

## ANNEX C

### Third-Party Submissions

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## ANNEX C-1

### THIRD-PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

(22 June 2001)

#### 1. Introduction

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

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

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

#### 2. Preliminary Issues - Scope of this Proceeding

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

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

✍ The alleged inconsistency of Brazil’s claims with Article 6.2 of the DSU

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>1</sup> It is the position of the European Communities that the words "these dispute settlement procedures" refer to consultations, panel procedure and appeal, but not to arbitration under Articles 21.3(c) or 22.6 of the DSU<sup>1</sup>. The European Communities does not see how recourse to an ordinary dispute settlement procedure including consultations, normal panel proceedings and the possibility of an appeal would conflict with the precepts of Article 21.5 of the DSU. The main reasons for the EC's position that recourse to arbitration procedures under Articles 21.3(c) and 22.6 of the DSU are not in line with the requirements of Article 21.5 of the DSU is that these arbitration procedures have strictly limited terms of reference, are not subject to appeal and, at least in the case of an arbitration procedure under Article 22.6 of the DSU, are not available at the request of the complaining party. None of these considerations applies under the circumstances of the present case.

complainant mentions a covered agreement as the legal basis for its complaint, as is the case in Brazilian claim 3, the fact that an earlier panel dealing with a dispute between the same parties has already dealt with the issue might become relevant in the context of a legal argument based on the concepts of *res iudicata* or litispendence. That is however apparently not the objection raised by Canada. That Brazil preferred an ordinary dispute settlement procedure over the accelerated procedure under Article 21.5 of the DSU does not prejudice Canada's procedural position nor is it in conflict with the precepts of fairness of the procedure or Article 23 of the DSU.

15. Finally, the European Communities would observe that, since Article 21.5 DSU applies equally to the straightforward compliance and cases where measures taken to comply with a previous DSB recommendation are alleged to be inconsistent with the covered agreements, the position taken by Canada would mean that the latter category of cases must also obligatorily be brought before an Article 21.5 panel.

*2.1.1. The alleged inconsistency of certain of Brazil's claims with Article 6.2 of the DSU*

16. In its preliminary submission of 18 June 2001, Canada argues that Brazil's claims 1, 2, 5 and 7 are inconsistent with the requirements of Article 6.2 of the DSU.

17. The European Communities has consistently held that Article 6.2 of the DSU is, in combination with Article 7.1 of the DSU, a fundamental provision with regard to the delimitation of the terms of reference of a panel that have multiple functions for the settlement of disputes under the auspices of the WTO. More particularly, Article 6.2 of the DSU serves the purpose of indicating both to the respondent and to the third parties what is the subject matter of the dispute and where are the outer limits of such dispute. This is of fundamental importance in order to enable the respondent to understand the complaint it has to answer and for third parties in order to make an informed decision about their participation in the dispute. This provision thus serves the requirements of the fairness of the procedure, as the Appellate Body stated in a large number of cases, starting from *European Communities – Bananas*.<sup>2</sup>

18. The European Communities is therefore of the view that this provision should be strictly observed by complaining parties in order to allow both the respondent to prepare its defence and third parties to participate in a meaningful manner in the dispute settlement procedure. Loosely worded requests for the establishment of a panel, such as the catch-all clause "including, but not limited to" to describe the subject matter of a dispute have therefore rightly been held to fall short of the minimum requirements for a request for the establishment of a panel.<sup>3</sup>

19. The European Communities sympathises with Canada's difficulties in the present case to identify the subject matter of the dispute on the basis of the Brazilian claims 1, 2, 5 and 7. The identification of these claims in Brazil's request for the establishment of a panel appear at first sight to be worded too vaguely as to allow a clear identification of the subject matter of the dispute. Of course, it is necessary to read these claims together with the introductory paragraphs of the request for the establishment of a panel. In the first sentence of the first introductory paragraph, Brazil does indeed refer to its consultation request with regard to export credits and loan guarantees for regional

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<sup>2</sup> Cf. Appellate Body report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, doc. WT/DS27/AB/R of 9.9.1997, para. 142.

