1 ARTICLE 27

1.1 Text of Article 27

Article 27

Special and Differential Treatment of Developing Country Members

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(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 phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies[55], and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

(footnote original)[55] For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either (a) on the basis of notification by the developing country Member having reached export competitiveness, or (b) on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

(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 with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

1.2 General

1.2.1 Relationship with item (k) of the Illustrative List

1. In *Canada – Aircraft Credits and Guarantees*, the Panel stated that:

> "Article 27 accords developing country Members special and differential treatment in respect of all export subsidies, whatever form they take. Thus, to the extent that an export credit constitutes an export subsidy, it falls within the scope of Article 27, and developing country Members are in principle entitled to special and differential treatment in respect of that export credit. We are therefore unable to interpret the second paragraph of item (k) in a manner that would render Article 27, in part at least, ineffective.[1]"[2]

[1] (*footnote original*) *See United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R-WT/DS4/AB/R, adopted 20 May 1996, p. 23, and *Japan – Alcoholic Beverages II,* Report of the Appellate Body, p. 12.

[2] Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.179.

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)."[3] 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."[4]

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."[5]

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 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.[6]

5. 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).
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> 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*

[3] Panel Report, *Brazil – Aircraft*, para. 7.39.
[4] Panel Report, *Brazil – Aircraft*, para. 7.40.
[5] Panel Report, *Brazil – Aircraft*, para. 7.52.
[6] 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."[7]

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."[8]

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(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.
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> 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'."[9]

8. The Panel subsequently examined whether, when read in conjunction with Articles 27.4 and 27.5 of the SCM Agreement, an interpretation of Article 27.2(b) based on its ordinary meaning may result in ambiguity or obscurity.[10] With respect to Article 27.4, the Panel held that the first sentence of this provision refers to the same period of eight years from the date of entry into force of the WTO Agreement, as stipulated in Article 27.2(b).[11] Further, the Panel disagreed with India'

[7] Panel Report, *India – Export Related Measures*, paras. 7.45-7.46.
[8] Panel Report, *India – Export Related Measures*, para. 7.47.
[9] Panel Report, *India – Export Related Measures*, paras. 7.50-7.51.
[10] Panel Report, *India – Export Related Measures*, para. 7.40.
[11] Panel Report, *India – Export Related Measures*, para. 7.58.

view that the eight-year phase-out period in the second sentence of Article 27.5 survives graduation, leading to inconsistency between Article 27.5 and a textual interpretation of Article 27.2(b) based on its ordinary meaning. According to the Panel, "[t]he second sentence of Article 27.5 applies to developing country Members 'referred to in Annex VII'. On graduating, a Member ceases to be one 'referred to in Annex VII', and the second sentence of Article 27.5 is no longer available to it."[12] The Panel concluded that interpreting Article 27.2(b) based on the ordinary meaning of its text does not, in light of either Article 27.4 or Article 27.5, lead to ambiguous, obscure, absurd, or unreasonable results.

9. As for India's arguments regarding the object and purpose of providing special and differential treatment, the Panel disagreed with the contention that "the text of Article 27.2(b) 'would run contrary to the object and purpose of Part VIII of the SCM Agreement'. Rather, it reflects part of a delicate balance, struck by the drafters, between constraining certain types of subsidies on the one hand and providing special and differential treatment through clear and unambiguous time-bound flexibilities on the other hand. A literal interpretation of Article 27.2(b) is thus in line with, and gives effect to, the purpose of furthering special and differential treatment for developing country Members."[13]

10. Having found that "the meaning of Article 27.2(b) is clear and unambiguous and its textual interpretation does not result in internal contradictions with Annex VII(b), Article 27.4, or Article 27.5", the Panel did not consider it necessary to have recourse to supplementary means of interpretation pursuant to Article 32 of the Vienna Convention.[14] Therefore, based on the text of Article 27.2(b), in its context and in light of the object and purpose of the SCM Agreement, the Panel concluded that "the eight-year transition period from the date of entry into force of the WTO Agreement set forth in Article 27.2(b) has expired on 1 January 2003, also for Members graduating from Annex VII.[15]

