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## **1 ARTICLE 8**

### **1.1 Text of Article 8**

#### **Article 8**

##### *Control, Inspection and Approval Procedures*

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

### **1.2 General**

1. In *EC – Approval and Marketing of Biotech Products*, the United States and Canada argued that the European Communities' general moratorium on approving applications to place genetically modified organisms on the market in the European Communities violated Article 8 because the European Communities had not abided by the provisions of Annex C(1). The Panel found that a failure to observe the provisions of Annex C implies a breach of Article 8:

"We recall that the United States and Canada seek to establish an inconsistency with Article 8 of the SPS Agreement on the basis of an inconsistency with Annex C(1)(a). Article 8 requires, inter alia, that Members observe the provisions of Annex C in the operation of their approval procedures. It follows that a failure to observe the provisions of Annex C(1)(a) implies a breach of Article 8. We have determined above that, as a result of the general de facto moratorium on approvals, the European Communities has failed, in at least one approval procedure conducted under Directives 90/220 and 2001/18, to observe the provisions of Annex C(1)(a), first clause. Accordingly, we conclude that in respect of the aforementioned approval procedure, the European Communities has, by implication, also acted inconsistently with the provisions of Article 8."<sup>1</sup>

2. The Panel in *US – Poultry (China)* observed that Article 8 and Annex C(1) apply to the procedures dealing with control, inspection and approval "which are aimed at checking and ensuring the fulfilment of SPS measures".<sup>2</sup>

### **1.3 "Otherwise ensure that..."**

3. The Panel in *Panama – Import Measures (Costa Rica)* interpreted the final clause in Article 8 as follows:

"The final clause of Article 8 of the SPS Agreement stipulates that Members shall 'otherwise ensure that their [control, inspection and approval] procedures are not inconsistent with the provisions of this Agreement'. In the Panel's view, this obligation implies that any approval procedure must be consistent with the obligations set forth in the other provisions of the SPS Agreement. Nevertheless, the Panel considers that

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<sup>1</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1569.

<sup>2</sup> Panel Report, *US – Poultry (China)*, para. 7.356.

the applicability of each provision will depend on the obligations it contains and the nature of the measure concerned."<sup>3</sup>

#### **1.4 Relationship with other provisions of the SPS Agreement**

##### **1.4.1 Annex C**

4. In *EC – Approval and Marketing of Biotech Products*, the Panel found that a failure to observe the provisions of Annex C(1) implies a breach of Article 8.<sup>4</sup>

##### **1.4.2 Article 5.2 and Annex C**

5. In *EC – Hormones*, the Appellate Body found that the language of Articles 5.2 and 8 and the footnote to Annex C is amply sufficient to authorize the taking into account of risks arising from failure to comply with the requirements of good veterinary practice in the administration of hormones for growth promotion purposes, as well as risks arising from difficulties of control, inspection and enforcement of the requirements of good veterinary practice. The Appellate Body disagreed with the Panel's suggestion that exclusion of risks resulting from the combination of potential abuse and difficulties of control is justified by distinguishing between "risk assessment" and "risk management". The Appellate Body noted that the concept of "risk management" is not mentioned in any provision of the SPS Agreement and, as such, cannot be used to sustain a more restrictive interpretation of "risk assessment" than is justified by the actual terms of Article 5.2, Article 8 and Annex C of the SPS Agreement.<sup>5</sup> The Appellate Body relied on this view in its evaluation of the term "risk assessment" in *US/Canada – Continued Suspension*.<sup>6</sup>

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<sup>3</sup> Panel Report, *Panama – Import Measures (Costa Rica)*, para. 7.457.

<sup>4</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1569. See also Panel Report, *Panama – Import Measures (Costa Rica)*, paras. 7.691-7.694.

<sup>5</sup> Appellate Body Report, *EC – Hormones*, paras. 205-206.

<sup>6</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 541-542.