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7. The oral hearing in the present appeal was held on 21 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. Arguments of the Participants and the Third Participants

A. *Claims of Error by Appellant – Brazil*

8. Brazil alleges that the Article 21.5 Panel erred in law by failing to observe the clear mandate in its terms of reference[10] and the requirement in Article 21.5 of the DSU that it review the revised TPC programme for its consistency with Article 3.1(a) of the *SCM Agreement.* Instead, the Article 21.5 Panel limited its review to whether the revised TPC was consistent with the recommendations and rulings of the DSB in the original dispute and concluded that "Canada has *implemented the DSB recommendation* in respect of TPC assistance to the Canadian regional aircraft industry."[11] (emphasis added) The Article 21.5 Panel also considered that its review was limited to the specific "factual circumstances" detailed in the original panel report.[12] In conducting its review in this limited fashion, the Article 21.5 Panel rejected certain evidence and legal arguments, raised by Brazil, that related to the consistency of the new measure with Article 3.1(a) of the *SCM Agreement.* In view of these errors, Brazil requests that the Appellate Body reverse the Article 21.5 Panel's findings and conclusions with respect to the revised TPC programme.

9. According to Brazil, Article 21.5 of the DSU requires a panel to conduct a four-part analysis: (i) whether the parties disagree as to (ii) the existence or (

10. This interpretation, Brazil believes, is supported by the context of Article 21.5, namely the overall implementation mechanism detailed in Articles 21 and 22 of the DSU. Monitoring compliance would become meaningless if Members could satisfy their implementation obligations by adopting remedial measures that are inconsistent with their WTO obligations. In that case, a Member would be able to shield its implementation measures from the "expedited" review envisioned in Article 21.5[15] by tailoring measures around the specific "factual circumstances" addressed in the original panel or Appellate Body decisions. The implementing Member may also wish to establish that its implementation measures are WTO-consistent. The review by panels, under Article 21.5, of implementation measures for consistency with the covered agreements also enhances one of the central purposes of the DSU, namely prompt compliance with the recommendations and rulings of the DSB and prompt settlement of WTO disputes.

11. Brazil notes that other Article 21.5 panels have concluded that their mandate included the determination of whether a Member's implementation measures were consistent with the covered agreements, and not just with the specific recommendations and rulings of the DSB and the specific factual circumstances of the original panel and Appellate Body reports.[16]

12. By limiting its review under Article 21.5 of the DSU to whether the revised TPC programme is consistent with the recommendations and rulings of the DSB, the Article 21.5 Panel rejected as irrelevant evidence submitted by Brazil in support of one of its principal legal arguments.[17] The evidence rejected is evidence on the revised TPC's continued "specific targeting" of the aerospace and regional aircraft industries. The Article 21.5 Panel reasoned that the evidence and argument involved "factual circumstances which themselves were not part of our original ruling"[18] and that such, therefore, were "not relevant to the present dispute, which concerns the issue of whether or not

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[15] *Australia – Measures Affecting Importation of Salmon, Recourse to Article 21.5 by Cani34't8r 0m0 TD (*

Canada has *implemented the DSB recommendation* on TPC assistance to the Canadian regional aircraft industry."[19] (emphasis added)

13. Brazil recalls the importance, in the original panel report, of the export-orientation or export propensity of the Canadian regional aircraft industry.[20] This export-orientation is translated into

the conduct of dispute settlement proceedings that prejudice the rights and interests of other Members, in particular to participate as third parties." [21]

20. The European Communities agrees with Brazil that monitoring compliance under Article 21.5 of the DSU should be meaningful and consistent with the DSU's objective of prompt settlement and compliance. The terms of reference of an Article 21.5 panel must be considered to include the "matter" before the original panel, as well as the additional question of whether that "matter" has been properly resolved (existence and consistency of implementation measures). However, Article 21.5 does not allow an examination of claims that could have been – but were not – included in the original panel's terms of reference. Nor could an Article 21.5 review extend to *any* provision of *any* covered agreement, subject only to the terms of reference and the scope of the claim brought under Article 21.5. For instance, it would be inappropriate for Brazil to argue, under Article 21.5 of the DSU, that the revised TPC programme was inconsistent with Article 5 of the *SCM Agreement.*

