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- (b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall be out of the WTO as of (a)

- (a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or
- (b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of de minimis under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent

### 1.3 Article 27.2

#### 1.3.1 "subject to compliance with the provisions in paragraph 4"

2. The Panel in *Brazil – Aircraft* rejected the argument that "Article 27 is *lex specialis* to Article 3, in that it provides special rules with regard to export subsidy programmes of developing country Members" and therefore the specific provisions in Article 27 "displace the general provisions of Article 3.1(a)."<sup>3</sup> Referring to the ordinary meaning of Article 27.2, the Panel stated the following:

"It is evident to us from this language that Article 27 does not 'displace' Article 3.1(a) of the SCM Agreement unconditionally ... Rather, the prohibition of Article 3.1(a) shall not apply 'subject to compliance with the provisions of paragraph 4'. The exemption for developing country Members other than those referred to in Annex VII from the application of the Article 3.1(a) prohibition on export subsidies is clearly conditional on compliance with the provision in paragraph 4 of Article 27. Thus, we consider that, where the provisions in Article 27.4 have not been complied with, the Article 3.1(a) prohibition applies to such developing country Members."<sup>4</sup>

3. The Panel in *Brazil – Aircraft* was called upon to decide the allocation of the burden of proof for claims under Article 27.4 of the SCM Agreement. In doing so, the Panel referred to Article 27.7 as context for Article 27.2(b):

"The phrase 'subject to compliance with the provisions in paragraph 4' contained in Article 27.2(b) can, in our view, be seen as analogous to the phrase 'which are in conformity with paragraphs 2 through 5' contained in Article 27.7. This supports an interpretation of Article 27.2(b) that developing country Members are excluded from the scope of application of the substantive obligation in question provided that they comply with certain specified conditions."<sup>5</sup>

#### 1.3.2 Article 27.2(b)

4. The Panel in *India – Export Related Measures* was faced with the question of whether, in the case of Members that have graduated from Annex VII(b) of the SCM Agreement, the eight-year period afforded by Article 27.2(b) to developing country Members must be counted "from the date of entry into force of the WTO Agreement", or, as argued by India, from the date of graduation from Annex VII(b). In assessing this issue, the Panel first examined the ordinary meaning of the phrase "a period of eight years from the date of entry into force of the

time the cross-reference in Annex VII(b) to Article 27.2(b) operates. We therefore consider that the text of Annex VII(b) does not support a reading that Article 27.2(b) is made applicable with a modified starting date for the eight-year transition period."<sup>7</sup>

6. The Panel also disagreed with India that using the ordinary meaning of Article 27.2(b) in case of Annex VII(b) Members graduating late would render Annex VII(b) ineffective or redundant. According to the Panel:

"Annex VII(b) provides for a simple cross-reference to Article 27.2(b). The expiry of the transition period in Article 27.2(b) does not render ineffective or redundant this cross-reference: the substance of the cross-reference is determined by the content of the provision referred to. Developing country Members in Annex VII(b), in the event of graduation before 1 January 2003, still enjoyed a transition period that in no case would have been less than the eight-year transition period until 1 January 2003 pursuant to Article 27.2(b). The possibility that Members graduating from Annex VII(b) no longer benefit from an additional transition period under Article 27.2(b) is inherent in the reference by Annex VII(b) to a provision that contains a time-limited transition period."<sup>8</sup>

7. In addition, the Panel did not consider that a literal interpretation of Article 27.2(b) results in treating graduating Annex VII(b) Members differently from other developing country Members. As the Panel explained:

