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1 ARTICLE 12

1.1 Text of Article 12

Article 12

Special and Differential Treatment of Developing Country Members

12.1 Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

12.2 Members shall give particular attention to the provisions of this Agreement concerning developing country Members' rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreement's institutional arrangements.

12.3 Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

12.4 Members recognize that, although international standards, guides or recommendations may exist, in their particular technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

12.5 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.

12.6 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country Members.

12.7 Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting Members and in particular of the least-developed country Members.

12.8 It is recognized that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures. It is further recognized that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Members, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the "Committee") is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members.

12.9 During consultations, developed country Members shall bear in mind the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures, and in their desire to assist developing country Members with their efforts in this direction, developed country Members shall take account of the special needs of the former in regard to financing, trade and development.

12.10 The Committee shall examine periodically the special and differential treatment, as laid down in this Agreement, granted to developing country Members on national and international levels.

1.2 Article 12.1

1. The Panel in *EU and Certain Member States – Palm Oil (Malaysia)* observed that Article 12.1 does not contain a self-standing special and more favourable treatment obligation:

"It follows from the terms of Article 12.1 that a finding of inconsistency with that provision requires a demonstration that the Member concerned has failed to provide the differential and more favourable treatment to developing country Members that is required under other provisions of Article 12, or through relevant provisions of other Articles of the TBT Agreement.¹ Article 12.1 does not establish a self-standing or unqualified obligation to provide 'differential and more favourable treatment to developing country Members'. Rather, as the panel in *EC – Approval and Marketing of Biotech Products* stated, 'Article 12.1 is relevant whenever there is a violation of one of the other provisions of Article 12, such as Articles 12.2, 12.3 or 12.7.'²

¹ (footnote original) The TBT Agreement contains numerous provisions on special and differential treatment. While most such provisions are indeed contained in Article 12, there are various others providing for such treatment in the TBT Agreement. These include, for instance, Article 11 (several provisions on technical assistance), Articles 2.12 and 5.9 (special attention to producers in developing countries when allowing a "reasonable interval" between the publication and entry into effect of technical regulations or conformity assessment procedures) or Article 15.4 (TBT Agreement Triennial Reviews, or any amendments to the Agreement, should be undertaken without prejudice to the provisions of Article 12).

² Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.956.

1.3 Article 12.3

1.3.1 General

1. In *EC – Approval and Marketing of Biotech Products*, the Panel observed that "Article 12.3 requires that in preparing and applying technical regulations, standards and conformity assessment procedures, Members take account of the special needs of developing country Members."³ That Panel also noted that "Article 12.3 is a specific application of the obligation in Article 12.2 to take account of developing country needs in the implementation of the *TBT Agreement* at the national level."⁴

2. The Panel in *US – COOL* rejected the argument by one of the complainants (Mexico) that Article 12.3 contained two obligations, and held:

"In light of the above, we conclude that Article 12.3 of the TBT Agreement lays down only one of the two legal obligations argued by Mexico, namely the one spelt out in the operative part of that provision: 'Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members'. The second half of the sentence lays down the objective of this obligation, namely to 'ensur[e] that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members'."⁵

3. The Panel in *US – COOL* noted the finding of the panel in *EC – Approval and Marketing of Biotech Products* that under Article 10.1 of the SPS Agreement – the "equivalent provision" to Article 12.3 of the TBT Agreement – the burden of proof was on the complaining party, and saw no reason to "depart from the established normal distribution of burden of proof" in assessing a claim under Article 12.3.⁶

1.3.2 Relationship with other provisions

1.3.2.1 Article 2.2 of the TBT Agreement

2. In *US – Clove Cigarettes*, the Panel differentiated the obligation contained in Article 12.3 from that contained in Article 2.2:

"The Panel observes that certain elements of Indonesia's Panel Request and subsequent submissions suggest that, in Indonesia's view, the relevant question under Article 12.3 of the *TBT Agreement* is whether a challenged measure 'created an unnecessary obstacle to exports from developing country Members'. To the extent that Indonesia is arguing that Article 12.3 embodies a prohibition against creating unnecessary obstacles to exports from developing countries, the Panel is unable to agree. We read Article 12.3 as establishing an obligation to 'take account of' the special development, financial and trade needs of developing country Members. We read the last part of the sentence in Article 12.3 as providing guidance on *how* and *why* the Member preparing or applying the technical regulation should 'take account of' these special needs – namely, 'with a view to' ensuring that technical regulations do not create unnecessary obstacles to exports from developing country Members.

