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Multilateral Trade Assistance Project III – EuropeAidll263l3lC/SERNN

REPORT

ACTIVITY CODE: CB-3

SUPPORTING MOIT ON DRAFTING A PRIME MINISTER'S DECISION ON THE PROMULGATION OF REGULATIONS ON THE ISSUANCE OF CERTIFICATE OF FREE SALE (CFS)

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I. Executive summary

Objectives

Activity CB-3 aims at Supporting MOIT on drafting a Prime Minister's Decision on the procedures to be adopted in respect of Certificates of Free Sale (CFS) for imported and exported products. The main objective of MOIT is twofold: first, to create a legal framework for the issuance of CFS to exporters to facilitate the exportation of goods to markets requiring such certificates, and second, to create an efficient legal framework for a proper assessment of the CFS presented by importers in order to control the quality of imported goods.

Issues at Stake

CFS is often required by the authorities of a number of importing states as a requisite for importing certain type of products (e.g., pharmaceuticals, candies, consumption goods, chemical products, washing powder, food, etc.). It is in general required that the CFS must be issued by the health or other competent authorities of the exporting country. Indeed, each country should have CFS legislation both for companies exporting certain type of products and for the importing authorities, as CFS is often an instrument for ensuring that the quality of imported products satisfies a minimum standard. Currently in Viet Nam there are no homogeneous rules on both for the issuance of CFS for exported goods and requirement of CFS for imported goods. This situation raised serious problems for some Vietnamese exporters that have been denied the access to the market of some countries as the products were not accompanied by CFS and to some foreign importers which do not properly find the appropriate guidance for requiring to their authority the issuance of CFS which are accepted by the competent authority in Vietnam.

The problems regarding the issuance of CFS for products to be exported are quite different from those affecting the regulation of CFS for imported products. While in the first case there is the need to ensure the most efficient administrative system for the prompt issuance of CFS, in the second the main worry regards the minimization of the risks that CFS could be perceived by foreign trade partners as a commercial barrier. Therefore, while the organization of an efficient system for the issuance of export-oriented CFS requires substantially the design of an appropriate flow-chart where the competencies among different agencies and ministries are clearly attributed in an exporter-oriented point of view, the regulation of CFS for imported products needs, first of all, the identification of the products which have to be accompanied by a CFS and the evaluation of the consistency of the regulation with Vietnam’s WTO commitments.

Methodology

The research, first of all, had been focused on the discipline on CFS in a number of WTO members. The main documents collected are reported in the annexes to this report.
The report, then, analyze the main legal issues regarding CFS on imports. The next section is dedicated to the analysis of the draft Decision prepared by the MOIT: this report provides the main modifications the experts considered appropriate to improve the efficiency of the CFS

system in Vietnam as well as its consistency with WTO rules. The last section is focused on the main models Vietnam could adopt for maximizing the efficiency of the system for issuing CFS for exported products.

Important remarks

Although a number of other countries already adopted the CFS system on imports and even taking into consideration that Vietnam has already been requiring the CFS for some products, it should be reminded that the CFS for imported products is a further administrative requirement to be satisfied by the importers of specific products. The legitimate objectives which justify the request of CFS to some imported products (i.e. the necessity to avoid that low quality and dangerous products are imported in the country) could be satisfied in a different manner, i.e. with the set up of an efficient system for controlling that the quality of imported products is conform with the national standards. Moreover, the CFS system, as it is pointed out in the section dedicated to the legal analysis, could raise some concerns regarding its consistency with the WTO commitments of Vietnam. For this reason the MOIT has been recommended to reconsider the necessity of continuing, even if in a more transparent manner, to request some imported products to be accompanied by the CFS. However in Vietnam an appropriate system for verifying that the quality of imported products is in line with national standard is lacking, as it requires huge investments which, at present, cannot be supported by a developing country like Vietnam. For this reason it has been taken the decision to cooperate in the drafting of the Decision on CFS to support the MOIT in the objective of having a WTO-consistent instrument, not perceived as a trade barrier from other WTO partners, which helps the country to pursue its legitimate interests.

II. The legal analysis: the WTO Consistency of the "Certificate of Free Sale"

Introduction: the CFS

The "Certificate of Free Sale" (in some countries even known as "Certificate of Free Trade") is an import requirement that has never been challenged before the Dispute Settlement System of the WTO. Neither has it been the subject of any formal request of consultation or of any formal protests before the usual diplomatic channels. From a legal point of view, the certificate is a declaration issued by a competent authority of the exporting country that the products listed in the document may be legally marketed in the country of origin. However, differently from other certificates, the effective value of the declaration provided in the CFS is questioned.

For example, the Institute for Trade, Standard and Sustainable Development (ITSSD), referring to the 'Certificate of Free Sale' for food and cosmetic products issued by United States, highlighted that it "is insufficient to substantiate safety of the product. The CFS just states that the FDA (Food and Drug Administration) regulates the manufacturer, who is operating in compliance with the law, but gives no assurances about the product per se"[1].

The debate on the consistency of the Certificate of Free Sale with international rules is still in an initial phase; among the very few information available about the international practice, the CFS has been mentioned in the discussion focused on trade facilitation[2] (the CFS is considered another burden penalizing the exporters of the targeted products). Moreover, in a report analyzing the trade barriers for EU exporters, it has been objected that, in some cases, the transhipment of a product through another country may require the issuing of two Certificates (one issued by the country of origin, the other by the country of shipment)[3].

WTO and CFS

Even if, as already mentioned, the CFS has never been challenged before the Dispute Settlement Body of the WTO and it has never been the subject of any formal request of consultation before the usual diplomatic channels, the requirement of Certificate of Free Sale by importing countries raises the following concerns regarding its consistency with the WTO agreements:

a) Violation of Article I and Article III.4 of GATT 1994;
b) Violation of Article XI of GATT 1994;

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[1] WTO Notifications: G/TBT/N/COL/65/Add.3 and G/SPS/N/COL/98/Add.3

[2] See ITC, Business and the WTO Negotiations on Trade Facilitation, Geneva, 2005.

[3] Centre d'etudes econmiques et institutionnelles, *In-depth analysis of trade and investment barriers* in certain third country markets in the area of labeling and marking requirements: Final Report, Bruxelles, 2002, where it is reported that "another problem could be related to the free sale certificate in the country of origin. For example, if one product is produced in Great Britain but shipped from France, both French and British certificates for free sale must be produced. The situation could be more complicated and the delay due to the free sale certificate could reach one year and a half".

c) Lack of legal basis for invoking article XX of GATT 1994 as a justification for the asserted violation of Article I, XI and III.4;
d) Violation of some provisions of the Sanitary and Phytosanitary Agreement (SPS), especially Article 5;
e) Violation of some provisions of the Technical Barriers to Trade Agreement (TBT);
f) The CFS regime shall comply with the rules of the WTO Import Licensing Agreement

The possible inconsistency with Article III.4 and article I of GATT 1994: an overview of the main obligations arising from Article III of GATT 1994.

Article III of GATT 1994 prohibits discrimination against imported products, i.e. it forbids WTO members from treating products of foreign origin less favourably than like domestic products once the imported products has entered the domestic market. Three paragraphs of Article III are of particular relevance:

par. 1, condemning the utilization of national policy in a protectionist manner, where Members recognize that:

"the that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production."

Par. 2, prohibiting the tax discrimination and the utilization of internal taxation for protectionist purposes, stating that:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1" (i.e. in a protectionist manner)".

Paragraph 4 of GATT 1994:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

As it is clear, while paragraph 1 is a rule of programmatic value, paragraph 2 deals only with taxation; therefore, the applicable rule for our purpose is paragraph 4.

Before analyzing the possible inconsistencies with Article III.4, it is worth to highlight that article III is only applicable to "internal measures" and not to "border measures".

A border measure is, for example, a customs duty or a quantitative restriction. According to GATT 1994, "border measures" are covered by the Most Favoured Nation Treatment (GATT Article I) and they target, normally, only foreign products aiming to have access to a certain market. "Border measures" are applied by the importing customs; once the products have been cleared by the importing customs, they have access to the internal market of a State. All the rules, regulations, laws, etc. applicable to the imported products that have been already cleared through the customs are considered by the GATT 1994 as "internal measures" and they have to conform, among the others, to the provisions of the above mentioned article III.

However, it is not always easy to distinguish between "border measures" and "internal measures", as there are some "internal measures" that are applied to imported products at the point of importation. For example, it may be argued that the Certificate of Free Sale is a "border measure" and not an "internal measure" and consequently he would not be subject to Article III provisions. Indeed, in some cases, the customs authorities of the importing countries did not release the products as they were not accompanied by correct certificates of free sale.
Nonetheless, GATT 1994, in the Ad Article III Note, makes clear that:

"Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III".

The traditional example is that of a product that cannot be imported or distributed in a country because it fails to meet a public health requirement that applies equally to domestic products.

In the light of ad Article III above mentioned, we can conclude that article III of GATT 1994 is applicable to CFS whenever the issuing of the CFS in the exporting country is dependent on the product compliance with country of origin laws and regulations etc. having the same scope of application of the laws, regulations, etc. applied by the importing country to like national products (e.g.; health rules, consumer protection rules, rules for the protection of environment, etc.).

Main concerns regarding the violation of Article III.4

The consistency of CFS requirements with GATT Article III.4 raises two main concerns:

i) From a formal point of view, the Certificate of Free Sale is only required to foreign "like" products but not to national ones; this amount to a different treatment between national and foreign products;

ii) From a substantial point of view, the foreign countries (countries of origin of the targeted products) laws, regulations and requirements for obtaining the "Certificate of Free Sale" could be more restrictive/burdensome/costly than those applied in Viet Nam to national products (this will be clarified better later).

With regard to the requirement provided in letter i) the violation of Article III.4 is plain as the certification is required only to foreign products and not to the national "like" ones.

Regarding point ii), the possible violation of Article III.4 should be analyzed on a case-by-case basis; indeed, a violation may occur when the "laws, regulations and requirements" of the exporting country to be complied with by the products targeted by the CFS are more restrictive (i.e. less favourable) than those applied in Viet Nam for like Vietnamese products.

Indeed, normally the exporter can obtain the CFS only if the products are consistent with all the country of origin "laws, regulations and requirements" (i.e. they can be sold in the country of origin market). Requiring CFS to some foreign products has the same effect of requiring that those products comply with all the country of origin relevant legislation. From a legal point of view this circumstance is substantially identical to a situation where the importing country requires foreign products to comply with some foreign legislation (e.g. provided by a national legal system, by an international agreement or a "code of conduct" elaborated by a nongovernmental institution).

