



Introduction

Export Credit Agencies (ECAs) are major players in international trade and investment, providing state backing for large-scale business transactions that span the globe. ECAs, however, suffer from serious deficiencies, such as lack of transparency and monitoring procedures, problems involving corruption and accountability, and most importantly, the detrimental character of many ECA-supported projects to the environment and social fabrics of developing countries.¹ A global ECA reform campaign has been actively raising the need to ensure that the activities of ECAs are consistent with and subservient to the goals and policies of sustainable development.²

Such ECA reform goals relating to sustainable development encompass not only reforms with respect to environmental protection and transparency, but also human rights, debt, corruption, and military expenditures. Also encompassed in the broad framework of sustainable development is the need to control export subsidies, which negatively affect the market share and terms of trade for developing countries. In this ambit, efforts to discipline export subsidies in the World Trade Organization (WTO) have faced the additional hurdle placed by provisions included in its *Subsidies Agreement*, which provide an exemption from subsidies disciplines to ECA practices compatible with the OECD *Arrangement*.³ A focus on the OECD *Arrangement* and its links to the WTO, particularly in light of ongoing negotiations on the subject at the WTO and of upcoming negotiations on the OECD *Arrangement*, may prove relevant in evaluating options to introduce further disciplines and sustainability considerations to the lending practices of ECAs.

This report attempts to shed light on the activities of ECAs and to clarify the practice of export credits, including their significance for the multilateral trading system. The report places export credits in the context of the World Trade Organization (WTO), its *Subsidies Agreement*, and the Doha Development Agenda. Subsequent sections explore the OECD *Arrangement* on ECAs, a “gentleman’s agreement” aiming at controlling the ECAs’ financial practices, and its relation to the WTO *Subsidies Agreement*. Substantive discussion of this relationship addresses the *Brazil—Canada Aircraft* cases, a long-lasting conflict at the WTO concerning export credits, which is relevant to the OECD *Arrangement* and ECAs. Some

concluding notes include issues of special concern to developing countries regarding ECA practices.

What are Export Credit Agencies?

Export Credit Agencies and Investment Insurance Agencies, commonly referred to as ECAs, provide government-backed loans, guarantees and insurance to corporations seeking business opportunities in developing countries and emerging markets.⁴ Their mandate is to promote their own countries’ exports and foreign investments. ECAs can be organized as stock corporations under private law and then endowed with the mandate to handle credit guarantees of their respective government. In such cases, the relationship can be compared to a trusteeship; Examples include Germany’s⁵ and France’s⁶ ECA. ECAs can also be plain public agencies, established by law, such as the U.S. EX-IM Bank⁷ and the British Export Credit Guarantee Department⁸. ECAs’ main fields of activities include:

Export credits, typically provided by ECAs either directly as a loan, with repayment terms generally from 2 to 10 years, or indirectly as insurance or a guarantee provided by an ECA to support a commercial loan. Export credit insurance covers two types of risk — commercial and political. The former refer to the buyer’s own ability to pay for the goods delivered, the latter to dangers arising out of country-specific problems such as the cancellation of an import license, war, or the prevention by the authorities in the buyer’s country of the transfer of the foreign exchange required to pay the supplier.

Investment insurances cover the political risks connected to an investment overseas, i.e. against losses in the host country due to expropriation, war, confiscation or nationalization, inconvertibility of profits or dividends, or transfer inability of currency. [See Box 1 on the following page.]

The OECD’s Role

The Organization for Economic Co-operation and Development (OECD), an inter-governmental organization, think tank, and monitoring agency, whose mandate is to promote economic cooperation among its members,¹⁴ is and has been one of the two major international platforms for ECA

Box 1

With almost 8 percent of global annual world trade covered⁹, the amount of business transactions supported by Export Credit Agencies outweighs, by far, the amount of development aid, traditional private investment, and other cash flow from developed to developing countries. This renders ECAs a major player in international economic transactions. The following graph depicts the value of business covered by the 51 members of the Berne Union, the largest international forum of ECAs, and contrasts this value with the resource flows from OECD countries' and the World Bank:

*Business Covered by ECAs – Export Credit and Investment Insurance¹⁰
In Comparison with OECD resource flows¹¹ and World Bank lending¹² in US\$ Billion*



A year in numbers: In 2001, ECAs covered US\$ 455 billion worth of business transactions with export credit insurance and US\$ 17 billion with investment insurance. In the same year, resource flows from OECD countries equaled US\$ 190.7 billion, World Bank lending amounted to US\$ 17.25 billion.

ECA funding focuses on large-scale projects such as mining, oil drilling, road and dam construction, power plants, and the support of the sale of weapons and military equipment. Among the non-OECD countries that receive most funding are Brazil, China, Iran, Saudi Arabia, Venezuela, Nigeria and the Philippines¹³. Some of the projects that ECAs specialize in entail high risks that might discourage commercial insurance institutions to support them.

meetings, information exchange and negotiations.¹⁵ The OECD Trade Directorate maintains the Export Credit Group (ECG), a semi-annual forum where technical financial issues are dealt with and negotiation positions are prepared. The other OECD group on export credit issues is the annual meeting of the 'Participants to the Arrangement',¹⁶ which is usually reserved for difficult, large-scale, and occasional political issues. Since the largest part of the business transactions covered by ECAs worldwide accrues to ECAs of the OECD countries¹⁷, the decisions adopted by the ECG and the Participants to the Arrangement are crucially important for the analysis of ECAs as such.

