

# ‘Operationalising’ special and differential treatment of developing countries under the SPS Agreement

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## Introduction

Special and differential treatment (SDT) of developing countries is provided for in many of the agreements of the World Trade Organisation (WTO), in order to take account of developing country<sup>1</sup> constraints. However, the effectiveness and enforceability of these provisions has been called into question, and they are seldom relied upon in WTO dispute settlement proceedings. The need for effective SDT is particularly acute when it comes to WTO agreements creating extensive disciplines in areas of national regulation. One such agreement is the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).<sup>2</sup>

It is therefore noteworthy that Argentina has recently taken the step of relying on an SDT provision in the SPS Agreement, in the pending *EC-Biotech* dispute.<sup>3</sup> It is the first time, since the coming into force of the SPS

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<sup>1</sup>It should be noted that the WTO applies a system of self-selection to the categorisation of members as developing countries. The sub-category of least-developed countries (LDCs) is instead determined by means of the LDC list maintained and updated by the United Nations Conference of Trade and Development. The term ‘developing countries’ as used in this article includes the sub-category of LDCs unless otherwise specified.

<sup>2</sup>The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) is one of the outcomes of the Uruguay Round of trade negotiations, which led to the creation of the WTO. It is one of the multilateral agreements on trade in goods found in Annex 1A to the Agreement Establishing the World Trade Organization, adopted on 15 April 1994. It entered into force on 1 January 1995. See *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (1994) 69-84.

<sup>3</sup>*European Communities-Measures Affecting the Approval and Trade or Marketing of Biotech Products. Request for the Establishment of a Panel by Argentina* WT/DS293/17 8 August 2003. This dispute concerns the European Communities’ *de facto* moratorium on the approval of

Agreement in 1995, that a member of the WTO has tried to enforce its special rules in favour of developing countries, in dispute settlement proceedings. The way the Panel in this case will deal with the SDT issue is likely to have far-reaching implications, not only for the position of developing countries under the SPS Agreement, but also for the current discussions in the Doha Development Round negotiations at the WTO on how to make SDT provisions more effective and operational.

This article aims to evaluate the existing SDT provisions in the SPS Agreement, in order to determine the possibilities open to the Panel to give them an effective interpretation. While inspired by Argentina's initiative in the *EC-Biotech* dispute, it will not limit itself to an examination of the particular provision relied upon by Argentina, and the arguments it made in support of its claim. Instead, it will look more generally at SDT provisions in the SPS Agreement.

First, the context for the discussion will be set by means of a brief look at the current negotiations on SDT at the WTO, in the ongoing Doha Round. Then, the need for SDT in the SPS Agreement will be addressed. Thereafter, the actual SDT provisions in the SPS Agreement will be scrutinised more closely to determine whether enforceable obligations can be derived from them. The disappointing experience with regard to implementation of many of these provisions, in the first ten years of operation of this agreement, will be considered. The possibilities for making the SDT provisions operational in dispute settlement will thereafter be examined. This will be done in the light of previous panel and Appellate Body decisions on similar provisions in other agreements, from which guidance might be drawn for the interpretation of SDT provisions in the SPS Agreement. Finally, conclusions will be drawn with regard to the effect of the possibilities open to panels to enforce existing SDT provisions in this agreement, on the deadlocked Doha Round negotiations in this area.

### **Doha Round negotiations on SDT**

The 'operationalisation'<sup>4</sup> of special and differential treatment of developing countries is currently a burning issue at the WTO. Developing countries

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agricultural biotechnology products, as well as the introduction by some EC member states of bans on products of agricultural biotechnology that have already been approved by the EC. Parallel disputes on the same matter have been initiated by Canada (WT/DS292) and the United States (WT/DS291). On 29 August 2003, a single panel was established to hear all three disputes, and composed on 4 March 2004. The panel proceedings are currently on-going after being extended four times. In his latest communication, the chairman of the panel reported that the panel estimates that it will issue its final report to the parties by the end of December 2005 (see WT/DS291/29; WT/DS292/23; WT/DS293/23).

<sup>4</sup>The term 'operationalisation' is currently commonly used in WTO discussions on SDT, as shorthand for the concept of making SDT provisions more precise, effective and operational. It will be used in this sense in this article.

have repeatedly raised concerns with regard to the lack of implementation of SDT provisions, which they regard as the *quid pro quo* for the extensive commitments they undertook in the Uruguay Round of trade negotiations. As part of the effort to bring developing countries back on board after the failure of the Seattle Ministerial Conference in 1999, these implementation concerns have received increased attention.

There is renewed recognition at the WTO of the need to ensure that developing countries fully share in the benefits of the trading system, by taking into account their special needs and constraints.<sup>5</sup> At the Doha Ministerial Meeting in 2001, concrete steps were taken towards this objective. First, the Ministerial Conference adopted the *Implementation Decision*, which embodies decisions to address developing country concerns regarding problems with implementation of certain provisions in WTO agreements, including those on SDT, and sets out a work programme on SDT.<sup>6</sup> Second, the *Ministerial Declaration* setting the agenda for trade negotiations in the ongoing Doha Round, known as the Doha Development Agenda, 'seek[s] to place developing country needs and interests at the heart of the Work Programme adopted in [that] Declaration'.<sup>7</sup> One of the ways it aims to achieve this is by recognising that SDT provisions are 'an integral part of the WTO Agreements' and mandating a review of these provisions with a view to 'strengthening them and making them more precise, effective and operational'.<sup>8</sup> It thus endorses the work programme set out in the *Implementation Decision* in this regard.<sup>9</sup>

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<sup>5</sup>It is not the aim of this article to provide an overview of SDT in the WTO. For an extensive and useful discussion of this issue, see Page and Kleen 'Special and differential treatment of developing countries in the World Trade Organization' (2005) 2 *Global Development Studies*.

<sup>6</sup>Ministerial Conference *Implementation-Related Issues and Concerns. Decision of 14 November 2001* WT/MIN(01)/17 20 November 2001 I (*Implementation Decision*). This decision was adopted having regard to articles IV:1, IV:5 and IX of the Marrakesh Agreement Establishing the WTO. Although this decision cannot be regarded as one of the 'covered agreements' regarding which WTO dispute settlement proceedings can be brought (in terms of article 1.1 of the DSU), it is clearly relevant for dispute settlement as a 'subsequent agreement' between the parties regarding the application of the provisions of a treaty, under article 31.3(a) of the Vienna Convention on the Law of Treaties. The relevance of this decision for the SDT provisions of the SPS Agreement is discussed further below.

<sup>7</sup>Ministerial Conference *Ministerial Declaration adopted on 14 November 2001* WT/MIN(01)/DEC/1 20 November 2001 par 2.

<sup>8</sup>*Id* at par 44.

<sup>9</sup>The Doha *Implementation Decision* n 6 above instructs the Committee on Trade and Development (CTD) to identify which SDT provisions are mandatory and which are non-binding and to consider the implications of making the non-binding provisions mandatory. Further, it must examine additional ways to make SDT provisions more effective. The deadline by which the CTD had to report to the General Council with clear recommendations was July 2002. See n 6 above at par 12. In terms of this mandate, delegations asked the WTO Secretariat to produce an informal factual paper giving an overview of mandatory and non-mandatory SDT provisions. The secretariat has done so in two comprehensive documents. See CTD *Non-mandatory Special and Differential Treatment Provisions in WTO Agreements and Decisions. Note by the Secretariat. Addendum* WT/COMTD/W/77/Rev 1/Add 3 4 February 2002, CTD *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions. A Review of Mandatory Special and*

To date, the Doha Round negotiations on SDT at the WTO have borne little fruit.<sup>10</sup> This is also the case with regard to those SDT proposals relating to the SPS Agreement that were referred to the SPS Committee by the General Council. The SPS Committee was unable to reach agreement on these proposals upon completion of its SDT work programme<sup>11</sup> in 2003,<sup>12</sup> and again in 2005. The latest report of the SPS Committee to the General Council reflects this stalemate, and notes that there is an ‘expectations gap’ between members in this regard.<sup>13</sup>

In the absence of progress towards addressing concerns with the effectiveness of SDT provisions through negotiations, the possibilities that exist for enforcing existing SDT provisions in dispute settlement gain in significance.<sup>14</sup>

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*Differential Treatment Provisions. Note by the Secretariat. Addendum WT/COMTD/W/77/Rev 1/Add 2 21 December 2001. The conclusions in these papers will be mentioned below where relevant to the SDT provisions of the SPS Agreement*

<sup>10</sup>There is significant disagreement with regard to the question whether cross-cutting principles for SDT should first be agreed upon (a view espoused by several developed members), or whether negotiations should rather focus on agreement-specific SDT proposals (the approach preferred by many developing members). This disagreement has hampered progress in the negotiations. For a useful summary of the negotiations in this regard, see *Doha Round Briefing Series. Cancun Update: Special and Differential Treatment* vol 2 No 13 August 2003; *Doha Round Briefing Series. Developments since the Fourth WTO Ministerial Conference: Special and Differential Treatment* vol 1 No 13 February 2003.

<sup>11</sup>Committee on Sanitary and Phytosanitary Measures *Special and Differential Treatment Proposals Schedule of Work. Decision by the Committee* G/SPS/26 2 July 2003.

<sup>12</sup>Committee on Sanitary and Phytosanitary Measures *Implementation and Special and Differential Treatment: Report by the Chairman to the General Council* G/SPS/30 20 November 2003). In this report, while mention is made of achievements with regard to the outstanding implementation issues referred to the SPS Committee in the *Doha Implementation Decision*, in contrast, with regard to the SDT proposals referred to it by the General Council there is only a brief report on comments received and on-going work. In August 2004, the General Council again referred agreement-specific proposals to the relevant WTO bodies, including the SPS Committee, with the instruction that they expeditiously complete consideration of thereof, and report back with recommendations by July 2005. See General Council *Doha Work Programme. Decision Adopted by the General Council on 1 August 2004* WT/L/579.

