

BRAZIL – AIRCRAFT¹

(DS46)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Canada	ASCM Arts. 3.1(a), 4.7, 27.4 Annex, I item (k)	Establishment of Panel	23 July 1998
			Circulation of Panel Report	14 April 1999
Respondent	Brazil		Circulation of AB Report	2 August 1999
			Adoption	20 August 1999

1. MEASURE AND INDUSTRY AT ISSUE

- **Measure at issue:** Brazilian government payment for the regional aircraft export under the interest rate equalization component of a Brazilian export financing programme: the *Programa de Financiamento às Exportações* (PROEX).
- **Industry at issue:** Regional aircraft manufacturing industry.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **ASCM Art. 3.1(a) (prohibited subsidies – export subsidies) and Annex I, Illustrative List of Export Subsidies, item (k):** Brazil did not dispute that its PROEX interest rate equalization scheme was a subsidy contingent upon export performance, but argued that it was “permitted” under item (k) of the Illustrative List of Export Subsidies. The Appellate Body reversed and modified the Panel's interpretation of “used to secure a material advantage in export credit terms” but upheld the Panel's conclusion that Brazil failed to establish that the payments fell within the first para. of item (k) as well as its consequential finding that the PROEX payments were prohibited export subsidies under Art. 3.1(a).
- **ASCM Art. 27 (S&D treatment):** The Appellate Body upheld the Panel's finding that Brazil's measure was not justified under Art. 27.4, as Brazil had increased the level of its export subsidies and had not complied with the phase-out period under the terms of Art. 27 by continuously granting subsidies after the date on which they should have been terminated. The Appellate Body also upheld the Panel's finding that the burden of proof under Art. 27.4 is on the complaining party as Art. 27.4 constitutes positive obligations for developing country Members as opposed to an affirmative defence.
- **ASCM Art. 4.7 (recommendation to withdraw a prohibited subsidy):** The Appellate Body upheld the Panel's recommendation that Brazil withdraw the PROEX export subsidies “without delay”, specifically, within 90 days from the date of adoption of the report, and noted that there was a significant difference between the relevant rules and procedures of the DSU on implementation and the special or additional rules and procedures in ASCM Art. 4.7. Hence in this instance, the provisions of DSU Art. 21.3 were not relevant to determining the period of time for implementation.

3. OTHER ISSUES²

- **Terms of reference (DSU Arts. 4 and 6):** Regarding whether and to what extent the panel's consideration of the matter identified in its terms of reference is limited by the scope of the consultations, the Appellate Body upheld the Panel's finding that consultations and panel requests must relate to the same “dispute”, but there need not be a “precise identity” between the two. The Appellate Body noted that DSU Arts. 4 and 6 and ASCM Art. 4 (paras. 1-4) do not require a “precise and exact identity” between the specific measures that were the subject of consultations and the measures identified in the panel request. In this case, certain regulatory instruments which came into effect after consultations had been held were nonetheless properly before the Panel because they were specifically identified in the request for establishment of the panel and they did not change the essence of the export subsidies on which consultations had been held.

¹ *Brazil – Export Financing Programme for Aircraft*

² Other issues addressed: methodology for calculating the level of export subsidies granted for purposes of ASCM Art. 27.4; business confidential information.

BRAZIL – AIRCRAFT (ARTICLE 21.5 – CANADA)¹

(DS46)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Canada	ASCM Art. 4.7 and Annex I, item (k)	Referred to the Original Panel	9 December 1999
			Circulation of Panel Report	9 May 2000
Respondent	Brazil		Circulation of AB Report	21 July 2000
			Adoption	4 August 2000

1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- Brazil indicated that it had put in place laws through which the interest rate equalization payments under PROEX would be revised, to the effect that the net interest rate applicable to any subsidized transaction under that programme would be brought down to the appropriate market “benchmark”.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **ASCM Art. 4.7 (recommendation to withdraw a prohibited subsidy):** The Appellate Body upheld the Panel's findings that Brazil was in violation of Art. 4.7 as it had not withdrawn the export subsidies for regional aircraft within 90 days of the adoption of the original panel and Appellate Body reports. The Appellate Body stated that Brazil's argument that it was continuing to make payments under letters of commitment (private contractual obligations under domestic law), which had been made before the expiry of the 90-day period of implementation, was not an adequate defence against the implementation of DSB recommendations.
- **ASCM Annex I, Illustrative List of Export Subsidies, item (k):** The Appellate Body upheld the Panel's conclusion and found that Brazil had failed to demonstrate that the PROEX payments were not used to secure a material advantage in the field of export credit terms within the meaning of item (k) because Brazil had not identified an appropriate “market benchmark” for comparison with the export credit terms available under the measure at issue. The market benchmark (i.e. US Treasury Bond rate plus 20 basis points) was inappropriate since it was not based on evidence from relevant, comparable transactions in the marketplace. In light of its above findings of violation (i.e. Brazil had not proved that PROEX payments met the conditions of the first para. of item (k)), the Appellate Body concluded that it was not necessary to rule on whether export subsidies under PROEX were “payments” or whether “export subsidies” were “permitted” under item (k) and found that the Panel's findings on these issues were moot, and, thus, of no legal effect.

