International trade: Rights and obligations of OIE Members

Introduction

This document is a guide to the rights and obligations of OIE Members with regard to international trade and trade disputes.

In part one, the OIE explains its informal mediation procedure for resolving trade disputes between Members. The OIE informal mediation procedure is different and independent from the World Trade Organization (WTO) procedures for resolving trade disputes. The WTO provides formal and informal approaches to solve trade disputes arising in relation to its Agreements. The OIE's informal procedure provides for OIE Members, on a voluntary basis, to seek to resolve their differences by using an approach that is based on science and on the OIE's standards for safe international trade in animals and animal products.

The revised OIE informal mediation procedure may be found in Annex A.

In part two the OIE presents the rights and the obligations of Members with reference to the conduct of international trade. Members should base their import measures on the OIE standards. This approach provides for safe trade, the avoidance of unjustified trade barriers and a strong presumption of compliance with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement). The relevant OIE standards are contained in the OIE *Terrestrial Animal Health Code* and *Aquatic Animal Health Code*, for terrestrial animals and aquatic animals respectively, and in the respective publications on *Diagnostic Tests and Vaccines*. Members should refer to these normative publications when making decisions on the management of risks associated with international trade in animals and animal products.

This paper primarily references terrestrial animals and the *Terrestrial Code*. However, Members should follow the same principles in regard to trade in aquatic animals and their products, based on the standards set out in the *Aquatic Code*.

Part 1 - Dispute mediation procedure

1.1. Introduction

Mediation is an informal procedure for resolving disagreements whereby a third party (a mediator) meets with parties to help them to resolve disagreements. The task of the mediator is to gain an understanding of the positions of the parties and to give advice and propose solutions to the disagreement. The mediator must be neutral and independent of the parties to the dispute. The use of this mechanism can help to minimise disagreements and promote effective trading relationships.

1.2. The WTO Framework

The WTO framework provides both formal and informal dispute settlement procedures.

WTO Members can raise SPS-related trade concerns with regard to other Members for discussion at meetings of the SPS Committee. This often concerns a situation where an importing country is thought not to have complied with a relevant international standard or not to have based an import measure on scientific evidence or, as appropriate, a risk assessment. Raising concerns in the SPS Committee often triggers bilateral discussions and may be helpful in resolving a specific trade problem. However, if this step proves insufficient to resolve the matter, the parties may jointly request Good Offices by the Chair of the SPS Committee. By resorting to this pathway, WTO Members may arrive at a mutually agreed solution to their SPS-related trade problems and avoid initiating a formal dispute under the WTO Dispute Settlement Mechanism.

The WTO Dispute Settlement Mechanism covers, *inter alia*, matters relating to the application of SPS measures subject to the disciplines of the SPS Agreement. This mechanism is based on the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which is conducted under the auspices of the WTO Dispute Settlement Body (DSB). Every WTO Member is represented with equal decision-making status in the DSB.

The WTO Dispute Settlement Mechanism is comprised of two main phases, a panel examination and, if requested, an Appellate Body review. The process begins with a compulsory preliminary stage, wherein the parties to the dispute must participate in a consultation process to address the form and content of the disagreement and to try to find a mutually agreed solution. A minimum of 60 days is available for this formal bilateral process. After 60 days, a WTO Member can request that a panel be established by the DSB to examine both factual matters and issues relating to legal interpretation. The members of the panel are usually three well-qualified experts acting in their own capacities and who are normally chosen in consultation with the countries in dispute The report issued by the Panel can be appealed by one or both parties, in which case it will be reviewed by the Appellate Body. The Appellate Body limits its review to issues of law and legal interpretation. The Panel report, or the Appellate Body report in case of appeal, is submitted for adoption by the entire WTO membership through the DSB. The DSB will adopt the final report unless there is a consensus among all WTO Members to reject, a procedure known as a negative consensus. At any time during the process, the parties may resort to the Good Offices of the WTO Director-General, conciliation or arbitration to try to solve the dispute.

