Task Order 2.2 – Free Trade Activity

An Appraisal of the SPS Provisions of the North American Free Trade Agreement

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1.0 Background

The objective of this paper is to provide a review of the Sanitary and Phytosanitary provisions of the North American Free Trade Agreement (NAFTA). However, in order to understand the NAFTA it is necessary to understand the history of its negotiation and its relationship with the Canada-United States Free Trade Agreement (CUSTA) and the Uruguay Round of multilateral trade negotiations. The CUSTA negotiations began first, in April 1986. At that time Canada realized that access to its most important trading partner was at risk as a result of protectionist forces in the United States (Warley and Barichello). One manifestation of Canada's problem was the United States aggressive use of administered protection. Canada's goal heading into the negotiations was to secure and improve market access to its most important trading partner, thereby obtaining preferred access to the giant United States market. For the United States, the negotiation of the CUSTA signalled to the rest of the world that it was willing to consider regional trade agreements, given what appeared to be a stalemate in launching the next round of multilateral negotiations.

The multilateral negotiations finally began in the fall of 1986 and didn't conclude until December 1993.[1] Hence, the negotiation of both the CUSTA and the NAFTA overlapped the multilateral negotiations whose provisions came into effect on January 1, 1995.

[1] The CUSTA negotiations concluded in January 1988, with the provisions of the agreement coming into force on January 1, 1989. The NAFTA negotiations began early in 1991, were concluded in August 1992 and came into effect on January 1, 1994.

It is widely understood that as tariffs are negotiated downward non-tariff barriers to trade become more important. This is especially true in agriculture where sanitary (human and animal health) and phytosanitary (plant health) as well as technical barriers to trade are common. Ideally, inside a free trade area (FTA) products move across the borders of member nations as easily as they move between different areas within a country. However, this ideal is difficult to achieve. Tariffs are transparent and easily monitored by customs agents and trade ministries, and traders are aware of pending reductions. However, when an FTA is formed many potential non-tariff barriers remain and they tend not to be transparent, and even when identified not easy to change. One of the most challenging areas involves the harmonization of sanitary and phytosanitary (SPS) regulations and technical barriers to trade (TBT). The goal is to make sure that regulations in the FTA-member nations facilitate, or at least do not to hamper the increased trade flows resulting from tariff elimination.

It seems reasonable to set the standard for successful integration of member nations regulatory schemes within a FTA higher than among non-member nations. However, the problems of integration are similar across all countries. Domestic regulations reflect the culture, geography, stage of development and language requirements of the home country. Most domestic regulations are designed to solve local problems and in solving these problems generally create costs and benefits for certain groups in the economy. When an attempt is made to change a regulation as a result of an FTA there is often an initial round of inertia, or active opposition as domestic “losers” attempt to

preserve the status quo. When domestic regulations are changed as a result of bilateral or multilateral negotiations, nationalists also decry the loss of sovereignty. At other times there will be active rent seeking among those who see positive benefits from the proposed regulatory changes.

The SPS provisions of the NAFTA and the World Trade Organization (WTO) are very similar because these negotiations over-lapped.[2] However, before considering the NAFTA provisions it is useful to begin with what was done in the CUSTA, roughly five years earlier.

2.0 The Canada-United States Free Trade Agreement

The flow of goods and services between Canada and the United States has been substantial since the founding of the two nations. As a result, the adjustment of standards and regulations between the two countries, to facilitate cross-border trade, pre-dates the CUSTA. However, prior to the CUSTA there was no formal requirement to consider each other's trade interests in setting regulations. The CUSTA changed all of this. There is no SPS chapter in the CUSTA but Article 708 deals with *Technical Regulations and Standards for Agricultural, Food, Beverage and Certain Related Goods*. The CUSTA delineates a number of very explicit SPS actions that were to be taken by the United States and Canada. These are summarized below:

[2] Roberts, et. al. provide a comprehensive review of SPS provisions from a WTO stand point, while Bredahl and Holleran cover TBT and food safety issues from a NAFTA perspective.

- Harmonize their respective technical regulatory requirements and inspection procedures, or, where harmonization was not feasible make the requirements equivalent.
- Apply import and quarantine restrictions on a regional basis, when diseases or pests are distributed regionally.
- Establish equivalent accreditation procedures for inspection systems and inspectors.
- Establish reciprocal training programs and where appropriate utilize each other's personnel for testing and inspection.
- Establish, where possible, common data and information requirements for submissions relating to the approval of new goods and processes.
- Work towards the elimination of technical regulations and standards, and prevent the introduction of new regulations and standards that constitute an arbitrary or disguised trade restriction.
- Exchange information related to technical regulations, standards and testing.
- Notify and consult with each other during the development, or prior to changing any technical regulation or standard that may affect trade in agricultural goods.

This impressive list of activities was to be accomplished by eight working groups that were established under Article 708 of the CUSTA (Table 1). Canada and the United States also agreed that they would establish a Joint Monitoring

Committee (JMC) to whom the working groups would report, and which would meet at least annually. The JMC was to monitor the progress of the working groups and ensure the implementation of the agreement. The working groups were to meet at least once a year and inform the JMC of their progress.

In simple terms the working groups were to facilitate increased trade by harmonizing standards between the United States and Canada and where this wasn't possible to accept differing standards that gave equivalent outcomes. Harmonization was to extend to equivalent accreditation procedures and equivalent training programs, which in theory would lead to the use of each other's personnel for testing and inspection. Transparency was to be increased by the exchange of data and information and by taking each other's trade concerns into account in setting or changing regulatory measures.

No one has kept a report card on how well the working group process functioned over the six years before the CUSTA was superseded by the NAFTA. However, most observers agree that progress was disappointing. Hayes and Kerr discuss the problems surrounding the efforts to improve border inspection procedures for beef exported from Canada to the United States.

We now turn to a discussion of the NAFTA, which forms the legal basis for trade between Canada, Mexico and the United States.