<sup>13</sup>This report notes ‘The SPS Committee has been unable to develop any clear recommendations for a decision on the proposals on special and differential treatment referred to it by the General Council’. See Committee on Sanitary and Phytosanitary Measures *Report on Proposals for Special and Differential Treatment. Adopted by the Committee on 30 June 2005* G/SPS/35 7 July 2005 pars 40-41.

<sup>14</sup>This raises interesting issues with regard to the balance between the political and dispute-settlement organs of the WTO. It is beyond the ambit of this article to address the debate regarding whether there is an institutional imbalance between the WTO’s consensus-based, inefficient rule-making procedures and its highly efficient, automatic dispute settlement system. For contributions to this important discussion, see Lorand Bartels ‘The separation of powers in the WTO: How to avoid judicial activism’ (2004) 53 *ICLQ* 861-895; Joost Pauwelyn ‘The transformation of world trade’ (2005) 104 *Michigan Law Review* 1-66. See further, Ignacio Garcia Bercero ‘Functioning of the WTO system: Elements for possible institutional reform’ (2000) 6 *International Trade Law and Regulation* 103: 105; Frieder Roessler ‘The institutional balance between the judicial and the political organs of the WTO,’ in Bronckers and Quick (eds) *New directions in International Economic Law: Essays in honour of John H Jackson* (2000) 325-345; and Claus-Dieter Ehlermann ‘Tensions between the dispute settlement process and the diplomatic and treaty-making activities

It is the task of panels and the Appellate Body to interpret these, and other, provisions in WTO agreements in a way that gives meaning and effect to them. The extent to which it is possible to 'operationalise' the SDT provisions, within the limits of the customary rules of interpretation to which panels are bound,<sup>15</sup> therefore deserves attention. A short examination of the need for special treatment of developing countries in the SPS Agreement precedes this analysis, in order to highlight the importance of operationalising its SDT provisions.

### **The need for SDT in the SPS Agreement**

In the current discussion on SDT in the WTO, there is wide recognition of the fact that 'one size does not fit all'<sup>16</sup> when it comes to regulatory disciplines in trade rules. This general observation is particularly on point when it comes to the SPS Agreement.

The SPS Agreement aims to balance the competing goals of trade liberalisation and the protection of health. It does so by recognising the sovereign right of governments to protect human, animal and plant health in their territories, while establishing disciplines on their ability to do so in ways that restrict trade in the agri-food sector. All sanitary and phytosanitary (SPS) measures<sup>17</sup> that affect trade must be applied in accordance with its rules.<sup>18</sup>

The SPS Agreement encourages members to harmonise their SPS measures<sup>19</sup> by basing them on international standards developed by international standard-

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of the WTO' (2002) 1/3 *World Trade Review* 301-308.

<sup>15</sup>Article 3.2 of the WTO's Dispute Settlement Understanding (DSU) provides that the dispute settlement system serves to clarify the existing provisions of the agreements 'in accordance with customary rules of interpretation of public international law'. These rules are reflected in articles 31 and 32 of the Vienna Convention on the Law of Treaties, as held by the Appellate Body in *US-Gasoline* and in *Japan-Alcoholic Beverages II*. See Appellate Body Report *United States-Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R 20 May 1996 DSR 1996 I 3 at 17; and Appellate Body Report *Japan-Taxes on Alcoholic Beverages* WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R 1 November 1996 DSR 1996 I 97 at 10.

<sup>16</sup>Bernard Hoekman *et al* *More Favorable Differential Treatment of Developing Countries: Towards a new approach in the WTO* Working Paper 3107 August 2003 at 3; J. Michael Finger 'The Uruguay Round North-South bargain: Will the WTO get over it?' in Kennedy and Southwick (eds) *The political economy of international trade law. Essays in honor of Robert E Hudec* (2002) 301-310 at 306.

<sup>17</sup>Broadly speaking, the term 'SPS measures' refers to all laws, regulations, decrees, requirements and procedures aimed at protecting human, animal or plant life or health from food-borne risks or risks from pests or diseases. See the definition in Annex A, par 1 of the SPS Agreement.

<sup>18</sup>Article 1.1 of the SPS Agreement.

<sup>19</sup>Article 3 of the SPS Agreement. This article does not oblige Members to harmonise their measures, but instead gives them three autonomous options. Members may: (1) base their measure on international standards; (2) conform their measure to international standards and thereby benefit from a presumption of consistency with the entire SPS Agreement and the GATT (3) adopt a measure resulting in a higher level of protection than the international standard, provided it is justified by means of a risk assessment. Article 3 was clarified by the Appellate Body in *EC-Hormones* WT/DS26/AB/R WT/DS48/AB/R 13 February 1998.

setting bodies.<sup>20</sup> A member that does not base its measure on an international standard must justify this by means of a risk assessment satisfying the requirements of the SPS Agreement.<sup>21</sup> In addition, members must meet various other requirements, including those regarding consistency in choice of level of SPS protection,<sup>22</sup> use of the least trade-restrictive measure,<sup>23</sup> and prior notification of measures.<sup>24</sup> These disciplines are resource-intensive and require a capacity that many developing countries do not have.

For example, developing countries have difficulty participating effectively in international standard setting,<sup>25</sup> with the result that the benchmark standards often do not reflect developing country circumstances and constraints. In addition, lack of scientific expertise and data collection capacity make it difficult for many developing countries to meet the complex requirements for a risk assessment to justify their deviation from international standards. The transparency and other disciplines of the SPS Agreement also require a well-developed regulatory infrastructure. Making the necessary investments in this area would often mean that developing countries must divert scarce resources from other development priorities.

Thus, the SPS Agreement, like other WTO agreements creating disciplines for behind-the-border regulatory regimes, necessitates the recognition of differences in capacity across different levels of development. The ability of countries to comply with, and benefit from, their rules depends on their 'starting position'.<sup>26</sup> In other words, the existing situation in a country, such as

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<sup>20</sup>Annex A par 3 of the SPS Agreement identifies the relevant international standard-setting bodies for purposes of the SPS Agreement, namely the Codex Alimentarius Commission (for food-safety issues); the International Office of Epizootics, now called the World Animal Health Organisation (for animal health issues); and the International Plant Protection Convention (for phytosanitary issues).

<sup>21</sup>The requirements for a risk assessment are set out in article 5.1 and 5.2 and Annex A par 4 of the SPS Agreement. In article 5.7, allowance is made for provisional measures when scientific evidence is insufficient.

<sup>22</sup>Article 5.5 of the SPS Agreement.

<sup>23</sup>Article 5.6 of the SPS Agreement.

<sup>24</sup>Article 7 and Annex B of the SPS Agreement.

<sup>25</sup>While developing country attendance of plenary meetings of the standard-setting bodies where standards are adopted is increasing, following new initiatives in this area by these bodies, their participation is not very effective. They are often not well prepared for the discussions at these meetings, having not participated in the process of preparation of standards in the technical committees, and they often lack the necessary national data to provide a meaningful input into the discussions.

<sup>26</sup>Hamwey notes that, '... the playing field resulting from international trade agreements that have ostensibly equivalent rules for all contracting parties, may provide a much smaller policy space for developing than developed countries because of differences in initial conditions and national policy implementation capacities'. Robert M Hamwey *Expanding National Policy Space for Development: Why the Multilateral Trading System Must Change* Working Paper 25, September 2005.

the strength of its regulatory system, its infrastructure, human and financial resources, etcetera, will affect the impact of regulatory disciplines on that country.

It is therefore necessary to find ways to ensure that agreements laying down regulatory disciplines, such as the SPS Agreement, are development-friendly.<sup>27</sup> They should leave sufficient space for countries to pursue their development policies through national regulation, while at the same time create clear and workable rules to ensure market access. This difficult balance is aimed at by provisions in WTO agreements on SDT of developing countries.<sup>28</sup>

More specifically, the need for SDT in the SPS Agreement arises in two main areas. The first concerns the disciplines of the SPS Agreement itself, namely these countries' difficulties with compliance with the resource-intensive obligations of the agreement and their lack of capacity to enforce their rights under the agreement. The second area goes beyond the SPS Agreement and relates to the constraints on developing countries' ability to meet the SPS requirements of their trading partners, even when these are consistent with the SPS Agreement. Both these areas need to be addressed in order to ensure that developing countries are in a position to reap the benefits of the SPS Agreement without bearing a disproportionate burden of costs.

At the same time, as was widely recognised by the negotiators of the SPS Agreement, any mechanisms to deal with developing country concerns should not jeopardise the right of a member to impose scientifically justified measures necessary to prevent unacceptable risks to human, plant or animal life or health.<sup>29</sup> To do so would not only lead to risks of harmful effects on human health and agricultural production, contrary to the duties of governments, but would also be counterproductive. It would fuel consumer fears, leading to a decrease in demand for products originating in developing countries, and harm

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<sup>27</sup>Stevens argues that this is particularly necessary now that the improved dispute settlement system has eliminated much of the flexibility that characterised the GATT. As a result, 'in order to avoid adverse, unintended consequences from dispute settlement (or the threat thereof), the WTO needs new mechanisms to balance precise rules and appropriate flexibility...'. See Christopher Stevens 'Recognising reality: Balancing precision and flexibility in WTO rules' presented at the Joint ICTSD-GP International Dialogue: Making Special and Differential Treatment More Effective and Responsive to Development Needs, Chavannes-de-Bogis, Switzerland: International Centre for Trade and Sustainable Development, 6 and 7 May 2003 at 3.

