

MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND

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Group of Negotiations on Goods (GATT)
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Working Group on Sanitary and Phytosanitary
Regulations and Barriers

SUMMARY OF THE MAIN POINTS RAISED AT THE EIGHTH MEETING OF
THE WORKING GROUP ON SANITARY AND PHYTOSANITARY
REGULATIONS AND BARRIERS

(5-7 June 1990)

Note by the Secretariat

1. The Working Group continued the detailed examination of the major concepts to be addressed by an agreement on sanitary and phytosanitary measures (SPS) based on the agenda contained in GATT/AIR/3006 and on the revised Synoptic Table of Proposals Relating to Key Concepts (MTN.GNG/NG5/WGSP/W/17/Rev.1).
2. The representative of the Nordic countries explained the changes introduced in their proposal presented at the last meeting (NG5/WGSP/W/21) and already incorporated in the document. He noted that the revised Synoptic Table did not reflect two elements contained in the Nordic proposal: Definitions and Retroactivity.
3. In continuing the examination of the major concepts, based both on the Nordic proposal and the Synoptic Table, one participant stressed the need for clarification of the relationship between an agreement on SPS measures and GATT Article XX. He wondered whether such an agreement would complement, replace or interpret the Article. In referring to the basic objectives he indicated his preference for the reinforcement of Article XX. Other participants indicated that the objective was the establishment of a multilateral framework of rules and disciplines to be specifically applied to bilateral agreements reached in the SPS area. The need to link an SPS agreement with the work of specialized international organizations as a means to achieve objectives was also stressed. Harmonization and requirements for a scientific basis were once more cited among tools to achieve objectives. Addressing the scope, one participant made the distinction between product coverage and measure coverage. He noted that the logical product coverage should be the one decided by the Negotiating Group on Agriculture, i.e., agricultural products, but did not object to the possible inclusion of fishery and forestry products. He drew the attention of the Group to the exclusion of industrial products which, in some cases, could be problematic (e.g. pesticides). With respect to the

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measure coverage, he, and some other participants, could not at this stage agree with the exclusion of consumer preferences, environment, animal welfare and ethical and world considerations and considered it a probable mistake to exclude them from a reinforced discipline. He also had some difficulties with the definitions given in the Nordic proposal. Other participants agreed that there was a need to deal with other issues such as consumer preferences, environment, etc., which were already used for trade protection, but objected that they should not be covered by an SPS discipline. Other ways would have to be found to deal with them. It was noted that Article XX(b) covered more than SPS measures and that it could be used for these types of measures. Most participants agreed on the need for a definition of product coverage, and a number of them were of the opinion that the Working Group should necessarily depend on the Negotiating Group on Agriculture on this issue and agreed that fishery and forestry products should be covered by the agreement. The representative of the International Plant Protection Convention (IPPC) suggested that the agreement text should at least refer to the IPPC which also deals with product coverage. Referring to the Synoptic Table, one participant indicated that he had problems with the notion of "end product inspection criteria".

4. In discussing harmonization, concerns were raised with respect to the need to clarify such concepts as explanation, justification and burden of proof with regard to SPS measures not in conformity (or more stringent than) internationally established standards, guidelines or recommendations. It was also imperative to know when each of these concepts would have to be used and, at least in the case of the burden of proof, by whom (whether by the importing or exporting countries). One tentative explanation was that a country using more stringent standards was not assumed to be wrong, but would not benefit from the presumption of conformity. It should consequently, if requested, provide explanations on the basis of the available scientific evidence and justification of criteria of assessment of judgment. This should, however, be distinguished from the legal burden of proof, a concept linked to dispute settlement more than harmonization.

5. With regard to the idea of a screening procedure to be established to identify which countries were applying specific international standards, a number of participants still wondered if this was not a transparency issue and requested a paper from the author of the idea to enable a better understanding of its aims, functioning and consequences for disciplines. Referring to the regional harmonization issue, a number of participants re-stated their concerns that regional standards should not become barriers to inter-regional trade and emphasized that regional harmonization should only be regarded as a step towards global harmonization.