ECAs have confronted mounting NGO and governmental pressure during the 1990s, as the lack of developmental, social and environmental standards in ECA practices have

made headlines. It became apparent that after international finance institutions such as the World Bank and the IMF have begun to consider the social and environmental implications of their practices,¹⁸ purely profit-oriented ECAs were thwarting many developmental goals, while financed in the same way, *i.e.* with taxpayer money. This resulted in the untenable situation that one part of taxpayer money fostered sustainable development while another part frustrated it.

The U.S. EX-IM Bank started to push for adoption of common environmental, social, and transparency standards in 1994, because it feared that its own relatively high thresholds might place it at a competitive disadvantage with other major ECAs. The 1997 Denver G7 Summit *Communiqué* backed this initiative by declaring:

“Governments should help promote sustainable practices by taking environmental factors into account when providing financing support for investment in infrastructure and equipment. We attach importance to the work on this in the OECD, and will review progress at our meeting next year.”¹⁹

In response to international pressure, in 1998 the OECD adopted a “Statement of Intent on Officially Supported Export Credits and the Environment”. Because the United States raised environmental standards as a competitiveness issue, negotiation of the common environmental guidelines was not placed at the OECD Environmental Policy Committee, but instead at the OECD ECG. Negotiations proceeded at a very slow pace. In 2001 the OECD arrived at a common policy, the “*Draft Recommendation on Common Approaches on environment and officially supported export credits: Revision 6*” (Rev.6), which laid down provisions for screening and classifying projects. The United States, however, blocked consensus on the *Common Approaches* because it neither (1) required public disclosure of project information before a decision was made; nor (2) compliance with a single set of technical standards. Rev.6 thus remained a mere *de facto* agreement, which the 28 other members of the ECG subsequently agreed to implement voluntarily.

Negotiations continued at the OECD ECG, and in October 2003 a draft Rev.8 was considered by the ECG. Civil society organizations around the world expressed concerns that this revised draft did not address significant issues regarding, *inter alia*, transparency and consultations, scope, applicable standards, and accountability and compliance mechanisms.²⁰ Preliminary reports indicate that the ECG agreed on draft *Common Approaches*,²¹ with Parties voting up or down on 21 November 2003.

The WTO And Its Links With Export Subsidies

Founded in 1995, the World Trade Organization’s (WTO) primary mandate is to provide the common institutional framework for the conduct of trade relations among its 146 Members in matters related to agreements that make up the WTO. Among other matters, WTO agreements cover trade in goods (GATT²²), services (GATS²³) and trade-related intellectual property issues (TRIPS²⁴). The WTO also has a mandate in the area of subsidies (ASCM²⁵), which contains, among other things, disciplines on export subsidies that seriously impact on ECA practices.

The WTO-covered agreements spell out the structural principles of the multilateral trading system, such as non-discrimination and the prohibition of quantitative restrictions. The *Dispute Settlement Understanding* (DSU)²⁶ provides the

framework for the settlement of disputes among Members, including remedies in cases of non-compliance generally equivalent to the injury sustained. The DSU further judicializes earlier – more diplomatic - practices of dispute settlement by including, *inter alia*, a formal appeals process, faster implementation, and clear timelines.

During the last years, developing countries have – with little success - pushed for remedying the imbalances in the agreements, including in the ambit of special and differential treatment. These are provisions that exempt least developed and some developing countries from the tight rules of the WTO agreements and allow for longer transition periods in which these countries can adjust their laws and economies. One of the matters under discussion is the ASCM, which includes S&D provisions yet to be fully clarified and implemented.²⁷

The Agreement on Subsidies and Countervailing Measures

The WTO *Agreement on Subsidies and Countervailing Measures* (ASCM)²⁸ entered into force in 1995 builds upon and refines the pre-WTO framework on subsidies. The GATT 1947 treatment of subsidies (Articles VI and XVI) was controversial and all but exhaustive (due to policy disputes between the USA and the EC). Subsequently, a *Subsidies Code* was agreed upon in the Tokyo Round (1979), but it avoided tackling some of the crucial and controversial issues, such as the definition of a subsidy.

The ASCM intends two things: first, it seeks to discipline the use of subsidies, and second, it regulates the actions countries can take to counter the effects of subsidies. A first action that a country affected by subsidies can take is the imposition of countervailing duties on the border, if such subsidized imports are causing material injury to its domestic industry of like products. A second alternative exists for a country whose exports are being impeded or displaced, either in third-country markets by subsidized exports from another country, or in the markets of the subsidizing country, in the form of a formal challenge of such subsidies before the WTO’s dispute settlement body.²⁹ These actions are available, however, only in cases of prohibited or actionable subsidies, as examined below.

As to the subsidies disciplines, the ASCM offered for the first time a definition of “subsidy”. Pursuant to Article 1.1 ASCM, a subsidy exists whenever: (i) a financial contribution is made; (ii) by a government or any public body within the territory of a Member; (iii) which confers a benefit. The Agreement contains a list of the types of measures that represent a financial contribution, including grants, loans, equity

infusions, loan guarantees, fiscal incentives, the provision of goods or services, the purchase of goods. A financial contribution by a government is not a subsidy, however, unless it confers a "benefit."

The disciplines set out in the *Agreement* only apply to "specific" subsidies, *i.e.* subsidies available only to an enterprise, industry, group of enterprises, or group of industries in the country that gives the subsidy. Further, the Subsidies Agreement distinguishes between two categories of subsidies:

- **Prohibited subsidies**³⁰ are subsidies that are either contingent upon export performance or upon the use of domestic over imported goods;
- **Actionable subsidies**³¹ are subsidies applied by one WTO Member which cause adverse effects on the interests of another Member. These subsidies are subject to challenge, either through multilateral dispute settlement or through countervailing action.

