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DEVELOPING COUNTRY MEMBERS REFERRED TO
IN PARAGRAPH 2(A) OF ARTICLE 27

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

- (a) Least-developed countries designated as such by the United Nations which are Members of the WTO.
- (b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached \$1,000 per annum⁶⁸: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

(*footnote original*)⁶⁸ The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.

1.2 General

1. 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 WTO Agreement" and concluded that "[t]he text of Article 27.2(b) does not leave scope for ambiguity in respect of the end date of that transition period", which runs from 1 January 1995 to 1 January 2003.¹

2. The Panel then proceeded to examine the context of Article 27.2(b) provided by Annex VII(b), Articles 27.4 and 27.5 of the SCM Agreement to determine whether any of these provisions justifies a departure from the ordinary meaning of Article 27.2(b), as argued by India. With respect to Annex VII(b), the Panel stated:

"Annex VII(b) regulates the *applicability* of Article 27.2(b) in respect of those developing country Members listed therein. By contrast, Article 27.2(b) sets out the *conditions* governing the entitlement to the non-application of Article 3.1(a).

The phrase in Annex VII(b) 'shall be subject to the provisions' renders applicable Article 27.2(b), without modifying the latter's content. The subclause 'which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached \$1,000 per annum' qualifies the provisions made applicable. This phrase indicates that Annex VII(b) Members are subject to the *same* provisions applying to other developing country Members *at the*

¹ Panel Report, *India – Export Related Measures*, para. 7.39.

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."²

3. 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."³

4. 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:

"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(b) provides for a transition period that lasts as long as these Members remain below the relevant threshold, even *after* the eight-year period available to the first category of Members referred to above.

Under this scheme of different flexibilities, we consider that a literal interpretation of Article 27.2(b) in respect of graduating Annex VII(b) Members does not reduce the additional flexibilities afforded by Annex VII(b). First, such literal interpretation does not affect the additional, and more favourable, flexibility of a transition period that lasts as long as GNP remains below the relevant threshold, irrespective of a strict deadline, and without an additional phase-out obligation. Second, beyond this additional flexibility, Annex VII(b), through its express cross-reference to Article 27.2(b), ensures that graduating Members have at least the *same* flexibility as the other developing country Members, namely 'a period of eight years from the date of entry into force of the WTO Agreement'.⁴

Current as of: December 2020

² Panel Report, *India – Export Related Measures*, paras. 7.45-7.46.

³ Panel Report, *India – Export Related Measures*, para. 7.47.

⁴ Panel Report, *India – Export Related Measures*, paras. 7.50-7.51.