6. A number of participants expressed their support for the Nordic approach on disciplines to be applied to SPS measures (Article 5 of the Nordic proposal). One participant referred to the need for a re-wording of the secretariat language in the first paragraph of Synoptic Table 4, in order to make the link with Article XX(b). It was nevertheless felt that this paragraph should be part of the preamble of the agreement. Although most participants agreed with the Nordic approach in relation to

governmental bodies at different levels, others thought the Nordic text sought too stringent obligations which could lead to possible constitutional difficulties in some countries. The language proposed by the secretariat in the third paragraph of Synoptic Table 4 suited these participants better. One participant noted that Article XXIV:12 of the General Agreement already contained language dealing with observance by local governments. One participant wondered whether emergency actions were covered by the discipline on SPS measures, and referred to the right of any contracting party to take emergency actions, if necessary going further than international standards, without prior notification.

7. Risk assessment, for which some participants prefer the expression "necessary or appropriate level of risk", was seen as a critical issue. The need for substantial support from the specialized international organizations in this area was stressed, and the necessity of using these organizations' relevant standards or recommendations as a basis for SPS regulations was underlined. However, it was suggested that a distinction be made between the evaluation of risk - which could be done on a scientific basis using the international organizations' methods when available - and the acceptable level of risk, which was a matter of national sovereignty for each country to decide upon on a case-by-case basis, subject to non-discriminatory national treatment. Risk assessment should duly take into account relevant economic consequences due both to the introduction of diseases and protection. Concerns about scientific justification of SPS measures were raised. It was indicated that small countries very seldom had recourse to it to justify their SPS measures because in practice they often copied the United States or European Community measures. At best, it could be expected that those countries provide an explanation for the introduction of measures, but not scientific evidence. Furthermore, a country applying SPS standards more stringent than internationally agreed ones should only have to explain the reasons for their utilization and not the scientific evidence. Only when a trade problem emerged or, in the view of some participants, when a trade interest existed, would scientific evidence be required.

8. Referring to Synoptic Table 5, some participants requested that the square brackets surrounding "areas recognized as having a low disease/pest prevalence" be dropped. They also indicated that "acceptable level of risk" seemed to them a different concept from "acceptable level of protection". Regarding economic consequences (when establishing SPS measures) they recalled the need for taking into consideration, in the event of dispute settlement, the damage in terms of loss of production or sales in an exporting country because of adoption of SPS measures more stringent than necessary. Several participants agreed that in determining an acceptable level of protection and when there were no agreed international standards, an importing country should take into account the level of protection adopted by other countries in similar circumstances, but not necessarily the least stringent one. The observer from the International Office of Epizootics (OIE) indicated that participants should be aware that the term "disease" was different from "infection", the case being possible that a country/area be considered "disease-free", although being infected.

9. In discussing national treatment and non-discrimination, several participants indicated that they had no difficulties with the secretariat wording in Synoptic Table 6 as it stood and especially its reference to "unjustifiably stricter" treatment of imported products than of domestic products or imported products from any other contracting party. Some, however, suggested that after "any other contracting party" the words "when the same conditions prevail" should be added. This approach was refuted by one participant who considered that "same conditions" do not exist between two different countries.

10. It was noted that the determination of pest- or disease-free areas and the basis for such determination were beyond the GATT task. The rôle of the GATT was to draw the trade consequences of the establishment of those areas. It was the rôle of relevant international organizations to develop criteria for their establishment. After indicating that this subject was a fundamental one for his authorities, one participant noted that regionalization should cover not only measures but also guarantees. Export conditions should be adapted to the sanitary situation within the importing area. International organizations should be requested to develop criteria to determine the pest- or disease-free areas. The decision to determine the area would then be the result of dialogue between the interested parties which, according to another participant, should also be able to determine if the criteria met adequate levels of control. Several participants noted that regionalization should also cover areas of limited pest or disease prevalence, and that relevant international organizations should also be requested to develop criteria to determine them. In relation to the rôle of independent experts from such organizations, it was said that recourse to them could occur in a dispute settlement procedure, but also on other occasions, for instance, to help countries in assessing their disease-free situations.

