ANNEX C

Third-Party Submissions

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ANNEX C-1

THIRD-PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

(22 June 2001)

1. Introduction

1. The European Communities (hereafter "the EC") makes this third party submission because of its systemic interest in the correct interpretation of the Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*") as well as the Understanding on Rules and Procedures concerning the Settlement of Disputes (the "DSU").

2. As an original signatory of, and a current participant in, the only international undertaking satisfying the conditions of the second paragraph of item (k) of the Illustrative List in Annex I to the *SCM Agreement,* that is the *OECD Arrangement,* the European Communities considers its close involvement in the work of this Panel to be particularly important.

3. The European Communities trusts that the parties will ensure that all documents submitted to the first meeting of the Panel will also be sent to the third parties, as required by Article 10.3 of the DSU. It also wishes to express its readiness to comment further on any of the legal issues arising in this case by answering any questions which the Panel may wish to put.

2. Preliminary Issues - Scope of this Proceeding

4. The European Communities has comments on the two preliminary issues raised by Canada:

- ? Whether allegations involving non-compliance with a previous DSB recommendation must obligatorily be brought before an Article 21.5 compliance panel;
- ? The alleged inconsistency of Brazil's claims with Article 6.2 of the DSU

2. Whether allegations involving non-compliance with a previous DSB recommendation must obligatorily be brought before an Article 21.5 compliance panel

5. In its preliminary submission of 18 June 2001, Canada argues that certain of Brazil's claims (claim 1 in part, claims 2 and 3 in their entirety) are inconsistent with Article 21.5 of the DSU since they are related to "issues of compliance".

6. Canada claims that Brazil's claim 1 is in part a claim concerning compliance because it refers to the allegation that

> [e]xport credits, including financing, loan guarantees, or interest rate support by or through the Canada Account are and *continue to be* prohibited export subsidies within the meaning of Articles 1 and 3 of the [Subsidies] Agreement [italics added].

7. It is because of the words in italics in this claim that, according to Canada, this claim is a complaint about compliance.

8. The European Communities does not consider this reading of Brazil's claim 1 to be compelling. A claim of this nature could easily be made even if there had been no prior panel procedure. The European Communities therefore does not believe that Canada's objection against this claim is justified.

9. It is true that Brazil's claim 2 contains an allegation that

> Canada has not implemented the report of the Article 21.5 panel, adopted by the DSB, requesting that Canada withdraw Canada Account subsidies.

10. This claim appears to refer as a legal basis to an adopted panel report rather than to a provision of any of the covered agreements. The European Communities therefore considers this claim to be inadequate for purposes of Article 6.2 of the DSU which requires the complainant to

> provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

11. As the standard terms of reference in Article 7.1 of the DSU demonstrate, the name of the covered agreement(s) cited by the parties to the dispute must be known at the time the request for the establishment of a panel is considered by the DSB. The closed list of covered agreements appears in Appendix 1 of the DSU, and a panel report in an earlier dispute, even once adopted, does not amount to a covered agreement. For these reasons, the European Communities is of the view that Brazil's claim 2 is indeed inadequate, albeit for reasons different from the ones invoked by Canada.

12. By contrast, Brazil's claim 3 does quote Articles 1 and 3 of the Subsidies Agreement which is a covered agreement under Appendix 1 of the DSU. This claim does therefore not suffer from the same inadequacy as Brazil's claim 2. Thus, the issue raised by Canada appears to be relevant at least in the context of this claim.

13. The European Communities is not convinced by Canada's argument that Article 21.5 of the DSU is the only provision under which an issue that arises in the context of compliance can be raised under the DSU. It is true that the terms of Article 21.5 of the DSU are not of a purely hortatory nature when it requires the parties to the dispute by the auxiliary "shall" to have recourse to "these dispute settlement procedures, including wherever possible resort to the original panel".[1] However, this "shall" relates, in the view of the EC, to the use of the original panel once the option of an Article 21.5 panel has been chosen and not to the use of the Article 21.5 procedure.