Also domestic production subsidies may qualify as actionable subsidies and thus be subject to challenge under the ASCM if they cause serious prejudice by impeding or displacing exports to a third country, or to countervailing duties³² under domestic law if they cause injury to the domestic industry of an importing country. Countervailing duties may only be charged after the injured country has conducted a detailed investigation on whether the product or service in question is being subsidized or not and on how this subsidy is damaging its economy, subject to strict procedural rules.

The ASCM grants special and differential (S&D) treatment to developing countries, mainly in the form of prolonged phase-out terms and restrictions on the use of presumptions on serious prejudice.³³ The ASCM grants particular differential treatment to least developing countries, which are exempt on the prohibition on export subsidies.³⁴

The ASCM is currently under review in the context of the Doha Development Agenda. Although some progress was expected from the WTO Cancun Ministerial, lack of consensus among WTO Members on other matters, including primarily agriculture and the "Singapore issues",³⁵ led to the premature closing of the meeting. Although some work has continued after Cancun, debate and uncertainty over the mandate of relevant WTO Committees has further obscured progress on the ASCM negotiations. Among the issues tasked:

- Clarification on the countervailing duties (CVD) regime's key terms, problems in calculating the amount of subsidies, shortcomings in CVD review options in the case of procedural mistakes, and the excessive use of the provisions on resort to facts available³⁶;

- Provisions on transition periods for certain subsidy programs and their extension for another 8 years³⁷;
- A proposal to allow certain subsidies with "legitimate development goals"³⁸.

The OECD Arrangement

The *OECD Arrangement on Guidelines for Officially Supported Export Credits*³⁹ (hereinafter "The Arrangement") was drafted in April 1978 by the major export credit providers. It intends to provide an institutional framework for the orderly use of publicly supported export credits relating to exports of goods and/or services and to financial leases with a repayment term of two years and more. The *Arrangement* also addresses tied aid⁴⁰ by establishing country and project eligibility rules, validity periods, and certain restrictions. The *Arrangement* does not cover military expenditures and agriculture,⁴¹ and provides special terms for power plants and for nuclear power plants.⁴² As the *Arrangement* can only be ascribed the status of a "gentleman's agreement",⁴³ implementation of its guidelines is by peer pressure, self-regulation and, above all, extensive exchange of information aided by the OECD electronic On-Line Information System (OLIS)⁴⁴.

Generally, the *Arrangement* aims at preventing ECAs from competing on the basis of financial conditions attached to export credits. The *Arrangement*, therefore, places limitations on the terms and conditions of export credits that benefit from official support, such as minimum premium benchmarks for seven country risk categories,⁴⁵ maximum repayment terms,⁴⁶ and minimum interest rates.⁴⁷ According to the *Arrangement*, ECAs should provide no more than 85 percent of the total financing for a particular transaction.⁴⁸ These financial terms are reviewed and may be changed at the semiannual meetings of the participants in the *Arrangement*.⁴⁹ Within these limits, certain derogations and deviations from the guidelines are possible⁵⁰, subject to prior discussion and/or notification procedures.

There are currently 10 participants to the *Arrangement*: Australia, Canada, Czech Republic, the European Community (comprising its 15 member states), Korea, Japan, Norway, New Zealand, Switzerland, and the United States. Hungary and Poland are observers. There is an annual plenary gathering at the OECD headquarters in Paris, attended by ECAs and their respective country's finance ministry representatives.

The *Arrangement* can be understood as a cartel-like, price-fixing mechanism, where the largest lenders of export credits establish limits on competition, in terms of the interest and premia fees, to prevent running substantial losses, and thus to avoid risking intensified scrutiny by their own national parliaments or governments. It is an agreement by the rich-

est countries in the world, and therefore its provisions are tailored for their needs.

Although interests rates and repayment terms have clear implications for project finance, the sustainability dimensions of the *Arrangement* have not been addressed systematically. The fact that nuclear power plants are allowed longer repayment terms, and that agriculture and military expenditures are excluded from the *Arrangement's* scope, raises serious questions as to the *Arrangement's* impacts on sustainable development. Under the ASCM (described below), generally only special and differential (S&D) treatment for developing countries allows for exceptions to subsidies disciplines. If the *Arrangement* is to continue to enjoy a "safe haven" under the ASCM, its contributions to sustainable development should be measurable, such as for example through incentives to renewable energy.

How Does The Arrangement Relate To The ASCM

The relationship between the OECD 1978 *Arrangement* and the WTO 1995 ASCM is established by item (k) of Annex I to the ASCM, which addressed export credits and was inherited from the 1979 GATT subsidy code. Annex I provides an "illustrative list of export subsidies" which are prohibited according to the ASCM⁵¹. Item (k) prohibits:

- Export credits at rates below those which the governments granting them actually have to pay for the funds so employed
- Government payments 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.

Thus item (k) basically requires ECAs not to provide services below market-level. With this exigence, item (k) has serious implications for current ECA practices, since such export credits are granted precisely because of the kind of risk and transactions for which private capital markets will not provide credit on the same terms.

Item (k) also includes a "safe haven" clause, which provides that an export credit practice that is in conformity with the interest rate provisions of an international undertaking, in which at least 12 ASCM members have been participating as of 1 January 1979, is not considered to be a prohibited export subsidy. (The OECD 1978 *Arrangement* is the only international undertaking that fits the description, and this is not by coincidence). Item (k) also provides that as long as an export credit practice of a country not member to the OECD *Arrangement* follows the *Arrangement's* rules concerning interest rate provisions, it shall not be considered a prohibited export subsidy under the ASCM.