11. The Panel in *India – Sugar and Sugarcane* made the same findings as those which were made in *India – Export Related Measures* as regards the interpretation of the transition period specified in Article 27.2(b) of the SCM agreement.[16]

1.3.3 Relationship with other provisions

1.3.3.1 Articles 27.3

12. The Panel in *Brazil – Aircraft* referred to Article 27.3 in the context of interpreting Article 27.2(b):

> "As [context] for Article 27.2(b), [Article 27.3] supports the view that the relevant provisions of Article 27, which extend 'special and differential treatment to developing countries', serve to exclude, in a qualified or unqualified manner, certain developing countries from the scope of application of certain substantive obligations found elsewhere in the Agreement for specified periods of time."[17]

1.4 Article 27.3

1.4.1 General

13. The Panel in *Indonesia – Autos* rejected the argument that "the obligations contained in Article III:2 of *GATT 1994* and the *SCM Agreement* are mutually exclusive"[18] because "the SCM Agreement 'explicitly authorizes' Members to provide subsidies that are prohibited by Article III:2 of GATT."[19] The Panel stated:

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[12] Panel Report, *India – Export Related Measures*, para. 7.62.
[13] Panel Report, *India – Export Related Measures*, para. 7.67.
[14] Panel Report, *India – Export Related Measures*, para. 7.72.
[15] Panel Report, *India – Export Related Measures*, para. 7.74.
[16] Panel Report, *India – Sugar and Sugarcane*, paras. 7.308-7.311, 7.313-7.315, 7.319 and 7.321.
[17] Panel Report, *Brazil – Aircraft*, para. 7.53.
[18] Panel Report, *Indonesia – Autos*, para. 14.97.
[19] Panel Report, *Indonesia – Autos*, para. 14.98.

> "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."[20]

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"[21], 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 language in the final clause encouraging Members to perform their phase-out in a progressive manner."[22] The Panel ultimately found that it was not necessary to resolve this issue. It held that the wording of Article 27.4 of the SCM Agreement does not specify in how many phases the elimination of subsidies should be carried out, what the time-period between these phased reductions should be, and how these phased reductions should be distributed within the eight-year period (the transition period granted to developing country Members). The Panel then found that it could not "conclude on the basis of Brazil's actions in the first four years since the date of entry into force of the WTO Agreement that Brazil has failed to comply with the phase-out requirement of Article 27.4 by reason of a failure to undertake phased reductions within the eight-year transition period."[23]

15. In the same context as in the preceding paragraph, the Panel in *Brazil – Aircraft* stated that "we do not consider that the absence of a termination date for PROEX [as of the date of the circulation of the Report, i.e. April 1999] demonstrates that Brazil is not in compliance with its obligation to eliminate its export subsidies by the end of the eight-year period."[24]

16. Instead, however, the Panel in *Brazil – Aircraft* determined that "[b]ecause, under the PROEX interest rate equalization scheme, bonds relating to an export transaction are not issued until it has been confirmed that an export transaction will in fact occur, this strongly suggests that Brazil will continue to issue bonds – and hence to grant new subsidies – after 31 December 2002."[25] The Panel regarded this as "sufficient to show, in advance, that Brazil has not complied with the condition of Article 27.4 that it 'phase out its export subsidies within the eight-year period'."[26]

1.5.2 "within the eight-year period"

17. The Panel in *India – Export Related Measures* considered that the "eight-year period" in the first sentence of Article 27.4 "must be read as referring to the period of eight years from the date of entry into force of the WTO Agreement stipulated in Article 27.2(b)".[27]

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[20] Panel Report, *Indonesia – Autos*, para. 14.98.
[21] Panel Report, *Brazil – Aircraft*, para. 7.79.
[22] Panel Report, *Brazil – Aircraft*, para. 7.79.
[23] Panel Report, *Brazil – Aircraft*, para. 7.81.
[24] Panel Report, *Brazil – Aircraft*, para. 7.82.
[25] Panel Report, *Brazil – Aircraft*, para. 7.84.
[26] Panel Report, *Brazil – Aircraft*, para. 7.85.
[27] Panel Report, *India – Export Related Measures*, para. 7.56.

