

Meeting the Transparency (Consultation) Obligations of the SPS Agreement

1. Background to the WTO/SPS Notification System

One of the principal innovations of the WTO SPS agreement (the agreement on the application of sanitary and phytosanitary measures) is a requirement for prior notification of SPS measures.

The main advantage of the notification system is to undertake consultation at an international level, by allowing other WTO members to comment on proposed measures. Any WTO member country proposing to introduce new SPS measures is, in most circumstances, required to:

- notify other WTO members of their intention;
- provide copies of the draft measure on request;
- allow reasonable time for other WTO members to make comments in writing;
- discuss these comments on request;
- take the comments and the results of the discussions into account;
- explain to the submitting country how it plans to take their comments into account;
- where appropriate, provide additional relevant information on the proposed SPS measures concerned;
- provide the submitting country with a copy of the corresponding SPS measures as adopted, or information that no corresponding SPS measures will be adopted for the time being.

The SPS notification system also facilitates trade by providing advance notice before new measures must be complied with (a 'no surprises' approach).

Whenever an SPS measure is raised in the SPS committee, the first question usually asked of the member imposing the measure is whether it was notified to the WTO. It is important that members comply with the SPS transparency obligations.

Each WTO member is required to designate a single central government authority as responsible for implementing, on a national level, the notification requirements of the SPS agreement, the National Notification Authority (NNA). In addition, each Member is required to establish a National Enquiry Point (NEP), which is responsible for the provision of answers to all reasonable questions as well as the provision of relevant documents. In New Zealand these two entities are operating as one – the New Zealand SPS contact point.

2. Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)

2.1 Transparency Definition

The term transparency in the context of the World Trade Organization (WTO) is used to signify one of the fundamental principles of its agreements: the aim is to achieve a greater degree of clarity, predictability and information about trade policies, rules and regulations of Members. In implementing this concept Members use notifications. Under the SPS Agreement, notifications are used to inform other Members about new or changed regulations that may significantly affect

their trading partners.¹ Transparency under the SPS Agreement also includes answering reasonable questions, and publishing regulations.

These procedures have been developed to assist Members fulfil their transparency obligations under Article 7 and Annex B of the SPS Agreement regarding the notification of SPS regulations, answering information requests under the National Enquiry Point system and publishing regulations.

2.2. Recommended Notification Procedures

Members should follow these procedures when notifying regulations as required in paragraphs 5 or 6 of Annex B of the SPS Agreement. The form for routine notifications should be used for notifications in accordance with paragraph 5 of Annex B of the SPS Agreement, whereas the form for emergency notifications should be used for notifications as provided for in paragraph 6 of Annex B of the SPS Agreement.

In accordance with Article 7 and paragraph 5 of Annex B of the SPS Agreement, Members are required to notify all regulations the content of which is "not substantially the same as the content of an international standard, guideline or recommendation", if such regulations are expected to have a significant effect on trade of other Members.

Members are encouraged to notify all regulations that are based on, conform to, or are substantially the same as an international standard, guideline or recommendation, if they are expected to have a significant effect on trade of other Members.²

For the purposes of Annex B, paragraphs 5 and 6 of the SPS Agreement, the concept of "significant effect on trade of other Members" may refer to the effect on trade:

- of one sanitary or phytosanitary regulation only or of various sanitary or phytosanitary regulations in combination;
- in a specific product, group of products or products in general; and
- between two or more Members.

To assess whether the sanitary or phytosanitary regulation may have a significant effect on trade, the Member concerned should consider relevant available information such as: the value or other importance of imports to the importing and/or exporting Members concerned, whether from other Members individually or collectively; the potential development of such imports; and difficulties for producers in other Members, particularly in developing country Members, to comply with the proposed sanitary or phytosanitary regulations. The concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant.

2.3. Timing of Notifications

Paragraph 5(a) of Annex B of the SPS Agreement obliges Members to publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with a proposal to introduce a particular regulation. This is useful so that other Members are better able to assess and

1 The 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.

2 The Secretariat should provide an annual report on the level of implementation of the transparency provisions of the SPS Agreement and of the recommended transparency procedures contained in this document, including, inter alia, an overview of those notifications which relate to the adoption of international standards, guidelines and recommendations by Members.

if necessary, comment on the proposed measures. Members may wish to provide information to the SPS Committee regarding expected modifications to their national regulatory systems.

Paragraph 5(b) of Annex B of the SPS Agreement obliges Members to submit a notification at an early stage when amendments can still be introduced and comments taken into account. This should be done when a draft of the complete text of a regulation is available.

Paragraph 5(d) of Annex B of the SPS Agreement obliges Members to allow a reasonable period of time for submission, discussion and consideration of comments. Members should normally allow a period of at least sixty calendar days for comments, except for proposed measures which facilitate trade³ and those which are substantially the same as an international standard, guideline, or recommendation. Where domestic regulatory mechanisms allow, the 60-day comment period should normally begin with the circulation of the notification by the WTO Secretariat. Any Member which is able to provide a time-limit beyond sixty days is encouraged to do so.