...

We find further support for our interpretation of Article 12.3 of the *TBT Agreement* by reading this provision in the context of Article 2.2 of the *TBT Agreement*. The latter provision, which clearly prohibits Members from adopting technical regulations that create unnecessary obstacles to trade, is worded and structured differently from the

³ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47, sub-para. 75.

⁴ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47, sub-para. 77.

⁵ Panel Reports, *US – COOL*, para. 7.762.

⁶ Panel Reports, *US – COOL*, paras. 7.772-7.773 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1622).

obligation in Article 12.3. In addition, it is not clear what object or purpose would be served by duplicating the obligation, already found in Article 2.2, in Article 12.3. Any measure captured by an obligation under Article 12.3 to ensure that technical regulations 'do not create unnecessary obstacles to exports from developing country Members' would already be captured and subsumed within the obligation under Article 2.2 to ensure that technical regulations do not create 'unnecessary obstacle to international trade' (as defined in the second sentence of that provision). Accordingly, if such an obligation were to be read in to Article 12.3, it would appear to be redundant and inutile in the light of Article 2.2.

For these reasons, we do not read Article 12.3 of the *TBT Agreement* as establishing an obligation against creating 'unnecessary obstacles to exports from developing country Members'. Contrary to certain arguments from Indonesia, this provision does not, in our view, 'prescribe a specific result to be achieved'. Rather, we read Article 12.3 as an obligation to 'take account of' the special needs of developing countries. This means that the focus and scope of the enquiry under Article 12.3 of the *TBT Agreement* differs significantly from that of Article 2.2 of the *TBT Agreement*, and finding that a measure is consistent (or inconsistent) with Article 2.2 does not answer the question of whether that measure is inconsistent with Article 12.3. Thus, where a panel finds that a Member has adopted a technical regulation that *is* more trade-restrictive than necessary to fulfil a legitimate objective under Article 2.2, this finding does not prove that the Member did *not* take account of developing country needs in the preparation and application of that measure. Conversely, where a panel finds that a Member has adopted a technical regulation that is *not* more trade-restrictive than necessary to fulfil a legitimate objective, this does not prove that the Member took account of developing country needs in the preparation and application of that measure."⁷

1.3.2.2 Article 10.1 of the SPS Agreement

4. The Panel in *EC – Approval and Marketing of Biotech Products* described Article 12.3 as the "equivalent provision" to Article 10.1 of the SPS Agreement.⁸

1.3.3 "developing country"

3. In *US – Clove Cigarettes*, the Panel had little difficulty in finding that Indonesia was a developing country and that this element of a claim under Article 12.3 was therefore satisfied:

"In its first written submission, the United States asserts in general that Indonesia has not met its burden of proof on any of the elements under Article 12.3 of the *TBT Agreement*, but that the United States will assume *arguendo* that Indonesia is a developing country in responding to the claim under Article 12.3.

Indonesia states that it is a developing country and argues, *inter alia*, that the World Bank classifies it as a developing country and that its status as a developing country Member of the WTO was recognized in *Indonesia – Autos*.

The Panel is of the view that the foregoing is more than sufficient to conclude that Indonesia is a 'developing country'. We therefore find that the first element of a claim under Article 12.3 of the *TBT Agreement* is satisfied."⁹

1.3.4 "special development, financial and trade needs"

4. In *US – Clove Cigarettes*, the Panel concluded that Indonesia had "special development, financial and trade needs" that were affected by the measure at issue:

⁷ Panel Report, *US – Clove Cigarettes*, paras. 7.614 and 7.616-7.617.

⁸ Panel Report, *EC – Approval and Marketing of Biotech Products*, fn 1330.

⁹ Panel Report, *US – Clove Cigarettes*, paras. 7.622-7.624.

"We begin by observing that the meaning of the expression 'special development, financial and trade needs' is not entirely clear. Indeed, the expression appears to be deliberately vague. The Panel notes that similar expressions are found in other WTO Agreements and instruments. For example, in *EC – Tariff Preferences*, the Appellate Body elaborated upon the meaning of the phrase 'development, financial, and trade needs' in the context of paragraph 3(c) of the Enabling Clause. In *Brazil – Aircraft*, the panel had to consider the phrase 'development needs' in the context of Article 27.4 of the *SCM Agreement*. That panel made the interesting observation that 'an examination of whether export subsidies are inconsistent with a developing country Member's development needs is an inquiry of a peculiarly economic and political nature, and notably ill-suited to review by a panel whose function is fundamentally legal'.