1.5.3 "a developing country Member shall not increase the level of its export subsidies"

1.5.3.1 "granting" of subsidies for the purposes of Article 27.4

18. In considering at what point in time payments can be considered "granted" for the purposes of Article 27.4, the Panel in *Brazil – Aircraft* had first found that the subsidy under the Brazilian PROEX programme does not take the form of a "potential direct transfer of funds" (the issuance of the letter of commitment), but rather the form of a "direct transfer of funds" when a payment is made or will be made.[28] The Panel then addressed the issue of when the grant of the subsidy by the Brazilian Government occurs; it held that the right to receive the PROEX payments only arises after the conditions relating to receipt of PROEX payments, and specifically the condition that the product in question actually be exported, has been fulfilled.[29] The Appellate Body first criticized the Panel for addressing the first issue:

> "The issue in this case is when the subsidies for regional aircraft under PROEX should be considered to have been 'granted' *for the purposes of calculating the level of Brazil's export subsidies under Article 27.4 of the SCM Agreement*. The issue is *not* whether or when there is a 'financial contribution', or whether or when the 'subsidy' 'exists', within the meaning of Article 1.1 of that Agreement.
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> …
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> … [W]e see the issue of the *existence* of a subsidy and the issue of the point at which that subsidy is *granted* as two legally distinct issues."[30]

19. The Appellate Body in *Brazil – Aircraft* then proceeded to agree with the findings of the Panel on the precise moment of the grant of subsidy under the PROEX programme:

> "We agree with the Panel that 'PROEX payments may be 'granted' where the unconditional legal right of the beneficiary to receive the payments has arisen, even if the payments themselves have not yet occurred.' We also agree with the Panel that the export subsidies for regional aircraft under PROEX have not yet been 'granted' when the letter of commitment is issued, because, at that point, the export sales contract has not yet been concluded and the export shipments have not yet occurred. For the purposes of Article 27.4, we conclude that the export subsidies for regional aircraft under PROEX are 'granted' when all the legal conditions have been fulfilled that entitle the beneficiary to receive the subsidies."[31]

1.5.3.2 Constant or nominal values

20. In assessing whether a developing country Member's level of export subsidies has increased, the Panel in *Brazil – Aircraft* used constant dollars instead of nominal dollars. The Panel considered it "appropriate in this case to use constant dollars, as that will provide a more meaningful assessment"[32] and noted that in this case, "the conclusion with respect to this issue would be the same whether constant or nominal dollars are used."[33] The Appellate Body in *Brazil – Aircraft* agreed with the Panel's decision and noted that the Panel "did *not* make a legal finding that the level of a developing country Member's export subsidies must be measured, in every case, using a constant value. The Panel simply made a pragmatic observation that using constant dollars is appropriate *in this case*."[34] The Appellate Body also stated that "[m]oreover, in our view, to take no account of inflation in assessing the level of export subsidies granted by a developing country Member would render the special and differential treatment provision of Article 27 meaningless."[35]

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[28] Panel Report, *Brazil – Aircraft*, para. 7.70.
[29] Panel Report, *Brazil – Aircraft*, para. 7.71.
[30] Appellate Body Report, *Brazil – Aircraft*, paras. 154-156.
[31] Appellate Body Report, *Brazil – Aircraft*, para. 158.
[32] Panel Report, *Brazil – Aircraft*, para. 7.73.
[33] Panel Report, *Brazil – Aircraft*, para. 7.73.
[34] Appellate Body Report, *Brazil – Aircraft*, para. 162.
[35] Appellate Body Report, *Brazil – Aircraft*, para. 163.