<sup>28</sup>The link between policy space for development and SDT is recognised by Hamwey, who argues that, '... special and differential treatment (S&DT) for developing countries under the [multilateral trading system] needs to be enhanced and made more actionable and effective in order to provide developing countries with essential national policy space for development'. Robert M Hamwey n 11 above.

<sup>29</sup>This recognition persists in the current SDT discussions. See Committee on Sanitary and Phytosanitary Measures, *Report on Proposals for Special and Differential Treatment* n 13 above at par 5

the reputation of such exporting countries by casting doubts on their regulatory capacities.<sup>30</sup> Similarly, difficulties with implementation of the regulatory disciplines of the agreement should not be dealt with by means of a relaxation of the rules. Creating loopholes through which measures that are disguised forms of protectionism can slip would undermine the market access gains achieved by the SPS Agreement. Thus, it is important to find ways of helping developing countries to overcome their constraints without weakening legitimate SPS measures or watering down the disciplines of the agreement. The extent to which SDT in the SPS Agreement achieves this difficult objective needs to be examined.

### **Provision of SDT in the SPS Agreement**

The general disciplines on SPS measures contained in the SPS Agreement apply equally to developed and developing countries. However, the SPS Agreement does recognise the financial and technical resource constraints that developing countries face. This consideration finds its first reflection in the preamble to the SPS Agreement, which recognises that:

... developing country Members may encounter special difficulties in complying with sanitary and phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary and phytosanitary measures in their own territories, and desir[es] to assist them in their endeavors in this regard; ...<sup>31</sup>

The degree to which this recognition is given effect in the operational provisions of the SPS Agreement, and their implementation, is interesting to examine.

Specific provisions exist in the SPS Agreement to take into account the special constraints of developing countries by providing them with some flexibility and assistance with regard to both their compliance with the SPS measures of other members, and their implementation of the obligations of the SPS Agreement. The main SDT provisions can be found in article 10 of the SPS Agreement, entitled 'Special and Differential Treatment'. However, article 14 and paragraphs 2, 8 and 9 of Annex B also reflect consideration of developing country constraints and can thus be regarded as forms of SDT.<sup>32</sup>

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<sup>30</sup>*Ibid.*

<sup>31</sup>See the 7<sup>th</sup> preambular recital of the SPS Agreement.

<sup>32</sup>It should be noted that some of the substantive disciplines in the SPS Agreement also contain elements of flexibility that can be used to the benefit of developing countries. For example, article 5.1 requires a risk assessment 'as appropriate to the circumstances' and article 5.6 allows technical and economic feasibility to be taken into account in the choice of an SPS measure. However, as these flexibilities are available to *all* members, they cannot be regarded as a form of SDT and will consequently not be discussed in this article.



For this reason, while the focus of the following discussion will be on article 10, other relevant articles will be examined where relevant.

### *SDT with regard to SPS measures of other members*

Many developing countries rely on food and agricultural products for a large part of their export earnings. They therefore have a significant interest in access to the markets of their trading partners for these products. The prevalence of strict SPS measures in developed countries form barriers to market access. The disciplines of the SPS Agreement aim to ensure that SPS measures are not misused as disguised forms of protection of domestic markets. Therefore, SPS measures that are not scientifically justified would fall foul of its rules.

However, the SPS Agreement recognises the sovereign right of members to choose their own level of protection against scientifically proven SPS risks. In developed countries, consumer demands and technological capacity often result in the choice of very high levels of protection, reflected in strict SPS requirements. Thus, many legitimate SPS measures exist that comply with the requirements of the agreement, yet present considerable hurdles to market access for developing countries.

In order to overcome this problem, it is necessary to make provision for SDT of developing countries in respect of the SPS measures applied by other WTO members. This SDT should ensure appropriate regard for developing country constraints, without endangering the level of SPS protection chosen by the importing member. The extent to which SDT in the SPS Agreement achieves this will now be examined by looking in detail at the relevant provisions.

### *Consideration in the preparation and application of SPS measures*

Many of the problems faced by developing countries with regard to meeting the SPS requirements of their trading partners could be avoided, if regard were had to their constraints during the process of drafting the measures or in their application. For example, some developed countries apply onerous and complex testing requirements to verify compliance with their SPS requirements, which developing countries lack the technology to meet. Similarly, process-based SPS requirements,<sup>33</sup> while routine for more

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<sup>33</sup>Process-based requirements are those that address the process of production of a product, whereas product-based requirements focus on the characteristics of the final product. An example of a process-based requirement is the Hazard Analysis and Critical Control Point (HACCP) system. HACCP is a method used to ensure food safety by analysing potential hazards in the production process, identifying the points where they can be controlled and setting up process parameters and their critical limits to achieve this control, as well as establishing follow-up procedures. Many developed countries currently apply HACCP requirements in a growing number of areas (such as fishery products). An example of a product-based requirement is the

developed members, are beyond some developing countries' capabilities. Active consideration of developing country circumstances could lead to the framing of SPS measures and the application thereof in ways that facilitate compliance by developing countries, without endangering the level of SPS protection sought.

For this reason, article 10.1 of the SPS Agreement provides that members 'shall' take account of the special needs of developing country members, and in particular least-developed country members, when preparing and applying SPS measures. This is the only SDT provision in article 10 of the SPS Agreement that is couched in mandatory terms, and thus creates an obligation for members.<sup>34</sup>

However, the strength of this obligation can be questioned. Developing countries have expressed the concern that their constraints are, in practice, rarely taken into account in the preparation and application of SPS measures.<sup>35</sup> In its review of the utilisation of SDT provisions, the WTO Secretariat reported that it had no information regarding the use of this provision.<sup>36</sup> These concerns led, in 2002, to a proposal by Egypt of a new SDT 'box' in the SPS notification format,<sup>37</sup> in which the notifying member should, *ex ante*, identify the SDT component of its measure. In response, Canada proposed that SDT be notified *ex post*, as an addendum to the notified measure.<sup>38</sup> Based on the Canadian proposal, the SPS Committee has adopted a new notification format for addenda to indicate when SDT has

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classic inspection requirement applied, for example, to fish and food products, based on the analysis of samples of the final product.

<sup>34</sup>In the WTO Secretariat's review of SDT provisions, this article is classified as a mandatory provision, creating an 'obligation of conduct', in that it does not prescribe a particular result. See *CTD Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions* n 9 above at 9.

<sup>35</sup>Committee on Sanitary and Phytosanitary Measures *Special and Differential Treatment: Note by the Secretariat*, G/SPS/W/105 9 May 2000 par 4.

<sup>36</sup>CTD *Information on the Utilisation of Special and Differential Treatment Provisions. Note by the Secretariat. Addendum* WT/COMTD/W/77/Rev 1/Add 4 7 February 2002 at 21-22.

<sup>37</sup>The notification format is a recommended guideline developed by the Secretariat in 1996 to assist countries in compliance with the notification requirements of the SPS Agreement. It has since been revised twice, and an addendum thereto developed for notification of the recognition of equivalence. See Committee on Sanitary and Phytosanitary Measures *Recommended Notification Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7). Revision* G/SPS/7/Rev 2 2 April 2002; Committee on Sanitary and Phytosanitary Measures *Notification of Determination of the Recognition of Equivalence of Sanitary and Phytosanitary Measures. Decision by the Committee. Addendum* G/SPS/7/Rev 2/Add 1 25 July 2002.

<sup>38</sup>Committee on Sanitary and Phytosanitary Measures *Enhancing Transparency of Special and Differential (S&D) Treatment within the SPS Agreement. Submission by Canada* G/SPS/W/127 30 October 2002. Egypt, in turn, responded to this proposal in Committee on Sanitary and Phytosanitary Measures *Comments on the Canadian Proposal. Statement by Egypt at the Meeting of 7-8 November 2002* G/SPS/GEN/358 15 November 2002.

been requested in the context of a notified SPS measure, and what response has been given to such a request.<sup>39</sup> To date, little, if any, use has been made of this notification format.<sup>40</sup> This seems indicative of continued inadequate implementation of article 10.1, despite its mandatory wording.

Although article 10.1 has never been addressed by a panel or the Appellate Body in a dispute to date, it has, as mentioned above, recently been raised as a challenge by Argentina in the pending *EC-Biotech* dispute.<sup>41</sup> Argentina emphasises the mandatory nature of this provision and claims that it requires more than mere attention to developing country problems. Instead, it requires 'positive action', in this case 'implementation of Member obligations in a manner that is beneficial or less detrimental to the interests of developing nations'.<sup>42</sup> According to Argentina, the European Communities (EC) has failed to comply with this obligation.

The EC has countered these arguments by stating that it does 'bear [SDT provisions] in mind when developing and applying its legislation, including, where relevant, its GMO legislation'.<sup>43</sup> It further argues that Argentina's claim amounted to 'nothing more than saying that since the European Communities has violated other provisions of the agreements and this affects Argentina, a developing country, it has consequently also failed to comply with its obligations of special and differential treatment towards developing countries'.<sup>44</sup> Finally, the EC disputes the factual assertion that developing country exports have been restricted by its measure, but avers that trade statistics show that its imports from developing countries that have widely adopted biotechnology in agriculture have increased since 1995/1996.<sup>45</sup>

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<sup>39</sup>The Canadian proposal was adopted in principle in 2003, and an elaboration of steps to implement this procedure was adopted in 2004. See Committee on Sanitary and Phytosanitary Measures *Procedure to Enhance Transparency of Special and Differential Treatment in Favour of Developing Country Members. Decision by the Committee* G/SPS/33 2 November 2004.