21. In the present dispute, however, the Article 21.5 Panel was entitled to examine the compatibility of the restructured TPC with Article 3.1(a) of the *SCM Agreement.* In conducting this examination, the Article 21.5 Panel was required to consider all the factual circumstances of the amended programme in order to ensure that the *de facto* export contingency had *in fact* been removed. The European Communities acknowledges that, in its substantive analysis, the Article 21.5 Panel compared the new factual situation with the old, rather than assessing the new factual situation under the *SCM Agreement.* However, since the substance of Brazil's complaint was that in reality "nothing had changed" in the restructured TPC, it is perhaps understandable that the Article 21.5 Panel considered that the questions of the existence of implementation of the DSB's recommendations and rulings and of the conformity with the *SCM Agreement* were very similar, if not the same.

22. The European Communities believes the Article 21.5 Panel correctly understood its mandate under Article 21.5 of the DSU. However, there are indications in its Report, notably in paragraph 5.17, that the Article 21.5 Panel may not have actually applied the appropriate legal standard. The European Communities, nonetheless, considers that the facts before the Article 21.5 Panel did not establish, as a legal matter, that the restructured TPC was inconsistent with Article 3.1(a) of the *SCM Agreement.* Even if the Panel had taken the "specific targeting" into account, this would not have altered the outcome of the case. Canada is not precluded from limiting eligibility for a subsidy to certain sectors or from concentrating funding on certain industries. Moreover, the export-oriented nature of the regional aircraft industry cannot *by itself* justify such a finding.

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

2. United States

23. In its submission, the United States avers that it "has a strong interest in the systemic implications of the issues presented in this appeal."[22] However, the United States does not make

26. Brazil's complaint, in the Article 21.5 proceedings, regarding TPC was limited to the second type of action taken by Canada to comply with the recommendations and rulings of the DSB, namely the restructuring of the TPC programme. Brazil does not disagree with the manner in which Canada has terminated existing TPC activities in the Canadian regional aircraft sector, and the Article 21.5 Panel did not examine those termination measures.

27. Before the Article 21.5 Panel, Brazil made four different arguments to establish that the revised TPC programme involves *de facto* export contingent subsidies that are inconsistent with Article 3.1(a) of the *SCM Agreement*.[25] The Panel considered each of these arguments in turn. For the reasons quoted below, the Article 21.5 Panel declined to examine the substance of the first of the four arguments made by Brazil, namely that the revised TPC programme "specifically targeted" the Canadian regional aircraft industry for assistance because of its export-orientation:

> … the "specific targeting" concept (in those or other words) *did not form part of our reasoning regarding contingency in fact on export performance 7.5 0ort*

prohibited export subsidies.[33] As such, the present proceedings involve only the measures taken by Canada for the purpose of "withdrawing" the prohibited export subsidies through the restructuring of the TPC programme. We are, therefore, not asked, in this appeal, to address any other aspect of Canada's obligation, under Article 4.7 of the *SCM Agreement*, to "withdraw" the measures found to be prohibited export subsidies.

34. Canada restructured the TPC programme by amending TPC's operating documentation, with effect from 18 November 1999. In that respect, Canada introduced, *inter al5 0n*

the *revised* TPC programme, which became effective on 18 November 1999 and which Canada presents as a "measure taken to comply with the recommendations and rulings" of the DSB.

37. Brazil asserts that this revised TPC programme is not "consistent" with Article 3.1(a) of the *SCM Agreement*, and Canada agrees that the Article 21.5 Panel was entitled to examine the revised TPC programme for its "consistency" with Canada's obligations under Article 3.1(a).[35] We agree with the parties that the "consistency" of the revised TPC programme with Article 3.1(a) of the *SCM Agreement* is the relevant issue. Furthermore, in our view, the obligation of the Article 21.5 Panel, in reviewing "consistency" under Article 21.5 of the DSU, was to examine whether the new measure – the revised TPC programme – was "in conformity with", "adhering to the same principles of" or "compatible with" Article 3.1(a) of the *SCM Agreement*.[36] In short, both the DSU and the Article 21.5 Panel's terms of reference required the Article 21.5 Panel to determine whether the revised TPC programme involved prohibited export subsidies within the meaning of Article 3.1(a) of the *SCM Agreement*.

