PONTIFÍCIA UNIVERSIDADE CATÓLICA DO RIO DE JANEIRO
DEPARTAMENTO DE ECONOMIA

MONOGRAFIA DE FINAL DE CURSO

CONSEQÜENCIAS DA ARBITRAGEM DA OMC NA DISPUTA EMBRAER X BOMBARDIER - UM ESTUDO PRELIMINAR

Paulo Herbert Garrido Cavalcanti
No de matrícula: 9615502

Orientador: Eliane Gotlieb

Julho de 2003

7,0

PONTIFÍCIA UNIVERSIDADE CATÓLICA DO RIO DE JANEIRO
DEPARTAMENTO DE ECONOMIA

MONOGRAFIA DE FINAL DE CURSO

CONSEQÜENCIAS DA ARBITRAGEM DA OMC NA DISPUTA EMBRAER X BOMBARDIER - UM ESTUDO PRELIMINAR

Paulo Herbert Garrido Cavalcanti
No de matrícula: 9615502

Orientador: Eliane Gotlieb

Declaro que o presente trabalho é de minha autoria e que não recorri, para realizá-lo, a nenhuma forma de ajuda externa, exceto quando autorizado pelo professor tutor.

Paulo Herbert

Julho de 2003

As opiniões expressas nesse trabalho são de responsabilidade única e exclusiva do autor.

Dedico esta monografia aos meus pais pelo apoio recebido durante toda minha vida acadêmica e em todos os momentos de minha vida. Agradeço pela colamoração para a criação desta monografia à minha orientadora Professora Eliane Gotlieb, ao Dr. Henrique Costa Rzezinski - vice-presidente de relações externas da EMBRAER pela entrevista concedida -, ao seu assessor Sr.José Serrador Neto, e ao amigo, Engenheiro Silvino Olegario de Carvalho Neto.

INDICE:

1 - INTRODUÇÃO

Nos últimos anos, mais precisamente desde a segunda metade da década de 90, a EMBRAER (Empresa Brasileira de Aeronáutica) e a canadense Bombardier Limited[1] vêm protagonizando uma longa disputa comercial com o apoio de seus respectivos governos, brasileiro e canadense, junto à Organização Mundial do Comércio, OMC.

As empresas litigantes acusam-se simultaneamente de práticas comerciais predatórias e de beneficiarem-se de políticas governamentais de incentivo à exportação, que estariam em desacordo com as normas de comércio internacional.

Ambas as empresas disputam o lucrativo e promissor mercado internacional de jatos regionais que tem demonstrado grande potencial de vendas. Os jatos em questão estão na faixa de 35 a 90 assentos e destinam-se a vôos de curta a média distância, tendo como vantagem sobre os jatos de maior porte o maior percentual de ocupação dos assentos em rotas regionais e a possibilidade de aumento da freqüência dos vôos ou mesmo de criação de novas rotas. Estas características vêm permitido aos seus operadores uma redução dos custos operacionais, o que tem despertado interesse crescente por estas aeronaves.

A EMBRAER é hoje a quarta maior fabricante de aeronaves comerciais do mundo e uma das maiores exportadoras brasileiras, além de possuir uma linha de aeronaves para fins militares que vão desde aviões de treinamento até caças bombardeiros, passando por aviões de vigilância e transporte. Seus modelos representam 70% do total de aeronaves empregadas pela Força Aérea Brasileira.

---

1 A Bombardier Limited esta subdividida em grupos que têm liberdade de ação dentro de suas areas de atuação. Entretanto,esses grupos não são empresas em si, no sentido legal. Ainda que a Bombardier Aerospace seja a area responsavel pelas atividades aeronauticas da Bombardier Limited – Bombardier-, as ações que envolveram as duas fabricantes de aeronaves nos tribunais da OMC se deram entre a Bombardier e a EMBRAER.

Desde 1995 a EMBRAER produz aeronaves a jato de pequeno a médio porte para transporte de passageiros em vôos comerciais e seus novos modelos permitiram que ela atingisse uma considerável fatia do mercado internacional. O crescimento de suas vendas em todo o mundo a colocaram em disputa direta com sua maior rival comercial atualmente, a Bombardier, que até então era líder absoluta do mercado de jatos regionais.

Os programas de incentivo à exportação de cada país começaram a ser atacados por ambos os lados com acusações mútuas de desrespeito às normas internacionais de comércio assinadas pelos dois países.

Estas acusações foram formalmente encaminhadas à OMC que iniciou a apuração da contenda e anunciou alguns resultados nos anos subsequentes.

Inicialmente o Brasil se viu obrigado a alterar seu programa de incentivo federal à exportação, o PROEX, que utiliza recursos do BNDES; numa segunda fase o Canadá teve seu programa condenado pela OMC.

A disputa conta ainda com um inesperado fator que abalou ainda mais este mercado. Em setembro de 2001 a organização terrorista Al Qaeda comandada pelo bilionário saudita Bin Laden executou um atentado terrorista nos Estados Unidos que resultou em milhares de mortes civis levando o governo deste país a declarar guerra ao terrorismo internacional.

Este trabalho buscará analisar de maneira objetiva as conseqüências, para a EMBRAER, da arbitragem da OMC nesta disputa, iniciada há quase uma década, e tecer breves comentários sobre o instrumental de política externa adquirido pelo Brasil durante este confronto com um país de Primeiro Mundo, no âmbito de um organismo internacional.[2]

---

2 O ataque efetuado por Osama Bin Laden teve enorme repercussão internacional e resultou em uma queda acentuada no número de passageiros das companhias aéreas em escala mundial o que as levou rapidamente a grandes perdas. Desde então, o mercado de jatos tem sofrido uma grande redução do número de vôos e muitas encomendas de novos aviões foram canceladas ou postergadas e as concorrências por novas aquisições escassearam. Contudo, por fugir ao escopo deste trabalho, não se

Para que isto seja possível será necessário percorrer alguns capítulos para que obtenhamos a dimensão das empresas litigantes, o valor financeiro desta contenda e o campo de batalha, ou seja, a Organização Mundial do Comércio. Estudaremos também os programas de incentivo à exportação de cada país para finalmente analisarmos a cronologia dos fatos e resultados obtidos por cada parte litigante.

pretende entrar em maiores detalhes a respeito dos efeitos destes fatos e será mantido o foco no objeto de análise desta monografia, a contenda entre as duas fabricantes de jatos regionais.

2 – PLAYERS

2.1 - A ORGANIZAÇÃO MUNDIAL DO COMÉRCIO (OMC)

A Organização Mundial do Comércio é o único órgão internacional responsável por lidar com as regras globais de comércio entre nações. A sua função principal é garantir que as trocas comerciais ocorram da maneira mais suave, previsível e livre possível. Neste capítulo serão expostas as ferramentas utilizadas pela OMC para regular o comércio internacional e a história deste jovem órgão internacional e seu predecessor o *General Agreement on Tariffs and Trade* (GATT) - Acordo Geral sobre Tarifas e Comércio -, uma burocracia com sede em Genebra na Suíça.

2.1.1 – PRIMÓRDIOS DO SISTEMA DE TROCAS MULTILATERAL

O mundo passava por um período de redução no comércio internacional e medidas protecionistas, desde a depressão iniciada com a crise de 1929, que se manteve até o fim da Segunda Guerra Mundial.

Em 1944, as lideranças do mercado financeiro internacional se reuniram em Bretton Woods no estado de New Hampshire, EUA, com o intuito de formular uma nova ordem econômico-financeira para o mundo no pós-guerra. O objetivo era criar instituições capazes de evitar a instabilidade da moeda, e o estabelecimento de um conjunto de regras de conduta da política de comércio internacional. Os recursos seriam providos pelo Fundo Monetário Internacional, Banco Mundial e o Banco Internacional para a Reconstrução e Desenvolvimento (BIRD), criados especialmente para viabilizar as metas propostas.

O predecessor da OMC, o GATT, foi criado de maneira provisória. Inicialmente a idéia era criar-se uma nova agência especializada das Nações Unidas, a Organização Internacional do Comércio (OIC). Os vinte e três países originais do GATT estavam entre cinqüenta que concordaram em criar um esboço da escritura inicial dessa agência, onde seriam estipuladas novas disciplinas para o comércio mundial e suas regras de aplicação, acordos tarifários, práticas protecionistas e investimentos internacionais.

Em 1947, a escritura inicial da OIC foi acordada na conferência das Nações Unidas sobre Comércio e Emprego em Havana. Era necessário que se criasse um mecanismo que regulasse e protegesse as concessões então acordadas até que a OIC fosse ratificada internacionalmente. Para atingir este objetivo, decidiu-se por adicionar algumas normas ao capítulo sobre políticas comerciais do tratado de Havana o que resultou no GATT. Para que o GATT começasse a vigorar o mais rápido possível, foi desenvolvido um Protocolo de Aplicação Provisória. Tal Protocolo foi assinado por vinte e três países: África do Sul, Austrália, Bélgica, Brasil, Burma, Canadá, Ceilão, Chile, China, Cuba, Estados Unidos, França, Holanda, Índia, Líbano, Luxemburgo, Nova Zelândia, Noruega, Paquistão, Rodésia do Sul (hoje Zimbábue), Reino Unido, Síria e Tchecoslovaquia (hoje República Tcheca e Eslovênia).

Contudo, em 1950 o governo dos Estados Unidos anunciou que não ratificaria o acordo de Havana, o que acabou por trazer um fim precoce à OIC. Apesar de seu caráter provisório, o GATT acabou por ser o único instrumento multilateral regulando o comércio internacional de 1948 até o estabelecimento da OMC.

Desde 1945, houve oito acordos multilaterais de comércio relevantes. Destes, os cinco primeiros resultaram de negociações bilaterais, onde cada país negocia aos pares, simultaneamente com diversos países. Os últimos três foram concluídos de maneira multilateral.

Esses acordos ficaram conhecidos como as "trade rounds" , ou "rodadas de comércio".

Apesar de muito extensivas, as rodadas de comércio oferecem uma abordagem em pacotes, e não de maneira pontual, dos assuntos relevantes. Desta forma, os participantes buscam garantir vantagens num vasto numero de temas ao invés de se aterem a negociações específicas que levariam a dificuldades políticas. Esta formulação garante que concessões sejam conseguidas mais facilmente em troca de benefícios economicamente atrativos do pacote como um todo. Além disto, países em desenvolvimento conseguem ter uma voz mais ativa nas negociações que no caso de acordos bilaterais com as potências econômicas, onde aqueles tendem a ser dominados.

O primeiro desses acordos multilaterais ficou conhecido como Rodada Kennedy e foi concluído em 1967. Nesta ocasião ficaram acordadas novas reduções tarifárias em diversas áreas, mas algumas indústrias específicas não sofreram nenhuma redução. Além disto uma nova regulação a respeito de políticas *anti-dumping* também entrou em vigor.

A rodada de Tóquio, conduzida entre 1973 e 1979 continuou a incansável busca por reduções tarifárias e demonstrou um maior esforço por estender e melhorar o sistema. A redução de tarifas ocorreu de maneira a harmonizar as cotas em várias indústrias ocorrendo cortes proporcionalmente diferentes em áreas distintas. Por outro lado, novos campos foram alcançados como o problema das barreiras não tarifárias onde se discutiram a redução de acordos de mercado, subsídios, cotas e restrições voluntárias à exportação.

A terceira e mais abrangente de todas as rodadas foi a iniciada no Uruguai, na cidade de Punta del Este a partir de 1986. A agenda de negociações desta rodada havia sido estipulada quatro anos antes, em 1982 em Genebra numa reunião ministerial dos membros do GATT. Esta foi a mais extensa de todas as rodadas e muitos acreditam que o volume, cerca de 22000 páginas de documentos e

suplementos jurídicos, e o tempo requerido, sete anos ao todo, para finalização de todas as novas regulações impediram o sucesso desta.

Certamente os resultados atingidos são difíceis de se resumir, contudo, muitos objetivos foram alcançados em novas áreas como a da agricultura, indústria têxtil, serviços e propriedade intelectual. Outra grande revolução ocorreu no campo administrativo onde uma nova instituição com o nome imponente de Organização Mundial do Comércio ou OMC iniciou seu desenvolvimento durante a assinatura final dos termos da rodada Uruguai conhecido como Acordo de Marrakesh, em abril de 1994.

