ANNEX C

SUBMISSIONS OF THIRD PARTIES

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ANNEX C-1

**SUBMISSION OF THE EUROPEAN COMMUNITIES
AS A THIRD PARTY**

(23 March 2001)

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I. 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*").

2. The questions before the Panel are of considerable importance and complexity. The EC hopes that the comments it offers below will help the Panel in its task. It also hopes that the Parties will provide it with all their submissions to the first and only meeting of the Panel (including therefore their second written submissions), as required by Article 10.3 *DSU*, so that it can make a further contribution at the meeting with the Panel.

3. 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 EC considers its close involvement in the work of this Panel to be particularly important.

II. SCOPE OF THIS PROCEEDING

4. The EC understands that the present proceeding does not concern contracts covered by PROEX I and II and that the question before the Panel is whether PROEX III is consistent or not with the *SCM Agreement*.[1]

5. The only basis on which the EC can express an opinion on this issue is from the terms of the new scheme as described in Section III, paragraphs 7 to 9 of Brazil's first written submission to the Panel and the documents referred to therein.

6. The EC notes that the only change in the scheme described by Brazil is the introduction of a requirement to comply with CIRR and that:[2]

> PROEX III interest rate equalization remains subject to the maximum percentages established by the Central Bank of Brazil in its Circular Letter No. 002881, dated 19 November 1999. Circular Letter No. 002881 sets the maximum allowable interest equalization payment at 2.5 percent.[3] This maximum amount is subject to the stipulation of Article 1, paragraph 1 of Resolution 00279 that interest rate equalization for regional aircraft must comply with the terms of the CIRR established under the *OECD Arrangement*.
>
> In addition, PROEX III interest rate equalization remains subject to the requirement that interest rate equalization may be provided for only 85 percent of the value of the sale, pursuant to Article 5, paragraph 1 of Directive number 374 of the Ministry of Development, Industry, and Foreign Trade, dated 21 December, 1999.[4] Directive 374 also establishes a maximum financing term of 10 years for regional jet aircraft.[5]

7. Canada seems to agree since it states that:[6]

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[1] First written submission of Canada, paragraph 19.

[2] First written submission of Brazil, paragraphs 8 and 9.

[3] Brazil's footnote: The original Portuguese version and the official English translation of Circular Letter No. 002881 are attached as Exhibit Bra-2.

[4] Brazil's footnote: The original Portuguese version and the official English translation of Directive 374 are attached as Exhibit Bra-3.

[5] Brazil's footnote: *Id*., Annex, NCM Heading 8802 (attached as Exhibit Bra-3).

[6] First written submission of Canada, paragraph 12.

In effect, the only discipline that Resolution 2799 imposes on PROEX payments is that they must be "in accordance with the CIRR".

8. The EC notes Canada's view that the scheme allows considerable flexibility and that the new scheme can be for unlimited periods and for 100% of the contract amount. The EC does not dispose of the necessary information to express a view on how Brazil does or will apply PROEX III and can only reserve its position on this question.

III. LEGAL ARGUMENT

9. Brazil makes three arguments in its defence:

- That PROEX III confers no benefit since financing is provided at CIRR which is at or above the "market rate";
- That PROEX III falls within the "safe haven" of the second paragraph of item (k);
- That PROEX III falls under the *a contrario* exception of the first paragraph of item (k).

10. These arguments will be considered in turn.

A. THE EXISTENCE OF A SUBSIDY

11. The EC does not agree that interest rate equalisation in the form offered in PROEX III does not confer a benefit for the purposes of Article 1 of the *SCM Agreement.*

12. It is paid to reduce the interest payment of a commercially negotiated contract by up to 2.5% per annum. It therefore inevitably – indeed *ex hypothesi* – provides a benefit compared with the market rate and thus a subsidy.

13. This conclusion is not contradicted by the various statements that Brazil refers to from the Norwegian export credit agency,[7] Mr Stafford and Mr Fumio Hoshi?[8]

14. These statements relate to whether the CIRRs actually correspond to rates available to first class borrowers in all cases and in no way support the suggestion that such rates are available to all borrowers on the market (especially in the absence of a guarantee or other security).

B. THE OECD SAFE HAVEN

15. Brazil's main defence is now that PROEX III falls under the safe haven of the second paragraph of item (k) of Annex I to the *SCM Agreement.*

1. The applicable version of the *OECD Arrangement*

16. Brazil bases its argument in the first instance on text of the 1992 version of the *OECD Arrangement.* The EC disagrees that the 1992 version is applicable. The text referred to as the *1998 version*[9] has replaced that of 1992

17. That the text of the second paragraph of item (k) of Annex I to the *SCM Agreement* makes a *dynamic* reference to the *OECD Arrangement* as in existence from time to time (rather than a *static*

[7] Paragraph 12.
[8] Paragraph 13.
[9] The text was agreed in 1997 and published in 1998.

reference to a given version) is made clear by the fact that it provides for the applicability of *successor* undertakings. If it had been intended that only a given version of the *OECD Arrangement* should be relevant, this would have been specified in the text of item (k) itself. Since a successor undertaking can be become the basis for the application of this provision, *a fortiori* the same must be true of amendments to the *OECD Arrangement.*

18. The context of the provision, represented by the *OECD Arrangement* itself, confirms this interpretation. The *OECD Arrangement* is a non-binding gentlemen's agreement that was always designed to be evolutive in character, developing stricter disciplines and responding to changes in circumstances. Concretely, this is reflected in the provisions on annual review and on future work contained in all versions of the *OECD Arrangement.*[10]

19. The negotiating history of item (k) also strongly suggests that a dynamic reference was meant. It was first adopted in 1979 as part of a result of the Tokyo Round negotiations. The fact that the identical words were adopted as part of the *WTO Agreement* indicates that it was presumed to have the same meaning as under the Tokyo Round Code and this can only mean that the references in both texts were dynamic references to the version of the *OECD Arrangement* applicable from time to time.

20. The EC notes that the Article 21.5 panel in *Canada – Aircraft* came to the same conclusion as the EC that the *1998 version* of the understanding was applicable and relevant to assessing the conformity of export credit practices with the second paragraph of item (k) of Annex I to the *SCM Agreement.*[11]

21. The first argument that Brazil makes to the contrary is that the words "has been" in the phrase "a successor undertaking that *has been* adopted" can only refer to versions that were adopted before the conclusion of the WTO Agreement.[12]

22. The EC shares Brazil's view of the meaning of the perfect tense – that it refers to a "time regarded as present"[13] – but not Brazil's conclusion. The use of the perfect tense in the parentheses to the second paragraph of item (k) of Annex I to the *SCM Agreement* contrasts with the neutral present used elsewhere in that paragraph and indicates that the successor undertaking (or amendment) must *have been adopted* before the export credit measure which is the subject of dispute is taken.

23. That this is the intent is also confirmed by the consideration that Members of the WTO cannot be expected to comply with undertakings that have not yet entered into force nor with undertakings that have been recognised as inadequate and thus have been replaced.

24. Brazil's second argument is that a dynamic reference would imply an amendment of the *SCM Agreement* derogating from the Article X of the WTO Agreement and add to WTO obligations contrary to Article 3.2 *DSU*.[14]

25. The EC does not agree that a change in the *OECD Arrangement* implies an amendment to the *SCM Agreement* at all. The text is not changed in any way. What is allowed or not allowed changes – but this is what the WTO Members agreed when adopting a text that makes a reference to another understanding. In the same way, what is allowed or not allowed under other provisions of the *WTO*

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[10] See Articles 82 to 88 of the 1998 version, Article 21 and Annex IX of the 1992 version of the *OECD Arrangement* and paragraph 13 of the original 1978 version.

[11] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft ("Canada – Aircraft")*, WT/DS70/AB/R, adopted 20 August 1999, esp. paragraph 5.78. It seems that Brazil had not contested that 1998 Arrangement was the relevant text. Note the discussion of "successor undertakings " in footnote 69.

[12] First written submission of Brazil, paragraphs 20 to 22.

[13] First written submission of Brazil, paragraph 20.

[14] Paragraphs 23 to 31.

Agreement may depend on decisions taken elsewhere. For example, Article XXI GATT 1994 allows Members to take action required by resolutions of the Security Council of the United Nations, which can lead to prohibitions of trade under a sanctions regime.

26. The change in the rights and obligations of Members resulting from changes in the *OECD Arrangement* is also analogous to the change resulting from the expiry of Articles 6.1, 8 and 9 of the *SCM Agreement* pursuant to its Article 31, which also did not require the application of Article IX of the *WTO Agreement*.

27. As for Article 3.2 *DSU*, this only provides that dispute settlement should not change the rights and obligations of Members, not that no provision of the *WTO Agreement* can be construed as allowing changes to what is permitted and not permitted by those provisions over time.

