WORLD TRADE ORGANIZATION

WT/DS46/AB/RW
21 July 2000

(00-2990)

Original:

WORLD TRADE ORGANIZATION
APPELLATE BODY

Brazil – Export Financing Programme for Aircraft

Recourse by Canada to Article 21.5 of the DSU

Brazil, *Appellant*
Canada, *Appellee*

European Communities, *Third Participant*
United States, *Third Participant*

AB-2000-3

Present:

Bacchus, Presiding Member
Ehlermann, Member
Lacarte-Muró, Member

I. Introduction

1. Brazil appeals from certain issues of law and legal interpretation in the Panel Report, *Brazil – Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU* (the "Article 21.5 Panel Report").[1] The Article 21.5 Panel was established pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") to consider a complaint by Canada with respect to the existence or consistency with the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") of measures taken by Brazil to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*").[2]

2. The original panel found as follows: "… we find that payments on exports of regional aircraft under the PROEX interest rate equalization scheme are export subsidies inconsistent with Article 3 of the SCM Agreement."[3] The original panel then recommended "that Brazil withdraw the subsidies

[1]WT/DS46/RW, 9 May 2000.

[2]The recommendations and rulings of the DSB resulted from the adoption, by the DSB, of the Appellate Body Report in *Brazil – Aircraft* and the original panel report in that dispute, as modified by the Appellate Body Report (Appellate Body Report, *Brazil – Aircraft*, WT/DS46/AB/R, adopted 20 August 1999; original panel report, *Brazil – Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by the Appellate Body Report). The DSB recommended that Brazil "withdraw" its prohibited export subsidies within 90 days, that is, by 18 November 1999.

[3]Original panel report, *Brazil – Aircraft*, *supra*, footnote 2, para. 8.2.

identified above without delay"[4], which in this dispute was found to be within 90 days.[5] On appeal,

5 June 2000, Canada filed an appellee's submission.[10] On the same day, the European Communities and the United States each filed a third participant's submission.[11]

7. The oral hearing in the appeal was held on 19 June 2000. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

II. Background

8. Before the original panel, the measures at issue were certain export subsidies granted under Brazil's *Programa de Financiamento às Exportações* ("PROEX") on sales of aircraft to foreign purchasers of Empresa Brasileira de Aeronáutica S.A. ("Embraer"), a Brazilian manufacturer of regional aircraft. The original panel described certain factual aspects of PROEX[12] as PROEX existed at that time. We provided a summary of these aspects.[13] The Article 21.5 Panel described the factual aspects of PROEX as revised by Brazil (the "revised PROEX "), in light of the recommendations and rulings of the DSB.[14] Below we provide a summary of the factual aspects of the revised PROEX, based on the summary set out in the Article 21.5 Panel Report.

9. PROEX is administered by the Comitê de Crédito às Exportações (the "Committee"), an inter-agency group within the Ministry of Finance in Brazil. Day-to-day operations of PROEX are conducted by the Bank of Brazil.[15] Under PROEX, the Government of Brazil provides interest rate equalization subsidies for sales by Brazilian exporters, including Embraer, as described below.

10. The financing conditions for which interest rate equalization payments are made are set by Ministerial Decrees. The length of the financing term, which is determined by the product to be exported, varies normally from one year to ten years. In the case of regional aircraft, however, this

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[10]Pursuant to Rule 22 of the *Working Procedures*.

[11]Pursuant to Rule 24 of the *Working Procedures*.

[12]Original panel report, *Brazil – Aircraft*, *supra*, footnote 2, paras. 2.1-2.6.

[13]Appellate Body Report, *Brazil – Aircraft*, *supra*, footnote 2, paras. 3-6.

[14]Article 21.5 Panel Report, paras. 2.1-2.6. Brazil informed the DSB that it had implemented the recommendations of the DSB through, in addition to Resolution 2667, Newsletter 2881. Newsletter 2881 establishes "the maximum percentages that may be applied under tax rate equalisation systems used for PROEX operations." These maximum percentages cover financing for up to ten years, with the highest interest rate equalization rate set at 2.5 per cent for financing of "over 9 years and up to 10 years". In the First Submission of Brazil to the Panel, however, Brazil indicated that Newsletter 2881 represents "an additional action that does not directly affect the question before this Panel". From this statement, the Article 21.5 Panel concluded that Brazil does not assert that Newsletter 2881 is relevant to its consideration of whether the revised PROEX is consistent with the *SCM Agreement*. Article 21.5 Panel Report, footnote 25. This conclusion was not appealed.

