WORLD TRADE ORGANIZATION

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CANADA – MEASURES AFFECTING THE EXPORT OF CIVILIAN AIRCRAFT

RECOURSE BY BRAZIL TO ARTICLE 21.5 OF THE DSU

AB-2000-4

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

Canada – Measures Affecting the Export of Civilian Aircraft

Recourse by Brazil to Article 21.5 of the DSU

Brazil, *Appellant*
Canada, *Appellee*

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

AB-2000-4

Present:

Feliciano, Presiding Member
Bacchus, Member
Ehlermann, Member

I. Introduction

1. Brazil appeals certain issues of law and legal interpretation in the Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU* (the "Article 21.5 Panel Report").[1] The Article 21.5 Panel was established to consider a complaint by Brazil that certain measures taken by Canada to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB"), in *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*")[2], were not consistent with Article 3.1(a) of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*").

2. The original panel found, *inter alia*, that "Canada Account debt financing since 1 January 1995 for the export of Canadian regional aircraft" and "[Technology Partnerships Canada] assistance to the Canadian regional aircraft industry [constitute] export subsidies inconsistent with Article[s] 3.1(a) and 3.2 of the SCM Agreement" [3]. The original panel concluded that "Canada shall withdraw [these] subsidies … within 90 days." [4]

[1]WT/DS70/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 *Canada – Aircraft* and the original panel report in that dispute, as modified by the Appellate Body Report (Appellate Body Report, *Canada – Aircraft*, WT/DS70/AB/R, adopted 20 August 1999; original panel report, *Canada – Aircraft*, WT/DS70/R, adopted 20 August 1999, as modified by the Appellate Body Report). The DSB recommended that Canada "withdraw" its prohibited export subsidies within 90 days, that is, by 18 November 1999.

[3]Original panel report, *Canada – Aircraft*, para. 10.1.

[4]*Ibid*., para. 10.4.

3. Before the Appellate Body, Canada appealed certain of the original panel's legal interpretations relating to Technology Partnerships Canada ("TPC") assistance. Canada did not appeal the original panel's findings relating to the Canada Account. The Appellate Body upheld the original panel's finding that TPC assistance to the Canadian regional aircraft industry constitutes export subsidies inconsistent with Articles 3.1(a) and 3.2 of the *SCM Agreement*.

4. Canada took steps to implement the recommendations and rulings of the DSB with respect to both the Canada Account and TPC. Taking the view that these measures were not consistent with Article 3.1(a) of the *SCM Agreement*, Brazil requested that the matter be referred to the original panel, pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").[5] On 9 December 1999, in accordance with Article 21.5 of the DSU, the DSB referred the matter to the original panel. The Article 21.5 Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 9 May 2000.

5. The Article 21.5 Panel concluded that:

> … (1) Canada has implemented the 20 August 1999 DSB recommendation that Canada withdraw TPC assistance to the Canadian regional aircraft industry within 90 days, and that (2) Canada has failed to implement the 20 August 1999 recommendation of the DSB that Canada withdraw the Canada Account assistance to the Canadian regional aircraft industry within 90 days.[6]

6. On 22 May 2000, Brazil notified the DSB of its intention to appeal certain issues of law covered in the Article 21.5 Panel Report and legal interpretations developed by the Article 21.5 Panel, pursuant to Article 4.8 of the *SCM Agreement* and paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rules 20 and 31(1) of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). Brazil appeals the Article 21.5 Panel's findings relating to TPC; the Article 21.5 Panel's findings relating to the Canada Account are not appealed by Canada and, therefore, do not form part of this appeal. On 29 May 2000, Brazil filed its appellant's submission.[7] On 5 June 2000, Canada filed an appellee's submission.[8] On the same day, the European Communities and the United States each filed a third participant's submission.[9]

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[5]WT/DS70/9 (23 November 1999).

[6]Article 21.5 Panel Report, para. 6.2.

[7]Pursuant to Rule 21(1) of the *Working Procedures*.

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

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

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 (iii) consistency with a covered agreement of (iv) measures taken to comply with the recommendations and rulings of the DSB. Brazil considers that the sole question in this appeal relates to element (iii). The term "consistency" is defined as "[t]he quality, state, or fact of being consistent; agreement (*with* something, *of* things etc.); uniformity, regularity."[13] The word "consistent" is defined as "[a]greeing in substance or form; congruous, compatible (*with, []to*), not contradictory; marked by uniformity or regularity."[14] The ordinary meaning of Article 21.5, therefore, requires an evaluation of a Member's implementation measures for agreement or congruity with the covered agreements. This could, in the view of Brazil, involve a review of those measures for consistency with *any* provision of *any* covered agreement, subject only to the original panel's terms of reference and the scope of the claim brought under Article 21.5.