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14. Article 21.5 of the DSU provides for a special accelerated procedure which the complainant in the original dispute has the right to resort to. However, nothing in the DSU appears to stand in the way to resort instead to an ordinary panel established under Article 7 of the DSU. Where a

[1] It is the position of the European Communities that the words "these dispute settlement procedures" refer to consuiaatory naturecartler-0.612 TD -0.1405 Tc 0.7759 2j 3.75 -4.5 4.0 -0.161 2j Tf 0.1725 c 0 Tw (1) Tj 3.75

aircraft provided by or through Canada Account, the Export Development Corporation (EDC), or the province of Quebec.

20. It thus appears that Brazil is limiting the subject matter under dispute, by the reference to its request for consultations in the present dispute, to export credits and loan guarantees provided by or through clearly identified Canadian agencies. It appears to the European Communities that the introductory paragraphs of the request for the establishment of a panel in the present case also govern the claims developed under Nos. 1 to 7 of that request.

21. In the EC's view, the question before the Panel is therefore whether claims 1, 2, 5 and 7 of the request for the establishment of a panel, read in conjunction with the introductory paragraphs of that request, are sufficiently specific to allow Canada as the respondent to prepare its defence and the third parties to participate in the present proceedings in a meaningful way. The European Communities does not believe that documents relating to other dispute settlement procedures between the same parties would be a relevant source of information for this purpose as long as they are not specifically cross-referenced in the request of the establishment for a panel in the present dispute.

22. On this understanding, the European Communities proposes to read claim 1 as follows:

> Export credits, including financing, loan guarantees, or interest rate support by or through Canada Account *for regional aircraft* are and continue to be prohibited export subsidies within the meaning of Article 1 and 3 of the Agreement.

23. The words in italics in this rephrased claim are taken from the first sentence of the first introductory paragraph. In the view of the EC, this delimitation of the claim gives it some more precision than may appear at first sight. The question remains however whether this additional precision is sufficient "to identify the specific measure at issue" and "to present the problem clearly", as required by Article 6.2 of the DSU.

24. The European Communities has serious doubts that claim 1, even when redrafted as proposed in the preceding portion of this submission, identifies a "specific measure" as required and matches the additional requirement to "present the problem clearly". The safest way to identify a specific measure is to either attach the text of the contested measure to the request for the establishment of the panel or, in the alternative, to refer to a publicly accessible source where the text of the measure can be found. If both these possibilities are not chosen, at the very least the features of the measure must be summarised in such a way that there can be no doubt concerning the identification of the measure. These features should include at the very least a description of the substance of the contested measure, the acting persons or agencies, the time when the measure was allegedly taken and the affected products or industries. The European Communities believes that Brazilian claim 1 fails to meet this minimum standard with regard to the identification of the specific measure at issue.

25. With regard to Brazilian claim 2, apart from the fact that it does not refer to a legal basis in any of the covered agreements (as discussed above), no specific measure is identified where Brazil claims that Canada "has not implemented the report of the Article 21.5 panel". While the additional elements contained in the introductory paragraphs of the request for the establishment of a panel in the present case may help to understand that the report of the Article 21.5 panel to which Brazil refers is the panel report concerning Canadian export credits and loan guarantees for regional aircraft[4], it is not clear what is the specific measure that Canada has omitted to take although it had an obligation to act. In a case of an omission to act, it will usually not be possible to identify the measure which should have been taken by attaching its text physically to the request for the establishment of a panel or by a reference to a public source. However, it is in practically all cases possible to identify a

[4] Panel report on *Canada – Measures Affecting the Export of Civilian Aircraft*, doc. WT/DS70/RW.

measure that purportedly served the purpose of carrying out the legal obligation to act, but that in the view of the complainant is not sufficient to fulfil such obligation. Even where that would not be the case, the complainant is always able to summarise the main features of the measure that the respondent allegedly failed to take in spite of a legal obligation to act in such a way that the specific measure at issue is sufficiently identified for the purposes of Article 6.2 of the DSU. For instance, the complainant could claim that the respondent failed to withdraw a clearly identified export subsidy although it had an obligation to do so. The European Communities is not convinced that Brazilian claim 2 in the present case meets this minimum standard.

26. Brazilian claim 5 is virtually identical with Brazilian claim 1, except that the Canadian agency mentioned here is the EDC (Export Development Corporation) and that the words "and continue to be" have been omitted from claim 5. The conclusions that the European Communities has drawn for claim 1 are thus in the view of the European Communities also applicable to claim 5.

