

**INTERPRETATION OF ARTICLE 7 OF DECISION G/SPS/19
ON THE IMPLEMENTATION OF ARTICLE 4 OF THE
AGREEMENT ON THE APPLICATION OF SANITARY
AND PHYTOSANITARY MEASURES**

Communication by Argentina

I. INTRODUCTION

1. The Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures (G/SPS/19) was adopted on 26 October 2001 to give effect to the provisions of Article 4, having regard to the difficulties facing developing country Members, and especially the least developed among them, in obtaining recognition of their sanitary or phytosanitary measures by importing Members.

2. Article 7 of the Decision reads as follows: "When considering a request for recognition of equivalence, the importing Member should analyse the science-based and technical information provided by the exporting Member on its sanitary or phytosanitary measures with a view to determining whether these measures achieve the level of protection provided by its own relevant sanitary or phytosanitary measures" (emphasis added). This wording clarifies the concept of equivalence set forth in Article 4 of the SPS Agreement, by adding that, for the purpose of determining equivalence, the exporting country has to demonstrate that its sanitary or phytosanitary measures achieve the same appropriate level of protection as that provided by the relevant measures of the importing country. This additional phrase is designed to prevent importing Members from taking discretionary action in their assessment of a measure presented as equivalent.

II. BASIS FOR ARTICLE 7 OF DECISION G/SPS/19

3. There are numerous legal instruments in the context of the multilateral trading system that recognize non-discrimination as one of the basic principles underpinning the entire WTO legal order. As regards trade in goods, Article I of the GATT 1994 lays down the principle of Most-Favoured-Nation Treatment and Article III that of National Treatment.

4. Specifically regarding the application of sanitary and phytosanitary measures, Article 2.3 of the SPS Agreement stipulates that "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members".

5. Article 5.5 likewise provides that "[w]ith the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection ... 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".

6. The SPS Agreement thus establishes the obligation not to discriminate in the adoption/application of sanitary and phytosanitary measures and in implementing the concept of an appropriate level of protection.

7. The Guidelines to Further the Practical Implementation of Article 5.5 (G/SPS/15) were adopted in July 2000, with a view to disciplining Members' behaviour so as to avoid arbitrary or unjustifiable distinctions in the levels considered to be appropriate, where such distinctions result in discrimination or a disguised restriction on international trade.

8. The wording of the Guidelines and WTO case law on the subject¹ make it clear that determination of the appropriate level of protection consists in a general or specific policy statement – in other words, a right enjoyed by all Members that is akin to the exercise of sovereignty. However, since such a right is not "absolute or unqualified"², Guideline A.1 specifies that "[a] Member should indicate the level of protection which it considers to be appropriate with respect to risks to human life or health, to animal life or health or to plant life or health in a sufficiently clear manner so as to permit examination of the extent to which any sanitary or phytosanitary measure achieves that level" (emphasis added).

9. Thus, although establishment of the appropriate level of protection is left to the sovereign discretion of each Member, its practical application cannot be arbitrary or give rise to disguised restrictions on international trade.

10. The above assumption leads to the following two situations:

Protection of the exporting Member when presenting the elements required to demonstrate equivalence

11. Exporting Members would never be able to make a satisfactory demonstration of the equivalence of their sanitary or phytosanitary measures if the importing Member did not clearly and precisely define its appropriate level of protection. This creates the obligation for Members to establish a clear parameter (Guideline A.1, document G/SPS/15). This obligation for the importing Member guarantees transparency when the exporter prepares/presents the elements required to demonstrate equivalence.

Protection of the exporting Member when the importing Member assesses the equivalence of the measures presented

12. Although establishment of the appropriate level of protection is akin to an act of national sovereignty, it may not be used as a means of arbitrary discrimination in the assessment of the measures presented by exporters in relation to the importing country's own measures. Situations may arise in which the level declared by a Member may not be that actually fulfilled by its sanitary or phytosanitary measures; in other words, there is a discrepancy between the level of protection established in law and that actually met by the Member's domestic measures.

13. Consequently, the objective nature of the equivalence assessment will be confirmed through comparison between the measures presented by the exporting Member and those applied, both in fact

¹ In *EC Measures Concerning Meat And Meat Products (Hormones)*, the Appellate Body reaffirms the right of Members to establish their own appropriate levels of protection, including levels higher than those that would be achieved by measures based on international standards.

² Definition given by the Appellate Body in *EC Measures Concerning Meat And Meat Products (Hormones)*.

and to the same degree, by the importing Member. This procedure gives exporting Members full assurance that, when their sanitary measures are examined to determine whether they fulfil the level of protection required by the importing Member, the importing Member has to conduct its examination in the light of the effective level achieved by its domestic measures.

III. FINAL COMMENT

14. In view of the above, and considering the fact that equivalence is determined (pursuant to Article 4 of the SPS Agreement) on the basis of comparison between the exporting country's measure and the importing country's level of protection, the principle of non-discrimination might be jeopardized by situations in which the exporting country had to satisfy requirements not met by the importing country's own measures.

15. Situations of this kind would not only be inconsistent with Articles 2.3 and 5.5 of the SPS Agreement but in practice would also rule out the possibility of using equivalence as a means of simplifying international trade.

16. For the above reason, and as a result of the combination of Article 4 of the SPS Agreement, the principle of non-discrimination (Articles 2.3 and 5.5 of the SPS Agreement) and the objective of establishing equivalence of sanitary measures as an effective means of facilitating international trade, agreement was reached on the present wording of Article 7 of Decision G/SPS/19 on Article 4.
