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Committee on Sanitary and Phytosanitary Measures

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**REPORT OF THE CO-STEWARDS OF THE PRIVATE STANDARDS E-WORKING GROUP
TO THE MARCH 2015 MEETING OF THE SPS COMMITTEE ON ACTION 1 (G/SPS/55)**

SUBMISSION BY THE CO-STEWARDS OF THE E-WORKING GROUP

The following communication, received on 13 March 2015, is being circulated at the request of China and New Zealand in their capacity as co-stewards of the e-Working Group on private standards.

1 BACKGROUND

1. At the October 2013 meeting of the SPS Committee, Members agreed to establish an "electronic working group" (e-WG), led by China and New Zealand as "co-Stewards", to develop a compromise working definition of an SPS-related private standard. The co-Stewards provided a draft working definition on their own responsibility in document G/SPS/W/276, which was considered at the March 2014 meeting of the SPS Committee. Other existing definitions were compiled by the Secretariat in document G/SPS/GEN/1334 and Rev.1 so that Members could decide if any elements of those existing definitions should be incorporated in the working definition.

2. The second report of the co-Stewards contained in document G/SPS/W/281 was considered at the October 2014 meeting of the SPS Committee, along with two options for the working definition contained in a room document circulated at a 14 October meeting of the e-WG. While the proposed definition was the same, one version incorporated a disclaimer as part of the text of the Decision, and the other as a footnote. The proposed text was as follows:

The working definition of an SPS-related private standard is: "An SPS-related private standard is a written requirement or condition, or a set of written requirements or conditions, related to food safety, or animal or plant life or health that may be used in commercial transactions and that is applied by a non-governmental entity that is not exercising governmental authority."

3. The proposed disclaimer, whether a footnote or in the text of the Decision was:

"This working definition is without prejudice to the rights and obligations of Members, or the views of Members on the scope of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures."

4. During the e-WG meeting of 14 October 2014, it was clarified that, in the WTO context, there appeared to be no difference in legal weight or value regarding whether the text was in a footnote attached to the main decision text, or if it was located in the main body of the Decision itself.

5. It was also noted that the term "working definition" is yet to be interpreted in WTO jurisprudence and that it relates to work for a specific purpose, and would be a definition used for the work of the SPS Committee, designed to limit discussions to SPS-related private standards only.

6. Some e-WG members sought further clarifications and either signalled support for, or outstanding concerns with the proposed textual options, and requested time to revert to their

capitals before any formal decision could be made. The Committee agreed to give the co-Stewards and the e-WG more time to find a compromise working definition that could be presented for consideration and adoption by the Committee as soon as possible and hopefully at the March 2015 meeting of the SPS Committee.

7. The e-WG proceeded with its work according to the following steps for advancing/concluding its discussions on the working definition:

- All e-WG members were to submit their preference for the placement of the disclaimer (as a footnote, or in the Decision text) and, in the event that there were remaining concerns with either of the proposed options, members were to submit their concerns together with suggested alternative text;
- The co-Stewards would consider members' (i) preferred option and/or (ii) comments and suggested alternative texts, and circulate a revised compromise text on a definition reflecting members' replies;
- E-WG members would submit their final comments and preferred option;
- The co-Stewards would circulate their final proposed definition for acceptance by the e-WG; and
- The proposed working definition as endorsed by the e-WG would be circulated to the rest of the Membership with the objective of the proposed working definition being considered/discussed/adopted at the March 2015 meeting of the Committee.

2 E-WG VIEWS AND CONSIDERATION OF THE DRAFT WORKING DEFINITION

Textual issues remaining

8. There has been general agreement on the co-Stewards' proposed text for a working definition with the exception of the European Union and the United States, who remain concerned with the use of the terms "non-governmental entity" and "requirement" in the working definition. (Note that Argentina supports the proposal by China and New Zealand in document G/SPS/W/272 as discussed below).

9. The European Union suggested:

- replacing "non-governmental entity" with "private body"; and
- deleting the term "requirement".

10. However, for a number of e-WG members (such as Argentina, Belize, Brazil and China) it is very important to maintain in the definition the terms "requirement" and "non-governmental entity". Some e-WG members (such as Australia and Japan) indicated flexibility and could accept either the co-Stewards' proposal or the EU proposal.

11. Canada has been able to agree to the inclusion of the terms "requirements" and "non-governmental entities" due to the presence of other disciplines within the definition. If those other disciplines are removed or changed, the use of these terms may once again become problematic from Canada's perspective.

12. The co-Stewards recall that the mandate of the Committee to develop a working definition of SPS-related private standards originates from Action 1 of the Committee Decision on "Actions regarding SPS-related Private Standards" (G/SPS/55), where the terms "requirements" and "non-governmental entities" are used. Besides, the co-Stewards believe that the two terms are generic, and not specific to the SPS Agreement. Therefore, the co-Stewards consider it necessary and appropriate to maintain the two terms in the working definition.

13. In addition to its concern with the terms "requirement" and "non-governmental entity", the United States also noted that it considered the term "related to" to be ambiguous.

14. The co-Stewards note that the term being defined is "SPS-related private standard", and hence would consider this an appropriate term.

15. Argentina would like to discuss the term "written" as it considers this restricts the scope of the definition by excluding certain requirements resulting from customary practice.

Disclaimer placement

16. A number of e-WG members submitted comments on which option they preferred. The majority of respondents preferred the option to include the disclaimer wording in the text of the Decision (as opposed to a footnote), and most also indicated flexibility on this point.

Wording of the disclaimer

17. The European Union suggested amending the wording of the disclaimer as follows:

"This working definition is without prejudice to the rights and obligations of Members provided for in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, including, but not limited to, the question of the scope of that Agreement."

Instead of:

"This working definition is without prejudice to the rights and obligations of Members, or the views of Members on the scope of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures."

(The main area of difference between the two has been underlined by the co-Stewards).

18. The United States supported this change but said it still did not sufficiently address its concerns as it did not think it was sufficient with respect to the issue of scope.

Consideration of other definitions (by OIE and Codex)

19. Argentina noted that the OIE and Codex definitions of private standards listed in document G/SPS/GEN/1334 and Rev.1 were agreed and official. Argentina particularly highlighted the terms "non-governmental entities" and "requirements" used in those definitions. Argentina considered that the current proposal did not take sufficient notice of definitions developed by the OIE and Codex. Argentina recalled that the OIE definition was developed by an ad-hoc group on "Private Standards and International Trade on Animals and Animal Products". Argentina considered the version that was most consistent with those definitions was the one submitted in document G/SPS/W/272 by China and New Zealand prior to the establishment of the e-WG. Argentina therefore supported that definition (with the amendment that a private standard could also consist of one requirement).

20. The co-Stewards take note of the existing definitions of private standards in the OIE, Codex and other international organisations contained in document G/SPS/GEN/1334 and Rev.1. The co-Stewards consider that the latest text proposed in document G/SPS/W/281 builds on the previous work in the SPS Committee, the latest comments of e-WG members and the relevant elements of other existing definitions.

3 OBSERVATIONS AND SUGGESTIONS FOR CONSIDERATION

21. Despite efforts made, e-WG members, while very close, could not reach consensus on the co-Stewards' proposed text for a working definition. In particular, the e-WG has reached an impasse with the terms "requirement" and "non-governmental entity".

22. As has been stated on a number of occasions, the issue of agreeing on a working definition of an SPS-related private standard will have to be addressed and Action 1 will continue to be on the agenda of meetings of the SPS Committee until its mandate has been fulfilled. The co-Stewards therefore suggest a cooling off period for all e-WG members to reflect further on this issue.