27. Brazilian claim 7 refers to *Investissement Québec* and is for the rest largely identical with claims 1 and 5. The conclusions that the European Communities has drawn for claim 1 are thus in our view also applicable to claim 7.

28. For the above reasons, the European Communities shares the concerns raised by Canada in its preliminary submission of 18 June 2001 with regard to Article 6.2 of the DSU. The European Communities notes that Canada has made the effort of drawing Brazil's attention to the shortcomings of its request for the establishment of a panel in the present dispute, and notes that Brazil has not responded positively to Canada's request to remedy these shortcoming prior to filing its first written submission. The European Communities therefore considers that Canada's rights of defence and the third parties' ability to clearly understand the purview of the present dispute have been seriously curtailed. The Panel should therefore come to the conclusion in the preliminary ruling requested by Canada that Brazil's claims 1, 2, 5 and 7 are not properly before it.

3. Substantive Legal Issues

29. There are a number of substantive legal issues on which the European Communities wishes to comment. These are:

? The distinction between mandatory and discretionary measures and its relevance in subsidy cases;
? The meaning of Article 1.1(a)1(iii) of the *SCM Agreement*;
? That "matching" is covered by the safe haven in the second paragraph of item (k) of the Illustrative List in Annex 1 of the *SCM Agreement*.
? Guarantees are also covered by the *OECD Arrangement*

30. These issues will be considered in turn.

3.1 The distinction between mandatory and discretionary measures and its relevance in subsidy cases

31. Canada lays great stress on the argument that since the contested programmes (EDC export credits and guarantees and *Investissement Québec*) are not mandatory – in the sense that that terms is used in WTO/GATT case law – the Panel may only consider specific instances in which these programmes have been applied.

3.1.1 There is no general principle preventing dispute settlement in relation to

with the *WTO Agreement* is a fundamental one.[7] Because it is laid down in the basic agreement of the system, it covers the whole set of the annexed agreements, whether or not they may contain specific expressions of the same principle. Furthermore, by virtue of Article XVI:3 of the *WTO Agreement*, it is a superior rule to provisions in the annexed agreements.

3.1.2 Whether discretionary subsidy programmes can be subject to dispute settlement

36. In the light of the above, the European Communities considers that the question of whether discretionary subsidy programmes can be subject to dispute settlement must be determined on the basis of terms of the *SCM Agreement.*

37. The first comment that it would make in this regard is that the *SCM Agreement* applies to both subsidy programmes and individual subsidy grants. This is already apparent from the repeated references to "programmes" in the *SCM Agreement*, in particular in Article 2.

38. In connection with export subsidies, the European Communities would point out that Article 3.2 of the *SCM Agreement* provides that:

> A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

39. For the EC, this means that Members may neither make the *grant* of a subsidy contingent upon export performance nor *maintain* any subsidy programme that specifically envisages that subsidies may be granted contingent upon export performance, even where the grant is discretionary. The reason for this clarification is clear. If it were otherwise, Members would be able to adopt export subsidy programmes along the lines of

> The minister may reward companies for exceptional export performance with grants of up to $X% of turnover as he considers appropriate.

40. An exclusion of discretionary measures from the *SCM Agreement* would make such laws unattackable. There would be little point in attacking individual grants as and when they occur since they will already have happened by the time DSB recommendations can be adopted.

41. The findings of the panel report in *Canada – Aircraft*[8] (which, in any event, was not reviewed by the Appellate Body on this point), is not of any guidance in the present case in view of the context in which the panel's reasoning occurs. The panel was examining whether there were any subsidies in preparation for examining whether they were *de facto* export contingent and therefore prohibited. Even if the *Canada – Aircraft* panel's overall conclusion may be correct, its reliance on the discretionary/mandatory distinction to arrive at its conclusion appears misplaced and inappropriate.

3.2 The interpretation of Article 1.1(a)(1)(iii) of the *SCM Agreement*

42. Brazil attempts to argue that EDC activities can generally be considered to be export subsidies because they involve situations where:

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[7] "As a general and fundamental obligation imposed on all WTO Members, Article XVI:4 of the Marrakesh *Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") requires that each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the *WTO Agreement*." (see *Japan - Taxes on Alcoholic Beverages*, Arbitration under Article 21(3)(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS11/13, 14 February 1997, para. 9).