The WTO Dispute Settlement Mechanism is vital for enforcing the trade rules and therefore for ensuring that trade flows smoothly. The DSB oversees the implementation of the legal rulings. In the (rare) cases of non-compliance with a DSB decision, a WTO Member may be allowed to impose commercial sanctions against the violating member. This mechanism underscores the rule of law, and it makes the trading system more secure and predictable. One recognized downside to this mechanism are the costs incurred to the parties in a dispute, since they normally require extensive involvement of well-qualified lawyers, specialized in trade law, as well as individuals with the necessary technical/scientific expertise, to defend a Member's position.

To date, thanks to its worldwide experts' network, the OIE has provided technical assistance and information on scientific matters to panels in every dispute taken to the WTO involving animal health issues.

1.3. The OIE Framework

The OIE has established a voluntary, science based approach to support resolving differences between Members. The OIE procedure does not aim to find fault. Rather, the goal is to find a mutually agreed compromise that will allow trade to be established (or re-established), preferably on the basis of compliance with OIE standards. The OIE mechanism is technically based and cost effective. However, any solution proposed is not legally binding on OIE Members.

The **OIE** mediation mechanism has been the subject of discussion within the SPS Committee (see SPS Committee paper G/SPS/GEN/437) and the 4^{th} OIE Strategic Plan 2006-2010 calls for further development of this mechanism.

The OIE mechanism for mediation comprises the following steps.

Initiation of the procedure

The OIE publishes scientific and technical standards with which Members should comply. When a Member considers that a trading partner has not complied with these provisions, or that its import policies are not based on science or, as appropriate, a risk analysis, the OIE can be asked to conduct an informal mediation process. This must be requested by both parties to the disagreement. OIE mediation cannot be initiated on a unilateral basis. In response to a request

from parties to a disagreement, the OIE Director General designates one or more experts to conduct the mediation.

By initiating the OIE mechanism, Members create an environment conducive to friendly bilateral discussions, with the objective of finding a basis for compromise. The OIE contribution is to help identify approaches to resolve differences in Members' interpretation of the scientific issues and in the application of OIE standards.

A cooperative process

The consent of both parties is fundamental to the OIE mediation procedure. The process is voluntary and reports of all discussions remain entirely confidential unless both parties agree to release them.

The OIE only begins the process once all parties have given their consent in writing.

The designation of experts likewise requires the consent of both parties.

Confidentiality is maintained throughout the process.

The proposed means of resolving the disagreement are not binding on the parties, unless both have previously agreed to be bound by the adopted solution. The outcome of the mediation may only be divulged with the consent of all parties.

The OIE mediation process may be terminated at any time, based on a written notification from one of the parties.

The designation of experts

Following initiation of the OIE mediation procedure, the Director General of the OIE recommends a number of experts, usually from OIE Reference Laboratories or Collaborating Centres. The parties to the disagreement then mutually agree on the list of experts.

The experts must be neutral, independent and impartial. It is desirable that they are not of the same nationality as the parties to the disagreement and it is preferable to designate an odd number of experts to aid in reaching a majority recommendation.

The designated experts endeavour to find a consensus solution based on scientific considerations and relevant OIE standards. To assist them in their task, the experts may ask the parties for additional information or data and/or ask for data to be clarified.

Conduct of the mediation procedure

To achieve a successful outcome, the parties must cooperate and act in good faith.

To commence, each party explains its position, the facts that have led to the dispute and the consequences of it. In collaboration with the parties, the experts identify the scope of the discussions and draw up terms of reference and a work programme. A timetable and a schedule of meetings and their agendas are developed. These documents must be endorsed by both parties before discussions on the case can begin.

The parties may nominate additional experts to help them present their case.

The experts may hold joint or separate meetings with the parties.

Developing a consensus

The OIE mediation mechanism provides a basis for a technically sound compromise acceptable to both parties. The parties, with the help of the designated experts, focus on the scientific and technical reasons for their differences rather than on legal aspects (which may be subjective, depending on the viewpoint and legal/administrative systems of each party). The search for a compromise is facilitated by referring to the OIE standards, which also provide the 'legal' context for the mechanism.