It is remarkable that the "safe haven" clause exists only in terms of interest rate provisions of export credits, and not in terms of other supporting measures,⁵² such as export guarantees,⁵³ risk premia,⁵⁴ and "matching".⁵⁵ This means that export credits that fulfill the interest rate provisions of the *Arrangement* are automatically exempted from the general prohibition of export-related subsidies⁵⁶, while the other supporting measures, even if they adhere to the *Arrangement* provisions, are subject to ASCM disciplines.

Item (k) has been on the negotiating table of the Doha Development Agenda. Developed countries aim towards an extension of the possibilities to grant subsidies. The EC has tabled a comprehensive proposal⁵⁷ to extend the "safe haven" clause to other forms of export financing, such as the aforementioned export guarantees, risk premia, and matching. This does not find the approval of developing countries⁵⁸ whose benefit of such an extension would be negligible. At the same time, developed countries push towards a tightening of S&D rules, particularly in regards to S&D's temporal limitations. Needless to say, not only the desire to "tighten" S&D rules, but even existing rules, are not suitable for developing country needs, which in their turn aim towards clarification of investigation procedures⁵⁹ and flexibility to waive their ASCM obligations in economically turbulent times.⁶⁰

Item (k) provides a safe haven for the *Arrangement* and "a successor undertaking which has been adopted by those original Members." This provision is not interpreted in a uniform way. Developed countries apply the "evolutionary interpretation", meaning that subsequent amendments of the *Arrangement* are comprised by the safe haven clause⁶¹, while many developing countries emphasize that, "when Members agreed to incorporate the interest rate provisions of the *Arrangement*, they incorporated the provisions that were in place at the time the *Marrakesh Agreement* was signed";⁶² in other words, that amendments to an *existing* "undertaking" are not comprised by the safe haven. The discussion on the matter is far from settled.

Another important link between the WTO trade rules and export credits is established by item (j) of Annex I of the ASCM, which prohibits governments from providing export credit guarantee or insurance programs at premium rates which are inadequate to cover the longterm operating costs and losses of the programs. Item (j) thus requires a break-even management of an export credit scheme in the long term. It has to be emphasized that the *Arrangement* constitutes an exception exclusively from item (k), and that measures that would be captured by item (j) do not benefit from the safe haven clause.

The Brazil — Canada Aircraft Cases

The *Brazil – Canada Aircraft Cases* are a series of disputes over subsidies granted by these states' governments to their respective aircraft industries. It has been one of the longest conflicts in the history of the international trading system, and the amount of retaliation ranks among the highest ever in the WTO. While the substance of the issue concerns aircraft, the tensions have spilled over into other trade areas, souring bilateral relations and distorting the dispute towards a question of national icons. Both companies involved, Canada's aircraft manufacturer *Bombardier* and the Brazilian corporation *Embraer*, are huge enterprises in their respective countries, with tens of thousands of employees, and are of crucial importance for external trade/exports. Both companies have long received official and unofficial government support through various channels at different levels, including through ECAs, the disentanglement of which has been a painful and tiresome process in the wake of the dispute before the WTO.

An Overview of the Substance of the Dispute:

1. Initial Panel Reports

The initial claim was raised by Canada, which in June 1996 requested consultations with Brazil before the WTO Dispute Settlement Body (DSB) regarding subsidies granted by the latter to its regional aircraft industry. These subsidies were being granted in the form of interest rate equalizations and direct export financing⁶³ through the Brazilian ECA *Programa de Financiamento as Exportações (PROEX)*. Canada deemed these subsidies to be inconsistent with Article 3 of the ASCM and Art. XVI of the GATT 1994 and requested their immediate withdrawal. In March 1997, Brazil responded and presented counter-claims⁶⁴ regarding the numerous Canadian subsidies mechanisms, among which were:

- *Export Development Canada's* (EDC) equity infusions into corporations specially established to facilitate the export of aircraft, and EDC loan guarantees for exported aircraft;
- Support from the *Canada Account* (an EDC-managed account for which the Government assumes the risks) to *Canadair* and *de Havilland*, both aircraft manufacturers, owned in whole or in part by *Bombardier*;
- The impending sale to *Bombardier*, by the Government of Ontario, of its investment in *de Havilland*, another aircraft manufacturer, on other than commercial terms.

In July 1998, the DSB established one panel to hear Canada's claims and another panel to hear Brazil's claims. The Panel Reports were released simultaneously on April 14, 1999. The key points in the Report of the Panel (WT/DS46/R)⁶⁵

requested by Canada were:

- PROEX interest rate equalization payments on Brazilian regional aircraft exports are prohibited export subsidies;
- Brazil failed to comply with certain of the conditions of Article 27.4 ASCM [on S&D treatment]⁶⁶ and therefore could not enjoy S&D treatment as a developing country.

Brazil's status as a developing country and its non-membership in the OECD *Arrangement* were decisive in the Panel's finding. Brazil argued that its export subsidies did not confer a 'material advantage' on the recipient, which would have been a necessary condition for the subsidy to fall under the prohibition of item (k) of Annex I ASCM. In Brazil's view, this subsidy merely offset the disadvantage of not being able to participate on the same terms as the OECD *Arrangement* parties. Brazil's arguments were rejected.⁶⁷

The Panel requested by Brazil ruled in its Report WT/DS70/R,⁶⁸ inter alia:

- EDC assistance to the Canadian aircraft industry in the form of export subsidies is consistent with the ASCM. (Brazil had contested its compatibility "as such");
- *Canada Account* debt financing since 1995 for aircraft export is inconsistent with ASCM Articles 3.1(a) and 3.2;
- *Technology Partnerships Canada* (TPC) assistance to the Canadian regional aircraft industry is inconsistent with ASCM Articles 3.1(a) and 3.2;
- The sale of *de Havilland* from the Government of Ontario to *Bombardier* is consistent with the ASCM.