[8] Report by the Panel on *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, 14 April 1999, at paragraph 9.127.

a government provides goods or services other than general infrastructure, or purchases goods;

within the meaning of Article 1.1(a)(1)(iii) of the *SCM Agreement*.

43. Brazil's argument appears to the European Communities to go too far and is probably to a large extent irrelevant. The European Communities has the following brief observations to offer:

44. First, the European Communities understands that this case concerns services offered to export customers of Canadian companies, which may indirectly benefit Canadian exporters. Items (k) and (j) of Annex 1 to the *SCM Agreement* expressly bring such measures into the scope of Article 3.1 *SCM Agreement*. Such services to purchasers are to be distinguished from services to exporters, which EDC also apparently provides but which call for a different analysis (not least because they do not fall under Items (k) and (j) of Annex 1 to the *SCM Agreement*.

45. The European Communities does not consider that Article 1.1(a)(1)(iii) of the *SCM Agreement* should be interpreted so widely as to render any government supplied service a subsidy when it has an economic value.

46.

52. On the issue of benefit Brazil has reasoned that if the conditions offered by EDC are more favourable than those allowed by the *OECD Arrangement*, there must be a "*a fortiori*" be a benefit.[10] It also argues that EDC financial services must be a subsidy since EDC states that its financing "complements" what is available on the market.[11]

53. The European Communities would basically agree with the first part of this reasoning without the "*a fortiori*" but disagree with the argument that EDC financial services must be a subsidy since it "complements" what is available on the market. There is no basis for saying that if the government offers something that is not available on the market, it must be offering a subsidy.

54. The European Communities would rather say that if EDC export credits were not available, it must be presumed that official financing would be made available in Canada on *OECD Arrangement* conditions.

55. For the reasons outlined above however, the European Communities does not agree that the existence of a benefit can be established simply from the absence of a "commercial supplier".

56. However, the European Communities would stress that it is not in a position to affirm that EDC does grant export credits for regional aircraft at other than OECD Arrangement conditions. This is a matter to be proved by Brazil.

3.3 "Matching" is covered by the safe haven in the second paragraph of item (k) of the Illustrative List

57. Perhaps the most important issue raised in this case is whether the "matching" provisions of the *OECD Arrangement* are part of the "interest rate provisions" so that matching in conformity with those rules could fall within the safe haven of the second paragraph of item (k).

58. The European Communities is firmly of the view that the "matching" of supported rates, provided for in Article 29 of the *OECD Arrangement* falls within the safe haven of the second paragraph of item (k). Matching is specifically envisaged and authorised by the *OECD Arrangement* but must comply with a strict set of conditions and procedures.

59. Indeed, it makes no sense to consider interest rates in isolation from all the conditions that influence the interest rate. The reference to the "interest rate provisions" of the *OECD Arrangement* must be considered to refer to all the provisions that may affect the interest rate – that is all provisions containing *substantive* rather than *procedural* obligations.

60. The European Communities therefore disagrees with the view taken by the panel in the *Canada – Aircraft* case. It is striking that that panel correctly gave a wide interpretation to the term "export credit practices"[12] which implies that that "interest rate buy downs" (that is interest rate equalisation) were covered by the second paragraph of item (k), but gave an excessively narrow interpretation to the "interest rate provisions" of the *OECD Arrangement*.[13]

61. This excessively narrow interpretation is all the more unconvincing in the light of the correct conclusion that the panel came to later in its report came that:

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[10] First Written Submission of Brazil, para. 53.
[11] First Written Submission of Brazil, para. 60 *et seq.*
[12] In paragraph 5.80 of the Report
[13] *Id.* paragraphs 5.80 – 5.92

not shared by the Participants to the *Arrangement* themselves, who obviously regard matching as being compatible with effective disciplines on export credits.

