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NEGOTIATIONS
THE URUGUAY ROUND

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Group of Negotiations on Goods (GATT)

Negotiating Group on Agriculture:
Working Group on Sanitary and Phytosanitary
Regulations and Barriers

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

(10-11 May 1990)

Note by the Secretariat

1. The Working Group undertook a 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/2980 and on the Synoptic Table of Proposals Relating to Key Concepts (MTN.GNG/NG5/WGSP/W/17).

2. The representative of the Nordic countries presented their proposal for a comprehensive draft agreement on sanitary and phytosanitary measures (NG5/WGSP/W/21). He maintained that the most appropriate way to establish a detailed and unambiguous discipline was to use a Code-like format, thus the Nordic proposed agreement was modelled, as far as possible, on the Agreement on Technical Barriers to Trade. However, to ensure the widest possible involvement, the proposed SPS agreement should be an integral part of the final Uruguay Round package of agreements, accepted by all who accept the final package. This comprehensive draft text superseded all previous Nordic proposals in this area, including NG5/WGSP/W/9, W/10, W/11 and W/14.

3. In examining the major concepts, most delegates noted the usefulness of the synoptic table prepared by the secretariat (WGSP/W/17). A few representatives protested that the secretariat had gone too far in suggesting common language, much of which they could not agree with, particularly as there had not yet been an issue-by-issue discussion. A number of others observed that the secretariat text reflected their understanding of what had been agreed at the previous meeting. It did not purport to indicate an agreed consensus, but by providing language on issues where there was at least some degree of commonality in the proposals, it allowed the Working Group to better focus its discussions, to more effectively identify where consensus might be possible and where divergent views existed. It was also noted that because of the interrelatedness of the various concepts, statements actually relevant to several concepts might have been included under only one concept in the synoptic table.

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4. In discussing the basic objectives of an SPS agreement, it was observed that whereas countries must maintain the right to provide the necessary protection to human, animal and plant life, it had been agreed in the Uruguay Round Ministerial Declaration that the objective was to minimize the negative effects on trade of such measures. Harmonization, along with transparency, requirements for a scientific basis, etc. were the tools to be used to achieve the objective. With regard to the scope of an agreement, most representatives agreed with the measures listed in the secretariat text, including those of packaging and labelling requirements directly related to food safety. One participant stated that a definition of an SPS measure was also needed. Another noted his preference for a definition rather than a listing of what constituted an SPS measure, and raised questions with regard to coverage of pesticides, veterinary medicines and health warning labels (such as on cigarettes). It was also observed that the Working Group could not take a decision with respect to product coverage in the absence of any decision by the Negotiating Group on Agriculture, but one participant indicated that the product coverage need not be identical and that SPS measures relating to fish and forestry products should be included regardless of their eventual coverage within any agreement reached by the Negotiating Group on Agriculture.

5. In discussing disciplines to be applied to SPS measures, many participants indicated that these disciplines should apply to all levels of government, not just the federal or "national" level. Many also agreed that measures which were consistent with internationally agreed standards or guidelines should be deemed to meet these obligations. It was observed that countries could nonetheless impose more stringent requirements, as long as they justified the need for these. Some participants noted that countries also needed to impose SPS restrictions even in the absence of conclusive scientific evidence. A few suggested, therefore, that there should be no requirement for measures to be based on scientific evidence, but rather that they not be maintained against scientific evidence. It was observed that the most difficult issue was who had the burden of proving that a certain measure was or was not justified, in the absence of an internationally agreed standard. Some advocated that the country imposing a measure should always be prepared to justify it, if requested, whereas others maintained that the country providing the product had the burden of proving its safety.

6. Given the importance of the objective of harmonization of SPS measures on the basis of internationally developed standards and guidelines, one participant suggested that a simple screening procedure be established to identify which countries were actually applying specific international standards as their SPS import requirements. He expressed concern that countries' delegates often agreed to standards within the international technical bodies with no intention of actually implementing them through national regulations. He proposed that, starting with the most trade-distortive measures, countries should notify their non-acceptance of identified international standards and guidelines, indicating whether they considered the standard to be too stringent, or not sufficiently protective, or whether special circumstances made the standard inappropriate for use by their country. In reacting to this proposal, some participants observed that such a screening procedure might be a useful tool for improving transparency of SPS measures.

7. A number of participants indicated that regional harmonization could be a useful step towards international harmonization, but others noted caution was needed to ensure that regional standards not become barriers to intra-regional trade. It was also observed that regional harmonization was perhaps more appropriate with respect to plant protection than for food safety, where Codex was moving towards the elimination of all regional standards in favour of international ones.

8. Other concerns were raised with respect to the burden of proof. Some participants believed a differentiation should be made depending on whether or not an international standard existed. Where one existed but was not applied, they argued that the importing country should always make clear the scientific justification for its SPS measure. On the other hand, if no standard existed, the burden would be on the exporter to show that the SPS measure was not justified. Others stated that the imposing country should always have the onus of justifying its SPS measures. The representative for the International Plant Protection Convention (IPPC) noted that the IPPC required signatories to publish their plant protection decisions with reasons, and to inform FAO and other signatories.

9. Concerns about misunderstanding of the term risk assessment and a preference for using "acceptable level of protection" were again raised. A number of participants stressed the need to identify what were the relevant economic considerations to be taken into account so that it was clear that a decrease in competitiveness or other such trading concerns were not relevant. It was observed that it would be most useful if risk assessment methodologies were developed by the relevant international organizations, recognizing that the determination of risk in each case would be made by the importing country. Provisions were needed to assure transparency and non-discrimination in such decisions, and a comparison with the measures being taken by other countries in similar circumstances might be appropriate. In some circumstances, it was observed, a ban on imports might, nonetheless, be justified.