28. Brazil also argues that "amendment" of item (k) in this way would not be transparent, would conflict with the object and purpose of the Agreement),[15] that it cannot be presumed that the WTO Members intended to give a small group of them the right to change the rights and obligations under the WTO Agreement and that such a power would be manifestly absurd and unreasonable.[16]

29. The EC disputes that the changes in the *OECD Arrangement* are untransparent. The current version of the *OECD Arrangement* is publicly disclosed by the OECD and is available on the OECD web site.[17]

30. It may appear strange that the WTO Members should have agreed to apply a text that could only be changed by a small number of them.

31. However, it is not unprecedented in the *WTO Agreement* for a small number of Members to be in a position to adopt texts that are of significance for all Members. Both the *SPS Agreement* and the *TBT Agreement*[18] require Members to base their measures on international standards when these are available and there are no imperative reasons for doing otherwise. These international standards can be drawn up by small numbers of WTO Members (and even non-Members) within the framework of other international organisations, such as Codex Alimentarius Commission in the case of the *SPS Agreement*.

32. There are objective reasons for the *SCM Agreement* to refer to rules established within the framework of the OECD: it is mainly the OECD Members who use export credits and have the necessary expertise and interest in developing the disciplines.

33. The EC would also point out that the WTO Secretariat is invited to attend the meetings of the participants in the *OECD Arrangement* and thus could be informed of any new development. The OECD Secretariat would certainly inform the WTO Secretariat of any new version of the *OECD Arrangement*.

2. The identification of the "interest rate provisions" of the *OECD Arrangement*

34. Brazil also disagrees with the Canada – Aircraft panel (recourse to Article 21.5) on the question of what are the "interest rate provisions" of the arrangement[19] and claims that this only refers

[15] First written submission of Brazil, paragraphs 32 to 35.
[16] Paragraphs 36 to 39 and also paragraph 31.
[17] http://www.oecd.org/ech/act/xcred-en.htm
[18] Articles 2.4 and 5.4 TBT Agreement and Article 3.1 of the *SPS Agreement*.
[19] Paragraphs 34 to 50, contradicting notably paragraph 5.147 of the *Canada – Aircraft Article 21.5* panel Report

to the single provision in the main text and the Sectoral Understanding on Export Credits for Civil Aircraft that specify the minimum interest rates.[20]

35. The EC also disagrees with the view expressed by the above panel but for the opposite reasons. It considers that the *Canada – Aircraft* panel took too narrow a view of the "interest rate provisions" of the *OECD Arrangement.*

36. In particular, the EC submits that that panel failed to take adequately into account the fact that the *OECD Arrangement* is 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. The EC believes that a failure to take this circumstance into account leads to the terms of the *OECD Arrangement* and the scope of the safe haven being interpreted too narrowly. A notable consequence of this narrow interpretation is that the "matching" of supported rates, provided for in Article 29 of the *OECD Arrangement* would not be within the safe haven. The EC is firmly of the view that matching is in conformity with the *OECD Arrangement* and that the provisions that allow it are interest rate provisions and that therefore matching is covered by the second paragraph of item (k). Matching is specifically envisaged and authorised by the *Arrangement* but must comply with a strict set of conditions and procedures.[21]

37. Although the panel in the Canada – *Aircraft* case correctly gave a wide interpretation to the term "export credit practices"[22] which implies that that "interest rate buy downs" (that is interest rate equalisation) were covered by the second paragraph of item (k), it gave an excessively narrow interpretation to the "interest rate provisions" of the *OECD Arrangement.*[23]

38. The EC considers that it makes no sense to consider interest rates in isolation from all the conditions that influence the interest rate. That is why it 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.

39. 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.

40. Article 14 of the OECD *Arrangement,* which immediately precedes the definition of CIRR, contains a definition of interest that reads as follows:

> (c) interest excludes:
>
> any payment by way of premium or other charge for insuring or guaranteeing supplier credits or financial credits. Where official support is provided by means of direct

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[20] First written submission of Brazil, paragraph 40.

[21] The EC recognises that the *procedures* of the *OECD Arrangement* cannot be applied to non-participants. But this does not mean that non-participants would be disadvantaged. In fact the opposite is the case. The safe haven only require non-participants in the *OECD Arrangement* to apply in practice the interest rate provisions of the *OECD Arrangement*, which the EC 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 offeror. 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.

[22] In paragraph 5.80 of the Report

[23] *Id.* paragraphs 5.80 – 5.92

> credits/financing or refinancing, the premium either may be added to the face value of the interest rate or may be a separate charge; both components are to be specified separately to the Participants,
>
> any other payment by way of banking fees or commissions relating to the export credit other than annual or semi-annual bank charges that are payable throughout the repayment period, and
>
> withholding taxes imposed by the importing country.

41. Article 15 on CIRRs goes on to make clear that

> CIRRs should represent final commercial lending interest rates in the domestic market of the currency concerned,

42. For the EC these provisions together make clear that CIRR is an interest rate based on an assumption of minimal risk of non-payment.

43. It is important to take into account:

(1) the pure cost of money for a prime borrower in a country with high creditworthiness; and,

(2) cost elements linked to the financial institution having a good creditworthiness and providing export credits; and,

(3) remuneration of the debtor risk that the financial institution bears.

44. CIRR was designed for taking care of 1) and 2), while 3) is to be covered by a separate premium.

45. This is made clear in the provisions in Chapter II of the *OECD Arrangement* relating to what is called "pure cover" – that is, Articles 7c), 19b second indent, 25 c as well in the Annex III). These provisions demonstrate that official support can be restricted to the assumption of the risk element of an export credit transaction. When official support is given in the form of insurance ("pure cover"), the loan has to fulfil all provisions for export credit of Chapter II of the Arrangement or of one of its sector understandings (except the minimum interest rate provisions).

46. It is implicit in these provisions that a payment is required for this assumption of risk. Article 22 of the *OECD Arrangement* sets out the disciplines that the are to be respected in calculating premia. Article 22 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." That this was the intention is demonstrated by the description of the Schaerer Package contained in Exhibit Bra-8.

47. There is no obligation in the *OECD Arrangement* to apply for an insurance/guaranty (against political risks of non-payment of the loan), even if in practice both CIRR financing and credit risk cover are often linked. Here again it is worthwhile to remember that the main principle of CIRR financing is to provide buyers with rates close to rates normally given, only, to first class borrower of high-income OECD countries and then add the premium element.

48. As mentioned above, the level of CIRR does not depend on the creditworthiness of the buyer. Even if insurance/guarantee is not really compulsory in the *OECD Arrangement*, almost all

Participants provide such insurance/guarantee in case of CIRR financing in order to minimise the potential cost for the budget of giving first class borrower rates to riskier countries/buyers.

49. One way of analysing PROEX III is to consider that it effectively compensates for the credit risk that would normally be charged to the borrower by the lending bank. As such it is equivalent to the payment of an insurance or guarantee payment and is an interest related official support for export credit that is not in conformity with these provisions of the *OECD Arrangement.*

50. The EC agrees with the statement of the Article 21.5 Panel in *Canada – Aircraft* that:[24]

> Thus, we 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.

51. The EC therefore disagrees with Brazil's statement in paragraph 52 of its first written submission that PROEX III conforms to "Articles 3 through 7 of the main text, and Articles 17 through 22 and Articles 24 and 25 of Annex IV."

C. THE FIRST PARAGRAPH OF ITEM (K)

52. The EC view on the first paragraph of item (k) is already known to the Panel.[25]

53. On the issue of "material advantage" it would appear that this is now being provided through the assumption of credit risk without remuneration.

IV. CONSULTATIONS IN ARTICLE 21.5 PROCEEDINGS

54. The EC has always maintained that consultations are an obligatory pre-condition to the establishment of a panel under Article 21.5 DSU. It repeats its position so as to make clear that it does not consent to what may be considered an evolving practice.

55. The first occasion when the question of whether consultations were required prior to the establishment of an Article 21.5 panel was in the context of the *Bananas* dispute. The EC made clear[26] that it considers consultations under Article 4 of the DSU to be necessary before the establishment of a panel can be requested under Article 21.5. The reason is the reference contained in Article 21.5 that any dispute on implementation "shall be decided through recourse to these dispute settlement procedures". In the view of the EC, "these dispute settlement procedures" include consultations and a right to an appeal. This is so for reasons related to the multilateral character of the procedures, which include procedural rights of other WTO Members, particularly potential third parties, and a standardised dispute settlement procedure the basic features of which may not be amended simply because that pleases the parties in an individual cases.

56. The EC considers that the obligatory requirements of the *DSU* can also not be modified by agreement between the parties.[27] If the parties to a dispute were entirely free to develop procedures of

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[24] Paragraph 5.114.

[25] First written submission of the EC to the original Article 21.5 panel, paragraphs 20 to 26 and oral statement, paragraphs 43 to 46.

[26] Cf. the statement of the EC representative at the DSB meeting of 22 September 1998, doc. WT/DSB/M/48, p. 7.