<sup>3</sup> Cf. Appellate Body report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, doc. WT/DS50/AB/R of 19.12.1997, para. 90 ("the convenient phrase, 'including but not necessarily limited to', is simply not adequate to 'identify the specific measure at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly' as required by Article 6.2 of the DSU").

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

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

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

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

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

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

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

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

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

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

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

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

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

### 3. Substantive Legal Issues

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

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

30. These issues will be considered in turn.

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

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

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

32. The European Communities contests that there exists in WTO law any *general* requirement that non-mandatory legislation cannot be the subject of dispute settlement. It considers that the scope of WTO obligations and the possibilities for invoking them against measures maintained by Members must be determined on the basis of the ordinary meaning of their text read in context and in the light of their object and purpose. WTO obligations are not to be restricted by some supposed overarching principle for which there is no basis in the text.

33. The European Communities would refer the Panel in this connection to the panel report in *United States– Sections 301-310 of the Trade Act of 1974*.<sup>5</sup> In paragraph 7.53 the panel in that case stated that:

Despite the centrality of this issue in the submissions of both parties, we believe that resolving the dispute as to which type of legislation, *in abstract*, is capable of violating WTO obligations is not germane to the resolution of the type of claims before us. In our view the appropriate method in cases such as this is to examine with care the nature of the WTO obligation at issue and to evaluate the Measure in question in the light of such examination. The question is then whether, on the correct interpretation of the specific WTO obligation at issue, only mandatory or also discretionary national laws are prohibited. We do not accept the legal logic that there has to be one fast and hard rule covering all domestic legislation. After all, is it so implausible that the framers of the WTO Agreement, in their wisdom, would have crafted some obligations which would render illegal even discretionary legislation and crafted other obligations prohibiting only mandatory legislation?<sup>6</sup> Whether or not Section 304 violates Article 23 depends, thus, first and foremost on the precise obligations contained in Article 23.

34. The European Communities agrees with this approach. It would add that the pretended principle that discretionary measures may not be subject to dispute settlement as such is further contradicted by the terms of Article XVI:4 of the *WTO Agreement* which reads:

Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements. (emphasis added)

35. This provision must be given meaning and this meaning can only be that Members must do more than ensure that no specific WTO-inconsistent action is taken – they must also ensure that their laws do not specifically allow or envisage WTO-inconsistent action. This new principle introduced

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<sup>5</sup> Report by the Panel on *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999 (*US – Section 301*).

<sup>6</sup> The Panel further reasons in a footnote as follows:

“Imagine, for example, legislation providing that all imports, including those from WTO Members, would be subjected to a customs inspection and that the administration would enjoy the right, at its discretion, to impose on all such goods tariffs in excess of those allowed under the schedule of tariff concessions of the Member concerned. Would the fact that under such legislation the national administration would not be mandated to impose tariffs in excess of the WTO obligation, in and of itself exonerate the legislation in question? Would such a conclusion not depend on a careful examination of the obligations contained in specific WTO provisions, say, Article II of GATT and specific schedule of concessions?”

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

### 3.1.2 Whether discretionary subsidy programmes can be subject to dispute settlement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

46. For the European Communities it is clear that Article 1.1(a)(1)(iii) of the *SCM Agreement* only brings into the scope of "financial contribution" supplies of services for less than full consideration. It is only in such cases that a government can be considered to have "contributed" anything that can be considered "financial".

47. Brazil's approach would transform all government services into subsidies. In many areas, including export credits and guarantees, governments are often able to offer something that commercial operators do not, or are able to offer it at a better rate, for example, because of some organisational or informational advantage. The European Communities does not consider that the *SCM Agreement* was intended to make all of these services subsidies, but to do so only when they are offered at a cost to the government – that is in the form of a financial contribution.

48. Even if this approach were not followed, it would still be necessary to consider whether the supply of these services confers a benefit. A benefit cannot be deduced from the fact that the recipient voluntarily accepts or seeks the services which it pays for. The Appellate Body has made clear that a benefit must be established by comparing the conditions on which the financial contribution is made with some relevant benchmark.<sup>9</sup>

49. Guidance for the interpretation of the concept of benefit is found in Article 14 of the *SCM Agreement*. Paragraph (d) relates to the supply of goods and services and provides that there is a benefit where the supply is for "less than adequate remuneration". It goes on to provide that this is to be assessed on the basis of "prevailing market conditions".

