
THE BRAZIL-CANADA AIRCRAFT DISPUTE (WTO CASES DS46 AND DS70)

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ABSTRACT

The Brazil-Canada Aircraft Dispute was a landmark case in WTO jurisprudence, focusing on the legality of government subsidies under the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Brazil's Proex program and Canada's EDC and TPC programs were found to constitute prohibited export subsidies, providing undue advantages to Embraer and Bombardier, respectively. The WTO ruled that both countries must withdraw or modify their subsidy programs to comply with international trade rules. The prolonged dispute underscored the challenges of enforcing WTO rulings, balancing national industrial policies with global trade obligations, and defining the scope of permissible state aid. The case set important precedents for future subsidy-related disputes, reinforcing the need for transparency and compliance in international trade law.

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INTRODUCTION

(WTO Cases DS46 and DS70) is a landmark case in international trade law, revolving around the provision of subsidies by the governments of Brazil and Canada to their respective aircraft manufacturers, Embraer and Bombardier. This case highlights the complex interplay between national economic interests, international trade regulations, and the WTO's role in adjudicating such disputes.

FACTS OF THE CASE

In the 1990s, the global regional aircraft market was dominated by two manufacturers: Embraer of Brazil and Bombardier of Canada. Both companies were direct competitors in the production of small to mid-sized regional jets. To enhance their competitiveness, both countries implemented financial support mechanisms for their national champions.

Brazil's Support to Embraer: Brazil provided subsidies to Embraer through its Proex (Programa de Financiamento às Exportações) program. This program offered financing at reduced rates to foreign buyers of Brazilian aircraft, effectively lowering the purchase cost of Embraer jets. The financing was part of Brazil's broader strategy to support its burgeoning aerospace industry and promote its exports.

Canada's Support to Bombardier: In response, Canada provided subsidies to Bombardier through various programs, notably Export Development Canada (EDC) and Technology Partnerships Canada (TPC). These programs offered low-interest loans and other forms of financial assistance to Bombardier, supporting the company's research and development, as well as export financing. As competition between Embraer and Bombardier intensified, both countries began accusing each other of providing illegal subsidies in violation of the WTO's Agreement on Subsidies and Countervailing Measures (SCM Agreement). This led to a series of legal challenges at the WTO.

ISSUES

The central issues in the Brazil-Canada Aircraft Dispute were:

1. Whether Brazil's Proex program constituted a prohibited export subsidy under the WTO's SCM Agreement.
2. Whether Canada's support to Bombardier through EDC and TPC violated the SCM

Agreement.

3. Whether both countries had implemented the necessary corrective measures following the WTO's initial rulings.

PETITIONER (CANADA) ARGUMENTS

Canada initiated the dispute by filing a complaint against Brazil (DS46) at the WTO in 1996.

Canada's arguments were primarily focused on Brazil's Proex program:

Prohibited Export Subsidies: Canada argued that the Proex program provided prohibited export subsidies under the SCM Agreement. Specifically, Canada contended that the program offered financial assistance that was contingent upon export performance, thereby distorting the competitive landscape in the regional jet market.

Market Distortion: Canada claimed that Proex distorted the market by artificially lowering the price of Embraer aircraft, giving the Brazilian manufacturer an unfair competitive advantage. This, according to Canada, harmed Bombardier's ability to compete on an equal footing in the global market.

Violation of WTO Rules: Canada maintained that the Proex program violated Brazil's commitments under the WTO and requested that the WTO panel order Brazil to withdraw the illegal subsidies immediately.

RESPONDENT (BRAZIL) ARGUMENTS

In response to Canada's complaint, Brazil filed a counter-complaint (DS70) against Canada, alleging that Canada's subsidies to Bombardier were also inconsistent with the SCM

Agreement:

Government Support: Brazil argued that Canada's EDC and TPC programs provided significant financial support to Bombardier, including below-market interest rates and grants for research and development. Brazil claimed that these forms of assistance constituted subsidies that were inconsistent with WTO rules.

Indirect Export Subsidies: Brazil contended that while Canada's subsidies were not explicitly contingent upon export performance, they had the same effect as direct export subsidies. By supporting Bombardier's development and export activities, these subsidies effectively distorted competition in the international market.

Double Standards: Brazil accused Canada of employing double standards by challenging Brazil's Proex program while simultaneously providing similar, if not more significant, subsidies to Bombardier. Brazil argued that both countries were engaged in similar practices, and that Canada's complaint was therefore unjustified.

ANALYSIS

The WTO's analysis of the Brazil-Canada Aircraft Dispute focused on interpreting the SCM Agreement's provisions related to prohibited subsidies, particularly those contingent upon export performance.

The Brazil-Canada Aircraft Dispute was a landmark case in WTO jurisprudence, emphasizing the complexities of applying the Agreement on Subsidies and Countervailing Measures (SCM Agreement) to state-supported industries¹. At its core, the dispute revolved around the aerospace sector, where both Brazil's Embraer and Canada's Bombardier competed for dominance in global markets. The WTO panel's findings against both nations underscored the strict prohibition of export-contingent subsidies under Article 3.1(a) of the SCM Agreement. Brazil's Proex program, which provided financial support to Embraer's customers, was found to be directly tied to export performance, making it a clear violation of WTO rules. Meanwhile, Canada's EDC and TPC programs, while not explicitly structured as export subsidies, were deemed to confer de facto export advantages by enabling Bombardier to offer more competitive financing terms.