[27] The EC notes that there is no such agreement in the present case although there was such an agreement in the original Article 21.5 proceeding. A similar situation prevailed in the Article 21.5 proceeding concerning *Canada – Aircraft* and in the unfortunate and problematic case *Australia – Leather*, where the

their own choice (*quod non*), this would jeopardise third party rights enshrined in the *DSU* (particularly in Articles 4.11 and 10). Nothing would stop the parties from agreeing bilaterally not only to jump the procedural step of consultations, but also to jump other procedural steps such as the panel stage and to submit their dispute to the Appellate Body straight away (e.g. in order to "gain time" and to exclude third parties who cannot participate in Appellate Body procedures if they did not reserve their right to participate in the preceding panel procedure). It would also mean that the parties are free to agree among themselves that a panel report under Article 21.5 is not binding and that it may be subjected to some kind of review by another international body, such as the WHO in a case concerning human health considerations. It would, therefore, constitute circumvention, indeed, an undermining, of the system for dispute settlement established by the *DSU*.

57. The EC believes that these scenarios are not compatible with the multilateral nature of the procedures under the DSU, the procedural rights of third parties and indeed the general matrix of procedural checks and balances built into the DS system. The *DSU* contains sufficient flexibility to adapt the basic procedural requirements to the needs of the parties in individual disputes. As an example, Article 4.7 (second sentence) of the *DSU* allows the parties to shorten the 60-day period on the basis of a bilateral agreement. If the parties to the dispute agree, a panel under Article 21.5 of the DSU may be established at the first meeting where the request is considered by the DSB (Article 6.1 of the *DSU*). The panel may propose special working procedures after consultations with the parties (Article 12.1 of the *DSU*). All these provisions indicate that there is some flexibility in the procedures, which is largely dependent on the agreement of the parties to the dispute. None of these provisions however allows the parties to the dispute to simply omit one of the essential procedural steps before requesting the next one.

58. The procedural step of holding consultations is of fundamental importance for the dispute settlement system. Consultations give the parties an opportunity to resolve their differences without an adjudication of the dispute and will, at the very least, allow the parties to clarify on what precise issues their disagreement continues. In this way, consultations contribute to discharging panel proceedings from issues on which there is no real and serious disagreement. In addition, any request for consultations under Article 4 of the *DSU* must be circulated to the entire WTO membership in order to identify and circumscribe the dispute, thus allowing potential third parties to prepare their request to participate in the procedure. In this regard, it must be recalled that third parties may participate in consultations requested under any of the provisions cited in Article 4.11 and footnote 4 of the *DSU*. Thus, third party rights are clearly impaired by the omission of the formal consultation stage in a dispute settlement procedure.

59. All these important functions of the consultations are undermined if the parties to the dispute are considered to be free to "jump the gun" and go to a panel procedure without holding formal consultations under Article 4 of the *DSU* first. Moreover, consultations must anyhow take place in order to agree on the procedure to be followed, and it is obvious that this is also an occasion to consult

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parties agreed to dispense with Article 4 consultations as well as certain essential procedural guarantees such as an appeal (cf. doc. WT/DS126/8 of 4October 1999). In all these cases an explicit agreement was reached between the parties before the request for the establishment of a panel under Article 21.5 of the DSU was submitted to the DSB. In the dispute on *Australia-Salmon*, it appears that no formal consultations were held before Canada requested the establishment of a panel under Article 21.5 of the DSU. It appears moreover that the fact that the parties renounced their rights to formal consultations in that case was also the result of an agreement between the parties, but that agreement was not circulated to WTO Members (cf. doc. WT/DS18/14 of 3 August 1999).

Similarly, in the *Shrimp/turtle* case, an understanding was reached between Malaysia and the United States regarding possible proceedings under Articles 21 and 22 of the DSU (cf. doc. WT/DS58/16 of 12 January 2000). According to this agreement, Malaysia "will consult with the United States before requesting the establishment of a panel under Article 21.5". While it is not specified whether these consultations will be held under Article 4 of the DSU, no other relevant provision on consultations of the DSU would seem to be applicable.

on substantive issues. Thus, in reality no time is gained in jumping this procedural step, except that third parties are put at a disadvantage and that the panel may have to address issues on which there is no real disagreement.

60. In conclusion, the EC is firmly of the view that the existing rules of the *DSU* do not allow parties to a dispute to agree bilaterally to dispense with consultations under Article 4 of the DSU. Any other approach leads to unacceptable uncertainty about the limits of the procedural guarantees for both parties and to a curtailing of third party rights clearly enshrined in the *DSU*.

61. As stated in the Appellate Body report in the *Bananas* case[28], "a panel request is normally not subjected to detailed scrutiny by the DSB". The Appellate Body concludes that "it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the *DSU*".

V. CONCLUSION

62. The state of the arguments presented by the parties and the information and time for reflection available to the EC 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.

[28] Cf. doc. WT/DS27/AB/R at para. 142.

ANNEX C-2

SUBMISSION OF KOREA AS A THIRD PARTY

(23 March 2001)

I. INTRODUCTION

1. Korea's interest in this DSU Article 21.5 proceeding is systemic. This has to do with the permissibility of an *a contrario* exception from the first paragraph of item (k) of the Illustrative List of Export Subsidies (the Illustrative List)[1].

2. Korea expresses no opinion about other issues and arguments raised by Canada and Brazil in this proceeding.

II. THE PERMISSIBILITY OF AN *A CONTRARIO* EXCEPTION

3. Under the first paragraph of item (k) of the Illustrative List, only those export credits that are used to secure a material advantage are categorized as prohibited export subsidies.

4. As a matter of logic, as well as of textual interpretation, then, an export credit practice that is not used to secure a material advantage cannot be a prohibited export subsidy within the meaning of Article 3.1(a) of the SCM Agreement. Rather, it must be a permitted practice. Any other interpretation renders meaningless item (k)'s limitation.

5. It has been argued that because the Illustrative List is not an exhaustive listing of all possible prohibited subsidies, an *a contrario* interpretation is not appropriate.[2] Korea does not share this view. Two situations should be differentiated: first, when there is a type of subsidy practice not identified in the Illustrative List; and, second, when, as in this dispute, a subsidy practice is identified and declared a prohibited export subsidy under certain conditions.

6. In the first situation, one cannot argue *a contrario* that the absence of a practice from the Illustrative List establishes that the practice is not a prohibited export subsidy. However, one cannot extend this argumentation to the second situation. Otherwise, the result would be that a practice, such as an export credit not used to secure a material advantage, that was excluded from categorization as a prohibited export subsidy by the text of the Illustrative List would nonetheless be considered one by virtue of being a prohibited export subsidy that was not included in the Illustrative List. Such a result is not logical and it violates the interpretive principle of effectiveness.

7. It also has been argued that, by virtue of footnote 5 of the SCM Agreement, the only subsidy practices that can be categorized as outside the scope of Article 3.1(a) of the SCM Agreement are those which the Illustrative List expressly asserts are not prohibited export subsidies.[3] Korea does not agree with this argument either. It would render meaningless situations, such as those under the first paragraph of item (k) of the Illustrative List, where a practice is declared to be a prohibited export subsidy only where a specified condition (in this case "secur[ing] a material advantage") is satisfied. In Korea's view, the only interpretation that does not render meaningless the conditional application of item (k) is an interpretation that "referred to," as used in footnote 5, encompasses not only practices

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[1] Annex I to the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

[2] First Submission of Canada, Brazil — Export Financing Programme for Aircraft — Second Recourse by Canada to Article 21.5 of the DSU, WT/DS46 (2 March 2001) (First Canadian Submission) at paras. 58-59.

[3] *Id.* at paras. 47-55.

expressly declared not to be prohibited export subsidies, but also practices that are prohibited export subsidies only where a specific condition (such as "secur[ing] material advantage") is satisfied.

8. The Appellate Body appears to share the position Korea takes. In its Article 21.5 report, it states that if Brazil had satisfied its burden of proof, "we [the Appellate Body] would have been prepared to find that the payments made under the revised PROEX are justified under item (k) of the Illustrative List."[4]

9. Apparently, the above statement by the Appellate Body deals only with the case of "the payment (of the costs incurred in obtaining credits)" within the meaning of the first paragraph of Annex I (K) of the SCM Agreement. Korea pays further attention to the textual interpretation of the paragraph, according to which this material advantage condition also applies to the other case of "the grant of export credits," juxtaposed in the same paragraph.[5]

10. Accordingly, for the reasons set out above, Korea believes that an *a contrario* interpretation of the first paragraph of item (k) of the Illustrative List is appropriate so as to give meaning to the material advantage condition. If an export credit practice, whether it is a grant of credits or a payment of costs, does not secure a material advantage, that practice must be viewed as a permitted practice.

[4] Brazil — Export Financing Programme for Aircraft — Recourse by Canada to Article 21.5 of the DSU, WT/DS46/AB/RW (21 July 2000) at para. 80.