It should be pointed out that CFS is required only to foreign product; it is a necessary but not sufficient condition for a foreign product to have access to the importing country; foreign products they have also to comply with the legislation of the importing country (standard, regulations, laws, etc.): it is a sort of "double requirement". This differentiates CFS from mutual recognition agreement, where complying with the exporting country's standard is sufficient for having access to the market of the partner country.

Furthermore, a violation of Article I of GATT 1994 (most favoured nation treatment) may occur in presence of different laws/regulations/etc. in different exporting countries. Requiring the CFS for like products to be imported from different countries, in this case, has the practical result of requiring the imported products to satisfy different laws/regulations etc. to be imported; this is a violation of article I of GATT 1994.

The possible violation of article XI of GATT 1994

Article XI of GATT 1994 prohibits the application of quantitative restrictions at the import or at the export of a product.

Failing to meet the requirements of the country of origin prevent the exporters to obtain the CFS for the targeted products. Without the CFS the targeted products cannot have access in the importing WTO member: this can be considered a quantitative restriction.

Moreover, in the hypothesis that the products would meet the law/regulations/etc. of the importing member requiring the CFS, there will be no legal basis available to the importing

States to justify the prohibition for the targeted products to entry the national market (see article XX below).

Art. XX justification for environmental, health and safety standard

As it is well known, article XX of GATT 1994 provides a two-tier test for determining whether a measure, otherwise inconsistent with GATT obligations, can be justified. First, the measure has to be justified according one of the exceptions listed in paragraphs (a) to (j); second, it must also satisfy the requirements imposed by the opening clause of article XX (better known as "chapeau").

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(*a*) necessary to protect public morals;
(*b*) necessary to protect human, animal or plant life or health;
(*c*) relating to the importations or exportations of gold or silver;
(*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
(*e*) relating to the products of prison labour;
(*f*) imposed for the protection of national treasures of artistic, historic or archaeological value;
(*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
(*h*) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;
(i) and (j) …omissis…

The main problem is represented, here, by the "chapeau" of article XX, requiring that the restrictive national measure can be adopted:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade"

In the US-Gasoline case, the Appellate Body ruled that "the purpose and the object of the introductory part of article XX is generally the prevention of the abuse of the exceptions of Article XX". For this reason the national measure (in our case, the CFS requirement) may not constitute:

- a) either arbitrary or unjustifiable discrimination between countries where the same conditions prevail;
- b) or a disguised restriction on international trade.

Regarding letter a), some misunderstanding may arise from the fact that both Article III.4 (the provision allegedly violated) and article XX introductory part (providing legitimate justifications for violation, among the others, of Article III.4 and Article XI) prohibits discrimination. However, the Appellate Body pointed out that the two standards are different: Article III.4 refers to "discrimination" per se, while article XX prohibits "arbitrary and unjustifiable" discrimination.
When discrimination is "arbitrary and unjustifiable"?
According to the Appellate Body "a discrimination is arbitrary and unjustifiable when it was not merely inadvertent or unavoidable, i.e. when the same objective might be pursued with a less discriminatory or non-discriminatory policy" (US- Gasoline, AB report, par. 23).

What does "the same conditions prevail" mean? In US-Shrimp, the Appellate Body pointed out that:

"We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not follow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries".

The decision of the Appellate Body was commented by P. Van Den Bossche as follows:

"The Appellate Body thus decided that discrimination may also result when the same measure is applied on countries where different conditions prevail. When a measure is applied without any regard for the difference in conditions between countries and this measure is applied in a rigid and inflexible manner, the discrimination may constitute "arbitrary discrimination" within the meaning of the chapeau of Article XX".

The case discussed by the Court was different from the situation occurring with CFS: there the focus was on a national legislation of the importing member applied to production processes located in the exporting country; on the other side, CFS relates to conformity of a product with the country where is has been produced. However, in case the foreign legislation is more burdensome/costly/etc. to what is necessary for protecting national values (and it is possible, as the measure is applied on countries "where different conditions prevail"), there is the risk that, without adequate justification, the CFS could not be justified by Article XX as it could be considered an "arbitrary unjustifiable discrimination".

What is the difference between the national and foreign standard (when the foreign standard is considered "compulsory" by the importing member) that is "acceptable" for WTO?

In the US-Shrimp case (art. 21.5 – Malaysia) the Appellate Body held that:

"Authorizing an importing member to condition market access on exporting members putting in place regulatory programme **comparable in effectiveness** to that of the importing member gives sufficient latitude to the exporting member with respect to the programme it may adopt to achieve the level of effectiveness required"

The criterion of the "comparability in effectiveness" could be the guidelines to verify the consistency of CFS required to products exported from high-level standard countries.

In the same decision, the Appellate Body noted that the application of the US measure (the importing member) also resulted in a differential treatment among various countries desiring certification. Those differences in treatment "constitute unjustifiable discrimination between exporting countries desiring certification in order to gain access to the United States shrimp market within the meaning of the chapeau of Article XX". In practice, the effects of the CFS are similar, as there are different requirements (imposed by the different originating countries) to like products imported in the country requiring the CFS.

The above mentioned consideration raises the issue (and the concern) of a possible violation of the Most Favoured Nation Treatment provided in article I of GATT 1994, as, when the standards of the exporting countries issuing the CFS are substantially different.

Regarding letter b) (disguised restriction on international trade) it is worthwhile to report the words of P. Van Den Bossche (future Appellate Body Member):

"In short, a measure which is provisionally justified under Article XX, will be considered a 'disguised restriction on international trade' if the design, architecture or structure of the measure at issue reveals that this measure does not pursue the legitimate policy objective on which the provisional justification was based but, in fact, pursues trade-restrictive, i.e. protectionist, objectives. Such a measure cannot be justified under article XX".

The legal entire matters of CFS, however, raises questions that are still unanswered as they have never been addressed by WTO/GATT dispute settlement:

Does WTO allow Members the discretion to prohibit the import of goods manufactured in a country only to be exported? Does WTO restrict the possibility of importing Members to reject goods that are not consistent with the rules/regulations/etc of the country of origin, even if these standard, regulations, etc. are much more severe than those of the importing State?

One further question that the Government of Vietnam should think about is the following:

- Can the same legitimate result/objective pursued by the CFS be achieved through a different instrument/system, potentially less discriminatory?

The possible inconsistency with SPS agreement

As it is well known, SPS agreement applies to all sanitary and phytosanitary (SPS) measures which may, directly or indirectly, affect international trade. They are measures aimed to pursue a number of legitimate objectives, such as the protection of human, animal, plant life or health within the territory of each WTO Member. SPS measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria, processes and production methods, testing, inspection, certification and approval procedures, etc.
According to Article 2.1 of SPS agreement, each member has the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measure are not inconsistent with the provision of the SPS agreement itself. Moreover, WTO members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence (art. 2.2 of SPS agreement).

What is relevant for CFS, in the above mentioned hypothesis that the measures applied by the exporting country are more restrictive than those applied by the importing one (e.g. Vietnam), is the text of Article 5.

Paragraph 1 of Article 5 concerns risk assessment:

“Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations”.

Paragraph 3 of Article 5 points out that:
“In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account, as relevant economic factors: the potential damage in terms of loss of production or sales in the event the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks”.

Paragraph 4 of the same article provides that:
“Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects”.

Paragraph 5, utilizing words similar to those of Article XX:

“…each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade”

In fine, paragraph 6, states that:

"…when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility".

Without going into detail, and leaving a more in-depth analysis to later versions of the present report, it could be possible to conclude that:

a) the CFS is not based on a risk assessment; the importing country requiring CFS has not, normally, selected the "appropriate level of sanitary or phytosanitary protection from such risk"; the CFS could imply the need to respect a standard that is more restrictive than necessary to fulfil national appropriate level of sanitary or phytosantitary protection;
b) taking into account the above letter a), there is no reference to the objective of minimizing negative trade effects in determining the appropriate level of sanitary protection;
c) as each WTO members is entitled to adopt its own level of protection, requiring CFS amounts to a request of different sanitary standard applied to different imported products, in violation of the above mentioned paragraph 5 (and see above, the paragraph focused on article XX);
d) requiring CFS, i.e. requiring the respect of each foreign country standard exporting the targeted products, the importing State cannot ensure that, as required by paragraph 6, "such measures are not more trade restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection". It could be possible that the internal standard applied in the US for selling the targeted products in the internal market are too trade restrictive than required to achieve the appropriate level of sanitary protection.

The possible inconsistency with TBT agreement

The consistency of CFS with TBT agreement raises concerns that are similar to those above mentioned for SPS.

As it is well known, to have access to the national market in each country, products shall comply with technical requirements relating to their characteristics and/or the manner in which they are produced. The purpose of these requirements may be the protection of life or health, the protection of environment, the prevention of deceptive practices or to ensure the quality of products. Moreover, procedures set up to verify whether a product meets certain requirements may obstruct trade. These barriers are referred as to technical barriers to trade. The rules applicable to the technical barriers to trade are set out in the Agreement on Technical Barriers to Trade (TBT agreement).

The issuing of a CFS by the authority of the exporting members is conditioned to the respect of the technical regulations provided by the legislation of the exporting country. Therefore, as in the case of SPS, the importing country requiring CFS will give access to his national market only to foreign products complying with the technical regulations issued by their originating countries.

The main rules to be taken into consideration for verifying the consistency of the requirement of CFS with TBT agreements are the following:

Article 2.1: "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country"

Article 2.2: "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information related processing technology or intended end-uses of products"

Article 2.3: "Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner".

Regarding Article 2.1, the considerations already presented in the paragraph focused on national treatment are still valid. Requiring CFS, in presence of more severe/burdensome/etc technical regulations in the exporting country with respect to those of importing country may entail the violation of the national treatment principle. Moreover, in presence of different technical regulations applied by different exporters, requiring CFS has the same effects of applying different technical regulations to similar products of different origin.

With regard to Article 2.2, it may be possible that a technical regulation that can be considered as not more trade restrictive than necessary to fulfil a legitimate objective in one country, i.e. the exporting country (taking account that the risks in every country might be different) could be, on the contrary, considered as "more trade restrictive than necessary" in another country, i.e. the importing one.

In fine, Article 2.3 presupposes that in each country the circumstances justifying the adoption of a certain technical regulations may suddenly change on a country-basis. As pointed out in the above paragraph, it could be possible that the circumstances justifying the adoption of technical regulations no longer exist only in the importing country (e.g. that requiring the CFS).