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."[36] 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 a period immediately preceding the date of entry into force of the WTO Agreement."[37]

1.5.3.4 Actual expenditures or budgeted amounts

22. Considering whether actual expenditures or budgeted amounts should be used when examining the level of export subsidies, the Panel in *Brazil – Aircraft* found that "the level of a Member's export subsidies in its ordinary meaning refers to the level of subsidies actually provided, not the level of subsidies which a Member planned or authorized its government to provide through its budgetary process."[38] The Panel continued as follows:

> "This reading is in our view confirmed by footnote 55 … The verb 'grant' has been defined to mean, *inter alia*, 'to bestow by a formal act' and 'give, bestow, confer'. Thus, the verb 'grant' in its ordinary meaning implies the actual provision of a subsidy, not its mere budgeting."[39]

23. In its finding that actual expenditures rather than the budgeted amounts should be used when examining whether a developing country Member has increased the level of its subsidies within the meaning of Article 27.4, the Panel in *Brazil – Aircraft* added that "an expenditure-based measurement is consistent with the object and purpose of the SCM Agreement, which is to reduce economic distortions caused by subsidies."[40] The Appellate Body in *Brazil – Aircraft* agreed with the Panel's reasoning on the use of actual expenditures rather than the budgeted amounts when examining the level of subsidies of a developing country Member under Article 27.4 and stated:

> "To us, the word 'granted' used in this context means 'something actually provided'. Thus, to determine the amount of export subsidies 'granted' in a particular year, we believe that the actual amounts *provided* by a government, and not just those *authorized* or *appropriated* in its budget for that year, is the proper measure. A government does not always spend the entire amount appropriated in its annual budget for a designated purpose. Therefore, in this case, to determine the level of export subsidies for the purposes of Article 27.4, we believe that the proper reference is to actual expenditures by a government, and not to budgetary appropriations."[41]

1.5.4 "use of subsidies inconsistent with its development needs"

24. Noting the difficulties for a panel to determine whether export subsidies are inconsistent with a developing country Member's development needs, the Panel in *Brazil – Aircraft* considered that "it is the developing country Member itself which is best positioned to identify its development needs and to assess whether its export subsidies are consistent with those needs. Thus, in applying this provision we consider that panels should give substantial deference to the views of the developing country Member in question."[42]

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[36] Panel Report, *Brazil – Aircraft*, para. 7.61.
[37] Panel Report, *Brazil – Aircraft*, para. 7.62.
[38] Panel Report, *Brazil – Aircraft*, para. 7.65.
[39] Panel Report, *Brazil – Aircraft*, para. 7.65.
[40] Panel Report, *Brazil – Aircraft*, para. 7.66.
[41] Appellate Body Report, *Brazil – Aircraft,* para. 148.
[42] Panel Report, *Brazil – Aircraft*, para. 7.89.

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]."[43] 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."[44]

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 Member's development needs. Nor do we see any basis to conclude that PROEX payments on regional aircraft are necessarily inconsistent with Brazil's development needs merely because the Brazilian value-added of the aircraft being exported is relatively low. There could be any number of reasons why the provision of export subsidies might be consistent with a Member's development needs in such a case."[45]

1.5.5 Burden of proof

27. In *Brazil – Aircraft*, the Panel and the Appellate Body were called upon to address the issue of allocation of the burden of proof under Article 27.4. More specifically, the question was raised as to who bore the burden of proof with respect to the conditions contained in Article 27.4, conditions which determine whether Article 3.1(a) applies to a developing country Member. The Panel opined that the fundamental issue in this respect was "whether the prohibition in Article 3.1(a) of the SCM Agreement *applies* to the developing country Member in question, rather than whether the developing country Member, having been found to be subject to the substantive obligations of Article 3.1(a), and having been found to have acted inconsistently with these obligations, can find justifying protection by invoking Article 27.2(b) in conjunction with Article 27.4."[46] Based on this reasoning, the Panel then found that the burden of proof under Article 27.4 is on the complaining Member, in this case Canada. The Appellate Body upheld this finding of the Panel, emphasizing that the fundamental issue was whether Article 3.1(a) was applicable to the developing country Member in question:

> "With respect to the *application* of the prohibition of export subsidies in Article 3.1(a) of the *SCM Agreement*, paragraphs 2 and 4 of Article 27 contain a carefully negotiated balance of rights and obligations for developing country Members. During the transitional period … certain developing country Members are *entitled* to the *non-application* of Article 3.1(a), *provided* that they comply with the specific obligation set forth in Article 27.4. Put another way, when a developing country Member complies with the conditions in Article 27.4, a claim of violation of Article 3.1(a) cannot be entertained during the transitional period, because the export subsidy prohibition in Article 3 simply *does not apply* to that developing country Member."[47]