38. We add also that the examination of "measures taken to comply" is based on the relevant facts proved, by the complainant, to the Article 21.5 panel, during the panel proceedings. Therefore, the "minimum implementation standard" that the Article 21.5 Panel expressed and which, it said, was "effectively" agreed between the parties, should be viewed with caution.[37] The Article 21.5 Panel said that Canada's implementation should " '*ensure*' that *future* TPC assistance to the Canadian regional aircraft industry will not be *de facto* contingent on export performance."[38] (emphasis added) The use in this standard of the words "ensure" and "future", if taken too literally, might be read to mean that the Panel was seeking a strict guarantee or absolute assurance as to the *future* application of the revised TPC programme. A standard which, if so read, would, however, be very difficult, if not impossible, to satisfy since no one can predict how unknown administrators would apply, in the unknowable future, even the most conscientiously crafted compliance measure.

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[35]We note that the claim made by Brazil relating to the revised TPC programme, in this Article 21.5 dispute, is the *same* as the claim made by Brazil in the original proceedings in relation to the TPC programme as previously constituted. In both cases, Brazil complained that the measure at issue was inconsistent with Article 3.1(a) of the *SCM Agreement*. These proceedings do not, therefore, involve a claim under a provision of the *SCM Agreement*, or, even, a claim under a covered agreement, that was not examined in the original proceedings in *Canada - Aircraft*.

[36]See the dictionary meanings of "consistency" and "consistent" in *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993), Vol. I, p. 486 and *The Concise Oxford Dictionary* (Clarendon Press, 1995), p. 285. The dictionary meaning of "consistency" includes the "quality" or "state" of "being consistent".

[37]Article 21.5 Panel Report, para. 5.12.

[38]*Ibid*.

39. In conducting its review under Article 21.5 of the DSU, the Article 21.5 Panel declined to examine Brazil's argument that 'the Canadian regional aircraft industry continues to be 'specifically targeted' for TPC assistance because of its undisputed export orientation."[39] The Article 21.5 Panel stated that this argument "did not form part" of the reasoning of the original panel and was "not relevant to the present dispute, which concerns the issue of whether or not Canada *has implemented the DSB recommendation*…".[40] (emphasis added)

40. We have already noted that these proceedings, under Article 21.5 of the DSU, concern the "consistency" of the revised TPC programme with Article 3.1(a) of the *SCM Agreement*.[41] Therefore, we disagree with the Article 21.5 Panel that the scope of these Article 21.5 dispute settlement proceedings is limited to "the issue of whether or not Canada *has implemented the DSB recommendation*". The recommendation of the DSB was that the measure found to be a prohibited export subsidy must be withdrawn within 90 days of the adoption of the Appellate Body Report and the original panel report, as modified – that is, by 18 November 1999. That recommendation to "withdraw" the prohibited export subsidy did not, of course, cover the new measure – because the new measure did not exist when the DSB made its recommendation. It follows then that the task of the Article 21.5 Panel in this case is, in fact, to determine whether the new measure – the revised TPC programme – is consistent with Article 3.1(a) of the *SCM Agreement*.

41. Accordingly, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the "measure taken to comply" may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the "measure taken to comply" will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU.

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[39]Article 21.5 Panel Report, para. 5.16.

[40]*Ibid*., para. 5.17.

[41]*Supra*, para. 37.

