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1 ARTICLE 28

1.1 Text of Article 28

Article 28

Existing Programmes

28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:

- (a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and
- (b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.

28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

1.2 Article 28.1

1.2.1 "inconsistent with the provisions of this Agreement"

1. The Panel in *Indonesia – Autos* addressed the question of whether Indonesia had extended the scope of a subsidy programme which was "inconsistent" with the provisions of the SCM Agreement, contrary to the prohibition contained in Article 28.2. Under Article 27.3, the prohibition of Article 3.1(b) was not applicable to Indonesia at the time of the dispute; therefore, the Indonesian programme did not violate the SCM Agreement. Nevertheless, the United States argued that the term "inconsistent" under Article 28.1 was to be understood as distinct from the concept of "prohibited"; more specifically, the United States argued that a subsidy programme could be inconsistent with the provisions of the SCM Agreement, regardless of the applicability of Article 3 in a particular case. The Panel rejected this argument:

"In the SCM Agreement ... the drafters have chosen to express the concept of subsidies meeting the substantive conditions of Article 3 by referring to subsidies 'falling under the provisions of Article 3' (See Article 2.3). If they had intended to express the same concept in Article 28, they could have used comparable language."¹

1.3 Relationship with other provisions

1.3.1 Article 5 of the SCM Agreement

2. The Panel in *EC and certain member States – Large Civil Aircraft* considered that subsidy programmes established prior to 1 January 1995 are subject to the disciplines of Parts II and III of the SCM Agreement. The Panel explained that:

¹ Panel Report, *Indonesia – Autos*, para. 14.261.

"The wording of Article 28.1(b), particularly the final phrase 'until then shall not be subject to Part II,' indicates that the three year period during which Members were required to bring their WTO-inconsistent measures into conformity with the SCM Agreement operated only as a temporary exemption from the application of the provisions of Part II.² In other words, it may be inferred from Article 28 that WTO-inconsistent subsidy programmes, established prior to 1 January 1995 and continuing in effect after that date, were generally intended to fall within the temporal scope of Part II, subject to the three-year grace period granted by Article 28.1. If such subsidy programmes were generally intended to fall within the temporal scope of the SCM Agreement for purposes of Part II (i.e., as regards the prohibition on the granting or maintaining of prohibited export subsidies) then, in the absence of any contrary intention expressed in the text or implied from the structure of the SCM Agreement, they would likewise fall within the temporal scope of Part III of the SCM Agreement (i.e., for purposes of the obligation not to cause, through the use of subsidies, adverse effects to the interests of other Members). Thus, Article 28.1 suggests that subsidy programmes established prior to 1 January 1995 and maintained subsequent to this date are subject to Part III - it does not tell us whether subsidies granted by Members prior to 1 January 1995 are subject to Part III."³

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² (*footnote original*) Part II of the SCM Agreement relates to prohibited export subsidies. Article 3.2, which is contained in Part II of the SCM Agreement, prohibits Members from granting or maintaining export subsidies referred to in Article 3.1. Article 4.7 provides that, should a panel find that a Member has granted or maintained a prohibited export subsidy in contravention of Article 3.2, it shall recommend that the subsidizing Member withdraw the subsidy without delay.

³ Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.63.