<sup>40</sup>One possible incidence of use of this format (although predating its final adoption) is the submission of an addendum to a notification by the EC of its decision to allow more flexibility on the dates of application of two elements of its protective measures against plant pests in wood packaging materials (see official document symbol G/SPS/N/EEC/221/Add 2 14 October 2004).

<sup>41</sup>See the unofficial translation of Argentina's submission *European Communities-Measures Affecting the Approval and Marketing of Biotech Products (WT/DS293). First Written Submission of the Argentine Republic (Courtesy Translation)* (2004).

<sup>42</sup>*Id* at par 182. In order to indicate its 'special needs' as a developing country, Argentina points to the fact that it is highly dependent on agricultural production and exports, and that the survival of a large sector of its population depends on access to markets for these products, including those produced through biotechnology. *Id* at par 185.

<sup>43</sup>*European Communities-Measures Affecting the Approval and Marketing of Biotech Products. First Written Submission by the European Communities* 17 May 2004 par 666.

<sup>44</sup>*Id* at par 667.

<sup>45</sup>*Id* at pars 670-671.

In response, Argentina disputes the EC's view, implicit in its arguments, that article 10.1 is discretionary and a member can thus have regard to developing country needs when it deems it 'relevant'.<sup>46</sup> Secondly, Argentina points out that the obligation contained in article 10.1 is separate, and not consequential on the violation of other provisions of the SPS Agreement.<sup>47</sup> Finally, Argentina questions how data on trade flows can be an indication that developing country needs have been taken into account.<sup>48</sup>

It remains to be seen what the panel will make of these arguments. In the meantime, WTO case law on other mandatory SDT provisions can be usefully examined to establish the likelihood that a challenge of non-compliance with article 10.1, such as that of Argentina, will be successful. The panel in *EC-Bed Linen*<sup>49</sup> was faced with a claim of violation of the SDT provision contained in article 15 of the Anti-Dumping Agreement.<sup>50</sup> Like article 10.1 of the SPS Agreement, article 15 of the Anti-Dumping Agreement is framed in mandatory terms. It provides in its first sentence that special regard 'must' be given to the special situation of developing country members, when considering the application of anti-dumping duties. In its second sentence it provides that the possibilities of constructive remedies 'shall' be explored where essential interests of developing countries are at stake. The panel noted that both parties in that dispute, the EC and India, had agreed that the first sentence of article 15 imposes *no legal obligations* on developed country members. Thus, the panel expressed no views on this matter.<sup>51</sup> Focusing on the second sentence, the panel held that it does create an obligation to consider actively, with an open mind, the possibility of constructive remedies before imposing an anti-dumping duty that would affect the essential interests of a developing member.<sup>52</sup>

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<sup>46</sup>*European Communities-Measures Affecting the Approval and Marketing of Biotech Products (WT/DS293)*. Written Rebuttal of the Republic of Argentina 19 July 2004 pars 113-115.

<sup>47</sup>*Id* at par 117.

<sup>48</sup>*Id* at par 122.

<sup>49</sup>Panel Report *European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* WT/DS141/R 12 March 2001 as modified by the Appellate Body Report WT/DS141/AB/R.

<sup>50</sup>Article 15 of the Anti-Dumping Agreement provides: 'It is recognized that *special regard must be given* by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement *shall be explored* before applying anti-dumping duties where they would affect the essential interests of developing country Members.' (Emphasis added).

<sup>51</sup>Panel Report *EC-Bed Linen* n 34 above at note 85.

<sup>52</sup>In our view, while the exact parameters of the term are difficult to establish, the concept of "explore" clearly does not imply any particular outcome. We recall that Article 15 does not require that "constructive remedies" must be explored, but rather that the "possibilities" of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in light of the object and purpose of Article 15, we do consider

The first sentence of article 15 of the Anti-Dumping Agreement was again at issue before the panel in *US-Steel Plate*.<sup>53</sup> Despite the word ‘must’ in this sentence, the panel held:

Members cannot be expected to comply with an obligation whose parameters are entirely undefined. In our view, the first sentence of Article 15 imposes no specific or general obligation on Members to undertake any particular action.<sup>54</sup>

On the same issue, the panel in *EC-Pipe Fittings*<sup>55</sup> found that:

... even assuming that the first sentence of Article 15 imposes a general obligation on Members, it clearly contains no operational language delineating the precise extent or nature of that obligation or requiring a developed country Member to undertake any specific action.<sup>56</sup>

It appears from these cases that the use of mandatory language in SDT provisions is not sufficient to make them enforceable. In addition, SDT provisions must contain specific obligations to undertake particular action before a claim of violation can succeed. This result is particularly problematic

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that the “exploration” of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.’ *Id* at par 6.233. This issue was not appealed.

<sup>53</sup>Panel Report *United States-Anti-Dumping and Countervailing Measures on Steel Plate from India* WT/DS206/R and Corr 1 29 July 2002. It is interesting that India in this case no longer held the view, stated in *EC-Bed Linen*, that the first sentence of article 15 contains no legal obligation. Instead, while acknowledging that ‘it does not set out any specific legal requirements for specific action’, India claimed that, ‘this mandatory provision does create a general obligation, the precise parameters of which are to be determined based on the facts and circumstances of the particular case’. *Id* at par 7.110.

<sup>54</sup>*Ibid*. In addition, as the provision refers to ‘developing country Members’ the panel held that it could not oblige consideration of the situation of companies operating in developing countries. It stated, ‘Simply because a company is operating in a developing country does not mean that it somehow shares the “special situation” of the developing country Member’. *Id* at par 7.111. This Panel Report was not appealed.

<sup>55</sup>Panel Report *European Communities-Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* WT/DS219/R 18 August 2003, as modified by the Appellate Body Report WT/DS219/AB/R. In this case Brazil argued that the first sentence of article 15 contains ‘a general obligation to pay particular attention to the special situation of developing Members, while the second sentence concerns one possible way of fulfilling this obligation’. It claimed that the EC did not have regard to the special situation of Brazil as a developing member (the specificity of the Brazilian tax rebate system which is unlike the sophisticated VAT systems in developed countries and the devaluation of the Brazilian currency) and conducted itself in the same way as it would have done when dealing with a developed member. *Id* at par 7.57.

<sup>56</sup>The panel further found that the second sentence of article 15 provides operational indications as to the nature of the specific action required. Thus compliance with the obligations in the second sentence would necessarily ‘constitute fulfilment of any general obligation that might arguably be contained in the first sentence’. *Id* at par 7.68. The panel’s interpretation of article 15 was not appealed.

when one takes into account the purpose of SDT, which is to provide the *flexibility* to respond to the *special needs* of developing countries. What the needs of particular developing countries are varies from case to case. Developing countries are not a homogenous group. Instead, there are vast differences in their levels of economic and human development, export diversification, ability to absorb costs from trade-restrictive measures and to adapt to new economic circumstances, and therefore also in their 'special situation'. To require that an SDT provision, to be effective and enforceable, must specify the required action to be taken in response to developing country needs undermines the very flexibility that characterises SDT.<sup>57</sup>

The prospect of applying this line of case law to article 10.1 of the SPS Agreement is not heartening. Article 10.1 merely requires that members 'take account' of developing (and least-developed) countries' special needs, and is thus very similar to the first sentence of article 15 of the Anti-Dumping Agreement. Article 10.1 does not oblige WTO members actually to adapt their SPS measures or the application thereof to address developing country needs, or even to explore the possibility of doing so. As a result, not even the obligation to 'actively consider with an open mind' alternative SPS measures or application procedures, is likely to be found to be contained in this provision. The risk exists that this provision may turn out to be, for practical purposes, a dead letter.

Militating against this result is the principle of effective treaty interpretation, which requires that effect be given to all provisions of a treaty. In *US-Gasoline*, the Appellate Body held:

One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.<sup>58</sup>

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<sup>57</sup>An example of a possible application of article 10.1 to ensure consideration of developing country constraints, by providing additional flexibility in particular, *ad hoc*, circumstances, is the following. In 2005, Sri Lanka requested that the EC suspend its ban on Sri Lankan cinnamon containing sulphur dioxide, and establish instead a maximum residue level of 150 parts per million, pending the development of an international standard. According to Sri Lanka, this would satisfy the EC's obligations under article 10.1. See Committee on Sanitary and Phytosanitary Measures *Trade Difficulties Encountered in the Export of Sri Lankan Cinnamon to the European Communities. Communication by Sri Lanka* G/SPS/GEN/597 10 October 2005.

<sup>58</sup>Appellate Body Report *United States-Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R 20 May 1996, DSR 1996 I 3 at 23. As noted in n 15 above, article 3.2 of the WTO's Dispute Settlement Understanding requires that WTO agreements be clarified 'in accordance with customary rules of interpretation of public international law', which have been held to be reflected in articles 31 and 32 of the Vienna Convention on the Law of Treaties.

This principle has been consistently followed in subsequent cases. It is therefore likely that a panel interpreting article 10.1 will consider itself bound to give some effect thereto, even if the provision itself is not regarded as enforceable. One way of doing so, appears to be by seeing it as reflecting the ‘general policy’ with regard to SDT, and therefore using it to inform related provisions, which give its general exhortation more concrete effect.

It is now necessary to examine the remaining SDT provisions in the SPS Agreement to determine if they can be regarded as giving effect to the obligation contained in article 10.1, in the same way that the second paragraph of article 15 of the Anti-Dumping Agreement, ‘operationalises’ the first paragraph.