3.0 The North American Free Trade Agreement

The CUSTA involved a trade agreement between two countries at similar levels of economic development sharing a common language and heritage. The

NAFTA was the first FTA to link a developing country (Mexico), with a per-capita gross domestic product of just over $4,000 per year, in the early 1990's, with two of the world's most industrialized nations, with per-capita GDPs of more than $20,000 per year (Meilke and van Duren).[3] The inclusion of Mexico in the FTA also raised more concerns about health and food safety issues than did the CUSTA. Opponents of the FTA argued that Mexico would have a competitive advantage in North American markets as a result of either lower SPS standards and/or lax enforcement of existing standards.

The draft GATT'94 provisions for sanitary and phytosanitary measures formed the basis for the NAFTA provisions, and hence the WTO and the NAFTA agreements are similar. The sanitary and phytosanitary provisions of the NAFTA are contained in both the agrifood chapter (Ch. 7) and the technical barriers to trade chapter (Ch. 9). The NAFTA contains more detailed provisions than does the CUSTA with respect to SPS measures, but also less explicit directives than did CUSTA.

The NAFTA-SPS chapter contains six principles the Parties to the agreement are asked to follow:

- Must not discriminate between foreign and domestic goods.
- May not adopt sanitary and phytosanitary measures which create a disguised restriction on trade.
- May adopt any sanitary and phytosanitary measures necessary to protect human, animal, and plant life and health.

[3] In 1998, the per-capita GDP in Mexico was US$4,300, Canada US$19,926 and in the United States US$31,456.

- May establish appropriate levels of protection.
- Must adopt science-based measures.
- May apply measures only to the extent necessary to achieve its appropriate level of protection (Roberts and Orden).

These general principles require elaboration. The first two principles require the NAFTA countries to establish SPS provisions that do not discriminate between foreign and domestic goods and that are not disguised barriers to trade. Unfortunately, discrimination and disguised barriers to trade are often in the eye of the beholder. Hence, the four remaining principles are aimed at creating rules and procedures that encourage harmonization of standards and non-discrimination.

The Parties to the NAFTA agreement are encouraged to adopt international SPS standards and where feasible to adopt measures that are identical or equivalent to those in the other member countries.[4] Any SPS measure that conforms to international standards is deemed to be consistent with the NAFTA, but differing standards are not necessarily inconsistent with the agreement. Each NAFTA country is explicitly allowed to develop its own SPS provisions, including ones that are more stringent than international standards. This leads to three key questions. First, when are SPS standards that are not identical, equivalent to each other and how is equivalence determined? Second, when are SPS standards that are higher than the relevant international standard

[4] The regional and international organizations mentioned in the agreement are the: Codex Alimentarius Commission, International Office of Epizootics, International Plant Protection Convention and the North American Plant Protection Organization.

justified, and non-discriminatory? Third, in the absence of an international standard, or ambiguous science what are NAFTA countries allowed to do?

The NAFTA provides guidance in answering each of these key questions. However, critics of the SPS provisions either ignore the fact that guidance is provided, or feel the potential outcomes are sub-optimal. A beginning point is to consider the answers to the three questions provided by the NAFTA, and potential criticisms.

When countries enter into a FTA it is highly unlikely that all of their SPS provisions will be identical, so the determination of equivalence is a crucial issue. Proof of equivalence rests with the exporting country. The exporting country is required to provide the importing country scientific evidence or other information showing that the exporting countries SPS measures achieve the importing countries appropriate level of protection. In doing so, the exporting country is to use a risk assessment methodology agreed to by both Parties. The exporting country in meeting this requirement should facilitate access, by the importing country, to its inspection, testing and other procedures. If the importing country decides the exporting countries measures are inadequate to achieve the desired level of protection, it is required to provide the exporter with its reasons in writing.

In judging the equivalence of SPS measures the risk assessment takes a central role. Article 715 of the NAFTA provides seven non-economic criteria that countries should take into account in conducting a risk assessment. These include, relevant scientific evidence; processes and production methods; inspection, sampling and testing methods; and ecological and other

environmental conditions. However, the agreement goes on to say that in establishing its appropriate levels of protection a Member it must take into account the objective of minimizing negative trade effects, and in conducting risk assessments it must consider economic factors in addition to biological ones. The agreement suggests that a Member should take into account the lost production and sales resulting from a pest or disease, and the cost of eradication or control of the pest. Essentially, the NAFTA calls for a benefit/cost analysis of a regulatory scheme although it does not suggest that any scheme with a benefit/cost ratio greater than one would necessarily be adopted.

Critics of the SPS agreement have two primary arguments with respect to the equivalence issue. First, they are very sceptical of elevating the role of international organizations to the point where they determine “trade-legal” standards. They argue that the work of these organizations is a closed-door process that limits public participation. At the same time they argue that the process is dominated by industry interests, and that standards set by an international body determine a ceiling rather than a floor for SPS rules. With respect to equivalence determinations the critics argue that the NAFTA does not provide sufficient guidance in the criteria to be used in determining equivalence, and that it is dangerous to employ subjective methods. They argue that significantly different and less protective standards can be declared equivalent. They are especially concerned with health and inspection systems that have been partially “privatized” such as the Australian meat inspection system. The Transatlantic Consumer Dialogue goes so far as to argue, “the very notion of

equivalence allows for imprecise, subjective comparisons that are not appropriate when dealing with issues as important as public health and safety".

With respect to the use of international standards the critics provide little in the way of alternatives. Clearly, if trade is to take place and SPS measures are important, there has to be some centralized rule making body. The acceptance of international standards would seem to be particularly important to small, poor, developing countries that lack the expertise to set their own standards. Formation of the NAFTA allows the three member countries to speak with one voice, or to better understand their differences before attending official international meetings. As with the WTO, the members of the international standard setting organizations are member governments who should represent the broad interests of their constituencies.

