

**WORLD TRADE  
ORGANIZATION**

**WT/DS70/AB/R**  
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**CANADA - MEASURES AFFECTING THE EXPORT OF CIVILIAN AIRCRAFT**

**AB-1999-2**

*Report of the Appellate Body*



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WORLD TRADE ORGANIZATION  
APPELLATE BODY

**Canada - Measures Affecting the Export of  
Civilian Aircraft**

Canada, *Appellant/Appellee*  
Brazil, *Appellant/Appellee*

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

AB-1999-2

Present:

Bacchus, Presiding Member  
Feliciano, Member  
Matsushita, Member

**I. Introduction**

1. Canada and Brazil both appeal from certain issues of law and legal interpretations developed in the Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft* (the "Panel Report").<sup>1</sup> The Panel was established by the Dispute Settlement Body (the "DSB"), pursuant to Article 4.4 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") and Article 6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), to examine certain alleged subsidies that Brazil contended Canada or its provinces had granted, inconsistently with its obligations under paragraphs 1(a) and 2 of Article 3 of the *SCM Agreement*, to support the export of civilian aircraft. A brief outline of the factual aspects of the dispute is given at paragraphs 2.1 and 2.2 of the Panel Report.

2. The Panel considered claims made by Brazil relating to the activities of the Export Development Corporation (the "EDC"); the operation of Canada Account; the Canada-Quebec Subsidiary Agreements on Industrial Development; Société de Développement Industriel du Québec; Technology Partnerships Canada ("TPC") and the Defence Industry Productivity Programme, as well as the sale to Bombardier Inc. ("Bombardier"), a Canadian corporation, by the Government of Ontario (through the Ontario Aerospace Corporation) of a 49 per cent interest in de Havilland Holdings Inc. The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 14 April 1999. The Panel found "that Canada Account debt financing since 1 January 1995 for the export of Canadian regional aircraft" and "TPC assistance to the Canadian regional aircraft industry" constitute prohibited export subsidies inconsistent with Articles 3.1(a) and 3.2 of the

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<sup>1</sup>WT/DS70/R, 14 April 1999.

*SCM Agreement*.<sup>2</sup> The Panel rejected all of Brazil's other claims.<sup>3</sup> The Panel recommended that Canada withdraw the prohibited export subsidies "without delay" and, in any event, "within 90 days".<sup>4</sup>

3. On 3 May 1999, Canada notified the DSB of its intention to appeal legal interpretations developed by the Panel, and certain issues of law covered in the Panel Report, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").

4. By joint letter of 5 May 1999, Canada and Brazil informed the Appellate Body that, pursuant to footnote 6 of Article 4 of the *SCM Agreement*, they had decided, by mutual agreement, to extend until 2 August 1999 the time-period provided in Article 4.9 of the *SCM Agreement* for the Appellate Body to issue its decision in this appeal.

5. On 13 May 1999, Canada filed its appellant's submission.<sup>5</sup> On 18 May 1999, pursuant to Rule 23 of the *Working Procedures*, Brazil filed its appellant's submission. On 28 May 1999, Brazil and Canada each filed their respective appellee's submissions<sup>6</sup>, and, on the same date, the European Communities and the United States filed third participants' submissions.<sup>7</sup> The oral hearing, provided for in Rule 27 of the *Working Procedures*, took place on 14 June 1999.

6. As described more fully in Section III of this Report, by joint letter of 27 May 1999, Brazil and Canada requested that the Appellate Body apply, *mutatis mutandis*, the Procedures Governing Business Confidential Information (the "BCI Procedures")<sup>8</sup> adopted by the Panel in this case. A preliminary hearing on this issue was held on 10 June 1999, with this Division sitting jointly with the Division of the Appellate Body hearing the appeal in *Brazil – Export Financing Programme For Aircraft* ("*Brazil – Aircraft*"),<sup>9</sup> and a preliminary ruling was issued by this Division on 11 June 1999.

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<sup>2</sup>Panel Report, para. 10.1.

<sup>3</sup>*Ibid.*

<sup>4</sup>*Ibid.*, paras. 10.3 and 10.4.

<sup>5</sup>Pursuant to Rule 21 of the *Working Procedures*.

<sup>6</sup>Pursuant to Rule 22 of the *Working Procedures*.

<sup>7</sup>Pursuant to Rule 24 of the *Working Procedures*.

<sup>8</sup>The BCI Procedures adopted by the Panel are reproduced in Annex I of the Panel Report.

<sup>9</sup>WT/DS70/AB/R, circulated to Members of the WTO on 2 August 1999.

## II. Arguments of the Participants and the Third Participants

### A. *Claims of Error by Canada – Appellant*

#### 1. Interpretation of "Benefit" in Article 1.1(b) of the *SCM Agreement*

7. Canada argues on appeal that the Panel erred, as a matter of law, in interpreting Article 1 of the *SCM Agreement* by effectively holding that the guidelines set out in Article 14 of the *SCM Agreement* establish the criteria for the determination of "benefit" in Article 1.1. The Panel, Canada asserts, failed to apply the principles of treaty interpretation in customary international law. These principles, set out in part in the *Vienna Convention on the Law of Treaties*<sup>10</sup> (the "*Vienna Convention*"), require that a treaty be interpreted in accordance with the ordinary meaning of its terms, in their context and in the light of its object and purpose. However, the Panel rejected relevant context, did not take into account the object and purpose of the *SCM Agreement*, and, in effect, wrote into the *SCM Agreement* provisions that the Members of the WTO did not negotiate.

8. Canada agreed with the Panel that the ordinary meaning of the term "benefit" is "advantage". The Panel asserted, however, that the existence of a "benefit" can be determined only by assessing "*whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution.*"<sup>11</sup> (emphasis added) The Panel erred in concluding that the existence of a "benefit" should be determined on the basis of "the commercial benchmarks applied in Article 14."<sup>12</sup>

9. Canada maintains that, in interpreting Article 1.1 of the *SCM Agreement*, account must be taken of the "cost to government" of a subsidy and that, therefore, the Panel's focus on Article 14 to the exclusion of "cost to government" amounts to an error in law.

10. Canada contends the Panel erred by reading into Article 1.1 words it does not contain and by asserting that the "only logical basis" for determining the existence of a "benefit" is a commercial benchmark.<sup>13</sup> Canada insists that nothing in Article 1 leads to such a "logical" conclusion.

11. Furthermore, Canada argues that the Panel erred by failing to give full effect to the opening clause of Article 14 ("For the purpose of Part V..."). This clause is a limiting clause that applies to the entirety of Article 14 and means that it has direct relevance only for domestic countervailing duty proceedings. Canada does not, however, dispute that Article 14 may serve as relevant context in the

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<sup>10</sup>Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; (1969) 8 International Legal Materials 679.

<sup>11</sup>Panel Report, para. 9.112.

<sup>12</sup>*Ibid.*, 9.113.

<sup>13</sup>*Ibid.*, para. 9.112.

interpretation of Article 1.1. It is *not*, however, the only element of relevant context. Moreover, Article 14 provides only one methodology for calculating the amount of a subsidy. Nothing in the *SCM Agreement* indicates that the commercial benchmark methodology is the *sole* means of calculating the amount of "benefit" or a subsidy.

12. Canada maintains that the Panel erred in dismissing Canada's argument that Annex IV to the *SCM Agreement* is also relevant context for determining the existence of a "benefit" (or measuring a subsidy). The Panel noted that Annex IV and Article 14 differ because Article 14 explicitly refers to the calculation of "benefit", while Annex IV "refers only to the calculation of the amount of a subsidy".<sup>14</sup> (emphasis in original) This is a misreading of Article 14 because the heading of this provision refers to the calculation of the amount of a *subsidy*. Moreover, both Article 14 and Annex IV have an identical limiting clause ("for the purpose of"). Canada, therefore, believes that both Article 14 and Annex IV constitute relevant context in interpreting Article 1.1.

13. Canada contends that the Panel erred in concluding that incorporating the "cost to government" into Article 1 would "exclude from the definition of 'subsidy' situations explicitly identified in Article 1.1(a)(1) itself as constituting government financial contributions ... ." <sup>15</sup> When a private body is directed or entrusted by the government to make a financial contribution, the private body incurs a cost on behalf of the government. The private body may or may not be compensated by the government, but a cost is nevertheless incurred through government action.

14. Canada maintains that, in the absence of a definition of "benefit" in the *SCM Agreement*, the Panel should have looked to the negotiating history of the *SCM Agreement*. Had it done so, the Panel would have discovered that, during the negotiations, there was disagreement over the appropriate criteria for valuing a subsidy and measuring a "benefit". The final text of the *SCM Agreement* "did not resolve the issue."<sup>16</sup> The *SCM Agreement* reflects, in effect, an agreement to leave the "gaps and ambiguities ... to be decided in a future negotiation."<sup>17</sup> In the meantime, panels should interpret and apply the negotiated text, not write an agreement that the negotiators did not make.

## 2. "Contingent In Fact Upon Export Performance"

15. In Canada's opinion, the Panel's finding that TPC contributions were "contingent ... in fact ... upon export performance" rests on three kinds of evidence:

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<sup>14</sup>Panel Report, para. 9.116.

<sup>15</sup>*Ibid.*, para. 9.115.

<sup>16</sup>Canada's appellant's submission, para. 108.

<sup>17</sup>*Ibid.*, para.109.

- (a) the "export propensity" of the Canadian regional aircraft industry;
- (b) evidence that this "export propensity" was one of the considerations taken into account by the TPC programme administrators and that exports were viewed, by Canadian government officials, as one of the positive achievements and objectives of TPC; and
- (c) evidence that the TPC programme provides assistance for projects that were relatively near to being ready for commercial exploitation.

16. According to Canada, such evidence cannot, as a matter of law, establish that subsidies are "contingent ... in fact ... upon export performance". To establish such a contingency, a complainant must adduce evidence that the subsidy induced the recipient to distort its marketing decisions in favour of exportation over domestic sales. The fact that the recipient industry has a high "export propensity" is not sufficient to establish export contingency.

17. Canada contends that the Panel Report has the effect of converting an enormous class of actionable subsidies into prohibited export subsidies. The *SCM Agreement* makes a fundamental distinction between prohibited and non-prohibited subsidies. The drafters did not intend to prohibit all subsidies to exporters. Rather, they structured the *SCM Agreement* so that most subsidies granted to exporters would be actionable, rather than prohibited. The proper categorization of a subsidy depends on the nature and trade effect of the subsidy, not on whether the recipient is an exporter. Further, the Panel's emphasis on "export propensity" would particularly affect countries with small markets that are highly export dependent, as well as developing countries which export a high proportion of their production.

18. In Canada's view, the expression "contingent ... upon" in Article 3.1, whether *de jure* or *de facto*, is defined by reference to conditionality. The requirements of Article 3.1 are met when a complainant establishes that the subsidy in question would not have been granted but for past or future exportation. A subsidy is "contingent ... in fact ... upon export performance" when the facts and circumstances are such that the recipient will reasonably know that there is a requirement to export, or to undertake export development, for the recipient to benefit from a subsidy.

19. Canada observes that, prior to the conclusion of the *SCM Agreement*, there was no treaty provision prohibiting subsidies "contingent ... in fact ... upon export performance". The negotiating history of this provision of the *SCM Agreement* confirms that the "in fact" language was intended to prevent circumvention of the *de jure* prohibition. It was not a means of expanding the scope of Article 3. Canada draws two conclusions from this. First, there is a single legal standard of "contingency", whether it is contingency in fact or in law. Second, application of that single legal

standard requires an examination of the legal instruments or the administration of the subsidy programme as a whole, and not just of isolated subsidies granted pursuant to the programme.

20. Canada also observes that, during the negotiation of the *SCM Agreement*, the United States advocated a "quantitative" approach to the determination of whether a subsidy was export contingent as well as application of an "export propensity" test. The "export propensity" test was rejected by negotiators because it would be inequitable for small economies that are more dependent on export markets. Furthermore, the negotiators did not consider that an intent-based approach would adequately reflect the scope of the *de jure* prohibition in Article 3. Thus, the negotiating history of footnote 4 confirms that the *de facto* contingency standard is based on the conditions attached to the subsidy and not on either intent or "export propensity". In Canada's view, to satisfy the requirements of the "in fact" standard, *the subsidy must cause the recipient to prefer exports to domestic sales*.

21. Canada argues that the meaning of "anticipated exportation" in footnote 4 was a primary source of the Panel's misinterpretation of Article 3.1. In its view, "anticipated exportation" reflects nothing more than that subsidy programmes which are contingent on export performance may be tied to exports that have not yet taken place. The expression does not create a standard different from that applied to contingency in law, nor does it diminish the requirements of conditionality.

22. In the case of a subsidy to an export-oriented company, it will naturally be expected that exports will continue to be made. But, in Canada's view, absent some understanding *by the company* that it is required to export as a condition of receipt of the subsidy, the subsidy would simply be actionable. Any other understanding of "anticipated exportation" would blur the distinction between prohibited, actionable and non-actionable subsidies.

23. The Panel's misinterpretation of Article 3.1(a), Canada believes, resulted in an erroneous finding that the TPC programme provides subsidies "contingent ... in fact ... upon export performance". The Panel erred in two ways. First, the Panel erred in its interpretation and application of the legal standard of contingency in fact. It did so by confusing the *considerations* that TPC took into account in deciding whether to provide the subsidy with *conditions* or *contingencies*. Second, by misinterpreting what constitutes anticipated export performance, the Panel made export orientation the "effective test" of contingency.<sup>18</sup> The Panel did not consider evidence that, on the basis of uniform criteria, TPC made contributions to enterprises in other sectors that are not export-oriented.

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<sup>18</sup>Canada's appellant's submission, para. 61.

This demonstrates that exportation was not a condition of receipt of TPC contributions. Canada acknowledges that Brazil only challenged TPC contributions to the regional aircraft industry. However, since the criteria applied to all TPC contributions were the same, the Panel should have assessed – but did not – contributions made under TPC as a whole.

24. Canada notes that, in terms of both objectives and contributions made, TPC provides broad support to virtually all industrial sectors. TPC administrators may consider whether a project is likely to build on an export base, sell domestically or produce import substitution. However, none of these considerations is a mandatory condition. There are no rewards or penalties for recipients depending on whether projected export sales targets are achieved. The Panel, however, found "anticipated exportation" to be a condition of the contributions on the basis of "projected export sales".<sup>19</sup> There is, however, no finding of fact that these projections were a condition of receiving TPC contributions. In Canada's opinion, the Panel mistakes trends and possibilities for future requirements or commitments.

25. Canada maintains that, in reaching its finding of *de facto* export contingency, the Panel relies almost exclusively on selective evidence as to the *motivation* underlying TPC contributions. But, even assuming that the motivation was export-related, that motivation is not a *condition* binding the recipient to prefer exportation over domestic sales. The Panel failed to determine whether the recipient would reasonably consider itself as being required, as a condition of receiving the contributions, to make export sales that would not otherwise be made. Canada notes that the Panel stated that "Canada has provided no evidence to ... show that the *export-related considerations*, described above, ... were not also taken into account by the TPC administrators."<sup>20</sup> (emphasis added) Canada insists, though, that Article 3 of the *SCM Agreement* is not concerned with "export-related *considerations*", but with whether export performance is a *condition*.

26. The Panel states that "the closer a subsidy brings a product to sale on the export market, the greater the possibility that the facts may demonstrate that the subsidy" was contingent on export performance.<sup>21</sup> The Panel, therefore, makes a link between "anticipated" exportation and the point in the development of a project at which a subsidy is paid. However, there is nothing in the text of Article 3, its context or its object and purpose, to justify this link. A subsidy granted for pure research could be export contingent, in the same way that a direct sales subsidy need not be. Canada

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<sup>19</sup>Panel Report, para. 9.346.

<sup>20</sup>*Ibid.*, para. 9.344.

<sup>21</sup>*Ibid.*, para. 9.339.

notes that, in terms of Article 8 of the *SCM Agreement* support for "pre-competitive development activity" is non-actionable. To conclude that the short step from pre-competitive development subsidies to "close to the market subsidies" makes the difference between non-actionable and prohibited subsidies is to ignore the role of actionable subsidies.

B. *Arguments by Brazil – Appellee*

1. Interpretation of "Benefit" in Article 1.1(b) of the *SCM Agreement*

27. Although Article 1.1(b) of the *SCM Agreement* defines a subsidy as a government financial contribution conferring an advantage, Brazil argues that the text of that provision gives little further guidance as to the relevant benchmark against which to judge whether an advantage was conferred. Resort to the relevant context is, therefore, required.

28. Brazil notes that the ordinary meaning of the term "confer" is to "[g]ive, grant, or bestow". This verb is, therefore, not self-referential. It implies action by the grantor upon someone else and, thus, implies "benefit to the recipient" – that is, the government, in making a contribution, conferred, gave, granted or bestowed an advantage *upon someone else*. The "cost to government" standard is, by contrast, inherently self-referential. It is concerned with the effect of a government contribution *on the government itself*, rather than on the recipient of the contribution.