The agreement on import licensing procedure

The agreement on Import Licensing Procedures (ILA) governs all licensing procedures, not only those introduced in order to administer quotas. Import licensing is defined as the administrative procedures used for the operation of import licensing regimes requiring the submission of an application, or other documentation (other than that required for customs purposes), to the

relevant administrative body as a prior condition for importation into the customs territory of the importing country (Article 1 of the ILA).
Article I of the ILA states requirements or all import licensing procedures. Members must ensure that the administrative procedures used to implement import licensing regimes conform with GATT 1994, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and financial and trade needs of developing country members.
Paragraph 3 of Article 1 requires that the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner.
Particularly relevant are the provisions of Article 2, dedicated to the automatic import licensing.
Automatic import licensing is defined as import licensing where approval of the application is granted in all cases (par. 1).
Moreover, the automatic licensing shall not be administered in such a manner as to have restricting effects on imports subject to automatic licensing (art. 2.2 a).

Automatic licensing procedures shall be deemed to have trade-restricting effects unless, *inter alia*:

(i) Any person, firm or institution which fulfils the legal requirements of the importing Member for engaging in import operations involving products subject to automatic licensing is equally eligible to apply for and to obtain import licences;

(ii) Applications for licences may be submitted on any working day prior to the customs clearance of the goods;

(iii) Applications for licences when submitted in appropriate and complete form are approved immediately on receipt, to the extent administratively feasible, but within a maximum of 10 working days;

(b) Members recognize that automatic import licensing may be necessary whenever other appropriate procedures are not available. Automatic import licensing may be maintained as long as the circumstances which gave rise to its introduction prevail and as long as its underlying administrative purposes cannot be achieved in a more appropriate way.

Article 5 of the ILA provides some notification requirements.

Based on the definition above mentioned, it seems that CFS is a sort of pre-requisite for obtaining the market access for the targeted products.

III. The impact of CFS on Vietnam's import: a synthetic qualitative analysis

One of the main concerns that Viet Nam feels the need to operate an import CFS regime at all bearing in mind that the vast majority of exporters to Viet Nam regard it as a costly and unnecessary burden on international trade.

Indeed, a CFS regime may constitute a barrier to trade or a competitive disadvantage with little public health benefit. For instance, certain countries may take a comparatively long time for product approval and will not issue a CFS prior to approval; the CFS requirement places manufacturers based in those countries at a disadvantage (compared to those based in countries with faster pre-market approval systems). Also certain countries have limited or no relevant regulations in force. The value to public health of a CFS from such countries is therefore significantly different to those CFS's issued by countries with a well-established regulatory system. Relying on a CFS as evidence for safety and performance of a product may therefore be misleading.

Moreover, requiring a CFS from the country of origin may unnecessarily inhibit the flexibility of a manufacturer to shift production from one manufacturing facility to another depending on manufacturing efficiency/costs/availability of materials, etc. Furthermore, requirements for CFS create significant additional administrative burdens on regulatory authorities in countries of origin as well as a financial burden to manufacturers. Finally, the CFS, to be valid, has to be *"legalized"* by *"consularisation"* or *"notarization"* by the Consulate of the importing country in the exporting trade partner: this will add significantly to the administrative burden and costs of importers.

IV. Recommendations for CFS required to some imported products

In view of the above mentioned legal and qualitative analysis, the CFS required to some imported products, in order not to be discriminatory and unnecessarily trade restrictive, should have the following characteristics:

a) It should be given the possibility, to those importers/producers not able to obtain a CFS in the country of origin, to demonstrate that their products are in conformity with Vietnamese or other international standard. For this reason, products not accompanied by CFS should not be rejected by the customs; the importers/producers should be given the possibility to provide alternative certificates/documents etc. regarding the quality of their products.
b) In many countries the CFS has been implemented on a provisional basis in the absence of a law providing a national standard for the quality of different products. For this reason, the CFS should be required as element to be presented at the Vietnamese customs only in the case Viet Nam has not enacted legislation on the quality of the specific imported product yet (and, in any case, taking into consideration the recommendation in point a). In all the other cases, the CFS should be requested only as an "internal measure", i.e. as a document to be presented to national agencies for registration, etc. In any case, the importers/producers not able to obtain the CFS should be allowed to demonstrate that the products comply with Vietnamese or other international standard. For this reason, art. 15 should be completed adding a statement similar to the following. "The importers unable to submit CFS is authorized to submit any evidence that the product satisfy all the requirements provided by the legislation of Viet Nam or by international standard";
c) In order to not represent an obstacle to trade and to be in conformity with the Doha Round trade facilitation outcomes, the CFS should involve a sort of recognition that the foreign products comply with all the standard of the exporting country. In case those standard are considered sufficient to achieve the level of sanitary and phytosanitary protection Viet Nam considers appropriate. In this case, the registration, the authorization to have access to Vietnamese market and/or other formalities should take into consideration that the product is in conformity with certain country of origin's standard.
d) All the procedures should have a deadline (for example, see Annex C of SPS agreement). This means that the foreign exporters should have the possibility to demonstrate that their products comply with the level of sanitary protection Vietnam considers appropriate within a pre-determined and reasonable period of time.
e) There should be the possibility for the importer to challenge the refusal of accepting the goods imported both when CFS is not considered in conformity with what required by the Decree and when goods are not accompanied by CFS.
f) It is of crucial importance to avoid the "double requirement" for foreign products and whatever kind of discrimination. The CFS should be considered as a "substitute" for all

the certificates required by the national authorities in accordance to Vietnamese laws, regulations, etc having the same scope of application of regulations, laws etc whose compliance is required to obtain the issuing of the CFS in the country of origin of the exported products. The CFS, in this case, could be considered as a sort of unilateral recognition of conformity assessment

g) The formality of legalization through the Vietnamese Embassy is a huge burden for exporters; it might raise concerns regarding its consistency with some WTO agreements (i.e. Annex C of SPS agreement; art. VIII of GATT 1994). Two examples further clarify the difficulties and the problems raised by article 17: i) a US exporter of medical devices from Seattle (US, West Cost) having to legalize the CFS in the Vietnamese embassy located in Washington: the cost and the time lost for this procedure could be considered a serious obstacle to trade; ii) what about the legalization of CFS in WTO members where Viet Nam has not established and Embassy?

It is further recommended that:

h) Viet Nam should make greater use of Mutual Recognition Agreements (MRAs). MRAs can facilitate trade between countries because products that are tested and certified before export can enter the importing country directly without having to undergo similar conformity assessment procedures in the importing country. MRAs could also contribute to product approval by regulatory authorities in countries where the testing and certification facilities are not available or are inadequate;

i) Viet Nam increases its participation in international standards setting. The adoption of more International Standards and conformity assessment systems (concerned with health, safety or the environment) by Viet Nam would reduce the need for a CFS import regime and greatly facilitate international trade. International Standards provide a reference framework, or a common technological language, between suppliers and their customers - which facilitates trade and the transfer of technology

j) Viet Nam accedes to the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents (Hague Apostil Convention).*[4]

k) As an alternative to an import CFS that Viet Nam should accept a copy of the market approval/examination certificate issued by any country where the conformity assessment is based on internationally accepted methods, regardless of the physical location of the manufacturer.

l) The CFS should not be based on the criteria of origin as it could create unnecessary complexity.

[4] The Hague Apostille Convention facilitates the circulation of public documents executed in one State party to the Convention and to be produced in another State party to the Convention. It does so by replacing the cumbersome and often costly formalities of a full legalisation process with the mere issuance of an Apostille (also called Apostille Certificate or Certificate). For more information see: http://www.hcch.net/index_en.php?act=text.display&tid=37

m) A policy should be established to address those instances where imported goods meet or exceed minimum Viet Nam standards, but do not qualifying for CFS standard in the country of manufacture/export.
n) The Decision should include an article providing the right of appeal should be inserted to cover rejection by the issuing authority.
o) There should be no formal requirement to present a CFS to Customs.
p) In countries where there is no requirement of CFS for imported products there should at least be a cross-reference to the relevant legislation covering penalties for non-compliance with the decree. This information as it is important that importers and exporters understand the consequences of non-compliance

V. The CFS for products to be exported

Introduction

The issuance of CFS for exported products shall respond to some important exigencies, i.e. the procedure shall be efficient, effective with the minimization of the issuing time. The comparative analysis of other countries' system for issuing CFS gave the possibility to identify some basic features that should be present in an efficient and effective administrative system for issuing CFS on exported products. This section, after a brief description of the main features of an "ideal" system for issuing CFS, presents three different models for issuing a CFS in alternative to the fourth one, at present applied by the Government.

The main features of an "ideal" administrative system for issuing a CFS

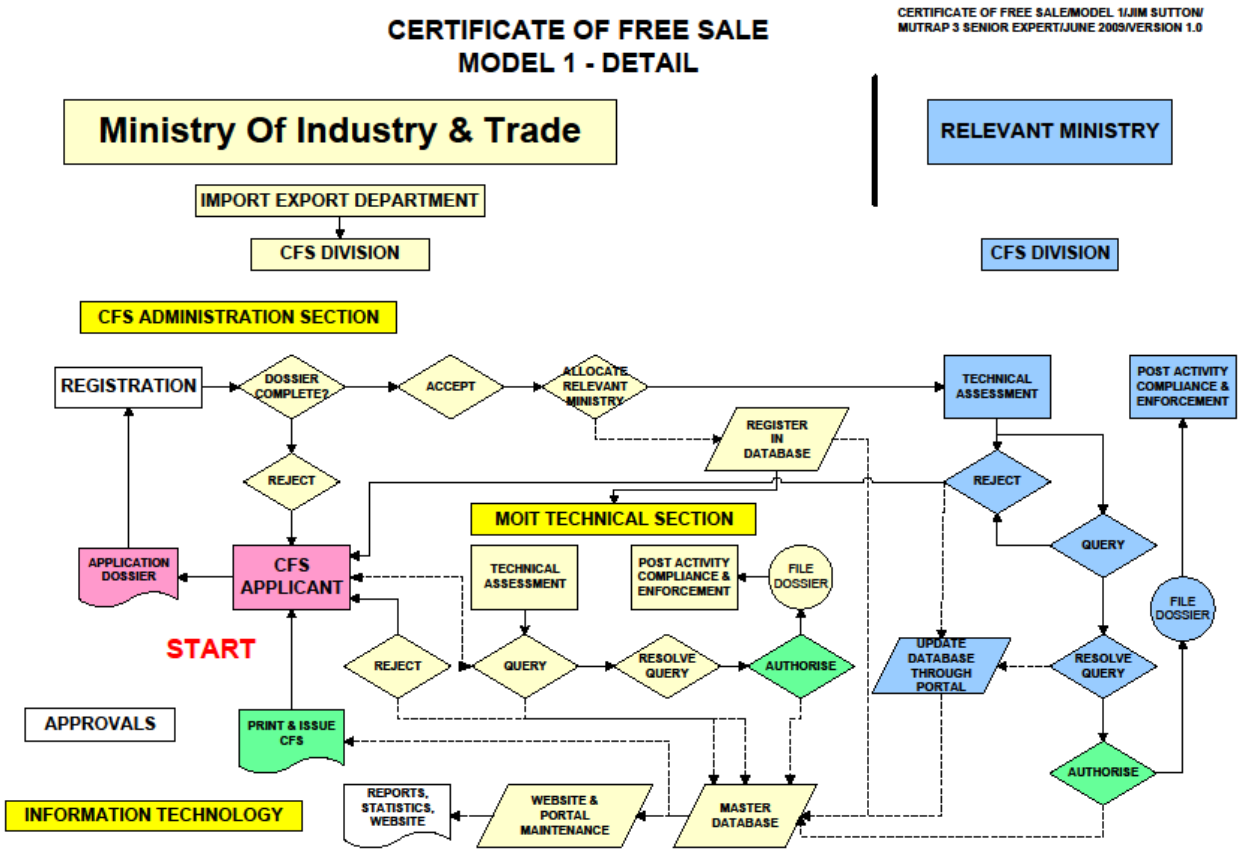
Any final model selected should have the following compulsory components built into the system:

1. Central control over CFS policy through a CFS policy oversight committee
2. Central control over uniformity of interpretation of policy and application of legislation
3. Policy of accountability by ministries
4. Computerisation of the application and approval process
5. A comprehensive statistical and reporting capability (Management Information System - MIS)
6. Public information as to the standardisation of testing/approval processes through a Testing & evaluation policy technical committee
7. An international high quality website providing local and international dissemination of public information about the Vietnamese CFS system (goods subject to, responsible ministries, processes, forms required, processing criteria, appeals process, supporting information requirements for applications, costs and fees, processing time frames etc)
8. A nationally defined administrative processing procedure
9. Policy describing uniformity of decision making and procedural review
10. An audit, investigation and enforcement program through a post audit activity compliance management regime under the control of a National compliance management committee

11. Internationally accessible decision appeals process through a Decision Appeals Committee

The Model 1

In the following table there is the visualization of the flow chart regarding the first model for the issuance of CFS on exported products.



The rationale

As CFS is an international trade issue, it is logical that MOIT be the central agency of State responsible for CFS.

The description of the procedure

MOIT will receive all CFS applications, register them and forward to relevant agencies for technical processing and evaluation. Agencies assess the application, undertake testing of the goods if required, and authorize/reject issue of CFS, however, the actual CFS is issued by the

MOIT. All stages of the process are computerized in a CFS database program owned and controlled by MOIT.

The responsibilities of MOIT

Here following the main tasks to be accomplished by MOIT according to model n. 1.

a) Maintain national CFS Policy: Co-ordinate, Develop and Maintain a World Trade Organization compliant policy of national standards that ensures imported goods do Lack of pose a threat to the health, wellbeing and safety of the citizens of the Socialist Republic Of Vietnam
b) Monitor and adapt the policy relating to the system, ensuring it remains efficient, effective, economic and internationally relevant to its' intended purpose - which should always be to facilitate international trade
c) Receive all CFS applications: after initial screening, reject non compliant applications (with reasons for rejection)
d) Accept compliant dossiers
e) Register in database
f) Direct dossier to relevant Ministry/ministries for technical evaluation
g) Issue CFS after first receiving an electronic authorization to do so from the relevant regulatory agency through the online database.
h) Maintain a national CFS website that
    i. Is designed primarily for the end user (importers and exporters)
    ii. Domestically and internationally accessible
    iii. Comprehensively details national CFS policy, national law, technical requirements, lodgement procedures, processing procedures (including fees, if any), and appeal mechanisms, applicable in Vietnam
    iv. Is multi lingual
    v. The website is to be included as an integral part of the banner website of Import/Export Department of the MOIT. The website is to comprehensively list classes of goods subject to CFS certification, responsible Ministries, and on-line and email contact point details within each of those ministries that can provide further information
    vi. The website should have a secondary purpose of providing a (publicly hidden) portal of access by relevant processing CFS authorities who will update the database as to real time CFS application processing progress
    vii. Line Ministries (CFS Issuing Agencies) can receive detailed statistical reports through the MIS Management Information System sub program of the database
    viii. Available statistical reports on line shall include, as a minimum, the following
i) Processing data for a given period by agency
j) Processing times by individual application, or batched (ie. workload by month, quarter, year)
k) Client applicant history, including received queried, rejected, and authorised applications. Current CFS holdings. Soon to expire holdings. Holdings by manufacturer (as distinct to exporter)
l) Client post activity Compliance performance history

m) Fees (if any) received/paid overall, by client
n) Details of history of processing breaches of legislated time frames by issuing agency.

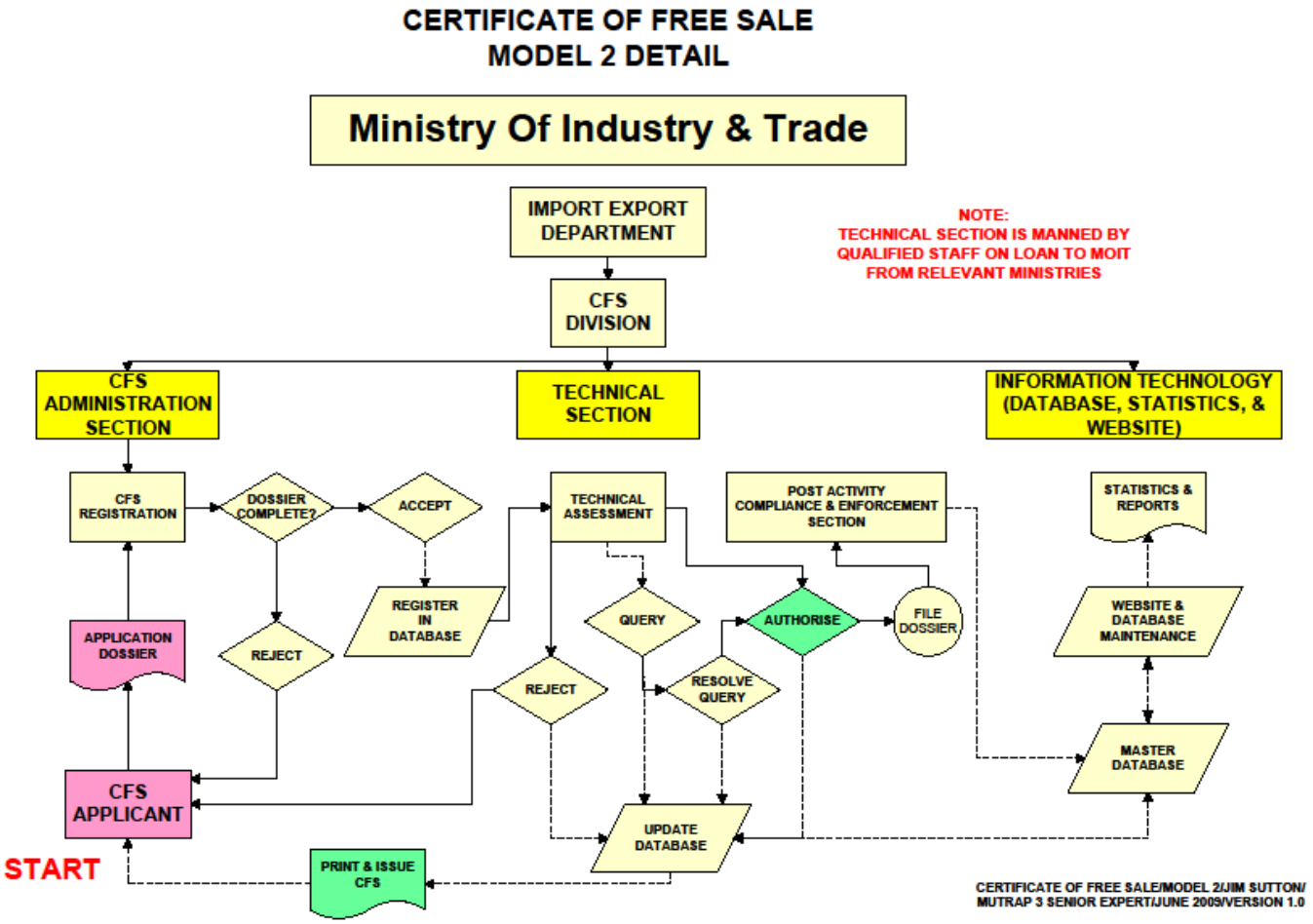
The responsibilities of Line Ministries

a) Access and Update the MOIT controlled national CFS database through online portal as to the technical and procedural requirements of that ministry
b) Reissue expired CFS
c) Formally assess CFS applications against national and international technical and scientific standards criteria
d) Test and analyze goods as part of the assessment process if required
e) Determine compliance or Lack of compliance with national standards
f) Reject or query applications as appropriate
g) Authorize (but Lack of issue) CFS for compliant applications
h) Retain and file authorized dossiers for possible later audit
i) Design and maintain a post CFS authorization regulatory compliance program of audit and investigation based upon risk assessment principles. Update audit results in the national MOIT CFS computer system.
j) Initiate legal/administrative penalty action if/as required in cases of lack of compliance (update database with basic detail summary).

The feasibility of model 1 to Vietnam

The feedback collected from the beneficiary and line Ministries indicate that the political and administrative realities in Viet Nam are such that they were convinced that it would be virtually impossible to persuade the agencies to relinquish control (to the MOIT) of the areas which they regard as of core competence.

