

# CANADA – AIRCRAFT<sup>1</sup>

(DS70)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Brazil</i>	<i>ASCM Arts. 1, 3.1 and 4.7</i>	Establishment of Panel	<i>23 July 1998</i>
			Circulation of Panel Report	<i>14 April 1999</i>
Respondent	<i>Canada</i>		Circulation of AB Report	<i>2 August 1999</i>
			Adoption	<i>20 August 1999</i>

## 1. MEASURE AND INDUSTRY AT ISSUE

- **Measure at issue:** Canadian measures providing various forms of financial support to the domestic civil aircraft industry.
- **Industry at issue:** Civil aircraft industry.

## 2. SUMMARY OF KEY PANEL/AB FINDINGS

- **ASCM Art. 1.1 (definition of a subsidy):** The Panel found that a “financial contribution” confers a “benefit” and constitutes a subsidy under Art. 1 when provided on terms more advantageous than those otherwise available to the recipient on the market. The Appellate Body, while upholding this finding, concluded that the word “conferred”, in conjunction with “thereby”, calls for an inquiry into what was conferred on the recipient, not an inquiry into the cost to the government as argued by Canada.
- **ASCM Art. 3.1(a) (prohibited subsidies – export subsidies):** The Appellate Body upheld the Panel's finding that contingency exists if there is a relationship of conditionality or dependence between the grant of the subsidy and the anticipated exportation or export earnings.
- **Examination of Canada's individual measures (as such/as applied distinction for discretionary and mandatory measures):** The Panel concluded that the EDC programme as such was discretionary legislation and, upon examination of its application, found no prima facie case that these were export subsidies. Although the Panel also found that the Canada Account programme *per se* was discretionary legislation that could not be challenged as such, it concluded that the programme as *applied* conferred a benefit and was an export subsidy contingent upon export performance. The Panel also found that TPC assistance was a subsidy contingent in fact upon export performance. In this respect, it applied the standard whether “the facts demonstrate that [TPC contributions] would not have been granted *but for* anticipated exportation”. The Appellate Body upheld these findings by the Panel.

## 3. OTHER ISSUES<sup>2</sup>

- **Adverse inference:** The Appellate Body found that panels have discretion to draw inferences from all the facts including where a party to a dispute refuses to submit information sought by a panel pursuant to DSU Art. 13. In this case, it held that the Panel did not err in refusing to draw adverse inferences from Canada's refusal to provide information. The Appellate Body stated that parties are under an obligation to cooperate with a panel.

<sup>1</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*

<sup>2</sup> Other issues addressed: panel's terms of reference; relationship between consultations and panel requests; application of the ASCM to measures in place prior to 1 January 1995; adoption of special working procedures on business confidential information.

# CANADA – AIRCRAFT (ARTICLE 21.5 – BRAZIL)<sup>1</sup> (DS70)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Brazil</i>	ASCM Art. 3.1(a)	Referred to the Original Panel	9 December 1999
			Circulation of Panel Report	9 May 2000
Respondent	<i>Canada</i>		Circulation of AB Report	21 July 2000
			Adoption	4 August 2000

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

- **(i) Canada Account debt financing** for regional aircraft exports – a new policy guideline under which all Canada Account transactions were required to comply with the rules set out in the OECD Arrangement on Guidelines for Officially Supported Export Credits (the “OECD Arrangement”); and **(ii) Technology Partnerships Canada (TPC) assistance** – no disbursements pursuant to any existing TPC Contribution Agreement to the Canadian regional aircraft industry; cancellation of conditional approval that had been given for two other regional aircraft industry projects established prior to circulation of the Appellate Body Report; and restructuring of the TPC to comply with the ASCM.

## 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- **ASCM Art. 3.1(a) (prohibited subsidies – export subsidies):** The Appellate Body first held that the obligation of an Art. 21.5 Panel is to review the consistency of the revised measure with the relevant Agreement (i.e. in this case, whether the “revised” TPC was consistent with ASCM Art. 3.1(c)) and that it was *not limited* to examining the measure from the perspective of the original proceedings (i.e. the issue of whether or not Canada has implemented the DSB recommendation). The Appellate Body then found that the Panel had erred in this case in declining to examine Brazil’s new argument related to “specific targeting” because the argument was not part of the original proceeding. Having completed the legal analysis of this issue based on the standard it had set out, the Appellate Body then rejected Brazil’s argument that Canada’s regional aircraft industry was “specifically targeted” for assistance because of its “high export-orientation”, since (i) the high export-orientation of a subsidized industry was not enough for the Appellate Body to find export contingency; and (ii) Brazil relied on the evidence relevant to the previous TPC programme and not to the revised programme. Consequently, the Appellate Body found that Brazil had failed to establish that the revised TPC programme was inconsistent with ASCM Art. 3.1(a) and had failed to establish that Canada had not implemented the recommendations and rulings of the DSB.
- **ASCM Annex I, Illustrative List of Export Subsidies, item (k), second para.:** In addressing whether the new policy guideline for Canada Account debt financing was consistent with Canada’s obligation to “withdraw” the prohibited export subsidy by ceasing to provide the subsidy, the Panel examined whether the policy guideline “ensure[d]” that future Canada Account transactions in the regional aircraft sector would qualify for the “safe haven” provided by the second para. of item (k) of the Illustrative List of Export Subsidies. In this regard, the Panel set out the legal standard for item (k): an “export credit practice which is in conformity with the interest rates provisions of the OECD Arrangement shall not be considered an export subsidy prohibited by the [ASCM]”. Having applied this standard to Canada’s policy guideline, the Panel found that the policy guideline was not sufficient to ensure that future Canada Account transactions in the regional aircraft sector would be in conformity with the interest rate provisions of the OECD Arrangement, and thus qualify for the “safe haven” in the second para. of item (k) of Annex I of the ASCM. Thus, Canada was found to have failed to implement the DSB’s recommendations and rulings.

<sup>1</sup> Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU

<sup>2</sup> Other issues addressed: DSU Art. 19.1.