A mais recente rodada de negociações iniciou-se em 2000 nos EUA onde se iniciaram os debates a respeito do comércio eletrônico internacional, além de assuntos relacionados à agricultura e serviços.

2.1.2 - OMC – CRIAÇÃO DA INSTITUIÇÃO

A OMC iniciou suas atividades em 1995 e ainda que muitos a considerem como uma mera extensão do GATT, podemos verificar inúmeras diferenças entre eles. Enquanto o GATT foi instituído de maneira provisória e não tinha o respaldo de nenhuma instituição, a OMC é uma organização fundada com o objetivo de ter compromissos permanentes. Uma significativa diferença entre estes órgãos é a que a solução de disputas comerciais que poderia levar até uma década para ser solucionada, nos termos do GATT, agora tem um dinamismo inédito, levando um período bem mais reduzido para se concretizar. Além disto, o GATT não possuía maneiras de impor efetivamente suas resoluções enquanto a OMC possui uma "solução de entendimento nas disputas" (SED) que permite aos países membros retaliar em caso de vitória nos tribunais da organização.

Ainda que a OMC seja uma instituição muito recente, o seu trabalho tem respaldo nos quase cinqüenta anos de história de seu antecessor e de sua contribuição para a melhoria dos sistemas de

trocas internacionais. A legislação atual da OMC ainda guarda muito dos fundamentos do GATT instituídos há cinqüenta e cinco anos.

Para conseguir levar a cabo o seu dever institucional de facilitar e impulsionar o comércio internacional a OMC tem por função administrar acordos de comércio, atuar como foro para negociações, solucionar disputas comerciais, rever políticas comerciais nacionais, assistir países em desenvolvimento em assuntos referentes à política comercial e cooperar com outras instituições internacionais. A estrutura do órgão conta com mais de cento e trinta países membros o que representa mais de 90% de todo o volume de comércio internacional. Cerca de trinta outros países estão em negociação para tornarem-se membros. Um dos mais recentes países a se afiliar, a China, abriu um enorme mercado consumidor aos produtos estrangeiros.

As decisões tomadas pelo órgão são todas por consenso ainda que o voto por maioria possa vir a ser necessário, mas este recurso nunca foi utilizado pela OMC e foi raramente necessário sob a administração do GATT.

O instrumento de decisões mais alto da OMC é a Conferência Ministerial cujos membros se reúnem ao menos uma vez a cada dois anos. Logo abaixo deste encontra-se o Conselho Geral que é formado normalmente por embaixadores e chefes de delegação em Genebra ou por diplomatas enviados por seus países. O Conselho Geral também funciona como Órgão Revisor de Políticas Comerciais e como Órgão de Resolução de Disputas. Outros conselhos mais específicos e comitês especializados se reportam ao Conselho Geral.

O Secretariado da OMC está baseado em Genebra e é comandado pelo seu diretor geral, ao todo cerca de quinhentas pessoas compõem seus quadros. O Secretariado não possui filiais fora de Genebra e tem por principais atribuições oferecer suporte técnico aos diversos conselhos e comitês e aos países em desenvolvimento, além de analisarem o comércio mundial e servir de relações públicas

da OMC. A provisão de auxílio legal durante a solução de disputas e da entrada de novos membros também faz parte de seus deveres.

2.1.3 - SOLUÇÃO DE DISPUTAS

Os países são regularmente aconselhados a resolver suas disputas de maneira amigável através de debates, mas se um entendimento não for possível os países membros podem pedir ã OMC que julgue a legalidade de seus pleitos.

O processo de solução de querelas é administrado pelo SED - Solução de Entendimento de Disputas -, que promove o ideal de comércio previsível, suave e dentro das regras acordadas pela OMC. Os países trazem queixas a este órgão quando acreditam que seus direitos especificados nos acordos internacionais firmados na OMC estão sendo violados. Os julgamentos são realizados por *experts* independentes especialmente indicados em cada disputa - Painel de *Experts* - e se baseiam na interpretação jurídica destes acordos.

Os documentos que regem os procedimentos a serem seguidos no âmbito do comércio internacional é extremamente vasto contando com dezenas de acordos firmados pelos países membros. Não é objetivo deste trabalho expor todos estes procedimentos, mas apenas oferecer um breve resumo daquilo que será importante no acompanhamento da disputa envolvendo os governos brasileiro e canadense no mercado de aviação regional.

A maioria dos acordos existentes na OMC são multilaterais, ou seja, foram assinados por todos os países membros. Contudo, alguns acordos são plurilterais, são acordos assinados apenas por uma parcela dos países membros. Um desses acordos plurilaterais é o que diz respeito ao comércio de aviões para uso civil, Agreement on Trade in Civil Aircraft (Acordo de Comércio de Aeronaves Civis), que foi assinado por apenas 26 países membros e está em vigor desde 1 de janeiro de 1980, tendo sido alterado por anexos após a Rodada Uruguai em 1994. Este acordo consta do Anexo 1 deste trabalho.

De forma mais geral, este acordo estipula as normas a serem adotadas pelos signatários do mesmo no comércio de aeronaves não militares. Entre estas normas, os países signatários devem anular todo e qualquer impedimento ou barreira (cota, imposto, tarifa, ou proteção não tarifária) à importação de aeronaves de uso civil e de seus componentes e peças, além dos simuladores de vôo para os aviões, e recursos utilizados na manutenção das aeronaves. O documento trata de outros pontos como o de subsídios governamentais ao desenvolvimento, produção e venda de aeronaves civis, e os efeitos adversos que estes subsídios podem vir a causar em indústrias concorrentes. Outro importante documento que trata da regulação dos subsídios governamentais em concorrências internacionais é o Agreement on Subsidies and Countervailling Measures, documento presente no Anexo II desta monografia e que será importante na análise da disputa comercial envolvendo os programas de incentivo à exportação dos governos do Brasil e Canadá.

Estes procedimentos permitem também que se apele juridicamente das decisões alcançadas pelo Painel de *experts*.

Aproximadamente duzentos casos foram analisados pela OMC desde sua criação enquanto o GATT ocupou-se de cerca de trezentos durante seus quase cinqüenta anos de vida.

Mais adiante nos aprofundaremos especificamente na contenda entre a brasileira EMBRAER e a canadense Bombardier sobre o uso de programas de subsídio às exportações, que ambas acreditavam interferir nos seus direitos e não obedecer as normas internacionais de comércio e foi arbitrado pela OMC.

2.2 - A EMBRAER

A Empresa Brasileira de Aeronáutica, EMBRAER, foi fundada em 1969 como uma empresa estatal cuja função seria de projetar e construir aviões em território nacional.

Desde o início, esta empreitada foi alvo de duras críticas de seus opositores que julgavam ser inadequado produzir tal bem de alta tecnologia no país pois não havia um parque industrial capaz de atender as exigências para a fabricação dos componentes e sistemas necessários às modernas aeronaves. Além disto, pesava o fracasso de inúmeras outras tentativas anteriores de conceber e manter uma indústria aeronáutica brasileira que iniciaram-se poucos anos após o primeiro vôo de Santos Dumont em um aparelho mais pesado que o ar em 1906.

Passados mais de trinta anos, o sucesso obtido nacional e internacionalmente pelos produtos da EMBRAER ainda causa espanto em muitos. Os aviões brasileiros por ela fabricados estão presentes em todos os continentes e a tecnologia de seus produtos é ratificada por seus clientes nos países mais desenvolvidos do planeta. A EMBRAER é hoje uma das maiores empresas do setor aeroespacial do mundo e além de sua sede em São José dos Campos, São Paulo, ela possui representações na Austrália, China, França, Singapura e Estados Unidos. Atualmente a empresa conta com mais de 12.400 (doze mil e quatrocentos) empregados e nos anos de 1999, 2000 e 2001 foi a maior exportadora nacional, tendo sido em 2002 a segunda maior exportadora do país.

Neste capítulo conheceremos com mais detalhes a história desta empresa de enorme importância econômica e estratégica para o Brasil, os sucessos e as derrotas que permitiram atingir o patamar de profissionalismo por ela atingido nos dias de hoje.

2.2.1 - 30 ANOS DE HISTÓRIA

No início da década de 60, mais precisamente em1962, o engenheiro aeronáutico francês Max Holste foi contratado pelo então Ministério da Aeronáutica para chefiar uma equipe do Centro Tecnológico da Aeronáutica (CTA) na missão de realizar estudos com vistas a modernizar os aparelhos North American T-6 utilizados pela Força Aérea Brasileira, FAB, e que chegavam ao fim da vida útil de seus motores a pistão. Naquele tempo alguns empreendedores já sonhavam com a construção de uma aeronave de transporte de pequeno porte no país e aliados à experiência de Max iniciaram a delinear as características básicas deste projeto. Estes engenheiros e técnicos estavam convencidos da necessidade de criar um aparelho que encontrasse demanda no mercado civil e possivelmente no mercado externo. Essas condições se mostraram determinantes para a produção do avião pois muitos projetos anteriores haviam sido descontinuados por falta de demanda e aqueles que tinham entrado em produção viam-se dependentes dos pedidos governamentais o que não era desejado. Era claro que a demanda das forças armadas seria de fundamental importância para que se iniciasse a produção de uma nova aeronave no Brasil para que se pudesse arcar com os riscos e gastos de grande magnitude advindos da implantação de um parque industrial aeronáutico moderno.

O projeto caminhou com o apoio do Ministério da Aeronáutica inicialmente nos corredores do CTA mais precisamente no hangar do PAR, departamento de projetos aeronáuticos que era dirigido pelo engenheiro aeronáutico formado pelo ITA e grande sonhador, o major Ozíres Silva.

Em 1969 esta equipe que havia sido responsável pelo projeto desde seu estágio embrionário deixou o CTA e criou a EMBRAER onde o programa teve continuidade e deu origem ao primeiro avião da recém fundada empresa, o Bandeirante. Este avião deu início a um longo relacionamento entre a empresa e a FAB que já nesta primeira

fase encomendou 80 aeronaves daquele modelo para transporte de pessoal. Desde então ficava claro que seria imprescindível para o sucesso deste ambicioso projeto que houvesse uma demanda permanente, capaz de manter as linhas de produção continuamente em atividade para que o esforço e a tecnologia alcançadas não fossem perdidas. A semente estava lançada e a EMBRAER iniciou suas atividades próximo ao CTA, na cidade de São José dos Campos, interior do Estado de São Paulo, por suas condições climáticas e geográficas, além da conveniência de ser vizinha ao berço intelectual de seus fundadores, o Instituto Tecnológico da Aeronáutica, ITA. Desde o início o Ministério da Aeronáutica e os engenheiros da EMBRAER perceberam que este processo só poderia render bons frutos se fosse baseado em um forte lastro educacional, que seria fornecido pelo ITA, responsável pela formação acadêmica dos engenheiros do CTA.

O Bandeirante foi um marco da aviação brasileira, sendo utilizado até hoje por vários operadores nacionais e internacionais. O sucesso deste avião foi conseguido pela brilhante estratégia de mercado adotada por seus projetistas. Na época de seu desenvolvimento a aviação internacional passava por uma profunda mudança com o advento das novas aeronaves à jato que permitiam a cada dia o transporte mais eficiente de um número crescente de passageiros unindo velocidade e custos decrescentes por passageiro. O resultado deste processo foi que os aviões se tornavam cada vez maiores e mais pesados levando o seu emprego às rotas entre grandes centros urbanos onde os aeroportos possuíam estrutura adequada à sua operação. As rotas entre cidades do interior e entre estas e os centros urbanos haviam sido deixadas de lado pelas companhias aéreas e pelos fabricantes de aviões. Os aeroportos regionais tinham menor capacidade de operação, levavam menos passageiros e tinham pistas menos preparadas, muitas vezes com pistas de terra batida. Essas características se verificavam não somente no Brasil mas em outros países. A criação de uma rede pulverizada de vôos em rotas

mais curtas e com menor número de passageiros por vôo tornaria o sistema de transporte aéreo mais eficiente. Esta era a visão dos engenheiros da EMBRAER e curiosamente não encontravam par em outros países, o que representava uma falha de mercado que poderia permitir uma grande demanda por aviões de transporte pequeno porte para o mercado civil.