The model 2



The description of the procedure

All relevant agencies provide sufficient technical experts (suggest 1 or 2 experts, dependent upon volume of work) within the CFS technical department of the MOIT. The MOIT will then receive, register, process, assess all CFS applications, and issue the CFS if it is compliant. The key experts of the relevant agencies that are located on loan within the CFS department of the MOIT will re-direct CFS applications to their respective agency, if, and only if, the further processing of the dossier requires physical or analytical assessment of the goods. That analysis or inspection shall be undertaken by staff within the relevant agency. After that assessment, the dossier will be returned to MOIT for finalization and issuance/rejection of the CFS. In cases where the goods require Lack of physical or analytical assessment in the field or in a laboratory,

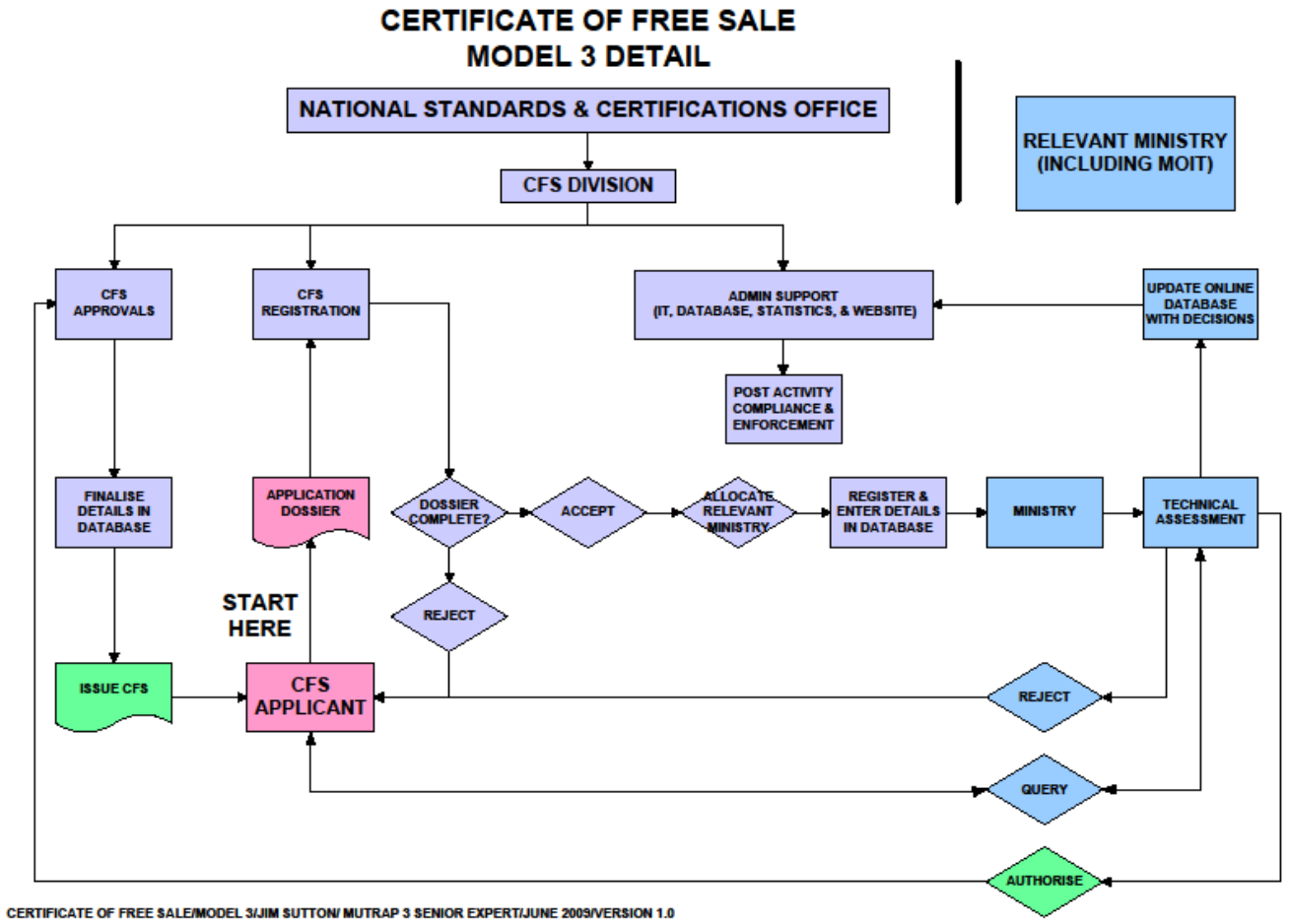
the CFS will be authorized and issued by the relevant agencies' staffs who are on loan and located within the MOIT.

MOIT and Line Ministries Responsibilities are similar than those describe for model 1.

The feasibility of model 2 to Vietnam

The same feedback collected for Model 1 also applies for model 2. Furthermore, the beneficiary pointed out that it would not be practical to locate key staff from other departments within the MOIT. The staffs most suitable for this function are also entrusted by their departments with a vast array of additional (non-CFS) tasks which they would be unable to address effectively whilst located in another government agency.

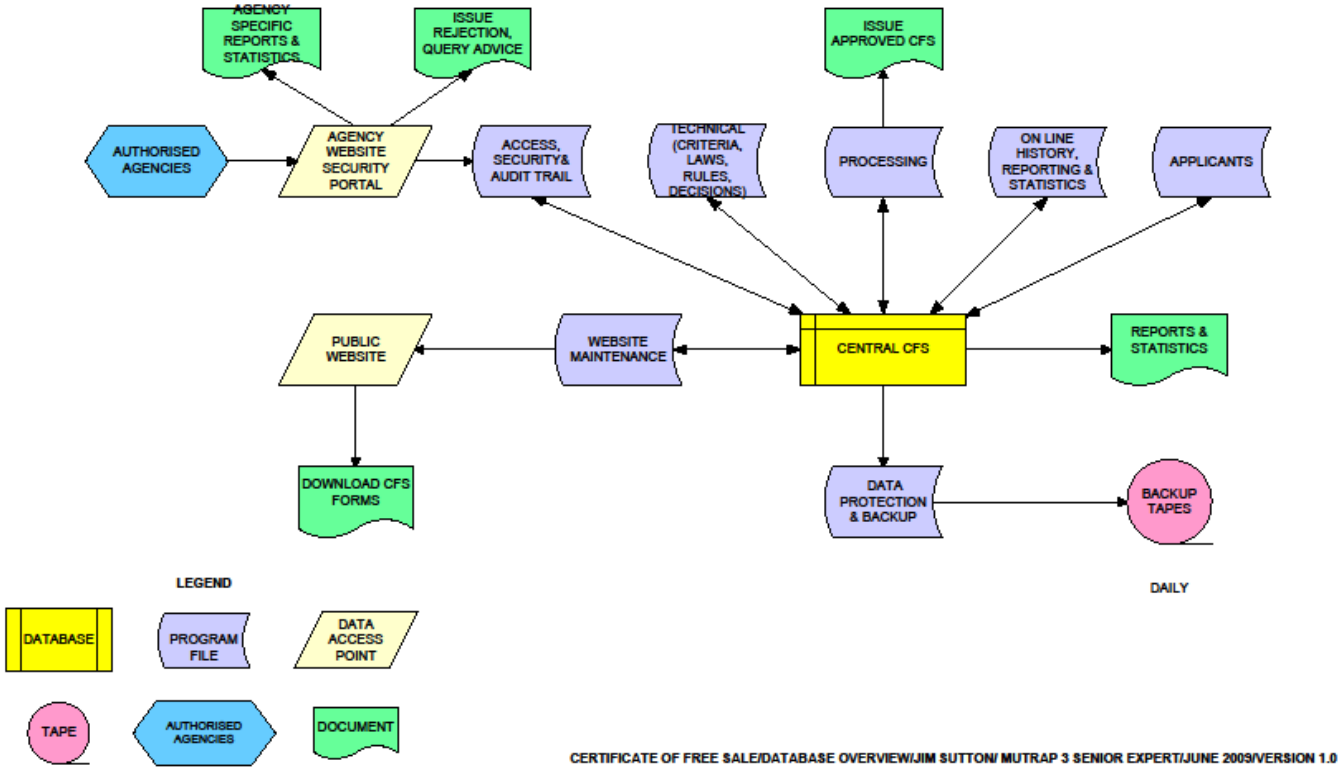
The model 3



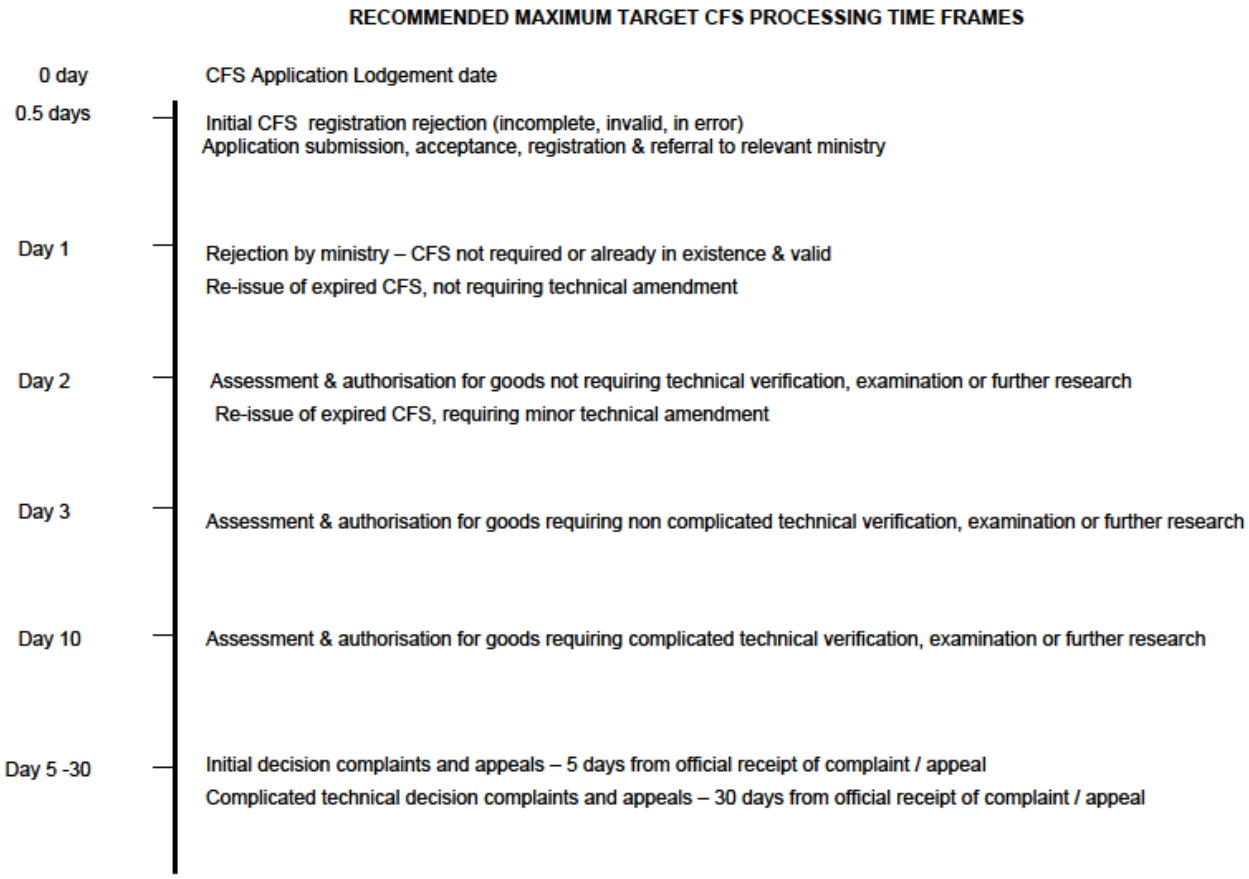
The description of the procedure

A National Standards Office is created, which, as part of its portfolio, controls CFS nationally. The NSO will sit outside the relevant ministries, as a statutory authority. It will operate in the same manner as Model 1, but MOIT, as a relevant issuing agency, will process CFS technical criteria in the same manner undertaken by the other agencies. NSO, instead of MOIT, will control CFS registration, issuance, and the CFS database.