28. The Panel in *Brazil – Aircraft* had opined that until non-compliance with the conditions set out in Article 27.4 is demonstrated, there is also, on the part of a developing country Member within the meaning of Article 27.2(b), no inconsistency with Article 3.1(a). The Panel therefore concluded that "it is for the Member alleging a violation of Article 3.1(a) of the SCM Agreement to demonstrate that the substantive obligation in that provision – the prohibition on export subsidies

[43] Panel Report, *Brazil – Aircraft*, para. 7.90.
[44] Panel Report, *Brazil – Aircraft*, para. 7.90.
[45] Panel Report, *Brazil – Aircraft*, para. 7.92.
[46] Panel Report, *Brazil – Aircraft*, para. 7.56.
[47] Appellate Body Report, *Brazil – Aircraft*, para. 139.

– applies to the developing country Member complained against."[48] The Appellate Body agreed with these conclusions:

> "Both from its title and from its terms, it is clear that Article 27 is intended to provide special and differential treatment for developing country Members, under specified conditions. In our view, too, paragraph 4 of Article 27 provides certain obligations that developing country Members must fulfill if they are to benefit from this special and differential treatment during the transitional period. On reading paragraphs 2(b) and 4 of Article 27 together, it is clear that the conditions set forth in paragraph 4 are *positive obligations* for developing country Members, *not* affirmative defences. If a developing country Member complies with the obligations in Article 27.4, the prohibition on export subsidies in Article 3.1(a) simply does not apply. However, if that developing country Member does *not* comply with those obligations, Article 3.1(a) *does* apply.
>
> For these reasons, we agree with the Panel that the burden is on the complaining party (*in casu* Canada) to demonstrate that the developing country Member (*in casu* Brazil) is not in compliance with at least one of the elements set forth in Article 27.4. If such non-compliance is demonstrated, then, and only then, does the prohibition of Article 3.1(a) *apply* to that developing country Member."[49]

1.5.6 Relationship with other provisions

29. In *US – Clove Cigarettes*, in the context of interpreting Article 12.3 of the TBT Agreement, the Panel observed "that the meaning of the expression 'special development, financial and trade needs' is not entirely clear."[50] The Panel considered similar expressions in the covered agreements, and noted in particular that:

> "In *Brazil – Aircraft*, the panel had to consider the phrase 'development needs' in the context of Article 27.4 of the *SCM Agreement*. That panel made the interesting observation that 'an examination of whether export subsidies are inconsistent with a developing country Member's development needs is an inquiry of a peculiarly economic and political nature, and notably ill-suited to review by a panel whose function is fundamentally legal'."[51]

30. The Panel in *US – Animals* was faced with the question of whether the obligation in Article 10.1 of the SPS Agreement imposes an obligation for positive action. The Panel, interpreting the term "special needs" in Article 10.1, noted the findings of the Panel in *Brazil – Aircraft*, but adopted a similar approach to the Panel in *US – Clove Cigarettes*. The Panel explained that:

> "First, many other provisions of the SPS Agreement – including Articles 5.1, 5.2 and 6.1 which are also raised in this dispute – and of the other covered agreements contain requirements for Members to 'take into account' certain techniques, factors, international standards, and so on, which have been interpreted by panels and the Appellate Body. Therefore, the use of the phrase 'shall take account of' in a provision does not make it so vague that it cannot constitute a positive obligation. With respect to the term 'special needs', the panel in *EC – Approval and Marketing of Biotech Products* stated that Article 10.1 was 'equivalent' to Article 12.3 of the TBT Agreement. The panel in *US – Clove Cigarettes,* although noting the vagueness of the expression 'special development, financial and trade needs', nevertheless examined the specific socio-economic context of Indonesia and made a finding under Article 12.3 of the TBT Agreement. We are aware that the panel in *Brazil – Aircraft,* in examining a claim under Article 27.4 of the SCM Agreement, which refers to a developing country Member's 'development needs', found that an inquiry into what those needs are is 'of a peculiarly economic and political nature, and notably ill-suited

[48] Panel Report, *Brazil – Aircraft*, para. 7.57.
[49] Appellate Body Report, *Brazil – Aircraft,* paras. 140-141.
[50] Panel Report, *US – Clove Cigarettes*, para. 7.627.
[51] Panel Report, *US – Clove Cigarettes*, para. 7.627.