11. In discussing equivalency, the necessity for dialogue among interested parties was stressed (aiming at achieving bilateral and multilateral agreements on mutual recognition of SPS measures) and one participant suggested that the relevant international organizations could, here too, be requested to develop equivalency criteria. A certain degree of flexibility would nevertheless be needed.

12. Surprised that little interest so far had been shown with regard to conformity assessment procedures (where most trade barriers arise) and processing and production methods (PPMs), one participant indicated that the PPM issue per se would disappear in a future agreement, because it would be covered by the scope and definitions. Another participant noted that a wider definition of control and inspection measures was needed but he thought that "conformity assessment procedures" was misleading. He referred to the limits of foreign inspection in an importing country and wondered who would cover the costs of inspection. He thought the PPMs issue needed further discussion. Other participants were of the view that PPMs should be subject to the same disciplines as end product characteristics. Regarding conformity assessment procedures, they agreed that this was an area of "friction", but not one of the major trade problems.

13. One participant observed that despite the existing procedures in the TBT Agreement (which did not cover PPMs and had a limited membership) and in relevant international organizations, while avoiding duplication, there was a need for an independent transparency mechanism in the SPS area. He added that active transparency (i.e. advance notification of measures with provisions for comments and consultations before implementation) was needed in order to avoid trade disputes. Only SPS regulations, not all measures which have a significant impact on trade, would have to be notified. Another participant indicated that he would circulate a text on the screening procedure at the next meeting of the Working Group and added that a notification/counter-notification procedure was needed. In relation to access to scientific data, he noted, a certain degree of confidentiality might be necessary. One participant observed that there were three different ways for dealing with notifications: notify everything (regulations, bilateral agreements, etc.); notify legislation and regulations and make other information available on demand; and notify everything only on demand. The highest transparency at the lowest cost might well correspond to the second alternative.

14. With respect to technical assistance, it was noted that apart from assistance in specific areas, and advice, donation, training, etc. for measures related to export markets, some countries might well need assistance to develop their internal transparency. Regarding special and differential treatment, some participants indicated that they still had difficulties with the idea of according longer time-frames to developing countries for the introduction of new SPS measures (even if the acceptable level of protection allowed scope for a phased introduction).

15. Discussing dispute settlement several participants again expressed their preference for the use of GATT Article XXIII procedures rather than for a separate SPS Code with its own procedures. However as the need for stronger provisions regarding the use of technical expertise was stressed once again by one participant, it was suggested that the terms of reference for particular panels could probably solve this problem. One participant noted that dispute settlement goes further than the expertise issue and suggested that it could also provide for ad hoc negotiations to discuss equivalency, regionalization, etc. Another participant said that before one contracting party may initiate a dispute settlement procedure against another contracting party which maintains a domestic approval procedure, it should have exhausted all the possibilities of obtaining approval for its products. Furthermore, if a panel is subsequently established, it should first consider if any such procedure (if reasonable) has been used.

16. With respect to the form of the SPS discipline and administration, one participant observed that although the possibility of a Code could not be excluded, the need for a link with GATT Article XX was necessary. Most participants agreed with the first paragraph of the secretariat's language in Table 14 of NG5/WGSP/W/17/Rev.1 and the need for a specific monitoring body of some sort.

17. The observer from the International Standards Organization (ISO) informed the Working Group of the activities of this international organization, and the observer from the OIE indicated that the OIE

International Committee had agreed to undertake the study on foot-and-mouth disease requested by the Working Group. The first results of this study should be reached by the end of the year, and submitted to the International Committee by May 1991. The observers from IPPC and Codex informed the Working Group of recent developments in their organizations' activities. ,

18. It was agreed that if the Negotiating Group on Agriculture had no objection, the secretariat would prepare a draft text for the framework of an agreement on sanitary and phytosanitary measures to be discussed in the Working Group's next meeting, scheduled for 2-4 July 1990.