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[10]WT/DS70/9 (23 November 1999).

[11]Article 21.5 Panel Report, para. 6.1.

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

[13]Brazil's appellant's submission, para. 16, citing *The New Shorter Oxford English Dictionary* (Fourth Ed. 1993).

[14]*Ibid*.

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

[15]*Australia – Measures Affecting Importation of Salmon, Recourse to Article 21.5 by Canada* ("*Australia – Salmon, Article 21.5*"), WT/DS18/RW, adopted 20 March 2000, para. 7.10.

[16]*Australia – Salmon, Article 21.5*, para. 7.10; *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Recourse to Article 21.5 by Ecuador*, WT/DS27/RW/ECU, adopted 6 May 1999, para. 6.8.

[17]Before the Article 21.5 Panel, Brazil made four arguments with a view to establishing that the revised TPC involves *de facto* export contingent subsidies that are inconsistent with Article 3.1(a) of the *SCM Agreement*. The four arguments that Brazil made were: that the revised TPC programme "specifically targeted" the Canadian regional aircraft industry for assistance because of its export-orientation; the nearness-to-the-market of the projects to be funded by the TPC; the "implicit" inclusion of export performance in the new TPC selection and assessment criteria; and, the absence of complete documentation for the revised TPC programme and the failure to replace all of the documentation relating to the "old" TPC (Brazil's four arguments are summarized in paragraph 5.15 of the Article 21.5 Panel Report and elaborated more fully in paragraphs 5.16, 5.19, 5.27 and 5.35 of the Article 21.5 Panel Report).

[18]Article 21.5 Panel Report, para. 5.17.

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 TPC's funding priorities, which have also not changed with the revised TPC. Since the inception of the programme, Brazil states, 65 per cent of TPC contributions have gone to the aerospace industry. Similarly, Canada has acknowledged that two-thirds of all contributions under the revised TPC will go to that industry. The economic significance of this specific targeting is considerable, since Canada has slated available funds under the revised TPC to increase by 396 per cent between now and 2003. In sum, Brazil argued to the Article 21.5 Panel that where the overwhelming export orientation of an industry has been repeatedly heralded by a government, and cited as its motivation for funding that industry, the continued specific targeting of that industry can serve as a fact from which an inference of *de facto* export contingency can be drawn. The Article 21.5 Panel's erroneous interpretation of the legal standard in Article 21.5, however, prevented it from making this analysis.

14. For these reasons, Brazil requests that the Appellate Body find the Article 21.5 Panel to have been in error, and that it accordingly reverse the Article 21.5 Panel's findings and conclusions with respect to the revised TPC. Brazil acknowledges the difficulty faced by the Appellate Body in completing the Article 21.5 Panel's analysis in this case, in which some facts are in dispute or are not the subject of a specific factual finding by the Article 21.5 Panel.

B. *Arguments by Appellee – Canada*

15. In this proceeding, Brazil claims that the Article 21.5 Panel did not make a determination as to whether the amended TPC programme conforms with Article 3.1 (a) of the *SCM Agreement*, and that this alleged failure constitutes a legal error. In Canada's view, Brazil's appeal is without merit. The Article 21.5 Panel specifically found that Canada had complied with the DSB recommendations regarding TPC assistance. Since the DSB's recommendations in the original dispute *included* a recommendation for Canada to conform TPC assistance to its *obligations under the SCM Agreement*, the Article 21.5 Panel did make the finding that, according to Brazil, the Article 21.5 Panel did not make.

[19]Article 21.5 Panel Report, para. 5.17.

[20]Original panel report, *Canada – Aircraft*, *supra*, footnote 2, para. 9.325.

16. Canada notes that Brazil devotes much time to arguing points that are not disputed by Canada and, more significantly, are not inconsistent with the decision of the Article 21.5 Panel. Canada does not dispute that the mandate of the Article 21.5 Panel was to assess whether Canada's implementation measures comply with the recommendation of the DSB that Canada bring TPC into conformity with Canada's obligations under the *SCM Agreement*.