If, at the end of the mediation procedure, it has not been possible to find a mutually agreed solution parties may still benefit from the work undertaken. Participation in the process can help to reduce the differences between the parties and normally gives each party a better understanding of the other's positions and concerns. The results of the mediation process can trigger subsequent discussions, which may assist in resolving the difference.

Conclusion of the mediation procedure

The experts draft a report on the OIE mediation procedure, detailing the discussions and recommendations and the status of the disagreement between parties at the end of the process.

The report is drafted in one of the three official languages of the OIE. Part one of the report summarises the scientific and technical aspects of the discussion while Part two presents the findings and recommendations of the experts. Any dissenting views are explained in the report.

The report is handled in a totally confidential manner.

The draft report is provided to the OIE Director General, who transmits it to the parties. The report is not legally binding (unless this had been confirmed by the parties at the outset). The parties decide how they will address the recommendations in the report.

Confidentiality

All discussions, including the final report, are confidential unless the parties decide otherwise.

All those associated with the procedure, including the parties, their representatives and the experts, must respect confidentiality. However, the findings may be cited in a formal WTO dispute case if one of the parties decides to do so.

Administrative procedures

At the first meeting, the parties and the OIE agree upon the administrative procedures for the dispute mediation, including:

- o the language(s) for the mediation; opting for more than one language means that interpreters and translators may be needed;
- where the mediation procedure will take place; this is normally but not essentially at the OIE headquarters in Paris;
- the cost of the process. Article 5.3.8. of the *Terrestrial Code* (2008) states that the parties shall agree to meet all expenses incurred by the OIE during the procedure. In accordance with established OIE procedures, the experts assisting the mediation will not receive an honorarium. They will however be compensated for the cost of their intervention (travel and per diem) by the OIE. The parties must pay a fixed fee in order to defray the costs assumed by the OIE. This fee will increase in 2009 to 8000 euros.

Part 2 - The rights and obligations of OIE Members

2.1. Introduction

The adoption, in 1995, of the WTO SPS Agreement provided the legal framework for international trade that applies to WTO Members today. In the Preamble to the SPS Agreement it is stated "that it is desirable to further the use of harmonized sanitary (...) measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including (...) the International Office of Epizootics". The SPS Agreement further refers to and recognises the OIE standards in its Article 3 on Harmonization, and in Annex A, paragraph 3(b). Thus, the SPS Agreement recognizes the OIE as the relevant standard-setting body for SPS measures relating to animal health and zoonoses.

The relevant recommendations are contained in particular in the OIE *Terrestrial Code* and *Aquatic Code*, for terrestrial animals and aquatic animals respectively, and in the OIE *Manuals of Diagnostic Tests and Vaccines*.

The WTO recognises that each Member has the sovereign right to set its appropriate level of protection when applying sanitary measures for international trade as long as they comply with the provisions established in the SPS Agreement. In the OIE context, the term "sanitary measure" means "a measure, such as those described in various Chapters of the *Terrestrial Code*, destined to protect animal or human health or life within the territory of the OIE Member from risks arising from the entry, establishment or spread of a hazard". ¹

OIE Members who are WTO Members may comply with their obligations under the SPS Agreement either by basing their measures on relevant OIE international standards, or by carrying out a scientific risk analysis as outlined in Section 2 of the *Terrestrial Code* (2008).

The standards and recommendations contained in the *Code* are designed to facilitate and promote international trade. The OIE *Code* is a reference document for use by veterinary authorities, those responsible for making decisions on the import and export of animals and their products, and all those involved in international trade. ² The application by Members of the OIE standards is the best means of avoiding disagreement and other problems in international trade.