A EMBRAER foi criada no dia 29 de dezembro de 1969 como uma sociedade anônima, de economia mista, ou seja, com capital governamental e privado, mantendo-se, no entanto, sob a forma de entidade de direito privado. Essa configuração foi estudada durante meses pois a iniciativa privada tinha uma visão muito crítica a respeito da criação de uma indústria aeronáutica brasileira e ainda que houvesse apoio de alguns empresários à idéia de construir aviões no país não se encontrou muito entusiasmo destes em colocar seu dinheiro à disposição de tal empreendimento. A burocracia e as peculiaridades do gerenciamento governamental pareciam inviáveis a uma empresa que pretendia atingir não somente o mercado nacional como também o mercado externo com seus produtos. A solução encontrada derivou de uma legislação vigente que permitia o aporte de capital governamental para uma empresa de capital misto e de direito privado. O apoio do Governo Federal foi de fundamental importância para a criação e o desenvolvimento inicial desta empresa.

Após quinze anos de sua fundação, a EMBRAER já atingia números expressivos tendo produzido até agosto de 1984 mais de 3000 aviões militares e civis e incorporado a Indústria Aeronáutica Neiva Ltda., de Botucatu, também no interior de São Paulo, e cuja produção era composta por pequenos aviões de treinamento, observação e de aviação agrícola. Além disso a empresa já contava com um efetivo de cerca de 7000 pessoas e possuía novas instalações nos EUA (EMBRAER Aircraft Corporation, EAC); França (EMBRAER Aviacion Internacionale, EAI); e no Brasil (EMBRAER Divisão de Equipamentos, EDE) também em São José dos Campos.

Neste período a empresa já se utilizava de tecnologia de ponta ainda inédita aos outros setores industriais brasileiros e suas vendas anuais já superavam os US$300 milhões, dos quais cerca de 30% destinavam-se à exportação. A venda dos aviões nacionais para o mercado externo era financiada pelo BNDE, Banco Nacional para o Desenvolvimento Econômico pois devido à alta taxa de inflação no país era impossível conseguir financiamentos em bancos privados que possuíssem taxas competitivas e por prazos mais longos. Ainda assim este esquema permitiu que a EMBRAER concluísse inúmeros contratos de vendas para mais de 30 países durante esses anos.

O quadro que aparentemente era muito favorável estava por mudar. Outros fabricantes de aviões entravam na disputa do mercado de aviões de transporte regional a cada dois ou três anos o que acirrou muito a disputa por novos contratos à partir do início da década de 80. Por outro lado, a demanda internacional começava a dar sinais de enfraquecimento e o ritmo de produção, que tinha se mantido através do lançamento constante de novas versões que se adaptassem ao mercado, parecia que entraria em declínio. O mercado militar também se reduzia com a possibilidade de um período mais duradouro de paz dado o aumento dos esforços diplomáticos nesse sentido em diversos países e o subsequente corte de verbas militares internacionalmente após a segunda metade daquela década. O mercado agora estava muito mais competitivo e a demanda por novas tecnologias a bordo e por maior qualificação profissional reduzia substancialmente os lucros dos fabricantes que tinham custos de produção crescentes e margens de lucro cada vez menores.

A EMBRAER começava a ter problemas como qualquer outra empresa num mercado competitivo mas sua concepção estatal reduzia a margem de manobra para enfrentar situações difíceis. Novas diretizes foram propostas para alavancar novas vendas e manter as linhas de produção mas era imprescindível que a empresa fosse privatizada, o que ocorreu em 7 de dezembro de 1994. Seus atuais

controladores possuem 60% do capital volante divididos entre a Cia. Bozano e os fundos de pensão PREVI e SISTEL.

A introdução de uma nova aeronave de propulsão a jato para o transporte regional que iniciou sua produção na segunda metade da década de 90 foi fundamental para a reestruturação da empresa e possibilitou a retomada da expansão produtiva e da conquista dos mercados internacionais. Esta aeronave foi o ERJ 145, um avião de 45 assentos com dois propulsores à jato na cauda que por sua eficiência e preço competitivo permitiu à EMBRAER tornar-se líder de mercado nesta categoria tomando, assim, o posto da sua maior rival desde então, a canadense Bombardier, que já possuía "know how" nesta área pois seus aviões executivos e de transporte regional já estavam na era do jato.

Com a intensificação das disputas no mercado regional no final da década de 80, como anteriormente mencionado, levaram ao desaparecimento de algumas fabricantes como a Fokker holandesa e a Avro inglesa, além da retirada do mercado regional da SAAB sueca. Com isso a EMBRAER e a Bombardier passaram a isolar-se na liderança do mercado enfrentando pouca resistência e combatividade de outras empresas do setor, o que levou a disputa a termos mais diretos entre estas duas fabricantes.

Em 1999 a EMBRAER celebrou um contrato de aliança estratégica com um grupo formado pelas maiores empresas do setor aeroespacial europeu, Dassault Aviation, EADS, Snecma e Thales, que adquiriram 20% do capital volante da empresa. Este contrato proporcionou à EMBRAER uma maior facilidade de adquirir equipamentos e novas tecnologias além de facilitar também que esta atingisse novos mercados. Atualmente a empresa possui mais de 45% do total de encomendas do setor de jatos de transporte regionais. Além de ser responsável pela fabricação de mais de 50% de todos os aparelhos da Força Aérea Brasileira e estar presente em outras 20 forças aéreas e mais de 40 países em todos os continentes.

2.3 - A BOMBARDIER

A empresa canadense iniciou suas operações em 1942, como uma fabricante de veículos de transporte em neve, e desde então vem diversificando sua área de atuação. Atualmente a Bombardier é uma corporação internacional presente em vários países, principalmente na América do Norte e Europa.

A empresa é composta por grupos de operações autônomas. Cada um destes grupos tem a liberdade necessária sobre suas operações com vistas a atingir a melhor eficiência possível.

A Bombardier atua hoje na área de construção de aviões, ferrovias (é desde o ano 2000 a maior fabricante mundial de veículos ferroviários), veículos para neve, barcos e lanchas, motores para aviação, financeira, mísseis entre outras. Alguns de seus produtos são internacionalmente famosos como o caso de seus aviões executivos da linha Learjet e seus jet-skis da marca Sea Doo.

A divisão da empresa é, no entanto, organizada nos seguintes grupos operacionais : Bombardier Aerospace, Bombardier Transportation, Bombardier Recreational Products, Bombardier Services e Bombardier Capital.

Em maio de 2002, o governo do Canadá reconheceu a importância histórica de Joseph Armand Bombardier, o fundador da empresa, para seu país.

Neste trabalho nos será mais interessante e intensamente focalizado o grupo Bombardier Aerospace por ser esta divisão responsável pelo desenvolvimento e manufatura de aeronaves. Alguns de seus modelos estão na mesma faixa de mercado dos aviões produzidos pela EMBRAER, o que tem levado as duas empresas a disputar "com todas as suas armas" os valiosos contratos internacionais. Esta disputa chegou à OMC pois ambas as empresas acusavam-se mutuamente de utilizarem-se de mecanismos de financiamento que não respeitariam os acordos internacionais de comércio.

2.3.1 – 1942 – 2003 – A Evolução da Bombardier Aerospace

Nesta seção será apresentada de forma breve o longo processo de aquisições percorrido pela Bombardier Aerospace desde sua fundação até os dias de hoje e que permitiram a esta empresa tornar-se uma gigante do ramo de construção e manutenção de aeronaves executivas, regionais e anfíbias.

No ano de 1942 Joseph Armand Bombardier fundou uma empresa para fabricação de veículos de transporte na neve que se chamou L`Auto-Neige Bombardier Limitée. A empresa prosperou e no ano de 1967 se tornou Bombardier Limited.

Em 1969 a Bombardier lançou ações no Canadá nas bolsas de Toronto e Montreal, hoje a empresa está listada nas bolsas de Toronto, Bruxelas e Frankfurt (que possui também ações de classe B da empresa desde 1998).

Já em 1970 iniciava-se o processo de expansão da companhia com as primeiras aquisições na Europa, notadamente entre elas estava a Rotax, fabricante Austríaco de motores de aviação de pequeno porte e que hoje fabrica diversos modelos de motores para os mais variados propósitos inclusive para lanchas, ultraleves e veículos de neve ("snowmobiles").

Já em 1986, mais um importante passo na área aeroespacial foi dado com a incorporação da Canadair, a maior fabricante canadense de aviões. A Canadair produziu mais de quatro mil aviões com seu nome desde a sua criação em 1944. Mesmo após sua inclusão no grupo Bombardier Aerospace seus aviões mantiveram o nome Canadair até o aniversário de cinqüenta anos da empresa em 1994. Entre as aeronaves fabricadas pela Canadair encontravam-se aviões de caça e bombardeio(décadas de 40 a 60), de transporte regional, de treinamento, de combate a incêndio, de patrulha e jatos executivos. Um dos produtos mais famosos da Canadair, o jato executivo de longo alcance Challenger, é produzido até hoje em várias versões sob a nova bandeira da Bombardier.

O programa de expansão das atividades da Bombardier continuou a todo vapor com a aquisição de importantes empresas como a Short Brothers plc em 1989. A Shorts, como era conhecida, era uma empresa britânica, da Irlanda do Norte, fabricante de aviões civis e militares fundada no ano de 1901. Esta empresa é reconhecida historicamente por ter sido a primeira do mundo a receber uma encomenda de produção em série de aviões no ano de 1909.

È interessante observar que, ao ser adquirida pela Bombardier, a Shorts havia há pouco iniciado a produção, sob licença da EMBRAER, de mais de 140 unidades da aeronave de treinamento militar EMB-312 Tucano, denominada S312 Tucano em sua versão britânica. Desta produção, 130 aeronaves destinavam-se às unidades de treinamento da RAF, Força Aérea Real (Reino Unido).

Já nos anos 90, a Bombardier criou uma nova subsidiária, a Learjet inc., para adquirir o controle da Learjet Corporation, uma tradicional fabricante norte-americana de aviões executivos a jato. A família de jatos Learjet é uma das mais conhecidas e de maior sucesso na indústria aeronáutica de aviões executivos no mundo.

Em 1992 mais uma reconhecida fábrica de aviões passou a fazer parte do grupo canadense. A De Havillad, uma empresa baseada em Ontario e cujo principal produto era o Dash 8, um avião turboélice de transporte regional passou a ter 51% de seu capital sob o controle do grupo Bombardier e os 49% restantes eram controlados pelo governo da província de Ontario. Essa parceria se manteve até 1997 quando a Bombardier passou a ser a única controladora da empresa cujo nome passou a ser De Havillad Inc..

Outras parcerias foram formadas ainda em 1992, como a que formou o consórcio International Nacelles Systems EEIG, entre a Shorts e a empresa francesa Hurel-Dubois, com vistas a conceber e fabricar nacelas para motores e outras partes para diversos tipos de aviões.

Em 1993, a Shorts e a Thomson-CSF, outra empresa francesa uniram seus esforços para criar a Shorts Missile Systems Limited,

num acordo onde ambas as empresas possuíam 50% do negócio para a fabricação de mísseis de curto alcance disparados à partir de aeronaves de combate. Contudo esta parceria viria a terminar em janeiro de 2000 quando a Bombardier retirou-se do negócio vendendo sua parte à Thomson. Mais tarde a Thomson passou a fazer parte do grupo Thales, fabricante de equipamentos eletrônicos para diversos sistemas civis e militares.

A Bombardier voltou a utilizar-se de sua subsidiária Shorts para adquirir mais uma empresa do setor aeroespacial. Em novembro de 93, a Airwork Limited, uma empresa britânica de apoio aeronáutico, passou a ser parte do grupo Bombardier.

Em fevereiro de 1995, mais uma aquisição do grupo ocorreu em território dos Norte Americano, com a compra de quatro centros de manutenção de aeronaves pertencentes à AMR Combs, realizada pela Learjet inc, subsidiária da Bombardier. Um mês mais tarde, a Bombardier e a AMR Combs realizam uma *joint venture*, formando uma nova companhia chamada Business Jet Solutions, oferecendo um programa de posse fracionária de aeronaves executivas chamado Flexjet. Dois anos mais tarde, em dezembro de 1997, a Bombardier adquiriu as cotas da AMR Combs na Business Jet Solutions.