50. In the area of government services such as export credits and guarantees, governments are often the only suppliers able to offer these services. In these cases, the "prevailing market conditions" (the relevant benchmark) can only be the conditions on which equivalent services are offered by the government elsewhere in the Member concerned.

51. The European Communities notes that Brazil has not attempted to show that the services offered by EDC are financial contributions in that they involve a cost to the government.

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<sup>9</sup> Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("United States – FSC"), WT/DS108/AB/R, adopted 20 March 2000, para.90.

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

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

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

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

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

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

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

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

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

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

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

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<sup>10</sup> First Written Submission of Brazil, para. 53.

<sup>11</sup> First Written Submission of Brazil, para. 60 *et seq.*

<sup>12</sup> In paragraph 5.80 of the Report

<sup>13</sup> *Id.* paragraphs 5.80 – 5.92

.. the *Arrangement* seems to recognize that financing terms and conditions must be treated as a package, and that derogation from one will undercut the others.<sup>14</sup>

62. Which led it conclude that:

... full conformity with the “interest rates provisions” – in respect of “export credit practices” subject to the CIRR – must be judged on the basis not only of full conformity with the CIRR but in addition full adherence to the other rules of the *Arrangement* that operate to support or reinforce the minimum interest rate rule by limiting the generosity of the terms of official financing support.<sup>15</sup>

63. These other provisions that “support or reinforce” those that the panel identified as “interest rate provisions” include:

... the amount of the cash down payment, the maximum repayment term, the timing of principal and interest payments, maximum “holding periods” or lock-in periods for interest rates, risk premiums, and similar terms.<sup>16</sup>

64. The *Canada – Aircraft* panel therefore seemed to be of the view that only those provisions that directly relate to minimum interest rates constitute “the interest rate provisions” whereas *conformity* with “the interest rate provisions” requires conformity with all those provisions that “support or reinforce” those “interest rate provisions”.

65. The European Communities considers that this is an artificial construct that finds no support in the text of item (k). The logic of the *Canada – Aircraft* panel report should have led it to the conclusion that all the provisions that “support or reinforce” the minimum interest rate disciplines are to be considered included within the term “interest rate provisions.”

66. The European Communities considers that the provisions of the *OECD Arrangement* that allow “matching” also serve to “support and reinforce” the other interest rate provisions. It is clear that a deviation from normal *OECD Arrangement* is liable to distort competition. If however, the country that consider initiating such unfair competition knows that other governments will match and give the same conditions then the most important incentive to deviate from the standard disappears. The very existence of a matching possibility is helping to discipline Participants, and if occasionally not enough, at least act as a stop gap measure, until the rules can be clarified by negotiation or via a dispute.

67. The textual basis for the contrary conclusion in the *Canada – Aircraft* panel<sup>17</sup> appears very weak. The panel reasoned that matching – although allowed by the *OECD Arrangement* – could not be considered to be “in conformity” with it since matching was a “derogation”. This is strained reasoning that ignores the informal and “gentleman’s agreement” character of the *OECD Arrangement*, a non-binding instrument which is designed to provide a framework for transparency and fair competition in the field of export credit transactions between the participants and to be applied flexibly.

68. A more teleological reason for the panel’s conclusion was its view that matching would “directly undercut the real disciplines on official support for export credits”.<sup>18</sup> That view, however, is

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<sup>14</sup> Paragraph 5.112 *in fine*.

<sup>15</sup> Paragraph 5.114.

<sup>16</sup> Paragraph 7.109.

<sup>17</sup> Paragraphs 5.120 *et seq.*

<sup>18</sup> Panel report, para. 5.125.

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

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

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

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

### **3.4 Guarantees are also covered by the *OECD Arrangement***

71. As explained above the European Communities considers that the reference to the “interest rate provisions” of the *OECD Arrangement* refers to all the provisions that may affect the interest rate – that is all provisions containing substantive rather than procedural obligations.

72. It is, in particular, completely unjustified to consider interest rates in isolation from the provisions relating to the *risk* involved and in particular the provisions on premiums.

