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## **1 ARTICLE 4**

### **1.1 Text of Article 4**

#### **Article 4**

##### *Equivalence*

1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

### **1.2 Obligation to determine appropriate level of protection**

1. In *Australia – Salmon*, the Appellate Body noted that although the SPS Agreement does not explicitly oblige Members to determine their appropriate level of protection, such an obligation is implicit in several provisions of the Agreement, including Articles 4.1 and 4.2:

"We recognize that the *SPS Agreement* does not contain an *explicit* provision which obliges WTO Members to determine the appropriate level of protection. Such an obligation is, however, implicit in several provisions of the *SPS Agreement*, in particular, in paragraph 3 of Annex B, Article 4.1<sup>1</sup>, Article 5.4 and Article 5.6 of the *SPS Agreement*."<sup>2</sup>

### **1.3 Decision on equivalence**

2. The Panel in *US – Poultry (China)* considered that while the Decision on Equivalence is not binding, it expands on the Members' own understanding of how Article 4 relates to the rest of the SPS Agreement and how it is to be implemented.<sup>3</sup>

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<sup>1</sup> (*footnote original*) Reasonable questions from interested Members within the meaning of paragraph 3 of Annex B can arise, in particular, with respect to the application of Article 4 of the SPS Agreement. Articles 4.1 and 4.2 imply, in our view, a clear obligation of the importing Member to determine its appropriate level of protection.

<sup>2</sup> Appellate Body Report, *Australia – Salmon*, para. 205

<sup>3</sup> Panel Report, *US – Poultry (China)*, para. 7.136.

## 1.4 Relationship with other provisions of the SPS Agreement

### 1.4.1 General

3. The Panel in *US – Poultry (China)* in reviewing the text of Article 4 and the Decision on Equivalence observed that Article 4 is not the only provision in the SPS Agreement that regulates the operation of equivalence regimes. The Panel therefore reasoned that this provision should not be applied in isolation from other relevant provisions of the SPS Agreement. The Panel stated:

"[T]he Panel sees nothing in Article 4 or the Decision which suggests that Article 4 is the only provision in the *SPS Agreement* which regulates the operation of equivalence regimes, including their 'procedural requirements' or that it should be applied in isolation from other relevant provisions of the *SPS Agreement*. In fact, the Decision states that the importing Member should explain its SPS measures by identifying the risk and provide a copy of the risk assessment or technical standard on which the measure is based. Further, it requires the importing Member to analyse the science-based and technical information provided by the exporting Member with respect to that Member's own SPS measure(s) to examine if the measure achieves the importing Member's ALOP.

The Decision, therefore, implies that measures taken as part of an equivalence regime, subject to Article 4, should also comply with other relevant provisions of the *SPS Agreement*."<sup>4</sup>

4. The Panel in *US – Poultry (China)* concluded that a determination of the particular provisions applicable to a given measure must be done on a case-by-case basis. With specific reference to Article 4, the Panel determined that nothing in Article 4 *a priori* precludes a given measure from being subject to the disciplines of Articles 2, 4 and 5 at the same time.<sup>5</sup>

### 1.4.2 Article 2.2

5. The Panel in *Japan – Apples* held that, while Article 4 might form part of the relevant context in the interpretation of Article 2.2, its purpose is clearly different from that of Article 2.2. Thus, in the assessment of claims under Article 2.2, a panel need not take into account the requirements of Article 4:

"We agree that other provisions of the *SPS Agreement* are part of the context of Article 2.2, as recalled by the Appellate Body in *Japan – Agricultural Products II*.<sup>6</sup> However, Article 4 deals with the specific question of the recognition of equivalence of measures. Unlike Articles 3.3, 5.1 and 5.7, the purpose of Article 4 is clearly different from that of Article 2.2. We also note that the United States did not raise any claim under Article 4 and that this Article is not a defence against violations of other provisions of the *SPS Agreement*. As a result, we see no reason to consider Japan's arguments regarding Article 4 in our assessment of Article 2.2, other than to the extent that Article 4 might form part of the relevant context in the interpretation of Article 2.2."<sup>7</sup>

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<sup>4</sup> Panel Report, *US – Poultry (China)*, paras. 7.136-7.137.

<sup>5</sup> Panel Report, *US – Poultry (China)*, para. 7.139.

<sup>6</sup> (footnote original) Appellate Body Report on *Japan – Agricultural Products II* para. 74

<sup>7</sup> Panel Report, *Japan – Apples*, para. 8.107.