#### *Longer compliance periods*

Compliance with new SPS measures often entails considerable changes to production and processing systems in developing countries. Particularly where the existing domestic SPS regime is very different from the new requirements on foreign markets, and supporting public services and infrastructure are weak, compliance may require substantial efforts and investments. Thus, time is needed to find the necessary resources and to make the required changes. If exports from developing countries are immediately subject to the new SPS measures, they risk being excluded from their export markets while producers are adapting to the new measure. This would result not only in loss of export revenue, but also in loss of market share, which may have significant long-term effects. To address this problem, article 10.2 of the SPS Agreement makes provision for the phased introduction of new SPS measures. It provides that members ‘should’ allow longer time frames for compliance with new SPS measures on products of interest to developing country members, where the appropriate level of protection of the importing member allows. This is aimed at allowing developing countries to maintain their export opportunities while adjusting to the new measures, in cases where this would not undermine the SPS protection sought by the importing member. However, it would appear at first sight from the hortatory wording of this provision, that it encourages, rather than obliges, members to grant developing countries extended compliance periods.<sup>59</sup>

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<sup>59</sup>The WTO Secretariat categorised this provision as a non-mandatory provision in the review of SDT provisions it conducted for the CTD. It noted that the provision could be made mandatory by replacing the word ‘should’ with ‘shall’. Alternatively it suggested that an authoritative interpretation of this provision could be adopted (pursuant to article IX:2 of the Marrakesh Agreement) clarifying that ‘should’ in article 10.2 must be read to express a duty rather than an exhortation. See CTD *Non-Mandatory Special and Differential Treatment Provisions in WTO Agreements and Decisions. Note by the Secretariat. Addendum WT/COMTD/W/77/Rev 1/Add 3 4 February 2002* at 6.

Concerns regarding the lack of implementation of this provision were raised in the run-up to the Doha Ministerial Meeting.<sup>60</sup> As a result of discussions on this issue, agreement was reached to include a provision in the Doha Implementation Decision specifying that:

... the phrase ‘longer time-frame for compliance’ referred to in Article 10.2 [of the SPS Agreement], shall be understood to mean normally a period of not less than 6 months. Where the appropriate level of sanitary and phytosanitary protection does not allow scope for the phased introduction of a new measure, but specific problems are identified by a Member, the Member applying the measure shall upon request enter into consultations with the country with a view to finding a mutually satisfactory solution to the problem while continuing to achieve the importing Member’s appropriate level of protection.<sup>61</sup>

The legal effect of article 10.2 has not yet been established in the case law. Therefore, once again, guidance may be sought from the interpretation of similarly worded SDT provisions in other WTO agreements. The Compliance Panel in *EC-Bed Linen* was faced with the question whether there was a violation of article 21.2 of the Dispute Settlement Understanding (DSU), which provides that special attention ‘should’ be applied to matters affecting developing country members with respect to measures that have been the subject of dispute settlement.<sup>62</sup> It found that this article contains no obligation to take any particular action, noting the use of the hortatory word ‘should’ and the fact that article 21.2 does not set out any specific action.<sup>63</sup> However, the panel stated that article 21.2 is not devoid of meaning but ‘clearly reflects the concern of Members with ensuring that appropriate attention is given the interests of developing Members, and thus states an important general policy’.<sup>64</sup> It thus found it appropriate that the

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<sup>60</sup>A group of developing countries (Cuba, the Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda) proposed that article 10.2 be modified to include a mandatory period of at least twelve months between the date of notification of the measure and its entry into force for products from developing countries. See Committee on Sanitary and Phytosanitary Measures *Special and Differential Treatment: Note by the Secretariat* G/SPS/W/105 9 May 2000 par 7.

<sup>61</sup>*Implementation Decision* n 6 above at par 3.1.

<sup>62</sup>Panel Report *European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India - Recourse to Article 21.5 of the DSU by India* WT/DS141/RW 24 April 2003 as modified by the Appellate Body Report WT/DS141/AB/RW.

<sup>63</sup>The panel held, ‘[W]e find nothing in that provision which explicitly requires a Member to take any particular action in any case. Nor has India pointed to any contextual element which would suggest that the hortatory word “should” must nonetheless be understood, in Article 21.2 of the DSU, to have the mandatory meaning of “shall”. ... In addition, the fact that there is no specific action set out in Article 21.2 makes it unlikely that Members intended the provision to be mandatory – the lack of specificity in this regard implies rather a hortatory use of should.’ *Id* at par 2.667.

<sup>64</sup>*Id* at par 2.669.



arbitrator in another case<sup>65</sup> had found guidance in this provision in his interpretation of article 21.3 of the DSU with regard to the determination of a reasonable period of time to comply with the recommendations and rulings of the Dispute Settlement Body. It further held, ‘There may be any number of ways in which the policy set forth in Article 21.2 might be effectuated. However, nothing in that provision obliges any Member actually to effectuate that general policy, or to do so in any particular way in any particular case.’<sup>66</sup>

By contrast, outside the context of SDT provisions, the Appellate Body in *Canada-Aircraft* has been prepared to interpret the word ‘should’ in article 13.1 of the DSU<sup>67</sup> as implying an obligation. It held:

Although the word ‘should’ is often used colloquially to imply an exhortation, or to state a preference, it is not always used in those ways. It can also be used ‘to express a duty [or] obligation’.<sup>68</sup>

It justified this finding by reference to the context of the provision, and the consequences of denying obligatory effect to this provision. The Appellate Body noted the fact that article 13.1 gives panels a right to seek information, which right would be rendered illusory if parties had no duty to respond to requests for information. Further, members would be free to prevent a panel from carrying out its duties and thereby undermine the negotiated dispute settlement procedures.<sup>69</sup> To avoid these far-reaching consequences, the Appellate Body saw fit to interpret the word ‘should’ as creating an obligation.<sup>70</sup>

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<sup>65</sup>Award of the Arbitrator *Indonesia – Certain Measures Affecting the Automobile Industry (Article 21.3)* WT/DS54/15, WT/DS55/14 WT/DS59/13 WT/DS64/12 at par 24.

<sup>66</sup>Panel Report *European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India - Recourse to Article 21.5 of the DSU by India* WT/DS141/RW 24 April 2003 as modified by the Appellate Body Report WT/DS141/AB/RW at par 2.669. This issue was not appealed.

<sup>67</sup>Article 13.1 of the DSU, with regard to the right of a panel to seek information, provides, ‘A Member *should* respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate’. (Emphasis added.)

<sup>68</sup>Appellate Body Report *Canada-Measures Affecting the Export of Civilian Aircraft* WT/DS70/AB/R 20 August 1999 at par 187.

<sup>69</sup>In this regard, the Appellate Body stated, ‘So to rule would be to reduce to an illusion and a vanity the fundamental right of Members to have disputes arising between them resolved through the system and proceedings for which they bargained in concluding the DSU. We are bound to reject an interpretation that promises such consequences.’ *Id* at par 189.

<sup>70</sup>Another example of where the Appellate Body gave binding force to a provision in which ‘should’ rather than ‘shall’ is used, is article 11 of the DSU which provides that, ‘... a panel should make an objective assessment of the matter before it. ...’ While it did not expressly address the issue of the use of the word ‘should’ in this article, the Appellate Body referred several times to the ‘duty’ of a panel to make an objective assessment, and called this an ‘obligation’. See Appellate Body Report *EC Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R 13 February 1998 DSR 1998 I 135 at par 133.

What guidance can we find in these cases for the interpretation of article 10.2 of the SPS Agreement? It appears that in certain specific cases the Appellate Body is willing to interpret a provision containing the word 'should' as mandatory. However, this seems limited to cases where the context of the provision indicates that an obligation was intended, without which negotiated rights would be made illusory. In other cases, panels would seem reluctant to give binding force to a provision containing the word 'should', particularly if it does not set out any specific action.

Article 10.2 of the SPS Agreement would seem to fall closer to the first than the second situation. Its context includes article 10.1, which is framed in mandatory terms. While the lack of operational language delineating the precise extent or nature of the obligation in article 10.1 means that it is unlikely to be interpreted as requiring a developed country member to do anything, it cannot be 'devoid of meaning'. It would seem logical that it should be seen as reflecting 'the concern of Members with ensuring that appropriate attention is given the interests of developing Members, and thus [as stating] an important general policy'.<sup>71</sup> As a result, it should guide the interpretation of the rest of article 10, including article 10.2. Otherwise, the right of developing country members to rely on this negotiated obligation would be illusory.

Unlike article 10.1, and contrary to the situation in *Canada-Aircraft*, article 10.2 *does* set out specific actions to give effect to its provisions. It concretely calls on members to allow longer time frames for compliance with new SPS measures on products of interest to developing country members, where the level of SPS protection allows. The time frame has further been specified as usually six months in the *Implementation Decision*. Thus, article 10.2, it is argued here, should be interpreted as concretely providing the operational indications for compliance with the obligation in article 10.1, in much the same way as article 15.2 of the Anti-Dumping Agreement is regarded as setting out obligations operationalising the provisions of article 15.1 of that agreement.<sup>72</sup> Article 10.2 therefore lays down an *enforceable obligation* on members to provide longer compliance

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<sup>71</sup>As set out above, this finding was made with regard to article 21.2 of the DSU, which also does not set out concrete action, and further contains the word 'should' rather than 'shall'. Panel Report *European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India - Recourse to Article 21.5 of the DSU by India* WT/DS141/RW 24 April 2003 as modified by the Appellate Body Report WT/DS141/AB/RW at par 2.669.

<sup>72</sup>The argument here goes one step further than the approach followed with respect to article 15 of the Anti-Dumping Agreement in that, unlike article 15.2, article 10.2 of the SPS Agreement is not couched in mandatory terms. However, in light of the fact that non-mandatory language is not seen by the Appellate Body as an impediment to the creation of obligations in cases where the context so demands, it would seem that such an interpretation is a logical extension of this line of reasoning.

periods, of usually six months, to developing countries so as to maintain their export opportunities, in all cases where such phased introduction of new SPS measures would not threaten the level of protection sought by the importing member.