73. The European Communities would draw the attention of the Panel to the fact that Article 22 of the *OECD Arrangement*, which sets out the disciplines that they are to be respected in calculating risk premia, integrates the obligations of item (j) of Annex I to the *SCM Agreement* into the *OECD Arrangement* since it requires that premia, as well as being consistent with the level of risk, shall not be “inadequate to cover the long term operating costs and losses”.

## **4. CONCLUSION**

74. The state of the arguments presented by the parties and the information and time for reflection available to the European Communities has not allowed it to make as full a contribution to the work of the Panel as it might have liked. It will therefore supplement its arguments at the Third Party Session in the light of the other submissions to be presented to the Panel before that meeting.

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<sup>19</sup> Paragraph 5.132.

## ANNEX C-2

### THIRD-PARTY SUBMISSION OF THE UNITED STATES

(22 June 2001)

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## I. INTRODUCTION

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

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

## II. FINANCING THROUGH THE “MARKET WINDOW”

3. Brazil claims that Canada provides prohibited export subsidies through its EDC market window operations.<sup>3</sup> Canada's response focuses primarily on its claim that Corporate Account market window financing does not confer a benefit, and thus does not constitute a subsidy at all. The United States takes no position on whether the particular transactions at issue conferred benefits, and thus constituted subsidies. We do, however, wish to make some brief comments on the issue of market windows that we hope will assist the Panel in reaching its own conclusions on this matter.

4. In its written submission, Brazil cites the OECD Trade Directorate's definition of market windows, which is “institutions related to governments which are able to raise finance and lend at very low rates of interest but which may not currently follow all the provisions of the Arrangement.”<sup>4</sup> The United States agrees with Brazil that this definition of market windows is accurate. The United States also agrees with Brazil's observation that market windows, through their direct and indirect relationships to governments, are in a position to convey benefits within the meaning of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”).

5. To elaborate, the competitive pressures on financial actors in the marketplace generate financing offers that reflect any internal cost advantages enjoyed by a particular actor. For wholly commercial actors, however, the ability and willingness to compete is constrained by such factors as balance sheets, true market-determined borrowing costs, arms-length shareholder lending policies, arms-length business costs, and the disciplines imposed by the need to provide returns to owners. Market window operations are largely free of these constraints, and thus are in a position to confer benefits by exceeding, if sometimes only in a small way, what purely market-based financial institutions can (or may be willing to) offer. Their ability to do so explains their existence, since there would otherwise be no reason for market windows to exist in parallel with private financial market actors, much less any logical reason for governments to limit their market window activities to nationals.

6. As Brazil has noted, the confidentiality of market window operations makes it difficult for an outside observer to determine the extent to which a particular market window transaction confers a benefit on a particular recipient. In the U.S. view, however, an appropriate criterion for the Panel to

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<sup>1</sup> More specifically, the *OECD Arrangement on Guidelines for Officially Supported Export Credits*.

<sup>2</sup> The United States has no comments on the issue of Investissement Québec Financing.

<sup>3</sup> See, e.g., Brazil's First Written Submission at para. 29.

<sup>4</sup> Brazil's First Written Submission at para. 37.

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

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

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

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

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

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

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

<sup>6</sup> Canada’s First Written Submission at para. 67.

<sup>7</sup> Moreover, while Canada states that EDC prices its market window financing in a way that “reflects” commercial benchmarks and interest rate margins, and that it prices “according to” benchmarks that it derives, this does not necessarily mean the financing is at market rates. See Canada’s First Written Submission at para. 67.

<sup>8</sup> See, e.g., Brazil’s First Written Submission at para. 81.

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

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

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

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

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

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<sup>9</sup> See, e.g., Canada’s First Written Submission at para. 47.

<sup>10</sup> Brazil’s First Written Submission at para. 57, citing *Canada - Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/RW, 9 May 2000, para. 5.125 (“*Canada – Aircraft 21.5*”).

<sup>11</sup> See *Canada – Aircraft 21.5* at paras. 5.125-5.126. Canada did not appeal the findings related to the Canada account, so the Appellate Body did not opine on the Panel’s findings.

<sup>12</sup> See *id.* at para. 5.125.

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

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

#### IV. CONCLUSION

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

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<sup>13</sup> See, e.g., *Arrangement* at arts. 42-53.

