BRAZIL - EXPORT FINANCING PROGRAMME FOR AIRCRAFT

SECOND RECOURSE BY CANADA TO ARTICLE 21.5 OF THE DSU

Report of the Panel
WT/DS46/RW/2

Adopted by the Dispute Settlement Body on 23 August 2001

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I. PROCEDURAL BACKGROUND

1.1 On 20 August 1999, the Dispute Settlement Body ("DSB") adopted the Appellate Body Report (WT/DS46/AB/R) and the Panel Report (WT/DS46/R), as modified by the Appellate Body Report, in the dispute *Brazil - Export Financing Programme for Aircraft* (hereafter "*Brazil - Aircraft*").

1.2 The DSB recommended that Brazil bring its export subsidies for regional aircraft under the *Programa de Financiamento às Exportações* ("PROEX") interest rate equalization scheme into conformity with its obligations under Articles 3.1(a) and 3.2 of the Agreement on Subsidies and Countervailing Measures (hereafter "*SCM Agreement*"). The DSB further recommended that Brazil withdraw the export subsidies for regional aircraft within 90 days.

1.3 On 19 November 1999, Brazil submitted to the Chairman of the DSB, pursuant to Article 21.6 of the Dispute Settlement Understanding (hereafter "DSU"), a status report (WT/DS46/12) on implementation of the Appellate Body's and the Panel's recommendations and rulings in the dispute. The status report described measures taken by Brazil which, in Brazil's view, implemented the recommendation of the DSB to withdraw the measures within 90 days.

1.4 Canada disagreed that the Brazilian measure brought Brazil into conformity with its obligations under the *SCM Agreement*. As a result, on 23 November 1999, Canada requested the establishment of a panel under Article 21.5 of the DSU. On 9 December 1999, the DSB referred the matter to the original Panel pursuant to Article 21.5 of the DSU.

1.5 The report of the Article 21.5 Panel was circulated to Members on 9 May 2000. The Panel found that the measures taken by Brazil to comply with the Panel's recommendation either did not exist or were not consistent with the *SCM Agreement*. Accordingly, the Panel concluded that Brazil had failed to implement the 20 August 1999 recommendation of the DSB that it withdraw the export subsidies for regional aircraft within 90 days. The Appellate Body, in a report circulated to Members on 21

July 2000, upheld the Panel's conclusions. The DSB adopted the Appellate Body Report (WT/DS46/AB/RW) and the Panel Report (WT/DS46/RW), as modified by the Appellate Body Report, on 4 August 2000.

1.6 In the light of Brazil's failure to implement the 20 August 1999 recommendations of the DSB, on 12 December 2000 the DSB authorized Canada to take appropriate countermeasures in the amount of C$344.2 million annually. At the same meeting, Brazil advised the DSB of new measures it had taken, which, in its view, brought PROEX into compliance with Brazil's obligations under the *SCM Agreement*.

1.7 On 22 January 2001, Canada submitted a communication to the Chairman of the DSB (WT/DS46/26), seeking recourse to Article 21.5 of the DSU. In that communication, Canada indicated that there was disagreement between Canada and Brazil as to whether the measures taken by Brazil to comply with the 20 August 1999 and 4 August 2000 recommendations of the DSB brought Brazil into conformity with the provisions of the *SCM Agreement* and resulted in the withdrawal of the export subsidies to regional aircraft under PROEX. Canada, therefore, requested that the DSB refer the matter to the original panel, pursuant to Article 21.5 of the DSU. In its communication, Canada also noted that it had not yet implemented the countermeasures authorized by the DSB on 12 December 2000 and that its second recourse to Article 21.5 of the DSU was without prejudice to its legal position with respect to the implementation of those authorized countermeasures. Canada stated that it was invoking Article 21.5 in the interest of further legal clarity.

1.8 At its meeting on 16 February 2001, the DSB decided, in accordance with Article 21.5 of the DSU, to refer to the original panel the matter raised by Canada in document WT/DS46/26. At that DSB meeting, it was also agreed that the Panel should have standard terms of reference as follows:

1.9 To examine, in the light of the relevant provisions of the covered agreements cited by Canada in document WT/DS46/26, the matter referred to the DSB by Canada in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.10 The Panel was composed as follows:

Chairperson:	Dr. Dariusz Rosati
Members:	Prof. Akio Shimizu
	Mr. Kajit Sukhum

1.11 Australia, the European Communities, Korea and the United States reserved their rights to participate in the Panel proceedings as third parties.[1]

1.12 The Panel met with the parties on 4-5 April 2001. It met with the third parties on 5 April 2001.

1.13 The Panel submitted its interim report to the parties on 20 June 2001. On 25 June 2001, both parties submitted a written request that the Panel review precise aspects of the interim report. Neither party requested an interim review meeting. The Panel submitted its final report to the parties on 10 July 2001.