[15]*Ibid*., para. 2.4.

term has often been extended to 15 years, by waiver of the relevant PROEX guidelines. The length of

NTN-I bonds are denominated in Brazilian currency, indexed to the dollar as of the date the bonds are issued. The bonds can only be redeemed in Brazil, and only in Brazilian currency.[20]

III. Arguments of the Participants and the Third Participants

A. *Claims of Error by Appellant*

are not "used to secure a material advantage in the field of export credit terms", then they do not constitute prohibited export subsidies under the *SCM Agreement*.

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reversal of the burden of proof was contrary to the holding of the Appellate Body in *Chile – Taxes on Alcoholic Beverages* ("*Chile – Alcoholic Beverages*")[21], which attaches a presumption of compliance to the measures taken by Members to implement DSB recommendations and rulings. Finally, Brazil argues that the Article 21.5 Panel applied an erroneous presumption of correctness to unsupported statements made by Canada regarding interest rates actually applied by Canada.

B. *Arguments by Appellee – Canada*

1. Issuance of NTN-I Bonds Pursuant to Letters of Commitment Issued before 18 November 1999

20. According to Canada, it is undisputed that Brazil took no steps to modify pre-existing PROEX letters of commitment pertaining to aircraft exported after 18 November 1999, and that Brazil continues to issue NTN-I bonds to provide interest equalization payments on aircraft exported after 18 November 1999 pursuant to the terms and conditions in letters of commitment issued before that date. The Article 21.5 Panel was consequently correct in finding that Brazil has failed to "withdraw" the prohibited export subsidies, as it continues to "grant" these subsidies. Whatever else "withdraw" may mean, at a minimum it must encompass ceasing to "grant or maintain" prohibited subsidies under Article 3.2 of the *SCM Agreement*, as Brazil continues to do.

21. Contrary to Brazil's assertion, Canada argues that the plain language and the structure of the *SCM Agreement* supports the Article 21.5 Panel's conclusion that the issue of whether a subsidy "exists" is legally distinct from the issue of when a subsidy is "granted" for the purpose of Article 3.2, and that PROEX subsidies are "granted" at the time the NTN-I bonds are issued. Moreover, as the Article 21.5 Panel observed, acceptance of Brazil's claim would permit a WTO Member, up to the final day of the implementation period, to contract to "grant" prohibited subsidies for years into the future and be insulated from any meaningful remedy under the WTO dispute settlement system.

2. Are Export Subsidies under PROEX "Permitted" under Item (k) of the Illustrative List?

22. Canada argues that the Article 21.5 Panel was correct in its finding that PROEX subsidies are not "permitted" under item (k) of the Illustrative List. Canada refers to Brazil's argument that the Article 21.5 Panel erred in concluding that the language in the first paragraph of item (k) cannot be used to establish that a subsidy which is contingent upon export performance within the meaning of Article 3.1(a) is "permitted". Canada notes that this argument is at the core of Brazil's claim that the revised PROEX is in compliance with the *SCM Agreement*.

[21]WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, para. 74.

23. Canada submits that the Article 21.5 Panel correctly determined that the first paragraph of item (k) does not create such an "*a contrario*" exception. While Brazil urges that the Article 21.5 Panel should have looked only to the language of item (k) itself, Canada argues that the Article 21.5 Panel rightly began by interpreting the text of Article 3 and footnote 5 of the *SCM Agreement*, which contain the prohibition on, and the parameters of any exception to, the prohibition on export subsidies. In particular, the Article 21.5 Panel determined that, in its ordinary meaning, footnote 5 provides a textual basis for deciding when the Illustrative List can be used to demonstrate that a practice included in the Illustrative List is not a prohibited export subsidy. The Article 21.5 Panel correctly determined that only the provisions of the Illustrative List that affirmatively state that a practice is not an export subsidy fall within the scoprguesfIn partigubsl3.ular, th its ordithedint tythe sinary meaning, footno.icle19.5 TD -0.1

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United States as evidence of such commercial interest rates was correct because, by its very nature, a government-guaranteed loan cannot be considered to be made at a commercial rate.