SUGGESTED CFS DATABASE PROCESS



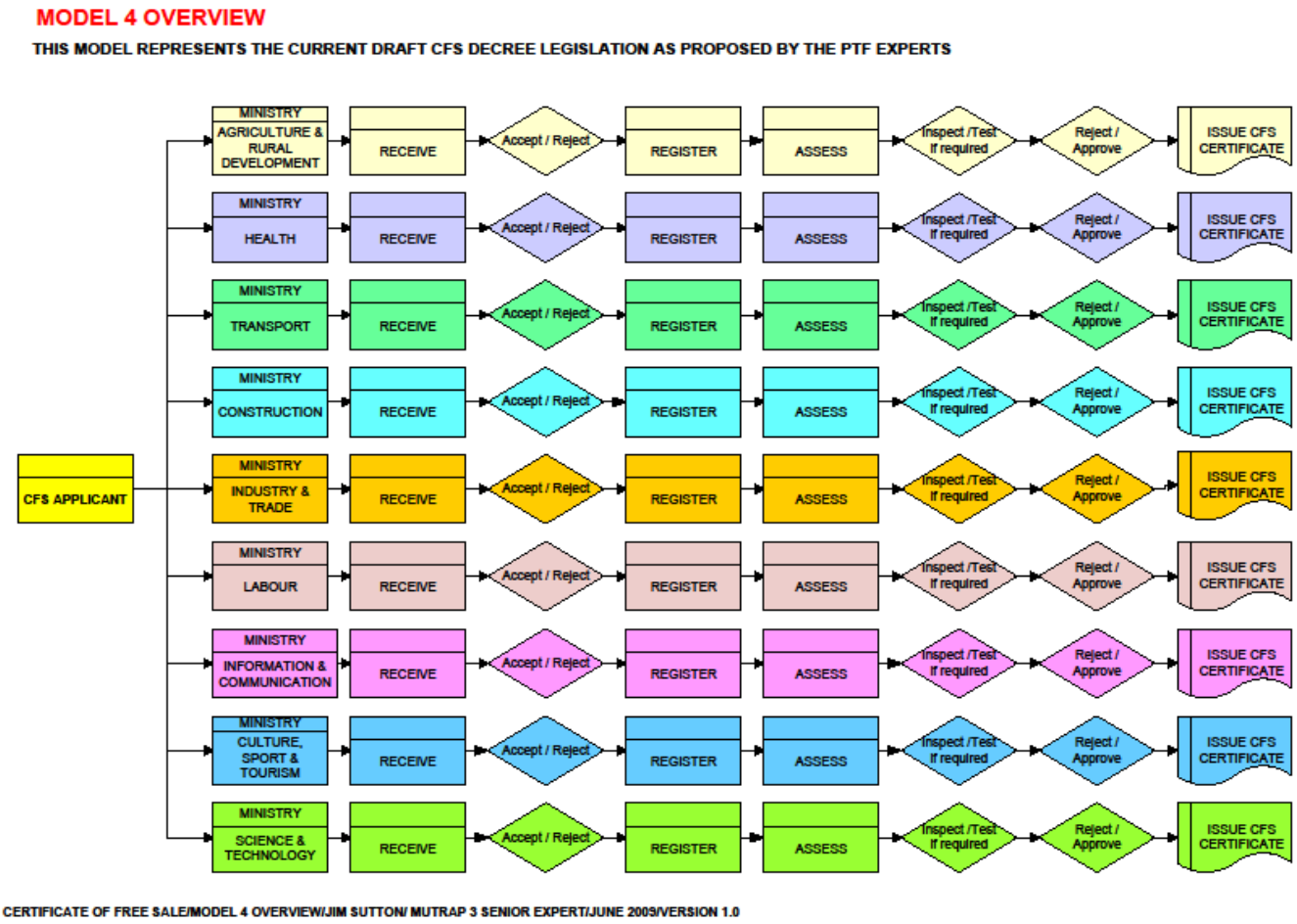
CERTIFICATE OF FREE SALE/DATABASE OVERVIEW/JIM SUTTON/ MUTRAP 3 SENIOR EXPERT/JUNE 2009/VERSION 1.0



The feasibility of model 3 to Vietnam

The same concerns which have been raised for model 1 and 2 also apply. Another stumbling block for the implementation of Model 3 is that it is in conflict with government policy not to introduce any more government departments and/or to create any more levels of bureaucracy.

The model applied at present: model 4



The description of the procedure

This is the current draft CFS Decree legislation as proposed by the PTF Experts shown in flowchart model format.

It can readily be seen that the legislation designates a model that is not designed from the viewpoint of the intended end user (the importer and exporter), but rather generally outlines an administrative procedure. This is why it is better to decide a model, and then write the decree to fit the model.

The main deficiencies

When the decree is viewed in a diagrammatic manner, it is easier to see system deficiencies such as the following:

a) Lack of central control over CFS policy
b) Lack of central control over uniformity of interpretation and application of legislation
c) Lack of accountability by ministries
d) Lack of computerization of the process
e) Lack of statistical or reporting capability
f) Lack of standardization of testing/approval processes
g) Lack of provision for local and international dissemination of public information about goods requiring CFS
h) Lack of provision for uniformity of decision making and procedural review
i) Lack of post audit activity compliance management regime
j) Lack of decision appeals process

These omissions together show a poor model design that needs review so as to develop a system that facilitates international trade in a WTO compliant manner.

The feasibility of model 4 to Vietnam

This is the preferred (and existing) model of the beneficiary. There was a recognition that it is far from perfect and could lead to duplication and inconsistency. However, the beneficiary argued that the political and administrative realities in Viet Nam are such that it would be virtually impossible to persuade the other agencies to relinquish their control of areas which they regarded as of core competence.

VI. The comments to the Draft Decision on CFS

Here following the main recommendations provided for each article of the CFS.

Chapter I: GENERAL PROVISIONS

Article	International Expert Comments
Article 1. Scope of regulation This decree provides details of the procedures and requirements for the issuance of Certificates of Free Sale (CFS) for: - Domestically originating products to be exported from Viet Nam; and - Foreign originating products to be imported into Viet Nam.	The decree should outline at the beginning a rationale, or purpose, that describes what it is designed to achieve. This is best undertaken in the form of a short preamble, which should clearly state the objectives of having a regulated CFS system.
Article 2. Subjects of application This decree is applicable to competent governmental authorities, traders, manufacturers, producers, and other organizations and individuals responsible for the quality of products, exported from or imported into Viet Nam.	This clause seems to encompass all the key stakeholders.

Article 3. Interpretation of terms (Definition) In this decree, the terms below are construed as follows: 1. Certificate of Free Sale (CFS) is a document which is required by some countries for the importation of specified products for the purpose of proving that the products are originating and freely sold in the domestic market. In Viet Nam, several different competent authorities issue CFS depending on the category of product. CFS shall encompass other specific certificates which include all of the information and characteristics of the CFS, such as – Certificate Pharmaceutical Product (CPP) and other similar certificates with similar content. CFS is only issued by the issuing authority at the request of the exporter. 2. The issuing authority is the competent governmental authority assigned to issue the CFS for products as provided for in Article 5. 3. Applicants covered by this decree include inter alia exporters, manufacturers, producers; and their authorized representatives.	There are insufficient definitions; and those that existed were too vague. For instance, definitions of *"originating"* and *"similar certificates with similar content"* are recommended. The Beneficiary accepted that there was some benefit in clarifying some of the terminology used in the decree. Definitions for CFS have been amended accordingly. However, no other definitions were deemed appropriate for inclusion by the Beneficiary. A key issue is whether the beneficiary requires that the CFS certify that the goods are originating in addition to freely sold on the domestic market. It is recommended to drop the originating criteria as it could create unnecessary complexity particularly in those instances where goods which have been imported (i.e. manufactured elsewhere) for sale on the domestic market are then resold/re-exported to Viet Nam. In such instances these goods would not meet the CFS criteria. Additionally, there is the problem regarding the definition of originating products and whose non-preferential origin laws will be applied for CFS purposes.

Chapter II: REQUIREMENTS FOR THE ISSUANCE OF CFS FOR EXPORTED PRODUCTS

Article	International Expert Comments
Article 4. Products for which CFS are issued Domestically originating products for export may be issued with a CFS if they comply with the following conditions: Supported by a duly completed application; The applicant is a registered legal entity which has registered as an approved trader as stipulated in Article 9; The products meet the requisite standards which are certified by the competent authority; and are accompanied by the documents as stipulated in Article 10.	It appears that no CFS will be issued for non-originating products by the Vietnamese issuing authorities even if they are freely sold on the Vietnamese domestic market.
Article 5. Information in the CFS 1. The CFS shall be valid for 2 years from the date of issue. 2. The CFS shall be on ISO A4 size paper in conformity with the specimen shown in Annex 1. It shall be completed in English and shall include the minimum information as follows: - Name of the issuing authority; - Reference number of CFS; - Date of issuance; - Description of products to be covered by CFS; - Types or categories of products to be covered by CFS; - Name and address of producer and/or manufacturer; - The CFS must clearly state that the	

products originate; and are freely sold in the domestic market of the exporting country; - Signature and position of the authorizing official; and the stamp of the issuing authority. 3. Each issuing authority may require that CFS certificates include additional information depending on the type of products and specific management requirements. 4. Each issuing authority may issue CPP and other certificates with similar information. 5. Each issuing authority shall print their own CFS forms with full information as stipulated from clause 1 to 3 of this Article. The type, color and background of paper and logo of the CFS shall be decided by separate ministries and notified to each other.	
Article 6. Authorization of issuance of CFS 1. The issuing authorities; and products covered by the CFS arrangements are stipulated in Annex 2. 2. The relevant issuing authority shall be responsible for the issuance of CFS for the products under its jurisdiction.	Annex 2 has yet to be submitted for consideration.