[1] Australia did not make any written or oral submissions to the Panel.

II. FACTUAL ASPECTS

2.1 As described in our original Panel Report[2], the *Programa de Financiamento às Exportações* (PROEX) was created by the Government of Brazil on 1 June 1991 by Law No. 8187 and is being maintained by provisional measures issued by the Brazilian government on a monthly basis. PROEX provides export credits to Brazilian exporters, inter alia through interest rate equalisation payments.[3] Interest rate equalisation involves payments by Brazil's National Treasury to entities financing or refinancing export transactions involving goods and services.

2.2 In an effort to comply with the 20 August 1999 recommendations of the DSB, Brazil revised the interest rate equalisation system of PROEX through Central Bank of Brazil (BCB) Resolution 2667 of 19 November 1999 (hereafter "PROEX II"). That Resolution was the focus of the previous Article 21.5 proceedings initiated by Canada.

2.3 The subject of these second Article 21.5 proceedings commenced by Canada is another revision of the interest rate equalisation system of PROEX (hereafter "PROEX III"), effectuated by Brazil in view of the 4 August 2000 recommendations of the DSB. That revision is set out in Central Bank of Brazil (BCB) Resolution 2799 of 6 December 2000.[4]

2.4 Of particular relevance to the instant proceedings are the provisions of Article 1 and Article 8, paragraph 2 of BCB Resolution 2799. Article 1 stipulates in relevant part:

> Art 1. In export financing operations for goods and services, as well as for software, in compliance with Law No. 9,609, dated February 19, 1998, the National Treasury may provide to the financing or refinancing agency, as the case may be, equalization enough to render financing costs compatible with those practiced in the international market.
>
> Paragraph 1. When financing exports of regional aviation aircraft, interest rate equalisation shall be established on a case-by-case basis, at levels that may vary according to the characteristics of each operation, complying with the Commercial Interest Reference Rate (CIRR) published monthly by the OECD corresponding to the currency and maturity of the operation.

2.5 Article 8, paragraph 2 of BCB Resolution 2799 states as follows:

> Paragraph 2. In the process of analyzing received requests for eligibility [for PROEX III support], the [Export Credit Committee] shall have as reference the financing terms practiced in the international market.

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[2] *Brazil - Export Financing Programme for Aircraft* ("*Brazil- Aircraft*"), Report of the Panel ("original Panel Report") adopted on 20 August 1999, WT/DS46/R, DSR 1999:III, 1221, paras. 2.1-2.6.

[3] Law No. 8187 of 1 June 1991, replaced by Provisional Measure No. 1629 of 12 February 1998.

[4] Exhibit BRA-1.

2.6 The other main features of PROEX III remain essentially as they were during the previous Article 21.5 panel proceedings.

2.7 Thus, the maximum financing terms for which interest rate equalisation payments may be made are established by a Ministerial Directive.[5] The length of the financing term, in turn, determines the spread to be equalised: the payment ranges from 0.5 percentage points per annum, for a term of up to six months, to a maximum of 2.5 percentage points per annum, for a term of over nine years and up to ten years.[6] The spread is fixed throughout the financing term.

2.8 PROEX III, like its predecessor versions, is administered by the *Comitê de Crédito as Exportações* (hereafter "Export Credit Committee"), a 13-agency group, with the Ministry of Finance serving as its executive. While day-to-day operations of PROEX III are conducted by the Central Bank of Brazil, all requests for PROEX III support in respect of exports of regional aviation aircraft must be approved by the Export Credit Committee.

2.9 PROEX III involvement in aircraft financing transactions begins when the manufacturer requests a letter of commitment from the Committee prior to conclusion of a formal agreement with the buyer. This request sets forth the terms and conditions of the proposed transaction. If the Export Credit Committee approves, the Central Bank of Brazil issues a letter of commitment to the manufacturer. This letter commits the Government of Brazil to providing support as specified for the transaction provided that the contract is entered into according to the terms and conditions contained in the request for approval, and provided that it is entered into within a specified period of time, usually 90 days (and provided the aircraft is exported, as explained below). If a contract is not entered into within the specified time, the commitment contained in the letter of approval expires.