27. In addition, the Article 21.5 Panel correctly determined that, in the circumstances of this case, floating rate transactions were not relevant as evidence of the market for fixed interest rates. According to Canada, Brazil could not explain what minimum rate it would apply if it provided PROEX payments in support of floating interest rates. In these circumstances, the Article 21.5 Panel had no choice but to disregard the floating rate transaction example provided by Brazil.

28. Furthermore, contrary to Brazil's allegation, the Article 21.5 Panel appropriately allocated the burden of proof at every stage of the proceeding. Brazil's argument completely mischaracterizes the finding of the Appellate Body in *Chile – Alcoholic Beverages*. The issue here has nothing to do with Brazil's previous measures or with presuming that Brazil is acting in bad faith, but rather with its failure to meet the burden of proof on an "affirmative defence". It was for Brazil to demonstrate that the market provided interest rates at the level of those resulting from the application of PROEX payments. Brazil did not prove that such rates exist.

C. *Arguments of the Third Participants*

1. European Communities

29. The European Communities begins its submission with comments on the agreement reached between Brazil and Canada, in this dispute, on, *inter alia*, the conduct of the procedure under Article 21.5 of the DSU. Although the European Communities accepts that parties may make agreements relating to procedural issues in dispute settlement proceedings, such agreements may not, in its view, affect the rights of third parties. The European Communities is concerned that, in certain disputes under Article 21.5, parties have agreed bilaterally to dispense with formal consultations under Article 4 of the DSU. The European Communities considers this to be inconsistent with the DSU and to prejudice third party rights. The European Communities recognizes that this issue was not raised before the Article 21.5 Panel and is not the subject of an appeal. However, the European Communities considers that it would be useful to all Members to have a ruling on this issue and would appreciate a statement from the Appellate Body to the effect that "the parties to a dispute may not enter into agreements regarding the conduct of dispute settlement proceedings that prejudice the rights and interests of other Members, in particular to participate as third parties."[22]

[22]European Communities' third participant's submission, para. 15.

(a) Issuance of NTN-I Bonds Pursuant to Letters of Commitment Issued before 18 November 1999

30. According to the European Communities, the Article 21.5 Panel's finding that Brazil has not withdrawn PROEX subsidies made pursuant to letters of commitment issued before 18 November 1999 was correct, as Brazil continues to "grant" those subsidies within the meaning of Article 3.2 of the *SCM Agreement*. The subsidies are "granted" for the purposes of Article 3.2 when the NTN-I bonds are issued, rather than when the letters of commitment are issued. When the subsidy "exists" under Article 1 is not relevant to this issue.

(b) Are Export Subsidies under PROEX "Permitted" under Item (k) of the Illustrative List?

31. The European Communities agrees with the Article 21.5 Panel's finding that the relationship between the prohibition contained in Article 3.1(a) of the *SCM Agreement* and the Illustrative List is governed exclusively by footnote 5. The interpretation "*a contrario*" of items in the Illustrative List, even in the qualified manner proposed by the United States, would read footnote 5 out of the *SCM Agreement*. Moreover, Brazil does not explain why the drafters would have restricted the scope of footnote 5 to only some of the measures in the Illustrative List.