The critics seem to ignore that guidance is provided in the NAFTA for conducting a risk assessment and that a set of one-size-fits-all criteria would be difficult to develop. In addition, with respect to equivalence, the importing country is in the driver's seat. It is the Party that has the final say as to whether equivalence has been achieved, and experience suggests that countries will be cautious in granting other countries equivalence. However, the critics may have a more legitimate concern with respect to control measures after equivalence has been granted. The Public Citizen quotes a USDA Office of Inspector General Report, which says:

"Detailed control process and procedures for determining the equivalency or the continuing eligibility of foreign inspection programs to export meat and poultry products to the United States were not adequately developed, were not

incorporated in formal agency procedures for distribution to responsible personnel, or were not functioning as required by regulation."

While foreign countries are required to certify annually that each of their establishments that export meat and poultry products to the United States continue to comply with United States standards, the USDA apparently did not enforce this requirement and countries were allowed to continue to export to the United States, even though they had not certified their establishments as meeting United States standards.

The second issue raised by the SPS agreement is when are standards higher than those set by international organizations acceptable and non-discriminatory? If an exporting member country believes that an SPS measure of another member is adversely affecting its exports, and the measure is not based on a relevant international standard, it may request the importing Party to provide the reasons for the measure. In judging the reasons for the measure the first test is be to establish that the standards do not discriminate between domestic and foreign suppliers, and do not differ across foreign suppliers. A second test is to establish a scientific reason for the higher standard. It is not difficult to imagine situations where the NAFTA countries might legitimately impose differing standards for the same pest. Canada, which has cold winters that kill many pests might have lower standards than Mexico where winterkill is unlikely. Clearly, the benefits of pest control also differ according to the size and value of the domestic crop and the probability of infestation.

The third key issue has to do with how SPS regulations are applied in the absence of an international standard or when the science is incomplete. The

debate over this aspect of SPS regulations, which is often identified as the "precautionary principle" has been heated between the European Union and the NAFTA countries. In NAFTA, the precautionary principle is addressed in Article 715(4). It allows NAFTA members to adopt provisional SPS measures when relevant scientific evidence is insufficient to complete a risk assessment. However, the country applying provisional SPS measures is required to complete its risk assessment and revise its measures when enough information is available to finish the evaluation.

Most of the concern about the use of the precautionary principle results from friction between North America and the European Union, and not among the NAFTA member nations. The most celebrated case involves North American beef that has been denied access to the European market because North American cattle are fed growth hormones, considered safe in North America and unsafe in Europe. The European Union has lost several WTO cases on this trade issue, not because the science is unclear but because they have been unable to find any sound science that supports their arguments.

The critics of the NAFTA continue to point to the "failure" to incorporate the precautionary principle in the agreement as a major shortcoming. Nonetheless, the NAFTA countries continue to argue that SPS regulations must have a scientific basis or they can be easily converted to disguised barriers to trade, while the EU argues that defining acceptable risk levels is a political responsibility that must take consumer concerns into account. The issues surrounding the use of the precautionary principle can only be solved at the

multilateral level. Within NAFTA it has not been a major issue, at least not until now.

In the situation where approval is required for the use of a food additive, or a tolerance level prior to granting access, NAFTA encourages the importing country to consider using a relevant international standard as the basis for granting access until it completes its review.

An important provision of the NAFTA (Article 716), that has been implemented in a number of situations, deals with regional conditions. This provision requires members to evaluate regions within a country, with the same level of risk, in the same fashion. It allows for the creation of disease free or pest free regions within a country. This has been done for avocados shipped from Mexico to the United States and for feeder cattle and hogs shipped from the United States to Canada.

A number of provisions of the NAFTA are designed to improve the transparency of SPS regulations and to encourage the NAFTA members to work together on SPS issues. Examples include:

- Each Member nation must ensure there is one inquiry point that is able to answer all reasonable SPS questions.
- At least 60 days prior to the adoption or modification of an SPS measure the home country should notify the other member countries in writing. The home country should provide a description of the goods involved and the objective and reasons for the SPS measure. The home country should

identify situations where the proposed regulation deviates from international standards and accept and take into account comments provided by other member countries.[5]

- When a Member country denies entry of another member's product on SPS grounds it must provide, on request, the reasons why the good is not in compliance.
- Where control, inspection and approval procedures are required they should be supplied to NAFTA members on the same basis as for the home country. The process should be undertaken in an expeditious fashion and the home country should inform the applicant of any deficiencies in their application.
- The NAFTA countries should cooperate with respect to the provision of technical information.

3.1 Implementation of NAFTA

Figure 1 shows the NAFTA institutions created at its inception. Each of the Member countries has its own internal structure while NAFTA business is conducted through a series of working groups arranged under five broad headings: 1) trade in goods, 2) technical barriers, 3) government procurement, 4) investment services and related matters, and 5) administrative and institutional provisions. The Committee on Sanitary and Phytosanitary Measures in turn formed eight technical working groups with similar responsibilities to those under

[5] There are rules in the NAFTA that allow a Member to take urgent action when this is required.

the CUSTA (Table 1). For the most part what was involved was making bilateral groups into trilateral groups.

The technical working groups created under the NAFTA have been active to varying degrees, ranging from nearly inactive to pro-active. Some of the issues considered by each of the technical working groups are indicated in Table 1. It is difficult for an outsider to get a good feel for the importance and depth of the discussions held in each working group since reports of their activity are difficult to obtain. An exception is the Pesticides working group where there has been considerable progress and information on their accomplishments and work plan are available on the web.[6]

Disputes over SPS issues are considered by the SPS Committee, that includes a representative from each Party. In facilitating decisions the SPS Committee has the right to draw on exerts and expert bodies such as the NAPPO. If an SPS issue cannot be resolved by the SPS Committee each Party has the option of taking the issue to a formal NAFTA dispute settlement panel. To date, no SPS issue has been taken to a NAFTA panel.