2.10 PROEX III interest rate equalisation payments begin after the aircraft is exported and paid for by the purchaser. PROEX III payments are made to the lending financial institution in the form of non-interest-bearing National Treasury Bonds (*Notas do Tesouro Nacional - Série I*), referred to as NTN-I bonds. The bonds are issued by the Brazilian National Treasury to its agent bank, the Central Bank of Brazil, which then passes them on to the lending banks financing the transaction. The bonds are issued in the name of the lending bank which can decide to redeem them on a semi-annual basis for the duration of the financing or discount them for a lump sum in the market. PROEX III thus resembles a series of zero-coupon bonds which mature at six-month intervals over the course of the financing period. The bonds can only be redeemed in Brazil and only in Brazilian currency at the exchange rate prevailing at the time of payment. If the lending bank is outside of Brazil, it may appoint a Brazilian bank as its agent to receive the semi-annual payments on its behalf.

[5] See Ministerial Directive 374 of 21 December 1999 (hereafter "Directive 374") (Exhibit BRA-3).

[6] See Central Bank of Brazil Circular Letter No. 2881 of 19 November 1999 (hereafter "Circular Letter 2881") (Exhibit BRA-2).

III. PROCEDURAL ISSUE

3.1 **Brazil** asserts that, during the meeting of the Panel with the parties, while the representative of Brazil was presenting Brazil's oral statement, a member of the Canadian delegation left the room carrying a copy of the confidential written version of Brazil's oral statement. According to Brazil, a member of its delegation later left the room to investigate and found that several persons who were not members of Canada's delegation were sitting in the lounge outside the meeting room reading Brazil's confidential statement. Brazil does not contest that Members are entitled to decide for themselves the composition of their delegations, but considers that they have no right to decide for themselves which documents designated by the other parties as confidential should be treated as such.

3.2 Brazil objects strongly to the alleged disclosure of its confidential statements to the representatives of private parties who were not members of Canada's delegation. Brazil submits that the aforementioned alleged incident is a serious breach of Canada's obligations to respect the rules of confidentiality, including Article 14 of the *DSU* and paragraph 3 of the Panel's Working Procedures. According to Brazil, nothing in the Panel's Working Procedures or the *DSU* authorizes disclosure of confidential documents to persons who are not members of a delegation. Brazil requests that the Panel specifically note this alleged breach of the rules in its Report and that it take whatever other steps it deems appropriate.

3.3 **Canada** explains that it has not given access to Brazil's submissions (including exhibits) and/or statements (including exhibits) in these proceedings to any employees of Canadian regional aircraft manufacturers. Canada notes that it has shared these documents with members of a private law firm retained by a Canadian regional aircraft manufacturer. According to Canada, these individuals have served as advisors to the Government of Canada, form part of Canada's "litigation team", and are subject to a confidentiality agreement whereby they are not to disclose the documents such as those previously mentioned, including to their client. Canada also states that these individuals would not have received any business confidential information if Brazil had filed any in these proceedings.

3.4 In the view of Canada, paragraph 13 of the Panel's Working Procedures recognizes that parties may consult advisors who are not members of their delegations. Canada submits that the only reason why parties should have the responsibility for these advisors in regard to the confidentiality of the proceedings is because a party may share submissions and other documents with these advisors. Canada considers that statements by the Appellate Body in *Canada - Measures Affecting the Export of Civilian Aircraft*[7] and Panel in *Korea - Taxes on Alcoholic Beverages*[8] confirm its view that submissions may be shared with a party's advisors who are not on its "dele-

[7] Canada refers to the Appellate Body Report on *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/RW, adopted 20 August 1999, DSR 1999:III, 1377, para. 141 (hereafter "Original Appellate Body Report on *Canada - Aircraft*").

[8] Canada refers to the Panel Report on *Korea - Taxes on Alcoholic Beverages*, WT/DS75/R and WT/DS84/R, adopted 17 February 1999, DSR 1999:I, 44, para. 10.32 (hereafter "Panel Report on *Korea - Alcoholic Beverages*").

gation". Canada also notes that, were it otherwise, parties would simply protect their ability to make a full response by greatly expanding their delegations, as is their right.

3.5 The **Panel** notes that, as a factual matter, Canada does not deny that a member of its delegation at the meeting of the Panel with the parties of 4 April 2001 provided a copy of Brazil's written version of its oral statement to people who were not members of its delegation, as notified to the Panel. In fact, Canada acknowledges that it has "shared [Brazil's submissions and statements] with members of a private law firm retained by a Canadian aircraft manufacturer".[9] Accordingly, the issue facing us is whether it was permissible for Canada to share Brazil's oral statement and other documents submitted to the Panel with the private law firm in question. In considering this issue, we note that Article 18.2 of the *DSU* provides in relevant part that:

> ... Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential.[10]

3.6 In our view, it emerges from this provision that Canada must keep confidential all information submitted to this Panel by Brazil.[11] However, as the Appellate Body has noted, "a Member's obligation to maintain the confidentiality of [...] proceedings extends *also* to the individuals whom that Member selects to act as its representatives, counsel and consultants."[12] Thus, the Appellate Body clearly assumed that Members may provide confidential information also to *non*-government advisors.