69. A further reason for not considering "matching" to be part of the "interest rate provisions" seems to be the panel's concern that

> … a reading that would, for example, include within the safe haven in the second paragraph of item (k) a transaction involving matching of a derogation, would put all non-Participants at a systematic disadvantage as they would not have access to the information about the terms and conditions being offered or matched by Participants.[19]

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70. The European Communities considers that this concern is unfounded. Although the *procedures* of the *OECD Arrangement* cannot be applied to non-participants, this does not mean that non-participants would be disadvantaged. In fact the opposite is the case. The second paragraph of item (k) only requires non-participants to the *OECD Arrangement* to *apply in practice* the interest rate provisions of the *OECD Arrangement*, which the European Communities believes means the substantive provisions which can affect interest rates and not the procedural provisions. Of course, non-participants would not receive the notifications that participants receive, but this should not stop them from matching an offer of export credit terms on a transaction that their companies are competing for. If a non-participant has doubts about the reliability of the alleged offer of non-Arrangement terms that it is invited to match, it may request confirmation of them from the offer or. Under the *OECD Arrangement* participants consider themselves entitled to match after they have taken appropriate measures to verify the terms (see e.g. Article 53). If non-participants are not required to follow the procedural requirements of the *OECD Arrangement*, they are nonetheless able to apply them by analogy.

3.4 Guarantees are also covered by the *OECD Arrangement*

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ANNEX C-2

THIRD-PARTY SUBMISSION OF THE UNITED STATES

(22 June 2001)

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I. INTRODUCTION................................

I. INTRODUCTION

1. The United States welcomes this opportunity to present its views in the dispute *Canada – Export Credits and Loan Guarantees for Regional Aircraft* (DS222). The United States will comment briefly on the issues it believes to be of particular importance.

2. Brazil organizes its first written submission as a challenge to the Export Development Corporation (EDC) on the one hand, and the Canada Account on the other. Canada argues in response that the EDC administers two programs, the Canada Account and the Corporate Account, and it addresses Brazil's claims in that manner. The United States leaves it to the Panel to decide how best to characterize the programs at issue. For the sake of convenience, the United States has organized its submission around the underlying substantive issues of the market window, which arises in the context of the Corporate Account; and the status of matching under the *OECD Arrangement*[1], which arises in the context of the Canada Account.[2]

II. FINANCING THROUGH THE "MARKET WINDOW"

3. Brazil claims that Canada provides prohibited export subsidies through its EDC market window operations.[3] Canada's response focuses primarily on its claim that Corporate Account market

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use in approaching this question would be to compare the terms that a market window offered to a borrower with the terms the borrower would have been able to obtain on the purely commercial market. This is, in fact, the analysis contemplated by Article 14(b) of the SCM Agreement. The Appellate Body has confirmed that Article 14 constitutes relevant context for interpreting the term "benefit."[5]

7. In approaching this issue, however, the Panel should be careful to distinguish between the concepts of "market pricing" and "operating on commercial principles". Canada defends the Corporate Account by claiming that it operates on commercial principles, and thus provides financing at market rates.[6] This statement, in and of itself, is insufficient to demonstrate that EDC's market window support does not confer a benefit. If the commercial market does not offer a particular borrower the exact terms offered by a government, then the government is providing a benefit to the recipient whenever those terms are more favorable than the terms that are available in the market. A government entity "operating on commercial principles" is still a government entity. It is not the commercial market.[7]

8. If the Panel were to determine that the financing at issue does confer benefits, and thus constitutes export subsidies, the United States can foresee that the question whether market window financing is eligible for the "safe harbor" in the second paragraph of item (k) of Annex I of the SCM Agreement, the "Illustrative List" of export subsidies, may arise. Briefly, the second paragraph of item (k) is intended to provide a "safe harbor" for financings of a type covered by the *Arrangement*, on terms consistent with the *Arrangement*. This includes financings offered by non-Participants to the *Arrangement* who elect to follow its terms.

9. In the view of the United States, the reference in the second paragraph of item (k) to "an export credit practice which is in conformity with those provisions" encompasses only those export credit practices that are covered by the *Arrangement* (namely, official export credits). Market windows are not presently covered by the *Arrangement*, and therefore it would not be possible for a Member to invoke the item (k) safe harbor to shield export subsidies granted through a market window, even if the terms of the particular market window financing happened to be consistent with the terms of the *Arrangement* that applied to credits offered by official export credit agencies. Applying "*Arrangement* terms" to a type of export credit practice not covered by the *Arrangement* would constitute an "apples and oranges" comparison, since there is no assurance in the abstract that the present *Arrangement* terms would be appropriate for market windows.