[5] Attention should be paid to the use of comma in front of "in so far as …" and the subject in the plural ("they") in the phrase of ", in so far as they are used to secure a material advantage …" (SCM Agreement Annex I(K)).

ANNEX C-3

**SUBMISSION OF THE UNITED STATES
AS THIRD PARTY**

(23 March 2001)

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I. INTRODUCTION

1. The United States welcomes this opportunity to present its views in the second Article 21.5 proceeding requested by Canada to review Brazil's implementation of the Dispute Settlement Body's ("DSB") recommendations and rulings in *Brazil - Export Financing Programme for Aircraft*, WT/DS46/R, 14 April 1999 ("Panel Report"); WT/DS46/AB/R, 2 August 1999 ("Appellate Body Report").

2. Canada claims that the revisions made by Brazil on 6 December 2000 in respect of the *Programma de Financiamento às Exportações* ("PROEX") do not bring PROEX into conformity with the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement") and the findings and recommendations of the Panel and the Appellate Body. Brazil argues in response that PROEX is not a subsidy under the SCM Agreement and that, even if it *is* a subsidy, it is not a prohibited subsidy. Due to the importance of various issues that the parties raise, the United States wishes to make certain brief observations that it hopes will assist the Panel in reaching its own determinations.

II. THE *A CONTRARIO* ISSUE

3. As it has in the past, Canada argues that the first paragraph of item (k) of the Illustrative List is not susceptible to an *a contrario* interpretation. Brazil disagrees with Canada's position. The United States has commented on this issue on numerous occasions over the course of these proceedings. For purposes of the present dispute, however, the United States takes no position on this issue other than to agree with Canada's statement that the second paragraph of item (k), footnote 59, item (h), and item (i) are all covered by footnote 5 of the SCM Agreement.[1]

III. THE RELEVANT *OECD ARRANGEMENT* REFERRED TO IN THE SECOND PARAGRAPH OF ITEM (K) IS THE VERSION OF THE *OECD ARRANGEMENT* IN EFFECT WHEN THE EXPORT CREDIT IS GRANTED

4. Brazil claims that the "relevant undertaking" referenced in the second paragraph of item (k) is limited to the version of the *OECD Arrangement* in effect on the date that the SCM Agreement entered into force (specifically, the 1992 version of the *Arrangement*). Brazil's argument is based on an erroneous interpretation of item (k). In the view of the United States, a proper textual analysis of the applicable language of item (k) demonstrates that the version of the *OECD Arrangement* in effect on the date that a Member grants the export credit at issue is the "relevant undertaking" with which the Member must comply.

5. The first sentence of the second paragraph of item (k) refers to "a successor undertaking which has been adopted by those original Members . . . ." Brazil claims that the term "has been" is central to a proper interpretation of this issue, on the grounds that the ordinary meaning of the term "has been" refers to a "'time regarded as present' when the text became effective on 1 January 1995."[2] In Brazil's view, the term "is a reference to a successor undertaking *already in existence* – an undertaking that '*has* been adopted."'[3] Brazil is mistaken.

6. The basis of Brazil's error is its belief that the term "has been" adopted refers to the time "regarded as present" when the text of item (k) became effective on 1 January 1995. In actuality, the term refers to the time "regarded as present" when a Member grants the export credit in question. The purpose of the second paragraph of item (k) was to create a safe harbor for Members who comply with the terms and conditions of the *OECD Arrangement* in their granting of export credits. Thus, the

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[1] *See* Canada submission at ¶ 54 and n.42.
[2] Brazil submission at ¶ 20.
[3] Id.

relevant question for determining the availability of the safe harbor is whether, at the time a Member grants the export credit in question, it is doing so in conformity with the relevant provisions of the *Arrangement* then in effect. To paraphrase the second paragraph of item (k), if a Member is a party to the latest version of the *OECD Arrangement* that has been adopted, or if in practice a Member applies the interest rate provisions of that agreement, then an export credit practice which is in conformity with those provisions shall not be considered a prohibited export subsidy.

7. A contrary interpretation of this language would be illogical, since it would suggest that a Member could grant export credits that are not in compliance with the most recent version of the *Arrangement*, and yet still benefit from the safe harbor in item (k). This would undermine the entire purpose of the safe harbor.

8. The drafting history of item (k) also demonstrates that Brazil's interpretation of this issue is mistaken. The final sentence of item (k) was inserted by the Tokyo Round negotiators of the Subsidies Code. The language in the Tokyo Round version of item (k) was virtually identical to the language in the present version, including the reference to parties "as of 1 January 1979".[4] Since the Tokyo Round Subsidies Code was completed in 1979, the drafters used the term "as of 1 January 1979" to refer to the version of the *OECD Arrangement* that was in effect at the time that the text of the Subsidies Code became effective, and the term "or a successor undertaking" to refer to future versions of the *Arrangement*.[5] As one authority has noted, "[t]he wording in question thus provided a safe harbor while allowing other signatories of the [Subsidies] code to follow the same practices and allowing for changes in the Arrangement.[6] The second paragraph of item (k) contemplates and provides for revisions to the *OECD Arrangement*, and there is, therefore, no basis to Brazil's claim that interpreting item (k) to include post-1995 versions of the *Arrangement* would effectively result in an amendment of the SCM Agreement.[7] On the contrary, it is Brazil's interpretation that would effectively amend the SCM Agreement by reading the "successor understanding" provision out of item (k).

9. Finally, Brazil suggests that it would not be fair to interpret the second paragraph of item (k) as applying to successor versions of the *Arrangement* because not all WTO Members are participants in the *Arrangement*. The United States observes, however, that the sole purpose of the relevant provision is to create a safe harbor from the prohibition in the first paragraph. Under the terms of Article 27 of the SCM Agreement, the export subsidy prohibition does not even apply to developing country Members until 2003, subject to compliance with the provisions of paragraph 4 of Article 27. Accordingly, item (k) is not even relevant to developing country Members unless they fail to adhere to the requirements of that paragraph. In any event, the fact that not all WTO Members are participants in the *Arrangement* cannot be legally determinative since neither were they all participants in the *Arrangement* at the time that item (k) was approved as an integral component of the SCM Agreement.

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[4] The only difference is the use of the term "signatory" or "signatories" where the present version uses "Member" or "Members".

[5] Brazil asserts that if the drafters had intended the safe harbor to apply to future versions of the *Arrangement*, they would have used the future tense "will" or "may" be adopted. On the contrary, the drafters' use of the term "has been adopted" demonstrates that the drafters did contemplate that the *Arrangement* would be changed. If the drafters had intended the second paragraph of item (k) to refer solely to the version of the *Arrangement* in effect on the date that the Uruguay Round Agreements entered into force, they would have said so.

[6] John E. Ray, Managing Official Export Credits 38 (1995) (emphasis added), attached hereto as U.S. Exhibit 1. Mr. Ray headed the Division of Financing and Other Export Questions in the Trade Directorate of the OECD from 1985 until 1993. He was an Assistant U.S. Trade Representative from 1979 to 1985, and with the U.S. Treasury Department prior to that date.

[7] Accordingly, Brazil's long discussion of the process of amendments under the WTO Agreement (at paras. 31) is beside the point.

10. In sum, the United States agrees with Brazil that the law of treaties states that governments may agree to be bound by the provisions of a future treaty. The language of the second paragraph of item (k) states that if a Member is party to an international undertaking on official export credits or "a successor undertaking", then an export credit practice which conforms with the provisions of that undertaking is not an export subsidy prohibited by the SCM Agreement.[8] The term "successor undertaking" in the second paragraph of item (k) demonstrates an intent to be bound by successor undertakings, which logically include an amended *OECD Arrangement*. The drafters of the SCM Agreement, keenly aware of the need for flexibility to update agreements, included the realistic possibility of an updated *OECD Arrangement* in the language "a successor undertaking." The item (k) safe harbor is an important part of the package of rights and obligations that Members accepted when they agreed to the WTO Agreements, and there is no basis to limit it in the manner that Brazil asserts.

IV. INTEREST RATE SUPPORT AT OR ABOVE CIRR DOES NOT *IPSO FACTO* MEAN THE RECIPIENT RECEIVES NO BENEFIT

11. Brazil claims that "interest rate support at or above CIRR does not confer a benefit."[9] The United States takes no position on whether Brazil's use of CIRR, in conjunction with other export credit terms, confers a benefit. Rather, the United States wishes to note only that interest rate support at or above CIRR does not, *ipso facto*, mean no benefit is conferred.

12. Brazil relies on the Appellate Body's designation of CIRR as a commercial rate.[10] Brazil's reliance is mistaken because the Appellate Body mentioned CIRR as a commercial rate in the context of the *OECD Arrangement*.[11] Brazil then tries to establish CIRR as a market rate by noting that some Canadian and Norwegian commercial rates below CIRR *may* not confer a benefit. In addition, Brazil points to a Norwegian loan with similar terms to the terms offered by PROEX. Yet Brazil's analysis focuses entirely on the interest rate and loan maturity. Brazil makes no mention of the creditworthiness of the borrower. The true test in determining if an export credit practice confers a benefit is whether all of the loan terms, in their entirety, confer a benefit on the recipient.

