chairperson of the Committee on the same day as the request is made ~~and the request will be circulated to the SPS Committee.~~¹⁴ The Committee will be informed of the request at the subsequent meeting of the Committee.¹⁵

Step B: Response to a Request

10. The responding Member will notify the requesting Member in writing in a WTO working language whether it accepts or rejects the request within 30 days of receiving the request. ~~If the responding Member accepts the consultations, it shall should also respond to any questions or comments included in the request for consultations on the points identified in paragraph 9.~~¹⁶ The responding Member will also send the response to the Secretariat and the Chairperson of the Committee on the same day as the response is made, ~~and the response will be circulated to the SPS Committee.~~¹⁷ The Committee will be informed of the response to the request (ie., whether the request was accepted or rejected) at the subsequent meeting of the Committee. This information may be provided under the agenda item on Specific Trade Concerns, or as information from Members, and the requesting and responding Members may provide whatever information they deem appropriate to the Committee.¹⁸

¹³ Change proposed by Argentina, Australia, Canada, Chile, El Salvador, Japan, Mexico and the United States.

¹⁴ Change proposed by Canada and the United States.

¹⁵ Change proposed by Argentina.

¹⁶ Change proposed by the United States.

¹⁷ Change proposed by Canada and the United States.

¹⁸ Change proposed by Argentina.

Step C: Consultation Procedure

11. Within 45 days of acceptance of the consultations request by the responding Member, the consulting Members ~~shall~~ should set a date for a meeting. ~~Normally the meeting should take place no later than the next regular SPS Committee meeting.~~¹⁹

12. The role of the Chairperson of the Committee (or designee thereof) is to facilitate communication between the consulting Members.²⁰ In that regard, the Chairperson of the Committee (or designee thereof) will consult with both Members regarding the parameters of the consultations, including, but not limited to:

- (a) whether it is recommended that technical experts of each consulting Member should be present at the consultations;
- (b) whether production of written responses and supplementary questions ~~are~~ is desirable; and
- (c) whether a mutually acceptable schedule for such submissions and for further meetings, if necessary, can be determined.

13. At no time may the Chairperson of the Committee (or designee thereof) opine on a technical issue or on the consistency with any WTO Agreement, including the Agreement, of a measure(s) or a consulting Member's position on a technical issue(s).

14. Where a consulting Member identifies a standard, guideline, or recommendation of the Codex Alimentarius Commission, the World Organisation for Animal Health (OIE), or the International Plant Protection Convention (IPPC), ~~the Chairperson of the Committee (or designee thereof), after consultation with~~ the consulting Members may jointly²¹ request the participation of the secretariat of the organization whose standard, guideline, or recommendation has been invoked to explain the scope or content of that standard, guideline, or recommendation.

15. The consulting Members will endeavour to complete the consultations within a reasonable period of time, ~~which should not surpass 180 days.~~²²

16. When one or both²³ of the consulting Members wishes to conclude the consultations, the Member(s) may do so through written notification to the other consulting Member at any time. The Member(s) will promptly provide written notification to the Secretariat and the Chairperson of the Committee (or designee thereof) that the consultations have concluded.

17. At the conclusion of the consultations, if approval is obtained from both Members, the Chairperson of the Committee will report the general outcome of the consultations to the Committee in accordance with the established working procedures of the Committee.²⁴ The report will not contain confidential information unless both consulting Members consent to the inclusion of such information as described in paragraph 7.

¹⁹ Change proposed by the United States.

²⁰ ~~In cases where the Chairperson of the Committee is not available to assist the consulting Members, and in cases where there may be a conflict of interest, e.g. because the Chairperson is a national of one of the consulting Members, the Chairperson will designate a facilitator, after consultation with the consulting Members.~~ Change proposed by the United States.

²¹ Changes proposed by the United States.

²² Change proposed by Canada and the United States.

²³ Change proposed by the United States.

²⁴ G/SPS/1, paragraph 6.

III. MONITORING

18. The Secretariat will monitor the use of this procedure, and, in accordance with paragraph 7, will ensure that the Secretariat's conclusions of such monitoring are reflected in the summary of Specific Trade Concerns that the Secretariat annually provides to the Committee (G/SPS/GEN/204).

IV. REVIEW AND DURATION

19. This procedure will be reviewed periodically and revised as necessary by the Committee in light of experience gained through its application. The Committee should undertake a first review of these guidelines not later than two years after their adoption by the Committee and thereafter as the need arises.
