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1 ARTICLE 4

1.1 Text of Article 4

Article 4

Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

- (a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;
- (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;
- (c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;
- (d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

1.2 General

1. In *US – Section 211 Appropriations Act*, the Appellate Body applied analogous reasoning to claims under Articles 3.1 and 4 of the TRIPS Agreement in respect of the same measure. The measure, on its face, discriminated as between the nationals of one other Member, and the nationals of all other countries. The Appellate Body dismissed an argument that the discrimination could be eliminated through an administrative procedure:

"Cuban nationals that reside in a country that is part of the 'authorized trade territory', such as the Members States of the European Communities, can apply to OFAC to be 'unblocked'. This implies that Cuban nationals that reside in the 'authorized trade territory' face an additional administrative procedure that does not apply to non-Cuban foreign nationals who are original owners, because the latter are

not 'designated nationals'. Therefore, as we stated earlier, treatment that is inherently less favourable persists."¹

2. In *US – Section 211 Appropriations Act*, the Appellate Body dismissed an argument that certain discriminatory treatment applied to the nationals of one other Member was offset in practice by another measure that could provide unfavourable treatment to the nationals of all other countries:

"The fact that Section 515.201 of Title 31 CFR *could* also apply to a non-Cuban foreign national does not mean, however, that it would offset *in each and every case* the discriminatory treatment imposed by Sections 211(a)(2) and (b) on Cuban original owners."²

1.3 Chapeau

1.3.1 "the protection of intellectual property"

3. In *US – Section 211 Appropriations Act*, the Appellate Body applied to trade names its findings with regard to trademarks in respect of Article 4 of the TRIPS Agreement.³

4. In *EC – Trademarks and Geographical Indications (US)* the Panel examined each aspect of the Regulation at issue that was the subject of an MFN claim in terms of the definition of "protection" of intellectual property set out in footnote 3:

"The MFN treatment obligation in Article 4 of the TRIPS Agreement applies 'with regard to the protection of intellectual property'. Footnote 3 provides an inclusive definition of the term 'protection' as used in Articles 3 and 4 ...

The Panel recalls its findings ... that the conditions of reciprocity and equivalence in Article 12(1) of the Regulation are matters affecting the availability of intellectual property rights, in relation to 'designations of origin' and 'geographical indications', as defined in the Regulation, which are part of a category of intellectual property within the meaning of Article 1.2 of the TRIPS Agreement.

Therefore, this claim concerns the 'protection' of intellectual property, as clarified in footnote 3 to the TRIPS Agreement, within the scope of the MFN treatment obligation in Article 4 of that Agreement."⁴

1.3.2 "any advantage, favour, privilege or immunity granted by a Member"

5. In *EC – Trademarks and Geographical Indications (US)* the Panel found that the availability of GI protection constituted an "advantage, favour, privilege or immunity granted by a Member":

"[T]he Panel found that GI protection is not available under the Regulation in respect of geographical areas located in third countries which the Commission has not recognized under Article 12(3), although GI protection under the Regulation may become available if the third country in which the GI is located enters into an international agreement or satisfies the conditions in Article 12(1).

This constitutes an 'advantage, favour, privilege or immunity' granted by the European Communities with regard to the protection of intellectual property."⁵

¹ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 314.

² Appellate Body Report, *US – Section 211 Appropriations Act*, para. 317.

³ Appellate Body Report, *US – Section 211 Appropriations Act*, paras. 352-353 and 357.

⁴ Panel Report, *EC – Trademarks and Geographical Indications (US)*, paras. 7.699-7.701.

⁵ Panel Report, *EC – Trademarks and Geographical Indications (US)*, paras. 7.703-7.704.

1.3.3 "immediately and unconditionally"

6. In *EC – Trademarks and Geographical Indications (US)* the Panel found that the EC subjected protection of GIs located in countries outside the European Communities to the following equivalence and reciprocity conditions:

- "- the third country is able to give guarantees identical or equivalent to those referred to in Article 4,
- the third country concerned has inspection arrangements and a right to objection equivalent to those laid down in this Regulation,
- the third country concerned is prepared to provide protection equivalent to that available in the Community to corresponding agricultural products or foodstuffs coming from the Community."⁶

7. In the Panel's view, this showed that the relevant advantage was not accorded "immediately and unconditionally":

"[GI protection under the Regulation] is subject to the satisfaction of the equivalence and reciprocity conditions, or the conclusion of an international agreement, or both, which indicates that it is not accorded 'immediately and unconditionally'."⁷

1.3.4 "to the nationals of any other country"

8. In *EC – Trademarks and Geographical Indications (US)* the Panel exercised judicial economy on the claims under Article 4, but it noted that the European Communities had not in fact accorded the advantage at issue to the nationals of any other country:

"However, [subjecting an advantage to the satisfaction of conditions] is not sufficient to demonstrate an inconsistency with Article 4 of the TRIPS Agreement, as it must be shown that the advantage, favour, privilege or immunity is granted by a Member 'to the nationals of any other country'. It is unnecessary for the purposes of this claim to re-examine the issue of how the Regulation discriminates according to nationality, considered in Section VII:B of this report, because the European Commission has not recognized *any* other country as satisfying the conditions under Article 12(1) under the procedure in Article 12(3)."⁸

1.4 Footnote 3

9. In *EC – Trademarks and Geographical Indications (US)* the Panel examined each aspect of the Regulation at issue that was the subject of an MFN claim in terms of the definition of "protection" of intellectual property set out in footnote 3.⁹

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⁶ Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.58.
⁷ Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.704.
⁸ Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.705.
⁹ Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.486. See also the jurisprudence relating to footnote 3 referred to under Article 3 of the TRIPS Agreement.