13. A benefit is conferred if the Member grants interest rate support at a rate lower than the recipient could obtain on the open market. This concept is embedded in the SCM Agreement. The Appellate Body referred to Article 14 in Part V of the SCM Agreement as "relevant context for the interpretation of 'benefit' in Article1.1(b)".[12] Article 14(b) defines a benefit to include the difference in payment between a government loan and "a comparable commercial loan which the firm could *actually obtain* on the market" (emphasis added).[13]

14. Accordingly, to determine whether an export credit practice confers a benefit, one must evaluate whether that recipient could obtain such a loan, on such terms, from a commercial lender. In a previous analysis, the Appellate Body considered the type of product being financed, the interest rate, and whether the Member offered a loan guarantee or interest rate equalization payments.[14] Under such a thorough analysis, consideration of the interest rate alone (CIRR or any other rate) does not determine whether an export credit confers a benefit.

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[8] SCM Agreement, Annex I, item (k).

[9] Brazil submission at ¶ 15.

[10] *Id.* at ¶ 11.

[11] The Appellate Body stated, "Under the *OECD Arrangement*, a CIRR is the *minimum* commercial rate available in that range for a particular currency." Appellate Body Report at ¶ 182.

[12] *Canada -Measures Affecting the Export Of Civilian Aircraft*, WT/DS70/AB/R (2 August 1999), Report of the Appellate Body at ¶ 155 ("*Canada-Aircraft*").

[13] SCM Agreement, Article 14(b).

[14] See Brazil-Export Financing Programme for Aircraft - Recourse by Canada to Article 21.5 of the DSU, WT/DS46/AB/RW (21 July 2000), Report of the Appellate Body at ¶ 74.

V. USE OF CIRR ALONE IS INSUFFICIENT TO MEET THE "SAFE HARBOR" OF THE SECOND PARAGRAPH OF ITEM (K) IN ANNEX I OF THE SCM AGREEMENT

15. Brazil claims that PROEX satisfies the requirement for the "safe harbor" under the second paragraph of item (k) because PROEX uses CIRR and thus applies the interest rate provisions of the *OECD Arrangement.*[15] The United States disagrees that use of CIRR alone qualifies Brazil for the "safe harbor" exemption under item (k).

16. According to the Panel, a Member must conform to all of the terms, conditions and accepted practices of the *OECD Arrangement* to benefit from the "safe harbor" exemption under item (k).[16] To claim exemption under the "safe harbor," CIRR must be applied in conjunction with the entire framework of the *OECD Arrangement.* Applying CIRR alone is insufficient to claim exemption under the "safe harbor" of item (k). Thus unless Brazil applies all of the accompanying terms, conditions and accepted practices of the *OECD Arrangement*, it will not benefit from the "safe harbor" under item (k).

VI. INTEREST RATE BUY-DOWNS CONSTITUTE THE "PAYMENT BY [GOVERNMENTS] OF ALL OR PART OF THE COSTS INCURRED BY EXPORTERS OR FINANCIAL INSTITUTIONS IN OBTAINING CREDITS"

17. Canada claims that PROEX payments are not "payments" under the first paragraph of item (k) because interest rate buy-downs are excluded from the scope of the payment clause of item (k).[17] While Canada cites the Panel's attempt to rule that Brazil's PROEX was not within the payment clause of item (k), the Appellate Body later declared those Panel findings moot.[18]

18. Brazil argues in response that PROEX is a "payment by [Brazil] of all or part of the costs incurred by exporters or financial institutions in obtaining credits."[19] The United States agrees with Brazil that interest rate buy-downs such as PROEX *do* fall within the scope of the payments clause of item (k).

19. The United States believes that the Panel should interpret the payment clause of item (k) within the context of the SCM Agreement and general export credit practice. Despite changing export subsidy practices, the text of item (k) remains essentially unchanged since its inception in 1958.[20] Very little guidance exists on the interpretation of the payment clause of item (k). Thus the intent of the payment clause of item (k) should be viewed within the context of general export credit practice and the SCM Agreement. Viewed as such, it is clear that the intent of the payments clause is to reduce the risk to the exporter or financial institution lending money to a borrower.

20. While buying-down interest rates does not constitute a direct payment, it does reduces the risk incurred by the exporter or financial institution. Through measures such as insurance, guarantees, and interest make-up, a Member can remove the risk that the financial institution or exporter would

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[15] *See* Brazil submission at ¶ 18.

[16] The Panel stated that a Member benefits from the "safe harbor" if it "applies the interest rate provisions" of the *OECD Arrangement* "in conformity with those [*i.e.*, the interest-rate] provisions." *Brazil-Export Financing Programme for Aircraft - Recourse by Canada to Article 21.5 of the DSU,* WT/DS46/RW (9 May 2000), Report of the Panel at ¶ 6.61 ("*Article 21.5 Panel Report*").

[17] Canada submission at ¶ 68.

[18] Brazil-Export Financing Programme for Aircraft - Recourse by Canada to Article 21.5 of the DSU, WT/DS46/AB/RW (21 July 2000), Report of the Appellate Body at ¶ 78.

[19] Brazil submission at ¶ 67.

[20] In 1958, the OEEC expanded its list of prohibited measures to include the costs born by governments in paying all or part of the costs incurred by exporters in obtaining credits. John E. Ray, Managing Official Export Credits 38 (1995) (emphasis added), attached hereto as U.S. Exhibit 1.

normally incur in lending money. Reduced risk results in lower lending costs. Without the Member's payment, the exporter or financial institution would have to charge higher rates to cover the risk themselves. Instead, the Member bears the cost of the credit and the exporter or financial institution saves from the reduced risk costs. The savings gained from reduced risk constitutes the "payment ... of all or part of the costs incurred by exporters or financial institutions." Thus buying-down interest rates is within the scope of the payment clause in the first paragraph of item (k).

VII. ADDITIONAL COMMENTS ON BRAZIL - EXPORT FINANCING PROGRAMME FOR AIRCRAFT OF 9 MAY 2000

21. The United States would like to bring to the attention of the Panel several statements by the Panel in its report *Brazil - Export Financing Programme for Aircraft*, WT/DS46/RW, 9 May 2000 ("Article 21.5 Panel Report"), which the United States believes misconstrue the relationship between the *OECD Arrangement* and item (k) of the *Illustrative List.* These statements were *dicta*, and were not within the scope of the appeal of that case to the Appellate Body. Nevertheless, from a systemic perspective, the United States would like to present its views on these issues.

22. In footnote 68, the Panel narrowly defines the "interest rate provisions" of the *Arrangement* to exclude guarantees in "pure cover" transactions.[21] The Panel also states that when a Participant matches the terms and conditions of non-conforming transactions offered by Participants or non-Participants, "it cannot be said that such matching credit "is 'in conformity with' the interest rate provisions of the *Arrangement*."[22]

23. In the view of the United States, for the 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 terms and conditions of the *Arrangement.* It would defeat the 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.

24. The United States also observes that a non-Participant that seeks the protection of paragraph 2 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.*[23] 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 sentence of item (k).

VIII. CONCLUSION

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

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[21] *Article 21.5 Panel Report*, Report of the Panel at ¶ 6.65 n.68.
[22] Id.
[23] *OECD Arrangement*, e.g. Articles 42-53.

ANNEX C-4

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(5 April 2001)

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I. INTRODUCTION

1. The European Communities appreciates the opportunity that it has been given to address the Panel as a third party in this dispute. The European Communities' interest in the dispute relates not only to its desire to ensure a correct interpretation of the Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*") but also from its position as an original signatory of, and a current participant in, the *OECD Arrangement.*

2. The European Communities thanks the parties for having provided it with copies of their second written submission, which has helped it to understand the issues and the arguments.

3. The European Communities will refrain from repeating the arguments contained in its written submission and confine itself to a few additional comments arising out of the rebuttal submissions of the parties and the submissions of the third parties.

II. THE FACTUAL BACKGROUND

4. The European Communities is not in a position to comment on the terms on which PROEX III is actually made available to customers of Embraer. It would make the following comments:

- The fact that factual allegations are being made for the first time in rebuttal submissions may be a consequence of the fact that no consultations were held as required by Article 4 of the *DSU* and underlines the importance of the European Communities' arguments on this issue;[1]

[1] Third Party Submission of the European Communities, paragraphs 52 to 61.

