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1 ARTICLE 10

1.1 Text of Article 10

Article 10

Special and Differential Treatment

1. In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.
2. Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.
3. With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.
4. Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.

1.2 Article 10.1

1.2.1 Members shall "take account of" the special needs of developing country Members

1. In *EC – Approval and Marketing of Biotech Products*, the Panel examined a claim by Argentina that by adopting and applying a general de facto moratorium on approvals of applications to place genetically modified organisms on the market, the EC had failed to apply its legislation in a manner which takes account of developing country Members' needs. The Panel found that the phrase "take account of" does not prescribe a specific result to be achieved and that merely because a Member (in this case the EC) did not afford special and differential treatment to a developing country member (i.e, Argentina) does not establish a prima facie case that the developed country Member did not "take account of" the developing country's needs when it made its decision:

"[T]he obligation laid down in Article 10.1 is for the importing Member to 'take account' of developing country Members' needs. The dictionary defines the expression 'take account of' as 'consider along with other factors before reaching a decision'. Consistent with this, Article 10.1 does not prescribe a specific result to be achieved. Notably, Article 10.1 does not provide that the importing Member must invariably accord special and differential treatment in a case where a measure has lead, or may lead, to a decrease, or a slower increase, in developing country exports.

...

The fact that there is no indication that between June 1999 and August 2003 the European Communities accorded Argentina special and differential treatment – e.g., by approving the marketing of biotech products exported from Argentina – does not in and of itself constitute prima facie evidence that the European Communities has failed to 'take account' of Argentina's needs. While the European Communities must take account of the interests of developing country Members in applying its approval legislation, the European Communities may at the same time take account of other legitimate interests, including those of its own consumers, its environment, etc. There is nothing in Article 10.1 to suggest that in weighing and balancing the various interests at stake, the European Communities must necessarily give priority to the needs of Argentina as a developing country. We therefore think it is conceivable that the European Communities 'took account' of Argentina's needs when adopting and applying its general de facto moratorium on approvals, but ultimately determined that applications concerning products of export interest to Argentina warranted no special and differential treatment. Accordingly, we consider that the fact that the European Communities did not accord Argentina special and differential treatment vis-à-vis other developed country exporters does not demonstrate, by itself, an inconsistency with Article 10.1."¹

2. The Panel in *US – Animals* agreed with the Panel in *EC – Approval and Marketing of Biotech Products* that Article 10.1 imposes a positive obligation that is subject to dispute settlement, and rejected claims that certain terms of that provision are too vague to be enforceable. According to the Panel, accepting such a proposition could render ineffective "many special and differential treatment provisions throughout the covered agreements, and upset the balance of rights and obligations between developed and developing country Members."²

3. The Panel in *US – Animals* further concurred with the Panel in *EC – Approval and Marketing of Biotech Products* that Article 10.1 does not require an importing Member to automatically grant priority to the developing country's products, in particular in the conduct of a risk assessment procedure.³

1.2.2 Burden of proof

4. The Panel in *EC – Approval and Marketing of Biotech Products* stated that the burden was on the complaining party to demonstrate that the (developed) responding party had not 'taken account of' the developing country's needs in making its decision:

"Argentina argues that the European Communities has not provided any evidence which would prove that it has taken into account Argentina's special needs as a developing country Member. This argument lacks merit, for it is incumbent on Argentina as the Complaining Party to adduce evidence and argument sufficient to raise a presumption that the European Communities has failed to take into account Argentina's special needs as a developing country Member."⁴

5. The Panel in *EC – Approval and Marketing of Biotech Products* also found that the absence of any reference to developing countries in the respondent Member's legislation was not enough to establish that the legislation did not take the needs of developing countries into account. Additionally, the Panel noted that Article 10.1 does not require Members to document how they have complied with Article 10.1:

[T]he absence of a reference to developing country needs in the text of the EC approval legislation does not demonstrate that that legislation itself fails to take account of these needs, or that the European Communities is precluded from taking account, or has not taken account, of these needs when applying that legislation. We therefore consider that it is not sufficient, for the purposes of establishing a claim under Article 10.1, to point to the absence in the EC approval legislation of a reference to the needs of developing country Members.

¹ Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.1620-7.1621.

² Panel Report, *US – Animals*, para. 7.690.

³ Panel Report, *US – Animals*, para. 7.704.

⁴ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1622.

Argentina further argues that for the entire period of application of the general de facto moratorium on approvals it could not identify any evidence supporting the conclusion that the European Communities has taken account of Argentina's special needs. We note that Argentina has merely asserted the absence of relevant evidence, without specifying what efforts it has undertaken to collect such evidence. Moreover, we note that Article 10.1 does not specifically require the importing Member to document how it has complied with Article 10.1."⁵

6. The Panel in *US – Animals* agreed with the Panel in *EC – Approval and Marketing of Biotech Products* that an absence of risk assessment documentation is not in itself sufficient to establish a *prima facie* case of inconsistency with Article 10.1. However, the Panel cautioned against creating "a potentially insurmountable burden on the complainant" in substantiating its claim under that provision.⁶ According to the Panel in *US – Animals*:

"If a developing country Member can demonstrate that its special needs were expressly identified to or by the importing Member and can show a lack of documentation of the consideration that is likely enough to shift the burden on to the importing Member to show how it took account of those special needs. Conversely, if the importing Member was not made aware of the special needs of the developing country Member, we consider that it will be more difficult for the developing country Member to make its case."⁷

1.2.3 "special needs of developing country Members"

7. The Panel in *US – Animals* interpreted the term "special needs of developing country Members" broadly, "so as to encompass both the needs of developing country Members generally, and the needs of a particular developing country Member".⁸

1.2.4 Relationship with other Agreements

8. The Panel in *US – Clove Cigarettes* examined a claim under Article 12.3 of the TBT Agreement, which the Panel in *EC – Approval and Marketing of Biotech Products* had previously described as the "equivalent provision" to Article 10.1 of the SPS Agreement.⁹ In the context of interpreting Article 12.3 of the TBT Agreement, the Panel in *US – Clove Cigarettes* was guided by the *EC – Approval and Marketing of Biotech Products* Panel's interpretation of Article 10.1. See the Section on Article 12.3 of the TBT Agreement.

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⁵ Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.1623-7.1624.

⁶ Panel Report, *US – Animals*, para. 7.698.

⁷ Panel Report, *US – Animals*, para. 7.700.

⁸ Panel Report, *US – Animals*, para. 7.692.

⁹ Panel Report, *EC – Approval and Marketing of Biotech Products*, fn 1330.