The technical working groups and the SPS Committee are not the only way in which SPS issues have been resolved among the NAFTA countries. In December 1998, Canada and the United States signed a Record of Understanding to address a number of bilateral agricultural issues designed to ease trade tension between the two countries. A significant number of these

[6] Reports can be found at:: http://www.hc-sc.gc.ca/pmra-arla/english/pubs/jnt_rev-e.html

issues involved SPS matters. In order to improve dialogue among legislators and government officials this initiative resulted in the formation of the Consultative Committee on Agriculture (CCA) and the Province-State Advisory Group (PSAG).[7] The CCA is lead by senior government officials, while the PSAG provides a forum for producers and exporters to raise trade issues. The PSAG reports to the CCA. By December 1999, progress had been made on the following SPS issues as a result of the Record of Understanding.

- Access into Canada for United States slaughter swine from regions free of pseudorabies without testing and quarantine.
- Expanded access for United States feeder cattle to the Canadian market, from six States, that meet certain animal health criteria.
- Improved transparency in United States cattle vaccination requirements for brucellosis and tuberculosis, including State testing and certification requirements.
- Simplification of United States equine semen requirements, including elimination of permit and certification requirements.
- The facilitation of shipments of United States grain through Canada to final destinations in the United States.
- Canada recognized that certain States are free of karnal bunt.
- Discussions on options to Canada's seed laboratory accreditation requirements.

[7] The Record of Understanding also led to the formation of the Advisory Committee on Private Commercial Disputes.

- Harmonizing veterinary drug registrations and residue limits.
- Collaboration on reviews of pest control products.
- Elimination of duplicate testing for bacterial ring rot in United States potato shipments to Canada.
- Identification of regulatory differences and harmonization measures for nursery stock.

The NAFTA working groups are not the only formal organizations working towards the harmonization of SPS standards. The North American Plant Protection Organization (NAPPO) is named in Article 713 as one of the organizations creating standards, guidelines and recommendations in the area of plant health. The NAPPO is a trilateral organization created in 1976 by the three NAFTA countries. The NAPPO strives to prevent the introduction and spread of plant pests and noxious weeds in North America through the harmonization of regional and international phytosanitary standards. The NAPPO, upon request, provides technical assistance to the NAFTA-SPS committee in order to assist the Committee in dispute resolution. Prior to the formation of NAFTA the NAPPO was not used extensively, but now takes on a key role in standard setting. The NAPPO maintains an inventory of approved standards, provides technical information to the NAFTA-SPS Committee, and assumes a trade facilitating role. In addition, it attempts to present a clear North American position at international standard setting organizations such as the International Plant Protection Convention.

Other ad hoc groups will also occasionally get involved in SPS issues. For example, some of the trade irritants considered by the Canada-United States Joint Commission on Grain related to SPS matters, although it did not comprise a major portion of their effort. Much of the agricultural trade between Mexico and the United States takes place under conditions laid out in protocols that are reviewed and renegotiated on an annual basis (USDA). Exports of peaches, nectarines, cherries and plums are covered by protocols that were renegotiated in fiscal 1999.

3.2 Lessons

Perhaps the major lesson coming from the experience of the CUSTA and the NAFTA is that SPS problems remain a challenge even when there are only three countries in an FTA, and each has a long history of trade with the others. On the positive side, it has been possible to integrate a country at a lower level of development with two highly developed countries. The major concerns raised by the critics of free trade, concerning SPS issues, when Mexico was added to the FTA have not materialized. In 1996, the USDA argued that:

> *"FDA and USDA reviews have consistently shown that violations on food products imported from Canada and Mexico are extremely low and are comparable with violation levels experienced with domestic products."*

In dealing with SPS issues the NAFTA has relied heavily on two pillars: 1) international standards; and 2) science based risk assessment. At least until now, North America has opposed any effort at the international level to introduce non-science based consumer concerns into SPS regulations.

In the NAFTA, the plan was for SPS issues to be addressed primarily by the technical working groups. This process largely involves solving SPS issues one at a time. Even so, the working groups have had trouble solving problems without political involvement, as illustrated by the Canada-United States Record of Understanding.

Are there lessons in the North American experience in handling SPS issues for a potential African FTA? First, with regard to the selection of SPS standards there would appear to be four choices: 1) use international standards, 2) adopt the standards of one member of the FTA, 3) create a unique FTA standards body, or 4) require the harmonization and equivalence of domestic measures. Each of these options has potential costs and benefits, and they are not necessarily mutually exclusive. The NAFTA has to a large extent followed option four, although it started from a position where international standards were generally accepted. With more than three countries in an FTA this would seem to be a fairly cumbersome process, especially when some non-existent standards will need to be developed. A careful benefit/cost analysis is required to choose among the remaining options, coupled with a deep understanding of local administrative and technical capabilities.

After a standard setting mechanism has been selected, a method will have to be found to address the inevitably contentious SPS issues that will arise among members of the FTA. If a working group process is used to settle SPS issues it is important to give it enough political oversight to make sure it does not become moribund.

4.0 Conclusions

The SPS provisions of the NAFTA are modeled on the WTO provisions. They rely on the use of sound science and risk assessments to set SPS standards while allowing individual countries the right to set their own standards. In conducting risk assessments not only are biological factors to be taken into account but the economic effects of the proposed measures are also to be considered. These rules and procedures are designed to keep SPS measures from being used as disguised barriers to trade.

Eight technical working groups were established under the NAFTA to consider SPS issues. Some of these working groups have been quite active, such as the Pesticide group, while others have been largely inactive. It appears that in order for the working groups to make progress they need considerable political oversight and encouragement.