17. Brazil's arguments that Canada had not eliminated TPC's alleged "targeting" of industries with a propensity to export were rejected because the *same allegations and arguments* had already been considered in the original panel proceedings, where they were found not to form part of the basis for the finding that TPC assistance was export contingent. In rejecting Brazil's claims of "specific targeting", the Article 21.5 Panel was not refusing to consider *new* facts; it was rejecting the need to *re*consider facts and contentions that had not changed. Brazil's argument was precisely that *nothing had changed* regarding the alleged targeting. The Article 21.5 Panel rejected that argument because Brazil was presenting the same allegations that had not been, and continued not to be, a basis for finding export contingency. In fact, Brazil was asking the Article 21.5 Panel to reconsider, and perhaps overrule, the original panel and Appellate Body decisions on a point that Brazil did not appeal during the original proceedings before the Appellate Body.

18. Canada, therefore, requests that the Appellate Body reject Brazil's appeal as there is no basis for Brazil's contention that the Article 21.5 Panel failed to assess whether Canada's "measures taken to comply with the recommendations and rulings" of the DSB were in conformity with the *SCM Agreement*.

C. *Third Participants*

1. European Communities

19. The European Communities begins with comments on the agreement reached between Brazil and Canada, in this dispute, *inter alia*, on the conduct of proceedings under Article 21.5 of the DSU. The European Communities believes that, although parties may make agreements relating to procedural issues in dispute settlement proceedings, such agreements may not affect the rights of third parties. In certain Article 21.5 disputes, 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 prejudicial to third party rights. While this issue was not raised before the Article 21.5 Panel and is not the subject of an appeal, 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." [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 specific arguments on the substantive issues involved. As a result, no arguments by the United States are summarized here.

III. Issue Raised in this Appeal

24. This appeal raises the issue of whether the Article 21.5 Panel erred in finding that Canada had "implemented the recommendation of the DSB concerning TPC assistance to the Canadian regional aircraft industry"[23], in particular, by declining to examine Brazil's argument that the revised TPC programme is inconsistent with Article 3.1(a) of the *SCM Agreement* on the ground that that industry is "specifically targeted" for TPC assistance because of its export-orientation.

IV. Technology Partnerships Canada

25. The original panel found, for the reasons enumerated in paragraph 9.340 of the original panel report, that TPC assistance to the Canadian regional aircraft industry involved subsidies that were contingent, in fact, upon export performance and, thus, inconsistent with Article 3.1(a) of the *SCM Agreement*.[24] The Article 21.5 Panel summarized, as follows, the steps taken by Canada to implement the recommendations and rulings of the DSB regarding TPC:

> 5.3 Canada has taken two types of action in order to implement the recommendation of the DSB concerning TPC assistance to the Canadian regional aircraft industry. First, Canada has terminated existing TPC activities in the Canadian regional aircraft sector. Thus, Canada (1) has cancelled funding under five TPC transactions identified by Canada, (2) has withdrawn approvals-in-principle for two new TPC funding projects in the regional aircraft sector, and (3) has closed all TPC files in the regional aircraft sector.
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> 5.4 Second, Canada has restructured the TPC programme and documentation so that, in its opinion, most of the factual considerations forming the basis for the Panel's finding of *de facto* export contingency no longer apply. According to Canada, the only factual consideration still applicable is the export orientation of the Canadian regional aircraft industry.

[22]United States' third participant's submission, p. 1.

[23]Article 21.5 Panel Report, para. 5.42.

[24]Original panel report, *Canada – Aircraft*, *supra*, footnote 2, para. 9.348.

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 in that dispute*. … That is, of the factual considerations enumerated by us at para. 9.340 of our Report, **none** concerned the alleged targeting of the Canadian aerospace industry generally, or the Canadian regional aircraft industry in particular, by TPC, **none** concerned the amount of total TPC funding directed at the Canadian aerospace or regional aircraft industries, and **none** concerned the fact that the aerospace or regional aircraft industries were eligible for TPC assistance. … Indeed, we consider that the question of whether TPC assistance is "specifically targeted" to the aerospace and regional aircraft industries is not relevant to the present dispute, which concerns the issue of *whether or not Canada has implemented the DSB recommendation* on TPC assistance to the Canadian regional aircraft industry.[26] (italics added)

28. The Article 21.5 Panel next stated that the recommendations and rulings of the DSB:

> … cannot have required Canada to take implementation action to ensure that TPC assistance is not "specifically targeted" at the aerospace and regional aircraft industries, *because such alleged "specific targeting" did not form part of the basis for the finding of de facto export contingency that gave rise to that recommendation*.[27] (emphasis added)

[25]Brazil's four arguments are identified, *supra*, in footnote 17 of this Report. These four arguments are also summarized in paragraph 5.15 of the Article 21.5 Panel Report and elaborated more fully in paragraphs 5.16, 5.19, 5.27 and 5.35 of the Article 21.5 Panel Report.