29. Brazil maintains that the Panel was justified in accepting Article 14 and rejecting Annex IV as relevant context in interpreting "benefit". Indeed, Brazil notes that Canada accepts that Article 14 of the *SCM Agreement* may serve as relevant context in interpreting Article 1. Although Annex IV.1 relates to the "calculation" of a *subsidy*, Article 14 relates to the calculation of "*benefit*" pursuant to Article 1.1(b). The purpose of Annex IV is to determine whether the value of a subsidy is sufficient to constitute "serious prejudice" in an actionable subsidies case. Article 14, in contrast, is concerned with the calculation of the amount of "benefit" flowing from a government financial contribution, with a view to determining whether there was a "benefit" conferred and therefore a subsidy provided in the first place.

30. Brazil asserts that the Panel's adoption of a "commercial benchmark" standard avoids the problems of both "over-inclusiveness" (that is, prohibiting commercial governmental activity), and "under-inclusiveness".<sup>22</sup> Commercial governmental activity will not be prohibited under the Panel's interpretation because it is not provided on terms more advantageous than those available in the marketplace. However, in Brazil's view, the "cost to government" standard proposed by Canada would be "*under-inclusive*" because it would not cover cases where a government provided funds at

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<sup>22</sup>Brazil's appellee's submission, para. 113.

more than its cost of funds, but with a maximum projected return rate significantly below what a commercial investor would receive. The Panel's approach avoids this problem.

31. Brazil emphasizes that the Panel's rejection of Annex IV as relevant context for the purposes of interpreting the meaning of the term "benefit" under Article 1.1 does not mean that, for the purposes of determining serious prejudice under Article 6.1(a), "cost to government" is irrelevant or, even, excluded.

32. Finally, Brazil argues Canada's claim that the Panel should not fill in the "gaps" in a delicately negotiated agreement, but should let both cost to government and benefit to recipient co-exist is "rather disingenuous".<sup>23</sup> There is no way for both standards to co-exist since the application of one would, in reality, preclude the application of the other. If there were no "cost to government", then the existence of a "benefit" alone would not have sufficed to show the existence of a subsidy and Canada would have prevailed.

## 2. "Contingent In Fact Upon Export Performance"

33. Brazil considers that the Panel found correctly that Article 3.1(a) of the *SCM Agreement* requires conditionality between the subsidy and exportation, irrespective of whether the subsidy is *de facto* or *de jure* contingent on export performance. Footnote 4 of the *SCM Agreement* confirms that the Panel was correct in finding that in the case of a *de facto* export contingent subsidy, the element of conditionality may be between the subsidy and "anticipated" exportation. Therefore, in the view of Brazil, contrary to Canada's claim, the nature of the contingency requirement is not the same for *de jure* and *de facto* contingency.

34. The ordinary meaning of the words "actual" and "anticipated" is, respectively, "[e]xisting in act or fact; real" and "[l]ook forward to; . . . expect", "[t]ake into consideration or mention before the due time", or "[o]bserve or practise in advance of the due time". This meaning speaks to an actor's *expectation* of a future event, such as exports, and it underscores the relevance, in examining *de facto* export contingency, of statements made by the grantor that express its intent, purpose, reasons or motivation in granting the subsidy.

35. Moreover, according to Brazil, contrary to Canada's assertions, the negotiating history of footnote 4, to the extent that it is relevant at all in terms of Article 32 of the *Vienna Convention*, does not demonstrate the rejection of an intent-based approach. Although the word "intended" was removed from an early draft of footnote 4, the word "anticipated" was added. In Brazil's view, this word expressly recognizes the relevance of the grantor's reasons for extending the subsidy.

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<sup>23</sup>Brazil's appellee's submission, para. 123.

36. With respect to Canada's arguments concerning the object and purpose of the *SCM Agreement*, Brazil recalls that the Appellate Body has stated that it is from the text, read in its context, "that the object and purpose of ... the treaty must first be sought".<sup>24</sup> Canada does the reverse. Rather than relying on the object and purpose of the *SCM Agreement* to confirm its interpretation of the text in its context, Canada instead bases its interpretation of the text on the object and purpose of the *SCM Agreement*. The Appellate Body has ruled previously that the object and purpose of a treaty is relevant "[w]here the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired".<sup>25</sup> In Brazil's view, that is not so in the case of either Article 3.1(a) or footnote 4.

37. Brazil makes specific comments on what it regards as Canada's two alternative legal tests for showing *de facto* export contingency. With respect to the first, Canada argues that a panel should determine whether the recipient believed it was required to prefer export over domestic sales or whether the recipient would reasonably have known that there was a requirement to export. Brazil considers that this involves "*subjective judgments* requiring insight into the recipient's thoughts."<sup>26</sup> (emphasis added) However, footnote 4 calls for a review of the "*objective expressions* of the grantor's expectations."<sup>27</sup> (emphasis in original) Furthermore, according to Brazil, Canada's focus on the recipient's, rather than the grantor's, intent finds no support in the text of footnote 4, which speaks directly to actions undertaken by the grantor.

38. Under Canada's second alternative test for showing *de facto* export contingency, a panel should determine whether the subsidy induced distortion of marketing decisions in favour of exportation over domestic sales or whether the recipient would reasonably consider that it was required to make export sales that would not otherwise be made. With respect to this second alternative test, Brazil repeats the observations it made regarding the first test. This second test is also a subjective test that wrongly focuses on the recipient instead of the grantor. In Brazil's view, satisfaction of this test would, in any event, require documentary evidence which Canada did not provide to the Panel.

39. Brazil contends that Canada overlooks the context of Article 3.1(a) that is most critical to this dispute, namely the distinction between *de facto* and *de jure* export contingency. Common to both *de facto* and *de jure* contingency is the requirement to prove the element of contingency. However, footnote 4 of the *SCM Agreement* describes how *de facto* export contingency should be

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<sup>24</sup>*United States - Import Prohibition of Certain Shrimp and Shrimp Products* ("United States – Shrimp"), WT/DS58/AB/R, adopted 6 November 1998, para. 114.

<sup>25</sup>*Ibid.*

<sup>26</sup>Brazil's appellee's submission, para. 34.

<sup>27</sup>*Ibid.*, para. 35.

"demonstrated". According to Brazil, the Panel, mindful of the text of footnote 4, recognized the different nature of the burden imposed on claimants lodging *de facto*, as opposed to *de jure*, claims. In a *de jure* case, conditionality will be evident on the face of the relevant legal text, whereas, in a *de facto* case, the facts must demonstrate the existence of the condition.

40. Brazil explains, furthermore, that facts can demonstrate that a contribution was in fact export contingent, without any one of those facts itself being a condition. There is no qualification in the text of the treaty on what facts can be used to demonstrate the existence of *de facto* export contingency. It was, therefore, permissible for the Panel to consider the relevance of evidence such as the TPC materials, as well as statements made by government officials, that demonstrated the granting authority's expectations.

41. Brazil's observes that the Panel recognized that, under footnote 4 to the *SCM Agreement*, export orientation cannot, on its own, make a subsidy *de facto* export contingent. But the Panel found, nonetheless, that export orientation was still a relevant fact in this dispute. Brazil acknowledges that export orientation would not necessarily be relevant in all cases. Moreover, the Panel's treatment of export orientation in this dispute does not mean that *every* recipient of a financial contribution with export-oriented sales will automatically be considered to have received a prohibited export subsidy. Brazil emphasizes that, in addressing Canada's actions in this dispute, the Panel considered a range of other facts, in addition to export orientation.<sup>28</sup>

42. According to Brazil, preference for near-market projects may reflect a desire for greater certainty about the preferred destination for a product. The Panel determined that as an evidentiary matter, a claim of "anticipation" is stronger if the sale which would realize that anticipation is in view when the subsidy is granted. This consideration was simply additional to others that demonstrated that TPC contributions were *de facto* export contingent. Furthermore, the effect of the Panel's consideration of this additional evidentiary requirement was "to make Brazil's burden of proof more difficult to satisfy."<sup>29</sup>

43. Brazil observes that the Panel recognized that Brazil had challenged the "actual application" of the TPC programme itself. Therefore, the Panel would have been justified in limiting its review solely to TPC contributions to the regional aircraft industry, which was the subject of the dispute.

44. According to Brazil, the Appellate Body should not accept Canada's argument that, the fact that TPC made contributions that were not export contingent, immunized Canada from a challenge in

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<sup>28</sup>Panel Report, paras. 9.340-9.346.

<sup>29</sup>Brazil's appellee's submission, para. 68.

cases where TPC contribution were indeed export contingent. If that view prevailed, only programmes mandating the grant of export subsidies would be open to challenge.

45. Brazil argues that, contrary to Canada's claim, the Panel did consider all of the TPC materials, including the TPC Interim Reference Binder, the TPC Applications Kit, and the TPC Business Plan, and, as a factual matter, determined that this evidence contained facts demonstrating *de facto* export contingency.<sup>30</sup> In any event, "the Panel was not given access to detailed information regarding TPC subsidies to other industries."<sup>31</sup>

C. *Claims of Error by Brazil – Appellant*

1. Drawing Adverse Inferences from Certain Facts

46. Brazil claims on appeal that the Panel erred in law by failing to draw adverse inferences from Canada's refusal to provide information about the EDC's debt financing activities and, in particular, information about the EDC's financing of the purchase from Bombardier of regional jet aircraft by ASA Holdings Inc. and its subsidiary Atlantic Southeast Airlines ("ASA").<sup>32</sup> Brazil requests that the Appellate Body reverse the Panel's conclusion and determine that the evidence on the record, "together with the adverse inferences flowing from Canada's failure to satisfy its duty of collaboration and to respond to the Panel's requests for information, lead to the conclusion that the EDC's debt financing confers a 'benefit'"<sup>33</sup> under Article 1.1(b) of the *SCM Agreement*.

47. According to Brazil, during consultations, "Canada refused to provide to Brazil transaction-specific details of EDC activities in the regional aircraft sector".<sup>34</sup> This was in direct contravention of the Appellate Body's previous statement that parties be "fully forthcoming" and freely disclose facts relating to claims, "in consultations as well as in the more formal setting of panel proceedings".<sup>35</sup> Brazil, therefore, asked the Panel to engage in additional fact-finding and to request Canada to furnish the complete details of, *inter alia*, the EDC's operations relating to the regional aircraft industry. The Panel declined to grant Brazil's request for additional fact-finding.<sup>36</sup>

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<sup>30</sup>Panel Report, para. 9.340.

<sup>31</sup>Brazil's appellee's submission, para. 84.

<sup>32</sup>For further details of the "ASA transaction" see Panel Report, para. 6.56.

<sup>33</sup>Brazil's appellant's submission, para. 84.

<sup>34</sup>*Ibid.*, para. 34.

<sup>35</sup>*India - Patent Protection for Pharmaceutical and Agricultural Chemical Products ("India – Patents")*, WT/DS50/AB/R, adopted 16 January 1998, para. 94.

<sup>36</sup>Panel Report, para. 9.53.

48. According to Brazil, despite the Panel's adoption of the BCI Procedures, Canada "repeatedly refused to provide information dealing with specific transactions".<sup>37</sup> The Panel rejected Canada's justification for its refusals to disclose information<sup>38</sup> and Brazil argues that these refusals were in direct contravention of what Brazil sees as Canada's duty of collaboration under Article 3.10 of the DSU.

49. Brazil maintains that the Panel Report illustrates that Brazil made every attempt to demonstrate, first, that the EDC enjoys discretionary authority to extend financing on terms that would constitute a "benefit", and, second, that the EDC's debt financing was provided to ASA on below-market terms. Brazil could not have presented more evidence without Canada's collaboration. Therefore, Brazil satisfied its burden of production as regards the EDC's debt financing to the extent that it was possible under the circumstances to do so.

50. Brazil argues that Canada was under a legal obligation, under Article 3.10 of the DSU, "to engage in these [dispute settlement] procedures in good faith ...". Brazil notes that this "good faith" obligation places a considerable burden upon Members and it has been the object of rulings by the Appellate Body and previous panels.

51. Brazil observes that the panel in *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* ("*Argentina – Textiles and Apparel*") emphasized the "rule of collaboration" incumbent upon parties to WTO dispute settlement.<sup>39</sup> According to that panel, the rule of collaboration provides that once "the claimant has *done its best* to secure evidence and has actually produced *some prima facie* evidence in support of its case", the respondent has the obligation "to provide the tribunal with relevant documents which are in its sole possession."<sup>40</sup> (emphasis added) Brazil argues that it is clear from the Panel record that Brazil satisfied the threshold requirement set out in the panel report in *Argentina – Textiles and Apparel* and that Canada's duty of collaboration was, therefore, triggered.

52. Brazil asserts that in public international law, the duty of collaboration has been broadly recognized as placing an exceptional burden on parties to international disputes, and is essentially derived from two shortcomings of international litigation. First, the duty of collaboration is imposed on a respondent state to counter the obstacles facing a complainant state in gathering evidence

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<sup>37</sup>Brazil's appellant's submission, para. 38.

<sup>38</sup>Panel Report, paras. 9.69 and 9.347, footnote 633.

<sup>39</sup>Panel report, WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R, para. 6.40.

<sup>40</sup>Panel report, *Argentina – Textiles and Apparel*, *supra*, footnote 39, para. 6.40.

peculiarly within the control of an uncooperative respondent. Second, the duty of collaboration is a response to the inability of international tribunals to compel the production of information.

53. Brazil considers that, because Brazil satisfied its burden of production, it was incumbent on Canada, as a matter of law, to uphold its duty of collaboration by producing all relevant information within its control. Canada expressly refused to do so.<sup>41</sup>

54. In addition to the duty of collaboration, Brazil believes that Canada was under an obligation by virtue of Article 13.1 of the DSU to respond to the Panel's requests for information. Brazil contends that by refusing to produce documents specifically requested by the Panel under Article 13.1 of the DSU, in particular documents relating to the ASA transaction, Canada failed to fulfil its obligation to "respond" under the DSU.

55. Brazil requested the Panel to draw adverse inferences from Canada's refusal to provide information about, in particular, the EDC's financing of the ASA transaction, and to presume that the information withheld constituted inculpatory evidence of Canada's infringement of the *SCM Agreement*.

56. The Panel refused to adopt adverse inferences in connection with the ASA transaction because, it said, "Brazil ha[d] made no attempt to demonstrate that EDC debt financing was provided to ASA on below-market terms", or because Brazil had not shown that "EDC debt financing generally confers a 'benefit'."<sup>42</sup> In so doing, the Panel erred in law. Brazil is concerned that the Panel has provided a "simple and foolproof roadmap for recalcitrant Members to avoid liability for infringements" of the *SCM Agreement*.<sup>43</sup>

57. Brazil maintains that in the absence of a power to compel production of information, the only viable means of enforcing the duty of collaboration and the duty to respond is to employ adverse inferences. Nothing in the DSU or the *SCM Agreement* prohibits the application of adverse inferences. Brazil notes that the Appellate Body has, in fact, recognized the use of similar presumptions. In its recent decision in *Japan – Measures Affecting Agricultural Products* ("*Japan – Agricultural Products*"), for example, the Appellate Body stated that the failure of a responding party to produce documentary evidence, such as studies or reports, supporting a particular phytosanitary testing requirement "would have been a strong indication that there are no such studies or reports".<sup>44</sup>

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<sup>41</sup>Panel Report, para. 9.176.

<sup>42</sup>*Ibid.*, para. 9.181.

<sup>43</sup>Brazil's appellant's submission, para. 76.

<sup>44</sup>Appellate Body Report, WT/DS76/AB/R, adopted 19 March 1999, para. 137.

58. Brazil concludes that the situation in this present case is precisely the type of situation in which, in the words of the International Court of Justice, "a more liberal recourse to inferences of fact" is appropriate.<sup>45</sup> Indeed, adopting adverse inferences to enforce a party's duty to produce evidence peculiarly within its possession is overwhelmingly the rule among those permanent and *ad hoc* international tribunals that have addressed the issue, even where the agreement underlying their jurisdiction does not specifically authorize such action.

59. In support of its position, Brazil cites numerous decisions from the International Court of Justice, the Mexican-United States Claims Commission, the French-Venezuelan Mixed Claims Commission, and the Iran-United States Claims Tribunal.

## 2. EDC Debt Financing

60. Brazil submits that the Panel's conclusion that the EDC's debt financing does not confer a "benefit" is contrary to the facts established by the Panel and the undisputed evidence of record. Brazil emphasizes that it does not challenge the Panel's factual findings. Rather, Brazil challenges the Panel's legal characterization of those factual findings and the legal characterization of the undisputed evidence of record. The Panel's legal characterization of the facts was inconsistent with the definitions of "benefit" and "subsidy", which Brazil argues were correctly set out by the Panel.