Em novembro de 1995 a Bombardier inaugura um centro de treinamento aeroespacial em colaboração com a CAE Electronics.

Em abril de 1996 a Bombardier se reorganiza, criando os cinco grupos de atuação atualmente em vigor. A divisão cria oficialmente a Bombardier Aerospace e outros quatro grupos: Bombardier Capital, Bombardier Recreational Products, Bombardier Services e Bombardier Transportation.

Em dezembro de 1996, a Bombardier volta a crescer em seu próprio país de origem, através da aquisição da área de montagem de aviões executivos da canadense Innotech Aviation inc., uma empresa sediada em Dorval, na província de Québec, onde se encontra a sede da própria Bombardier Aerospace.

Em novembro de 1997, a Lufthansa, uma das maiores empresas européias de transporte de passageiros, inaugurou o Lufthansa Bombardier Aviation Services, o único centro de serviços exclusivamente para aeronaves Bombardier na Europa.

Em agosto de 2000, mais um grande passo da Bombardier, neste mês ela anunciou a alocação de U$ 170 milhões para construir uma instalação responsável pela montagem final dos jatos regionais CRJ700 e CRJ900 no aeroporto Mirabel, na cidade de Montreal. As siglas CRJ correspondem a Canadair Regional Jet, (Jato Regional da Canadair), e esta nomenclatura foi mantida mesmo após a compra da Canadair pela Bombardier.

Em novembro deste mesmo ano, a Bombardier se desfez de suas atividades na área de defesa de empresas britânicas por ela controladas. Entre as empresas vendidas se encontrava a Airwork.

Após os inúmeros fatos supracitados, a Bombardier Aerospace tornou-se uma das líderes mundiais do setor aeroespacial, perdendo em porte apenas para as gigantes do setor: Boeing (EUA) e Airbus (Europa). Hoje ela conta com mais de trinta e três mil funcionários no mundo e possui capacidade de projetar e construir plenamente seus aviões em suas fábricas no Canadá, EUA e Reino Unido.

A Bombardier é líder mundial em vendas de aeronaves regionais de transporte(incluindo-se aviões turboélices ou à jato) com capacidade entre vinte e noventa assentos. Na aviação executiva tem a maior gama de produtos, o que lhe permite ter uma liderança incontestável no segmento. A Bombardier possui também uma aeronave anfíbia para combate ao fogo e de patrulha, o Bombardier 415.

Além das aeronaves que fabrica, a Bombardier é responsável pela construção de alguns componentes e partes de aviões maiores para outros fabricantes. O treinamento de pilotos e técnicos é outra atividade desempenhada pelo grupo em diversas localidades em todo o mundo.

3 – A DISPUTA

A disputa do mercado de aviões à jatos comercias de pequeno porte destinados a rotas regionais, conhecidos como jatos regionais, levou as duas maiores fabricantes do setor a um duelo judicial na Organização Mundial do Comércio. Os governos dos dois países entraram com pedidos, na OMC, de revisão das políticas de comércio adotadas por seus concorrentes.

O caminho percorrido pelas duas empresas e por seus governos, à partir da segunda metade da década de 90 até o resultado deste embate no início de 2003, será exposto cronologicamente no decorrer deste capítulo.

3.1 - O INÍCIO

A contenda iniciou-se formalmente em 18 de junho de 1996, quando o Canadá fez um pedido de consultas ao Brasil em relação ao PROEX. O PROEX é um programa governamental de apoio à exportação, com fundos do BNDES, que apoia as vendas, ao mercado externo, dos aviões da EMRAER.

O governo canadense alegava que o PROEX não estaria de acordo com os requerimentos do WTO Subsidies Agreement (Acordo sobre Subsídios da OMC). Essas alegações iniciaram-se logo após as primeiras vendas do modelo de cinqüenta assentos da EMBRAER, o ERJ-145, para a Continental Express, uma empresa americana de transporte aéreo. A canadense Bombardier havia desfrutado do monopólio no mercado de jatos regionais pelos quatro anos anteriores, desde as primeiras vendas de seu jato CRJ, com capacidade para cinqüenta passageiros, à empresa City Line, da Lufthansa (outra empresa de transporte aéreo), na Alemanha.

As consultas prosseguiram durante o mês de julho de 1996 entre os governos do Brasil e do Canadá, mas não se chegou a nenhum

acordo. Em 16 de setembro do mesmo ano, o Canadá pediu formalmente ao Dispute Setlement Body (SED - Solução de Entendimento de Disputas) da OMC que estabelecesse um Painel para solucionar a questão. Contudo, o requerimento feito pelo Canadá tinha um erro processual, e mais tarde foi arquivado. Com isso, os governos dos dois países concordaram em retomar as conversações durante os meses restantes de 1996.

A EMBRAER decidiu iniciar uma pesquisa a respeito dos programas canadenses, já que a Bombardier estava criticando o PROEX. A EMBRAER analisou e reuniu o maior número de informações disponíveis publicamente sobre os programas do governo canadense e os enviou ao Itamaraty, aos cuidados do Ministro de Relações Exteriores, e também à missão brasileira em Genebra, na OMC. Estas informações permitiram que o Brasil obtivesse a base para dar início à sua própria requisição de consultas na OMC. Esta atitude foi tomada em março de 1997.

Os programas canadenses de apoio às vendas da Bombardier eram o TPC, Technology Partnerships Canada (Parcerias Tecnológicas do Canadá); e o Canada Account, um programa de financiamento à exportação promovido pelo EDC, Canada's Export Development Corporation (Corporação para Desenvolvimento da Exportação do Canadá).

Com esta iniciativa, ambos os países encontravam-se na mesma posição legal perante a OMC. Os dois poderiam iniciar um processo na SED com a requisição do estabelecimento de um Painel, mas ambos sabiam que se o fizessem, o outro responderia da mesma forma.

O cenário permaneceu imutável durante alguns meses porém, próximo ao fim do ano, a Bombardier cancelou a participação da EMBRAER como subcontratante no programa da OTAN, que forneceria aviões de treinamento para uma nova base daquela instituição, e que tinha por primeiro contratante aquela empresa. A EMBRAER foi substituída pela Raytheon, uma empresa norte

americana, no contrato supracitado. Este fato ocorreu pouco antes de uma reunião de cúpula entre o Presidente do Brasil, Fernando Henrique Cardoso, e o Primeiro Ministro Canadense, Jean Chrétien, o que obviamente causou constrangimentos durante aquele encontro.

Os governos dos dois países resolveram designar enviados especiais às duas empresas e às respectivas agências governamentais envolvidas. Estes enviados recomendaram aos governos do Brasil e Canadá que estabelecessem um acordo bilateral sobre comércio aeronáutico e que envolveria monitoramento e verificações permanentes. Nenhum dos lados ficou satisfeito com esta solução e não se obteve acordo algum.

O governo Brasileiro estava disposto a considerar modificações no PROEX, mas o governo canadense insistia que seus programas eram consistentes com as regulamentações da OMC.

3.2 PEGANDO EM ARMAS

A contenda entrou oficialmente em questão na OMC quando, em 10 de julho de 1998, o Canadá pediu o estabelecimento de um Painel de resolução de disputa àquela organização. O Brasil, logo em seguida, fez o mesmo e levou os programas canadenses à apreciação da OMC. O procedimento legal de resolução de disputas havia se iniciado.

Nos meses de novembro e dezembro de 1998 houve várias reuniões entre os juizes do Painel e os dois lados. Em abril de 1999 os juizes chegaram ao seu veredicto, reportando que ambos os países mantinham subsídios que eram inconsistentes com o WTO Subsidies Agreement (Anexo 2 desta monografia). Tanto o PROEX quanto o TPC e o Canada Account foram considerados subsídios à exportação.

É importante ressaltar que a posição tomada por cada país foi diferente no sentido de que o Brasil confirmava desde o início que o PROEX se tratava de um programa de subsídio à exportação,

enquanto o Canadá relutava em admitir tal classificação aos seus programas. Além disto, o Brasil notificou formalmente a OMC, quando da sua criação, os detalhes do PROEX. O governo canadense nunca notificou a OMC sobre seus programas de incentivo à exportação.

3.2.1 - O PROEX

O governo brasileiro aceitou a designação do PROEX como um programa de incentivo á exportação mas argumentou que não se tratava de uma violação das normas da OMC por dois motivos. O Primeiro era que, segundo o artigo 27 do Acordo sobre Subsídios da OMC, é permitido aos governos de países em desenvolvimento manter subsídios pelo período de oito anos, contados à partir de 1995, data da fundação da OMC, desde que estes subsídios não sejam crescentes no decorrer dos anos. Segundo, o primeiro parágrafo do item (K) do Anexo I do Acordo referido permite, tecnicamente, aos olhos dos representantes brasileiros, apoio ao pagamento de taxas de juros, como no PROEX, caso isto não seja usado para obter vantagem material.

O Painel, no entanto, descordou do governo brasileiro em ambos os pontos, e o Brasil apelou. O Apellate Body (Órgão de Apelação), reafirmou os resultados do Painel, mas o motivo pelo qual julgava o ponto de vista brasileiro com relação ao item (k) era significativamente diferente daquele do Painel, e bem mais favorável ao Brasil.

Retomando os dois pontos em questão, o Artigo 27 que permite subsídios desde que não crescentes, foi indevidamente aplicado pelo Brasil por uma visão diferente de metodologia a ser aplicada na mensuração deste valor. Os representantes brasileiros mediam tamanho do subsídio pelo valor total do orçamento destinado ao ano. Se o orçamento destinado pelo Congresso Nacional não fosse

crescente, então estaria em conformidade com as normas da OMC. Este valor, em dólares, não aumentou no período. Os juizes da OMC, no entanto tomavam por medida a despesa real no período, ano a ano, e este valor cresceu com as vendas da EMBRAER. O Artigo 27, portanto, tornou-se um simples problema de metodologia de cálculo.

O item (k) é um pouco mais complexo e sua discussão foi mais duradoura. O Anexo I do Acordo sobre Subsídios é uma lista ilustrativa de Subsídios à Exportação e que são condenados pela OMC. O primeiro parágrafo deste item cita como exemplo: "the payment by (governments) of all or part of the costs incurred by exporters or financial institutions in obtaining credits...". Esta afirmativa colocaria o PROEX em posição proibitiva pelo tem (k), já que o PROEX é um financiamento (pagamento) dado pelo governo do Brasil, de todo ou parte dos custos incorridos pelos exportadores, como a EMBRAER, ou por instituições financeiras para obtenção de crédito. Contudo, o parágrafo do item (k) não pára por aí, e continua dizendo logo a seguir das palavras mencionadas acima: "...credits in so far as they are used to secure a material advantage in the field of export credit terms."

Para os diretores da EMBRAER e para os representantes do governo brasileiro, se tais pagamentos não fossem utilizados para assegurar uma vantagem material nos termos dos créditos para exportação, estes pagamentos não estariam na lista de subsídios proibidos pela OMC. Este argumento ficou conhecido pelo Painel como o argumento *a contrario*.

O Canadá, por sua vez, fez três argumentações contra a posição brasileira. Primeiro, segundo eles, o PROEX não é um pagamento como o termo é utilizado no item (k). Segundo, de acordo com os representantes canadenses, o argumento *a contrario* feito pelo Brasil não era permitido. E, por fim, ainda que o PROEX fosse um pagamento dentro dos termos do item (k), e que o argumento *a contrario* fosse uma interpretação válida, o PROEX ainda seria

utilizado para garantir uma vantagem material nos termos de crédito para exportação.

O Painel da OMC originalmente concordou com o Canadá no terceiro ponto. Segundo os *experts* do Painel, o PROEX era utilizado para garantir vantagens materiais. Com a decisão de que o PROEX era utilizado para garantir vantagens materiais, o Painel original não relevou os dois primeiros argumentos do Canadá de que o PROEX não seria um pagamento no sentido do item (k), nem que a interpretação *a contrario* do item (k) não seria permitida.

A resolução do Painel original de que o PROEX seria uma garantia de vantagens materiais, não foi aceita pelo governo brasileiro que, então, apelou. Enquanto o Órgão de Apelação manteve o resultado do Painel, ele mudou consideravelmente sua análise, sendo muito mais favorável ao Brasil.