[26]Article 21.5 Panel Report, para. 5.17.

[27]*Ibid*.

29. The Article 21.5 Panel then held, as regards this argument of Brazil, that:

> … we do not consider it necessary to examine Brazil's argument that "nothing has changed" because TPC assistance continues to "specifically target" the Canadian aerospace and regional aircraft industries.[28]

30. The Article 21.5 Panel went on to examine the merits of Brazil's three other arguments and rejected each of them. The Article 21.5 Panel, therefore, concluded that it was "unable to accept Brazil's claim that Canada has not implemented the recommendation of the DSB concerning TPC assistance to the Canadian regional aircraft industry." [29]

31. Brazil's present appeal is limited to the Article 21.5 Panel's treatment of its argument relating to the "specific targeting" of the Canadian regional aircraft industry because of its export-orientation.[30] On appeal, Brazil submits that the Article 21.5 Panel erred by failing to examine the revised TPC programme for its consistency with Article 3.1(a) of the *SCM Agreement*, as required by Article 21.5 of the DSU and by the Article 21.5 Panel's terms of reference.[31] Instead, Brazil asserts that the Article 21.5 Panel limited its review to an examination only of whether Canada had amended the TPC programme to make it consistent with "the recommendations and rulings of the DSB".[32] Brazil contends that in so doing, the Article 21.5 Panel erred by confining itself to the original panel's findings in *Canada – Aircraft* and by declining to consider Brazil's "specific targeting" argument.

32. Article 4.7 of the *SCM Agreement* provides:

> If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member *withdraw the subsidy* without delay. … (emphasis added)

33. Pursuant to this provision, the recommendations and rulings of the DSB in the original proceedings required Canada to "withdraw" the measure "found to be a prohibited export subsidy". As we have already noted, the Article 21.5 Panel's terms of reference embrace only the measures taken by Canada with a view to restructuring the TPC programme, which was found to involve

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

[29]*Ibid*., para. 5.42.

[30]Brazil's appellant's submission, para. 12, and statement by Brazil at the oral hearing in response to questioning. Brazil appeals the Article 21.5 Panel's treatment of Brazil's "first category of evidence", which related to the fact that "industries eligible for 'new' TPC assistance remain specifically targeted because of their export orientation and the expectation that that export orientation will continue" (Brazil's appellant's submission, para. 9).

[31]WT/DS70/9 (23 November 1999).

[32]Article 21.3 of the DSU.

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 alia*, the following new TPC documents: "Special Operating Agency Framework Document"; "Terms and Conditions"; "Investment Application Guide"; and, "Investment Decision Document". The new TPC "Terms and Conditions" document states that the "granting of contributions will not be contingent, either in law or in fact, upon actual or anticipated export performance" (Section 6.1). This is repeated in the TPC Investment Application Guide (Section 5). Section 5 of that Guide also states that "administering officials will not request or consider information concerning the extent to which applicant or recipient enterprises do or may export."

35. The subject-matter of these proceedings is determined by Article 21.5 of the DSU, as well as, of course, by the Panel's terms of reference. Article 21.5 of the DSU stipulates:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. …

36. Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those "measures *taken to comply* with the recommendations and rulings" of the DSB. In our view, the phrase "measures taken to comply" refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been "taken to comply with the recommendations and rulings" of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures[34]: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the "measures taken to comply" which are – or should be – adopted to *implement* those recommendations and rulings. In these Article 21.5 proceedings, the measure at issue is a new measure,

[33]WT/DS70/9 (23 November 1999). In the document requesting recourse to Article 21.5, Brazil identified the "new terms and conditions and a new administrative framework for the [TPC] program".

[34]We recognize that, where it is alleged that there exist *no* "measures taken to comply", a panel may find that there is *no* new measure.

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* sufficient to show that a subsidy is granted in the knowledge, or with the anticipation, that exports will result.[47] Such knowledge or anticipation does not, taken alone, demonstrate that the granting of the subsidy is "contingent upon" export performance. The second

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[44]Brazil's first submission to the Article 21.5 Panel, para. 19 (Article 21.5 Panel Report, p. 49).

[45]Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* ("*Canada – Automotive Industry*"), WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 123. See also Appellate Body Report, *Canada – Aircraft*, *supra*, footnote 2, para. 166.