61. In seeking to establish that the Panel's legal characterization of the facts was inconsistent with the evidence on the record, Brazil relies on evidence from three sources:

- (a) an EDC Standing Board Resolution and the EDC's support to ASA
- (b) statements by a former EDC President
- (c) a statement by Canada made to the Panel in the course of the dispute

62. Brazil construes the EDC's constituent statute as allowing it to choose whether or not to grant subsidies within the meaning of Article 1.1 of the *SCM Agreement*. Consistent with this discretion, an EDC Standing Board Resolution provides that in appropriate cases, the EDC is authorized to offer financing terms that, in Brazil's view, are more generous than those available on the market.

63. Brazil refers to the *Arrangement on Guidelines for Officially Supported Export Credits of the Organization for Economic Cooperation and Development* (the "*OECD Arrangement*"). The prefatory language of the *OECD Arrangement* states, under the heading "Best Endeavours",

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<sup>45</sup>*The Corfu Channel Case*, 1949 ICJ 4, p. 18.

The Arrangement sets out the most generous repayment terms and conditions that may be supported. All Participants recognise the risk that over time, these maximum repayment terms and conditions may come to be regarded as normal practice. They therefore undertake to take the necessary steps to prevent this risk from materialising.

64. In Brazil's view, as a consequence of this statement, even *meeting* the terms of the *OECD Arrangement* exceeds the outer bounds of what Participants in the *Arrangement* consider "normal" commercial practice. It, therefore, follows that if the EDC offers terms that go beyond the outer bounds of the *OECD Arrangement*, customers of Canadian exporters receive a "benefit", as that term is defined by the Panel.

65. Brazil argues that the Panel erred in concluding that Brazil did not establish that the EDC has exercised this discretionary authority by offering terms going beyond those provided in the *OECD Arrangement*. Brazil introduced uncontested evidence about the one example of the EDC's debt financing to the regional aircraft industry for which a modest amount of public information was available, namely the ASA transaction. The Panel noted that Canada did not contest the evidence regarding the factual elements of the transaction<sup>46</sup>, which included a commitment to finance 16.5-year leases of the aircraft purchased.

66. Brazil submits that these repayment terms go beyond those included in the *OECD Arrangement*, which allows for a maximum repayment term of 10 years.<sup>47</sup> The repayment terms offered in the ASA transaction, therefore, go well beyond the outer bounds of "normal" commercial practice. Thus, under the Panel's market-based legal standard of "benefit" and "subsidy", the evidence demonstrates that the EDC has conferred a "benefit".

67. The former President of the EDC, Mr. Paul Labbé, stated in a publication issued by Canada's Department of Foreign Affairs and International Trade, that:

EDC's financing support gives Canadian exporters an edge when they bid on overseas projects. ...Trade deals increasingly depend on complex and tightly negotiated financing arrangements where a few basis points in interest rates can make or break the deal. Exporters are having to bid not just on the basis of quality and price, but also on the basis of the financing package supporting the sale.<sup>48</sup>

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<sup>46</sup>Panel Report, para. 6.79.

<sup>47</sup>*OECD Arrangement*, Annex III, Part 2, Chapter V, para. 21(a).

<sup>48</sup>Panel Report, para. 6.57.

68. Brazil maintains that the Panel found that it would be possible to conclude from this statement that the EDC's debt financing confers a "benefit" and constitutes a "subsidy". This conclusion is correct, as demonstrated by a review of the three underlying facts acknowledged in the statement:

- First, Canada did not dispute that the "EDC's financing support gives Canadian exporters an edge". An "edge" is an "advantage" and constitutes a subsidy.
- Second, Brazil believes that the Panel found that the "edge" stems from the EDC's "financing support" in the form of, among other things, "a few basis points". This is a subsidy.
- Third, Canada did not dispute that the EDC helps exporters compete "on the basis of the financing package supporting the sale", rather than on the two factors, quality and price", identified by Canada and other Participants in the *OECD Arrangement* as relevant to normal commercial competition. In looking beyond those two factors, the EDC confers a subsidy.

69. Brazil submits that the Panel, however, took the view that there was a "possibility for divergent contextual interpretations" of Mr Labbé's statement and concluded that the EDC's debt financing does not confer a "benefit".<sup>49</sup> The Panel found that Mr Labbé's statement implied two, non-mutually exclusive conclusions. Brazil believes that at least one of those conclusions – that the EDC grants exporters an "edge" in the form of "a few basis points" – required the Panel to determine that the EDC's financing extends assistance at better-than-market rates.

70. Brazil notes also that Canada stated to the Panel that the EDC "does not always offer the most attractive financing package available to regional aircraft customers".<sup>50</sup> The Panel followed this up by asking Canada a question that correctly noted that the statement could mean that the EDC does, "sometimes", provide the most attractive financing package available.<sup>51</sup> If, by Canada's own admission, the EDC "sometimes" offers "the most attractive financing package available", by definition, the EDC sometimes offers terms that are better-than-market.

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<sup>49</sup>Panel Report, para. 9.163.

<sup>50</sup>Canada's second written submission to the Panel, para. 63, footnote 48.

<sup>51</sup>Question 10 of the Questions posed by the Panel at the second Panel meeting with the parties.

71. Thus, in conclusion, Brazil argues the Panel erred in its legal characterization of the facts in the record. Brazil maintains that when applied to the Panel's legal standard, those facts demonstrate that the EDC's debt financing confers a "benefit" and constitutes a "subsidy" within the meaning of Article 1.1 of the *SCM Agreement*. Accordingly, the Panel's legal conclusion on the EDC's debt financing is in error and should be reversed.

3. EDC Equity Financing of CRJ Capital

72. Brazil contends also that, contrary to the Panel's conclusion, the evidence of record concerning the EDC's equity investment, through Exinvest, in CRJ Capital, establishes that this investment confers a "benefit".

73. Brazil originally argued before the Panel that CRJ Capital leased aircraft to customers. However, in response to Canada's denial that CRJ Capital leases aircraft, Brazil emphasized that, whether the financing supports leases of aircraft or, alternatively, sales of aircraft, is irrelevant to Brazil's claim that a "benefit" is conferred by the EDC's equity investment in CRJ Capital.

74. Brazil maintains that 20% of CRJ Capital's total capital is in the form of equity provided by the EDC (10%) and Bombardier (10%), and the remaining 80% is debt from unspecified lenders. This capital structure permits CRJ Capital to provide financing at below-market rates. The only charge on CRJ Capital's total capital, Brazil asserts, is the charge required to service its debt, because equity holders are paid only from profits. Therefore, financing payments from aircraft purchasers, which need only cover the cost to CRJ Capital of its debt, are lower than they would be if, in the absence of the EDC's investment, CRJ Capital had to rely on debt for 100% of its underlying capital.

75. Brazil notes a statement by Richard Dixon, Industry Canada's Director of Airframe Systems, to the effect that CRJ Capital seeks to offer aircraft purchasers with a double-B credit rating financing terms ordinarily available only to double-A credit risks.<sup>52</sup> Canada did not contest this statement. Brazil considers that particular weight should be attached to it, given that it is by a Canadian official and is "against interest".<sup>53</sup> In Brazil's view, offering such preferential credit terms constitutes a "benefit".

76. Brazil requests the Appellate Body to reverse the Panel's finding on this point and determine that the EDC's equity investment in CRJ Capital constitutes a subsidy within the meaning of Article 1.1 of the *SCM Agreement*.

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<sup>52</sup>See Panel Report, para. 6.108.

<sup>53</sup>Brazil's appellant's submission, para. 97.

D. *Arguments by Canada – Appellee*

1. Drawing Adverse Inferences from Certain Facts

77. Canada begins with a review of some of the international law authorities cited by Brazil. According to Canada, Brazil has cited authorities incorrectly, out of context, and for propositions that they do not support. Moreover, some of the authorities cited by Brazil do not involve a tribunal drawing adverse inferences at all, but stand for the proposition that, in the absence of best evidence through no fault of the claimant, a tribunal may make inferences of fact based on the evidence of record. This is not the same as drawing adverse inferences.

78. Canada agrees that the "WTO dispute settlement process cannot function properly unless the parties to the dispute are willing to co-operate. This principle underlies the whole of the DSU."<sup>54</sup> However, this principle of collaboration is, in no way, meant to relieve the claimant of its burden of proof. In the absence of a *prima facie* case presented by the claimant, the respondent is under no obligation to provide any evidence and therefore the duty of collaboration does not arise. According to Kazazi, "the respondent should not be expected to provide any evidence before the claimant presents at least *prima facie* evidence in favour of its case."<sup>55</sup>

79. Canada acknowledges that panels have "comprehensive" authority to seek information under Article 13.1 of the DSU; but that authority is not without limits. A panel's authority under Article 13.1 is qualified by the principles of due process and the fundamental considerations that underlie any judicial system of dispute settlement. One of these considerations is the burden of proof. Canada quotes the Appellate Body in *Japan - Agricultural Products*, to the effect that a panel's authority under Article 13.1 "cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency...".<sup>56</sup> Moreover, information obtained through Article 13.1 cannot be used "to make the case for a complaining party".<sup>57</sup> Canada, therefore, argues that a panel may not engage in a fact-finding mission to assist the complaining party.

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<sup>54</sup>Canada's appellee's submission, para. 103.

<sup>55</sup>Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study of Evidence Before International Tribunals* (Kluwer Law International, 1996), p. 138.

<sup>56</sup>*Supra*, footnote 44, para. 129.

<sup>57</sup>*Ibid.*

80. Canada notes that neither the DSU nor the *SCM Agreement* provides explicit authority for a panel to draw adverse inferences from a party's refusal to produce evidence requested by the panel. However, assuming that this authority may exist, the practice of international tribunals establishes that it arises only when certain requirements have been met.<sup>58</sup> One of the requirements identified by Kazazi is that the claimant must have made a *prima facie* case before adverse inferences can be drawn.<sup>59</sup> This is because in the absence of a *prima facie* case and, therefore, in the absence of the duty to collaborate, a respondent's decision not to provide information should not be perceived adversely. According to Canada, the legal authorities cited by Brazil support this view.

81. Canada argues that even if a *prima facie* case has been made, explanations provided by a respondent for not providing evidence or information should be taken into account by a tribunal. It is only unexplained refusals to produce evidence which may lead to adverse inferences being drawn. Again, Canada considers that authorities cited by Brazil support this view.

82. Canada concludes that in the absence of a *prima facie* case against the EDC's debt financing activities, the duty to collaborate did not arise and, thus, the Panel correctly decided not to draw adverse inferences against Canada. Furthermore, Canada offered two justifications for its refusal to supply information. First, Brazil had not made out a *prima facie* case and, second, the procedures adopted by the Panel for protecting sensitive business confidential information were "inadequate".<sup>60</sup>

83. Whereas Brazil argues that the Panel erred by failing to draw adverse inferences from Canada's refusal to provide requested information, Canada submits that the "real issue" is whether the Panel should have asked Canada to provide the information requested.<sup>61</sup> In the absence of a *prima facie* case against the EDC's debt financing, the Panel's request that Canada provide details of the terms and conditions of the alleged EDC debt financing to ASA was "improper".<sup>62</sup> This request was, in effect, "an initiative by the Panel to advance Brazil's case" and, was therefore inconsistent with Article 13.1 and the rules on burden of proof.<sup>63</sup>

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<sup>58</sup>See Kazazi, *supra*, footnote 55, pp. 320-322.

<sup>59</sup>*Supra*, footnote 55, pp. 321-322.

<sup>60</sup>Canada's appellee's submission, para. 152.

<sup>61</sup>*Ibid.*, para. 127.

<sup>62</sup>*Ibid.*, para. 128.

<sup>63</sup>*Ibid.*, para. 131.

2. EDC Debt Financing

84. According to Canada, Brazil's argument that the EDC's debt financing of the ASA transaction goes beyond the terms of the *OECD Arrangement* is an entirely new issue that was never raised before the Panel. *At no time* did Brazil argue before the Panel that the 10-year term set out in the *OECD Arrangement* sets or exceeds the outer bounds of normal commercial practice. Likewise, *at no time* did Brazil argue that a 16.5-year lease was beyond commercial practice. Canada argues that this new argument cannot, therefore, be an issue of law covered in the panel report, as required for appeals by Article 17.6 of the DSU.

85. Furthermore, Canada maintains that, if Brazil had made these arguments before the Panel, Canada could have readily adduced evidence to demonstrate that a financing term for regional jet aircraft of more than 10 years, and even of up to 18 years, is entirely within the bounds of commercial practice. To that end, Canada cites four transactions, from 1997 and 1998, involving financing terms for aircraft of 15.25 years, 15.5 years, 16.5 years and 18.25 years.

86. Moreover, in Canada's opinion, Brazil bases its argument on the *OECD Arrangement* on the unfounded proposition that the Participants in the *Arrangement* have determined that the *Arrangement's* terms and conditions constitute "normal commercial practice". This argument is not tenable. Nothing in Article 1 of the *SCM Agreement*, or indeed in the *OECD Arrangement* itself, provides that the *Arrangement* may serve as the relevant commercial benchmark for the *SCM Agreement*. A preambular statement in the *OECD Arrangement* is not enough to read into the *SCM Agreement* a benchmark that has not been expressly provided for in that *Agreement*. Moreover, the reference in the preamble of the *OECD Arrangement* to "practice" refers to the practice of "officially supported export credits" and not to "commercial practice". Canada adds that it would, in any event, be unacceptable to define the standards of consistency with a WTO agreement by reference to criteria established by an organization outside the WTO, over which most WTO Members have no control or influence.

87. Canada also asserts that if, as the Panel said, market criteria are to serve as benchmarks for determining whether there is a "benefit", it is nonsensical to argue that the *OECD Arrangement* is a better indicator of the market than the practice of commercial banks, because, in many instances, the market is more generous than the *OECD Arrangement*.

88. Canada is of the view that Brazil's other arguments on the EDC's debt financing are an attempt to have the Appellate Body revisit the evidentiary record that was thoroughly considered by the Panel. Brazil's real challenge, in Canada's view, is to the Panel's weighing of the evidence and to the Panel's discretion to determine what constitutes *prima facie* evidence.

89. Canada recalls that a panel's fact-finding process – the determination of the credibility and weight properly to be ascribed to evidence – is beyond appellate review, unless the panel's fact-finding is so "egregious" that it calls into question the good faith of the panel.<sup>64</sup> A panel's objective assessment of the facts includes the panel's determination of whether a claimant has adduced evidence sufficient to make out a *prima facie* case. It is not a legal error for a panel to accord a different weight to the evidence than that suggested by one of the parties.

90. As for the statement by Mr. Labbé concerning the "edge" provided by the EDC's debt financing, Canada argues that Brazil is challenging the Panel's assessment of the weight of that evidence, rather than its legal characterization. The issue is not whether the statement *itself* amounted to a subsidy. That is, it is not the *legal character of the statement* that Brazil challenges. The Panel considered and weighed the statement in question and found that it was not evidence sufficient to raise a presumption that what Brazil claimed was true. Canada argues that this is a factual finding and clearly outside the scope of appellate review.

91. Canada finds "particularly puzzling" Brazil's claim that a financial institution goes beyond the market by the mere fact of offering the most attractive financing package relative to other market players.<sup>65</sup> When a borrower seeks financing, it will look at a variety of financing options. Choosing the package offered by one lender over another does not mean that the successful lender is "below market". Indeed, if that were the definition of "market", the successful financing party *would always be below the market*. In that case, Canada contends, the financing provided by all state-owned banks and lending institutions would always be, by definition, subsidies.

### 3. EDC Equity Financing of CRJ Capital

92. As regards the proper scope of appellate review, Canada reiterates that a panel's fact-finding process is beyond appellate review, unless the panel's fact-finding is so "egregious" that it calls into question the good faith of the Panel.

93. Canada believes that Brazil's argument on the EDC's equity infusion into CRJ Capital is without merit. The Panel carefully weighed Brazil's evidence, and found it wanting. Brazil has not challenged the Panel's assessment of the facts under Article 11 of the DSU. Accordingly, the Panel's findings of fact are not subject to appellate review. Canada recalls the Panel's finding that there is "*no*

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<sup>64</sup>Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("European Communities – Hormones"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paras. 132 and 133; Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, adopted 17 February 1999, paras. 161 and 162.

<sup>65</sup>Canada's appellee's submission, para. 75.

*factual basis*" to establish a *prima facie* case in terms of Brazil's claim.<sup>66</sup> (emphasis added) As Canada interprets this statement, the Panel, therefore, found that it was unable to attach *any* weight to the evidence supplied by Brazil. To entertain Brazil's appeal, the Appellate Body would have to overturn this appreciation of the evidence.