2.2. The procedure for developing OIE standards and recommendations

The aim of the *Code* is, *inter alia*, to ensure the sanitary safety of international trade in terrestrial animals and their products by detailing science based health measures to be used by the veterinary authorities of the importing and exporting countries to avoid the transfer of agents pathogenic for animals or humans, while avoiding unjustified sanitary barriers.³

The *Terrestrial Code* is prepared by the Terrestrial Animal Health Standards Commission and the *Aquatic Code* is produced by the Aquatic Animal Health Standards Commission. These Specialist Commissions work closely with other relevant international organisations and non-governmental organisations, and with the National Delegates of OIE Members. Members of the Commission are elected by the General Assembly of national Delegates of OIE Members. Draft standards and recommendations are circulated to Delegates at least twice for comment before being proposed for adoption by the OIE International Committee, comprising all National Delegates. The transparent and democratic procedures followed by the OIE provide a basis for consensus and support implementation of the standards by OIE Members.

http://www.oie.int/eng/normes/mcode/en_glossaire.htm#sous-chapitre-2

http://www.oie.int/eng/normes/en_mcode.htm

http://www.oie.int/eng/normes/en_mcode.htm

2.3. Obligations of importing countries

Importing countries should consider the exporting country's sanitary status, as relevant to the animals or animal products that are to be traded. Relevant data are contained in the WAHID database, which is accessible on the OIE Web site⁴. WAHID contains much useful information, including in the six monthly reports describing the status of each country with regard to OIE-listed diseases and in other useful information provided by Members. It is useful for Members to compare the sanitary situation between the importing country and the exporting country, based on data in the most recent six monthly reports.

As established in the WTO SPS Agreement, an importing country has the right to choose its appropriate level of protection for animal health, plant protection and food safety matters.

As stated in the *Code*, import conditions must take account of the animal health situation of both the importing country and the exporting country, as relevant to the animals/animal products to be traded.

The importing country should not impose measures in relation to diseases or pathogens that are not listed by the OIE, unless the disease or pathogen has been identified as presenting a significant risk on the basis of an import risk analysis conducted according to Section 2 of the *Terrestrial Code* 5 (2008).

The importing country should not impose sanitary measures for diseases or pathogens that occur in the importing country and are not the subject of official controls. Where official controls are implemented, the measures applied to imported animals/animal products should not be more restrictive than those applied nationally to similar animals/animal products under the official control programme.

Importing countries should publish a list of their border posts for imported animals and animal products. This helps to promote international trade since it provides information that helps exporting countries to make arrangements for importation to take place effectively and efficiently.

2.4. Obligations of exporting countries

Exporting countries should provide the following sanitary information, as listed in Article 5.1.3. of the *Terrestrial Code* (2008)⁶, at the request of the importing country:

- the animal health situation and the national animal health information systems;
- the occurrence of notifiable diseases;
- the ability to apply measures to control and prevent the relevant OIE-listed diseases⁷;
- the structure of the Veterinary Services and the authority which they exercise;
- technical information, particularly on biological tests and vaccines applied in all or part of the national territory.

For trade in animals and some animal products, it is usual for an official veterinarian (or a private veterinarian holding an appropriate official delegation) to inspect the consignment prior

⁴ http://www.oie.int/wahid-prod/public.php?page=home

http://www.oie.int/eng/normes/mcode/en_titre_1.2.htm

⁶ http://www.oie.int/eng/normes/mcode/en_chapitre_1.5.1.htm

List of transmissible diseases approved by the OIE International Committee and listed in Chapter 1.2. of the *Code*.

to export. The veterinarian issues a veterinary health certificate⁸ according to the arrangements agreed between the Veterinary Authorities of the exporting and importing country, preferably using the models published in the OIE *Code*.

At the request of the importing country, the exporting country should supply information on the exported animals or animal products, including:

- the estimated date of entry of the consignment into the territory of the importing country;
- the animal species involved;
- the quantity;
- the means of transport;
- the border post in the importing country where the consignment will arrive.

Veterinary Authorities of exporting countries should⁹:

- have official procedures for authorisation of certifying veterinarians;
- ensure that relevant instructions and training are provided to certifying veterinarians;
- monitor the activities of certifying veterinarians to verify their integrity and impartiality.

Exchange of this information helps to assure safe international trade.