## ANNEX C-3

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

(27 June 2001)

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

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

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

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

† Comments on the written observations of the United States.

#### **1. Article 10.3 DSU and Business confidential information**

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

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

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

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

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

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

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

9. This said, the European Communities would like to make some comments on the way in which Brazil explains its claims in its reply to the preliminary objection. These comments are inspired by a desire to see the *SCM Agreement* and the DSU correctly applied.

10. The European Communities agrees that it is possible for a Member to attack a subsidy programme “as such” or *per se*. It is also of course possible to attack individual grants under such a programme and even to do both at once. Both programmes and grants are “*measures*” capable of becoming the object of a claim in a request for the establishment of a panel.

11. The arguments that are invoked against each of these measures will not however be the same. To attack a programme, it will be necessary to identify features of the *programme* that are inconsistent with the specified WTO obligations. To attack an individual grant, it will only be necessary to identify features of *that particular grant* that are inconsistent with the specified WTO obligations.

12. It is still not clear to the European Communities which Brazil is seeking to do. The “available evidence” mentioned in Brazil’s request for consultations all related to an individual grant –the Air Wisconsin transaction. Brazil now says that it is attacking the programmes “as such” and “as applied”. The term “as applied” may mean that Brazil seeks to adduce evidence about the way in which the programmes are applied in order to establish that the programmes are “as such” inconsistent with the *SCM Agreement*. However, Brazil seems to be using the term “as applied” to cover its attack on individual grants.

13. Brazil has invoked certain characteristics of the EDC, Canada account and *Investissement Québec* that it may consider justifies a finding against the *programmes* but it also appears to be arguing that the evidence that it has brought, or is seeking to bring, against *individual grants* of subsidy justify a finding against the programme or alternatively against *all grants* under those programmes benefiting in some way the Canadian regional aircraft industry.

14. The European Communities asks the Panel to carefully distinguish claims against the programmes and claims against individual grants in order to maintain the necessary discipline in dispute settlement and avoid encouraging “fishing expeditions”.

### **3. Comments on the written observations of the United States**

15. The European Communities also wishes to comment on the written observations of the United States.

#### **3.1 Matching**

16. The European Communities is pleased to note that it is in agreement with the United States on the important issue of matching. The Panel will have noted that the European Communities has made some different arguments in support of the same conclusion. All these arguments reinforce each other and the European Communities hopes that they will allow the Panel to decide that matching in conformity with the *OECD Arrangement* may fall under the safe haven of the second paragraph of item (k) of the Illustrative List.

#### **3.2 Financial contribution and benefit**

17. The only other comment that the European Communities would make concerns the United States analysis of “market window” operations as subsidies. The United States reasoning is striking for the complete absence of any consideration of the question of financial contribution. The United States reasoning seems to be that if there is a benefit, there is a subsidy. The EC has already

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

18. The United States goes on to presume that there will always be a benefit whenever a “government entity” does something different from what it calls “the commercial market” it is providing a subsidy. (The European Communities assumes that when the United States uses the term “government entity” it is in fact referring to the notion of “public body” in Article 1.1 *SCM Agreement*. It notes in passing that Canada appears to recognise that EDC is a “public body” in para. 37 of its first written submission.)

19. I will quote the passage with which the European Communities particularly disagrees in paragraph 7 of the United States submission:

If the commercial market does not offer a particular borrower the exact terms offered by a government, then the government is providing a benefit to the recipient whenever those terms are more favorable than the terms that are available in the market. A government entity “operating on commercial principles” is still a government entity. It is not the commercial market.

20. The failure to give proper meaning to the notion of “financial contribution” conflicts with the view of the Appellate Body in *Brazil – Proex* that “financial contribution” and benefit are separate elements. It also largely reduce the notion of “financial contribution” to redundancy, something which we know a treaty interpreter must not do.

21. The United States’ reasoning on “benefit” makes any loan (or supply of a service) by a government entity automatically a subsidy if it is providing something that is not available on what the United States calls “the commercial market”.

22. As the European Communities stated in connection with its written comments on Article 1.1(a)(1)(iii) of the *SCM Agreement*, in many areas, including export credits and guarantees, governments are often able to offer something that commercial operators do not, or are able to offer it at a better rate, for example, because of some organisational or informational advantage.