*Reasonable adaptation periods*

Another provision in the *SPS Agreement* that aims to allow sufficient time for producers to adapt to new SPS measures can be found in paragraph 2 of Annex B. It provides that members ‘shall’ allow a reasonable interval between the publication of an SPS measure and its entry into force for producers in exporting members (particularly in developing countries) to adapt to the new measure, except in urgent circumstances. It differs from article 10.2 in that it provides for delaying the entry into force of an SPS measure, rather than just extending the period of time for compliance therewith.

As the reasonable adaptation period required by Annex B, paragraph 2, must be granted equally to both developed and developing country exporting members, this provision is not an SDT provision in the strict sense of the term. However, this provision does hold particular advantages for developing countries. As developing countries often face more difficulties in adapting to new SPS measures than do their developed counterparts, the provision makes specific reference to developing countries. This implies that in determining the reasonable adaptation period to be provided for compliance with new SPS measures, a member should have particular regard to the time needed by the affected developing country members to adapt to the new requirements. For this reason, it can be seen as an SDT provision in the broader sense of the term.<sup>73</sup>

Unlike article 10.2, the binding and enforceable nature of paragraph 2 of Annex B is beyond doubt.<sup>74</sup> It is both worded in a mandatory fashion and specifically identifies the action required. Further, the specific reference in this provision to developing countries would make article 10.1 relevant to its interpretation, as part of the context of the provision. This would add further support to its enforceable nature, as a provision giving effect to the general policy contained in article 10.1.

Despite these strong indications of the enforceability of the requirement of a reasonable adaptation period, lack of implementation of this provision

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<sup>73</sup>An indication that Annex B par 2 is regarded as an SDT provision is the fact that it is included in the secretariat’s review of SDT provisions, conducted for purposes of the Doha Round negotiations on SDT. See CTD *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions. A Review of Mandatory Special and Differential Treatment Provisions. Note by the Secretariat. Addendum WT/COMTD/W/77/Rev 1/Add 2* 21 December 2001 9-10.

<sup>74</sup>In its review of SDT provisions, the WTO Secretariat classifies this provision as a mandatory provision containing an ‘obligation of result’. See *id* at 10.

persisted. This led developing countries to raise this as an implementation issue to be addressed before launching the Doha Round of negotiations. Following discussions in this regard, the reasonable adaptation period, for purposes of Annex B, paragraph 2, was specified in the Doha *Implementation Decision* to mean normally a period of not less than six months. However, in each specific case, regard must be had to the circumstances of the measure and actions necessary for its implementation. The *Implementation Decision* further notes that the entry into force of trade liberalising measures should not be unnecessarily delayed.<sup>75</sup>

Despite the six-month specification in the *Implementation Decision*, statistics for 2002<sup>76</sup> show that only 3,7 percent of routine notifications<sup>77</sup> provided for an adaptation period of at least six months. A further 34,2 percent of notifications provided an adaptation period shorter than six months, and 62,1 percent did not state the date of adoption and/or entry into force. This situation showed only slight improvement in 2003.<sup>78</sup>

The frequent failures to comply with paragraph 2 of Annex B have never been challenged in dispute settlement proceedings, notwithstanding its apparently binding and enforceable nature. This may be due to the fact that the enforcement thereof is hindered by a loophole, namely the proviso that a reasonable adaptation period need not be granted in 'urgent circumstances'. There is no further clarification of what types of situation would be deemed urgent.<sup>79</sup> The risk therefore exists that members may interpret urgency broadly

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<sup>75</sup>Ministerial Conference *Implementation-Related Issues* n 6 above at par 3.2.

<sup>76</sup>These statistics were developed by China, on the basis of an analysis of all notifications submitted in 2002. See Committee on Sanitary and Phytosanitary Measures *Report of the Analysis on SPS Notifications in 2002. Submission by China* G/SPS/GEN/378 31 March 2003 par 13.

<sup>77</sup>Routine notifications are those that are not 'emergency notifications', which have a different notification format. Emergency notifications relate to measures adopted in situations of urgency, for which a reasonable adaptation period is not required.

<sup>78</sup>On analysis of all notifications submitted in 2003, China calculated that 9,2 percent of routine notifications provided at least 6 months adaptation period, 41,4 percent provided a period of less than 6 months, and 49,4 percent did not specify the date of adoption and/or entry into force of the measure. See Committee on Sanitary and Phytosanitary Measures *Report of the Analysis on SPS Notifications in 2003. Submission by China* G/SPS/GEN/498 on 18 June 2004 par 15.

<sup>79</sup>The concept of 'urgency' is also found in article 4.8 and 4.9 of the DSU, which allow for shorter consultation periods and the acceleration of dispute settlement proceedings in cases of urgency, including those concerning perishable goods. This issue came before a panel in *Canada-Patent Term* where the US requested expedited consideration of the dispute under article 4.9 of the DSU on the grounds that premature expiration of patents during the dispute settlement procedure caused irreparable harm to the patent owners. The panel did not examine the requirement of urgency, but noted that due to other demands on panelists' time, it could not accelerate the timetable prior to the first substantive meeting. It then fixed its timetable according to the minimum periods of the proposed timetable provided in Working Procedures in Appendix 3 to the DSU, since Canada did not object to such a timetable (see Panel Report *Canada-Term of Patent Protection* WT/DS170/R 12 October 2000, as upheld by the Appellate

and thus be disinclined to grant the required adaptation period. In the absence of any criteria for the determination of urgency, developing members may be reluctant to incur the costs of challenging a refusal to grant an adaptation period before a panel due to the uncertainty regarding what a panel might regard as 'urgent'.

There is a risk that a panel will readily find that urgency exists in most cases where SPS measures comply with the remaining requirements of the SPS Agreement, since such measures address scientifically proven risks to human, plant or animal life or health. A panel may be hesitant to interfere with the determination by a member in such a sensitive policy area. This may result in an overly broad interpretation of 'urgency', which would diminish the utility of the provision for reasonable adaptation periods in Annex B, paragraph 2.

Instead, it is recommended that panels shoulder their responsibility to interpret and apply this provision, in order to guard the negotiated balance reflected in the SPS Agreement between the right of members to protect health in their territories, and the goal of increasing market access for food and agricultural products, including through SDT of developing countries. While this task is not an easy one, it is nevertheless one which panels are obliged to carry out under article 11 of the DSU. This article requires that panels carry out an 'objective assessment' of the matter before them, which has been interpreted to mean neither *de novo* review of the matter, nor complete deference to the determination of a member.<sup>80</sup> Therefore, when addressing claims under paragraph 2 of Annex B, a panel must not simply defer to the determination by a member that the situation was urgent, but must objectively examine the facts and the applicability of the legal requirements of this provision to such facts.<sup>81</sup> Such

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Body WT/DS170/AB/R par 1.5). Thus, there is as yet no real guidance on how a panel might interpret 'urgency'. In addition, urgency in article 4.8 and 4.9 of the DSU seems to relate to the risk of economic damage pending dispute settlement proceedings, whereas urgency in paragraph 2 of Annex B of the SPS Agreement relates to risks to the life or health of humans, animals or plants. Panels are therefore likely to give a broader interpretation to urgency in the latter than in the former case.

<sup>80</sup>In *EC-Hormones*, the Appellate Body first dealt with the issue of the standard of review to be applied by panels under the SPS Agreement, and it emphasised the need for the standard of review to reflect the balance created in that agreement between the jurisdictional competences transferred by members to the WTO and those retained by them. Neither the panel nor the Appellate Body is authorised to change this balance. As the SPS Agreement is silent on this issue, the Appellate Body held that article 11 of the DSU articulates the appropriate standard of review applicable both to the determination of the facts and to their legal characterisation. It further held that article 11 sets out a standard of review that is neither total deference nor *de novo* review, but rather an 'objective assessment'. See Appellate Body report *EC-Hormones* pars 114-116.

<sup>81</sup>While it is not the purpose of this article to address in detail the question of the standard of review to be applied by panels in WTO dispute settlement proceedings, it is necessary to point out that this issue is problematic. It is not completely clear what an 'objective assessment'

policing of compliance with this provision, including the urgency requirement justifying deviation, would encourage members to take the obligation to provide a reasonable adaptation period seriously.

*Facilitation of participation in international standard setting*

Another area where there is a need to take account of the special needs of developing countries, is in international standard setting. The issue of developing country participation in international standard setting is currently at the forefront of policy discussions and reforms in the standard-setting bodies. Participation in the numerous committees of the international bodies where harmonised standards are initiated, developed and proposed for adoption is onerous. It requires not only financial and human resources for attendance of meetings, but also scientific data and technical capabilities for the formulation of national positions regarding standards of interest to the country. An actively involved private sector is also crucial to provide important inputs for the identification of areas where standards are needed, and the formulation of standards that are feasible and appropriate for national conditions. However, this is often lacking in developing countries. These factors have led to assertions that the standards set by the international bodies do not cover areas of interest for developing countries and do not reflect a level of protection that is realistic or desirable for developing countries. Deficient developing country participation in international standard setting has, since the coming into force of the SPS Agreement, significant implications for developing country trade. Even at the time of drafting the SPS Agreement, the importance of improving developing country participation in international standard setting was recognised. This concern is reflected in article 10.4, which provides that members 'should' encourage and facilitate the active participation of developing countries in the relevant international organisations. The 'relevant international organizations' would seem to be a reference to the international standard-setting bodies.<sup>82</sup> Although it falls under article 10, which is entitled

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entails, nor how far a panel may go in reviewing national determinations. Between total deference and *de novo* review is a wide spectrum of possibilities, and the lack of guidance for panels in this respect gives cause for concern in a field such as that of SPS regulation, where disputes turn on the evaluation of complex scientific facts. See further on this point Ehlermann and Lockhart 'Standard of review in WTO law' (2004) 7/3 *Journal of International Economic Law* 491-521; and Joost Pauwelyn 'Does the WTO Stand for "defence to" or "interference with" National Health Authorities when applying the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)?' in Cottier and Mavroidis (eds) *The role of the judge in international trade regulation: Experience and lessons for the WTO* (2003) 175-192.