94. In any event, Canada says, CRJ Capital has only participated in the commercial financing of the sale of 17 regional aircraft for Air Canada. These are domestic sales that, therefore, fall outside of the scope of Article 3 of the *SCM Agreement*. According to Canada, "Brazil has presented no evidence that CRJ Capital has participated in the commercial financing of aircraft for *export*, as indeed it has not."<sup>67</sup> (emphasis added)

E. *Third Participants*

1. European Communities

(a) Interpretation of "Benefit" in Article 1.1(b) of the *SCM Agreement*

95. Canada argues that the notion of "benefit" in Article 1.1(b) required an element of net cost to the government as well as "benefit" to the recipient. The European Communities considers that the criterion of net cost to government is more relevant to the question of financial contribution than it is to "benefit". In this respect, the European Communities believes that the Panel should have examined the issue of cost to government more closely because the Canadian programmes that have been found to be prohibited export subsidies appear to be *self-financing* and, therefore involve no net cost to government.

96. According to the European Communities, the text of Articles 1, 14 and Annex IV of the *SCM Agreement* reflects a delicately negotiated compromise that panels and the Appellate Body should be careful not to upset. It is clear from the text of Article 1.1 that the definition of subsidy requires two elements: a financial contribution by a government and a "benefit" which is *thereby* conferred. The word "thereby" makes clear the need for a causal link between the financial contribution and the "benefit". It is only that part of the financial contribution which confers a "benefit", and only that part of the "benefit" which can be said to result from a financial contribution, that can be considered to constitute a subsidy. In other words, the notions of financial contribution and of "benefit" impart meaning to one another.

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<sup>66</sup>Panel Report, para. 9.200.

<sup>67</sup>Canada's appellee's submission, para. 89.

97. In the view of the European Communities, Annex IV.1 confirms that "cost to government" is the appropriate measure of "financial contribution". Annex IV.1 is, therefore, just as much part of the context of Article 1 as Article 14, and the Panel erred in finding otherwise. Annex IV and Article 14 confirm that when measuring the amount of a subsidy, both the market value of the "benefit" and the cost to the government are relevant. The Panel, therefore, should have examined the *extent* of the financial contribution, that is the cost to government, because only in that way could it have established whether a "benefit" was *thereby* conferred.

98. The European Communities believes that, as an illustrative list of what is *included* within the prohibition of export subsidies, "Annex I cannot be used for the purpose of interpreting Article 1."<sup>68</sup> However, if Annex I were to be accepted as relevant to the interpretation of Article 1, the European Communities would point out that the items contained in Annex I are drafted in terms of cost to the government.

99. The European Communities adds that the Panel's interpretation of Article 1 would have the effect of compromising many types of government activity which do not give rise to a net cost or are indeed profitable and which are undertaken for the "benefit" of industry in situations where government action is more efficient than action of the private sector.

(b) "Contingent In Fact Upon Export Performance"

100. The European Communities agrees with Canada that the Panel has adopted an unjustifiably broad approach to *de facto* export contingency. Like Canada, the European Communities considers that the legal nature of contingency is essentially the same for both *de jure* and *de facto* subsidies. Export performance must be a *condition* for the receipt of the subsidy, or, in other words, the subsidy would not have been granted *but for* the export performance.

101. The European Communities maintains that footnote 4 to the *SCM Agreement* provides further guidance as to the meaning of contingent in fact. As the Panel recognized, the words "tied to" in footnote 4 imply some kind of constraint. The Panel, however, used the language in footnote 4 to develop a legal standard based, not on conditionality, but rather on expectation of exportation.

102. In the European Communities' view, in the present case, the Panel should have compared the situations where TPC assistance was granted with those where it was refused, and looked at the reasons for TPC's decisions. If a consistent pattern emerged of preference being given to applicants because of their commitment to export, this would have indicated *de facto* conditionality. Instead, the Panel declined to examine the operation of the TPC programme in other sectors.

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<sup>68</sup>European Communities' third participant's submission, para. 29.

103. The European Communities is of the view that an indication of *de facto* export contingency might be found if the effect of a subsidy could be demonstrated to increase export effort at the expense of domestic sales. But, this factor should be treated with "great caution".<sup>69</sup> A policy of encouraging global competitiveness is not the same as export contingency, and the fact that a programme of assistance leads to increased exports, even if more rapidly than domestic sales, may be the normal economic consequence of an investment rather than the result of some artificial constraint or condition.

104. According to the European Communities, the object and purpose of the prohibition of *de facto* export contingency is to prevent circumvention of the *de jure* prohibition. The Panel should, therefore, have looked for evidence of conditions that were imposed in the contract that would *in practice* require exportation, albeit without export contingency being an express condition. For example, *de facto* export contingency might be indicated if the recipient were required, in the contract, to achieve certain minimum production and sales targets which could only be achieved through increased export effort and not through domestic sales. A government may also attempt to circumvent the *de jure* prohibition by contractually obliging a company to produce twice as much as it sells domestically. Such a condition will require increased export efforts. A panel could also consider whether the recipient's freedom to direct his sales effort to the domestic or the export market is somehow restricted.

105. The European Communities takes issue with the Panel's reliance on the closeness to export market and of the projects supported by TPC. The closeness of a subsidy to export marketing of a product has no relevance to its export contingency. A subsidy granted for research and development can just as easily be made *de facto* contingent on export performance as a subsidy granted at a later stage in product development.

(c) Drawing Adverse Inferences from Certain Facts

106. The European Communities agrees with Brazil that there is a duty of collaboration on parties to dispute settlement proceedings to provide information that is within their control. The European Communities does not agree that the appropriate remedy for a failure to comply with this obligation is the drawing of adverse inferences, by a panel, unless there is specific legal basis in a covered agreement that empowers a panel to draw such inferences.

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<sup>69</sup>European Communities' third participant's submission, para. 43.

107. The European Communities argues that the *SCM Agreement* provides such an express power in certain circumstances, but in others requires reliance on the facts available.<sup>70</sup> These provisions show that where a power to draw adverse inferences was considered necessary, specific provision was made for it. In the absence of such express provision, as in the present situation, all that a panel can do is base its decision on an objective assessment of the facts available to it, as provided for in Article 11 of the DSU.

108. The European Communities believes that, under Article 11 of the DSU, a panel may draw *logical* inferences from the facts. However, drawing *adverse* inferences is different because it implies a preference for the adverse over the favourable (or simply logical) inference, as a form of "punishment" designed to enforce the duty of collaboration. In addition, the European Communities argues, under Article 11 of the DSU, inferences should be drawn from *facts*, whereas the power to draw adverse inferences applies where a responding party does *not* produce facts to rebut a mere *assertion* made against it.

109. The European Communities concludes that the Appellate Body should reject Brazil's claim that the Panel should have drawn adverse inferences and it should also take this opportunity to reverse the Panel's finding in paragraph 9.181 of the Panel Report that the Panel had the power to draw adverse inferences.

## 2. United States

### (a) Interpretation of "Benefit" in Article 1.1(b) of the *SCM Agreement*

110. The United States argues that the focus of Article 1.1(b) of the *SCM Agreement* is on the advantage conferred on the recipient, and not on the cost to the subsidizing government. A beneficiary is no less advantaged by a subsidy merely because it involved no net cost to the government. Thus, the United States believes that the Panel's interpretation of Article 1.1 was correct and should be sustained.

111. In the view of the United States, the Panel based its interpretation of the term "benefit" on the ordinary meaning of the term, and not on the guidelines set out in Article 14 of the *SCM Agreement*. Thus, contrary to Canada's arguments, the Panel looked to Article 14 only as contextual support for the interpretation it had already reached. Canada is also incorrect in claiming that the Panel failed to consider the object and purpose of the *SCM Agreement*. The Panel did consider it but did not agree

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<sup>70</sup>See Articles 12.7 and 18.6 and Annex V, paras. 6, 7 and 8 of the *SCM Agreement*.

with Canada that the object and purpose of the *SCM Agreement* was the avoidance of a net cost to the government.<sup>71</sup>

112. According to the United States, the fundamental error in Canada's position is its conclusion that the purported failure of the *SCM Agreement* negotiations to resolve the question of how to measure the amount of a subsidy means that there must be both a cost to the government and a "benefit" to the recipient before there can be a "benefit". The United States contends that Canada's attempt to conflate these two unrelated inquiries finds no support in the plain text of Article 1.1.

113. The United States maintains that both Article 14 and Annex IV.1 have relevance to other provisions of the *SCM Agreement*. However, it would be improper to assume that these provisions are relevant in places where, in fact, they are not. For instance, nothing in the language of Annex IV suggests that the "cost to government" standard found there is in any way relevant to determining the existence of a "benefit" under Article 1.1. Indeed, Annex IV.1 never even mentions Article 1.1. In contrast, the United States notes that the text of Article 14 makes an explicit and deliberate link between that provision and Article 1.1.

114. The United States agrees with the Panel's observation that requiring a "cost to government" as a condition for finding a "benefit" would write much of Article 1.1(a)(1)(iv) out of Article 1.1(a). Canada's argument that a private body would incur a cost on *behalf* of a government does not change the fact that there would be no cost to the government itself.

(b) "Contingent In Fact Upon Export Performance"

115. The United States takes no position on whether, as a factual matter, assistance under the TPC programme is, in fact, a prohibited export subsidy. However, the United States strongly disagrees with Canada's interpretation of what constitutes a subsidy that is "contingent ... in fact ... upon export performance" and is "in fact tied to actual or anticipated exportation or export earnings" under Article 3.1(a).

116. According to the United States, Canada's interpretation of contingent in fact upon export performance is "flawed".<sup>72</sup> First, contrary to Canada's assertion, there is no recipient "knowledge test" and a complainant is not required "to plumb the subjective understandings of subsidy recipients".<sup>73</sup>

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<sup>71</sup>See Panel Report, para. 9.119.

<sup>72</sup>United States' third participant's submission, para. 35.

<sup>73</sup>*Ibid.*

Instead, the question is whether the granting of a subsidy is tied to actual or anticipated exportation or export earnings. The focus is, therefore, on the grantor. The recipient's understanding of the government's motivation is irrelevant.

117. Furthermore, in the view of the United States, if the existence of a *de facto* export subsidy were dependent on the subjective understanding of the recipient and on how the recipient reacts after it receives the subsidy, there would be no way for a Member to determine in advance whether granting a particular subsidy would violate Article 3.2 of the *SCM Agreement*. This would undermine the *ex ante* character of the prohibition in Article 3.1 and would place a Member's adherence to WTO obligations in the hands of subsidy recipients.

118. Also, the United States maintains that, contrary to Canada's proposed interpretation, nothing in Article 3.1(a) suggests that a *de facto* export subsidy exists only if the subsidy induced the recipient to distort its marketing decisions in favour of exportation. There is no mention in Article 3.1(a) of the subsidy's effect on the recipient's domestic sales activities, much less any requirement that the complaining Member demonstrate that the recipient increased its exports in order to receive the subsidy.

119. In addition, the United States maintains that Canada ignores that Article 3.1(a) applies to *anticipated* exportation. The ordinary meaning of "anticipate" is to "look forward to; *colloq.* expect." Thus, a *de facto* export subsidy can exist where the granting of a subsidy is tied to *expected* exportation or export earnings. There is no requirement that exportation or export earnings have actually occurred, that penalties be imposed if expectations are not fulfilled, or that the recipient respond to the contribution in a particular way.

120. Finally, the United States argues that "the word 'anticipated' connotes a test based on intent."<sup>74</sup> The United States acknowledges that the final text of footnote 4 does not contain a government "knowledge test", as originally articulated by the European Communities during the negotiation of the *SCM Agreement*. However, the word "anticipated" is, nonetheless, consistent with a test that takes into account the intent of the subsidizing government.

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<sup>74</sup>United States' third participant's submission, para. 39.

(c) Drawing Adverse Inferences from Certain Facts

121. The United States is sympathetic to Canada's concerns about the need to protect business confidential information. It also recognizes that the dispute settlement process could be used improperly by Members to conduct "fishing expeditions" through the files of their adversaries.<sup>75</sup> However, if the dispute settlement process is to be effective, parties to disputes cannot be permitted to frustrate legitimate inquiries through ill-founded claims of business privilege. In this case, the Panel established BCI Procedures that it viewed as sufficient. Given this fact, "the Panel should have required parties to submit relevant information, and should not have permitted the parties to benefit from their refusal to do so".<sup>76</sup>

122. The Panel's approach to this issue has several negative consequences. First, permitting parties to self-select the information that they are willing to provide gives responding Members control of the course of a dispute. Second, since the complaining Member generally bears the burden of proof, responding Members, with a less transparent approach to governing, will be unfairly advantaged vis-à-vis Members with more open systems. This will encourage Members to avoid publicly disclosing their subsidy practices. Third, the overall utility of the dispute settlement provisions is likely to be undermined.

123. In the view of the United States, the Panel's actions point to the importance of establishing formal procedures for protecting business confidential information. Once these procedures are established, parties should not be permitted to refuse to provide business confidential information without consequence. This is not to say that parties will be required to submit business confidential information, "merely that the refusal to do so should entail some negative result".<sup>77</sup>

124. The United States takes no position on Brazil's claim that Canada violated the duty to be fully forthcoming and the duty of collaboration, nor on Brazil's discussion of the duty of collaboration in other international law contexts.

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<sup>75</sup>United States' third participant's submission, para. 47.

<sup>76</sup>*Ibid.*, para. 48.

<sup>77</sup>*Ibid.*, para. 51.

### III. Preliminary Procedural Matter and Ruling

#### A. *Procedures Governing Business Confidential Information*

125. By joint letter of 27 May 1999, Brazil and Canada requested that we apply, *mutatis mutandis*, the BCI Procedures adopted by the Panel in this case. In their request, they also asked that certain of the BCI Procedures be applied to the third participants in this appeal; in particular, that the third participants designate authorized representatives who would be required to file declarations of non-disclosure with the Presiding Member of this Division before being allowed to view any information designated as "business confidential" or to attend portions of the oral hearing when such information may be discussed.

126. By letter of 31 May 1999, we invited the participants to file legal memoranda in support of their request, and offered each an opportunity to respond to the legal memorandum submitted by the other. The third participants were also given an opportunity to file legal memoranda. Brazil and Canada submitted legal memoranda on 2 June 1999. On 4 June 1999, the third participants, the European Communities and the United States, also filed legal memoranda. On the same date, Brazil and Canada each filed a written response to the memorandum previously submitted by the other on 2 June 1999. A preliminary hearing on this issue was held on 10 June 1999, with this Division sitting jointly with the Division of the Appellate Body hearing the appeal in *Brazil - Aircraft*.

#### 1. Arguments of Participants and Third Participants

##### (a) Canada

127. Canada considers that Article 18.2 of the DSU does not provide adequate procedural protection for confidential proprietary business information of the type that is before the Appellate Body in this case. This information is not in the public domain and would be of significant commercial interest, particularly to competitors of the enterprises that it concerns.

128. Canada observes that, in the absence of procedures to protect business confidential information at the appellate review stage, Brazil made references in its other appellant's submission and in its appellee's submission to business confidential information that Canada had submitted to the Panel under the BCI Procedures. The information submitted by Brazil was not, therefore, subject to any procedures to protect its confidentiality. Canada also argues that the Appellate Body should adopt procedures to ensure that the questions it poses at the oral hearing can be given a complete response, where necessary by reference to business confidential information included in the Panel record.

129. In adopting procedures for protecting business confidential information, Canada submits that the Appellate Body must balance two competing interests, both rooted in fairness and due process, and neither having a claim to better protection than the other. First, both the Appellate Body and the participants must be given reasonable access to the information that was introduced into evidence before the Panel. Second, however, additional procedural safeguards are necessary to provide private business interests with adequate protection for their proprietary business information when Canada or Brazil deems it necessary to refer to such evidence in support of its case. Canada, therefore, requests that, pursuant to Rule 16(1) of the *Working Procedures*, the Appellate Body adopt, *mutatis mutandis*, the Panel's BCI procedures and the "Declaration of Non-Disclosure" set out in Annexes I and II of the Panel Report.

(b) Brazil

130. Brazil states that it agreed to join in Canada's request that the Appellate Body adopt procedures for protecting business confidential information as a good faith attempt to accommodate Canada's concerns on confidentiality. Brazil notes two qualifications to its acceptance in principle of the BCI Procedures by the Appellate Body. First, the procedures should not unduly restrict the access of authorized persons to the information. Second, the procedures must be limited to business proprietary information of private parties who are not subject to the confidentiality obligations of the DSU.

131. Brazil recalls that in its submissions to the Appellate Body, it cited certain information that Canada had designated before the Panel as business confidential information. Brazil does not consider that this particular information is, in any sense, business confidential information entitled to special protection.