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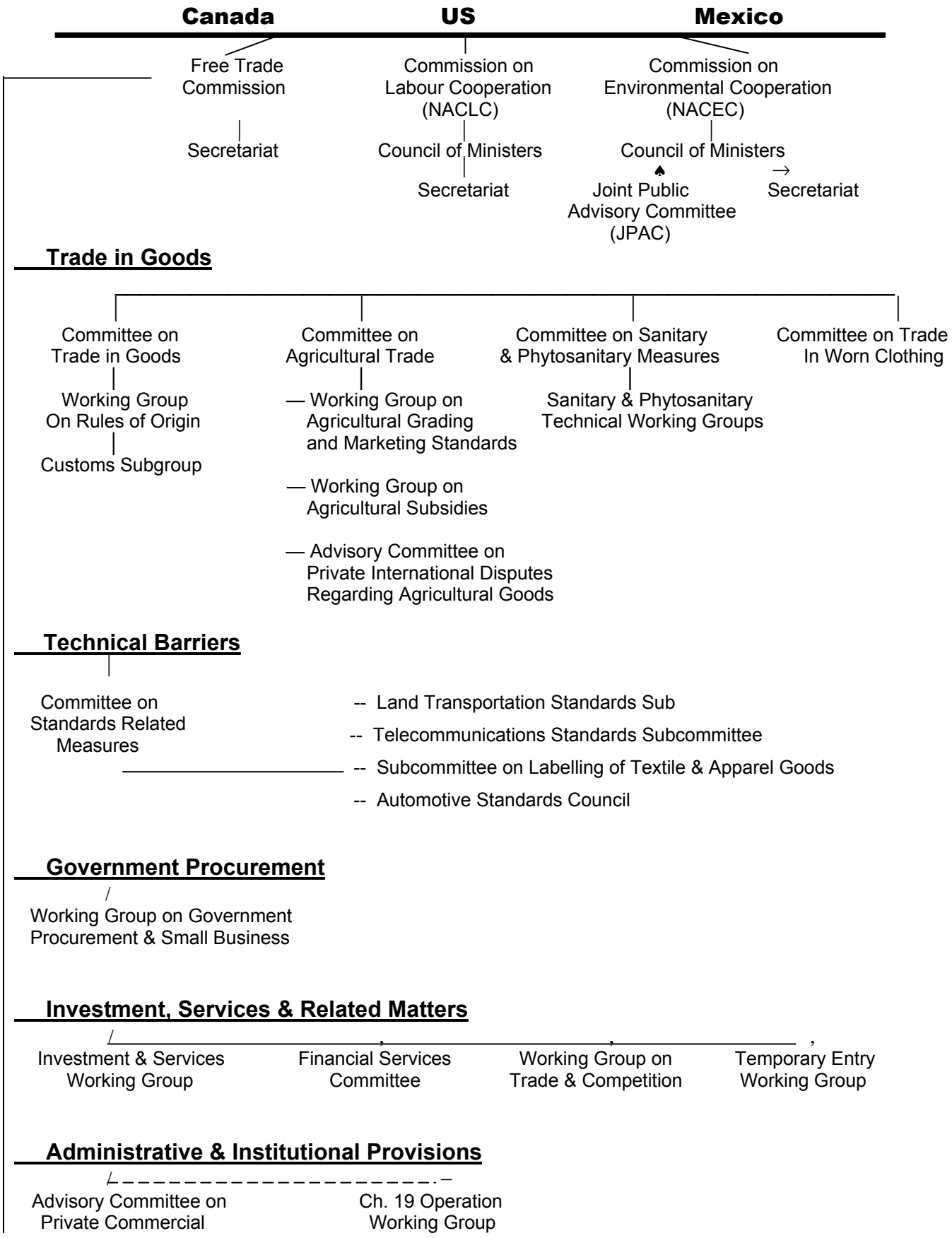
Table 1: CUSTA and NAFTA Working Groups

CUSTA Working Groups	NAFTA Working Groups	Selected Issues Considered by NAFTA Working Group
Animal Health	Animal Health	- develop a common approach for disease freedom recognition - develop an approach to evaluate the veterinary services within member countries - harmonization of diagnostic services
Plant Health, Seeds and Fertilizer	Plant Health	- harmonization of the Japanese beetle regulations - develop harmonized approach to Asian and European Gypsy moth - equivalency of greenhouse certification
Meat and Poultry Inspection	Meat, Poultry and Egg Inspection	- exchange information on proposed changes - exchange information on import reinspection procedures
Dairy, Fruits, Vegetables and Egg Inspection	Dairy, Fruits, Vegetables and Processed Foods	- harmonization of US-Canada potato grade system
Veterinary Drugs and Feeds	Veterinary Drugs and Feed	- equivalence of registration systems
Food, Beverage and Color Additives and Unavoidable Contaminants	Food Additives and Contaminants	- harmonization of US-Canada food additive regulations - potential for joint reviews of food additive petitions

Table 1(cont.): CUSTA and NAFTA Working Groups

Pesticides	Pesticides	- re-evaluate and register older chemical pesticides - work towards a harmonized approach to pesticide certification and training - coordinate development of field residue data among NAFTA countries to support registration of pesticides for minor crops
Packaging and Labelling of Agricultural, Food, Beverage and Certain Related Goods for Human Consumption	Food Labelling, Packaging and Standards	
	Fish and Fishery Products	- negotiate equivalence of US-Canada agreement regarding molluscan shellfish inspection programs - develop criteria for seafood equivalence determination - develop a joint protocol on how to conduct audits of inspection systems

Figure 1: NAFTA INSTITUTIONS



North American Free Trade Agreement

Chapter Seven: Agriculture and Sanitary and Phytosanitary Measures

Section B - Sanitary and Phytosanitary Measures

Article 709: Scope and Coverage

In order to establish a framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures, this Section applies to any such measure of a Party that may, directly or indirectly, affect trade between the Parties.

Article 710: Relation to Other Chapters

Articles 301 (National Treatment) and 309 (Import and Export Restrictions), and the provisions of Article XX(b) of the GATT as incorporated into Article 2101(1) (General Exceptions), do not apply to any sanitary or phytosanitary measure.

Article 711: Reliance on Non-Governmental Entities

Each Party shall ensure that any non-governmental entity on which it relies in applying a sanitary or phytosanitary measure acts in a manner consistent with this Section.

Article 712: Basic Rights and Obligations

Right to Take Sanitary and Phytosanitary Measures

1. Each Party may, in accordance with this Section, adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory, including a measure more stringent than an international standard, guideline or recommendation.