32. The European Communities agrees with the Article 21.5 Panel's finding that a Member may demonstrate through positive evidence that a net interest rate below the relevant Commercial Interest Reference Rate ("CIRR") established by the *Arrangement on Guidelines for Officially Supported Export Credits* (the "*OECD Arrangement*") is not "used to secure a material advantage in the field of export credit terms". The European Communities considers, nevertheless, that the Article 21.5 Panel failed to formulate and apply the appropriate benchmark in order to assess whether an interest rate

2. United States

(a) Issuance of NTN-I Bonds Pursuant to Letters of Commitment Issued before 18 November 1999

34. The United States submits that in the context of this case, the Article 21.5 Panel's conclusion, that the continued issuance of NTN-I bonds pursuant to letters of commitment issued before 18 November

IV. Issues Raised in this Appeal

38. The following issues are raised in this appeal:

(a) whether the continued issuance of NTN-I bonds, pursuant to letters of commitment issued before 18 November 1999, under the terms and conditions of PROEX as it existed before it was revised, is consistent with the recommendation of the DSB, made pursuant to Article 4.7 of the *SCM Agreement*, to withdraw the measures found to be prohibited export subsidies inconsistent with Article 3.1(a) of the *SCM Agreement*; and

(b) whether payments made under PROEX, as revised by Brazil, are "permitted" under Item (k) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement* (the "Illustrative List").

V. Issuance of NTN-I Bonds Pursuant to Letters of Commitment Issued before 18 November 1999

39. Canada's complaint, on this issue, is limited to the claim that Brazil has failed to "withdraw" the prohibited export subsidies under PROEX that were found by the original panel to be inconsistent with Article 3.1(a) of the *SCM Agreement.* Canada alleges that Brazil has continued, *after NTN(the "77 are "24*

subsidies through the continued issuance of NTN-I bonds, Brazil has failed to implement the recommendation of the DSB that it "withdraw" these export subsidies for regional aircraft under PROEX within 90 days, that is, by 18 November 1999.[26]

41. On appeal, Brazil argues that the Article 21.5 Panel erred in finding that the continued issuance of NTN-I bonds, pursuant to letters of commitment issued *before* 18 November 1999, represents the "grant" of subsidies contingent upon export performance. Brazil argues that the *issuance* of the NTN-I bonds does not involve the "grant" of "PROEX subsidies", because "PROEX subsidies" are "granted" at an earlier stage. Brazil contends that "PROEX subsidies are granted when the Government of Brazil makes a financial contribution 'and a benefit is thereby conferred'"[27]; that is, the subsidies are "granted" when they are deemed to "exist" under Article 1. According to Brazil, "this occurs when a letter of commitment is issued and the transa. nsD is finlizuedebyal contsa.l mdhe

relevant to our inquiry into the issue before us. The export subsidies under PROEX that are at issue in this appeal were found, by the original panel and by us, to be prohibited export subsidies inconsistent with Article 3.1(a) of the *SCM Agreement*. The existence of a "subsidy" was not contested by Brazil in the proceedings before the original panel[33]; and Brazil also conceded before the original panel that subsidies under PROEX were export contingent.[34] The only issue before us now is whether the continued issuance of NTN-I bonds by Brazil *after* 18 November 1999, pursuant to letters of commitment issued *before* 18 November 1999, is consistent with the recommendation of the DSB to "withdraw" the prohibited export subsidies within 90 days.

45. Turning to the ordinary meaning of "withdraw", we observe first that this word has been defined as "remove" or "take away"[35], and as "to take away what has been enjoyed; to take from."[36] This definition suggests that "withdrawal" of a subsidy, under Article 4.7 of the *SCM Agreement*, refers to the "removal" or "taking away" of that subsidy. We observe also that Brazil concedes that it has taken *no action* to implement the recommendation of the DSB with respect to transactions relating to NTN-I bonds issued pursuant to letters of commitment issued before 18 November 1999.[37] In this respect, the Article 21.5 Panel stated that "Brazil does not deny that it continues to issue NTN-I bonds in respect of commitments made prior to 18 November 1999."[38] Thus, NTN-I bonds continue to be issued, after 18 November 1999, on precisely the same terms and conditions as they were before. These bonds, in essence, represent disbursements made under PROEX. The financing institution can choose either to sell the bonds in the market or simply receive payments as they become due.[39] Thus, Brazil is continuing to make payments, after 18 November 1999, under a subsidy programme found to involve prohibited export subsidies inconsistent with Article 3.1(a) of the *SCM Agreement*, namely the PROEX programme as previously constituted. In our view, to continue to make payments under an export subsidy measure found to be prohibited is not consistent with the obligation to "withdraw" prohibited export subsidies, in the sense of "removingubsR paymesubsidh Tj -218