23. The European Communities identifies in the United States arguments on this issue, the same omissions that it sees in Brazil’s arguments on Article 1.1(a)(1)(iii) of the *SCM Agreement* to which it would again refer the Panel. To summarise, the United States position ignores two fundamental points:

† Only supplies of loans or services for less than full consideration can be considered to constitute “financial contributions”. It is only in such cases that a government can be considered to have “contributed” anything that can be considered “financial”.

† It is too simplistic to consider that a benefit exists whenever a “government entity” supplies something on conditions that are not identical to those of the “commercial market”. In some sectors, like for example export credits, government supply of services *is* the market.

24. The European Communities will endeavour to illustrate its point with some examples. If a public body today gives a company \$100 in exchange for €100, it will be making a financial contribution. How much will that financial contribution be? I have looked up the answer – it is \$14. According to the reasoning that the European Communities is criticising, however, it would be \$100, the amount of “transfer of funds”. In this example it is also fairly clear that the benefit is the same

amount. If the exchange was \$86 for E100, there would today, according to the European Communities, be no financial contribution but still, it seems, a financial contribution according to the approach we are criticising.

25. To take a slightly different example, suppose a public body gives a company \$100 in exchange for an amount of non-convertible currency that the government can exchange for the equivalent of \$100 but which no private body can. For the European Communities there would be no financial contribution because there is no cost to the government. For others there would still be a financial contribution of \$100. The benefit to the recipient is of course likely to be \$100.

26. Similarly, if a public body gives 100 US\$ to a company in exchange for a promise to repay \$110 in a year's time, whether it is making a financial contribution or not will depend on whether, all things considered, there is a cost to the government in doing this. This may well depend on the various means available to the public body (but not necessarily to others) to secure repayment. For the United States and Brazil, it appears, there would always be a financial contribution and the only question would be whether there is a benefit according to some "commercial market".

27. These examples are not academic. The situation concerning export credits and insurance is similar. Public bodies may be in a position to assess the risk of lending to another country and also to secure repayment in case of difficulties that private bodies are not.

28. In a nutshell, whether there is a financial contribution depends on, and is to be assessed from, the perspective of the public body. Whether there is a benefit depends on, and is to be assessed from, the perspective of the recipient. These will not always be the same.

29. The European Communities asks the Panel to take these considerations into account and conduct a thorough analysis of whether there are financial contributions and benefits in order to avoid setting troublesome precedents.

#### **4. Conclusion**

30. The European Communities has had very little time to prepare these comments but would reiterate its interest in these proceedings and invite the Panel not to hesitate to ask any questions that it may have. The European Communities will do its best to reply helpfully.

31. The European Communities would like to take this opportunity to thank the Panel for giving it this opportunity to express its views and for listening so attentively.

## ANNEX C-4

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

(27 June 2001)

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

#### **The "Mandatory" vs. "Discretionary" Distinction in Subsidy Cases**

2. The first issue I would like to discuss today is the distinction between mandatory and discretionary measures in GATT and WTO jurisprudence. The EC (at para. 34) contests the very existence of the mandatory vs. discretionary distinction, describing it as a "pretended principle." Suffice it to say that the EC's view is not shared by the many WTO panels that have considered the issue, including the recent *Hot-Rolled Steel* panel which described the principle (at para. 7.141) as "well established", or by the WTO Appellate Body, which recognized the distinction and discussed it at length in *United States – 1916 Act*. The principle was also at issue in the ongoing case of *Export Restraints*. Although that report has not yet been circulated to the WTO Membership, we assume that it may contain insights that the Panel will find useful.

3. The EC is similarly misguided when it describes Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* as a new, "fundamental" principle that requires Members to "ensure that their laws do not specifically allow or envisage WTO inconsistent action." This assertion, aside from requiring dramatic, wholesale changes to Members' laws, is simply wrong. Parties to an international agreement have, by becoming parties, committed to implement their agreement obligations in good faith. Accordingly, one cannot assume that authorities will act in bad faith by exercising their discretion under domestic legislation so as to violate international obligations, and the WTO Agreements provide no basis for requiring Members to craft their laws in a way that would remove all such discretion.