42. Consequently, in these proceedings, the task of the Article 21.5 Panel was not limited solely to determining whether the revised TPC programme had been rid of those aspects of the original measure – the TPC programme, as previously constituted – that had been identified in the original proceedings, in the context of all of the facts, as not being consistent with Canada's WTO obligations. Rather, the Article 21.5 Panel was obliged to examine the revised TPC programme for its consistency with Article 3.1(a) of the *SCM Agreement*. The fact that Brazil's argument in these Article 21.5 proceedings "did not form part" of the original panel's reasoning relating to the *previous* TPC programme does not necessarily mean that this argument is "not relevant" to the Article 21.5 proceedings, which relate to the *revised* TPC programme. In our view, the Article 21.5 Panel should have examined the merits of Brazil's argument as it relates to the *revised* TPC programme. We conclude, therefore, that the Article 21.5 Panel erred by declining to examine Brazil's argument that the revised TPC programme "specifically targeted" the Canadian regional aircraft industry for assistance because of its export-orientation.[42]

43. With a view to resolving this dispute, and considering that the undisputed facts on the record are adequate for this purpose, we believe that we should complete the Article 21.5 Panel's analysis by examining this argument. In so doing, we observe that the essence of Brazil's argument is that the Canadian regional aircraft industry is "specifically targeted" for assistance in two different ways under the revised TPC programme.

44. First, Brazil notes that the "Eligible Areas" for TPC assistance include "Aerospace and Defence", and that these industrial sectors are the sole such sectors to be identified expressly as eligible for TPC assistance. The other two "Eligible Areas" are "Environmental Technologies" and "Enabling Technologies", which could involve projects drawn from any industrial sector, including "Aerospace and Defence". In Brazil's view, the express identification of "Aerospace and Defence" as "Eligible Areas" puts these industrial sectors, which include the Canadian regional aircraft industry, in a privileged position and represents "specific targeting" of the Canadian regional aircraft industry. Second, Brazil maintains that the Canadian regional aircraft industry is also "specifically targeted", in practice, through the allocation of TPC funding assistance. According to Brazil, 65 per cent of TPC funding has, in the past, "gone to the [Canadian] aerospace industry".[43]

45. Brazil maintains that the reason for these two types of "targeting" is the high export-orientation of the industry. In support of this argument, Brazil relies on a series of statements made by Canadian Government Ministers, Members of Parliament, other government officials, and by the

[42]Article 21.5 Panel Report, para. 5.18.

[43]Brazil's first submission to the Article 21.5 Panel, para. 21 (Article 21.5 Panel Report, p. 50).

TPC itself, regarding the objectives of TPC.[44] Brazil acknowledges that the statements it relies upon were made in connection with the *old* TPC programme, as *previously* constituted. Brazil argues, nevertheless, that the "specific targeting" is a fact that tends to establish that the revised TPC programme involves subsidies which are *de facto* export contingent.

46. Canada does not contest any of the factual assertions made by Brazil in presenting its "specific targeting" argument. However, Canada emphasizes that the statements Brazil relies upon were made in relation to the *old* TPC programme, not to the *revised* programme. Canada also states that no TPC assistance has been granted or committed under the *revised* TPC programme to the Canadian regional aircraft industry. In other words, Canada asserts that there have been, thus far, no transactions involving the Canadian regional aircraft industry under this new measure. Brazil does not contest this assertion.

47. It is worth recalling that the granting of a subsidy is not, in and of itself, prohibited under the *SCM Agreement*. Nor does granting a "subsidy", without more, constitute an inconsistency with that Agreement. The universe of subsidies is vast. Not all subsidies are inconsistent with the *SCM Agreement*. The only "prohibited" subsidies are those identified in Article 3 of the *SCM Agreement*; Article 3.1(a) of that Agreement prohibits those subsidies that are "contingent, in law or in fact, upon export performance". We have stated previously that "a subsidy is prohibited under Article 3.1(a) if it is 'conditional' upon export performance, that is, if it is 'dependent for its existence on' export performance."[45] We have also emphasized that a "relationship of conditionality or dependence", namely that the granting of a subsidy should be "tied to" the export performance, lies at the "very heart" of the legal standard in Article 3.1(a) of the *SCM Agreement*.[46]

48. To demonstrate the existence of this "relationship of conditionality or dependence", we have also stated that it is *not*

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

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Florentino Feliciano
Presiding Member

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James Bacchus
Member

Claus-Dieter Ehlermann
Member