PROEX is not consistent with Brazil's obligations under Article 3.1(a) of the *SCM Agreement*.[43] Brazil maintains, in response, that the revised PROEX is justified by item (k) of the Illustrative List.[44]

49. The original panel found, and Brazil did not contest, that PROEX involves "subsidies" within the meaning of Article 1 of the *SCM Agreement* that are "contingent upon export performance" within the meaning of Article 3.1(a) of that Agreement.[45] The Article 21.5 Panel noted that Brazil did not suggest that the modifications Brazil has since made to PROEX mean that the revised PROEX does not involve export subsidies under Article 3.1(a).[46] Rather, Brazil maintains in these Article 21.5 proceedings that the export subsidies under the revised PROEX are justified by item (k) of the Illustrative List.[47] In this respect, the Article 21.5 Panel also stated that Brazil acknowledged that it is asserting, through its reliance on item (k), an alleged "affirmative defence", and that, therefore, the burden of establishing entitlement to that "defence" is on Brazil.[48]

50. To determine whether Brazil was entitled to the benefit of such a "defence", the Article 21.5 Panel considered the following issues. First, the Article 21.5 Panel stated that Brazil's "defence" depends upon the proposition that the first paragraph of item (k) may be used to establish that an export subsidy within the meaning of item (k) is "permitted" by the *SCM Agreement*. Then, the Article 21.5 Panel stated that Brazil's "defence" depends upon Brazil establishing: (a) that PROEX payments are "the payment by [governments] of all or part of the costs incurred by exporters or financial institutions in obtaining credits" within the meaning of the first paragraph of item (k); and (b) that PROEX payments are not "used to secure a material advantage in the field of export credit terms."[49]

51. The Article 21.5 Panel stated that Brazil's argument "depends upon" Brazil succeeding in its legal and factual arguments on *all three of these issues*.[50] Thus, if Brazil had failed to meet its burden of proof on *any one* of these issues, the Article 21.5 Panel could have rejected Brazil's argument on that basis alone. The Article 21.5 Panel stated that "[i]n this Article 21.5 dispute, however, we have decided to address all three elements of Brazil's defence. In our view, this more comprehensive approach will provide a greater degree of clarity and guidance to the parties in

[43]Article 21.5 Panel Report, para. 6.3.

[44]*Ibid*.

[45]Original panel report, *Brazil – Aircraft*, *supra*, footnote 2, paras. 7.12 and 7.15.

[46]Article 21.5 Panel Report, para. 6.21.

[47]*Ibid*., para. 6.22.

[48]*Ibid*.

[49]*Ibid*.

[50]*Ibid*.

respect of implementation."[51] The Article 21.5 Panel, therefore, examined each of these three issues, and subsequently found that Brazil had not met its burden of proof on any of them. Consequently, the Panel concluded that the revised PROEX was not justified by item (k), and that, therefore, Brazil had not implemented the recommendation of the DSB that it "withdraw" its export subsidies under PROEX within 90 days.

52. Having stated the Article 21.5 Panel's conclusions, we think it useful to summarize the Article 21.5 Panel's reasoning on each of these three issues.

53. As we have noted, the first issue is whether the first paragraph of item (k) of the Illustrative List may be interpreted such that payments *not* "used to secure a material advantage in the field of export credit terms" are "permitted" under the *SCM Agreement.* In examining this issue, the Article 21.5 Panel emphasized the importance of footnote 5 to Article 3.1(a). Footnote 5 provides that: 'Measures *referred to in Annex I as not constituting export subsidies* shall not be prohibited under this or any other provision of this Agreement shau4ow (. In e) Tj 136.5 w0d0 p'6sa87875 Tw ( ) Tj 93 0

> While the financial institutions involved in financing PROEX-supported transactions certainly *provide* export credits, they cannot be seen as *obtaining* such credits. … In short, we do not agree that payments to a lender that amount to interest rate support can reasonably be understood to be payments of all or part of the costs of obtaining export credits.[55]

