

**SERIOUS PREJUDICE**

Paper from Brazil

The following communication, dated 15 November 2005, is being circulated at the request of the Delegation of Brazil.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/284), also be circulated as a formal document.

**I. INTRODUCTION**

1. This communication addresses the “serious prejudice” provisions of Article 6 of the WTO *Agreement on Subsidies and Countervailing Measures* (“ASCM”), which provide an important remedy in response to the adverse displacement or impedance and price effects of subsidies.

2. This paper, in part, comments on Canada’s communication on serious prejudice, TN/RL/GEN/14, dated 15 September 2004, which addressed the expiration of certain provisions and alleged deficiencies in Article 6. Brazil reserves the right to submit further communications on the issues in this paper as well as on other aspects of Part III of the ASCM.

**II. COMMENTS ON CANADA’S PROPOSED AMENDMENTS**

**A. REINSTATEMENT OF ARTICLE 6.1**

3. In its communication on serious prejudice, Canada proposes that Article 6.1 of the ASCM be reinstated. Brazil supports the reinstatement of this provision provided that footnotes 15 and 16 relating to civil aircraft be deleted. We also suggest some additions and clarifications as detailed below.

4. Footnotes 15 and 16 were based on the expectation that civil aircraft would be subject to specific multilateral rules. Given that such rules have not been developed, and the Doha Development Agenda does not provide for the negotiation of such rules, we think that these footnotes are thus no longer relevant and should be deleted.

5. Brazil proposes that the phrase “*enterprise, or product line*” be added to Article 6.1(b) to clarify that subsidies to cover operating losses associated with a particular product line, as distinguished from operating losses across an enterprise as a whole, should also be deemed to result in serious prejudice. The amended provision would thus read:

- (b) subsidies to cover operating losses sustained by an industry,  
enterprise, or product line;

6. Furthermore, Brazil proposes that Article 6.1(c) should be clarified since it contains vague, undefined terms, in particular “long-term solutions” and “acute social problems”. In the absence of generally accepted meanings for these terms, the application of these terms to specific factual situations could prove impracticable. Brazil would be receptive to more discussions on how any of the issues intended to be covered by the terms “long-term solutions” and “acute social problems” could be addressed more specifically and with greater certainty in Article 6.1. One possibility would be the elimination of both terms.

7. Brazil agrees with Canada that paragraph 4 of Annex IV appears anomalously situated, as it relates to whether a particular subsidy in a start-up situation is deemed to result in serious prejudice rather than to the calculation of the amount of subsidization. Brazil therefore proposes a new Article 6.1(e) that includes paragraph 4 of Annex IV, including relevant footnotes. The proposed provision would read:

- (e) where the recipient is in a start-up situation,<sup>1</sup> the overall rate of subsidization exceeds 15 percent of the total funds invested.<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> For purposes of this paragraph, a start-up period will not extend beyond the first year of production.

#### B. PROPOSED AMENDMENT TO ARTICLE 7 OF THE ASCM

8. In its communication, Canada proposes the imposition of certain additional requirements with respect to consultations described in Articles 7.1 and 7.2 of the ASCM. Specifically, Canada proposes that a Member, in its “*statement of available evidence*” under paragraph 7.2, also provide “detailed assessment” of such evidence in arriving at the “*reason to believe*” referred to in paragraph 7.1, including “the amount of the subsidy”<sup>1</sup>.

9. Brazil does not agree with the introduction of such requirements that operate to impose additional burdens on Members at the consultations phase of the proceeding. Brazil considers that at this stage of a proceeding the availability of evidence is limited. Article 7.3 states that the “purpose of the consultations shall be to clarify the facts of the situation. . .”. Thus, to expect a Member to provide a detailed assessment at this juncture presumes greater access to information than is realistic in most cases.

10. Furthermore, Brazil considers that Members would be prejudiced by the requirement to place a detailed assessment on the record at the consultations stage which could be relied upon to the detriment of a Member at later stages of the proceeding when more information is available and the record is more fully developed.

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<sup>1</sup> The introduction of the term “amount” could be construed as a requirement of precise quantification of the subsidy, which goes beyond the idea of “general magnitude” used by the panel *United States Subsidies on Upland Cotton*, when referring to the nature of the serious prejudice analysis.

11. Accordingly, and for the reasons explained above, Brazil does not agree with Canada's proposed amendments to Article 7 of the ASCM.

C. OTHER PROPOSED AMENDMENTS

12. Canada also proposes to (a) replace the cost-to-government approach with a benefit-to-recipient approach in the calculation of *ad valorem* subsidization under subparagraph 6.1(a) of the ASCM; (b) extend the market share analysis in Article 6.4 of the ASCM to the causation assessment under 6.3(a); (c) confirm that the threshold percentage in paragraph 4 of Annex IV to the SCM extends beyond subsidies expensed in the start-up period to include subsidies allocated over a multi-year period;

13. Subject to additional clarification and review of implementing text, Brazil supports these amendments proposed by Canada and looks forward to further discussions among WTO Members.

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