Right to Establish Level of Protection

2. Notwithstanding any other provision of this Section, each Party may, in protecting human, animal or plant life or health, establish its appropriate levels of protection in accordance with Article 715.

Scientific Principles

3. Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is:

a) based on scientific principles, taking into account relevant factors including, where appropriate, different geographic conditions;

b) not maintained where there is no longer a scientific basis for it; and

c) based on a risk assessment, as appropriate to the circumstances.

Non-Discriminatory Treatment

4. Each Party shall ensure that a sanitary or phytosanitary measure that it adopts, maintains or applies does not arbitrarily or unjustifiably discriminate between its goods and like goods of another Party, or between goods of another Party and like goods of any other country, where identical or similar conditions prevail.

Unnecessary Obstacles

5. Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is applied only to the extent necessary to achieve its appropriate level of protection, taking into account technical and economic feasibility.

Disguised Restrictions

6. No Party may adopt, maintain or apply any sanitary or phytosanitary measure with a view to, or with the effect of, creating a disguised restriction on trade between the Parties.

Article 713: International Standards and Standardizing Organizations

1. Without reducing the level of protection of human, animal or plant life or health, each Partyshall use, as a basis for its sanitary and phytosanitary measures, relevant international standards, guidelines or recommendations with the objective, among others, of making its sanitary and phytosanitary measures equivalent or, where appropriate, identical to those of the other Parties.

2. A Party's sanitary or phytosanitary measure that conforms to a relevant international standard, guideline or recommendation shall be presumed to be consistent with Article 712. A measure that results in a level of sanitary or phytosanitary protection different from that which would be achieved by a measure based on a relevant international standard, guideline or recommendation shall not for that reason alone be presumed to be inconsistent with this Section.

3. Nothing in Paragraph 1 shall be construed to prevent a Party from adopting, maintaining or applying, in accordance with the other provisions of this Section, a sanitary or phytosanitary measure that is more stringent than the relevant international standard, guideline or recommendation.

4. Where a Party has reason to believe that a sanitary or phytosanitary measure of another Party is adversely affecting or may adversely affect its exports and the measure is not based on a relevant international standard, guideline or recommendation, it may request, and the other Party shall provide in writing, the reasons for the measure.

5. Each Party shall, to the greatest extent practicable, participate in relevant international and North American standardizing organizations, including the *Codex Alimentarius Commission, the International Office of Epizootics*, the *International Plant Protection Convention*, and the *North American Plant Protection*

Organization, with a view to promoting the development and periodic review of international standards, guidelines and recommendations.

Article 714: Equivalence

1. Without reducing the level of protection of human, animal or plant life or health, the Parties shall, to the greatest extent practicable and in accordance with this Section, pursue equivalence of their respective sanitary and phytosanitary measures.
2. Each importing Party:
    a) shall treat a sanitary or phytosanitary measure adopted or maintained by an exporting Party as equivalent to its own where the exporting Party, in cooperation with the importing Party, provides to the importing Party scientific evidence or other information, in accordance with risk assessment methodologies agreed on by those Parties, to demonstrate objectively, subject to subparagraph (b), that the exporting Party's measure achieves the importing Party's appropriate level of protection;
    b) may, where it has a scientific basis, determine that the exporting Party's measure does not achieve the importing Party's appropriate level of protection; and
    c) shall provide to the exporting Party, on request, its reasons in writing for a determination under subparagraph (b).
3. For purposes of establishing equivalence, each exporting Party shall, on the request of an importing Party, take such reasonable measures as may be available to it to facilitate access in its territory for inspection, testing and other relevant procedures.
4. Each Party should, in the development of a sanitary or phytosanitary measure, consider relevant actual or proposed sanitary or phytosanitary measures of the other Parties.

Article 715: Risk Assessment and Appropriate Level of Protection

1. In conducting a risk assessment, each Party shall take into account:
    a) relevant risk assessment techniques and methodologies developed by international or North American standardizing organizations;
    b) relevant scientific evidence;
    c) relevant processes and production methods;
    d) relevant inspection, sampling and testing methods;
    e) the prevalence of relevant diseases or pests, including the existence of pest-free or disease-free areas or areas of low pest or disease prevalence;
    f) relevant ecological and other environmental conditions; and
    g) relevant treatments, such as quarantines.
2. Further to paragraph 1, each Party shall, in establishing its appropriate level of protection regarding the risk associated with the introduction, establishment or spread of an animal or plant pest or disease, and in assessing the risk, also take into account the following economic factors, where relevant:
    a) loss of production or sales that may result from the pest or disease;
    b) costs of control or eradication of the pest or disease in its territory; and
    c) the relative cost-effectiveness of alternative approaches to limiting risks.
3. Each Party, in establishing its appropriate level of protection:

a) should take into account the objective of minimizing negative trade effects; and
b) shall, with the objective of achieving consistency in such levels, avoid arbitrary or unjustifiable distinctions in such levels in different circumstances, where such distinctions result in arbitrary or unjustifiable discrimination against a good of another Party or constitute a disguised restriction on trade between the Parties.

4. Notwithstanding paragraphs (1) through (3) and Article 712(3)(c), where a Party conducting a risk assessment determines that available relevant scientific evidence or other information is insufficient to complete the assessment, it may adopt a provisional sanitary or phytosanitary measure on the basis of available relevant information, including from international or North American standardizing organizations and from sanitary or phytosanitary measures of other Parties. The Party shall, within a reasonable period after information sufficient to complete the assessment is presented to it, complete its assessment, review and, where appropriate, revise the provisional measure in the light of the assessment.

5. Where a Party is able to achieve its appropriate level of protection through the phased application of a sanitary or phytosanitary measure, it may, on the request of another Party and in accordance with this Section, allow for such a phased application, or grant specified exceptions for limited periods from the measure, taking into account the requesting Party's export interests.