55. The third issue considered by the Article 21.5 Panel was whether export subsidies under the revised PROEX are "used to secure a material advantage in the field of export credit terms" within the meaning of the first paragraph of item (k) of the Illustrative List. The Article 21.5 Panel said that:

> … a Member may under the first paragraph of item (k) as interpreted by the Appellate Body establish that a payment was not used to secure a material advantage in the field of export credit terms, even if it resulted in a below-CIRR interest rate, if it could establish that the net interest rate resulting from the payment was not lower than the minimum *commercial* interest rate in respect of that currency.[56]

56. In its reasoning on this third issue, the Article 21.5 Panel considered evidence presented by Brazil in support of its argument.[57] The Panel examined the evidence and concluded "that Brazil has failed to demonstrate that PROEX payments are not 'used to secure a material advantage in the field of export credit terms' within the meaning of the first paragraph of item (k)."[58]

57. On appeal, Brazil argues that the Article 21.5 Panel erred in its findings on all three of these issues, and erred also in its finding that the burden of proof under item (k) is on Brazil. First, with regard to whether the first paragraph of item (k) may be used as a basis for arguing that certain export subsidies are "permitted", Brazil submits that the Article 21.5 Panel's reliance on footnote 5 was misplaced. Brazil emphasizes, first of all, that its argument that subsidies under the revised PROEX are "permitted" was not based on footnote 5 but rather on an "*a contrario*" interpretation of the text of the first paragraph of item (k).[59] Second, Brazil argues that the Article 21.5 Panel erred in its finding that Brazil failed to demonstrate that subsidies under the revised PROEX are the "payment" by governments "of all or part of the costs incurred by exporters or financial institutions in obtaining credits" within the meaning of the first paragraph of item (k).[60] And, third, Brazil argues that the

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[55]Article 21.5 Panel Report, para. 6.72.

[56]*Ibid*., para. 6.92.

[57]*Ibid*., paras. 6.94-6.105.

[58]*Ibid*., para. 6.106.

[59]Brazil's appellant's submission, para. 26.

[60]*Ibid*., paras. 35-48.

Article 21.5 Panel erred in finding that Brazil failed to demonstrate that subsidies under the revised PROEX are *not* "used to secure a material advantage in the field of export credit terms." On this third issue, Brazil asserts that the Article 21.5 Panel erred in concluding that a net interest rate that "results from a government guarantee" is not a "commercial" rate.[61] On this issue, in addition, Brazil argues that the Article 21.5 Panel erred in rejecting evidence of a floating rate transaction as irrelevant to a fixed rate transaction.[62] Furthermore, Brazil submits that the Article 21.5 Panel reversed the burden of proof by requiring Brazil to demonstrate that subsidies under the revised PROEX are *not* "used to secure a material advantage in the field of export credit terms."[63]

58. Having stated the Article 21.5 Panel's conclusions, having summarized the Article 21.5 Panel's reasoning in reaching those conclusions, and having summarized Brazil's arguments on appeal with respect to those conclusions, we turn now to our own analysis of these three issues. We note at the 88e1 11.258e1 r"urnagissu respArticle

62. We also indicated, in that Report, that the CIRR represents the *minimum* authorized interest rate that can be offered to borrowers in officially-supported export credit transactions under the *OECD Arrangement*.[68] We then noted that:

> The fact that a particular *net* interest rate is below the relevant CIRR is a *positive indication* that the government payment in that case has been 'used to secure a material advantage in the field of export credit terms'.[69] (emphasis added)

63. The Article 21.5 Panel correctly concluded from our Report in *Brazil – Aircraft* that "the CIRR was not intended as the exclusive and immutable benchmark applicable in all cases."[70] The Article 21.5 Panel then stated that:

> … we consider that a Member may under the first paragraph of item (k) as interpreted by the Appellate Body establish that a payment was not used to secure a material advantage in the field of export credit terms, *even if it resulted in a below-CIRR interest rate*, …[71] (emphasis added)