132. Brazil emphasizes that, in including certain information Canada had designated as "business confidential" before the Panel, in its submissions to the Appellate Body, and in serving those submissions on Canada and on the third participants in this appeal, it did not act inconsistently with either the letter or the spirit of the DSU. Brazil notes that Rule 18(2) of the *Working Procedures* required it to serve its written submissions on Canada as well as the third participants, and Brazil states that it "has no reason to doubt" that the third participants will comply with their obligations under Article VII:1 of the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*Rules of Conduct*"). Brazil maintains as well that the confidentiality provisions of Article 18.2 of the DSU also apply to the third participants.

(c) European Communities

133. The European Communities considers that the BCI Procedures are based on the administrative protective order system used in countervailing duty procedures before the administrative authorities of certain Members of the WTO. This system cannot simply be transplanted into the WTO.

134. The European Communities contends that the proposed procedures for protecting business confidential information are inconsistent with the DSU in two ways. First, the proposed procedures deprive Members of rights contained in the DSU. They are inconsistent with Article 18.1 of the DSU, which forbids *ex parte* communications with a panel or the Appellate Body. In the case of the Appellate Body, the prohibition against *ex parte* communications also extends to third participants under Rule 19(1) of the *Working Procedures*. Such procedures would deny a party to a dispute access to business confidential information if that party could not accept the procedures for protecting business confidential information developed by the panel or the Appellate Body Division. The proposed procedures for protecting business confidential information are also inconsistent with Rule 18(2) of the *Working Procedures*, which requires "every document" filed by a participant or a third participant to be served on the other participants and third participants.

135. Second, the proposed procedures would impose new obligations on Members and create new rights for Members, contrary to Article 3.2 of the DSU. Such additional procedures would restrict access to certain documents to defined places, thereby restricting a party's ability to consider them. They would require the receiving party to permit the providing party to inspect the safe in its Mission where the information is to be stored. The European Communities argues that this is "tantamount to a waiver of the immunity enjoyed by those premises under international law". In addition, the procedures would require officials of the European Communities to sign undertakings incompatible with the "conduct of their duties".

136. The European Communities submits that Articles 14 and 18.2 of the DSU regulate the question of confidentiality in dispute settlement proceedings. If information is designated as confidential by a party to a dispute, Article 18.2 requires the other parties to take all necessary precautions according to their own administrative traditions and structures. The "bad faith" of other Members cannot be presumed. The proper place to resolve problems posed by the treatment of confidential information is in the current review of the DSU by WTO Members.

(d) United States

137. The United States argues that the need for additional procedures for protecting business confidential information is *extremely important*, "because it goes to the viability of WTO dispute settlement as a vehicle for preserving the rights and obligations of Members". In the view of the United States, "basic considerations of due process, as well as the need to preserve rights and obligations of Members, require the Appellate Body to apply such procedures". As a consequence, the United States has no objection to the joint request made by Brazil and Canada.

138. The United States makes three general arguments in support of the use of additional procedures for protecting business confidential information in WTO dispute settlement proceedings. First, the United States argues that nothing in the DSU precludes panels or the Appellate Body from adopting additional procedures for protecting business confidential information. On the contrary, Article 12.1 of the DSU explicitly allows panels to deviate from the working procedures set out in Appendix 3 of the DSU. The United States believes that the Appellate Body has authority comparable to that of panels to adopt such procedures as a result of Article 17.9 of the DSU and Article 16(1) of the *Working Procedures*.

139. Second, the United States argues that the application of procedures for protecting business confidential information promotes important objectives because Members' rights and obligations under the covered agreements can only be preserved if due process is accorded to both the complaining party and the responding party. The United States maintains that the demands of due process are not satisfied, however, if the absence of such procedures precludes a Member from properly making its case.

140. Third, the United States maintains, contrary to the position taken by the European Communities, that a Member's national laws do not provide a basis for depriving another Member of its rights under the *WTO Agreement*. Thus, the United States asserts, the claim by the European Communities that its officials would be unable, under their staff regulations, to accept the undertakings proposed "should not be allowed".

2. Ruling and Reasons

141. In our preliminary ruling of 11 June 1999, we concluded that it is not necessary, under all the circumstances of this case, to adopt *additional* procedures to protect business confidential information in these appellate proceedings. Our ruling was as follows:

Pursuant to Article 17.9 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), the Appellate Body has the authority to draw up its own Working Procedures. Under Rule 16.1 of our *Working Procedures for Appellate Review*, a Division of the Appellate Body may adopt additional procedures for the orderly conduct of a particular appeal, provided that any such additional procedures are not inconsistent with the DSU, the other covered agreements and the *Working Procedures for Appellate Review*. We have concluded, however, that it is not necessary, under all the circumstances of this case, to adopt *additional* procedures to protect "business confidential information" during these appellate proceedings.

We note that, with respect to "business confidential information" submitted to the Panel that remains currently in the possession of the participants, Article XII of the Panel Procedures Governing Business Confidential Information required the parties, "[a]t the conclusion of the Panel", to "return any printed or binary-encoded Business Confidential information in their possession to the party that submitted such Business Confidential (sic)" and to "destroy all tapes and transcripts of the Panel hearings that contain Business Confidential information, unless the parties mutually agree otherwise." It thus appears that each participant has an obligation, under the Panel Procedures, to return any Business Confidential information submitted by the other participant. The WTO Secretariat, assisting the Panel, was required, by the Panel Procedures, to "transmit any printed or binary-encoded Business Confidential information, plus all tapes and transcripts of the panel hearings that contain Business Confidential Information, to the Appellate Body as part of the record of the Panel proceedings." That information will be kept in a secure, locked cabinet in the Appellate Body Secretariat.

We also note that *all* Members are obliged, by the provisions of the DSU, to treat these proceedings of the Appellate Body, including written submissions and other documents filed by the participants and the third participants, as confidential. We are confident that the participants and the third participants in this appeal will *fully respect* their obligations under the DSU, recognizing that a Member's obligation to maintain the confidentiality of these proceedings extends also to the individuals whom that Member selects to act as its representatives, counsel and consultants.

Accordingly, we decline the request of Brazil and Canada. The reasons for this ruling will be set out more fully in the Appellate Body Report in this appeal.

142. We have no further reasons to add to the first two paragraphs of our ruling above. The following is an elaboration of the reasons in the third paragraph of our ruling. Our ruling applies only to the request for *additional* procedures to protect "business confidential information" in these appellate proceedings, and it, therefore, has no effect on the BCI Procedures adopted by the Panel. Neither the Panel's decision to adopt BCI Procedures, nor the content of those Procedures, has been appealed.

143. With respect to appellate proceedings, in particular, the provisions of the DSU impose an obligation of confidentiality which applies to WTO Members generally as well as to Appellate Body Members and staff. In this respect, Article 17.10 of the DSU states, without qualification, that "[t]he proceedings of the Appellate Body shall be confidential." (emphasis added) The word "proceeding" has been defined as follows:

In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, *including all possible steps in an action from its commencement to the execution of judgment.*<sup>78</sup> (emphasis added)

More broadly, the word "proceedings" has been defined as "the business transacted by a court".<sup>79</sup> In its ordinary meaning, we take "proceedings" to include, in an appellate proceeding, any written submissions, legal memoranda, written responses to questions, and oral statements by the participants and the third participants; the conduct of the oral hearing before the Appellate Body, including any transcripts or tapes of that hearing; and the deliberations, the exchange of views and internal workings of the Appellate Body.

144. Article 18.2 of the DSU also contains rules protecting the confidentiality of written submissions and information submitted to the Appellate Body:

*Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.* (emphasis added)

145. In our view, the provisions of Articles 17.10 and 18.2 apply to all Members of the WTO, and oblige them to maintain the confidentiality of any submissions or information submitted, or received, in an Appellate Body proceeding. Moreover, those provisions oblige Members to ensure that such confidentiality is fully respected by any person that a Member selects to act as its representative, counsel or consultant. In this respect, we note, with approval, the following statement made by the panel in *Indonesia – Certain Measures Affecting the Automobile Industry*:

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<sup>78</sup>*Black's Law Dictionary* (West Publishing Co. 1990), p. 1204.

<sup>79</sup>*The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. II, p. 2364.

We would like to emphasize that *all members of parties' delegations - whether or not they are government employees -- are present as representatives of their governments, and as such are subject to the provisions of the DSU and of the standard working procedures, including Articles 18.1 and 18.2 of the DSU and paragraphs 2 and 3 of those procedures.* In particular, parties are required to treat as confidential all submissions to the Panel and all information so designated by other Members; and, in addition, the Panel meets in closed session. Accordingly, *we expect that all delegations will fully respect those obligations and will treat these proceedings with the utmost circumspection and discretion.*<sup>80</sup> (emphasis added)

146. Finally, we wish to recall that Members of the Appellate Body and its staff are covered by Article VII:1 of the *Rules of Conduct*<sup>81</sup>, which provides:

Each covered person *shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential.* (emphasis added)

147. For these reasons, we do not consider that it is necessary, under all the circumstances of this case, to adopt *additional* procedures for the protection of business confidential information in these appellate proceedings. We, therefore, decline the request of Brazil and Canada.

#### **IV. Issues Raised in this Appeal**

148. This appeal raises the following issues:

- (a) whether the Panel erred in its interpretation of the term "benefit" in Article 1.1(b) of the *SCM Agreement*;
- (b) whether the Panel erred in its interpretation and application of the expression "contingent ... in fact ... upon export performance" in Article 3.1(a) of the *SCM Agreement*;
- (c) whether the Panel erred in declining to draw inferences from Canada's refusal to provide information about certain debt financing activities of the EDC;

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<sup>80</sup>Panel report, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 23 July 1998, para. 14.1.

<sup>81</sup>The *Rules of Conduct* have been directly incorporated into the *Working Procedures* (see Rule 8 of those *Working Procedures*).

- (d) whether the Panel erred in finding that certain debt financing activities of the EDC in support of the Canadian regional aircraft industry do not confer a "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement*; and
- (e) whether the Panel erred in finding that the equity investment by the EDC in CRJ Capital does not confer a "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement*.

**V. Interpretation of "Benefit" In Article 1.1(b) of the *SCM Agreement***

149. In interpreting the term "benefit" in Article 1.1(b) of the *SCM Agreement*, the Panel found that:

... the ordinary meaning of "benefit" clearly encompasses some form of advantage. ... In order to determine whether a financial contribution (in the sense of Article 1.1(a)(i)) confers a "benefit", *i.e.*, an advantage, it is necessary to determine whether the financial contribution places the *recipient* in a *more advantageous position than would have been the case but for the financial contribution*. In our view, the only logical basis for determining the position the recipient would have been in absent the financial contribution is the *market*. Accordingly, a financial contribution will only confer a "benefit", *i.e.*, an advantage, if it is *provided on terms that are more advantageous than those that would have been available to the recipient on the market*.<sup>82</sup> (emphasis added)

150. The Panel concluded that the notion of "cost to government" is not relevant to the interpretation and application of the term "benefit", within the meaning of Article 1.1(b) of the *SCM Agreement*.<sup>83</sup> The Panel found contextual support for this reading of "benefit" in Article 14 of the *SCM Agreement*. It also found that Annex IV of that Agreement does not form part of the relevant context of "benefit" in Article 1.1(b).

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<sup>82</sup>Panel Report, para. 9.112. The Panel confirmed its interpretation in similar terms in its conclusion at para. 9.120 of the Panel Report.

<sup>83</sup>*Ibid.*, para. 9.112.

151. Canada appeals the Panel's legal interpretation of the term "benefit" in Article 1.1(b) of the *SCM Agreement*. In Canada's view, the Panel erred in its interpretation of "benefit" by focusing on the commercial benchmarks in Article 14 "to the exclusion of cost to government", and by rejecting Annex IV as relevant context.<sup>84</sup> Canada maintains that Annex IV of the *SCM Agreement* supports the view that "cost to government", which is mentioned in Annex IV, is a legitimate interpretation of the term "benefit". In its appellee's submission, Brazil agrees fully with the Panel's interpretation.

152. Under the heading "*Definition of a Subsidy*", Article 1.1 of the *SCM Agreement* provides, in relevant part:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government") ...

...

and

(b) *a benefit is thereby conferred.* (emphasis added)

153. In addressing this issue, we start with the ordinary meaning of "benefit". The dictionary meaning of "benefit" is "advantage", "good", "gift", "profit", or, more generally, "a favourable or helpful factor or circumstance".<sup>85</sup> Each of these alternative words or phrases gives flavour to the term "benefit" and helps to convey some of the essence of that term. These definitions also confirm that the Panel correctly stated that "the ordinary meaning of 'benefit' clearly encompasses some form of advantage."<sup>86</sup> Clearly, however, dictionary meanings leave many interpretive questions open.

154. A "benefit" does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a "benefit" can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term "benefit", therefore, implies that there must be a recipient. This provides textual support for the view that the focus of the inquiry under Article 1.1(b) of the *SCM Agreement* should be on the recipient and not on the granting authority. The ordinary meaning of the word "confer", as used in Article 1.1(b), bears this out. "Confer" means, *inter alia*,

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<sup>84</sup>Canada's appellant's submission, paras. 98 and 102.

<sup>85</sup>*The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 214; *The Concise Oxford Dictionary*, (Clarendon Press, 1995), p. 120; *Webster's Third New International Dictionary* (unabridged), (William Benton, 1966), Vol. I, p. 204.

<sup>86</sup>Panel Report, para. 9.112.

"give", "grant" or "bestow".<sup>87</sup> The use of the past participle "conferred" in the passive form, in conjunction with the word "thereby", naturally calls for an inquiry into *what was conferred on the recipient*. Accordingly, we believe that Canada's argument that "cost to government" is one way of conceiving of "benefit" is at odds with the ordinary meaning of Article 1.1(b), which focuses on the *recipient* and not on the *government* providing the "financial contribution".

155. We find support for this reading of "benefit" in the context of Article 1.1(b) of the *SCM Agreement*. Article 14 sets forth guidelines for calculating the amount of a subsidy in terms of "the benefit to the recipient". Although the opening words of Article 14 state that the guidelines it establishes apply "[f]or the purposes of Part V" of the *SCM Agreement*, which relates to "countervailing measures", our view is that Article 14, nonetheless, constitutes relevant context for the interpretation of "benefit" in Article 1.1(b). The guidelines set forth in Article 14 apply to the calculation of the "benefit to the recipient conferred pursuant to paragraph 1 of Article 1". (emphasis added) This explicit textual reference to Article 1.1 in Article 14 indicates to us that "benefit" is used in the same sense in Article 14 as it is in Article 1.1. Therefore, the reference to "benefit to the recipient" in Article 14 also implies that the word "benefit", *as used in Article 1.1*, is concerned with the "benefit to the recipient" and not with the "cost to government", as Canada contends.

156. The structure of Article 1.1 as a whole confirms our view that Article 1.1(b) is concerned with the "benefit" to the recipient, and not with the "cost to government". The definition of "subsidy" in Article 1.1 has two discrete elements: "a financial contribution by a government or any public body" and "a benefit is thereby conferred". The first element of this definition is concerned with whether the *government* made a "financial contribution", as that term is defined in Article 1.1(a). The focus of the first element is on the action of the government in making the "financial contribution". That being so, it seems to us logical that the second element in Article 1.1 is concerned with the "benefit... conferred" on the *recipient* by that governmental action. Thus, subparagraphs (a) and (b) of Article 1.1 define a "subsidy" by reference, first, to the action of the granting authority and, second, to what was conferred on the recipient. Therefore, Canada's argument that "cost to government" is relevant to the question of whether there is a "benefit" to the *recipient* under Article 1.1(b) disregards the overall structure of Article 1.1.

157. We also believe that the word "benefit", as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient "better off" than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in

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<sup>87</sup>*The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993) Vol. I, p. 474; *The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 278; *Webster's Third New International Dictionary*, (William Benton, 1966), Vol. I, p. 475.

determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.

158. Article 14, which we have said is relevant context in interpreting Article 1.1(b), supports our view that the marketplace is an appropriate basis for comparison. The guidelines set forth in Article 14 relate to equity investments, loans, loan guarantees, the provision of goods or services by a government, and the purchase of goods by a government. A "benefit" arises under each of the guidelines if the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.

159. Canada has argued that the Panel erred in failing to take account of paragraph 1 of Annex IV as part of the relevant context of the term "benefit". We fail to see the relevance of this provision to the interpretation of "benefit" in Article 1.1(b) of the *SCM Agreement*. Annex IV provides a method for calculating the total *ad valorem* subsidization of a product under the "serious prejudice" provisions of Article 6 of the *SCM Agreement*, with a view to determining whether a subsidy is used in such a manner as to have "adverse effects". Annex IV, therefore, has nothing to do with whether a "benefit" has been conferred, nor with whether a measure constitutes a subsidy within the meaning of Article 1.1. We agree with the Panel that Annex IV is not useful context for interpreting Article 1.1(b) of the *SCM Agreement*.