The dispute also illustrated the enforcement challenges in international trade law. Both Brazil and Canada engaged in lengthy compliance proceedings, each accusing the other of failing to adhere to WTO rulings. The WTO's Appellate Body played a crucial role in reviewing compliance measures and interpreting subsidy provisions, but the ongoing legal battles highlighted the difficulties in ensuring meaningful enforcement. The case also raised broader policy questions about balancing free trade principles with the need for governments to support domestic industries, particularly in capital-intensive sectors like aerospace.

Furthermore, the dispute demonstrated the strategic use of WTO litigation as a tool for economic diplomacy. Both nations leveraged legal mechanisms not only to challenge each other's subsidies but also to defend their own industrial policies. The prolonged nature of the case, with multiple compliance reviews and continued disagreements, exemplified the

¹ *Appellate Body Report, Canada—Measures Affecting the Export of Civilian Aircraft, WTO Doc. WT/DS70/AB/R (Aug. 2, 1999).*

limitations of WTO remedies when dealing with entrenched state support mechanisms. Ultimately, the Brazil-Canada Aircraft Dispute served as a precedent for future cases involving government subsidies, reinforcing the need for greater clarity in defining and regulating state aid within the global trade system.

JUDGMENT

The final judgment in the Brazil-Canada Aircraft Dispute reflected the complexities of international trade law and the challenges of resolving disputes involving strategic industries. The case was significant not only for the aerospace sector but also for the broader framework governing state subsidies under the WTO's Agreement on Subsidies and Countervailing Measures (SCM Agreement). The WTO's rulings against both Brazil and Canada underscored the strict prohibition of export-contingent subsidies while also exposing the difficulties in ensuring full compliance with international trade obligations².

1. Brazil's Compliance:

Following the WTO's ruling, Brazil undertook several adjustments to its Proex program in an attempt to bring it into compliance with the SCM Agreement.³ The Brazilian government modified the structure of financial assistance provided to Embraer's customers, aiming to eliminate the direct link between Proex benefits and export performance. However, Canada continued to challenge these modifications, arguing that Brazil's revised measures still functioned as prohibited subsidies.⁴ The dispute led to further WTO litigation, with Canada pressing for more stringent enforcement of the ruling. Eventually, Brazil phased out certain aspects of Proex that had been deemed inconsistent with WTO rules, though it continued to advocate for the legitimacy of state support in the aerospace sector.⁵

2. Canada's Compliance:

In response to the WTO's findings, Canada also adjusted its EDC and TPC programs. The Canadian government restructured the financing mechanisms to reduce the perception of direct export contingency, seeking to align with WTO obligations. However, Brazil remained skeptical of Canada's compliance, arguing that the modifications did not fully eliminate the

² Appellate Body Report, Brazil—Export Financing Programme for Aircraft, WTO Doc. WT/DS46/AB/R (Aug. 2, 1999).

³ Panel Report, Brazil—Export Financing Programme for Aircraft, WTO Doc. WT/DS46/R (Apr. 14, 1999).

⁴ Appellate Body Report, Canada—Measures Affecting the Export of Civilian Aircraft, WTO Doc. WT/DS70/AB/R (Aug. 2, 1999).

⁵ Panel Report, Brazil—Export Financing Programme for Aircraft—Recourse to Article 21.5 of the DSU by Canada, WTO Doc. WT/DS46/RW (July 26, 2000).

competitive advantages that Bombardier received through these programs. As a result, the dispute continued with additional compliance proceedings and legal challenges. Over time, Canada introduced further changes to its subsidy programs, gradually addressing the concerns raised by Brazil and the WTO. Nevertheless, the dispute left a lasting impact on trade relations between the two countries and shaped future discussions on industrial subsidies within the WTO framework.

3. Impact on International Trade Law:

The Brazil-Canada Aircraft Dispute had a profound impact on the interpretation and application of the SCM Agreement, particularly concerning the definition of prohibited export subsidies. The case reinforced the WTO's role as the primary forum for resolving trade disputes related to government support programs, setting an important precedent for future cases involving state aid. Additionally, the dispute underscored the challenges of balancing national economic interests with international trade rules, especially in industries where government intervention is a common practice. The legal battles between Brazil and Canada highlighted the enforcement difficulties faced by the WTO in ensuring that member states comply fully with dispute settlement rulings. The case also spurred discussions on the need for clearer subsidy regulations and more effective compliance mechanisms within the WTO's dispute resolution system.

CONCLUSION

The Brazil-Canada Aircraft Dispute remains a landmark case in WTO jurisprudence, illustrating the complexities of addressing government subsidies in highly competitive industries. The case not only shaped the future of the regional jet market by influencing government support policies for aerospace manufacturers but also set important legal precedents for how the WTO handles disputes involving subsidies and trade distortions. The protracted nature of the dispute demonstrated the difficulties in enforcing WTO rulings and ensuring full compliance, particularly when national economic interests are at stake.

Despite the long and contentious legal battles, the case reinforced the need for transparency, fairness, and adherence to international trade rules in the global marketplace. It highlighted the necessity for governments to carefully design industrial support programs to avoid breaching WTO obligations, while also showcasing the strategic use of WTO litigation as a tool for economic diplomacy. Moving forward, the lessons from this dispute continue to inform trade policy discussions, particularly in sectors where state support remains a contentious issue. The

Brazil-Canada Aircraft Dispute ultimately served as a critical test case for the WTO's ability to regulate subsidies and maintain a level playing field in international trade.

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