<sup>82</sup>Not all these international standard setting bodies are international organisations in the strict sense of the term. However, the SPS Agreement does seem to regard them as such, as evinced by the wording of Annex A par 3, which in its definition of international standards, guidelines and recommendations, lists the three main standard-setting bodies (CAC, OIE, and IPPC) and then provides that 'for matters not covered by the above *organizations* ...' regard may be had to standards, guidelines and recommendations 'promulgated by *other relevant international organizations*, open for membership to all Members, as identified by the Committee'. (Emphasis added.)

‘Special and Differential Treatment’, this paragraph seems to fit more comfortably into the category of technical assistance provisions.<sup>83</sup> It does not create flexibilities for developing countries, but rather calls for assistance to promote the participation of developing countries in standard setting.

Article 10.4 is addressed to WTO members, rather than to the international standard setting bodies themselves. This is logical since the WTO agreements can only create obligations for members and organs of the WTO. Despite the fact that the SPS Agreement makes use of the standards set by the relevant international standard-setting bodies, these bodies are not under the authority of the WTO but are independent institutions. Any WTO provisions relating to improving developing country participation in the standard-setting process in these international bodies must therefore be addressed to WTO members. These members may give effect to article 10.4 in their individual capacities through bilateral technical assistance initiatives, or through efforts undertaken within the relevant standard-setting bodies, in their capacities as members of these bodies.

Like article 10.2, discussed above, article 10.4 is couched in hortatory language and the question arises whether any binding obligations can be derived from its terms. The same argument developed above would apply here, to support the interpretation of article 10.4 in the light of the guiding principle, laid down in article 10.1, that developing countries interests ‘shall’ be taken into account in the development and application of SPS measures. International SPS standards can be seen as part of the process of development of SPS measures, as they are required to form the basis of SPS measures adopted by members, unless deviation can be scientifically justified. Consequently, article 10.4 should be seen as one indication of how effect must be given to the general obligation in article 10.1.<sup>84</sup> It should therefore be seen as a binding obligation, despite its hortatory language.

However, the question remains whether an *enforceable* obligation will be derived from the terms of article 10.4, calling on members to ‘encourage and facilitate’ active developing country participation in standard setting. Since no *concrete action* is specified indicating how encouragement and facilitation must be given effect, there is a risk that panels will see this provision as unable to create an obligation for members as ‘Members cannot be expected to comply with an obligation whose parameters are entirely undefined’.<sup>85</sup>

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<sup>83</sup>Article 9 of the SPS Agreement contains provisions on technical assistance.

<sup>84</sup>This would be in line with the approach of the panel in *EC-Pipe Fittings* where the second sentence of article 15 was held to provide ‘operational indications as to the nature of the specific action required [by the first sentence]’. Panel Report *EC Pipe Fittings* n 40 above at par 7.68.

<sup>85</sup>Panel Report *Steel Plate from India* n 38 above at par 7.110. This is also in line with the approach of the panel in *EC-Pipe Fittings* n 40 above at par 7.68.

Such an outcome would be unfortunate. It is not possible to lay down in the SPS Agreement precise actions required from members to promote developing country participation in international standard setting. This would mean trying to influence directly the international standard-setting bodies or other international organisations,<sup>86</sup> which is outside the sphere of competence of the WTO. Nevertheless, there are many opportunities for actions by members to promote developing country participation. It would therefore be better if, instead, panels would interpret article 10.4 by analogy to the case law on article 15 of the Anti-Dumping Agreement discussed above. Accordingly, a panel could find that interpreting the words of this article in its context (with reference to article 10.1) and in light of its object and purpose leads to the conclusion that while no obligation to actually increase developing country participation can be derived from article 10.4, it does create an enforceable obligation on members at least to *actively take steps*, ‘with a willingness to reach a positive outcome’<sup>87</sup> to improve such participation.

It should be noted that both individual WTO members and the international standard-setting bodies themselves are taking steps to address the problem of developing country participation.<sup>88</sup> In addition, the SPS Committee has developed the practice of holding its meetings back-to-back with meetings of the Codex Alimentarius Commission, to enable SPS officials to attend both meetings in one trip. Further, at the Doha meeting the heads of the FAO, WHO, OIE, World Bank and WTO issued a joint statement indicating their commitment to enhancing developing countries’ capacity to participate

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<sup>86</sup>Such other organisations include the Food and Agriculture Organisation and the World Health Organisation, which are the parent bodies of the Codex Alimentarius Commission.

<sup>87</sup>The finding with regard to article 15 of the Anti-Dumping Agreement from which this analogy is drawn is Panel Report *EC-Bed Linen* n 34 above at par 6.233. Here, as mentioned above, the panel held: ‘Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the “exploration” of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.’

<sup>88</sup>A trust fund has been established by the FAO and WHO to promote developing country participation in the Codex Alimentarius Commission. The International Plant Protection Convention has created a trust fund under FAO rules to enhance developing country participation in its standard-setting meetings and activities. The World Animal Health Organization (OIE) will establish a similar trust fund before the end of 2005, with support from the European Union. These trust funds are funded by contributions by donor agencies and member countries. Further, the OIE provides financial support for the participation of Chief Veterinary Officers of its member countries in its standard-setting activities. See Committee on Sanitary and Phytosanitary Measures *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures. Report Adopted by the Committee on 30 June 2005 G/SPS/36* 11 July 2005 par 43.



effectively in international standard setting.<sup>89</sup> This initiative led to the establishment of the Standards and Trade Development Facility (STDF), which aims to enhance developing country capacity in the area of SPS standards. Such efforts seem to be driven by the need to ensure the legitimacy and acceptability of the international standards, in the light of the changed situation since the coming into force of the SPS Agreement, rather than by any perception of an obligation to do so by members under article 10.4. Nevertheless, the recognition of the binding and enforceable nature of article 10.4 in dispute settlement would serve as an added impetus for such actions.

*Assistance in monitoring of notifications*

Developing countries face constraints in fully benefitting from the increased transparency of SPS measures achieved by the SPS Agreement if they do not have the skilled human resources to monitor the notifications and identify those of interest to them. For this reason, under paragraph 9 of Annex B, the WTO Secretariat is obliged to draw the attention of developing countries to any notifications relating to products of interest to them. This aims at enabling developing countries to take full advantage of the increased transparency resulting from the disciplines of the SPS Agreement despite the fact that they may lack the resources to keep track of all notifications.

The question of enforceability of this provision through dispute settlement does not arise, as the WTO dispute settlement system is limited to disputes between members. Thus, claims can only be brought by a WTO member against measures taken by another member and not against acts or omissions of the WTO Secretariat. Nevertheless, the Secretariat takes its task under Annex B, paragraph 9, seriously and has made every effort to give effect to this provision.

In practice, it is difficult to determine which notifications may be of interest to each developing country member. This was particularly the case initially when notifications were rudimentary and provided little information. The Secretariat has thus revised the notification format to be used by members, to include a box on which countries are most likely to be affected by the notification. The notifications received are transmitted by electronic mail<sup>90</sup> to each member's enquiry point, and in paper form to all members' permanent missions to the WTO.<sup>91</sup>

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<sup>89</sup>Directors-General of the Food and Agriculture Organisation the Office International Des Epizooties the World Health Organisation and the World Trade Organisation and the President of the World Bank *Participation of Developing Countries in the Development Application of International Standards, Guidelines and Recommendations on Food Safety, Animal and Plant Health* (2001).

<sup>90</sup>The secretariat has created a self-subscribing e-mail list to receive SPS notifications and other non-restricted SPS documents. WTO members and interested public can subscribe to this list.

<sup>91</sup>The secretariat sends all SPS-related documents to members in English as well as the other WTO working languages of their choice (French or Spanish).

In addition, the Secretariat decided to implement its obligation by circulating lists of all notified SPS measures to all WTO members. Initially these periodic lists contained merely the official document number of the notification and the date in which it was issued,<sup>92</sup> and were therefore not very useful for developing country members. Following consultations with members on this issue, the Secretariat decided, in 1999, to draw up a monthly document identifying all notifications received that month, with a short summary of the products covered by each notification, the countries or regions identified in the notification as likely to be affected, the nature of the measure, and the deadline for the submission of comments.<sup>93</sup> This additional information facilitates the monitoring of relevant notifications by developing country authorities. The summary document is sent to all members in the same way as the notifications.

These efforts indicate that this SDT provision, addressed to the WTO Secretariat, is implemented effectively, within the limits of what is possible given the information provided by members in their notifications of SPS measures.

#### *SDT with regard to obligations under the SPS Agreement*

Not only is compliance with foreign SPS measures a problem for many developing countries, the implementation of the obligations contained in the SPS Agreement may also be costly and burdensome. As has been set out above, a certain level of regulatory capacity, infrastructure and skilled human resources is necessary in order to meet the requirements of the SPS Agreement. In countries in which well-functioning SPS regulatory systems are not in place, administrative systems are poor, or sufficient scientific capacity, both in the form of properly equipped laboratories and trained scientific staff, is lacking, complying with the SPS Agreement requires significant adjustments.