Segundo o Painel, o PROEX sempre provia vantagem pois a taxa de juros líquida ao tomador (do empréstimo),em qualquer transação, seria sempre menor com o PROEX do que seria sem ele. O Órgão de Apelação discordou desta lógica, dando razão para a argumentação brasileira. De acordo com o Órgão de Apelação, o mercado é a medida certa para dizer se o PROEX garante ou não uma vantagem material. Ou seja, a questão não é se o tomador está melhor com ou sem o PROEX, mas se a taxa de juros líquida, com o PROEX, é menor do que a taxa que seria possível ao tomador adquirir no mercado. Uma medida do mercado, segundo o Órgão de Apelação, seria a CIRR, Commercial Interest Reference Rate (Taxa de Juros Comercial de Referência), estabelecida pela OCDE, Organização para Cooperação e Desenvolvimento Econômico.

Em resumo, segundo o Órgão de Apelação, o PROEX não era inerentemente ilegal, mas teria que sofrer uma alteração que estipulasse como taxa mínima, uma *benchmark* de mercado.

3.2.2- TPC, CANADA ACCOUNT E EDC.

O Brasil desafiou três programas canadenses, o TPC, O Canada Account, e o EDC. O governo canadense utilizou o TPC para fazer empréstimos à indústria aeronáutica canadense com baixas taxas de juros. Os empréstimos governamentais, além disso eram pagos apenas em caso de lucros, ou seja, se a Bombardier não obtivesse lucross com os projetos desenvolvidos com o dinheiro emprestado ela não precisaria pagar o débito ao governo.

Este acordo, sob o entendimento da missão brasileira junto à OMC, correspondia claramente a um subsídio. Não só a Bombardier, como algumas de suas subsidiárias, se beneficiaram deste programa. E seguramente a Bombardier não teria conseguido termos tão privilegiados no mercado. E, ainda que não fosse formalmente um programa destinado ao subsídio para exportação, a indústria aeronáutica tinha sido contemplada com os fundos do TPC. No anp em que a disputa se iniciou, 1998, 100% dos aviões construídos no Canadá foram exportados.

Em vista destas situações, o Painel da OMC concluiu que o TPC era, realmente, um subsídio à exportação, e não obedecia a regulamentação vigente.

O Canada Account, também foi condenado pela OMC como um subsídio proibido à exportação. Basicamente o Canada Account se tratava de uma conta sem vínculos formais que permitia ao Primeiro Ministro Canadense e seu gabinete subsidiar exportações em situações em que as leis canadenses não permitiriam subsídio. Estes subsídios eram camuflados nos orçamentos ministeriais e não eram levados ao conhecimento público. O Canadá admitiu o uso desta conta para subsidiar a venda de aviões.

O EDC, no entanto, não foi punido pelo Painel de solução de disputas, contudo o Brasil apelou e esta situação se reverteu. Mesmo antes da resolução final, o Canadá já havia modificado o EDC quando

o Governo do Brasil iniciou as consultas em março de 1997. Nesta época, havia sido criada uma subsidiária do EDC chamada Exinvest, que deveria assistir as exportações de aviões canadenses a companhias de leasing de aeronaves. A estrutura utilizada por este programa foi criticada pelo governo brasileiro ainda na época das consultas o que fez com que o programa fosse eliminado antes da abertura do Painel na OMC.

Mas ainda que o Exinvest tenha sido eliminado, o programa original, o EDC, ainda continuava ativo. O resultado do julgamento do EDC desapontou o Brasil, mas também muitos dos membros da própria OMC, que procura manter a maior clareza e transparência nos seus procedimentos.

A Operação do EDC é secreta e mesmo sendo uma entidade governamental, ela opera como se fosse um banco privado e suas operações com seus clientes não são abertas nem mesmo ao parlamento canadense.

O Canadá apelou da decisão a favor do Brasil a respeito do TPC e o Brasil apelou a respeito da decisão envolvendo o EDC. O Órgão de Apelação reafirmou o julgamento do Painel sobre o TPC como um programa proibido de apoio à exportação. Além disso, o mesmo Órgão também reafirmou a sentença dada pelo Painel em relação ao EDC, devido a um problema técnico de ordem legal. Contudo, expressou claramente a sua discordância em relação à atitude do Painel e sugeriu ao Brasil que reapresentasse sua reclamação contra o EDC na OMC.

A sugestão dada pelo Órgão de Apelação ao Brasil para reapresentar sua queixa a respeito do EDC não tem precedentes na história da OMC.

3.2.3 - MUDANÇAS

Após as decisões do Órgão de Apelação, as resoluções do Painel, modificadas pelo Órgão supracitado, foram adotadas em 20 de agosto de 1999 e ambos os países teriam noventa dias, até 18 de novembro de 1999, para alterar todos os aspectos proibidos de seus subsídios.

O Canadá anunciou mudanças no TPC e no Canada Account, enquanto o Brasil anunciou que havia adotado uma taxa de juros referencial mínima para o PROEX, a taxa seria a do tesouro americano de dez anos mais vinte pontos percentuais. Esta taxa se tornaria conhecida como "T-Bill plus 20".

Após esta etapa ambos os lados alegou que o outro não havia alterado devidamente seus programas e os juizes originais foram novamente convocados para determinar se as medidas adotadas por Brasil e Canadá haviam sido suficientes. Em 9 de maio de 2000 os *experts* chegaram à conclusão de que o Brasil não havia alterado satisfatoriamente o PROEX e que o Canadá não havia alterado satisfatoriamente o Canada Account, contudo, em relação ao TPC, as medidas adotadas foram aprovadas. O Brasil apelou mas o Canadá não apelou sobre a decisão referente ao Canada Account.

Finalmente, ao término das revisões do processo de apelação, o PROEX, com a taxa mínima referencial "T-Bill Plus 20", ainda garantia uma vantagem material, pois, segundo a visão da OMC, o Brasil não foi capaz de provar que as taxas de mercado estavam naquele nível. Contudo, a conclusão de que o Proex não era um pagamento no sentido empregado no item (k), e a interpretação *a contrario* não seria permitida foram rejeitadas. O TPC foi considerado mudado satisfatoriamente para atender as normas da OMC, mas a Canada Account não estava em conformidade com estes parâmetros.

Como resultado desta fase da disputa o Canadá pediu à OMC permissão para retaliar o Brasil em decorrência do PROEX, mas o governo brasileiro não recorreu ao mesmo procedimento em relação ao Canadá.A arbitragem permitiu ao Canadá retaliar o Brasil em U$234 milhões.

3.2.4 - SEGUNDA ETAPA

Em dezembro de 2000, com vistas a adaptar o PROEX à regulação da OMC, o governo brasileiro alterou novamente seu programa. Mais uma vez o Canadá discordou das mudanças realizadas e iniciou uma nova fase da disputa na OMC.

O PROEX foi examinado e em 26 de julho de 2001, o painel declarou que o Programa brasileiro de incentivo à exportação em questão estava em total conformidade com as normas aplicáveis, rejeitando a alegação canadense de que tal programa violaria as normas da OMC. O governo canadense não satisfeito com esta resolução entrou com pedido de apelação e, em 23 de agosto de 2001 o Órgão de Apelação reafirmou a decisão inicialmente tomada pelo painel e declarou o PROEX em perfeita conformidade com a normalização vigente. À partir desta última resolução, o PROEX não pode mais ser alvo de investigação na OMC (salvo mudanças no programa), colocando um fim na discussão sobre sua regularidade. Esta decisão confirma o que o Brasil e a EMBRAER vinham afirmando, ou seja, a conformidade do PROEX às regras internacionais sobre subsídios impostas pela OMC.

Desde o fim do ano 2000 e nos primeiros meses de 2001, ambas as empresas, EMBRAER e Bombardier, participaram de uma licitação para fornecimento de jatos regionais em um grande contrato para a Air Wisconsin, uma empresa de transporte aéreo norte americana. Em janeiro de 2001, o Ministro da Indústria canadense, Brian Tobin, declarou em uma sessão de imprensa que o governo canadense iria subsidiar, através dos programas Canada Account, EDC, e

Investissement Quebec (um programa da provincia de Quebec), a Bombardier na venda de aviões para a Air Wisconsin.

A Bombardier venceu a concorrência e o ministro canadense afirmou que as medidas tomadas por seu país apenas igualavam a proposta feita pelos representantes da EMBRAER. Esta afirmação é falsa, dado que a oferta brasileira não era aberta à análise canadense e portanto não havia como o Canadá saber o que estava sendo proposto afim de igualar qualquer oferta. O governo brasileiro, então, abriu novo processo contra o Canadá na OMC, confrontando o Canada Account, EDC e Investissement Quebec.

Em 19 de outubro de 2001, a OMC concordou com o Brasil e declarou ilegais os programas canadenses. Como punição, o Canadá teria 90 dias para eliminar os subsídios ilegais à partir daquela data. È importante ressaltar que desta vez as operações do EDC tiveram que ser abertas e, ao contrário do que havia ocorrido dois anos mais cedo, quando o EDC foi protegido por ser considerado confidencial, este programa foi declarado totalmente irregular. Tanto o Canada Account como o Corporate Account foram considerados irregulares, atingindo, assim, ambos os programas sob a bandeira do EDC. O relatório do painel afirmou por unanimidade que o Canadá vinha violando as normas da OMC no mínimo desde 1996. Desta vez o governo canadense não apelou da decisão da OMC.

Em 24 de junho de 2002, o SED da OMC autorizou o Brasil a retaliar o Canadá. O valor solicitado pelo Brasil foi de US$ 3.36 bilhões, número este ainda sujeito à arbitragem pela OMC. Em dezembro de 2002 a OMC autorizou ao governo brasileiro a retaliação no valor de US$248 milhões contra o Canadá.

4 - CONCLUSÃO

A concorrência internacional pelo mercado de jatos regionais que fez com que a EMBRAER entrasse em confronto com a canadense Bombardier, desde a Segunda metade da década de 1990, alterou a perspectiva da empresa sobre as condutas vigentes neste mercado.

As seis condenações consecutivas dos programas canadenses de incentivo à exportação, que claramente indicaram sua não conformidade com as normas internacionais de comércio, trouxeram uma nova perspectiva a respeito das políticas de comércio exterior para o Brasil.

A EMBRAER durante todo o processo obedeceu às regulações da OMC e provou, depois de sete anos de disputas jurídicas naquela organização que não buscava apoio irregular do governo brasileiro no financiamento de suas vendas. A alteração do PROEX em decorrência das resoluções da OMC, há mais de três anos, permitem à EMBRAER continuar contando com o financiamento governamental e demonstram a boa vontade tanto da empresa quanto do governo em manterem-se alinhados com as regulações internacionais.

A EMBRAER é uma empresa de importância estratégica para o Brasil. Ela foi a maior exportadora do país entre os anos de 1999 e 2001, tendo sido a segunda maior exportadora no ano de 2002. Além disso é uma das maiores importadoras do país pois os componentes de seus aviões são, em sua maioria importados. A imagem da empresa e seu sucesso no mercado internacional, aliado à noção de contar com o apoio de um governo sério e munido de políticas igualmente sérias pode incentivar o ingresso de novas fábricas estrangeiras no país. Quanto maior a confiança e o número de vendas de produtos da EMBRAER no mercado internacional, maior o interesse de seus fornecedores em ingressar no país para melhorar o seu serviço junto à ela, criando novos empregos e contribuindo para o aumento da renda

e da escolaridade (por tratarem-se de empresas de alta tecnologia) da população brasileira.

Este quadro mostra o quão importante foi a decisão da OMC em respeito às políticas nacionais de fomento à exportação, em particular o PROEX, que financia parte das vendas da EMBRAER no exterior. A OMC declarou perfeitamente em conformidade com os requisitos internacionais de comércio o programa brasileiro. A EMBRAER adquiriu, depois de tantos anos, um vasto material jurídico que permitirá à empresa se adaptar e preparar cada vez melhor para as disputas vindouras no comércio mundial. Além disso, a EMBRAER, através do SED pôde obter uma visão mais clara do nível de subsídios apoiado pelo governo canadense nas vendas da Bombardier (sua maior concorrente), que era muito superior ao montante esperado pela empresa brasileira antes do início da contenda.