III. THE INTERRELATIONSHIP BETWEEN THE "MATCHING PROVISIONS" OF THE *ARRANGEMENT* AND ITEM (K) OF THE ILLUSTRATIVE LIST

10. Brazil argues that Canada provided prohibited export subsidies by using Canada Account financing in support of the Air Wisconsin transaction.[8] Canada appears to concede that it used Canada Account financing in support of that transaction, and it does not contest that Canada Account financing constitutes export subsidies within the meaning of the SCM Agreement. Rather, it defends

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[5] *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, para. 155. Since this information may be difficult to obtain, the Panel might also consider evidence of commercial market practices involving borrowers with financial profiles similar to companies that obtained credits from a market window, or consider other comparisons that would allow an objective determination of this issue.

[6] Canada's First Written Submission at para. 67.

[7] Moreover, while Canada states that EDC prices its market window financing in a way that "reflects" commercial benchmarks and interest rate margins, and that it prices "according to" benchmarks that it derives, this does not necessarily mean the financing is at market rates. *See* Canada's First Written Submission at para. 67.

[8] *See*, *e.g*., Brazil's First Written Submission at para. 81.

itself by claiming that the export subsidies at issue fall within the safe harbor of the second paragraph of item (k) of the Illustrative List, because Canada was simply matching an offer made by Brazil.[9] Brazil argues in response that the item (k) safe harbor does not shield otherwise prohibited export subsidies that conform with the matching provisions of the *Arrangement*, citing the finding by the Article 21.5 Panel in *Canada – Aircraft* that the matching provisions are not part of the "interest rates provisions" of the *Arrangement*.[10]

11. The United States takes no position on the merits of the Air Wisconsin transaction. As a general matter, however, the United States agrees with Canada that matching is in conformity with the interest rates provisions of the *Arrangement*, and thus is eligible for the safe harbor in the second paragraph of item (k), regardless of whether the initiating offer is in derogation of *Arrangement* provisions.

12. The *Canada – Aircraft* Article 21.5 Panel stated that the matching of an initiating offer that does not comply with Arrangement terms is itself out of conformity with the interest rate provisions of the Arrangement.[11] In the view of the United States, this formulation is incorrect. For purposes of the second paragraph of item (k), the term "interest rate provisions" should be seen as a form of "shorthand" for encompassing all of the substantive terms and conditions of the *Arrangement*. It would defeat the entire logic of the *Arrangement* if a WTO Member were unable to make use of the matching provisions of the *Arrangement* – its key enforcement provision – for fear that such action might be deemed an export subsidy under the SCM Agreement.

13. In this sense, the United States disagrees with the *Canada – Aircraft* Article 21.5 Panel's statement that adopting Canada's view "would directly undercut real disciplines on official support for export credits."[12] On the contrary, it is the Panel's interpretation that would undercut *Arrangement* disciplines. The ability of Members to match non-conforming offers creates an incentive for other Members not to make non-conforming offers, lest they find themselves in a subsidy "race to the bottom." Therefore, an interpretation of the second paragraph of item (k) that would prohibit Members who are concerned about respecting their obligations under Article 3 of the SCM Agreement from matching non-conforming offers would remove any such incentive. Conversely, an interpretation of the second paragraph of item (k) that would shield matching offers from the Article 3 prohibition, particularly when the initial non-conforming offers are not themselves shielded, would provide an especially strong incentive against making non-conforming offers in the first instance.

14. Other objections that the *Canada – Aircraft* Article 21.5 Panel raised in response to Canada's interpretation are equally without merit. For example, since the purpose of the matching provision is to dissuade Members from initiating non-conforming offers, adopting Canada's interpretation of the second paragraph of item (k) would decrease the likelihood that the factual scenarios the Panel identified in paragraph 5.137 of its decision would ever arise. Similarly, the Panel's concern (in para. 5.138) that Canada's interpretation would permit Members to "opt out" of their WTO obligations on the basis of the behavior of non-Members is misplaced, because if matching is shielded by the item (k) safe harbor, then a Member who matches a non-conforming offer is acting in accordance with its WTO obligations.

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[9] *See, e.g.*, Canada's First Written Submission at para. 47.