It is important to ensure that the regulatory disciplines of the SPS Agreement do not have the effect of forcing developing countries to divert resources from other areas of public spending which may be more crucial to their development needs, such as the provision of health and education services. For this reason, some additional flexibility is needed with regard to the compliance obligations of developing countries. The extent to which this is provided for in the SPS Agreement bears examination.

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<sup>92</sup>See, for example, Committee on Sanitary and Phytosanitary Measures *List of Notifications - Note by the Secretariat* G/SPS/W/19 19 June 1995.

<sup>93</sup>Committee on Sanitary and Phytosanitary Measures, *Electronic Transmission of Notifications to National Enquiry Points: Note by the Secretariat* G/SPS/GEN/136 9 August 1999. These lists can be found in the series G/SPS/GEN/\* by searching under the keyword 'notifications'.

*Delayed compliance with the SPS Agreement*

Many of the disciplines of the SPS Agreement reflect ‘best practices’ of developed countries with regard to SPS regulation. For example, currently in developed countries scientific risk assessments are an inherent part of the regulatory process. Similarly, it is common practice in these countries to invite public comments on regulatory proposals and to publish new regulations promptly. While often the adoption of such regulatory practices by developing countries has long-term benefits, they lack the resources to do so immediately. For this reason, such countries need additional time for the implementation of their obligations under the SPS Agreement. Reflecting recognition of this situation, article 14 of the SPS Agreement makes provision for delayed implementation of the obligations under the agreement for developing and least-developed country (LDC) members. LDCs were granted a five-year transitional period, from the entry into force of the WTO Agreement on 1 January 1995, for implementation of their obligations. Other developing members were given a two-year transitional period, where lack of technical expertise, infrastructure or resources prevented immediate implementation of their obligations. However, this possibility did not extend to their transparency and information obligations for non-LDC members.

This exclusion can be attributed to the fact that transparency of SPS measures is crucial to the operation of the SPS Committee as a forum for consultations on SPS issues. It enables members to monitor compliance with the SPS Agreement by other members, and to raise their concerns at an early-enough stage in the regulatory process when changes can still be made to the SPS measure at issue. It is also of key importance for exporting firms, as it creates a predictable trading environment. Therefore, developing countries (other than LDCs) were, in principle, obliged to comply immediately with the transparency provisions in the SPS Agreement.

The transitional period expired in January 2000 for least-developed members, and in January 1997 for other developing members. As one might expect, not all developing countries and LDCs have been able to comply fully with their obligations under the SPS Agreement within the transition periods. Some obligations, such as those relating to risk assessments, may require far-reaching reforms and institutional capacity. In addition, such reforms are often not a priority for government spending in countries with more urgent development needs. In addition, although the transitional period for non-LDC developing countries does not apply to the transparency obligations, it can be envisioned that immediate compliance would be impossible for some of these countries.<sup>94</sup>

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<sup>94</sup>An example of an LDC for which the transition periods were not sufficient is Bangladesh, which is currently not in a position to comply with its notification obligations. Despite having set up its required National Notification Authority and Enquiry Point, it has never notified an

Therefore, although the transitional periods in article 14 represent one of the most effective forms of SDT since their application was automatic and did not depend on implementation by other members, they were not sufficient to address fully developing country constraints with regard to meeting their obligations under the SPS Agreement.

*Time-limited exemptions from specific obligations*

To create additional flexibility for developing countries that have difficulties with compliance with their obligations, beyond that provided by the transition periods, article 10.3 of the SPS Agreement provides that the SPS Committee 'is enabled to grant' developing countries, upon request, specified, time-limited exemptions from all or some of their obligations under the SPS Agreement. This is done with the aim of enabling developing countries to comply with their obligations by giving them extra time to adjust to their new obligations, and takes account of their financial, trade and development needs.

Decisions of the SPS Committee are taken by consensus in accordance with article 12.1 of the SPS Agreement. Thus, any exemptions requested under article 10.3 would need the tacit approval of all members. While the Committee is enabled to grant requested exemptions, it has no obligation to do so. Neither are concrete criteria laid down according to which the Committee should evaluate developing country requests under article 10.3. The only guidance for the Committee in this article is the provision that the Committee is enabled to grant such requests from developing countries 'taking into account their financial, trade and development needs'. This leaves a very broad discretion to the Committee in this regard. The actions of the members acting within the SPS Committee are not guided by the general policy contained in article 10.1 as waivers cannot be regarded as covered by its reference to the 'preparation and application' of SPS measures by members.

It is difficult to determine whether members within the SPS Committee would be disposed to grant requests under article 10.3 easily, or instead be reluctant to do so, as to date no developing country or LDC has requested such an exemption. This despite the fact that some remain in breach of certain obligations under the SPS Agreement, such as the obligation to establish a National Notification Authority and Enquiry Point, to publish and notify all new SPS measures,<sup>95</sup> or to base their SPS measures on either an international standard or a risk assessment.

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SPS measure. See Trade Policy Review Body *Trade Policy Review: Bangladesh - Report by the Secretariat* WT/TPR/S/68 3 April 2000 Part II par 25 and Table II.23.

<sup>95</sup>As of May 2005, out of 148 members 139 had notified an enquiry point, 130 had identified their national notification authority, and 87 (ie 59%) had notified at least one new or revised SPS measure. See Committee on Sanitary and Phytosanitary Measures *Implementation of the Transparency Obligations as of 18 June 2004. Note by the Secretariat - Revision* G/SPS/GEN/27/Rev 13 21 June 2004 pars 26-27.

It seems possible that the hesitance of developing countries to make use of this exemption possibility is due to their uncertainty regarding the likelihood that their requests will be granted, given the broad discretion of the SPS Committee in this regard, and the fact that it takes decisions by consensus. Developing countries' failure to make use of article 10.3 may reflect their unwillingness to draw attention to their non-compliance in the face of this uncertainty. If the SPS Committee were to refuse to grant an exemption, the requesting country will have exposed itself to the risk of challenges for violation of the SPS Agreement.<sup>96</sup>

Some developing countries have proposed that article 10.3 be amended to oblige the SPS Committee to grant requests for time-limited exemptions for developing countries. However, this would have the effect of creating an automatic waiver, excusing developing countries from any obligations under the SPS Agreement upon request. When one bears in mind that intra-developing country trade in food and agricultural products is significant, the creation of such a loophole in the obligations would be to the detriment of developing countries themselves by reducing their possibilities to enforce the market access achievements of the SPS Agreement against other developing countries. Instead, the creation of clear and concrete criteria to determine when the 'financial, trade and development needs' of developing countries preclude immediate compliance with specific obligations may be more useful.

#### *Exemption from elements of the notification obligations*

As stated above, compliance with the transparency obligations of the SPS Agreement can be particularly costly and onerous for developing countries. While transparency is important for the proper operation of the SPS Agreement, some of these obligations are less crucial than others and may create an unnecessary burden for developing countries. This is reflected in the additional flexibility allowed in paragraph 8 of Annex B, with regard to documentation for notified measures.

This provision contains an obligation to provide, upon request, copies of the documents, or in case of lengthy documents, summaries of the documents covered by a specific notification in one of the official languages of the WTO. However, its application is limited to developed countries, and it can thus be seen as providing a specific waiver to developing countries from its obligations of translation and summary. This is clearly an attempt to reduce

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<sup>96</sup>In addition, it is useful to bear in mind, as noted above, that there is no possibility to challenge the action of a WTO organ in dispute settlement proceedings, as these are limited to disputes between members. Thus the issue of enforceability of article 10.3 does not arise.

the burden on developing countries that results from compliance with some of the transparency provisions.

Once again, as was the case with the transitional periods, this SDT provision is automatic in application and requires no implementation. It can thus be regarded as an effective, albeit very limited, form of SDT.

### **Conclusion**

If developing countries are to benefit fully from the rules of the SPS Agreement, appropriate flexibilities are necessary to take account of their special constraints. It is therefore important that the provision of SDT in this agreement not remain at the level of rhetoric, but be effective and operational.

Although implementation of SDT in the SPS Agreement has been disappointing to date, the above examination of the various forms of SDT provided for in the SPS Agreement indicates that real possibilities exist for panels, such as the panel in the *EC-Biotech* dispute, to operationalise SDT provisions through effective treaty interpretation. Although these possibilities are not limitless, they do allow for the recognition that several provisions contain enforceable obligations that give effect to the general policy of consideration for the special needs of developing countries, thereby ensuring that the negotiated rights enshrined in these provisions are not rendered illusory.

This conclusion has implications for the ongoing Doha Round negotiations on SDT, at least as they relate to the SPS Agreement. The deadlocked negotiations reflect an impasse between two opposing positions. On the one side are developing countries, who view the operationalisation of SDT provisions through amendments or clarifications to strengthen them and make them enforceable, as merely ensuring the implementation of existing negotiated rules. They are therefore not prepared to make concessions in other areas to get, as *quid pro quo*, the agreement of developed countries to these amendments. On the other side are several developed countries, who regard the strengthening of SDT provisions as the creation of new rights and obligations, and thus as something developing countries should 'pay' for by means of concessions in other areas.

Once it becomes clear that most of the existing SDT provisions can be operationalised by effective treaty interpretation in dispute settlement proceedings, the basis for this deadlock falls away. Members are then left with two options. They can leave the fleshing out of SDT provisions to panels and the Appellate Body, on a case-by-case basis as they are faced with claims such as that of Argentina in *EC-Biotech*, or instead they can reach political agreement on the nature and extent of these obligations,

through amendments or clarifications to the relevant articles in the SDT negotiations. The latter option would allow members to develop an acceptable framework for the provision of SDT, in order to ensure that the flexibilities it creates do not threaten the careful balance achieved by the SPS Agreement between the right of members to protect health and the promotion of market access.