64. We agree with this legal interpretation by the Article 21.5 Panel of the "material advantage" clause in item (k). Again, as we said in our Report in *Brazil – Aircraft*, the CIRR is "*one example*" of a "market benchmark" that may be used to determine whether a "payment" is used to "secure a material advantage". (emphasis added) The CIRR is a constructed interest rate for a particular currency, at a particular time, that does not always necessarily reflect the actual state of the credit markets.[72] Where the CIRR does not, in fact, reflect the rates available in the marketplace, we believe that a Member should be able, in principle, to rely on evidence from the marketplace itself in order to establish an alternative "market benchmark", on which it might rely in one or more transactions.[73] Thus, the CIRR is not, necessarily, the *sole* "market benchmark" that may be used to determine whether a payment "is used to secure a material advantage in the field of export credit terms", within the meaning of item (k) of the Illustrative List.

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[68]We note that a participant in the *OECD Arrangement* can always offer borrowers officially-supported export credits if, besides respecting the CIRR, it also respects the other "repayment terms and conditions" of the *OECD Arrangement* (see Introduction, *OECD Arrangement*).

[69]Appellate Body Report, *Brazil – Aircraft*, *TD /F1 9.,3B36 (OECD 4j TTc 1.5938foot Tw (2,e th4 Tj 74sects th A1l3198*

normally *below* the relevant CIRR.[80] Instead, Brazil argues that there is an alternative "market benchmark" that is "appropriate", and that the net interest rates under the revised PROEX are at or above this alternative "market benchmark". In Resolution 2667, Brazil identifies the United States Treasury Bond rate plus 20 basis points (0.2 per cent) as the "appropriate" "market benchmark".[81] Before the Article 21.5 Panel, Brazil argued that the enactment of Resolution 2667:

> … means, effectively . . . that no application for PROEX interest equalization support for regional aircraft will be favorably considered unless it reflects a net interest rate to the borrower equal to or more than the 10-year United States Treasury Bond ("T-Bill") plus 0.2 per cent per annum.[82]

Brazil contends, on this basis, that the revised PROEX is *not* "used to secure a material advantage in the field of export credit terms" within the meaning of the first paragraph of item (k) of the Illustrative List.

69. To prove this argument, Brazil must establish *both* of two elements: first, Brazil must prove that it has identified an appropriate "market benchmark"; and, second, Brazil must prove that the net interest rates under the revised PROEX are at or above that benchmark.

70. We consider, first, whether Brazil has established an appropriate "market benchmark", other than the CIRR. In an effort to do so, before the Article 21.5 Panel, Brazil submitted evidence relating to two examples.

71. As its first example, Brazil submitted documentation relating to the terms of an export financing transaction, at a floating interest rate, for large civil aircraft supported by an export credit guarantee from the Export-Import Bank of the United States. Brazil argued before the Article 21.5 Panel that the interest rate for this transaction[83], plus an amount to reflect a one-time guarantee fee Brazil estimated would have been charged by the lender, should be compared to the "minimum" net interest rate for export credits benefiting from payments under the revised PROEX, that is, the 10-year United States Treasury Bond rate plus 20 basis points (or 0.2 per cent). In Brazil's view, the "minimum" net interest rate for PROEX-supported export credits is higher than the net interest rate of

[80]Response of Brazil to Question 1 of the Article 21.5 Panel (Article 21.5 Panel Report, p. 133). We note that on 12 July 2000, the CIRR for export credit transactions of greater than eight and one half years

rather than the *interest rate equalization payments* made under PROEX.[87] We, therefore, have reservations – on which we need not opine – as to the relevance of the Export-Import Bank transaction, relied upon by Brazil, in attempting to establish a "market benchmark" for PROEX.

75. With respect to the second example – Brazil's assertions relating to EDC financing at below the relevant CIRR – we note that Canada has admitted that EDC financing has sometimes been offered at some, unspecified, interest rate below the relevant CIRR.[88] However, Brazil has provided *no evidence* of any specific transaction in which the EDC has offered financing at rates below the relevant CIRR, nor has Brazil offered any evidence of the specific rate actually offered by the EDC in these transactions. In our view, the admission by Canada that EDC has offered, in certain transactions, an unspecified interest rate *somewhere* below the applicable CIRR does not, in any way, identify an alternative *generalized* "market benchmark" below the CIRR. In short, Canada's admission does not explain why the specific interest rate chosen for the revised PROEX – the United States Treasury Bond 10-year rate, plus 20 basis points (or 0.2 per cent) – should be seen as an appropriate "market benchmark".