[10] Brazil's First Written Submission at para. 57, *citing Canada - Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU,* WT/DS70/RW, 9 May 2000, para. 5.125 ("*Canada – Aircraft 21.5*").

[11] *See Canada – Aircraft 21.5* at paras. 5.125-5.126. Canada did not appeal the findings related to the Canada account, so the Appellate Body did not opine on the Panel's findings.

[12] *See id.* at para. 5.125.

15. Finally, contrary to the Panel's concern (at para. 5.136), Canada's approach to this issue does not raise the issue of structural inequity in respect of developing countries. Article 27 of the SCM Agreement exempts developing countries from the prohibitions of paragraph 1(a) of Article 3, subject to compliance with the provisions in Article 27.4. This exemption applies to all export subsidies, not just to export credits. The exemption in the second paragraph of item (k) is much more limited. Despite its more limited scope, however, the item (k) safe harbor was an important part of the overall package that WTO Members agreed to when they accepted the SCM Agreement.

16. The United States also observes that a non-Participant that seeks protection of the second paragraph of item (k) by applying "an export credit practice which is in conformity with those provisions" must also conform with the transparency provisions of the *Arrangement*.[13] These provisions require notification to other Participants of non-conforming terms. Participants can then seek to consult with the Participant offering non-conforming terms, and, if appropriate, match the non-conforming credit. Participants are unable to react to a credit offered by a non-Participant if they are not advised as to the terms being offered. Non-Participants should not be given a "free ride" to pick and choose which provisions of the *Arrangement* they choose to follow if they expect to enjoy the protection of the second paragraph of item (k).

IV. CONCLUSION

17. The United States thanks the Panel for providing an opportunity to comment on the issues at stake in this proceeding, and hopes that its comments will prove to be useful.

[13] *See*, *e.g.*, *Arrangement* at arts. 42-53.

ANNEX C-3

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES AT THE FIRST MEETING OF THE PANEL

(27 June 2001)

1. The European Communities has already had the opportunity to set out its view on this case in its written submission and will not repeat now what it said there.

2. The European Communities will briefly make some additional comments:

? Article 10.3 DSU and the perhaps related question of Business confidential information;

? Comments on Brazil's reply to the preliminary objection of Canada; and

? Comments on the written observations of the United States.

1. Article 10.3 DSU and Business confidential information

3. The European Communities would first, if you allow, congratulate the Panel on having made the correct response to Canada's request to submit certain crucial information to the Panel only.

4. The DSU provides that panel proceedings are confidential. Panels often have to deal with confidential information. Whether it is described as "government confidential information," "business confidential information", "proprietary information" or "private confidential information" it is all protected by Article 18 of the DSU. After the proceedings are over, there is no problem with a panel omitting certain information from the report that is rendered public.

5. The European Communities considers that it cannot be presumed that Members will not respect the rules of the DSU. It is also firmly of the view that Members may not be prevented from receiving certain information to which they are entitled under the DSU.

6. Therefore the Panel was right to return Canada's information without reading it.

7. The European Communities notes however that Brazil was also asked by the Panel to provide certain information at the same time as Canada. If this information was provided, the European Communities should have received a copy pursuant to Article 10.3 DSU and the European Communities would like to take this opportunity to ask the Panel to clarify this issue.

2. Comments on Brazil's reply to the preliminary objection of Canada

8. The European Communities now understands that Brazil is making three basic "overarching" claims (1, 5 and 7) and that the others are elaborations thereon. The European Communities also notes that it had correctly understood that the claims were all limited to Canadian support to its regional aircraft industry.

9. This said, the European Communities would like to make some comments on the way in

commented on a similar neglect of the concept of "financial contribution" in Brazil's arguments concerning Article 1.1(a)(1)(iii) *SCM Agreement.* The present comments elaborate on those written comments.

18. The United States goes on to presume that there will always be a benefit whenever a "government entity" does something different from what it calls "the commercial market" it is

ANNEX C-4

ORAL STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

(27 June 2001)

1. Mr. Chairman and Members of the Panel, it is my honour to appear before you today to present the views of the United States as a third party in this proceeding. Instead of repeating the points we made in our written submission, I will limit my comments to responding to certain statements that the European Communities ("EC") made in its 3rd party written submission.