2. Appellate Body Reports

Brazil appealed WT/DS46/R and both parties appealed WT/DS70/R. Mostly, the Appellate Body (AB) confirmed the findings of the panels in its reports.⁶⁹ In particular, three findings may prove to be relevant and important for future disputes involving ECAs: one concerns the burden of proof problem in cases where one party refuses to disclose data; the second addresses the relationship of the ASCM with the *Arrangement*, and the third deals with the relation between the terms "benefit" in Art. 1.1 ASCM and "material advantage" in item (k) of Annex I ASCM.

Re the burden of proof, the AB stated⁷⁰ that Brazil did not provide enough evidence in order to establish a prima-facie case for inferring (because of lack of counter-evidence) the incompatibility of Canada's subsidy measures with the ASCM. In other words, Brazil could not prove that EDC measures conferred a "benefit" to the aircraft industry, mainly because Canada refused to disclose any information.

A substantive part of ECA activities takes place behind closed doors, numbers and figures remaining secret. Subsidies that are prohibited under the ASCM are difficult to challenge if the defendant refuses to disclose data. The AB confirmed in the present report that, still and all, the burden of proof rests with the plaintiff, and that if the defendant completely refuses cooperation, the Panel may, but is not obliged to, draw negative inferences from this refusal. In the words of a developing country commentator:

“The rules of the WTO agreements on subsidies etc, have been written in such a manner as to enable the practices of industrialized countries to continue. And panel and Appellate Body rulings have complicated the problem of developing countries in challenging these; by first having to establish prima facie, the ‘facts’ of the subsidy practices of the other side (hidden in most cases, through complicated and secretive practices, with evidence invariably in the possession of the other side that can be withheld under arguments of commercial secrecy).”⁷¹

Re the relation between the ASCM and the OECD Arrangement. Brazil tried to establish the relevance of the OECD Arrangement as a benchmark for determining whether a subsidy measure conferred a “benefit” on the recipient, in the meaning of ASCM Article 1.1(b).⁷² Brazil argued that while the Arrangement provides for a maximum repayment term of ten years, the Canadian repayment term of 16.5 years goes “beyond the outer bounds of ‘normal’ commercial practice”⁷³ and therefore constitutes a “benefit”. Canada opposed this view, finding it “unacceptable to define the standards of consistency with a WTO agreement by reference to criteria established by an organization outside the WTO, over which most WTO Members have no control or influence”⁷⁴. Because of a procedural error by Brazil,⁷⁵ the Appellate Body did not address this issue.

Re the terms “benefit” and “material advantage”. A related matter was dealt with in the Report on the case originally brought by Canada against Brazil⁷⁶, issued on the same day, 2 August 1999. The question dealt with the interpretation of the term “material advantage” in the context of item (k). The AB stated:

“We believe that the OECD Arrangement can be appropriately viewed as one example of an international undertaking providing a specific market benchmark by which to assess whether payments by governments, coming within the provisions of item (k), are ‘used to secure a material advantage in the field of export credit terms’.”⁷⁷

Thus the AB envisaged the Arrangement as a benchmark for the term “material advantage” in the context of item (k), but not for the term “benefit” in the context of Article 1.1. ASCM. The Panel Report WT/DS222/R⁷⁸ rejected a submission where Brazil⁷⁹ demanded that exclusively the Arrangement be used to determine a “benefit”. This Panel’s rejection noted that this case involved sufficient counter-evidence, so that the exclusivity demanded by Brazil could not be upheld.⁸⁰ Whether this means, that *as such*, the OECD Arrangement can never be used as a benchmark for the term “benefit” is not entirely clear and awaits clarification in future disputes.

Further Development of the Brazil—Canada Aircrafts Dispute

Both countries refused to withdraw the subsidies that were deemed to be illegal. Then in August 2000, Canada received permission to take countermeasures (within the meaning of Art 4.10 ASCM) against Brazil from an Arbitrator, which found that Brazil had not complied with the Panel and AB decisions. Canada has not resorted to such action as of yet (November 2003).

Then in March 2001, Brazil again attempted to discipline Canadian subsidies and requested *another* panel⁸¹. The principal points of complaint were that:

- Canada has not implemented the Report of the DS70 Panel;
- *Canada Account* has provided a credit of over \$100 million to Air Wisconsin and credits to other major airlines and manufacturers, thus constituting a breach of Art. 1 and 3 ASCM thereby;
- EDC and IQ (*Investissement Québec*, a Quebec export credit program) “as such” and “as applied”, are violating Articles 1 and 3 ASCM.

The new Panel upheld in its Report⁸² three out of ten Brazilian complaints, rejecting the other seven. Particularly, the claims asserting the incompatibility of the EDC and IQ programmes “as such” with the ASCM were rejected. The Panel emphasized that it had been judicially established “over the years”⁸³, that only those programmes that *require* a violation of the GATT/WTO rules “could be found to be inconsistent with those rules”.⁸⁴ The Panel reasoned that EDC and IQ programs do not *mandate* the conferral of a benefit and, hence, subsidization and can therefore not be inconsistent with the ASCM, “as such”.