160. Canada insists that the concept of "cost to government" is relevant in the interpretation of "benefit". We note that this interpretation of "benefit" would exclude from the scope of that term those situations where a "benefit" is conferred by a private body under the direction of government. These situations cannot be *excluded* from the definition of "benefit" in Article 1.1(b), given that they are specifically *included* in the definition of "financial contribution" in Article 1.1(a)(iv). We are, therefore, not persuaded by this argument of Canada.

161. In light of the foregoing, we find that the Panel has not erred in its interpretation of the word "benefit", as used in Article 1.1(b) of the *SCM Agreement*.

## VI. "Contingent In Fact Upon Export Performance"

162. The Panel held that a subsidy is "contingent ... in fact ... upon export performance" under Article 3.1(a) of the *SCM Agreement* if there is a relationship of conditionality or dependence "between the grant of the subsidy and the 'anticipated exportation or export earnings'".<sup>88</sup> The Panel stated that it could:

... examine most effectively whether there exists the requisite conditionality between the grant of TPC assistance to the Canadian regional aircraft industry and anticipated exportation or export earnings, by determining whether the facts demonstrate that such TPC assistance would not have been granted to the regional aircraft industry but for anticipated exportation or export earnings.<sup>89</sup> (emphasis in original)

With respect to demonstrating *de facto* export contingency, the Panel held that:

... it is clear from the ordinary meaning of footnote 4 that any fact could be relevant, provided it "demonstrates" (either individually or in conjunction with other facts) whether or not a subsidy would have been granted but for anticipated exportation or export earnings. We consider that this is true of the export-orientation of the recipient, or of the reason for the grant of the subsidy, just as it is true of a host of other facts potentially surrounding the grant of the subsidy in question. In any given case, the relative importance of each fact can only be determined in the context of that case, and not on the basis of generalities.<sup>90</sup> (emphasis in original)

The Panel also opined that:

... the closer a subsidy brings a product to sale on the export market, the greater the possibility that the facts may demonstrate that the subsidy would not have been granted but for anticipated exportation or export earnings. Conversely, the further removed a subsidy is from sales on the export market, the less the possibility that the facts may demonstrate that the subsidy would not have been granted but for anticipated exportation or export earnings.<sup>91</sup>

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<sup>88</sup>Panel Report, para. 9.331.

<sup>89</sup>*Ibid.*, para. 9.332.

<sup>90</sup>*Ibid.*, para. 9.337.

<sup>91</sup>*Ibid.*, para. 9.339.

163. On this basis, and after examination of the facts before it, the Panel found that "TPC assistance to the Canadian regional aircraft industry is 'contingent...in fact...upon export performance' within the meaning of Article 3.1(a) of the SCM Agreement."<sup>92</sup>

164. Canada appeals the Panel's finding that TPC assistance is "contingent ... in fact ... upon export performance". Canada argues, *inter alia*, that a subsidy is "contingent ... in fact ... upon export performance" when "the facts and circumstances are such that the recipient will reasonably know that there is a requirement to export ...".<sup>93</sup> Canada maintains that the Panel made the export orientation of the Canadian regional aircraft industry the "effective test" of *de facto* export contingency.<sup>94</sup> Canada also argues that the Panel erred in concluding that "the closer a subsidy brings a product to sale on the export market, the greater the possibility that the facts may demonstrate that the subsidy would not have been granted but for anticipated exportation or export earnings."<sup>95</sup> Canada contends further that the Panel "confus[ed]" *considerations* taken into account by TPC with *conditions* based on export performance.<sup>96</sup> Finally, Canada maintains that the Panel erred because it gave "no indication that ... the operation of the TPC programme as a whole" had been considered.<sup>97</sup> For its part, Brazil agrees fully with the Panel's interpretation and application of the expression "contingent ... in fact ... upon export performance".

165. Article 3.1 of the *SCM Agreement* provides, in pertinent part:

Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

- (a) subsidies contingent, in law or in fact<sup>4</sup>, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I ...

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<sup>4</sup>This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. 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 within the meaning of this provision.

Article 3.2 adds that "[a] Member shall neither grant nor maintain subsidies referred to in paragraph 1."

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<sup>92</sup>Panel Report, para. 9.347.

<sup>93</sup>Canada's appellant's submission, para. 30.

<sup>94</sup>*Ibid.*, para. 61.

<sup>95</sup>Panel Report, para. 9.339.

<sup>96</sup>Canada's appellant's submission, para. 59.

<sup>97</sup>*Ibid.*, para. 77.

166. In confronting this issue, we start our interpretive task once more by examining the ordinary meaning of the treaty text. In our view, the key word in Article 3.1(a) is "contingent". As the Panel observed, the ordinary connotation of "contingent" is "conditional" or "dependent for its existence on something else".<sup>98</sup> This common understanding of the word "contingent" is borne out by the text of Article 3.1(a), which makes an explicit link between "contingency" and "conditionality" in stating that export contingency can be the sole or "one of several other *conditions*".

167. Article 3.1(a) prohibits *any* subsidy that is contingent upon export performance, whether that subsidy is contingent "in law or in fact". The Uruguay Round negotiators have, through the prohibition against export subsidies that are contingent *in fact* upon export performance, sought to prevent circumvention of the prohibition against subsidies contingent *in law* upon export performance.<sup>99</sup> In our view, the legal standard expressed by the word "contingent" is the same for both *de jure* or *de facto* contingency. There is a difference, however, in what evidence may be employed to prove that a subsidy is export contingent. *De jure* export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument. Proving *de facto* export contingency is a much more difficult task. There is no single legal document which will demonstrate, on its face, that a subsidy is "contingent ...in fact ... upon export performance". Instead, the existence of this relationship of contingency, between the subsidy and export performance, must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case.

168. Recognizing the difficulties inherent in demonstrating *de facto* export contingency, the Uruguay Round negotiators provided a standard, in footnote 4 of the *SCM Agreement*, for determining when a subsidy is "contingent ... in fact ... upon export performance". Footnote 4 reads:

This *standard is met* when the *facts demonstrate* that the *granting* of a subsidy, without having been made legally contingent upon export performance, is *in fact tied to actual or anticipated exportation or export earnings*. 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 within the meaning of this provision. (emphasis added)

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<sup>98</sup>*The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 494; *The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 289. See also *Webster's Third New International Dictionary*, (William Benton, 1966), Vol. I, p. 493. See Panel Report, para. 9.331.

<sup>99</sup>See the submission of the European Communities during the negotiations of the *SCM Agreement*, entitled "Elements of the Negotiating Framework" (MTN.GNG/NG10/W/31), which was cited before us para. 40 of the United States' third participant's submission.

169. Footnote 4 makes it clear that *de facto* export contingency must be *demonstrated* by the *facts*. We agree with the Panel that what facts *should* be taken into account in a particular case will depend on the circumstances of that case. We also agree with the Panel that there can be no general rule as to what facts or what kinds of facts *must* be taken into account. We note that satisfaction of the standard for determining *de facto* export contingency set out in footnote 4 requires proof of three different substantive elements: first, the "*granting* of a subsidy"; second, "is ... *tied to* ..."; and, third, "actual or anticipated exportation or export earnings". (emphasis added) We will examine each of these elements in turn.

170. The first element of the standard for determining *de facto* export contingency is the "*granting* of a subsidy". In our view, the initial inquiry must be on whether the *granting authority* imposed a condition based on export performance in providing the subsidy. In the words of Article 3.2 and footnote 4, the prohibition is on the "*granting* of a subsidy", and not on receiving it. The treaty obligation is imposed on the *granting* Member, and not on the recipient. Consequently, we do not agree with Canada that an analysis of "contingent ... in fact ... upon export performance" should focus on the reasonable knowledge of the recipient.<sup>100</sup>

171. The second substantive element in footnote 4 is "tied to". The ordinary meaning of "tied to" confirms the linkage of "contingency" with "conditionality" in Article 3.1(a). Among the many meanings of the verb "tie", we believe that, in this instance, because the word "tie" is immediately followed by the word "to" in footnote 4, the relevant ordinary meaning of "tie" must be to "limit or restrict as to ... conditions".<sup>101</sup> This element of the standard set forth in footnote 4, therefore, emphasizes that a relationship of conditionality or dependence must be demonstrated. The second substantive element is at the very heart of the legal standard in footnote 4 and cannot be overlooked. In any given case, the facts must "demonstrate" that the granting of a subsidy is *tied to* or *contingent upon* actual or anticipated exports.<sup>102</sup> It does *not* suffice to demonstrate solely that a government granting a subsidy *anticipated* that exports would result. The prohibition in Article 3.1(a) applies to subsidies that are *contingent* upon export performance.

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<sup>100</sup>In finding that the knowledge of the recipient is not part of the legal standard of *de facto* export contingency, we do not suggest that relevant objective evidence relating to the recipient can never be considered by a panel.

<sup>101</sup>*The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. II, p. 3307. See also *The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 1457.

<sup>102</sup>We note that the Panel considered that the most effective means of demonstrating whether a subsidy is contingent in fact upon export performance is to examine whether the subsidy would have been granted *but for* the anticipated exportation or export earnings (Panel Report, para. 9.332). While we consider that the Panel did not err in its overall approach to *de facto* export contingency, we, and panels as well, must interpret and apply the language actually used in the treaty (see, for instance, Appellate Body Report, *India – Patents, supra*, footnote 35, para. 45).

172. We turn now to the third substantive element provided in footnote 4. The dictionary meaning of the word "anticipated" is "expected".<sup>103</sup> The use of this word, however, does *not* transform the standard for "contingent ... in fact" into a standard merely for ascertaining "expectations" of exports on the part of the granting authority. Whether exports were anticipated or "expected" is to be gleaned from an examination of objective evidence. This examination is quite separate from, *and should not be confused with*, the examination of whether a subsidy is "tied to" actual or anticipated exports. A subsidy may well be granted in the knowledge, or with the anticipation, that exports will result. Yet, that alone is not sufficient, because that alone is not proof that the granting of the subsidy is *tied to* the anticipation of exportation.

173. There is a logical relationship between the second sentence of footnote 4 and the "tied to" requirement set forth in the first sentence of that footnote. The second sentence of footnote 4 precludes a panel from making a finding of *de facto* export contingency for the sole reason that the subsidy is "granted to enterprises which export". In our view, merely knowing that a recipient's sales are export-oriented does not demonstrate, without more, that the granting of a subsidy is tied to actual or anticipated exports. The second sentence of footnote 4 is, therefore, a specific expression of the requirement in the first sentence to demonstrate the "tied to" requirement. We agree with the Panel that, under the second sentence of footnote 4, the export orientation of a recipient may be taken into account as *a* relevant fact, provided that it is one of several facts which are considered and is not the only fact supporting a finding.

174. Canada argues that the Panel erred in stating that "the closer a subsidy brings a product to sale on the export market, *the greater the possibility* that the facts may demonstrate that the subsidy"<sup>104</sup> is "contingent ... in fact ... upon export performance". (emphasis added) We recall that the Panel added that "the further removed a subsidy is from sales on the export market, *the less the possibility* that the facts may demonstrate that the subsidy"<sup>105</sup> is "contingent ... in fact ... upon export performance". (emphasis added) By these statements, the Panel appears to us to apply what could be read to be a legal presumption. While we agree that this nearness-to-the-export-market factor *may*, in certain circumstances, be a relevant fact, we do not believe that it should be regarded as a legal presumption. It is, for instance, no "*less ... possible*" that the facts, taken together, may demonstrate that a pre-production subsidy for research and development is "contingent ... in fact ... upon export performance". If a panel takes this factor into account, it should treat it with considerable caution. In our opinion, the mere presence or absence of this factor in any given case does not give rise to a

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<sup>103</sup>*The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 88, states that a colloquial meaning for "anticipate" is "expect". *The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 53, identifies "expect" as a disputed meaning of "anticipate".

<sup>104</sup>Panel Report, para. 9.339.

<sup>105</sup>*Ibid.*, para. 9.339.

presumption that a subsidy is or is not *de facto* contingent upon export performance. The legal standard to be applied remains the same: it is necessary to establish each of the three substantive elements in footnote 4.

175. Having examined the legal standard set forth in footnote 4 for determining *de facto* export contingency under Article 3.1(a), we turn next to the Panel's application of that legal standard to the facts relating to assistance provided by TPC to the Canadian regional aircraft industry. The Panel set out in some detail the various facts that it took into account in concluding that TPC assistance was "contingent ... in fact ... upon export performance".<sup>106</sup> Indeed, the Panel took into account sixteen different factual elements, which covered a variety of matters, including: TPC's statement of its overall objectives; types of information called for in applications for TPC funding; the considerations, or eligibility criteria, employed by TPC in deciding whether to grant assistance; factors to be identified by TPC officials in making recommendations about applications for funding; TPC's record of funding in the export field, generally, and in the aerospace and defence sector, in particular; the nearness-to-the-export-market of the projects funded; the importance of projected export sales by applicants to TPC's funding decisions; and the export orientation of the firms or the industry supported.

176. From our scrutiny of the Panel Report, we are unable to agree with Canada that the Panel made the export orientation of the regional aircraft industry the "effective test". In keeping with the standard set forth in footnote 4, the fact of the Canadian industry's export orientation seems to us not to have been given undue emphasis by the Panel. Rather, this fact was simply one of a number of facts that, when considered together, the Panel found demonstrated that the granting of subsidies by TPC was "tied to" actual or anticipated exports.

177. We recall our finding that the Panel could be understood as having treated the nearness-to-the-export-market factor as giving rise to a legal presumption in determining whether TPC assistance was "contingent ... in fact ... upon export performance".<sup>107</sup> However, we also have said that this factor may, in certain circumstances, be a relevant factor in making such a determination. In our view, in the circumstances of this case, the Panel did not err in taking this nearness-to-the-export-market factor into consideration, together with all the other facts that the Panel considered. Moreover, in our view and in light of all the facts the Panel considered, the Panel would, in all probability, have concluded that TPC assistance to the Canadian regional export industry was "contingent ... in fact ... upon export performance", even if it had not taken this factor into account.

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<sup>106</sup>Panel Report, para. 9.340.

<sup>107</sup>*Supra*, para. 174.

178. Canada also asserts that the Panel "confused" *considerations* – that is, the eligibility criteria set out in the TPC Handbook that TPC took into account in making its funding decisions – with *conditions* based on export performance.<sup>108</sup> We do not agree. The Panel did *not* find that the TPC eligibility criteria *were* conditions, but, rather, it found that those criteria helped to *demonstrate* the existence of *de facto* contingency upon export performance.<sup>109</sup> We consider it perfectly possible that such considerations, especially when taken together with other facts, could demonstrate that a subsidy is "contingent ... in fact ... upon export performance".<sup>110</sup> Indeed, in many cases, the eligibility criteria used by a granting authority, and their application in practice, may provide particularly good evidence of whether the granting of a subsidy is "contingent ... in fact ... upon export performance".

179. We note, finally, that the Panel took into account a number of facts related to the TPC programme as a whole.<sup>111</sup> Therefore, we do not agree with Canada's assertion that "[t]here is no indication that the Panel considered the operation of the TPC programme as a whole".<sup>112</sup> Moreover, the fact that some of TPC's contributions, in some industry sectors, are *not* contingent upon export performance, does not necessarily mean that the same is true for all of TPC's contributions. It is enough to show that one or some of TPC's contributions do constitute subsidies "contingent ... in fact ... upon export performance".

180. For all these reasons, we uphold the Panel's legal finding that "TPC assistance to the Canadian regional aircraft industry is 'contingent...in fact...upon export performance' within the meaning of Article 3.1(a) of the SCM Agreement."<sup>113</sup>

## VII. Drawing Adverse Inferences from Certain Facts

181. We come to the issue of whether the Panel erred in law in declining to draw adverse inferences from Canada's refusal to provide information to the Panel about the EDC's debt financing activities. The Panel's ruling on this issue needs to be quoted *in extenso*:

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<sup>108</sup>Canada's appellant's submission, para. 59.

<sup>109</sup>See Panel Report, paras. 9.340 and 9.341.

<sup>110</sup>We note that none of the considerations or eligibility criteria, by itself, amounts to an export condition because, if that were so, there would be a case of *de jure* export contingency.

<sup>111</sup>The facts identified in the eighth, ninth, eleventh and thirteenth points of para. 9.340 of the Panel Report all relate to the TPC programme as a whole.

<sup>112</sup>Canada's appellant's submission, para. 77.

<sup>113</sup>Panel Report, para. 9.347.