A EMBRAER, segundo declarações feitas à imprensa, espera que a decisão da OMC possa trazer maior transparência às disputas internacionais e que o mercado siga as normas reguladas pela OMC. Contudo, a atitude canadense de continuar negando qualquer ilegalidade na condução de suas políticas de incentivo à exportação, mesmo após o relatório final da OMC em relação ao caso, preocupam muito a direção da empresa.

O Brasil, por sua vez, adquiriu um importante instrumental de política externa ao participar desta empreitada em um reconhecido órgão internacional. O governo brasileiro certamente está em melhores condições de debater com países de primeiro mundo após esta experiência, e está melhor representado em Genebra.

A atitude canadense de manter suas políticas mesmo após sua condenação em júri internacional seguramente prepara o país sobre o que esperar em futuras querelas. O PROEX conta, agora, com o respaldo internacional , tendo sido aprovado e não sendo mais passível de reclamações internacionais.

ANEXO I

O anexo I conta com informações em sua diagramação original para manter inalteradas as suas características.

AGREEMENT ON TRADE IN CIVIL AIRCRAFT

PREAMBLE

Signatories[1] to the Agreement on Trade in Civil Aircraft, hereinafter referred to as "this Agreement";

Noting that Ministers on 12-14 September 1973 agreed the Tokyo Round of Multilateral Trade Negotiations should achieve the expansion and ever-greater liberalization of world trade through, *inter alia*, the progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade;

Desiring to achieve maximum freedom of world trade in civil aircraft, parts and related equipment, including elimination of duties, and to the fullest extent possible, the reduction or elimination of trade restricting or distorting effects;

Desiring to encourage the continued technological development of the aeronautical industry on a world-wide basis;

Desiring to provide fair and equal competitive opportunities for their civil aircraft activities and for their producers to participate in the expansion of the world civil aircraft market;

Being mindful of the importance in the civil aircraft sector of their overall mutual economic and trade interests;

Recognizing that many Signatories view the aircraft sector as a particularly important component of economic and industrial policy;

Seeking to eliminate adverse effects on trade in civil aircraft resulting from governmental support in civil aircraft development, production, and marketing while recognizing that such governmental support, of itself, would not be deemed a distortion of trade;

Desiring that their civil aircraft activities operate on a commercially competitive basis, and recognizing that government-industry relationships differ widely among them;

Recognizing their obligations and rights under the General Agreement on Tariffs and Trade, hereinafter referred to as "the GATT", and under other multilateral agreements negotiated under the auspices of the GATT;

---

[1]The term "Signatories" is hereinafter used to mean Parties to this Agreement.

Recognizing the need to provide for international notification, consultation, surveillance and dispute settlement procedures with a view to ensuring a fair, prompt and effective enforcement of the provisions of this Agreement and to maintain the balance of rights and obligations among them;

Desiring to establish an international framework governing conduct of trade in civil aircraft;

Hereby agree as follows:

Article 1

Product Coverage

1.1 This Agreement applies to the following products:

(*a*)all civil aircraft,
(*b*)all civil aircraft engines and their parts and components,
(*c*)all other parts, components, and sub-assemblies of civil aircraft,
(*d*)all ground flight simulators and their parts and components,

whether used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification or conversion of civil aircraft.

1.2 For the purposes of this Agreement "civil aircraft" means (*a*) all aircraft other than military aircraft and (*b*) all other products set out in Article 1.1 above.

Article 2

Customs Duties and Other Charges

2.1 Signatories agree:

2.1.1to eliminate by 1 January 1980, or by the date of entry into force of this Agreement, all customs duties and other charges[1] of any kind levied on, or in connection with, the importation of products, classified for customs purposes under their respective tariff headings listed in the Annex, if such products are for use in a civil aircraft and incorporation therein, in the course of its manufacture, repair, maintenance, rebuilding, modification or conversion;

[1]"Other charges" shall have the same meaning as in Article II of the GATT.

2.1.2to eliminate by 1 January 1980, or by the date of entry into force of this Agreement, all customs duties and other charges[1] of any kind levied on repairs on civil aircraft;

2.1.3to incorporate in their respective GATT Schedules by 1 January 1980, or by the date of entry into force of this Agreement, duty-free or duty-exempt treatment for all products covered by Article 2.1.1 above and for all repairs covered by Article 2.1.2 above.

2.2Each Signatory shall: (*a*) adopt or adapt an end-use system of customs administration to give effect to its obligations under Article 2.1 above; (*b*) ensure that its end-use system provides duty-free or duty-exempt treatment that is comparable to the treatment provided by other Signatories and is not an impediment to trade; and (*c*) inform other Signatories of its procedures for administering the end-use system.

Article 3

Technical Barriers to Trade

3.1Signatories note that the provisions of the Agreement on Technical Barriers to Trade apply to trade in civil aircraft. In addition, Signatories agree that civil aircraft certification requirements and specifications on operating and maintenance procedures shall be governed, as between Signatories, by the Provisions of the Agreement on Technical Barriers to Trade.

Article 4

Government-Directed Procurement, Mandatory Sub-Contracts and Inducements

4.1Purchasers of civil aircraft should be free to select suppliers on the basis of commercial and technological factors.

4.2Signatories shall not require airlines, aircraft manufacturers, or other entities engaged in the purchase of civil aircraft, nor exert unreasonable pressure on them, to procure civil aircraft from any particular source, which would create discrimination against suppliers from any Signatory.

---

[1]"Other charges" shall have the same meaning as in Article II of the GATT.

4.3 Signatories agree that the purchase of products covered by this Agreement should be made only on a competitive price, quality and delivery basis. In conjunction with the approval or awarding of procurement contracts for products covered by this Agreement a Signatory may, however, require that its qualified firms be provided with access to business opportunities on a competitive basis and on terms no less favourable than those available to the qualified firms of other Signatories.[1]

4.4 Signatories agree to avoid attaching inducements of any kind to the sale or purchase of civil aircraft from any particular source which would create discrimination against suppliers from any Signatory.

Article 5

Trade Restrictions

5.1 Signatories shall not apply quantitative restrictions (import quotas) or import licensing requirements to restrict imports of civil aircraft in a manner inconsistent with applicable provisions of the GATT. This does not preclude import monitoring or licensing systems consistent with the GATT.

5.2 Signatories shall not apply quantitative restrictions or export licensing or other similar requirements to restrict, for commercial or competitive reasons, exports of civil aircraft to other Signatories in a manner inconsistent with applicable provisions of the GATT.

Article 6

Government Support, Export Credits, and Aircraft Marketing

6.1 Signatories note that the provisions of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Agreement on Subsidies and Countervailing Measures) apply to trade in civil aircraft. They affirm that in their participation in, or support of, civil aircraft

[1] Use of the phrase "access to business opportunities ... on terms no less favourable ..." does not mean that the amount of contracts awarded to the qualified firms of one Signatory entitles the qualified firms of other Signatories to contracts of a similar amount.

programmes they shall seek to avoid adverse effects on trade in civil aircraft in the sense of Articles 8.3 and 8.4 of the Agreement on Subsidies and Countervailing Measures. They also shall take into account the special factors which apply in the aircraft sector, in particular the widespread governmental support in this area, their international economic interests, and the desire of producers of all Signatories to participate in the expansion of the world civil aircraft market.

6.2 Signatories agree that pricing of civil aircraft should be based on a reasonable expectation of recoupment of all costs, including non-recurring programme costs, identifiable and pro-rated costs of military research and development on aircraft, components, and systems that are subsequently applied to the production of such civil aircraft, average production costs, and financial costs.

Article 7

Regional and Local Governments

7.1 In addition to their other obligations under this Agreement, Signatories agree not to require or encourage, directly or indirectly, regional and local governments and authorities, non-governmental bodies, and other bodies to take action inconsistent with provisions of this Agreement.

Article 8

Surveillance, Review, Consultation, and Dispute Settlement

8.1 There shall be established a Committee on Trade in Civil Aircraft (hereinafter referred to as "the Committee") composed of representatives of all Signatories. The Committee shall elect its own Chairman. It shall meet as necessary, but not less than once a year, for the purpose of affording Signatories the opportunity to consult on any matters relating to the operation of this Agreement, including developments in the civil aircraft industry, to determine whether amendments are required to ensure continuance of free and undistorted trade, to examine any matter for which it has not been possible to find a satisfactory solution through bilateral consultations, and to carry out such responsibilities as are assigned to it under this Agreement, or by the Signatories.

8.2 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually

inform the CONTRACTING PARTIES to the GATT of developments during the period covered by such review.

8.3 Not later than the end of the third year from the entry into force of this Agreement and periodically thereafter, Signatories shall undertake further negotiations, with a view to broadening and improving this Agreement on the basis of mutual reciprocity.

8.4 The Committee may establish such subsidiary bodies as may be appropriate to keep under regular review the application of this Agreement to ensure a continuing balance of mutual advantages. In particular, it shall establish an appropriate subsidiary body in order to ensure a continuing balance of mutual advantages, reciprocity and equivalent results with regard to the implementation of the provisions of Article 2 above related to product coverage, the end-use systems, customs duties and other charges.

8.5 Each Signatory shall afford sympathetic consideration to and adequate opportunity for prompt consultation regarding representations made by another Signatory with respect to any matter affecting the operation of this Agreement.

8.6 Signatories recognize the desirability of consultations with other Signatories in the Committee in order to seek a mutually acceptable solution prior to the initiation of an investigation to determine the existence, degree and effect of any alleged subsidy. In those exceptional circumstances in which no consultations occur before such domestic procedures are initiated, Signatories shall notify the Committee immediately of initiation of such procedures and enter into simultaneous consultations to seek a mutually agreed solution that would obviate the need for countervailing measures.

8.7 Should a Signatory consider that its trade interests in civil aircraft manufacture, repair, maintenance, rebuilding, modification or conversion have been or are likely to be adversely affected by any action by another Signatory, it may request review of the matter by the Committee. Upon such a request, the Committee shall convene within thirty days and shall review the matter as quickly as possible with a view to resolving the issues involved as promptly as possible and in particular prior to final resolution of these issues elsewhere. In this connection the Committee may issue such rulings or recommendations as may be appropriate. Such review shall be without prejudice to the rights of Signatories under the GATT or under instruments multilaterally negotiated under the auspices of the GATT, as they affect trade in civil aircraft. For the purposes of aiding consideration of the issues involved, under the GATT and such instruments, the Committee may provide such technical assistance as may be appropriate.

8.8 Signatories agree that, with respect to any dispute related to a matter covered by this Agreement, but not covered by other instruments multilaterally negotiated under

the auspices of the GATT, the provisions of Articles XXII and XXIII of the General Agreement and the provisions of the Understanding related to Notification, Consultation, Dispute Settlement and Surveillance shall be applied, *mutatis mutandis*, by the Signatories and the Committee for the purposes of seeking settlement of such dispute. These procedures shall also be applied for the settlement of any dispute related to a matter covered by this Agreement and by another instrument multilaterally negotiated under the auspices of the GATT, should the parties to the dispute so agree.

Article 9

Final Provisions

9.1 *Acceptance and Accession*

9.1.1 This Agreement shall be open for acceptance by signature or otherwise by governments contracting parties to the GATT and by the European Economic Community.

9.1.2 This Agreement shall be open for acceptance by signature or otherwise by governments having provisionally acceded to the GATT, on terms related to the effective application of rights and obligations under this Agreement, which take into account rights and obligations in the instruments providing for their provisional accession.

9.1.3 This Agreement shall be open to accession by any other government on terms, related to the effective application of rights and obligations under this Agreement, to be agreed between that government and the Signatories, by the deposit with the Director-General to the CONTRACTING PARTIES to the GATT of an instrument of accession which states the terms so agreed.

9.1.4 In regard to acceptance, the provisions of Article XXVI:5 (*a*) and (*b*) of the General Agreement would be applicable.

9.2 *Reservations*

9.2.1 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Signatories.

9.3 *Entry into Force*

9.3.1 This Agreement shall enter into force on 1 January 1980 for the governments[1] which have accepted or acceded to it by that date.

[1] For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Economic Community.

For each other government it shall enter into force on the thirtieth day following the date of its acceptance or accession to this Agreement.

9.4 *National Legislation*

9.4.1 Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement.