3. OTHER ISSUES

- **Burden of proof:** Upholding the Panel's findings, the Appellate Body stated that since Brazil was clearly asserting an “affirmative defence” to a violation of ASCM Art. 3.1(a) under the first para. of item (k) of the Illustrative List of Export Subsidies, the burden was on Brazil to prove that the measure put in place was justified under the terms of item (k).

¹ Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU

BRAZIL – AIRCRAFT (ARTICLE 21.5 – CANADA II)¹ (DS46)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Canada	ASCM Arts. 1, 3 and Annex I, item (k)	Referred to the Original Panel	16 February 2001
			Circulation of Panel Report	26 July 2001
Respondent	Brazil		Circulation of AB Report	NA
			Adoption	23 August 2001

1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- Following authorization by the DSB of countermeasures to be imposed by Canada against Brazil, Brazil announced that it had revised the interest rate equalization component of PROEX, its export financing programme related to the sale of regional aircraft, and had, thereby, eliminated the prohibited export subsidy found to be in violation of the ASCM by the original Panel, under its new PROEX III scheme.

2. SUMMARY OF KEY PANEL/AB FINDINGS²

- ASCM Art. 1 (definition of a subsidy):** On the question of whether the PROEX III payments constituted a subsidy within the meaning of Art.1 (i.e. whether it was a (i) financial contribution that conferred a (ii) benefit), the Panel found that PROEX III payments did constitute a financial contribution and that the PROEX III scheme conferred a benefit on producers of regional aircraft, as it did not preclude granting of the payments to reduce the interest rates below those which could be obtained commercially. However, the Panel concluded that Canada had failed to establish that PROEX III *mandated* that the Brazilian government conferred a "benefit" on producers of regional aircraft. Since it was a discretionary provision, PROEX III was not found to amount to an as such violation.
- ASCM Art 3.1(a) (prohibited subsidies – export subsidies):** The Panel found that PROEX III applied only to export financing operations and therefore, was contingent upon export under Art. 3.1(a). However, the Panel concluded that because Brazil maintained the discretion to limit the provision of the PROEX III interest rate equalization payments to circumstances where a benefit was not conferred, Brazil was not required by the PROEX III scheme to provide a "subsidy" within the meaning of Art. 1.1. Therefore, there was no prohibited export subsidy and no violation of Art. 3.1(a).
- ASCM Annex I, Illustrative List of Export Subsidies, item (k):** (second para. of item (k)) The Panel found that PROEX III constituted "interest rate support" and was, therefore, an export credit practice subject to the interest rate provisions of the OECD Arrangement. The Panel nevertheless concluded that PROEX III, as such, allowed Brazil to act in conformity with the OECD Arrangement and that Brazil had, therefore, successfully invoked the safe haven provided for by the second para. of item (k).

(first para. of item (k)) Regarding Brazil's claim that, even if PROEX III was not covered by the safe haven provided under the second para. of item (k), the payments under PROEX III were still permitted as they were not used to secure a material advantage in the field of export credit terms under the first para. of item (k), the Panel found that Brazil failed to establish that PROEX III was justified under the first para. because the payments made under PROEX III were not "payments" within the meaning of the first para.: while PROEX III allowed Brazil to make payments that did not secure a material advantage in the field of export credits, the financial institutions involved in financing PROEX III-supported transactions provided "export credits", but they could not be seen as "*obtaining* export credits" as indicated in the first para. of item (k). The Panel also found that the first para. of item (k) cannot, as a legal matter, be invoked as an affirmative defence to a violation of ASCM Art. 3.1(a).

¹ Brazil – Export Financing Programme for Aircraft, Second Recourse by Canada to Article 21.5 of the DSU

² Other issues addressed: ASCM (general); private counsel; confidentiality; mandatory vs discretionary legislation distinction.