The result of this finding is that ECA practice *as such* is not at odds with the ASCM. As long as an ECA adheres to the Canadian model by, above all, not mandating the conferral

of a benefit but rendering it discretionary, it minimizes the risk of being declared incompatible with the ASCM.

This time, Brazil received the authorization from an Arbitrator to initiate countermeasures after Canada refused to withdraw the offending subsidies.⁸⁵ Like Canada, Brazil has not resorted to such measures, and the Parties seem as far as ever from a mutually satisfactory solution.

Export Credits & Trade – Key concerns of Developing Countries

A principal concern for developing countries is their exclusion from the OECD *Export Credit Arrangement*. As stated above, item (k) in Annex I to the ASCM enables the *Arrangement* members to maintain export credits under certain conditions, exempting them from the general prohibition on export subsidies. Theoretically, developing countries can benefit from this exemption, too, if they apply the minimum interest rates required. This possibility, however, bears three important drawbacks:

Developing countries rarely have the economic power to compete in their ECA policies with OECD countries, if operating on the same terms.

The overall costs of granting export credits remains more expensive for developing countries due to their lower credit ratings in international financial markets. Hence, Brazil's unsuccessful attempt to offset this downside through lower interest rates.⁸⁶

Being attached to the provisions of the *Arrangement* without being able to influence future amendments means that national legislation could suddenly become WTO inconsistent because of such changes to the *Arrangement* introduced by the OECD members without any participation of developing countries.⁸⁷ (This argument notwithstanding the 'evolutionary interpretation' debate discussed above).⁸⁸

If developing countries cannot, or do not want to apply the interest rate provisions of the *Arrangement*, Article 27.4 ASCM forces the phase-out of their export credits. Thus, the "safe haven" clause in item (k) protects the OECD countries' capital markets, and market share, by forcing middle-income developing countries (e.g., Malaysia or Brazil, countries which pose the biggest competitive threat to the *Arrangement* members) to terminate this kind of subsidy policy.

Further concerns:

Among the issues that, from the developing countries' viewpoint, should be addressed in the course of further nego-

tiations are problems widely known to be connected to ECAs, such as:

- **Transparency of transactions** – as already mentioned, ECAs often refuse to disclose data on a large scale, leaving many negative consequences of their activities unknown to the broad public.
- **Combating corruption** – many international trade and investment transactions with developing countries involve bribing officials to the detriment of rule of law and economic well-being.⁸⁹
- **Sustainability** – many export credits are being issued for economically unsound projects that impede social and cultural development and entail irreversible environmental damage;⁹⁰
- **Arms trade and export credits** – estimates differ, but at least GB£ 420 million worth of annual defense exports are being supported by the British ECA alone⁹¹.

Conclusions

Export Credit Agencies are collectively the largest sources of public financial support for foreign corporate investment in, and trade with, the developing world. Their activities, having remained undisclosed for a long time, have become publicly known in recent years and therefore subject to mounting scrutiny by their respective governments, international organizations, and civil society groups. While being involved in a substantive part of international economic relations, ECAs are bound by few or no environmental, social, and cultural guidelines, which often has adverse effects on the recipient country's sustainable development. The Three Gorges Dam project in China and the Russian Sakhalin II venture are only two recent examples of ongoing ECA-backed undertakings with catastrophic consequences for local communities and the environment.

However, the times they are a-changin'. Recent developments are hallmarked by very slow, but at least perceivable improvement of ECA standards concerning sustainability.⁹² The creation of complaint-driven compliance mechanisms in Canada's and Japan's ECAs, the revision of the OECD *Common Approaches*, individual ECA's initiatives to implement environmental assessment procedures⁹³ and the EX-IM Bank's relatively elaborated environmental guidelines⁹⁴ constituting examples of decision-making towards slightly more responsible use of resources and economically and socially sounder projects. These developments are largely the result of a global ECA campaign that has placed pressure on ECAs' home governments and on the OECD.

Recently, ECA activities have entered an area of international scrutiny within the legal framework of the WTO, facing the fact that their activities are regarded as subsidies, and thus subject to the disciplines of the subsidies regime. As the WTO Dispute Settlement Body (DSB) decisions in the *Brazil/Canada Aircraft* disputes indicate, only those ECA practices that conform to the OECD *Arrangement* may benefit

from certain exemptions to ASCM disciplines. These DSB decisions, together with ongoing negotiations on the ASCM in the Doha Round, as well as upcoming negotiations on the OECD *Arrangement*, open several windows of opportunity for civil society and for countries concerned about the sustainability implications of ECA practices.

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ENDNOTES

¹ See ECA Watch, G. Watson, Ed., *Race to the Bottom, Take II*, September 2003; see also D. Norlen, et. al., *Unusual Suspects, Unearthing the Shadowy World of Export Credit Agencies* (Pacific Environment and ECA Watch, 2002)

² See *Jakarta Declaration for Reform of Official Export Credit and Investment Insurance Agencies*, May 2000, available at www.eca-watch.org

³ For a detailed discussion on the OECD *Arrangement*, see *infra* pg. 8.

⁴ E. Thenard, CIEL Issue Brief for the World Summit on Sustainable Development (WSSD), *Export Credit Agencies and Sustainable Development*, 2002.

⁵ Euler Hermes Kreditversicherungs-AG.

⁶ COFACE (Compagnie Française d'Assurance pour le Commerce Extérieur).

⁷ Established by the Export-Import Bank Act of 1945.

⁸ Established by the 1991 Export and Investment Guarantees Act.