9.4.2 Each Signatory shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

9.5 *Amendments*

9.5.1 The Signatories may amend this Agreement, having regard, *inter alia*, to the experience gained in its implementation. Such an amendment, once the Signatories have concurred in accordance with the procedures established by the Committee, shall not come into force for any Signatory until it has been accepted by such Signatory.

9.6 *Withdrawal*

9.6.1 Any Signatory may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of twelve months from the day on which written notice of withdrawal is received by the Director-General to the CONTRACTING PARTIES to the GATT. Any Signatory may upon such notification request an immediate meeting of the Committee.

9.7 *Non-Application of this Agreement Between Particular Signatories*

9.7.1 This Agreement shall not apply as between any two Signatories if either of the Signatories, at the time either accepts or accedes to this Agreement, does not consent to such application.

9.8 *Annex*

9.8.1 The Annex to this Agreement forms an integral part thereof.

9.9 *Secretariat*

9.9.1 This Agreement shall be serviced by the GATT secretariat.

9.10 *Deposit*

9.10.1 This Agreement shall be deposited with the Director-General to the CONTRACTING PARTIES to the GATT who shall promptly furnish to

each Signatory and each contracting party to the GATT a certified copy thereof and of each amendment thereto pursuant to Article 9.5 and a notification of each acceptance thereof or accession thereto pursuant to Article 9.1, or each withdrawal therefrom pursuant to Article 9.6.

9.11 *Registration*

9.11.1 This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Geneva this twelfth day of April nineteen hundred and seventy-nine in a single copy, in the English and French languages, each text being authentic, except as otherwise specified with respect to the various lists in the Annex.[1]

---

[1] On 25 March 1987, the Committee agreed that the Spanish text of the Agreement shall also be considered authentic.

ANNEX

(as amended by the Protocol (1986) amending the access to the Agreement on Trade in Civil Aircraft.

PRODUCT COVERAGE

1. The product coverage is defined in Article 1 of the Agreement on Trade in Civil Aircraft.

2. Signatories agree that products covered by the descriptions listed below[1] and properly classified for customs purposes under the Customs Co-operation Council Nomenclature (Revised) headings of the Harmonized System codes shown alongside shall be accorded duty-free or duty-exempt treatment, if such products are for use in civil aircraft or ground flying trainers* and for incorporation therein, in the course of their manufacture, repair, maintenance, rebuilding, modification or conversion.

These products shall not include:

an incomplete or unfinished product, unless it has the essential character of a complete or finished part, component, sub-assembly or item of equipment of a civil aircraft or ground flying trainer*, (e.g. an article which has a civil aircraft manufacturer's number),

materials in any form (e.g. sheets, plates, profile shapes, strips, bars, pipes, tubes or other shapes) unless they have been cut to size or shape and/or shaped for incorporation in civil aircraft or a ground flying trainer* (e.g. an article which has a civil aircraft manufacturer's part number),

raw materials and consumable goods.

4. For the purpose of this Annex, «Ex» has been included to indicate that the product description referred to does not exhaust the entire range of products within the Customs Co-operation Council Nomenclature (Revised) headings or the Harmonized System codes listed below.[1]

---

[1]The list is not reproduced.

*For the purposes of Article 1.1 of this Agreement «ground flight simulators» are to be regarded as ground flying trainers as provided for under 8805.20 of the Harmonized System.

ANEXO II

O ANEXO II conta com informações em sua diagramação original para manter inalteradas suas características.

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Members hereby *agree* as follows:

PART I: GENERAL PROVISIONS

Article 1

Definition of a Subsidy

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

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

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) [3];

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

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

---

[3] In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

Article 2

Specificity

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[4] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[5] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

---

[4] Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

[5] In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

PART II: PROHIBITED SUBSIDIES

Article 3

Prohibition

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

(a) subsidies contingent, in law or in fact[6], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[7];

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

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

Article 4

Remedies

4.1 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.

4.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

---

[6] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

[7] Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

4.4 If no mutually agreed solution has been reached within 30 days[8] of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts[9] (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date of the composition and the establishment of the panel's terms of reference.

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

4.8 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[10]

4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate[11] countermeasures, unless the DSB decides by consensus to reject the request.

---

[8] Any time-periods mentioned in this Article may be extended by mutual agreement.
[9] As established in Article 24.
[10] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.
[11] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate.[12]

4.12 For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.

PART III: ACTIONABLE SUBSIDIES

Article 5

Adverse Effects

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

(a) injury to the domestic industry of another Member[13];

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994[14];

(c) serious prejudice to the interests of another Member.[15]

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 6

Serious Prejudice

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

(a) the total ad valorem subsidization[16] of a product exceeding 5 per cent[17];

---

[12] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

[13] The term "injury to the domestic industry" is used here in the same sense as it is used in Part V.

[14] The term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

[15] The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.

[16] The total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV.

[17] Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft.

(b) subsidies to cover operating losses sustained by an industry;

(c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;

(d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.[18]

6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;

(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity[19] as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period *when subsidies have been granted.*

6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative shares of the market" shall include any of the following situations: *(a)* there is an increase in the market share of the subsidized product; *(b)* the market share of the subsidized product remains constant in circumstances in which, in the absence of the

---

[18] Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph.

[19] Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.

subsidy, it would have declined; *(c)* the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist[20] during the relevant period:

(a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;

(b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;

(c) natural disasters, strikes, transport disruptions or other *force majeure* substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;

(d) existence of arrangements limiting exports from the complaining Member;

(e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, *inter alia*, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);

(f) failure to conform to standards and other regulatory requirements in the importing country.

6.8 In the absence of circumstances referred to in paragraph 7, the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V.

---

[20] The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either GATT 1994 or this Agreement. These circumstances must not be isolated, sporadic or otherwise insignificant.

6.9 This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 7

Remedies

7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.

7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to *(a)* the existence and nature of the subsidy in question, and *(b)* the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice[21] caused to the interests of the Member requesting consultations.

7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

7.4 If consultations do not result in a mutually agreed solution within 60 days[22], any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel's terms of reference.

7.6 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB[23] unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. The appellate report shall be adopted by the DSB and unconditionally accepted by

---

[21] In the event that the request relates to a subsidy deemed to result in serious prejudice in terms of paragraph 1 of Article 6, the available evidence of serious prejudice may be limited to the available evidence as to whether the conditions of paragraph 1 of Article 6 have been met or not.

[22] Any time-periods mentioned in this Article may be extended by mutual agreement.

[23] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[24]

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.

PART IV: NON-ACTIONABLE SUBSIDIES

Article 8

Identification of Non-Actionable Subsidies

8.1 The following subsidies shall be considered as non-actionable[25]:

(a) subsidies which are not specific within the meaning of Article 2;

(b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable:

(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:[26, 27, 28]

---

[24] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

[25] It is recognized that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of this Article does not in itself restrict the ability of Members to provide such assistance.

[26] Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this subparagraph do not apply to that product.

[27] Not later than 18 months after the date of entry into force of the WTO Agreement, the Committee on Subsidies and Countervailing Measures provided for in Article 24 (referred to in this Agreement as "the Committee") shall review the operation of the provisions of subparagraph 2(a) with a view to making all necessary modifications to improve the operation of these provisions. In its consideration of possible modifications, the Committee shall carefully review the definitions of the categories set forth in this

the assistance covers[29] not more than 75 per cent of the costs of industrial research[30] or 50 *per cent of the costs of pre-competitive development activity*[31], [32]; *and provided that* such assistance is limited exclusively to:

(i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);

(ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;

(iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;

(iv) additional overhead costs incurred directly as a result of the research activity;

(v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development [33] and non-specific *(within the meaning of Article 2) within eligible regions* provided that:

---

subparagraph *in the light of the experience of Members in the operation of research programmes and the* work in other relevant international institutions.

[28] The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher education or research establishments. The term "fundamental research" means an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.

[29] The allowable levels of non-actionable assistance referred to in this subparagraph shall be established by reference to the total eligible costs incurred over the duration of an individual project.

[30] The term "industrial research" means planned search or critical investigation aimed at discovery of new knowledge, with the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services.

[31] The term "pre-competitive development activity" means the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or use, including the creation of a first prototype which would not be capable of commercial use. It may further include the conceptual formulation and design of products, processes or services alternatives and initial demonstration or pilot projects, provided that these same projects cannot be converted or used for industrial application or commercial exploitation. It does not include routine or periodic alterations to existing products, production lines, manufacturing processes, services, and other on-going operations even though those alterations may represent improvements.

[32] In the case of programmes which span industrial research and pre-competitive development activity, the allowable level of non-actionable assistance shall not exceed the simple average of the allowable levels of non-actionable assistance applicable to the above two categories, calculated on the basis of all eligible costs as set forth in items (i) to (v) of this subparagraph.

[33] A "general framework of regional development" means that regional subsidy programmes are part of an internally consistent and generally applicable regional development policy and that regional development subsidies are not granted in isolated geographical points having no, or virtually no, influence on the development of a region.

(i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria[34], indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

(iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:

- one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;

- unemployment rate, which must be at least 110 per cent of the average for the territory concerned;

as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.

(c) assistance to promote adaptation of existing facilities[35] to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

(i) is a one-time non-recurring measure; and

(ii) is limited to 20 per cent of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and

(iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

---

[34] "Neutral and objective criteria" means criteria which do not favour certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional development policy. In this regard, regional subsidy programmes shall include ceilings on the amount of assistance which can be granted to each subsidized project. Such ceilings must be differentiated according to the different levels of development of assisted regions and must be expressed in terms of investment costs or cost of job creation. Within such ceilings, the distribution of assistance shall be sufficiently broad and even to avoid the predominant use of a subsidy by, or the granting of disproportionately large amounts of subsidy to, certain enterprises as provided for in Article 2.

[35] The term "existing facilities" means facilities which have been in operation for at least two years at the time when new environmental requirements are imposed.

(v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.[36]

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

8.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases, of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to the arbitration body. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

Article 9

Consultations and Authorized Remedies

9.1 If, in the course of implementation of a programme referred to in paragraph 2 of Article 8, notwithstanding the fact that the programme is consistent with the criteria laid down in that paragraph, a Member has reasons to believe that this programme has resulted in serious adverse effects to the domestic industry of that Member, such as to cause damage which would be difficult to repair, such Member may request consultations with the Member granting or maintaining the subsidy.

---

[36] It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.

9.2 Upon request for consultations under paragraph 1, the Member granting or maintaining the subsidy programme in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

9.3 If no mutually acceptable solution has been reached in consultations under paragraph 2 within 60 days of the request for such consultations, the requesting Member may refer the matter to the Committee.

9.4 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under paragraph 3. In the event the recommendation is not followed within six months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.

PART V: COUNTERVAILING MEASURES

Article 10

Application of Article VI of GATT 1994[37]

Members shall take all necessary steps to ensure that the imposition of a countervailing duty[38] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated[39] and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

---

[37] The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered non-actionable in accordance with the provisions of Part IV. However, measures referred to in paragraph 1(a) of Article 8 may be investigated in order to determine whether or not they are specific within the meaning of Article 2. In addition, in the case of a subsidy referred to in paragraph 2 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Part III or V may be invoked, but such subsidy shall be treated as non-actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8.

[38] The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

[39] The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

Article 11

Initiation and Subsequent Investigation

11.1 Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of *(a)* a subsidy and, if possible, its amount, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and *(c)* a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) evidence with regard to the existence, amount and nature of the subsidy in question;

(iv) evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition

to, the application expressed[40] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[41] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

11.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation.

11.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.

11.7 The evidence of both subsidy and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

11.8 In cases where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the provisions of this Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the importing Member.

11.9 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is *de minimis* , or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be *de minimis* if the subsidy is less than 1 per cent ad valorem.

11.10 An investigation shall not hinder the procedures of customs clearance.

11.11 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

---

[40] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

[41] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

Article 12

Evidence

12.1 Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.[42] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

12.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or interested party shall be made available promptly to other interested Members or interested parties participating in the investigation.

12.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 11 to the known exporters[43] and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the protection of confidential information, as provided for in paragraph 4.

12.2. Interested Members and interested parties also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested Members and interested parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation, due account having been given to the need to protect confidential information.

12.3 The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

---

[42] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

[43] It being understood that where the number of exporters involved is particularly high, the full text of the application should instead be provided only to the authorities of the exporting Member or to the relevant trade association who then should forward copies to the exporters concerned.