[46]Appellate Body Report, *Canada – Aircraft*, *supra*, footnote 2, para. 171; Appellate Body Report, *Canada – Automotive Industry*, *supra*, footnote 45, para. 107. We note that, in our Report, in *Canada – Aircraft*, we said that the distinction between *de facto* and *de jure* contingency lies in the "evidence [that] may be employed to prove that a subsidy is export contingent" (*supra*, footnote 2, para. 167). While *de jure* contingency must be demonstrated on the basis of the "words of the relevant … legal instrument", *de facto* contingency "must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy" (Appellate Body Report, *Canada – Aircraft*, *supra*, footnote 2, para. 167).

[47]Appellate Body Report, *Canada – Aircraft*, *supra*, footnote 2, para. 172.

sentence of footnote 4 of the *SCM Agreement* stipulates, in this regard, that the "*mere fact* that a subsidy is granted to enterprises which export shall not *for that reason alone* be considered to be an export subsidy…". (emphasis added) That fact, by itself, does not, therefore, compel the conclusion that there is a "relationship of conditionality or dependence", such that the granting of a subsidy is "tied to" export performance. However, we have also said that the export-orientation of a recipient "may be taken into account as *a* relevant fact, provided it is one of several facts which are considered and is not the only fact supporting a finding" of export contingency.[48] (underlining added)

49. Recalling all this, at its core, we see Brazil's argument about "specific targeting" essentially as a contention that the *SCM Agreement* precludes the two types of targeting Brazil identifies simply because of the high export-orientation of the Canadian regional aircraft industry. However, in our view, the fact that an industrial sector has a high export-orientation is not, by itself, sufficient to preclude that sector from being expressly identified as an eligible or privileged recipient of subsidies. Nor does the high export-orientation of an industry limit, in principle, the amount of subsidies that may be granted to that industry. As we have said, granting subsidies, in itself, is not prohibited. Under Article 3.1(a) of the *SCM Agreement*, the subsidy must be *export contingent* to be prohibited. The two "targeting" factors *may* very well be relevant to an inquiry under Article 3.1(a) of the *SCM Agreement*, but they do not necessarily provide conclusive evidence that the granting of a subsidy is "*contingent*", "*conditional*" or "*dependent*" upon export performance. In these proceedings, we do not see the two "targeting" factors, by themselves, as adequate proof of prohibited export *contingency*.

50. Moreover, the evidence that Brazil relies upon in seeking to demonstrate that the Canadian regional aircraft industry is "specifically targeted" *because of* its high export-orientation relates to the TPC as *previously* constituted, and not to the *revised* TPC programme.[49] In particular, Brazil relies upon evidence of the high proportion of TPC funding allocated to the Canadian regional aircraft industry under the *old* TPC programme and on statements made in connection with that programme by Canadian Government Ministers, Members of Parliament, officials, and by TPC itself. The burden of explaining the relevance of the evidence, in proving the claim made, naturally rests on whoever presents that evidence. Brazil has not offered any convincing explanation as to why the evidence relating to the *old* TPC programme continues to be relevant to the *revised* TPC programme. We do not believe we should simply assume that this particular evidence is relevant in respect of the revised TPC programme.

[48]Appellate Body Report, *Canada – Aircraft*, *supra*, footnote 2, para. 173.

[49]As we have noted, *supra*, in paragraph 46, Canada asserts that no funding has been granted to the Canadian regional aircraft industry under the revised TPC programme, and Brazil does not contest this assertion.

51. For all these reasons, we find that Brazil has not sufficiently established that the Canadian regional aircraft industry is "specifically targeted" *because of* its high export-orientation.

52. We conclude that Brazil has failed to establish that the revised TPC programme is inconsistent with Article 3.1(a) of the *SCM Agreement*. We also conclude that Brazil has failed to establish that Canada has not implemented the recommendations and rulings of the DSB. The outcome of the present proceedings does not, of course, preclude possible subsequent dispute resolution proceedings regarding the WTO-consistency of the revised TPC programme, or of specific instances of assistance actually granted under that programme.

V. Findings and Conclusions

53. For the reasons set out in this Report, the Appellate Body finds that the Article 21.5 Panel erred by declining to examine Brazil's argument that the revised TPC programme is inconsistent with Article 3.1(a) of the *SCM Agreement* on the ground that the Canadian regional aircraft industry is "specifically targeted" for TPC assistance because of its export-orientation. However, the Appellate Body finds that Brazil has failed to establish that the revised TPC programme is inconsistent with Article 3.1(a) of the *SCM Agreement* and, accordingly, that Brazil has failed to establish that Canada has not implemented the recommendations and rulings of the DSB.

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