

71. Therefore, as the party invoking an exception Brazil has the burden of establishing that it meets the conditions set out in paragraphs 2 and 4 of Article 27, and that its exercise of its right under Article 27 does not devalue or negate the rights of other WTO Members under the SCM Agreement.

E. Export subsidies prohibited by Article 3 must be withdrawn without delay

72. Article 3.2 provides that “[a] Member shall neither grant nor maintain subsidies referred to in paragraph 1.”

73. As demonstrated in sections B and C, PROEX payments made on export sales of Brazilian civil aircraft constitute prohibited subsidies within the meaning of Article 3.1. Brazil must neither grant nor maintain such payments. That is to say, Brazil must not:

- enter into new arrangements by which PROEX would be paid;
- begin paying subsidies promised or committed, such as those in respect of aircraft that have yet to be delivered, including on the conversion of options to firm orders; and
- continue to pay PROEX subsidies.

74. Article 4.7 sets out the specific remedy available to Canada, as well as the grant of authority to the Panel with respect to the application of Article 3.2. Article 4.7 provides that:

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 In this regard, the panel shall specify in its recommendation the time period within which the measure must be withdrawn.

75. Canada submits that the Panel may recommend the withdrawal of subsidies already granted where the circumstances of the case and the distortions caused by the subsidies in question warrant such a remedy. In this light, Canada submits that in respect of transactions entered into by Embraer and subsidies granted by Brazil in the period between the composition of the Panel and the adoption of the Report of the Panel, the Panel should make a specific recommendation, for the following reason.

other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligations to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other members.”

United States - Import Prohibition of Certain Shrimp and Shrimp Products (United States - Shrimps), WT/DS58/AB, Report of the Appellate Body circulated on October 12, 1998, at para. 156.