> 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 to dispute settlement and we will turn to Argentina's claim that the United States did not act in conformity with that obligation."[52]

1.6 Article 27.5

31. The Panel in *India – Export Related Measures*, in the context of interpreting Article 27.2(b) of the SCM Agreement, disagreed with India's view that Article 27.5 allows Members graduating from Annex VII(b) eight years to phase out export subsidies for products for which they have reached export competitiveness. According to the Panel:

> "The second sentence of Article 27.5 applies to developing country Members 'referred to in Annex VII'. On graduating, a Member ceases to be one 'referred to in Annex VII', and the second sentence of Article 27.5 is no longer available to it."[53]

1.7 Article 27.8

1.7.1 "in accordance with the provisions of paragraphs 3 through 8 of Article 6"

32. The Panel in *Indonesia – Autos* stated that while a complaining party is, pursuant to Article 27.8, deprived of the rebuttable presumption of serious prejudice under Article 6.1(a) when trying to prove serious prejudice by virtue of a subsidy granted to a developing country Member, Article 27.8 does not establish a legal standard for making a prima facie case higher than that normally applicable under Article 6:

> "We do not agree, however, that the complainants bear a heavier than usual burden of proof in this dispute or that the concept of 'like product' should be interpreted more narrowly than usual because Indonesia is a developing country Member. … [B]ecause Indonesia is a developing country Member, Article 27.8 requires complainants to demonstrate serious prejudice by positive evidence 'in accordance with the provisions of paragraphs 3 through 8 of Article 6' rather than taking advantage of the rebuttable presumption of serious prejudice that otherwise would have applied under Article 6.1(a). Article 27 does not, however, impose a higher burden of proof on complainants than that normally applicable under Article 6, nor does it provide that the term 'like product' is to be defined differently in the case of subsidization provided by a developing country Member."[54]

1.8 Article 27.9

33. The Panel in *Indonesia – Autos* described the provision in Article 27.9 as follows:

> "Article 27.9 provides that, *in the usual case*, developing country Members may not be subject to a claim that their actionable subsidies have caused serious prejudice to the interests of another Member. Rather, a Member may only bring a claim that benefits under GATT have been nullified or impaired by a developing country Member's subsidies or that subsidized imports into the complaining Member have caused injury to a domestic industry."[55]

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[52] Panel Report, *US – Animals*, para. 7.690.
[53] Panel Report, *India – Export Related Measures*, para. 7.62.
[54] Panel Report, *Indonesia – Autos*, para. 14.167.
[55] Panel Report, *Indonesia – Autos*, para. 14.156.

1.9 Article 27.10

34. The Appellate Body in *US – Carbon Steel*, rejected the Panel's findings that *de minimis* subsidization is non-injurious subsidization and noted that Article 27.10 (and 27.11) of the *SCM Agreement* require termination of a countervailing duty *investigation* with respect to a developing country Member when "the overall level of subsidies granted does not exceed" 2 or 3 per cent:

> "Articles 27.10 and 27.11 of the *SCM Agreement* require termination of a countervailing duty *investigation* with respect to a developing country Member whenever 'the overall level of subsidies granted does not exceed' 2 or 3 percent, depending on the circumstances. These provisions require authorities, in a countervailing duty investigation, to apply a higher *de minimis* subsidization threshold to imports from developing country Members. To accept the Panel's reasoning—that *de minimis* subsidization is non-injurious subsidization—would imply that, for the same product, imported into the same country, and affecting the same domestic industry, the *SCM Agreement* establishes different thresholds at which the same industry can be said to suffer injury, depending on the origin of the product."[56]

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[56] Appellate Body Report, *US – Carbon Steel*, para. 82.