We note that Brazil asked us to make adverse inferences in light of Canada's refusal to provide details of the ASA transaction. In certain circumstances when direct evidence is not available, we consider that a panel may be required to make such inferences when there is sufficient basis to do so. This is especially true when direct evidence is not available because it is withheld by a party with sole possession of that evidence. In the present instance, however, we do not consider that there is sufficient basis for an inference that EDC debt financing in the Canadian regional aircraft sector confers a "benefit". In particular, Brazil has made no attempt to demonstrate that EDC debt financing was provided to ASA on below-market terms. Furthermore, Brazil has not demonstrated, on the basis of its arguments concerning statements by EDC officials and EDC's financial performance, that EDC debt financing generally confers a "benefit". Had Brazil done so, we may have been required to make the inferences requested by Brazil.<sup>114</sup>

182. Brazil appeals this ruling of the Panel and claims that the Panel committed an error of law by failing to draw adverse inferences from Canada's refusal to submit information requested about the EDC's financing of the ASA transaction. Brazil believes that, in the circumstances of this case, the Panel was obliged to infer that the information Canada withheld was prejudicial to Canada's position. Brazil supports its arguments by reference to authorities cited from public international law. Brazil asks us to reverse the Panel ruling, to draw ourselves the adverse inferences which Brazil contends the Panel should have drawn, and to determine that the evidence of record, together with such adverse inferences, lead to the conclusion that the EDC's debt financing confers a "benefit" and hence fulfils that necessary element of a "subsidy". Canada maintains that the Panel did not err. Canada argues that adverse inferences may only be drawn by a panel, in the event of one party's refusal to provide information, if the other party has made out its case on a *prima facie* basis. Canada also argues that the Panel should not have requested information from it under Article 13.1 since Brazil had not yet established a *prima facie* case. The parties' arguments and counter-arguments on this issue raise a number of questions with fundamental and far-reaching implications for the entire WTO dispute settlement system. These questions relate to: first, the authority of a panel to request a party to a dispute to submit information about that dispute; second, the duty of a party to submit information requested by a panel; and, third, the authority of a panel to draw adverse inferences from the refusal by a party to provide requested information. We shall deal with these questions in that sequence.

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<sup>114</sup>Panel Report, para. 9.181.

- (a) The authority of a panel to request information from a party to the dispute

183. Article 13 of the DSU reads as follows:

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

184. In *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, we ruled that Article 13 of the DSU made "a grant of *discretionary authority*" to panels enabling them to seek information from any relevant source.<sup>115</sup> (emphasis added) In *European Communities – Hormones*, we observed that Article 13 of the DSU "enable[s] panels to seek information and advice *as they deem appropriate in a particular case*."<sup>116</sup> (emphasis added) And, in *United States - Shrimp*, we underscored "*the comprehensive nature*" of the authority of a panel to seek information and technical advice from "any individual or body" it may consider appropriate, or from "any relevant source."<sup>117</sup> (emphasis added) There, we stated that:

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<sup>115</sup> Appellate Body Report, WT/DS56/AB/R, adopted 22 April 1998, para. 84.

<sup>116</sup> *Supra*, footnote 64, para. 147.

<sup>117</sup> *Supra*, footnote 24, para. 104.

*It is particularly within the province and the authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and relevancy of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received.*<sup>118</sup> (emphasis added)

...

The thrust of Articles 12 and 13, taken together, is that *the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ..."*<sup>119</sup> (emphasis added)

185. It is clear from the language of Article 13 that the discretionary authority of a panel may be exercised to request and obtain information, not just "from any individual or body" within the jurisdiction of a Member of the WTO, but also from *any Member*, including *a fortiori* a Member who is a party to a dispute before a panel. This is made crystal clear by the third sentence of Article 13.1, which states: "*A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.*" (emphasis added) It is equally important to stress that this discretionary authority to seek and obtain information is *not* made conditional by this, or any other provision, of the DSU upon the other party to the dispute having previously established, on a *prima facie* basis, such other party's claim or defence. Indeed, Article 13.1 imposes *no conditions* on the exercise of this discretionary authority. Canada argues that the Panel in this case had *no authority to request* the submission of information relating to the EDC's financing of the ASA transaction because Brazil had not previously established a *prima facie* case that the financial contribution offered by such financing conferred a "benefit" on ASA and therefore satisfied that other prerequisite of a prohibited export subsidy. This argument is, quite simply, bereft of any textual or logical basis. There is nothing in either the DSU or the *SCM Agreement* to sustain it. Nor can any support for this argument be derived from a consideration of the nature of the functions and responsibilities entrusted to panels in the WTO dispute settlement system – a consideration which we essay below.

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<sup>118</sup>*Supra*, footnote 24, para. 104.

<sup>119</sup>*Ibid.*, para. 106.

- (b) The duty of a Member to comply with the request of a panel to provide information

186. An important part of Brazil's appeal with respect to the issue of adverse inferences is Brazil's contention that Canada was under a duty to comply with the Panel's request to provide information relating to the EDC's financing of the ASA transaction. Canada denies that it was legally burdened with such a duty.

187. We note that Article 13.1 of the DSU provides that "A Member *should* respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate." (emphasis added) Although the word "should" is often used colloquially to imply an exhortation, or to state a preference, it is not always used in those ways. It can also be used "to express a duty [or] obligation".<sup>120</sup> The word "should" has, for instance, previously been interpreted by us as expressing a "duty" of panels in the context of Article 11 of the DSU.<sup>121</sup> Similarly, we are of the view that the word "should" in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in a normative, rather than a merely exhortative, sense. Members are, in other words, under a duty and an obligation to "respond promptly and fully" to requests made by panels for information under Article 13.1 of the DSU.

188. If Members that were requested by a panel to provide information had no legal duty to "respond" by providing such information, that panel's undoubted legal "*right* to seek" information under the first sentence of Article 13.1 would be rendered meaningless. A Member party to a dispute could, at will, thwart the panel's fact-finding powers and take control itself of the information-gathering process that Articles 12 and 13 of the DSU place in the hands of the panel.<sup>122</sup> A Member could, in other words, prevent a panel from carrying out its task of finding the facts constituting the dispute before it and, inevitably, from going forward with the legal characterization of those facts. Article 12.7 of the DSU provides, in relevant part, that "...the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes." If a panel is prevented from ascertaining the real or relevant facts of a dispute, it will not be in a position to determine the applicability of the pertinent treaty provisions to those facts, and, therefore, it will be unable to make any principled findings and recommendations to the DSB.

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<sup>120</sup>*The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 1283. See also *The Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. II, p. 2808, and *Black's Law Dictionary*, (West Publishing Co., 1990), p. 1379, which states that "should" "ordinarily impl[ies] duty or obligation; although usually no more than an obligation of propriety or expediency, or moral obligation, thereby distinguishing it from 'ought'."

<sup>121</sup>*European Communities – Hormones*, *supra*, footnote 64, para. 133.

<sup>122</sup>*United States – Shrimp*, *supra*, footnote 24, para. 106.

189. The chain of potential consequences does not stop there. To hold that a Member party to a dispute is not legally bound to comply with a panel's request for information relating to that dispute, is, in effect, to declare that Member legally free to preclude a panel from carrying out its mandate and responsibility under the DSU. So to rule would be to reduce to an illusion and a vanity the fundamental right of Members to have disputes arising between them resolved through the system and proceedings for which they bargained in concluding the DSU. We are bound to reject an interpretation that promises such consequences.

190. We believe also that the duty of a Member party to a dispute to comply with a request from the panel to provide information under Article 13.1 of the DSU is but one specific manifestation of the broader duties of Members under Article 3.10 of the DSU not to consider the "use of the dispute settlement procedures...as contentious acts", and, when a dispute does arise, to "engage in these procedures in good faith in an effort to resolve the dispute."

191. As noted earlier, Brazil alleges that Canada acted in disregard of its duties under Articles 13.1 and 3.10 of the DSU in refusing to comply with the Panel's request for information about the EDC's financing of the ASA transaction. Canada controverts this allegation and submits two justifications for its failure to provide the requested information. Canada's first justification is that Brazil had not, when the Panel issued its request for information on the EDC's financing for the ASA transaction, established by other evidence, a *prima facie* case that such financing constituted a prohibited export subsidy under Article 3.1(a) of the *SCM Agreement*. The second justification pleaded by Canada is that the information requested by the Panel constituted "business confidential information" and that the BCI Procedures adopted by the Panel were not adequate to ensure the protection of such information.

192. Canada's first justification rests on the assumption that a Member's duty to respond promptly and fully to a Panel's request for information arises only *after* the opposing party to the dispute has established a *prima facie* case that its complaint or defence is meritorious. A *prima facie* case, it is well to remember, is a case which, in the absence of effective refutation by the defending party (that is, in the present appeal, the Member requested to provide the information), requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.<sup>123</sup> There is, as noted earlier, nothing in either the DSU or the *SCM Agreement* to support Canada's assumption. To the contrary, a panel is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a *prima facie* basis. A panel may, in fact, need the information sought in order to evaluate

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<sup>123</sup>See *European Communities – Hormones*, *supra*, footnote 64, para. 104.

evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a *prima facie* case or defence. Furthermore, a refusal to provide information requested on the basis that a *prima facie* case has not been made implies that the Member concerned believes that it is able to judge for itself whether the other party has made a *prima facie* case. However, no Member is free to determine for itself whether a *prima facie* case or defence has been established by the other party. That competence is necessarily vested in the panel under the DSU, and not in the Members that are parties to the dispute. We are not, therefore, persuaded by the first justification Canada gave for its refusal to provide the information requested by the Panel.

193. This view is entirely consistent with our ruling in *Japan – Agricultural Products*. There, the complainant, the United States, claiming that the Japanese measure requiring varietal testing was inconsistent with Article 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), had to show that there was an alternative measure which satisfied the three requirements of Article 5.6. The panel was not persuaded by the United States that "testing by product" was such an alternative measure. However, the panel "deduced" from statements made by experts advising it that there was another measure, the "determination of sorption levels", that met the requirements of the *SPS Agreement* – something which the United States had not even alleged or argued before the panel, let alone something on which the United States had submitted any evidence. The panel in that case proceeded to find that the Japanese measure was inconsistent with Article 5.6 of the *SPS Agreement*. In reversing this finding of the panel, we said:

In the present case, *the Panel was correct to seek information and advice from experts to help it to understand and evaluate the evidence submitted and the arguments made by the United States and Japan with regard to the alleged violation of Article 5.6. The Panel erred, however, when it used that expert information and advice as the basis for a finding of inconsistency with Article 5.6, since the United States did not establish a prima facie case of inconsistency with Article 5.6 based on claims relating to the "determination of sorption levels". The United States did not even argue that the "determination of sorption levels" is an alternative measure which meets the three elements under Article 5.6.*<sup>124</sup> (emphasis added)

194. Thus, in *Japan – Agricultural Products*, the issue was not whether the panel there had the authority to *request* particular information from the responding Member, nor whether that responding Member was under a duty to comply with the panel's request. Nor, in that case, did any Member refuse to provide information to the panel. The issue of a panel's authority to draw adverse inferences from a party's refusal to provide requested information did not, therefore, arise. The panel in *Japan – Agricultural Products* had simply and erroneously relieved the complaining Member of the task of

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<sup>124</sup>*Supra*, footnote 44, para. 130.

showing the inconsistency of the responding Member's measure with Article 5.6 of the *SPS Agreement*.

195. Canada's second justification for its refusal to comply with the Panel's request for information relates to the authority of the Panel to adopt special procedures for the additional protection of so-called business confidential information. Canada, with the acquiescence of Brazil, asked the Panel to adopt certain procedures, submitted by Canada, for the protection of such information. The Panel accommodated Canada's request, making only one change, at Brazil's request. We do not believe that, having requested such procedures in the first place, Canada was entitled unilaterally to reject the additional procedures adopted by the Panel and then to withhold information requested by the Panel on the ground that Canada found those procedures inadequate. Canada's position is inconsistent with the Panel's authority under the DSU to determine its own procedures. The Panel's decision to adopt the additional confidentiality procedures was in the nature of an interlocutory ruling made in the course of the proceedings before it. Canada has not appealed that interlocutory ruling and, accordingly, must be held bound by it.

196. Finally, we recall that Canada, jointly with Brazil, asked the Appellate Body to adopt *mutatis mutandis* the BCI Procedures in the course of proceedings before the Appellate Body. If Canada truly considered those procedures so inadequate as to compel it to reject the Panel's requests for information that Canada regarded as business confidential, then Canada's request that we adopt those very procedures on appeal appears to us a curious one. We find Canada's second justification for its refusal to provide requested information, just as we did its first one, less than persuasive.

- (c) The drawing of adverse inferences from the refusal of a party to provide information requested by the Panel

197. We have concluded that a panel has broad legal authority to request information from a Member that is a party to a dispute, and that a party so requested has a legal duty to provide such information. The question remains: if that Member refuses to provide that information, does the panel have the authority to draw adverse inferences from that refusal?

198. We approach this question by noting once more that the mandate of a panel under the DSU requires it to determine the facts of the dispute with which it is seised, and to evaluate or characterize those facts in terms of their consistency or inconsistency with a particular provision of the *SCM Agreement* or another covered agreement. The DSU does not purport to state in what detailed circumstances inferences, adverse or otherwise, may be drawn by panels from infinitely varying combinations of facts. Yet, in all cases, in carrying out their mandate and seeking to achieve the "objective assessment of the facts" required by Article 11 of the DSU, panels routinely draw inferences from the facts placed on the record. The inferences drawn may be inferences of fact: that

is, from fact A and fact B, it is reasonable to infer the existence of fact C. Or the inferences derived may be inferences of law: for example, the *ensemble* of facts found to exist warrants the characterization of a "subsidy" or a "subsidy contingent ... in fact ... upon export performance". The facts must, of course, rationally support the inferences made, but inferences may be drawn whether or not the facts already on the record deserve the qualification of a *prima facie* case. The drawing of inferences is, in other words, an inherent and unavoidable aspect of a panel's basic task of finding and characterizing the facts making up a dispute. In contrast, the burden of proof is a procedural concept which speaks to the fair and orderly management and disposition of a dispute. The burden of proof is distinct from, and is not to be confused with, the drawing of inferences from facts.

199. The facts before the Panel on the issue of the EDC's debt financing may be summarized in the following terms: Brazil submitted certain evidence about the EDC's financing of the ASA transaction.<sup>125</sup> Canada refused to provide Brazil with information on the EDC's financing activities that Brazil requested during consultations. The Panel then requested Canada to submit transaction-specific information on the terms and conditions of the EDC's financing of the ASA transaction. Canada refused to provide the information requested by the Panel. There appears to us to be no objective reason to consider that the information requested and withheld did not exist or was not pertinent to Brazil's claim. We consider it safe to assume that the information requested by the Panel was in the possession of Canada because Canada did not indicate otherwise to the Panel. The information requested by the Panel was not publicly available. As we have explained, Canada's justifications for its refusal to provide information requested by the Panel were not accepted by the Panel.<sup>126</sup> On this basis, Brazil urges that the Panel erred in law by not drawing the inference that the information withheld by Canada was, in its nature or tenor, adverse to Canada and supportive of Brazil's claim that the EDC's debt financing, at least in that particular transaction, amounted to a prohibited export subsidy under Article 3.1(a) of the *SCM Agreement*.

200. We note, preliminarily, that the "adverse inference" that Brazil believes the Panel should have drawn is not appropriately regarded as a punitive inference in the sense of a "punishment" or "penalty" for Canada's withholding of information. It is merely an inference which in certain circumstances could be logically or reasonably derived by a panel from the facts before it.

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<sup>125</sup>The evidence presented to the Panel on the ASA transaction consisted of a Form 10-Q, filed by ASA Holdings, Inc., with the US Securities and Exchange Commission for the quarterly period ended 31 March 1997 (file No. 333-13071) and the 1997 Annual Report of ASA Holdings, Inc. (see Panel Report, para. 6.56, footnotes 200 and 201).

<sup>126</sup>We agree with the Panel that Canada's justifications were not legally acceptable (see paras. 192 and 196 of this Report).

201. We note also the fact that Article 4 of the *SCM Agreement*, which is applicable in respect of proceedings relating to alleged *prohibited export subsidies*, does not specifically address the matter of drawing adverse inferences from a Member's refusal to provide information. We take special note, however, of the fact that Annex V of the *SCM Agreement*, which deals with procedures for developing information about "serious prejudice" in cases involving *actionable subsidies* under Part III of the same Agreement, *does* address, in impressive detail, the drawing of adverse inferences under certain circumstances.<sup>127</sup> Annex V of the *SCM Agreement* reads, in pertinent part:

1. *Every Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7.*

...

6. *If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.*

7. *In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.*

8. *In making a determination to use either best information available or adverse inferences, the panel shall consider the advice of the DSB representative nominated under paragraph 4 as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.*

9. *Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process. (emphases added)*

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<sup>127</sup>The provisions of Annex V of the *SCM Agreement* are identified in Appendix 2 of the DSU as "special or additional rules and procedures".