- Faced with the evidence produced by Canada that Brazil in fact provides PROEX on more favourable terms than allowed under the *OECD Arrangement*, the Panel may consider it necessary to seek confirmation or refutation of these allegations from Brazil. In this respect it would also be important for the Panel to clarify the legal status of Circular Letter No 002881 and Directive 374 referred to by Brazil in paragraphs 8 and 9 of its first submission;

- In the absence of cooperation by Brazil, the Panel should draw the necessary inferences from the evidence that it does have and the refusal of Brazil to confirm or refute it, as explained by the Appellate Body in its report in the proceeding *Canada – Aircraft.*[2]

III. THE OECD SAFE HAVEN

5. Brazil's main defence is now that PROEX III falls under the safe haven of the second paragraph of item (k) of Annex I to the *SCM Agreement.*

A. THE APPLICABLE VERSION OF THE *OECD ARRANGEMENT*

6. As the Panel is aware, the European Communities is firmly of the view that the *1998 version of the OECD Arrangement*[3] is the only one relevant to the present dispute.

7. The *OECD Arrangement* is an evolving understanding that is regularly revised to take account of changing circumstances and the second paragraph of item (k) of Annex I to the *SCM Agreement* makes a *dynamic* reference to the *OECD Arrangement* applicable at the time the measure under consideration is taken. This is clear from the language and the reference to *successor* undertakings.

8. An interpretation of the second paragraph of item (k) of Annex I to the *SCM Agreement* that froze the text of the *OECD Arrangement* as it was on the day the *WTO Agreement* was concluded would lead to unacceptable results:

- It could allow the development of trade-distortive export subsidies through the exploitation of lacunae in the frozen version of the *OECD Arrangement.* Export credits is a field where new practices are constantly being developed and the evolution of the *OECD Arrangement* is indeed characterised by the need to adopt rules to deal with new practises and factual circumstances in the market place;

- It could lead to the participants to the *OECD Arrangement* being put in a situation where it would be impossible to fulfil both their obligations under the WTO and their commitments under the *OECD Arrangement.* Moreover such situation could lead to obvious distortions of competition. This could arise for example if a new *OECD Arrangement* were to contain obligations relating to the maximum repayment terms or the repayment profile that differ from the obligations under the frozen version.

9. As Canada has remarked[4] the circumstances in which item (k) was originally drafted confirms this view. The Tokyo Round subsidies code was adopted a year after the first OECD arrangement and it cannot have been anticipated at that time that there would already be a successor undertaking in existence when the subsidies code was concluded. Therefore, the reference to a "successor undertaking which *has been* adopted by those original members" can only have been intended to refer

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[2] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft ("Canada – Aircraft")*, WT/DS70/AB/R, adopted 20 August 1999, paras. 200 – 205.

[3] The text was agreed in 1997 and published in 1998.

[4] Second written submission of Canada, paragraph 64.

to successor undertakings adopted after conclusion of the Tokyo Round subsidies code and before the measure under consideration.

B. THE IDENTIFICATION OF THE "INTEREST RATE PROVISIONS" OF THE *OECD ARRANGEMENT*

10. The European Communities explained in its written submission[5] that it makes no sense to consider interest rates in isolation from all the conditions that influence the interest rate and that the reference to the "interest rate provisions" of the *OECD Arrangement* must refer to all the provisions that may *affect* the interest rate – that is all provisions containing *substantive* rather than *procedural* obligations.

11. The panel in the *Canada – Aircraft Article 21.5* proceeding took a very restrictive view of the "interest rate provisions" but later in its report came to the (correct) view that

> .. 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.[6]

12. 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.[7]

13. 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.[8]

14. 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."

15. 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 in fact leads 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." As noted above, they include the provisions on premia.

16. As the European Communities explained in its written statement, one way of analysing PROEX III is to consider that it effectively compensates for the credit risk that would normally be charged to the borrower by the lending bank. As such it is equivalent to the payment of an insurance or guarantee payment and is an interest related official support for export credit that is not in conformity with the interest rate provisions of the *OECD Arrangement*[9] 9

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[5] Third Party Submission of the European Communities, paragraphs 38 and 39.
[6] Paragraph 5.112 *in fine*.
[7] Paragraph 5.114.
[8] Paragraph 7.109.
[9] Written Submission of the European Communities, paragraphs 40 to 48.

C. EXPORT CREDIT GUARANTEES ARE COVERED BY THE SAFE HAVEN

17. A further consequence of the European Communities' position is that export credit guarantees are covered by the safe haven provided that they satisfy the conditions set out in Article 22 of the *OECD Arrangement* – one of which is that they are at rates "not inadequate to cover long term operating costs and losses." The European Communities draws the Panel's attention to the fact that Article 22 has integrated the conditions set out in item (j) of the Illustrative List in annex I to the *SCM Agreement* into the *OECD Arrangement.* It has also developed the conditions of item (j) by including other conditions, not found in item (j), within the *OECD Arrangement.*

D. MATCHING

18. The above considerations also lead to the conclusion that the "matching" provisions of the *OECD Arrangement* are also part of the "interest rate provisions". They also serve to "support and reinforce" the other interest rate provisions. The European Communities would refer the Panel to the comments it made in its written submission. [10]

19. The *Canada – Aircraft* panel did not share this view.[11] The textual basis for this conclusion 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.*

20. 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."[12] That view, however, is not shared by the Participants to the *Arrangement* themselves, who obviously regard matching as being compatible with effective disciplines on export credits.

21. 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.[13]

22. 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 offeror. 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

[10] Written Submission of the European Communities, paragraph 36.
[11] Paragraphs 5.120 *et seq.*
[12] Panel report, para. 5.125.
[13] Paragraph 5.132.

required to follow the procedural requirements of the *OECD Arrangement*, they are nonetheless able to apply them by analogy.

IV. THE FIRST PARAGRAPH OF ITEM (K)

23. The European Communities did not discuss the first paragraph of item (k) in its written submission to the Panel, stating that it maintained its previously expressed views that were already known to the Panel from the previous proceeding.[14]

24. There appears to be one issue on which the European Communities has not stated its view – that of the kinds of measure that may fall under the first paragraph of item (k).

25. Whereas the second paragraph of item (k) covers all "export credit practices," a broad term, the scope of the first paragraph of item (k) is defined differently. It covers:

> The grant by governments … of export credits … or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits ….

26. Interest rate equalisation payments are not export credits. The only question is whether they can be "payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits."

27. The Panel was of the view in the first Article 21.5 proceeding that payments to a *lender* that amount to interest rate support cannot reasonably be understood to be payments of all or part of the costs of obtaining export credits.[15]

28. The Appellate Body considered that it did not need to consider this issue and that the Panel's findings on this issues were "moot, and, thus, of no legal effect.[16]

29. The European Communities considers that the interpretation of the first paragraph of Item (k) should not turn on who formally receives the payment or incurs the cost. Such an approach would allow circumvention of the disciplines. The purpose underlying both paragraphs of item (k) and the *OECD Arrangement* is to avoid distortions of competition arising out of export credit practices so that competition between exporters can relate to the other conditions they are being able to offer buyers. It is therefore the resulting attractiveness of the package for the buyer that is important – not the details of the payments between the various actors. A payment to one of these actors can reduce the burden on another – in other words be considered an indirect payment to that other.

V. CONCLUSION

30. The European Communities hopes that these remarks are helpful and wishes the Panel well in its consideration of the complex and difficult issues that are before it.

Thank you for your attention.

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[14] Written submission to the Panel, paragraph 52 referring to the first written submission of the European Communities to the original Article 21.5 panel, paragraphs 20 to 26 and oral statement, paragraphs 43 to 46.

[15] Article 21.5 Panel Report, paragraphs 6.71 to 6.73.

[16] Article 21.5 Appellate Body Report, paragraph 78.

ANNEX C-5

ORAL STATEMENT OF THE UNITED STATES

(5 April 2001)

1. Mr. Chairman, members of the Panel, I am pleased to have this opportunity to appear before you today in this Article 21.5 proceeding. We know the Panel has carefully reviewed our written submission, so I will not repeat those statements here. Instead, I will limit my comments today to a brief observation on the second paragraph of item (k) of the Illustrative List.

2. Mr. Chairman, the purpose of the *OECD Arrangement* is to provide for the orderly use of officially supported export credits. The second paragraph of item (k) of the illustrative list establishes a safe harbor for export credit practices that comply with all of the terms and conditions of the *Arrangement.* A Member cannot comply with just some of the terms and conditions, such as CIRR, and claim the protections of the safe harbor. A contrary conclusion would undermine the entire purpose of the *Arrangement.*

3. This concludes my presentation.

ANNEX C-6

RESPONSES BY THE EUROPEAN COMMUNITIES TO QUESTIONS OF THE PANEL

(17 April 2001)

Q26. Please discuss your understanding of the meaning of the term "interest rate support" as used in Article 2 of the 1998 OECD Arrangement. Are PROEX III payments "interest rate support" within the meaning of the 1998 OECD Arrangement?

1. Article 2 of the *OECD Arrangement* starts by stating that it applies to all "official support" for exports with a term of two years or more. It then specifies the categories of measure covered. These are "direct credits/financing or refinancing, interest rate support, guarantee or insurance." It therefore appears that "interest rate support" is a residual category of "official support" for exports, that is, not in the form of direct credits/financing or refinancing or guarantees or insurance. It covers measures by which "official" bodies support interest rates without directly financing or refinancing transactions or providing guarantees or insurance.