3.7 We see nothing in Article 18.2 of the *DSU*, or any other provision of the *DSU*[13], to suggest that Members may share such confidential information with non-government advisors only if those advisors are members of an official delegation at a panel meeting.[14] Indeed, paragraph 13 of this Panel's Working Procedures expressly provides that:

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[9] Canada's Response to Panel Question 31 (Annex A-4).

[10] Para. 3 of this Panel's Working Procedures also includes the quoted sentence.

[11] This is subject, of course, to the provisions of the last sentence of Article 18.2 of the *DSU*, which allow a party to panel proceedings to disclose to the public non-confidential summaries of the information contained in the written submissions of the other party, if such summaries are requested.

[12] Original Appellate Body Report on *Canada - Aircraft*, *supra*, footnote 7, para. 141 (emphasis added). The Appellate Body made the quoted statement in respect of appellate review proceedings. We do not see, however, why the same reasoning should not extend, by analogy, to panel proceedings.

[13] Contrary to Brazil, we do not think that Article 14 of the *DSU* is relevant to the issue before us. Article 14 focuses on panels and their obligations in respect of confidentiality; it does not address itself to the obligations of the parties in respect of confidentiality.

[14] The following statement by the Panel in *Korea - Alcoholic Beverages* supports this view:

> We note that written submissions of the parties which contain confidential information may, in some cases, be provided to non-government advisors who are not members of an official delegation at a panel meeting. The duty of confidentiality extends to all governments that are parties to a dispute and to all such advisors *regardless of whether they are designated as members of delegations and appear at*

> The parties and third parties to this proceeding have the right to determine the composition of their own delegations. Delegations may include, as representatives of the government concerned, private counsel and advisers. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations, *as well as any other advisors consulted by a party* or third party, act in accordance with the rules of the DSU and the working procedures of this Panel, particularly in regard to confidentiality of the proceedings. Parties shall provide a list of the participants of their delegation before or at the beginning of the meeting with the Panel. (emphasis added)

3.8 It is apparent from the second and third sentences of paragraph 13 of the Working Procedures that the "other advisors" referred to are advisors who are *not* part of a Member's delegation at a panel meeting. It is equally clear to us that paragraph 13 is based on the premise that parties to panel proceedings *may* give their "other advisors" access to confidential information submitted by the other party.[15] Were it otherwise, there would be no point in requiring parties to safeguard the confidentiality of panel proceedings in respect of such "other advisors".[16]

3.9 On the basis of the foregoing, we are unable to accept Brazil's argument that Canada acted inconsistently with the requirements of the *DSU* or this Panel's Working Procedures by giving advisors not designated as members of its delegation access to information submitted to this Panel by Brazil.[17]

3.10 In reaching this conclusion, we note, however, that, pursuant to paragraph 13 of the Working Procedures, Canada must ensure that any advisors who were not members of its official delegation respect the confidentiality of the present proceedings.

3.11 We note Canada's statement that the members of the law firm which have had access to Brazil's submissions have been part of its litigation team and have served as "advisors" to the Government of Canada. Since no members of a private law firm were part of Canada's delegation to the meeting of the Panel with the parties, the private lawyers Canada says were advising it fall within the "other advisors" category within the meaning of paragraph 13 of the Panel's Working Procedures. It was (and is), therefore, the responsibility of Canada to ensure that those private lawyers maintain the confidentiality of the documents submitted by Brazil.

> *a panel meeting*. (Panel Report on *Korea - Alcoholic Beverages*, *supra*, footnote 8, para. 10.32, emphasis added)

[15] Brazil is correct in pointing out that para. 13 does not *expressly* authorize disclosure of confidential information to "other advisors", but, in our view, it does so by implication. We stress, however, that para. 13 talks about "advisors" and not other members of the public, such as private parties interested in the outcome of particular panel proceedings.

[16] We note that there is nothing in the other paras. of this Panel's Working Procedures to suggest that confidential information may be disclosed to non-government advisors only if those advisors are members of an official delegation to a panel meeting.

[17] It should be pointed out that Brazil did not, in these proceedings, submit any business confidential information.