Whatever the exact meaning of the terms 'special development, financial and trade needs', the Panel considers that Indonesia satisfies the requirement of being a developing country that has 'special development, financial and trade needs' affected by the ban on clove cigarettes. In this regard, the Panel notes that Indonesia explained 'the importance of clove cigarettes to its economy and its people'. More specifically, clove cigarettes have been produced in Indonesia for over a century; it is estimated that as many as 6 million Indonesians are employed directly or indirectly in the manufacture of cigarettes and the growing of tobacco; the cigarette industry, including clove, accounts for approximately 1.66 per cent of Indonesia's total gross domestic product ('GDP'); and Indonesia has exported clove cigarettes to the United States for well over 40 years. It is also not in dispute that, as a result of the ban, U.S. imports of clove cigarettes produced in Indonesia have declined from approximately \$15 million in 2008 to zero in 2010.

We consider that the above is sufficient to conclude that Indonesia has 'special development, financial and trade needs' that are affected by technical regulation at issue. We therefore find that the second element of a claim under Article 12.3 of the *TBT Agreement* is satisfied."¹⁰

5. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel made the following observations about the requirements in Article 12.3:

"Article 12.3 simply requires that there be a nexus between the measures and the special development, financial and trade needs of developing country Members.

The Panel notes that the text of Article 12.3 does not call for an assessment of the trade effects of the challenged measures, or of whether, and if so how, the measures at issue otherwise impact the special needs of developing country Members identified."¹¹

1.3.5 "take account of"

6. In *US – Clove Cigarettes*, the Panel rejected Indonesia's claim under Article 12.3 on the grounds that Indonesia could not demonstrate that the United States did not "take account of" its special needs as a developing country. In this context, the Panel relied on the finding by the panel in *EC – Approval and Marketing of Biotech Products* in connection with Article 10.1 of the SPS Agreement:

"The panel in *EC – Approval and Marketing of Biotech Products*, which rejected Argentina's claim under Article 10.1 of the *SPS Agreement*, observed with respect to the meaning of the terms 'take account of' that:

'... 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,

¹⁰ Panel Report, *US – Clove Cigarettes*, paras. 7.627-7.629.

¹¹ Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.921-7.922.

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'.

That panel also found that it is the complaining party that carries the burden of proving that the Member adopting the technical regulation did not 'take account of' developing country Members' needs.

We agree with that panel's interpretation of the obligation to 'take account of' developing country Members' needs, and we agree with the panel that it is the complaining party, in this case Indonesia, that carries the burden of proof."¹²

7. The Panel in *US – Clove Cigarettes* added that:

"[T]o 'take account of' the special financial, development and trade needs of a developing country does not necessarily mean that the Member preparing or applying a technical regulation must agree with or accept the developing country's position and desired outcome. In our opinion, the fact that the United States ultimately decided not to exclude clove cigarettes from the scope of the ban in Section 907(a)(1)(A) does not mean that the United States did not take account of Indonesia's special financial, development and trade needs."¹³

5. The Panel in *US – COOL* similarly followed the approach of the panel in *EC – Approval and Marketing of Biotech Products*. The Panel in *US – COOL* additionally noted the finding of the panel in *US – Continued Suspension* that, in the context of Article 5.2 of the SPS Agreement, "taking available scientific evidence into account does not require that a Member conform its actions to a particular conclusion in a particular scientific study".¹⁴ The Panel considered:

"Based on the approach to Article 10.1 of the SPS Agreement by the panel in *EC – Approval and Marketing of Biotech Products* and the interpretation of the term 'take into account' by the panel in *US – Continued Suspension*, we find that Article 12.3 of the TBT Agreement does not amount to a requirement for WTO Members to conform their actions to the special needs of developing countries but merely to give consideration to such needs along with other factors before reaching a decision."¹⁵

6. The Panel in *US – COOL* found that, in the context of Article 12.3 of the TBT Agreement, the term "take account of" entails that Members are "obliged to accord active and meaningful consideration to the special development, financial and trade needs of developing country Members".¹⁶ The Panel further elaborated:

"As to what such active and meaningful consideration means in practical terms, we do not read Article 12.3 of the TBT Agreement as prescribing any specific way. In particular, while not excluding it, Article 12.3 does not specifically require WTO Members to actively reach out to developing countries and collect their views on their special needs. Further, we do not interpret the term 'take account of' in Article 12.3 of the TBT Agreement as an explicit requirement for Members to document specifically in their legislative process and rule-making process how they actively considered the special development, financial and trade needs of developing country Members. Indeed, the panel in *EC – Approval and Marketing of Biotech Products* held that 'it is not sufficient, for the purposes of establishing a claim under Article 10.1 [of the SPS Agreement], to point to the absence in the EC approval legislation of a reference to the needs of developing country Members'. "¹⁷

¹² Panel Report, *US – Clove Cigarettes*, paras. 7.632-7.634.

¹³ Panel Report, *US – Clove Cigarettes*, para. 7.646.

¹⁴ Panel Reports, *US – COOL*, paras. 7.777-7.780.

¹⁵ Panel Reports, *US – COOL*, para. 7.781.

¹⁶ Panel Reports, *US – COOL*, para. 7.786.

¹⁷ Panel Reports, *US – COOL*, para. 7.787.

8. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel reasoned that showing that a member has taken account of the special needs of developing country members does not necessarily require direct evidence:

"[A]n assessment of whether a regulating Member has failed to 'take account of' the special needs of developing country Members will generally require a panel to reach a conclusion based on circumstantial evidence and inferences, rather than direct evidence. By way of elaboration, requiring a complainant to adduce direct evidence – i.e. in the form of letters or other documents in which a regulating Member would expressly state that it refused to consider the needs of developing country Members when preparing a technical regulation – would entail a potentially insurmountable burden of proof...

...

[W]hile there is nothing unusual about a panel making findings on the basis of inferences that are reasonably drawn from circumstantial rather than direct evidence, the typical circumstances giving rise to a claim of inconsistency under Article 12.3, and the typical forms of circumstantial evidence available, make it difficult to conclusively eliminate opposing inferences that may be reasonably drawn from the same facts. When a regulating Member is made aware that a proposed technical regulation or conformity assessment procedure is apt to have an adverse impact on the special needs of developing country Members, and ultimately no modifications are made to the measure to avoid or substantially mitigate those impacts despite those concerns having been communicated, one inference that might be drawn is that the regulating Member did not take account of the special needs of developing country Members contrary to the requirements of Article 12.3. However, without more, it is equally plausible to draw the reasonable inference that the regulating Member did take account of those special needs, as required by Article 12.3, and simply decided to not make any such modification to the measure.

The Panel considers that in such circumstances, which may be expected to be the typical circumstances when claims of inconsistency under Article 12.3 are raised, a relevant consideration that must inform what inference should most reasonably be drawn is the nature of the modifications to the measure that the regulating Member would have had to introduce to accommodate the special needs of developing country Members. Where a regulating Member is made aware that a proposed technical regulation or conformity assessment procedure is apt to have an adverse impact on the special needs of developing country Members, and the regulating Member could modify the proposed measure to accommodate those concerns without undermining the measure's contribution to its objective or its chosen level of protection, then the absence of any such modifications may, all things being equal, strengthen the inference that those special needs were not taken into account. In contrast, when it is not apparent how the regulating Member could modify the proposed measure to address those concerns without undermining the measure's contribution to its objective or its chosen level of protection, this would weaken the inference that the special needs were not taken into account, and suggest instead that 'in weighing and balancing the various interests at stake,' the regulating Member decided to give priority to the competing objectives of the measures."¹⁸

9. The Panel in *EU and Certain Member States – Palm Oil (Malaysia)* pointed out that Article 12.3 does not necessarily require a reference to the special needs of developing country members in the text of the measure:

"The Panel has also considered Malaysia's argument that there is no mention of the needs of developing countries in the measures at issue or related documents (the explanatory memorandum to the initial proposal for RED II, RED II itself, the impact assessment for RED II, the Delegated Regulation, and the Status Report (2019), and that the provisions on independent smallholders in the Delegated Regulation are merely a theoretical option.

¹⁸ Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.937-7.939.

The Panel does not consider that the absence of any reference to the special needs of developing country Members in the text of the measure *itself* would support an inference that the European Union did not take account of the special needs of developing country Members."¹⁹

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¹⁹ Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.944-7.945.