76. We, therefore, find that Brazil has not established an appropriate "market benchmark" for the revised PROEX under the "material advantage" clause of the first paragraph of item (k) of the Illustrative List. We said Brazil had to prove *both* that it had identified an appropriate "market

C. *Are export subsidies under PROEX "payments" within the meaning of the first paragraph of item (k)?*

78. Brazil also appeals the Article 21.5 Panel's finding that export subsidies under the revised PROEX are not "payments" within the meaning of the first paragraph of item (k). We have found that Brazil has failed to establish that export subsidies under the revised PROEX are not "used to secure a material advantage in the field of export credit terms" within the meaning of the first paragraph of item (k). As we noted earlier, in order to establish a justification under item (k), Brazil was required to prove each of the three issues it argued before the Article 21.5 Panel.[91] As Brazil has failed to prove one of the elements necessary to prove that payments made under the revised PROEX are justified by item (k), we do not believe it is necessary to examine the issue of whether export subsidies under the revised PROEX are "the payment [by governments] of all or part of the costs incurred by exporters or financial institutions in obtaining credits" within the meaning of the first paragraph of item (k). Therefore, we do not address the Article 21.5 Panel's findings[92] on this issue. These findings of the Article 21.5 Panel are moot, and, thus, of no legal effect.

D. *May the first paragraph of item (k) be interpreted to establish that an export subsidy is "permitted"*?

79. Brazil also appeals the Article 21.5 Panel's finding that "the first paragraph of item (k) cannot be used to establish that a subsidy which is contingent upon export performance within the meaning of Article 3.1(a) is 'permitted".[93]

80. If Brazil had demonstrated that the payments made under the revised PROEX were not "used to secure a material advantage in the field of export credit terms", and that such payments were "payments" by Brazil of "all or part of the costs incurred by exporters or financial institutions in obtaining credits", then we would have been prepared to find that the payments made under the revised PROEX are justified under item (k) of the Illustrative List. However, Brazil has not demonstrated that those conditions of item (k) are met in this case. In making this observation, we wish to emphasize that we are not interpreting footnote 5 of the *SCM Agreement*, and we do not opine on the scope of footnote 5, or on the meaning of any other items in the Illustrative List.

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[91]See, *supra*, para. 58.

[92]Article 21.5 Panel Report, para. 6.72.

[93]*Ibid*., para. 6.67. See also, Article 21.5 Panel Report, para. 6.106(ii).

81. However, we do not believe it is necessary for us to rule on these general questions in order to resolve this dispute. We, therefore, hold that the Article 21.5 Panel's finding that "the first paragraph of item (k) cannot be used to establish that a subsidy which is contingent upon export performance within the meaning of Article 3.1(a) is 'permitted'"[94] is moot, and, thus, is of no legal effect.

VII. Findings and Conclusions

82. For the reasons set out in this Report, the Appellate Body:

(a) upholds the conclusion of the Article 21.5 Panel that as a result of the continued issuance by Brazil of NTN-I bonds, after 18 November 1999, pursuant to letters of commitment issued before 18 November 1999, Brazil has failed to implement the recommendation of the DSB that it withdraw the prohibited export subsidies under PROEX within 90 days; and

(b) upholds the Article 21.5 Panel's findings that payments made under the revised PROEX are prohibited by Article 3 of the *SCM Agreement*, and are not justified under item (k) of the Illustrative List, and therefore upholds the Article 21.5 Panel's conclusion that Brazil has failed to implement the recommendation of the DSB that it withdraw the export subsidies for regional aircraft under PROEX within 90 days.

[94] Article 21.5 Panel Report, para. 6.67. See also, Article 21.5 Panel Report, para. 6.106(ii).

Signed in the original at Geneva this 12th day of July 2000 by:

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James Bacchus
Presiding Member

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