202. There is no logical reason why the Members of the WTO would, in conceiving and concluding the *SCM Agreement*, have granted panels the authority to draw inferences in cases involving actionable subsidies that *may* be illegal *if* they have certain trade effects, but not in cases that involve prohibited export subsidies for which the adverse effects are presumed. To the contrary, the appropriate inference is that the authority to draw adverse inferences from a Member's refusal to provide information belongs *a fortiori* also to panels examining claims of prohibited export subsidies. Indeed, that authority seems to us an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement: a view supported by the general practice and usage of international tribunals.<sup>128</sup>

203. Clearly, in our view, the Panel had the legal authority and the discretion to draw inferences from the facts before it – including the fact that Canada had refused to provide information sought by the Panel.<sup>129</sup> The Panel acknowledged that it had the authority to draw such inferences, but it declined nonetheless to draw the "inference that EDC debt financing in the Canadian regional aircraft sector confers a 'benefit'." The Panel stated that it did not believe "there is sufficient basis" for such an inference.<sup>130</sup> Brazil poses the issue: did the Panel err in law or abuse its discretion by declining to make that inference?

204. In confronting this issue, we note that the Panel's statement seems less than completely clear. Did the Panel, in fact, decline to take account of Canada's refusal to provide information and refuse to infer that the information withheld would support Brazil's claim? Or was the Panel saying that *all* the facts before it, *including* Canada's withholding of information, did not reasonably warrant a finding that the EDC's debt financing in the Canadian regional aircraft sector confers a "benefit" and amounts

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<sup>128</sup>See, for instance, *The Corfu Channel Case*, 1949, ICJ 4, p. 18, where the International Court of Justice stated that "... the victim of a breach of international law is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions."; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, 1986 ICJ 14, pp. 82-86, paras. 152, 154-156, where on the basis of the facts before it, the International Court of Justice found that it could "reasonably infer" that certain aid had been provided from Nicaraguan territory; the International Court of Justice also made use of inferences to conclude that the scale of this aid ceased to be significant after the early months of 1981; *Case Concerning The Barcelona Traction, Light and Power Company, Limited*, 1970 ICJ 3, p. 215, para. 97. Judge Jessup, in his separate opinion, opined that "... if a party fails to produce on demand a relevant document which is in its possession, there may be an inference that the document 'if brought, would have exposed facts unfavourable to the party ...'". The Mexican-United States General Claims Commissions stated, in *William A. Parker (U.S.A.) v. United Mexican States* (Reports of International Arbitral Awards, Vol. IV, 35, p. 39), that "[i]n any case where evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the respondent Government, the failure to produce it, unexplained, may be taken into account by the Commission in reaching a decision." See also D.V. Sandifer, *Evidence Before International Tribunals*, Revised Edition, (University Press of Virginia, 1975), p. 153.

<sup>129</sup>We have summarized certain of the pertinent facts that were before the Panel in para. 199 of this Report.

<sup>130</sup>Panel Report, para. 9.181.

to a prohibited subsidy? This appears to us to be precisely the type of situation in which a panel should examine very closely indeed whether the full *ensemble* of the facts on the record reasonably permits the inference urged by one of the parties to be drawn, because a party's refusal to collaborate has the potential to undermine the functioning of the dispute settlement system. The continued viability of that system depends, in substantial measure, on the willingness of panels to take all steps open to them to induce the parties to the dispute to comply with their duty to provide information deemed necessary for dispute settlement. In particular, a panel should be willing expressly to remind parties – during the course of dispute settlement proceedings – that a refusal to provide information requested by the panel may lead to inferences being drawn about the inculpatory character of the information withheld.

205. If we had been deciding the issue that confronted the Panel, we might well have concluded that the facts of record<sup>131</sup> did warrant the inference that the information Canada withheld on the ASA transaction<sup>132</sup> included information prejudicial to Canada's denial that the EDC had conferred a "benefit" and granted a prohibited export subsidy. Yet, we do not believe that the record provides a sufficient basis for us to hold that the Panel erred in law, or abused its discretionary authority, in concluding that Brazil had not done enough to compel the Panel to make the inferences requested by Brazil. For this reason, we let the Panel's finding of *not proven* remain, and we decline Brazil's appeal on this issue.

206. By this finding, we do not intend to suggest that Brazil is precluded from pursuing another dispute settlement complaint against Canada, under the provisions of the *SCM Agreement* and the DSU, concerning the consistency of certain of the EDC's financing measures with the provisions of the *SCM Agreement*. In that respect, we note that Brazil may request information from Canada, under Article 25.8 of the *SCM Agreement*. In the event of such a request, Article 25.9 of the *SCM Agreement* requires Canada to provide information sufficient to enable Brazil to assess the "compliance" of those measures with the *SCM Agreement*.

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<sup>131</sup>Certain of these facts are summarized at para. 199 of this Report.

<sup>132</sup>Brazil appealed the Panel's failure to draw adverse inferences from a refusal by Canada, in only one instance, to provide information requested by the Panel, that is, its refusal to provide information on the terms and conditions of the ASA transaction. However, we note that Canada also withheld, for various reasons, such as the protection of information claimed to be "business confidential" and "Cabinet" and "Ministerial" privilege, other information requested by the Panel under Article 13.1 of the DSU (the Panel records Canada's repeated refusals to provide full information to the Panel at paras. 9.188, 9.218, 9.242, 9.272, 9.293, 9.294, 9.299, 9.303, 9.313 and 9.327 of the Panel Report). We observe that the Panel "regretted" that Canada chose not to provide the Panel with certain of the information requested under Article 13.1 of the DSU (see Panel Report, paras. 9.244 and 9.314, footnote 621) and that the Panel did not accept Canada's reasons for withholding that information (see Panel Report, paras. 9.66-9.69 and 9.347, footnote 633).

## VIII. EDC Debt Financing

207. With respect to the EDC's debt financing activities, the Panel found that "there is no *prima facie* case that EDC debt financing confers a 'benefit', and therefore constitutes a 'subsidy', within the meaning of Article 1 of the SCM Agreement."<sup>133</sup> In reaching this finding, the Panel reviewed evidence presented by Brazil in the form of certain statements made by officials of the EDC<sup>134</sup>, evidence on the EDC's "financial performance" and, in particular, its net interest margin<sup>135</sup>, and evidence on the EDC's financing of the ASA transaction.<sup>136</sup>

208. Brazil argues that, in making this finding, the Panel erred in its "legal characterization" of the facts.<sup>137</sup> In its appeal, Brazil relies on three pieces of evidence that it believes demonstrate that the "financial contribution" in the form of the EDC's debt financing "confers" a "benefit" and is, therefore, a "subsidy" within the meaning of Article 1.1 of the *SCM Agreement*: first, the EDC's provision of a 16.5-year lease period for the financing of the ASA transaction; second, a statement by the former President of the EDC, Mr. Paul Labbé, that the EDC's debt financing provides Canadian exporters with an "edge"<sup>138</sup>; and, third, a statement by Canada in the course of the Panel proceedings that the EDC "does not always offer the most attractive financing package".<sup>139</sup>

209. With respect to the ASA transaction, Brazil argues that the 16.5-year lease period constitutes a "benefit" since this lease-period exceeds the maximum 10-year lease period that governments participating in the *OECD Arrangement* are authorized to offer.<sup>140</sup> Canada contends that Brazil did not make this argument to the Panel and that, as a result, this argument "cannot give rise to an 'issue of law covered in the panel report'".<sup>141</sup>

210. During the oral hearing, we asked Brazil to identify where, in its arguments before the Panel, it had argued that the 16.5-year financing term was a "benefit" on the ground that it exceeded the terms of the *OECD Arrangement*. In a written response to our question, Brazil pointed, on the one hand, to statements it made to the Panel concerning the 16.5-year length of the ASA financing period and the allegedly "concessionary rates"<sup>142</sup> offered by the EDC to ASA and, on the other hand, to

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<sup>133</sup>Panel Report, para. 9.182.

<sup>134</sup>*Ibid.*, paras. 9.162 – 9.165.

<sup>135</sup>*Ibid.*, paras. 9.166 – 9.174.

<sup>136</sup>*Ibid.*, paras. 9.175 – 9.182.

<sup>137</sup>Brazil's appellant's submission, para. 9.

<sup>138</sup>This statement is quoted in full at para. 6.57 of the Panel Report.

<sup>139</sup>Canada's second written submission to the Panel, para. 63, footnote 48.

<sup>140</sup>*OECD Arrangement*, Annex III, Part 2, chapter V, para. 21(a).

<sup>141</sup>Canada's appellee's submission, para. 10, quoting Article 17.6 of the DSU.

<sup>142</sup>Brazil's first written submission to the Panel, para. 6.4.

arguments Brazil made to the Panel about the *OECD Arrangement* in the context of the EDC's equity financing.<sup>143</sup> Having examined those statements and arguments, we conclude that Brazil has not identified any submission to the Panel, oral or written, in which it brought these two distinct elements together to argue that a 16.5-year lease period is a "benefit" because it exceeds the terms of the *OECD Arrangement*. Therefore, we find that this argument was not made to the Panel and that the Panel made no finding relating to it. It was raised for the first time in this appeal.

211. In our view, this new argument raised by Brazil is beyond the scope of appellate review. Article 17.6 of the DSU provides that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." In principle, new arguments are not *per se* excluded from the scope of appellate review, simply because they are new. However, for us to rule on Brazil's new argument, we would have to solicit, receive and review new facts that were not before the Panel, and were not considered by it. In our view, Article 17.6 of the DSU manifestly precludes us from engaging in any such enterprise. We note, furthermore, that, if complaining parties were allowed to raise new arguments of this nature on appeal, that could also undermine the due process rights of responding parties, which would not have had the opportunity to rebut such allegations by submitting evidence in response.<sup>144</sup>

212. The statement made by the former President of the EDC to which Brazil refers was the following:

EDC's financing support gives Canadian exporters an *edge* when they bid on overseas projects. . . . Trade deals increasingly depend on complex and tightly negotiated financing arrangements where a few basis points in interest rates can make or break the deal. Exporters are having to bid not just on the basis of quality and price, but also on the basis of the financing package supporting the sale. (emphasis added)

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<sup>143</sup>Brazil's reply, by letter of 15 June 1999, to our question posed at the oral hearing. Brazil referred to: its first written submission to the Panel, paras. 4.4 and 6.4; Brazil's reply to Question 11 of the Questions Posed by the Panel at the first Panel meeting with the parties; Brazil's comments of 8 January 1999 on Canada's replies to Questions 6, 10 and 28 of the Questions Posed by the Panel at the second Panel meeting with the parties; Brazil also referred to Canada's first written submission to the Panel, paras. 73, 74, 160 and 161; Canada's reply to Question 28 of the Questions Posed by the Panel at the second Panel meeting with the parties; and Canada's statement of its oral submission to the Panel at the first Panel meeting with the parties, para. 5.

<sup>144</sup>In that respect, we observe that Canada cites four transactions in the field of aircraft financing which it believes demonstrate that "a financing term for regional jet aircraft of greater than 10 years – as a matter of fact, up to 18 years – is entirely within the bounds of commercial practice." Canada's appellee's submission, para. 64.

213. The Panel observed that, in view of Canada's explanation of this statement, "the relevant 'edge' is the ability of the EDC's officials to assemble better structured financial packages on the basis of their knowledge and expertise."<sup>145</sup> In light of Canada's explanation, the Panel took the view that there was a "possibility for divergent contextual interpretations" of this statement and inferred that it "provides no firm guidance as to whether the EDC provides exporters with an 'edge' through subsidization."<sup>146</sup> The Panel's inference from this evidence does not appear to us to be either illogical or unreasonable, and Brazil has not demonstrated that the Panel's conclusion is tainted by any error of law. Thus, we are not persuaded by Brazil's argument based on this statement.

214. The third fact on which Brazil relies in appealing this issue is Canada's statement, made in its second written submission to the Panel, that the EDC "does not always offer the most attractive financing package available to regional aircraft customers." This statement was not the subject of any factual or legal findings by the Panel. Brazil does not argue that the Panel erred in failing to make a finding relying on this statement. Rather, Brazil argues that this statement helps to show that the EDC's debt financing constitutes a "benefit".

215. Brazil has failed to demonstrate that the Panel erred in law in its consideration of this statement. We note that the Panel asked Canada for clarification as to the meaning of the statement<sup>147</sup>, and Canada's response to the Panel indicates that this statement appears consistent with the EDC doing no more than acting as a commercial financing body.<sup>148</sup> We are unable, therefore, to hold that the Panel has erred in law in failing to rely on this statement.

216. For these reasons, we conclude that Brazil's arguments on appeal do not demonstrate that the Panel committed an error of law in finding that "there is no *prima facie* case that the EDC's debt financing confers a 'benefit', and therefore constitutes a 'subsidy', within the meaning of Article 1 of the SCM Agreement."<sup>149</sup>

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<sup>145</sup>Panel Report, para. 9.163.

<sup>146</sup>*Ibid.*

<sup>147</sup>Question 10 of the Questions, dated 10 December 1998, posed by the Panel to Canada at the second Panel meeting with the parties.

<sup>148</sup>Canada's reply, of 21 December 1998, to Question 10 of the Questions posed by the Panel at the second Panel meeting with the parties.

<sup>149</sup>Panel Report, para. 9.182.

**IX. EDC Equity Financing of CRJ Capital**

217. Brazil contests the Panel's finding that "there is no factual basis on which to establish a *prima facie* case that the EDC has made equity infusions into CRJ Capital that have facilitated CRJ Capital's ability to lease or sell Canadian regional aircraft at a reduced price."<sup>150</sup> Brazil argues that the evidence on the Panel record establishes that this investment confers a "benefit", and, therefore, constitutes a "subsidy". In making this argument, Brazil relies on CRJ Capital's "total capital"<sup>151</sup> structure and certain statements made by Mr. Richard Dixon, an official of Industry Canada, to the effect that CRJ Capital offers borrowers with a double-B credit rating lending rates that are ordinarily available only to borrowers with a double-A credit rating.<sup>152</sup>

218. Brazil asserts before us, as it did before the Panel, that CRJ Capital's "total capital" structure permits CRJ Capital to provide financing of regional aircraft at lower-than-market rates. However, we see no facts in the Panel record to support this assertion. Indeed, in these appeal proceedings, Canada contested Brazil's description of CRJ Capital's capital structure, which is an essential aspect of Brazil's argument.<sup>153</sup> Moreover, in our view, Mr. Dixon's statements are not sufficient, on their own, to establish a finding that CRJ Capital offered preferential financing, let alone that it was the EDC's equity investment that permitted CRJ Capital to provide such financing. We note, for instance, that there is no evidence in the Panel record of any transaction in which CRJ Capital *actually offered* financing terms of the type described by Mr. Dixon.

219. We, therefore, find that Brazil's arguments on appeal do not demonstrate that the Panel erred in law by finding that "there is no factual basis on which to establish a *prima facie* case that the EDC has made equity infusions into CRJ Capital that have facilitated CRJ Capital's ability to lease or sell Canadian regional aircraft at a reduced price."<sup>154</sup>

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<sup>150</sup>Panel Report, para. 9.200.

<sup>151</sup>Brazil's appellant's submission, para. 92.

<sup>152</sup>This statement is quoted at para. 6.136 of the Panel Report.

<sup>153</sup>Statement by Canada at the oral hearing.

<sup>154</sup>Panel Report, para. 9.200.

**X. Findings and Conclusions**

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

- (a) upholds the Panel's interpretation of the term "benefit" in Article 1.1(b) of the *SCM Agreement*;
- (b) upholds the Panel's interpretation and application of the expression "contingent ... in fact ... upon export performance" and the Panel's finding that "TPC assistance to the Canadian regional aircraft industry is 'contingent...in fact...upon export performance' within the meaning of Article 3.1(a) of the *SCM Agreement*"<sup>155</sup>;
- (c) concludes that the Panel did not err in law or abuse its discretion by declining to draw inferences from Canada's refusal to provide information requested by the Panel about certain debt financing activities of the EDC;
- (d) upholds the finding of the Panel that Brazil had not established a *prima facie* case that the debt financing activities of the EDC in support of the Canadian regional aircraft industry confer a "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement*; and
- (e) upholds the finding of the Panel that Brazil had not established a *prima facie* case that the equity investment by the EDC in CRJ Capital confers a "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement*.

221. The Appellate Body *recommends* that the DSB request that Canada bring its export subsidies found in the Panel Report, as upheld by our Report, to be inconsistent with Canada's obligations under Articles 3.1(a) and 3.2 of the *SCM Agreement* into conformity with its obligations under that Agreement. Specifically, we recall that the Panel recommended that "Canada shall withdraw the subsidies identified in sub-paragraphs (b) and (f) of [paragraph 10.1 of the Panel Report] within 90 days."<sup>156</sup>

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<sup>155</sup>Panel Report, para. 9.347.

<sup>156</sup>*Ibid.*, para. 10.4.