Article 7. Responsibilities of the applicant The applicant is responsible for: 1. Obtaining the approved trader status from the issuing authority as stipulated in Article 9; 2. Submitting the CFS application to the registered issuing authority; 3. Providing proof that the exported products satisfy the requirements of the issuing authority; 4. The accuracy and truthfulness of declarations relating to the CFS application; and 5. Payment of the issuance fee.	
Article 8. Responsibilities of the issuing authority The issuing authority is responsible for: 1. Providing guidance, if requested, to the applicant on the CFS procedures to be followed; 2. Receiving and checking the approved trader status; and the application; 3. Verifying the products quality, if required; and 4. Issuing the CFS if the products comply with the required regulations.	
Article 9. Registration of approved trader status 1. Before an applicant can be considered for issuance of CFS by the issuing authority he/she must first complete the registration for approved trader status. In order to obtain the approved trader status, the documents required to be submitted are: a) Specimen signature of the person	Additional flexibility has been built-in with regard to the place of registration.

authorized to sign the application; and specimen official seal of the applicant (Annex 3); b) Business registration (certified true copies); c) Tax code registration (certified true copies); d) Details of factory (if applicable) (Annex 4). 2. Any changes of information related to the approved trader status shall be immediately notified to the issuing authority. Even in case of no change, the registration must be updated every two years. 3. In those instances where an applicant wishes to be issued with a CFS at a place other than where he/she has registered for approved trader status, he/she should send a written request to the alternative issuing authority where he/she wants to apply for a CFS. The application must be accompanied by an explanation providing justification for the request.	
Article 10. Application document 1. The application shall include: a) A duly completed CFS application form (Annex3); b) Notarized copies of the prerequisite standards certified by the competent authority; c) Product labels translated into Vietnamese. d) Description of the production process and a technical analysis of the product; e) Certification of standard conformity, Certification of technical regulation conformity; and/or other relevant documents depending on specific	The necessity for notarization is not convincing. This is most likely to be a requirement of the importing authorities rather than at the behest of the Vietnamese issuing authorities In connection with the application criteria, there should be a guideline issued to facilitate acceptance of international standards such as ISO quality and other relevant international testing certificates - this will help with WTO compliance. A policy should be established to address those instances where imported goods meet or exceed minimum Viet Nam standards, but do not qualifying for CFS standard in the country of manufacture/export

requirements of the issuing authority. 2. In the event that the importing country requests that the applicant submit the CFS in another format as required by that country, the issuing aauthority may issue the CFS based on such a format.	
Article 11. Submission of CFS application The official who receives the CFS application shall check the application and notify the applicant in writing either of the following actions: 1. Acknowledging the receipt and acceptance of the application if it is in accordance with Article 10; or 2. Rejecting the application and/or requesting additional documentation and information, as appropriate if it is not in accordance with Article 10	An article providing the right of appeal should be inserted to cover rejection by the issuing authority. See Article 31.

Article 12. Issuance of CFS 1. Notwithstanding paragraph 2, a CFS must be issued no later than five working days, from the date of receipt of a full and valid application in accordance with Article 10. 2. Prior to the issuance of a CFS, the issuing aauthority reserves the right to carry out an on-site verification at the applicants premises if *inter alia* an examination of the CFS application raises issues that warrant closer inspection and/or there have been suspected violations in respect of similar CFS applications.	
Article 13. Refuse to issue CFS The issuing aauthority shall refuse to issue CFS if the products fail to satisfy the requirement as provided for in Article 10. The reasons for the refusal shall be given to the applicant in writing.	An article providing the right of appeal should be inserted to cover rejection by the issuing authority. See Article 31.
Article 14. Loss of the CFS In the event of theft, loss or destruction of a CFS, the exporter may apply in writing to the issuing authority for a certified true copy of the original and the copy to be made out on the basis of the recorded documents in their possession bearing the endorsement of the words "CERTIFIED TRUE COPY" on the CFS. This copy shall bear the date of issuance of the original CFS. The certified true copy of a CFS shall be issued no longer than one year from the date of issuance of the original CFS.	
Article 15. Treatment of errors on the CFS On discovering any errors and/or omissions on the CFS, the applicant must inform the issuing authority immediately and request a replacement CFS. The	

erroneous CFS shall be returned to the issuing authority for destruction.	
Article 16. Revocation of CFS The issuing authority shall revoke a CFS in the following cases: 1. The applicant has provided false and/or incorrect information; 2. The CFS was issued for products which did not meet the requisite standards.	An article providing the right of appeal should be inserted to cover revocation by the issuing authority. See Article 31.
Article 17. Internet Certification CFS may be issued via the Internet. The relevant ministries will be responsible for the introduction and use of such procedures.	This clause facilitates trade and is to be commended. However, the commitment of the various issuing agencies to implement this clause needs to be monitored.
Article 18. Issuance fee The CFS issuance fee shall be regulated by Ministry of Finance.	

Chapter III: CFS REQUIREMENTS FOR IMPORTED PRODUCTS TO BE CIRCULATED IN VIET NAM

Article	International Expert Comments
Article 19. Products for which a CFS must be presented to Customs at importation Notwithstanding Article 21, a CFS must be presented at importation to Customs for products for which Viet Nam has not yet enacted legislation on the quality of the product; and which may potentially cause harm to public health and the environment. A list of such products shall be promulgated by the relevant ministries.	There should be no formal requirement to present a CFS to Customs. However, if this is unacceptable to the Beneficiary, a clause which keeps Customs involvement to the bare minimum should be drafted.
Article 20. Products subject to submission of CFS as a basis for issuance	A key problem with the proposed CFS regime can be summarized with one question: What is the justification to reject

of other certificates required by Vietnamese competent authorities Applicants importing products subject to the requirement of CFS as a basis for issuance of other certificates required by relevant ministries before such products can freely circulate in Viet Nam are not required to submit the CFS to Customs at importation. In such instances, the CFS is only required to be produced to the competent authority for obtaining the necessary certification.	goods without CFS? This Article be further enhanced to enable exporters who are unable to obtain a CFS in the country of origin, to demonstrate that their products are in conformity with Vietnamese or other international standards. Without such enhancements we believe that the decree could be considered as discriminatory in the event that it could require foreign products to comply with higher standards than national ones. For instance, what would happen in the case of an exporter who manufactured products for export to Viet Nam which are below domestic standards but exceed Vietnamese standards? As it stands the draft decree requires that the exporter provides a CFS for all specified products. However, for specified products covered by the aforementioned example this would not be possible even though the products exceed the Vietnamese standards.
Article 21. CFS of the imported products The CFS issued by the exporting territory/ country must include the information and contents as provided for in Article 5, and may include other information as required by the exporting territory/ country.	
Article 22. Treatment of minor discrepancies of the CFS of the imported products Where there are no grounds to seriously doubt the accuracy and veracity of the CFS, the discovery of minor discrepancies, *inter alia* typographical errors in the statements made in the CFS submitted to the relevant authorities, shall not *ipso facto* invalidate the CFS, if it does in fact correspond to the products submitted.	This seems a reasonable concession.

Article 23. Consular attestation The CFS issued by the exporting territory/ country must be attested in accordance with the laws and regulations of Viet Nam, except for those which are exempted from attestation according to the agreements between such territory/ country with Viet Nam	The requirement for legalization and notarization of foreign CFS issued in exporter countries by the Vietnamese Embassy should be deleted in its entirety, and not replaced. Such a clause will cause a great deal of antagonism in exporter countries, from traders and governments alike, and act as an impediment to free trade with Viet Nam. Two examples further highlighted the difficulties and the problems raised by Article 17: i) a US exporter of medical devices from Seattle (US, West Cost) having to legalize the CFS in the Vietnamese Embassy located in Washington DC: the cost and the time lost for this procedure could be considered a serious obstacle to trade; ii) what about the legalization of CFS in WTO members where Viet Nam has not established Embassy. If a legalization clause must be included then it should be watered down to allow discretion and flexibility; stating that legalization may (rather than shall) be required depending on the circumstances. Internal guidance could then be issued in respect of when/products legalization should be required. Viet Nam can dramatically and immediately improve the business environment by acceding to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents (Hague Apostille Convention).[5]

[5] The Hague Apostille Convention facilitates the circulation of public documents executed in one State party to the Convention and to be produced in another State party to the Convention. It does so by replacing the cumbersome and often costly formalities of a full legalization process with the mere issuance of an Apostille (also called Apostille Certificate or Certificate). For more information see: http://www.hcch.net/index_en.php?act=text.display&tid=37

Article 24. Responsibilities of relevant authorities for the CFS of the imported products The relevant authorities shall be responsible for checking the CFS of the imported products. Each CFS can only cover one shipment.	
Article 25. Verification of CFS In those cases where there are reasonable grounds to doubt the authenticity, validity, veracity and/or accuracy of the CFS the relevant authority may send a written verification request, accompanied by a copy of the CFS concerned, to the issuing authority of the exporting territory/country. The verification request shall specify the reasons for the request.	
Article 26. Denial of CFS of the imported products The relevant authorities have the right to refuse to accept the CFS of the imported products in those cases where there are serious doubts as to the authenticity, validity, veracity and/or accuracy of the CFS.	An article providing the right of appeal should be included.
Article 27. Record keeping 1. The application for CFS and all documents related to such application shall be retained by the applicant and the issuing authority for a period of not less than three years from the date of issuance. 2. The CFS of the imported products shall be retained by the importer for a period of not less than three years from the date of import.	
Article 28. Consular aattestation fee The CFS Consular attestation fee shall be regulated by Ministry of Finance.	

Article 29. Responsibilities of Ministries The Ministry of Industry and Trade shall have an overall responsibility for the administration, coordination and implementation of the CFS regime in Viet Nam.	The nomination of the Ministry of Industry and Trade for a coordinating role should facilitate the implementation of our recommendations in respect of *inter-alia* adoption of a national policy model for CFS; establishment of responsibility for policy overview and procedure implementation; and establishment of a policy review standing committee.