2. PROEX III is a government (or "official") measure that allows the effective rate of interest for purchasers of certain Brazilian goods to be lower than it would otherwise be. It is therefore interest rate support within the meaning of Article 2.

Q27. Please discuss, how, if at all, the concept of minimum premium as reflected in Article 20 of the 1998 OECD Arrangement applies to interest rate support. Why is interest rate support not identified in Article 20 of the 1998 OECD Arrangement? Are minimum premium benchmarks under the 1998 OECD Arrangement available to non-Participants?

3. The EC explained in paragraph 49 of its written submission to the Panel and in paragraph 16 of its Oral Statement that it considered interest rate support in the form of an interest rate buy-down such as that provided by PROEX III to be the economic equivalent of a security or a guarantee.

4. According to Article 15 of the *OECD Arrangement*, CIRR corresponds to the interest rate payable by "first class" borrowers, that is, those for which the risk of non-repayment is the smallest. The interest rate that a borrower such as an airline must actually pay on financing will defend on the risk of non-repayment that the lender incurs and therefore on the security that is offered to guarantee repayment. Providing security involves a cost for the borrower. For example, if a borrower provides security in the form of a mortgage on its assets, it will be restricted in its freedom to use those assets and in particular to pledge those same assets to other lenders. If it provides the lender with a guarantee from a third party with better credit, such as a bank or the state, it will have to pay a premium for this guarantee and offer security or undertake obligations towards the guarantor.

5. In the field of both marketable and officially supported export credits three cost elements are charged to the borrower: the pure cost of money, the handling/administrative costs linked to the provision of financing and the cost of the risk of not being paid back by the debtor (see paragraph 43 of the EC written submission). Usually, the market charges an all-in rate covering those three cost elements, while the "officially suported sector" charges them separately (cf. Article 14c) of the 1998 OECD Arrangement). The CIRR rate (being government bond yields plus a 100/120 basis point margin) is deemed to cover the first two cost elements, whereas the minimuM premium is deemed to cover the third cost element (cf. Article 20 of the 1998 Arrangement).

6. Interest rate and premium, as well as their related disciplines, are complementary within the 1998 OECD Arrangement. Therefore, "interest rate support" is not identified in Article 20, devoted to

officially supported insurance/guarantee, just like insurance/guarantee is not identified in Article 15, devoted to officially supported financing. Direct credits/financing and refinancing are identified in both articles so as to avoid confusion because in those export credit techniques financing and insurance are mixed being specified that official support may be provided to only one part of the deal.

7. The fact that interest rate support is not expressly mentioned in Article 20 of the *OECD Arrangement* does not mean that it can be concluded that a practice such as PROEX III having the effect described above is consistent with the *OECD Arrangement.* The *OECD Arrangement* is described in the section "status" of the introduction as a "gentleman's agreement". One consequence of this is that circumvention of its provisions is not considered legitimate.

8. The benchmarks have not yet been published. If the Panel considers that the non-publication of the benchmarks is a reason why the minimum premia provisions cannot be considered part of the provisions that non-participants should apply "in practice" in order to benefit from the safe haven of the second paragraph of item (k), the EC would invite it to state this expressly so that it can be clear to all that once the benchmarks are published these provisions will be among those that non-participants must apply "in practice" in order to benefit from the safe haven.

ANNEX C-7

RESPONSES OF THE REPUBLIC OF KOREA TO QUESTIONS OF THE PANEL

(17 April 2001)

The Panel posed two questions to the third parties in this dispute. The responses of the Republic of Korea follow.

Q26. Please discuss your unders tanding of the meaning of the term "interest rate support" as used in Article 2 of the 1998 OECD Arrangement. Are PROEX III payments "interest rate support" within the meaning of the 1998 OECD Arrangement?

1. Article 2 of the 1998 OECD Arrangement deals with the scope of application of the Arrangement. It identifies five means by which official support for exports can be given – direct credits/financing, refinancing, interest rate support, guarantee or insurance. Korea believes that the Panel in the original recourse to Article 21.5 of the DSU in this dispute gave an accurate illustration of "interest rate support." At note 53 of its Report, the Panel stated:

> To take a hypothetical and highly simplified example, imagine that the yield on the relevant US Government bonds (and thus the US Government's cost of borrowing) is 5 per cent. Brazil's cost of borrowing is 10 per cent and the interest rate on commercial export credits is 8 per cent. Because it is constructed based on the relevant US Government bond yields plus 1 percentage point, the US dollar CIRR would be 6 per cent. While developed countries could afford to borrow at 5 per cent and provide export credits at 6 per cent, Brazil could only do so by providing direct export financing at 4 percentage points below its own cost of borrowing, an expensive proposition. It would be much less costly to Brazil to allow a commercial lender to provide the export credits, and pay the lender 2 percentage points in the form of interest rate support.[1] In other words, a government can provide either: (i) direct export credit financing; or (ii) interest rate support by buying down financing provided by a commercial lender (reducing the interest rates charged to the borrower to the level allowed by the OECD Arrangement).

2. Korea chooses not to provide views on whether PROEX III payments are "interest rate support" within the meaning of the 1998 OECD Arrangement.

Q27. Please discuss how, if at all, the concept of minimum premiums as reflected in Article 20 of the 1998 OECD Arrangement applies to interest rate support. Why is interest rate support not identified in Article 20 of the 1998 OECD Arrangement? Are minimum premium benchmarks under the 1998 OECD Arrangement available to non-Participants?

3. The concept of minimum premiums does not apply to interest rate support. The text of Article 20(a) lists only four of the five means, set out in Article 2, by which official support for exports can be given; interest rate support is not included. The Panel Report in this dispute confirmed this and, in Korea's opinion, provided a sound explanation of why interest rate support is not included:

> Paragraph 20, however, excludes "interest rate support" from the categories of official support for which a minimum premium must be charged, presumably because in the case of interest rate support the government does not bear the risk of loss in the case

[1] *Brazil-Export Financing Programme for Aircraft-Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW (9 May 2000) at paragraph 6.53, note 53 (emphasis added).

> of default. In any event, these premia relate to the risk relating to the country of the *buyer/borrower*, not that of the *lender*.[2]

4. The Panel in Brazil's DSU Article 21.5 recourse regarding Canada's aircraft financing support also noted that the concept of minimum premiums does not apply to interest rate support:

> Moreover, we note that the *Arrangement* establishes explicit rules concerning guarantees and insurance, specifically by establishing minimum premium benchmarks. The minimum benchmarks are set with respect to adequacy of premiums to cover the "sovereign" and "country" credit risk involved in supported transactions. These benchmarks also apply explicitly to official financing support. Thus, both the minimum premium rule and the minimum interest rate rule on their faces make clear whether or not they apply to guarantees and insurance.[3]

5. Thus, interest rate support is not subject to the minimum premium provisions of Article 20 of the 1998 OECD Arrangement. Where a Participant provides interest rate support, unlike the other four types of support, the commercial lender, not the government, bears the risk of loss in the case of default. Thus, there is no need to ensure adequacy of premiums to cover the government's credit risk.

6. The Canadian Article 21.5 Panel Report also answers the third part of the Panel's Question 27 – minimum premium benchmarks are not available to non-Participants. As the Panel stated:

> We note that, by contrast, no information is published on the minimum premium benchmarks. Thus, only Participants have access to this information. Given this, it is at present impossible for a non-Participant to have any idea whether a given transaction respects the rules concerning minimum premiums. Thus, until such time as the Participants make this information publicly available, non-Participants should be presumed to be respecting the minimum premium rules in the context of any analysis under the second paragraph of item (k). Canada also has recognized this issue and come to the same conclusion. In particular, Canada states that "it would be unreasonable to expect a non-OECD WTO Member to charge a premium level which is unknown to such Member, in order for that Member to be in full compliance with the interest rates provisions of the *Arrangement.* Canada is prepared to accept the consequence that in relation to premiums and for the purpose of the second paragraph of Item (k), a higher threshold is imposed on those WTO Members that are also OECD Participants" (Canada's reply to the Panel's Canada Account question 3(h)).[4]

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[2] *Brazil—Export Financing Programme for Aircraft—Report of the Panel*, WT/DS46/R (14 April 1999) at paragraph 7.31, note 206 (emphasis in original).

[3] *Canada-Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/RW (9 May 2000) at paragraph 5.100 (*Canada-21.5*). *See also*, Export Credits and Related Facilities, Background Paper by the Secretariat, G/AG/NG/S/13 (26 June 2000) at paragraph 27(f).

[4] *Canada—21.5* at paragraph 5.134, note 118 (emphasis added).