Article 716: Adaptation to Regional Conditions

1. Each Party shall adapt any of its sanitary or phytosanitary measures relating to the introduction, establishment or spread of an animal or plant pest or disease, to the sanitary or phytosanitary characteristics of the area where a good subject to such a measure is produced and the area in its territory to which the good is destined, taking into account any relevant conditions, including those relating to transportation and handling, between those areas. In assessing such characteristics of an area, including whether an area is, and is likely to remain, a pest-free or disease-free area or an area of low pest or disease prevalence, each Party shall take into account, among other factors:

a) the prevalence of relevant pests or diseases in that area;
b) the existence of eradication or control programs in that area; and
c) any relevant international standard, guideline or recommendation.

2. Further to paragraph 1, each Party shall, in determining whether an area is a pest-free or disease-free area or an area of low pest or disease prevalence, base its determination on factors such as geography, ecosystems, epidemiological surveillance and the effectiveness of sanitary or phytosanitary controls in that area.

3. Each importing Party shall recognize that an area in the territory of the exporting Party is, and is likely to remain, a pest-free or disease-free area or an area of low pest or disease prevalence, where the exporting Party provides to the importing Party scientific evidence or other information sufficient to so demonstrate to the satisfaction of the importing Party. For this purpose, each exporting Party shall provide reasonable access in its territory to the importing Party for inspection, testing and other relevant procedures.

4. Each Party may, in accordance with this Section:

a) adopt, maintain or apply a different risk assessment procedure for a pest-free or disease-free area than for an area of low pest or disease prevalence, or
b) make a different final determination for the disposition of a good produced in a pest-free or disease-free area than for a good produced in an area of low pest or disease prevalence, taking into account any relevant conditions, including those relating to transportation and handling.

5. Each Party shall, in adopting, maintaining or applying a sanitary or phytosanitary measure relating to the introduction, establishment or spread of an animal or plant pest or disease, accord a good produced in a pest-free or disease-free area in the territory of another Party no less favorable treatment than it accords a good produced in a pest-free or disease-free area, in another country, that poses the same level of risk. The Party shall use equivalent risk assessment techniques to evaluate relevant conditions and controls in the pest-free or disease-free area and in the area surrounding that area and take into account any relevant conditions, including those relating to transportation and handling.

6. Each importing Party shall pursue an agreement with an exporting Party, on request, on specific requirements the fulfillment of which allows a good produced in an area of low pest or disease prevalence in the territory of an exporting Party to be imported into the territory of the importing Party and achieves the importing Party's appropriate level of protection.

Article 717: Control, Inspection and Approval Procedures

1. Each Party, with respect to any control or inspection procedure that it conducts:

(a) shall initiate and complete the procedure as expeditiously as possible and in no less favorable manner for a good of another Party than for a like good of the Party or of any other country;

(b) shall publish the normal processing period for the procedure or communicate the anticipated processing period to the applicant on request;

(c) shall ensure that the competent body

(i) on receipt of an application, promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of any deficiency,

(ii) transmits to the applicant as soon as possible the results of the procedure in a form that is precise and complete so that the applicant may take any necessary corrective action,

(iii) where the application is deficient, proceeds as far as practicable with the procedure if the applicant so requests, and

(iv) informs the applicant, on request, of the status of the application and the reasons for any delay;

(d) shall limit the information the applicant is required to supply to that necessary for conducting the procedure;

(e) shall accord confidential or proprietary information arising from, or supplied in connection with, the procedure conducted for a good of another Party

(i) treatment no less favorable than for a good of the Party, and

(ii) in any event, treatment that protects the applicant's legitimate commercial interests, to the extent provided under the Party's law;

(f) shall limit any requirement regarding individual specimens or samples of a good to that which is reasonable and necessary;

(g) should not impose a fee for conducting the procedure that is higher for a good of another Party than is equitable in relation to any such fee it imposes for its like goods or for like goods of any other country, taking into account communication, transportation and other related costs;

(h) should use criteria for selecting the location of facilities at which the procedure is conducted that do not cause unnecessary inconvenience to an applicant or its agent;

(i) shall provide a mechanism to review complaints concerning the operation of the procedure and to take corrective action when a complaint is justified;

(j) should use criteria for selecting samples of goods that do not cause unnecessary inconvenience to an applicant or its agent; and

(k) shall limit the procedure, for a good modified subsequent to a determination that the good fulfills the requirements of the applicable sanitary or phytosanitary measure, to that necessary to determine that the good continues to fulfill the requirements of that measure.

2. Each Party shall apply, with such modifications as may be necessary, paragraphs 1(a) through (i) to its approval procedures.

3. Where an importing Party's sanitary or phytosanitary measure requires the conduct of a control or inspection procedure at the level of production, an exporting Party shall, on the request of the importing Party, take such reasonable measures as may be available to it to facilitate access in its territory and to provide assistance necessary to facilitate the conduct of the importing Party's control or inspection procedure.

4. A Party maintaining an approval procedure may require its approval for the use of an additive, or its establishment of a tolerance for a contaminant, in a food, beverage or feedstuff, under that procedure prior to granting access to its domestic market for a food, beverage or feedstuff containing that additive or contaminant. Where such Party so requires, it shall consider using a relevant international standard, guideline or recommendation as the basis for granting access until it completes the procedure.

Article 718: Notification, Publication and Provision of Information

1. Further to Articles 1802 (Publication) and 1803 (Notification and Provision of Information), each Party proposing to adopt or modify a sanitary or phytosanitary measure of general application at the federal level shall:

(a) at least 60 days prior to the adoption or modification of the measure, other than a law, publish a notice and notify in writing the other Parties of the proposed measure and provide to the other Parties and publish the full text of the proposed measure, in such a manner as to enable interested persons to become acquainted with the proposed measure;

(b) identify in the notice and notification the good to which the measure would apply, and provide a brief description of the objective and reasons for the measure;

(c) provide a copy of the proposed measure to any Party or interested person that so requests and, wherever possible, identify any provision that deviates in substance from relevant international standards, guidelines or recommendations; and

(d) without discrimination, allow other Parties and interested persons to make comments in writing and shall, on request, discuss the comments and take the comments and the results of the discussions into account.