2.5. The use of the OIE PVS Tool as a mechanism to support safe international trade

The performance of Veterinary Services (VS) is an important element assuring safe international trade. Not only must the VS be capable of promptly and efficiently detecting and managing OIE listed diseases, including those that present food safety and other public health risks, they must also provide effective sanitary guarantees via the veterinary health certificate. The maintenance of confidence between trading partners relies on consistent performance in these, and other, aspects.

The quality of VS is addressed in Section 3 of the Terrestrial Code (2008).

With this in mind, the OIE has developed a Tool for Evaluation of the Performance of the Veterinary Services (the PVS Tool). The legal basis for the PVS Tool is found in Chapters 3.1. and 3.2. of the *Terrestrial Code*.

The OIE PVS Tool may be used to evaluate the quality of VS, to assess their compliance with OIE international standards on quality and, if needed, to establish priorities for investment and strengthening of their infrastructure ¹⁰.

OIE Members have strongly supported the PVS evaluation procedure and this mechanism has been very successful at global level to date.

http://www.oie.int/eng/normes/mcode/en_chapitre_1.5.1.htm and

http://www.oie.int/eng/normes/mcode/en_chapitre_1.5.2.htm

http://www.oie.int/eng/normes/mcode/en_chapitre_1.5.1.htm

http://www.oie.int/eng/oie/organisation/EN_OIE%20PVS%20Tool_2008.pdf

2.6. The use of equivalence as a mechanism to facilitate safe trade

The concept of "equivalence" as applied to sanitary measures refers to the acceptance by an importing country that the measure(s) proposed by an exporting country achieves the appropriate level of protection required by the importing country, even though the measures may be different to those applied by the importing country.¹¹

Equivalence is referred to in Article 4 of the SPS Agreement ¹². The OIE has issued relevant standards, which Members should take into account when making decisions on trade measures. The OIE standards on equivalence may be found in Chapter 5.3. of the *Terrestrial Code* (2008).

The OIE informal mediation process may be used to help resolve a difference between Members regarding the use of the equivalence principle.

2.7. The use of zoning and compartmentalisation as mechanisms to facilitate safe trade

In view of the difficulty for a country in maintaining disease free status for the whole of its territory, the OIE has developed the concepts of zoning and compartmentalisation to help manage diseases and facilitate safe trade. Zoning and compartmentalization enable Members to define, within the national territory, animal subpopulations with a different health status. Relevant standards and guidance may be found in Chapters 4.3. and 4.4. of the *Terrestrial Code* (2008). The OIE has also provided guidance on the practical application of compartmentalization to avian influenza and Newcastle Disease in a checklist, which may be found on the OIE internet site 13.

For an importing country to recognise the existence of a zone or compartment in an exporting country as the basis for trade in animals or animal products, the exporting country should be able to demonstrate that it has complied with the relevant OIE standards. Detailed documentation should be provided by the exporting country for discussion between the Veterinary Authorities. As previously mentioned, the findings of an OIE PVS Evaluation should also be taken into account.

This concept is also recognized in the Article 6 of the SPS Agreement, and the SPS Committee has adopted Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of SPS Measures (Regionalization) (see SPS Committee paper G/SPS/48).

2.8. Risk analysis

"Risk analysis" means the process consisting of hazard identification, risk assessment, risk management and risk communication. "Risk" means the likelihood of the occurrence, and the likely magnitude of the biological and economic consequences of an adverse event to animal or human health in the importing country during a specified time period. 14

The WTO SPS Agreement obliges Members to base their import measures on relevant international standards (of the OIE, in the case of animal health and zoonotic diseases) or a scientific risk analysis carried out according to relevant international standards.

The OIE provides guidance on the conduct of an import risk analysis in Section 2 of the *Terrestrial Code* (2008) and more detailed guidance is provided in the two volumes of the OIE *Handbook on Import Risk Analysis for Animals and Animal Products*.

http://www.oie.int/eng/normes/mcode/en_glossaire.htm#sous-chapitre-2

Equivalence is referred in Article 4 of the SPS Agreement. In addition, the SPS Committee has adopted a Decision on the Implementation of Article 4 of the Agreement on the Application of SPS Measures (Equivalence) (see SPS Committee paper G/SPS/19/Rev.2).

http://www.oie.int/eng/info_ev/Other%20Files/En_final_Compartmentalisation_AI_ND_10_05_2007.pdf

http://www.oie.int/eng/normes/mcode/en_glossaire.htm#sous-chapitre-2

In the situation where relevant international standards have not been developed and/or an importing country considers that it requires a higher level of protection than that provided by the international standard, the importing country should carry out an import risk analysis. This should take into account the results of an evaluation of the Veterinary Services of the exporting country, if one has been conducted. In some cases, the application of zoning and compartmentalisation must also be addressed.