"Article 27.2 and Annex VII provide for special and differential treatment and establish different degrees of flexibility in excluding developing country Members from the application of the prohibition of export subsidies under Article 3.1(a). The flexibilities differ between three categories of Members in respect of the period during which the prohibition in Article 3.1(a) 'shall not apply', i.e. the transition period. First, for developing country Members in general, Article 27.2(b) stipulates a transition period of eight years from the entry into force of the WTO Agreement. During this period, the first sentence of Article 27.4 imposes a progressive phase-out obligation on developing country Members referred to in Article 27.2(b). Second, for least developed country Members, Article 27.2(a) in connection with Annex VII(a) provides that the prohibition in Article 3.1(a) shall not apply as long as the Members in question are designated as least developed countries by the United Nations. Third, for the developing country Members listed in Annex VII(b), Article 27.2(a) in connection with Annex VII [ ( ) ]TJM(2000)347.108.0398.01 62[(V)3 (I)(a) ]0.001 0.3)-8]( )0.7 (coc 0 TwT3.18



"Assuming that such 'explicit authorization' is the correct conflict test in the WTO context, we find that, whether or not the SCM Agreement is considered generally to 'authorize' Members to provide actionable subsidies so long as they do not cause adverse effects to the interests of another member, the SCM Agreement clearly does not authorize Members to impose discriminatory product taxes. Nor does a focus on Article 27.3 suggest a different approach. Whether or not Article 27.3 of the SCM Agreement can be reasonably interpreted to 'authorize', explicitly or implicitly, the provision of subsidies contingent on the use of domestic over imported goods (an issue we do not here decide), Article 27.3 is unrelated to, and cannot reasonably be considered to 'authorize', the imposition of discriminatory product taxes."<sup>20</sup>

## **1.5 Article 27.4**

### **1.5.1 "shall phase out its export subsidies"**

14. The Panel in *Brazil – Aircraft* was faced with interpreting what it termed the "internal contradiction within the text of Article 27.4"<sup>21</sup>, created, on the one hand, by "the mandatory language providing that a developing country Member 'shall phase out its export subsidies'" and, on the other, by "the hortatory lanw3.7 (y)4.3 0 6 2w 7.16 0g7.3 (r)-1 (e)2 ( im)5.7 (p)15.69f.

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### 1.5.3.3 Benchmark period

21. In Brazil – Aircraft, the parties disagreed "as to the benchmark period against which an examination as to whether a Member has increased the level of its export subsidies should be made."<sup>36</sup> Referring to footnote 55 of Article 27.4, the Panel stated:

"[Footnote 55] offers for such Members a ceiling level of export subsidies based on their 1986 level. Implicit in this explanation is that, absent footnote 55, a developing country Member which granted no export subsidies as of the date of entry into force of the WTO Agreement would be prohibited from providing any export subsidies during the eight-year transition period. Thus, footnote 55 indicates that the relevant benchmark period against which the obligation not to increase the level of export subsidies should be measured is the period from 1986 to the date of entry into force of the WTO Agreement." (WT/DS46/AB/R, paras. 111-112)

25. The Panel in *Brazil – Aircraft* considered that the burden is on the claiming party to demonstrate that, because the developing country Member "has not complied with the conditions set forth in Article 27.4, the Article 3.1(a) prohibition on export subsidies applies to [the developing country Member]."<sup>43</sup> The Panel concluded that "in order to prevail on this issue Canada must present evidence and argument sufficient to raise a presumption that the use of export subsidies by Brazil is inconsistent with Brazil's development needs."<sup>44</sup>

26. In *Brazil – Aircraft*, Canada argued that the Brazilian PROEX programme was inconsistent with Brazil's development needs, because the Brazilian value-added of the aircraft, according to Canada, was "relatively low". The Panel was unconvinced by this argument:

"In our view, the fact that Brazil has a generally applicable rule regarding the relationship between the domestic content of an exported product and the extent of the PROEX interest rate equalization available with respect to that product does not mean that the deviation from that rule in a particular case is necessarily inconsistent with a developing country's development needs."<sup>45</sup>



to review by a panel whose function is fundamentally legal.' However, we concur with the reasoning of the panels in EC – Approval and Marketing of Biotech Products and US – Clove Cigarettes that, such provisions impose positive obligations and must be subject to dispute settlement. To do otherwise might render unenforceable many special and differential treatment provisions throughout the covered agreements and upset the balance of rights and obligations between developed and developing country Members.

Therefore, in our view Article 10.1 does impose a positive obligation that is subject t