2. Each Party shall seek, through appropriate measures, to ensure, with respect to a sanitary or phytosanitary measure of a state or provincial government:

(a) that, at an early appropriate stage, a notice and notification of the type referred to in paragraphs 1(a) and (b) are made prior to their adoption; and

(b) observance of paragraphs 1(c) and (d).

3. Where a Party considers it necessary to address an urgent problem relating to sanitary or phytosanitary protection, it may omit any step set out in paragraph 1 or 2, provided that, on adoption of a sanitary or phytosanitary measure, it shall:

(a) immediately provide to the other Parties a notification of the type referred to in paragraph 1(b), including a brief description of the urgent problem;

(b) provide a copy of the measure to any Party or interested person that so requests; and

(c) without discrimination, allow other Parties and interested persons to make comments in writing and shall, on request, discuss the comments and take the comments and the results of the discussions into account.

4. Each Party shall, except where necessary to address an urgent problem referred to in paragraph 3, allow a reasonable period between the publication of a sanitary or phytosanitary measure of general application and the date that it becomes effective to allow time for interested persons to adapt to the measure.

5. Each Party shall designate a government authority responsible for the implementation at the federal level of the notification provisions of this Article, and shall notify the other Parties thereof. Where a Party designates two or more government authorities for this purpose, it shall provide to the other Parties complete and unambiguous information on the scope of responsibility of each such authority.

6. Where an importing Party denies entry into its territory of a good of another Party because it does not comply with a sanitary or phytosanitary measure, the importing Party shall provide a written explanation to the exporting Party, on request, that identifies the applicable measure and the reasons that the good is not in compliance.

Article 719: Inquiry Points

1. Each Party shall ensure that there is one inquiry point that is able to answer all reasonable inquiries from other Parties and interested persons, and to provide relevant documents, regarding:

(a) any sanitary or phytosanitary measure of general application, including any control or inspection procedure or approval procedure, proposed, adopted or maintained in its territory at the federal, state or provincial government level;

(b) the Party's risk assessment procedures and factors it considers in conducting the assessment and in establishing its appropriate levels of protection;

(c) the membership and participation of the Party, or its relevant federal, state or provincial government authorities in international and regional sanitary and phytosanitary organizations and systems, and in bilateral and multilateral arrangements within the scope of this Section, and the provisions of those systems and arrangements; and

(d) the location of notices published pursuant to this Section or where such information can be obtained.

2. Each Party shall ensure that where copies of documents are requested by another Party or by interested persons in accordance with this Section, they are supplied at the same price, apart from the actual cost of delivery, as the price for domestic purchase.

Article 720: Technical Cooperation

1. Each Party shall, on the request of another Party, facilitate the provision of technical advice, information and assistance, on mutually agreed terms and conditions, to enhance that Party's sanitary and phytosanitary measures and related activities, including research, processing technologies, infrastructure and the establishment of national regulatory bodies. Such assistance may include credits, donations and grants for the acquisition of technical expertise, training and

equipment that will facilitate the Party's adjustment to and compliance with a Party's sanitary or phytosanitary measure.

2. Each Party shall, on the request of another Party:

(a) provide to that Party information on its technical cooperation programs regarding sanitary or phytosanitary measures relating to specific areas of interest; and

(b) consult with the other Party during the development of, or prior to the adoption or change in the application of, any sanitary or phytosanitary measure.

Article 721: Limitations on the Provision of Information

Nothing in this Section shall be construed to require a Party to:

(a) communicate, publish texts or provide particulars or copies of documents other than in an official language of the Party; or

(b) furnish any information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

Article 722: Committee on Sanitary and Phytosanitary Measures

1. The Parties hereby establish a Committee on Sanitary and Phytosanitary Measures, comprising representatives of each Party who have responsibility for sanitary and phytosanitary matters.

2. The Committee should facilitate:

(a) the enhancement of food safety and improvement of sanitary and phytosanitary conditions in the territories of the Parties;

(b) activities of the Parties pursuant to Articles 713 and 714;

(c) technical cooperation between the Parties, including cooperation in the development, application and enforcement of sanitary or phytosanitary measures; and

(d) consultations on specific matters relating to sanitary or phytosanitary measures.

3. The Committee:

(a) shall, to the extent possible, in carrying out its functions, seek the assistance of relevant international and North American standardizing organizations to obtain available scientific and technical advice and minimize duplication of effort;

(b) may draw on such experts and expert bodies as it considers appropriate;

(c) shall report annually to the Commission on the implementation of this Section;

(d) shall meet on the request of any Party and, unless the Parties otherwise agree, at least once each year; and

(e) may, as it considers appropriate, establish and determine the scope and mandate of working groups.

Article 723: Technical Consultations

1. A Party may request consultations with another Party on any matter covered by this Section.

2. Each Party should use the good offices of relevant international and North American standardizing organizations, including those referred to in Article 713(5), for advice and assistance on sanitary and phytosanitary matters within their respective mandates.

3. Where a Party requests consultations regarding the application of this Section to a Party's sanitary or phytosanitary measure, and so notifies the Committee, the Committee may facilitate the consultations, if it does not consider the matter itself, by referring the matter for non-binding technical advice or recommendations to a working group, including an ad hoc working group, or to another forum.

4. The Committee should consider any matter referred to it under paragraph 3 as expeditiously as possible, particularly regarding perishable goods, and promptly forward to the Parties any technical advice or recommendations that it develops or receives concerning the matter. The Parties involved shall provide a written response to the Committee concerning the technical advice or recommendations within such time as the Committee may request.

5. Where the involved Parties have had recourse to consultations facilitated by the Committee under paragraph 3, the consultations shall, on the agreement of the Parties involved, constitute consultations under Article 2006 (Consultations).

6. The Parties confirm that a Party asserting that a sanitary or phytosanitary measure of another Party is inconsistent with this Section shall have the burden of establishing the inconsistency.