ANNEX C-8

**RESPONSES OF THE UNITED STATES
TO QUESTIONS OF THE PANEL**

(18 April 2001)

For Third Parties

Q26. Please discuss your understanding of the meaning of the term "interest rate support" as used in Article 2 of the 1998 OECD Arrangement. Are PROEX III payments "interest rate support" within the meaning of the 1998 OECD Arrangement?

1. The term "interest rate support" as used in Article 2 of the 1998 *OECD Arrangement* refers to practices under which a government enters into an agreement on interest rates with a commercial bank that is providing the export credit financing for an export transaction. The purpose of the agreement is to allow the commercial bank to provide fixed rate financing at the appropriate CIRR rate. Commercial banks typically fund themselves on a floating interest rate basis such as LIBOR. In order for the bank to avoid losses associated with mismatched funding (i.e., funding itself at a floating rate and lending at a fixed rate), the government interest rate support provides the bank with a payment to compensate the bank for the funding risk. Typical of most OECD governments offering interest rate support, the government agrees that the commercial bank will receive a minimum return above its cost of funds to cover overhead and a normal profit margin on its services. On each semiannual repayment date under the loan, the difference between the bank's funding base plus the interest make-up margin and the CIRR rate is calculated. If the CIRR provides an interest rate that is lower than the commercial bank's funding rate plus the interest make-up margin, then the government pays the shortfall to the commercial bank. Thus, the interest rate support allows the commercial bank to offer CIRR financing without the interest rate risk associated with its funding at a floating rate. In addition, interest rate support allows commercial banks to help provide CIRR financing.

2. The United States is not sufficiently familiar with the facts of PROEX III to opine on whether PROEX III payments, as applied, constitute "interest rate support." As a general matter, the United States would consider interest rate support to be consistent with the *OECD Arrangement* if (a) the interest rate that the borrower sees after the interest rate support is the appropriate CIRR rate; and (b) the interest rate support is not offered in a manner or at a level that is used to cover other borrower costs associated with the transaction (such as the risk premium or the cost of the exported item).

Q27. Please discuss how, if at all, the concept of minimum premiums as reflected in Article 20 of the 1998 OECD Arrangement applies to interest rate support. Why is interest rate support not identified in Article 20 of the 1998 OECD Arrangement? Are minimum premium benchmarks under the 1998 Arrangement available to non-Participants?

3. The minimum premiums reflected in Article 20 of the 1998 *OECD Arrangement* apply to all transactions in which a government provides support that shifts the repayment risk of the borrower from the lender to the government providing support. Interest rate support, in and of itself, does not shift the repayment risk of the borrower to the government providing the support because the government does not take on the risk of repayment. Hence, interest rate support is not mentioned in Article 20. Under Article 20, when a government does offer interest rate support in conjunction with insurance or a guarantee, the government must charge the appropriate minimum premium rate because it is providing insurance or guarantee cover.

4. Virtually all of the information regarding the minimum premium benchmarks under the 1998 *OECD Arrangement* is available to non-Participants. This information is available on the OECD web

site (at http://www.oecd.org/ech). The only piece of information not currently available is the country classifications. Discussions are underway within the Participants to post these classifications on the OECD web site, thereby making all information necessary to apply the minimum premium benchmarks publicly available. However, for transactions with borrowers in High-Income OECD countries, the *Arrangement* provides that the minimum premium benchmarks do not apply. Rather, the premium charged shall not undercut the pricing of the private market.[1] Thus, for these countries, there are transparent rules for the application of risk premiums – market rates apply.

For the United States

Q28. The United States contends that "buying down interest rates . . . reduces the risk incurred by the exporter or financial institution" (US third-party submission, para. 24). Interest rate buy-downs are not however necessarily accompanied by an assumption of risk by the government/export credit agency. Please comment.

5. Interest rate buy-downs reduce the financial risk of the transaction by reducing the cost of the credit and the debt service impact on the borrower. All things being equal, buy-downs enhance the borrower's net cash flow position by the amount of the foregone or avoided interest payments, improving its ability to service any given level of debt service, and thereby reducing the risk of the transaction.

6. Interest rate buy-downs do not necessarily involve an assumption of risk on the part of the government or export credit agency, because, in making the interest rate buy-down, the government or export credit agency assumes no additional legal obligation to make payments to the exporter or commercial lender in the event the borrower fails to make timely payment on the loan.

Q29. The United States argues that non-Participants which want to use the safe haven provided by the second paragraph must also conform with the transparency provisions of the Arrangement (US third-party submission, para. 24). Is the United States suggesting that non-Participants would be obliged to make notifications of non-conforming terms to Participants? Do Participants make notifications of non-conforming terms available to non-Participants?

7. At a minimum, all countries invoking item (k) protection must be obligated to respond bilaterally to a query from a competitor as to whether all the terms it is offering conform to the *Arrangement* and to respond in a timely and meaningful manner. Transparency minimizes the chance of premature or incorrect matching and the transparency obligation also inhibits the initiation of non-conforming offers. While the Participants do not currently make notifications of non-conforming terms available to non-Participants, the United States would be willing to support the transparent exchange among all governments of prior notified non-conforming terms.

Q30. With reference to the U.S. oral statement, could the United States elaborate on why it believes that the reference to "interest rates provisions" in the second paragraph of item (k) is a reference to all of the terms and conditions of the OECD Arrangement? In particular, if the second paragraph of item (k) referred to all of the terms and conditions of the OECD Arrangement, why does it not refer to the "provisions of the relevant undertaking" (as opposed to the "interest rates provisions of the relevant undertaking")?

8. The first paragraph of item (k) describes a certain type of government practice that constitutes a prohibited export subsidy. Thus, in interpreting the second paragraph of item (k), the treaty interpreter must keep in mind that the practice at issue is one that normally, but for the second paragraph of item (k), would be prohibited by the SCM Agreement.

[1] *See Arrangement* Article 22 b.

9. The *OECD Arrangement* itself also provides relevant context for resolving this issue. The purpose of the *OECD Arrangement* is:

> to provide a framework for the orderly use of officially supported export credits. The Arrangement seeks to encourage competition . . . based on quality and price of goods and services exported rather than on the most favorable officially supported terms.[2]

10. The premise of the item (k) safe harbor is that Members create a level playing field in the use of officially supported export credits by complying with the terms and conditions of the *Arrangement*. It would not be logical to read the second clause of the second paragraph of item (k) as permitting a Member to comply with something less than all of the terms and conditions of the *Arrangement* and still qualify for the safe harbor, since to do so would undermine the disciplines of the *Arrangement*, which is the entire basis of the safe harbor. In interpreting the language at issue, the Panel should keep in mind the object and purpose of the *Arrangement* and the safe harbor, as well as the absurd consequences that would result from interpreting the relevant language in a narrow manner. As the United States noted in its written submission, the wording of the second paragraph of item (k) was meant "to provide[] a safe harbor while allowing other signatories of the code to follow the same practices," not to permit other signatories to benefit from the safe harbor without applying all of the terms and conditions of the *Arrangement*.[3]

11. Furthermore, the only way to make sense of the second paragraph of item (k) is to read it as requiring the application of all of the substantive rules of the *Arrangement*, because every piece of the Arrangement implicitly assumes all of the others. The *Arrangement* defines the reference point of a level playing field as the cost of export credits from the borrower's perspective. The borrower's perspective is of an all in-cost. The term "all in-cost" refers to the cost to the borrower, in net present value terms, of the financing costs at the time the exporter ships the export item to the buyer. The all in-cost depends on the interest rate charged, any up-front fees, and the average life of the transaction (made up of the tenure and repayment pattern of the transaction). Without taking all of these factors into consideration, there is no way to determine, from the borrower's perspective, what the real cost of the export credit is.

12. For example, a ten-year export credit at CIRR is very different from a 100-year export credit at CIRR, just as a ten-year export credit at CIRR with equal semiannual repayments is very different from a ten-year export credit at CIRR with a single bullet payment at the end of the ten years. Likewise, financing a maximum of 85 percent of the export credit value at CIRR, with the remaining 15 percent financed with cash or privately on market terms, is different from a financing on *Arrangement* terms for one hundred percent of the transaction. In addition, fees and interest rates are interchangeable – with up-front fees being converted into interest rate spreads or interest rate spreads being converted into up-front fees. Thus, the CIRR regime only makes sense in the context of all of the other *Arrangement* rules, such as maximum repayment terms, repayment profiles, and risk premiums.[4]

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[2] OECD, The Arrangement on Guidelines for Officially Supported Export Credits (Paris: OECD, 1998), Introduction.

[3] United States written submission at para. 8, *citing* U.S. Exhibit 1 at 38 (emphasis added).

[4] In fact, the *Arrangement* sets the CIRR based on the repayment terms of the transaction.

13. The Appellate Body has stated that "[t]he duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties."[5] The wording of the second paragraph of item (k) indicates an intention on the part of the drafters to create a limited safe harbor from the prohibition in the first paragraph of item (k) for Members who comply with the terms and conditions of the *OECD Arrangement.*

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[5] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, Report of the Appellate Body at para. 83.