12.4 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[44]

12.4.1 The authorities shall require interested Members or interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

12.4.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[45]

12.5 Except in circumstances provided for in paragraph 7, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.

12.6 The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if *(a)* the firm so agrees and *(b)* the Member in question is notified and does not object. The procedures set forth in Annex VI shall apply to investigations on the premises of a firm. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

12.7 In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

---

[44] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

[45] Members agree that requests for confidentiality should not be arbitrarily rejected. Members further agree that the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.

12.8 The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

12.9 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and

(ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

12.10 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidization, injury and causality.

12.11 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

12.12 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

Article 13

Consultations

13.1 As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.

13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to

continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.[46]

13.3 Without prejudice to the obligation to afford reasonable opportunity for consultation, these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of this Agreement.

13.4 The Member which intends to initiate any investigation or is conducting such an investigation shall permit, upon request, the Member or Members the products of which are subject to such investigation access to non-confidential evidence, including the non-confidential summary of confidential data being used for initiating or conducting the investigation.

Article 14

Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

(a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan

[46] It is particularly important, in accordance with the provisions of this paragraph, that no affirmative determination whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Part II, III or X.

absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;

(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

Article 15

Determination of Injury[47]

15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products[48] and *(b)* the consequent impact of these imports on the domestic producers of such products.

15.2 With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

---

[47] Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

[48] Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

15.5 It must be demonstrated that the subsidized imports are, through the effects[49] of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

15.6 The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

15.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, *inter alia*, such factors as:

(i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;

(ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;

(iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

---

[49] As set forth in paragraphs 2 and 4.

duties on such a basis, the importing Member may levy the countervailing duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 18, and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

16.4 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraphs 1 and 2.

16.5 The provisions of paragraph 6 of Article 15 shall be applicable to this Article.

Article 17

Provisional Measures

17.1 Provisional measures may be applied only if:

(a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;

(b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports; and

(c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

17.2 Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.

17.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

17.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months.

17.5 The relevant provisions of Article 19 shall be followed in the application of provisional measures.

Article 18

Undertakings

18.1 Proceedings may[51] be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

(a) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

(b) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. It is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.

18.2 Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary affirmative determination of subsidization and injury caused by such subsidization and, in case of undertakings from exporters, have obtained the consent of the exporting Member.

18.3 Undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

18.4 If an undertaking is accepted, the investigation of subsidization and injury shall nevertheless be completed if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of subsidization or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases, the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

18.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that governments or exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the subsidized imports continue.

---

[51] The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of undertakings, except as provided in paragraph 4.

18.6 Authorities of an importing Member may require any government or exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking, and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Article 19

Imposition and Collection of Countervailing Duties

19.1 If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.

19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties[52] whose interests might be adversely affected by the imposition of a countervailing duty.

19.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

[52] For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.

19.4 No countervailing duty shall be levied[53] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

Article 20

Retroactivity

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

20.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

20.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

---

[53] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

Article 21

Duration and Review of Countervailing Duties and Undertakings

21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.[54] The duty may remain in force pending the outcome of such a review.

21.4 The provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

21.5 The provisions of this Article shall apply *mutatis mutandis* to undertakings accepted under Article 18.

Article 22

Public Notice and Explanation of Determinations

22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

---

[54] When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[55], adequate information on the following:

(i) the name of the exporting country or countries and the product involved;

(ii) the date of initiation of the investigation;

(iii) a description of the subsidy practice or practices to be investigated;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested Members and interested parties should be directed; and

(vi) the time-limits allowed to interested Members and interested parties for making their views known.

22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

22.4 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers or, when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;

(iv) considerations relevant to the injury determination as set out in Article 15;

---

[55] Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

(v) the main reasons leading to the determination.

22.5 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

22.6 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 18 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

22.7 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

Article 23

Judicial Review

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

PART VI: INSTITUTIONS

Article 24

Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

24.1 There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it

shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

24.4 The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.

24.5 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved.

PART VII: NOTIFICATION AND SURVEILLANCE

Article 25

Notifications

25.1 Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each year and shall conform to the provisions of paragraphs 2 through 6.

25.2 Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection, and without prejudice to the contents and form of the questionnaire on subsidies[56], Members shall ensure that their notifications contain the following information:

(i) form of a subsidy (i.e. grant, loan, tax concession, etc.);

---

[56] The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 9S/193-194.

(ii) subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year);

(iii) policy objective and/or purpose of a subsidy;

(iv) duration of a subsidy and/or any other time-limits attached to it;

(v) statistical data permitting an assessment of the trade effects of a subsidy.

25.4 Where specific points in paragraph 3 have not been addressed in a notification, an explanation shall be provided in the notification itself.

25.5 If subsidies are granted to specific products or sectors, the notifications should be organized by product or sector.

25.6 Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.

25.7 Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

25.8 Any Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member (including any subsidy referred to in Part IV), or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.

25.9 Members so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member. In particular, they shall provide sufficient details to enable the other Member to assess their compliance with the terms of this Agreement. Any Member which considers that such information has not been provided may bring the matter to the attention of the Committee.

25.10 Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.

25.11 Members shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

25.12 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 11 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

Article 26

Surveillance

26.1 The Committee shall examine new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of this Agreement at special sessions held every third year. Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 at each regular meeting of the Committee.

PART VIII: DEVELOPING COUNTRY MEMBERS

Article 27

Special and Differential Treatment of Developing Country Members

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies[57], and shall eliminate them within a period shorter than that provided for in this

[57] For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.

paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either *(a)* on the basis of notification by the developing country Member having reached export competitiveness, or *(b)* on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or

(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of *de minimis* under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

PART IX: TRANSITIONAL ARRANGEMENTS

Article 28

Existing Programmes

28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:

(a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and

(b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.

28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

Article 29

Transformation into a Market Economy

29.1 Members in the process of transformation from a centrally-planned into a market, free-enterprise economy may apply programmes and measures necessary for such a transformation.

29.2 For such Members, subsidy programmes falling within the scope of Article 3, and notified according to paragraph 3, shall be phased out or brought into conformity with Article 3 within a period of seven years from the date of entry into force of the WTO Agreement. In such a case, Article 4 shall not apply. In addition during the same period:

(a) Subsidy programmes falling within the scope of paragraph 1(d) of Article 6 shall not be actionable under Article 7;

(b) With respect to other actionable subsidies, the provisions of paragraph 9 of Article 27 shall apply.

29.3 Subsidy programmes falling within the scope of Article 3 shall be notified to the Committee by the earliest practicable date after the date of entry into force of the WTO Agreement. Further notifications of such subsidies may be made up to two years after the date of entry into force of the WTO Agreement.

29.4 In exceptional circumstances Members referred to in paragraph 1 may be given departures from their notified programmes and measures and their time-frame by the Committee if such departures are deemed necessary for the process of transformation.

PART X: DISPUTE SETTLEMENT

Article 30

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the

settlement of disputes under this Agreement, except as otherwise specifically provided herein.

PART XI: FINAL PROVISIONS

Article 31

Provisional Application

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

Article 32

Other Final Provisions

32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[58]

32.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

32.3 Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

32.4 For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.

32.5 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.

---

[58] This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

32.6 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

32.7 The Committee shall review annually the implementation and operation of this Agreement, taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

32.8 The Annexes to this Agreement constitute an integral part thereof.

ANNEX I

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available[59] on world markets to their exporters.

(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes[60] or social welfare charges paid or payable by industrial or commercial enterprises.[61]

---

[59] The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

[60] For the purpose of this Agreement:

The term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

"Prior-stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

"Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

"Remission" of taxes includes the refund or rebate of taxes;

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes58 in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes58 on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).[62] This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(i) The remission or drawback of import charges58 in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk

---

"Remission or drawback" includes the full or partial exemption or deferral of import charges.

[61] The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any Member may draw the attention of another Member to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.

Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.

[62] Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

ANNEX II

GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS[63]

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both

[63] Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.

II

In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

3. Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The Members note that an input need not be present in the final product in the same form in which it entered the production process.

4. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for waste" should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

5. The investigating authority's determination of whether the claimed allowance for waste is "normal" should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The investigating authority should bear in mind that an important question is whether the

authorities in the exporting Member have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

ANNEX III

GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies in Annex I, substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

II

In examining any substitution drawback system as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Paragraph (i) of the Illustrative List stipulates that home market inputs may be substituted for imported inputs in the production of a product for export provided such inputs are equal in quantity to, and have the same quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting Member to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.

2. Where it is alleged that a substitution drawback system conveys a subsidy, the investigating authorities should first proceed to determine whether the government of the exporting Member has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. It may be deemed necessary by the investigating authorities to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.

3. Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually

applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting Member based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 2.

4. The existence of a substitution drawback provision under which exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.

5. An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.

ANNEX IV

CALCULATION OF THE TOTAL AD VALOREM SUBSIDIZATION (PARAGRAPH 1(A) OF ARTICLE 6)[64]

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government.

2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's[65] sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.[66]

3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.

4. Where the recipient firm is in a start-up situation, serious prejudice shall be deemed to exist if the overall rate of subsidization exceeds 15 per cent of the total funds invested. For purposes of this paragraph, a start-up period will not extend beyond the first year of production.[67]

5. Where the recipient firm is located in an inflationary economy country, the value of the product shall be calculated as the recipient firm's total sales (or sales of the relevant

---

[64] An understanding among Members should be developed, as necessary, on matters which are not specified in this Annex or which need further clarification for the purposes of paragraph 1(a) of Article 6.

[65] The recipient firm is a firm in the territory of the subsidizing Member.

[66] In the case of tax-related subsidies the value of the product shall be calculated as the total value of the recipient firm's sales in the fiscal year in which the tax-related measure was earned.

[67] Start-up situations include instances where financial commitments for product development or construction of facilities to manufacture products benefiting from the subsidy have been made, even though production has not begun.

product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the 12 months preceding the month in which the subsidy is to be given.

6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.

7. Subsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization.

8. Subsidies which are non-actionable under relevant provisions of this Agreement shall not be included in the calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6.

ANNEX V

PROCEDURES FOR DEVELOPING INFORMATION CONCERNING SERIOUS PREJUDICE

1. Every Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7. The parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information.

2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product.[68] This process may include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII.[69]

3. In the case of effects in third-country markets, a party to a dispute may collect information, including through the use of questions to the government of the third-country Member, necessary to analyse adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country

---

[68] In cases where the existence of serious prejudice has to be demonstrated.

[69] The information-gathering process by the DSB shall take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process.

Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member (e.g. most recent statistics which have already been gathered by relevant statistical services but which have not yet been published, customs data concerning imports and declared values of the products concerned, etc.). However, if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government.

4. The DSB shall designate a representative to serve the function of facilitating the information-gathering process. The sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties.

5. The information-gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7. The information obtained during this process shall be submitted to the panel established by the DSB in accordance with the provisions of Part X. This information should include, *inter alia*, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in question and changes in market shares. It should also include rebuttal evidence, as well as such supplemental information as the panel deems relevant in the course of reaching its conclusions.

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

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

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

9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where

the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process.

ANNEX VI

PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 6 OF ARTICLE 12

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. In case of such a request the investigating authorities may place themselves at the disposal of the firm; such a visit may only be made if *(a)* the authorities of the importing Member notify the representatives of the government of the Member in question and *(b)* the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

ANNEX VII

DEVELOPING COUNTRY MEMBERS REFERRED TO IN PARAGRAPH 2(A) OF ARTICLE 27

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum[70]: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

[1] The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.

[70] The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.

BIBLIOGRAFIA:

- OMC .Disponível em <http//:www.wto.com>. Acesso em 19/03/2003.

- Embraer. Disponível em <http//: www.embraer.com.br>. Acesso em 23/03/2003.

- Bombardier. Disponível em <http//: www.bombardier.com>. Acesso em 15/04/2003.

- Silva, Ozires. A decolagem de um sonho/ Ozires Silva. São Paulo: Lemos Editorial, 1998.

- Pereira, Roberto, Enciclopédia de aviões brasileiros/ Roberto Pereira. São Paulo: Globo, 1997.

- Krugman, Paul. R. e Obstfeld, Maurice. Economia Internacional - Teoria e Política. São Paulo: Makron Books, 2001.