10. With regard to equivalency, several participants observed that it should be recognized that different methods could result in similar levels of protection. The focus should be on the practical results of such recognition, as on scientific grounds, absolute equivalence of different measures was virtually impossible. A number of participants stressed that equivalency was essentially determined through bilateral or plurilateral consultations. One participant noted the need for criteria to be developed by technical experts for judging the validity of rejections of claims for equivalency. Another stated that it should be the right of exporting countries to use different techniques if they could demonstrate that they achieved similar results. However, if the exporter were using an internationally agreed method or standard, the importer should bear the onus of justifying why it was not acceptable.

11. In discussing national treatment and non-discrimination, one participant observed that differing treatment was almost an inherent part of SPS measures as rarely did the same SPS conditions exist in different countries. Some participants indicated that such differing treatment should be justified, on the basis of scientific evidence. One participant expressed his concern that whereas Article XX(b) provided for

non-discrimination, its wording had different implications than that of Article III where the importer had the legal burden of proof for justifying any "less favourable" treatment. He could not accept this latter obligation with respect to SPS measures.

12. The principle of disease-free areas was already widely accepted, one participant observed, but was in need of updating. Currently it often meant that a disease-free area would accept imports from another disease-free area, which was not always scientifically justified. Such an approach could actually result in increased discrimination. What was needed was acceptance of the broader concept of regionalization also of treatments, control measures, etc. Several participants indicated the need for the relevant international organizations to develop rules and methodologies to assist in the identification of disease-free zones. It was also suggested that it was up to the exporting country to demonstrate its inclusion in a disease-free zone and the existence of adequate controls to maintain that status, but an importing country had the right to satisfy itself that adequate controls were indeed in place. The representative of the IPPC observed that a general framework could be developed in the GATT, with further work left to the technical organizations as the situation varied from disease to disease. He also indicated that the concept of limited prevalence of a disease might be important with respect to some pests, through a reduction of the requirements for certain treatments.

13. With respect to control concerns and processing and production methods, one participant observed that even if regulations were harmonized, their application could cause barriers to trade. He suggested that disciplines needed to cover procedures for sampling, testing, etc. - generically called conformity assessment procedures. Another participant stated that transparency with regard to how a product was certified would greatly improve confidence in others' controls. He further observed that many countries made use of the International Standards Organization (ISO) and the International Laboratory Accreditation Conference (ILAC) procedures. One participant expressed the concern that although requirements based on PPMs were in some cases less onerous than those based on end product characteristics, they posed the legal problem of inspection of foreign facilities and lack of sanction or enforcement mechanisms on foreign enterprises. The point was also made that although regulations on the basis of PPMs imposed methods rather than end results, there was some scope for recognizing as equivalent different methods which achieved similar results. Other participants indicated that the proposed SPS disciplines should also apply to requirements based on PPMs.

14. One participant observed that improved transparency should result in reducing the number of disputes, so the aim should be for comprehensiveness even if some duplication of procedures occurred. Another suggested a trial period with the establishment only of inquiry points, after which an assessment could be made of the need for more complete procedures. He also observed that there existed some confusion between the legal burden of proof versus the provision of information without prejudice to conformity with the new rules. A participant cited the different levels of information requirements within the technical bodies - IPPC signatories had a legal obligation to notify some phytosanitary measures, Codex regularly

published a review of acceptances of its standards, the International Office of Epizootics (OIE) had no systematic procedure for notifications - and suggested use of the procedures existing in the TBT agreement. He also pointed out that the proposed screening procedure would identify not the degree of acceptance of international standards, but of their actual application.

15. Information regarding technical assistance in the areas of plant protection and food safety was provided in NG5/WGSP/W/16 and W/20 respectively. The need for continued FAO involvement in this area was stressed, particularly with the difficulties faced by many developing countries in appropriately assessing SPS risks. Special and differential treatment for developing countries could be provided through prior notice and consultation on SPS measures of interest to them, and by providing, where feasible, longer periods before the implementation of SPS measures with possible negative effects on their trade.

16. Several participants noted that provisions with regard to dispute settlement were dependent on whether GATT Article XXIII procedures were to be used, or a separate SPS Code established with its own procedures. Most participants expressed a preference for the former, but indicated that existing provisions for panels seeking technical advice should be strengthened. One observed that decisions would have to be made as to how determinant scientific evidence was vis-à-vis other criteria. A GATT panel could not judge the scientific value of an SPS measure, but only whether it conformed to the proposed GATT obligations, i.e., did a country act reasonably in its risk assessment, or take reasonable action in the absence of an international standard, or justify its reason for not using an international standard. The critical rôle of the technical organizations in consultations to avoid disputes was underscored. One participant indicated his preference that recourse first be made to the dispute settlement procedures of the technical organizations and of the TBT on food hygiene, although he agreed that countries always maintain their right to invoke GATT dispute settlement provisions. The need to at times accept experts from countries involved in the dispute as panel members, given the limited number of qualified experts on some diseases, was also raised.

17. Most participants agreed that an SPS discipline should be part of the Uruguay Round package of results, and should provide clear and detailed disciplines and rules. One participant expressed his preference for a code-like form, and indicated the need to establish a permanent monitoring body of some sort.

18. It was agreed that the Working Group would continue its issue-by-issue examination, on the basis of a revision of the synoptic table to take account of the Nordic proposed draft agreement and with revisions to the secretariat language reflecting the discussions. The next meetings of the Working Group were scheduled for 5-7 June and 2-4 July. It was also agreed that, barring objections to be notified to the secretariat, the International Standards Organization (ISO) would be invited to participate in the Working Group's meetings.