3. Conclusions

By adopting the OIE standards as the basis for their sanitary measures, OIE Members obtain guarantees for safe international trade in animals and animal products. In the case where there is no relevant international standard or where Members require a higher level of sanitary safety, science based risk analysis following OIE standards should be undertaken. The use of concepts such as equivalence, zoning and compartmentalization, according to OIE standards, can help to facilitate safe international trade.

In the event where OIE standards are not respected and differences arise, Members should first consider using the OIE informal mediation mechanism.

Confidence in the quality of veterinary services is the cornerstone of international trade. Good governance, ensuring transparency in disease reporting, efficiency in disease management and reliability in veterinary certification, is key to provide the necessary assurances to trading partners.

Rights and obligations of OIE Members

Annex A - The OIE informal mediation procedure

- 1. When a Member considers that another Member is not applying relevant OIE standards or has adopted import measures that are not based on an import risk analysis according to OIE standards, the Member may send a written request to the OIE for mediation. The request should outline the grounds for requesting the mediation process. The OIE then forwards the request to the Member in question.
- 2. On receipt of the request, the Member in question should provide a written reply within a period of 20 days, stating whether or not it agrees to mediation.
 - Silence on the part of one of the parties is not taken to indicate agreement. The entire mediation process depends on the consent of the parties. Furthermore, if the Member in question does not reply within the given time limit, the OIE will take this as a refusal to engage in mediation.
 - If both parties agree to mediation, the OIE will initiate the process.
- 3. The mediation process takes place within a period of 90 days, with a single extension available at the request of both parties. The procedure begins once the Director General of the OIE confirms that the OIE will undertake the mediation.
- 4. The Parties select one or more experts (desirably an odd number), selected from a list provided by the Director General. The experts should be impartial and independent of the parties and, preferably, not be of the same nationality as the parties. The experts may request the provision by the parties of any information they deem to be relevant to the mediation.
- 5. At the first meeting the parties agree administrative arrangements for the mediation, including the venue for meetings, the language(s) to be used and the conditions to be established for meeting the cost of the mediation by the OIE. Needs for interpretation and/or translation should be agreed and the timeframes for the mediation procedure established. The mediator nominated by the Director General of the OIE should remind the parties that the findings of the mediation will not be published and the conclusions will not be binding without prior agreement of both parties unless they decide a different option. The position of both parties on these two points should be confirmed at this stage.

The parties explain their respective positions and provide relevant documentation to the mediator. Subsequently, the parties and the mediator draft the terms of reference and a work programme, including the framework for the mediator's involvement and the main issues to be dealt with during the mediation process.

If they wish, the parties may terminate the mediation process at any time. To do so, they should notify the other party in writing and send a copy to the Director General.

- 6. Bilateral consultations between the parties take place in accordance with the agreed work programme and the undertaking on confidentiality. Unless the parties agree to the contrary, both the discussion and the final report will remain confidential.
- 7. The mediator drafts a report on the mediation in one of the three OIE official languages. This report is in two parts: part one summarises the technical issues discussed and part two presents the mediator's findings and recommendations to the parties.
 - A preliminary draft report will be sent to the parties for comment. Parties should provide their comments within 60 days of receiving the preliminary draft report. The mediator will then produce a final draft report, taking account of comments provided by the parties. If a party provides no comments, the mediator may assume that the party is in agreement with the preliminary draft report.

-	The final draft report is sent to the step will be completed within comparties (or one month after expreceived).	one month	after th	e media	tor receives	comment from the
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