A notification should be made well before the entry into force of the relevant measure, except when urgent problems of health protection arise or threaten to arise for the Member concerned. In accordance with paragraph 6(a) of Annex B of the SPS Agreement, any regulation brought into force in urgent circumstances is required to be notified immediately and a rationale for the urgent action provided.

The late notification of a measure already in force does not in and of itself constitute sufficient reason for the use of the emergency format. When urgent problems of health protection are not involved, late notifications should be made using the regular format and consideration should still be given to all comments received, in accordance with paragraph 5(d) of Annex B of the SPS Agreement.

2.4 Handling of Comments on Notifications

Each Member should notify the WTO Secretariat of the authority or agency (e.g. its National Notification Authority) which it has designated to be in charge of handling comments received, and of any change and/or modification of such authority or agency.

Members submitting comments on a notified draft regulation should provide them without unnecessary delay to the authority designated to handle the comments, or to the National Notification Authority if no other designation is made.

A Member receiving comments through the designated body should, without further request:

- acknowledge the receipt of such comments;
- explain within a reasonable period of time, and at the earliest possible date before the adoption of the measure, to any Member from which it has received comments, how it will take these comments into account and, where appropriate, provide additional relevant information on the proposed sanitary or phytosanitary regulations concerned;
- provide to any Member from which it has received comments, a copy of the corresponding sanitary or phytosanitary regulations as adopted or information that no corresponding sanitary or phytosanitary regulations will be adopted for the time being.

A Member receiving comments through the designated body may consider making available to other Members, where possible, non-confidential comments and questions it has received and answers it has provided, or summaries thereof, preferably via electronic means.

Members should grant requests for extension of the comment period wherever practicable, in particular with regard to notifications relating to products of particular interest to developing

³ Trade facilitating measures could include, inter alia, the raising of the level of maximum residue limits of certain pesticides in certain products, the lifting of a ban on imports, or the simplification or elimination of certain certification/approval procedures.

country Members, where there have been delays in receiving and translating the relevant documents or where there is a need for further clarification of the measure notified. A 30-day extension should normally be provided and notified to the WTO (see section below on Addenda).

Members are also encouraged to use the "Procedure to Enhance Transparency of Special and Differential Treatment in Favour of Developing Countries" (G/SPS/33).

2.5 Addenda, Revisions and Corrigenda

In addition to their original notifications, Members can also provide supplementary information in three different forms:

- An addendum is used to provide additional information or changes to an original notification. A Member may wish to indicate on the addendum if the final regulation has been substantially modified from the notified proposal.
- A corrigendum is used to correct an error in an original notification such as an incorrect address detail.
- A revision is used to replace an existing notification.

Any addendum or corrigendum should be read in conjunction with the original notification.

2.5.1 Addenda

Members should notify changes in the status of a notified SPS regulation. The issuance of an addendum allows Members to track the status of an SPS regulation via its unique notification number. Addenda to SPS notifications should be made in a number of circumstances, such as:

- (a) if the comment period has been extended;
- (b) when a proposed regulation is either adopted, published or comes into force, if the relevant dates have not been provided in the original notification or have been changed. Members are strongly encouraged to follow this recommendation and inform other Members in a timely manner. A Member may wish to indicate on the addendum if the final regulation has been substantially modified from the notified proposal;
- (c) if the content of a previously notified draft regulation is partially changed, or if the scope of application of the existing notification is modified, either in terms of Members affected or products covered. Such an addendum should provide for a new 60-day comment period unless the notified change is of a trade-facilitating nature or is negligible. Where domestic regulatory mechanisms allow, the 60-day comment period should normally begin with the circulation of the notification by the WTO Secretariat;
- (d) if a proposed regulation is withdrawn;
- (e) in the case of an emergency notification, an addendum should also be submitted if the period of application of the existing notification is extended.

An addendum should:

- briefly recap what was notified, when and what it was about - this is a practical requirement, and reduces the need for Members to have to go back to the original notification to check what it was about;
- specify what change has been made and why - briefly state why the information, dates, etc. have been changed; and
- restate the comments deadline, even if it has not been changed - as a reminder to Members that if they wish to comment it must be done by this date.

A form for making an addendum is available in Annex A-2 of these procedures for routine notifications and in Annex B-2 for notifications of emergency measures.

2.5.2. Revisions

Revisions replace an existing notification. Revisions should be submitted, for example, if a notified draft regulation was substantially redrafted or if a notification contained a large number of errors. A Member should provide a further period for comments on the revised notification, normally 60 calendar days, unless the notified change is of a trade-facilitating nature or would have a negligible effect on trade. Where domestic regulatory mechanisms allow, the 60-day comment period should normally begin with the circulation of the revised notification by the WTO Secretariat.

A form for making a revision is available in Annex A-3 of these procedures for routine notifications and Annex B-3 for notifications of emergency measures.

2.5.3. Corrigenda

Members should inform the Secretariat of any error(s) contained in their original notification. The Secretariat will issue a corrigendum accordingly.

A form for making a corrigendum is available in Annex A-4 of these procedures for routine notifications and Annex B-4 for notifications of emergency measures.