⁹ Bruce Rich: Trade Above All, TomPaine.Common sense – A Public Interest Journal, <http://www.tompaine.com/feature.cfm/ID/4357> (accessed 6 August 2003)

¹⁰ Source: Berne Union Yearbook 2003, p. 189. It has to be highlighted that very often ECAs are reluctant to disclose the amount of transactions covered, often referring to possible competitive damages for their clients if data were made public.

¹¹ Source: Statistical Annex of the 2002 OECD Development Cooperation Report, <http://www.oecd.org/dataoecd/52/9/1893143.xls> (accessed July 19th, 2003).

¹² Source: World Bank 2001 Annual Report, http://www.world-bank.org/annualreport/2001/pdf/tab1_1.pdf (accessed 19 July 2003).

¹³ OECD statistics, <http://www.oecd.org/dataoecd/13/44/7084900.pdf> (accessed 13 August 2003).

¹⁴ The 30 OECD members belong to the world's richest countries, producing two thirds of the world's goods and services (source: OECD homepage, http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html [accessed 13 August 2003]). Member states are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

¹⁵ The other being the Berne Union (International Union of Credit and Investment Insurers).

¹⁶ On the *Arrangement* on Guidelines for Officially Supported Export Credits see Chapter 3.

¹⁷ See the IMF Bulletin of the Intern-American Development Bank "Political Risks: Is insurance needed?", Section "Provision of

Political Risk Insurance”, http://www.iadb.org/sds/IFM/publication/gen_154_1035_e.htm (accessed 20 August 2003).

¹⁸ Although compliance with operational directives and safeguard policies remains a serious challenge; see D. Clark, et.al., Eds, *Demanding Accountability*, 2003; For reference to the recent Baku-Tbilisi-Ceyhan (BTC) Pipeline case, see www.ciel.org and <http://www.bankwatch.org/issues/oilclima/baku-ceyhan/mbaku.html>

¹⁹ G8 Communiqué, Denver, June 22, 1997, <http://www.g7.utoronto.ca/summit/1997denver/g8final.htm> (accessed 23 July 2003)

²⁰ Les Amis de la Terre, et.al., letter sent to the OECD ECG on 23 October 2003, available at www.ciel.org

²¹ OECD, Working Party on Export Credits and Credit Guarantees, *Revised Draft OECD Recommendations on Common Approaches on Environment and Officially Supported Export Credits*, 07 November 2003, TD/ECG(2003)13/REV2.

²² General Agreement on Tariffs and Trade.

²³ General Agreement on Trade in Services.

²⁴ Trade-Related Aspects of Intellectual Property Rights.

²⁵ Agreement on Subsidies and Countervailing Measures.

²⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes.

²⁷ For details see “Implementation-related Issues and Concerns”, Doha Round Briefing Series of the ICTSD and IISD, Vol. 1 No.1 of 13, p.3.

²⁸ Full text of the ASCM at: http://www.wto.org/english/docs_e/legal_e/24-scm.doc, overview at http://www.wto.org/english/tratop_e/scm_e/subs_e.htm.

²⁹ ASCM, Article 7. Since the existence of the WTO at least eight panel reports have been issued on the topic of subsidies and countervailing measures. For details see http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (accessed 19 August 2003).

³⁰ Art 3 ASCM

³¹ Art 5 ASCM

³² Part V of the ASCM.

³³ Art 27 ASCM.

³⁴ Article 27 ASCM and Annex VII ASCM.

³⁵ On the Singapore Issues, see generally http://www.ciel.org/Tae/WTO_Cancun_3Sept03.html

³⁶ Details on these questions are exposed in the Communication from India to the Committee on Subsidies and Countervailing Measures G/SCM/W/462 of 3 September 2001.

³⁷ Procedures for extensions under Article 27.4 for certain developing country members, Committee on Subsidies and

Countervailing Measures G/SCM/39 of 20 November 2001.

³⁸ See details in The Doha implementation decision explained, http://www.wto.org/english/tratop_e/dda_e/implem_explained_e.htm#subsidies (accessed 19 August 2003)

³⁹ Full text at <http://www.oecd.org/dataoecd/52/3/2763846.pdf>

⁴⁰ Tied aid is aid which is in effect (in law or in fact) tied to the procurement of goods and/or services from the donor country and/or a restricted number of countries (Art 31a of the Arrangement). In 1992, the Parties to the Arrangement agreed on the Helsinki Package, which brought greater discipline and transparency in the field of tied aid credits.

⁴¹ OECD Arrangement, Chapter I, 3(d).

⁴² OECD Arrangement, Chapter II, 11, and Annex II.

⁴³ OECD Arrangement, Introduction.

⁴⁴ OECD: The Export Credit Arrangement. <http://www.oekb.at/1/03/03/10303000.html> (accessed 19 August 2003)

⁴⁵ Art 22 of the Arrangement.

⁴⁶ Art 10.

⁴⁷ Art 15.

⁴⁸ Art 7.

⁴⁹ Unitar Online Resource Center, Training Package 4, Chapter IV.1: International Sources of Funds, Section II: Other Official Sources: Export Credit B. Inter-ECA Competition, found at http://www.unitar.org/dfm/Resource_Center/TrainingPackage/TP4/ChIV1/12interECA.htm (accessed 19 August 2003).

⁵⁰ A good overview over the Arrangement’s provisions can be found at <http://www.oekb.at/1/03/03/10303000.html>. The exception provisions can be found in Chapter IV, Sections 2 and 3 of the Arrangement.

⁵¹ Art. 3.1(a) ASCM.

⁵² See the Proposal of the European Communities to the Negotiating Group on Rules, TN/RL/W/30 of 21 November 2002, FN 5.