Chapter IV: IMPLEMENTATION PROVISIONS

Article	International Expert Comments
Article 30. Right of Appeal Applicants may complain or appeal against a decision made by the issuing authorities in accordance with this decree.	The inclusion of an appeals mechanism which is internationally accessible is necessary. For instance, there should be the possibility for the importer to challenge the rejection of a CFS that is not considered in conformity with what required by the Decree; and when goods are not accompanied by CFS. The beneficiary has rejected the need for legal references and penalties in the decree as it is not normal practice in Viet Nam to detail such information in a decree. As a compromise, it is recommended that there should at least be a cross-reference to the relevant legislation containing this information as it is important that importers and exporters understand the consequences of non-compliance.
Article 31. Entry into force The decree shall be effective in 45 days from its signing date.	
Article 32. Implementation responsibility Ministers, the heads of the ministerial-level agencies, the heads of the	

Government-attached agencies, the chairmen of the People's Committees of the provinces and centrally-run cities, and the related organizations, and individuals shall be responsible for implementing this Decree.	

ANNEX I: THE DRAFT DECISION ON CFS

THE PRIME MINISTER

SOCIALIST REPUBLIC OF VIETNAM
Independence – Freedom – Happiness

No: /2010/QĐ-TTg

Ha Noi, date 2010

DECISION

On issuance of Certificate of Free Sale for import goods and requirements for Certificate of Free Sale for export goods

GOVERNMENT PRIME MINISTER

Pursuant to Law on Organization of Government dated 25/12/2001;
Pursuant to Law on Product and Goods Quality dated 21/11/2007;
Pursuant to Law on Technical Standards and Specification dated 29/6/2006;
Pursuant to Law on Pharmacy dated 14/6/2005;
Pursuant to Commercial Law dated 14/6/2005;
Pursuant to Ordinance on Food hygiene and Safety dated 07/8/2003;
At the proposal of Minister of Industry and Trade,

DECIDES:

Chapter I
GENERAL PROVISIONS

Article 1. Scope

This decision provides for the issuance of Certificate of Free Sale (CFS) for domestically manufactured products, goods to be export and requirements of CFS for externally manufactured products, goods to be imported for circulation in Viet Nam.

Article 2. Subjects of application

This decision is applicable for state management agencies, businesses, organizations, individuals producing, trading products, goods, and organizations, individuals involving in the products, goods quality in Viet Nam.

Article 3. Interpretation

In this Decision, the following terms are understood as follows:

1. Certificate of Free Sale (CFS) is the Certificate provided by the competent state agencies of the export countries to businesses exporting products, goods listed in CFS to certify that those products, goods are produced and freely circulated in the export countries.

2. CFS issuing agencies are competent state agencies that are assigned the task of issuing CFS for particular products, goods as stipulated in Article 5.

3. Applicants for CFS are exporters, producers, legally authorized representatives of exporters or producers.

Chapter II
CFS ISSUANCE FOR EXPORT PRODUCTS, GOODS

Article 4. Information in the CFS

1. CFS enters into force in 2 years since the issuance date or from the date as stipulated in CFS.

2. CFS form is stipulated in Annex 4. CFS, in A4 paper size, in English, and include the minimum information as follows:

- Name of agency issuing CFS;
- Ref. Number of CFS;
- Date of issuance and date of entry into force of CFS;
- Name of products, goods expected to be issued CFS;
- Types or groups of categories of goods, products expected to be issued CFS;
- Name and address of producer;
- The CFS must clearly state that products, goods are produced and for sale freely in markets of the manufactured countries;
- Signature, position of CFS issuing person and stamp of CFS issuing agency.

3. Other specific information of each CFS issuing agency can be included in the CFS depending on manamgent requirements.

4. CFS issuing agencies print their CFS forms with full information as stiplated from section 1 to 3 this Article. Type of paper, colour of paper and background of paper and logo in CFS will be uniformly regulated by Ministries and they will circulate the form among themselves.

Article 5. Authorisation of issuance of CFS

1. The issuance of CFS is based on the assignment of reponsibilities of State sector management Minitries relating to the products, goods quality as stipulated in Article 32, Decree No 132/2008/NĐ-

CP of the Government dated 31/12/2008 detailing the impelementation of some articles of Law on Products and Goods Quality.

2. Ministries are responsible for organization of implementation of the issuance of CFS for products, goods under their management as stipulated in section 1 this article.

3. List of CFS issuing agency is presented in Annex 5.

Article 6. Responsibilities of CFS applicant

CFS applicant has responsibilities to:

1. Register business dossier to CFS issuing agencies according to regulation in Article 5;

2. Submit the CFS application dossier to CFS issuing agencies;

3. Evidence of the compliance of exported goods with regulations of CFS issuance requirements;

4. Be responsible against the law on the correctness, truthfulness of declarations relating to CFS application.

Article 7. Responsibilities of CFS issuing agencies

CFS issuing agencies have responsible to:

1. Guide the CFS applicant if requested;

2. Receive; check business dossier and CFS application dossier;

3. Physically verify requirements of goods quality if necessary;

4. Issue CFS to goods that comply with CFS regulations.

Article 8. Products, goods that are issued CFS

Domestically manufactured products, goods for export are issued CFS if they comply with conditions as stipulated in article 8 to Article 11.

Article 9. Business dossier registration

1. CFS applicants are only considered for issuance of CFS at the place of business dossier registration after completing procedures of business dossier registration. Business dossier includes:

a) Register sample signature of authorized person of CFS application and stamp of business (Annex 1);

b) Certificate of Business Registration (certified copies with stamp of copies of origins);

c) Certificate of tax code registration (certified copies with stamp of copies of origins);

d) List of manufacture establishments (if any) of the business (Annex 2).

2. All changes in the business dossier should be notified to CFS issuing agency where the dossier was registered before requesting for CFS issuance. In case of no change, the business dossier is still updated twice a year.

3. In case the CFS applicant wishes to be issued the CFS at a place other than where the business dossier has been registered under force majeure or rational reasons, he/she should send a written document to request clearly not to issue CFS at the place of business dossier registration and should carry out business dossier registration at the place of the new CFS issuing agency.

Article 10. CFS application dossier

1. CFS application dossier includes:

a) Fully and validly declared CFS application form (Annex3);

b) Fully and validly declared CFS form;

c) Certified copies of National Standards or Basic Standard Statement;

d) Label of products, goods. In case the label of products, goods in foreign language, it should be translated into Vietnamese;

e) Other documentations such as Certification of Product Standards or other depending on specific requirements of CFS issuing agency.

2. Where imported country requests the business to submit CFS according to CFS form as regulated by that country, the CFS issuing agency can provide CFS on the basis of required form with full information as stipulated in Article 4.

Article 11. Receiving CFS application

Upon submission of CFS application, the official who receives the application is responsible for receiving the dossier, checking and notifying in written document or other types of document to CFS applicant in regards to the implementation of one of following activities:

1. CFS issuance according to regulation in Article 11;

2. Request to supplement documents according to regulation in Article 9;

3. Refusal of CFS issuance in case of detecting of any of following cases:

a) CFS applicant has not registered business dossier according to regulation in Article 8;

b) CFS application is not correct, fulfilled according to regulation in Article 9;

c) The dossier has contradictory information;

d) Submission of CFS application is not in the same place of business dossier registration;

e) CFS form is declared with hand-writing, rubbed, or not clear to read, or printed in different ink colors;

f) Has legal basis to prove that the products, goods are not domestically produced, CFS applicant has dishonest, misleading acts in supplying Basic Standard Statement or Viet Nam Standards.

Article 12. CFS issuance

1. CFS must be issued in a period not more than three (03) working days since the CFS applicant's submission of full and valid dossier, except cases stipulated in section 2, this article.

2. CFS issuing agency can inspect the manufacture place in case they realize that documentation inspection provides insufficient basis for CFS issuance or detect signs of legal violation of CFSs that have been previously issued. Inspectors of CFS issuing agency will prepare a written minute on the inspection results and request co-signatures of CFS applicant and/or exporters. Where CFS applicant and/or exporters refuse to sign, the inspector should clearly state the reasons of refusal and make a verification signature in the minute.

The period for processing the CFS application for this case will not be more than five (05) working days since the submission of full dossier by the applicant.

3. Upon considering CFS issuance, where detecting the incompliance of goods with conditions for CFS issuance, or the dossier is unfulfilled, the CFS issuing agency will inform CFS applicant according to section 2 or section 3 Article 10.

Article 13. Withdrawal of issued CFS

CFS issuing agency will withdraw issued CFS in following cases:

1. The exporter, CFS applicants provide fake documents

2. Issued CFS is in compliance with basic standards announced by the business or Viet Nam standards.

Article 14. CFS issuance fee

CFS issuance fee is specifically regulated by Minitry of Finance.

Chapter III
CFS REQUIREMENTS FOR PRODUCTS, GOODS IMPORTED FOR CIRCULATION IN VIET NAM

Article 15. Products, goods requested for CFS before import

Business importing goods in Group 2 that have new, potential charateristics causing unsafety according to section 4, Article 7, Decree No 132/2008/NĐ-CP of the Government dated 31/12/2008 regulating the details to implemt some articles of Law on Products and Goods Quality, must submit CFS to Customs agencies as carrying out import procedures.

List of products, groups of group 2 will be issued by responsible sector Ministries.

Article 16. Products, goods requested for CFS which serves as basis for other certifications provided by Viet Nam competent state agency

Bussiness having goods that are subjected to CFS so that they are issued other certifications as requested by relevant Ministries, prior to the circulation of products, goods in Viet Nam market, don't have to submit CFS to Customs agency upon the implementation of goods import procedures. In this case, CFS will only be sumbitted to competent state agency as requested for other cerfications issuance.

Article 17. Consular legalization

CFS issued by export countries should be subjected to consular legalization in the Embassy of the Socialist Republic of Viet Nam in the exporting country.

Chapter IV
ORGANIZATION FOR IMPLEMENTATION

Article 18. Entry into force

This decision takes effects 45 days after its signing date.

Article 19. Responsibility of implementation

The Ministries, heads of Ministry equivalent agencies, heads of Government controlled agencies, Chairman of People's Committee of Central controlled provinces/cities and concerned organizations, individuals are responsible for implementing this Decision./.

Recipients:
- Secretariat of Central Party;
- Prime Minister, Deputy-Prime Minister of Government;
- Ministries, Ministry-equivalent agencies, agencies under Government;
- Central Steering Unit office on combating corruption;
- People's Council, People's Committee of central controlled provinces/cities;
- Central Office and departments of The Party;
The President Office;
- Ethnic Council and Committees of National Assembly;
- National Assembly office;

PRIME MINISTER

Nguyen Tan Dung

- Supreme Court;
- People’s Supreme Procuracy;
- State Audit;
- National Financial Supervisory Committee;
- Social Policy Bank;
- Viet Nam Development Bank;
- Vietnam National Front UBTW;
- Central agencies of organizations;
- Government office: Departments, Official Gazette;
- Filing: admin, (5b).