4. The United States has addressed the mandatory vs. discretionary distinction on numerous occasions, in numerous disputes. Instead of repeating those discussions here, I would simply invite the Panel to review our submissions on this topic, in particular in the *Export Restraints* dispute, all of which are public (see <http://www.ustr.gov/enforcement/briefs.shtml>).

#### **Proper Interpretation of Article 1.1(a)(1)**

5. I will now turn to the proper interpretation of Article 1.1(a)(1) of the *Agreement on Subsidies and Countervailing Measures*. In challenging Brazil's argument that EDC activities can be considered export subsidies, the EC claims (from para. 42) that Article 1.1(a)(1)(iii) of the SCM Agreement only applies to "supplies of services for less than full consideration." Stated differently (e.g., at para. 47), the EC believes that there must be a "cost to the government" for there to be a financial contribution under Article 1.1(a)(1)(iii). It is important to note, moreover, that the logic of its argument would pertain to all parts of Article 1.1(a)(1). The plain language of the SCM Agreement provides no support for the EC's position. (See also the discussion of a similar issue in the original proceedings in the *Canada - Measures Affecting the Export of Civilian Aircraft* dispute,

WT/DS70, for example at para. 9.118 of the Panel report and paras. 154-156 of the Appellate Body report.)

6. As Article 1.1(a)(1) makes clear, the term “financial contribution” does not apply only when there is a cost to the government. For example, Article 1.1(a)(1)(i) of the SCM Agreement includes loans among the types of government practices that constitute financial contributions. The language is unambiguous: *if* there is a loan, *then* there is a financial contribution. A loan that costs the government nothing is still a loan, and thus is a financial contribution under Article 1.1(a)(1). The cost to government concept has no relevance to this issue.

7. In addition to contradicting the plain language of Article 1.1(a)(1), the EC’s approach suffers from another infirmity. Under the plain language of Article 1.1(a)(1)(iv), there *is* a financial contribution when a government entrusts or directs a private body to carry out one of the functions illustrated in subsections (i) through (iii). However, there would be no cost to the government in such a situation. By reading subsection (iv) out of Article 1, the EC’s interpretation violates the principle of the effectiveness of treaty interpretation.

8. The EC claims (at para. 47) that including the cost-to-government concept in the definition of financial contribution is necessary to ensure that the SCM Agreement does not treat “all” government services as subsidies, such as when a government is able to offer “something that commercial operators do not, or are able to offer it at a better rate.” But the SCM Agreement already contains ample limitations on what constitutes a subsidy that falls within the bounds of the Agreement without grafting on the EC’s additional, unmerited, requirement. Namely:

- There must be a financial contribution within the meaning of Article 1.1(a)(1);
- which confers a benefit within the meaning of Article 1.1(b);
- and is specific within the meaning of Article 1.2.

9. In addition, even if there is a subsidy under these criteria, it would be prohibited or actionable only if it was an export subsidy, an import substitution subsidy, or causing adverse effects within the meaning of Part III of the SCM Agreement. Therefore, the EC’s fears are groundless.

#### **“Matching” and the Second Paragraph of Item (k) of the Illustrative List**

10. The second from final issue I would like to address is the EC’s comments about the interrelationship between item (k) of the SCM Agreement’s Illustrative List and the matching provisions of the *OECD Arrangement*. Unlike with respect to the EC’s claims about the mandatory/discretionary distinction and the cost to government concept, the United States is in general agreement with the EC’s statements (from para. 57) on the issue of matching and item (k). In particular, although we did not address the issue in our written submission, we agree with the EC (at paras. 71-73) that guarantees are covered by the *OECD Arrangement*.

11. The United States would like to address one more point in response to the EC’s oral statement today, and that is concerning business confidential information. The United States position on this is well known - we believe that there may be situations in which it is necessary to have additional procedures in place to protect business confidential information. Article 18 of the DSU is not always a sufficient safeguard. For example, we would note that just recently an interim panel report, which is confidential under the terms of Article 18 of the DSU, was published immediately after it was provided to the parties.

12. This concludes my presentation. Thank you again for this opportunity to express our views.

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