⁵³ Export guarantees insure the export of goods and/or services and/or investments, covering a range of political and commercial risks. See <http://www.oekb.at/english/1/02/10200000.shtml> (accessed 20 August 2003)

⁵⁴ Risk premia are rewards for holding a risky investment rather than a risk-free one.

⁵⁵ Matching refers to the practice of improving one’s own financial services, adjusting them to the level of those offered by competitors. Often this results in interest rates below those established by the Arrangement. See Art. 29 of the Arrangement and para. 185 of the Appellate Body Report WT/DS46/AB/R. An extensive elaboration of matching techniques and their incompatibility with item (k)2 is exposed in the Panel Report WT/DS222/R, para. 7.154 – 7.182.

⁵⁶ Article 3 ASCM.

- 57 See FN 52.
- 58 See the Indian reply to the EC proposal, TN/RL/W/40 of 10 December 2002 and the Egyptian paper to the Negotiating Group on Rules TN/RL/W/57 of 10 February 2003.
- 59 Indian Submission to the Negotiating Group on Rules TN/RL/W/120 of 16 June 2003, para 11-13.
- 60 Egyptian Paper to the Negotiating Group on Rules TN/RL/W/57 of 10 February 2003, p.2.
- 61 For details see Brazil's Paper to the Negotiating Group on Rules TN/RL/W/5 of 26 April 2002.
- 62 Ibid.
- 63 See Panel Report WT/DS46/R under II. Factual Aspects, p.2.
- 64 Request for Consultation WT/DS70/1, G/SCM/D11/1.
- 65 Brazil - Export Financing Programme for Aircraft - Report of the Panel WT/DS46/R of 14 April 1999.
- 66 First, contrary to the demands of 27.4. ASCM, Brazil has increased the level of its export subsidies in the last five years before the Panel Report. Second, it failed to phase out its export subsidies within the eight-year period. For details, see para. 7.58 – 7.86 of the Panel Report WT/DS46/R.
- 67 Para. 7.30 – 7.37 of the Panel Report WT/DS46/R.
- 68 Canada - Measures Affecting the Export of Civilian Aircraft - Report of the Panel WT/DS70/R of 14 April 1999.
- 69 Brazil - Export Financing Programme for Aircraft - AB-1999-1 - Report of the Appellate Body WT/DS46/AB/R, Canada - Measures Affecting the Export of Civilian Aircraft - AB-1999-2 - Report of the Appellate Body WT/DS70/AB/R, both of 2 August 1999.
- 70 Section VII, particularly para. 205 of the AB Report WT/DS70/AB/R.
- 71 Chakravarthi Raghavan, New panel on Canadian aircraft export subsidy, Third World Network Website, <http://www.twinside.org.sg/title/aircraft.htm> (accessed 5 Aug 2003).
- 72 *Claims of Error by Brazil – Appellant*, Section C.2 of the Appellate Body Report WT/DS70/AB/R.
- 73 Para. 66 of the Appellate Body Report WT/DS70/AB/R.
- 74 Para. 86 of the Appellate Body Report WT/DS70/AB/R.
- 75 Para. 210 of the Appellate Body Report WT/DS70/AB/R. Brazil argued on evidence that it had failed to present before the original Panel. Because of Article 17.6 of the DSU, the AB is limited to issues of law covered in the panel report.
- 76 WT/DS46/AB/R.
- 77 Para. 181 of the Appellate Body Report WT/DS46/AB/R.
- 78 Details on the new proceedings in the following section.
- 79 Para. 7.236 of the Panel Report WT/DS222/R.
- 80 Para. 7.234 of the Panel Report WT/DS222/R.
- 81 WT/DS222/2 of 1 March 2001.
- 82 WT/DS222/R of 28.1.2002
- 83 For occurrences of the application of this principle see the cases quoted in Footnote 33 in the Panel Report WT/DS222/R.
- 84 WT/DS222/R, para. 7.56.
- 85 WT/DS222/ARB of 17.2.2003
- 86 Para. 7.29 of the Panel Report WT/DS46/R.
- 87 For further criticism on this topic see the Paper by Brazil for the Negotiating Group on Rules TN/RL/W/5 of 26 April 2002, last paragraph; as well as India's communication to the Negotiating Group on Rules, TN/RL/W/40, 10 December 2002.
- 88 See *supra* note pg. 9.
- 89 See P. Bosshard, Berne Declaration, *Publicly Guaranteed Corruption, Corrupt Power Projects and the Responsibility of Export Credit Agencies in Indonesia*, November 2000; See also S. Hawley, The Corner House, *Still Underwriting Corruption: the ECGD's Recent Record*, May 2002.
- 90 See C. Maurer & R. Bandhari, World Resources Institute, *The Climate of Export Credit Agencies*, February 2001.
- 91 Source: Paul Ingram, Ian Davis: The Subsidy Trap, <http://www.oxfordresearchgroup.org.uk/programmes/arm-strade/Summary.pdf>, (accessed 11 August 2003)
- 92 See A. Goldzimer, Environmental Defense, *Worse than the World Bank? Export Credit Agencies – The Secret Engine of Globalization*, p. 6, accessible at <http://www.foodfirst.org/pubs/backgrdrs/2003/w03v9n1.pdf> (accessed 27 Aug 2003).
- 93 See B. Rich, Environmental Defense, "Exporting Destruction", the *Environmental Forum*, September/October 2000, Volume 17, No. 5, p. 39.
- 94 <http://www.exim.gov/products/policies/environment/environment.html> (accessed 27 August 2003).