

**DE FACTO EXPORT CONTINGENCY**

Paper from Brazil

The following communication, dated 16 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)/291), also be circulated as a formal document.

**I. INTRODUCTION**

1. Brazil is encouraged by the ongoing consideration by WTO Members in the Negotiating Group on Rules of the disciplines applicable to prohibited export subsidies under Article 3 of the WTO Agreement on Subsidies and Countervailing Measures (“SCM Agreement”).
2. We recall the discussion of the Group and proposals of certain WTO Members to clarify the standard for *de facto* export contingency contained in Article 3.1(a) of the SCM Agreement. Brazil shares concerns about ensuring that any changes to the text do not disturb the important principle that prohibited subsidies by their sole existence cause serious trade effects.
3. In the context of these ongoing discussions, Brazil would like to take this opportunity to raise its specific concerns regarding *de facto* export contingency and propose certain textual amendments to Article 3.1(a) to address our concerns.

**II. DE FACTO EXPORT CONTINGENCY**

4. Article 3.1(a) of the SCM Agreement provides that certain subsidies are prohibited if they “are contingent, in law or in fact, whether solely or as one of several conditions, upon export performance”. Footnote 4 clarifies how to apply this standard. It states:

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.

5. The WTO Appellate Body interpreted footnote 4 as containing three substantive elements: (1) “granting of a subsidy”; (2) “...is...tied to...”; and (3) “actual or anticipated exportation or

export earnings”.<sup>1</sup> The second element is the key, and the Appellate Body defined the term “tied to” to mean “limit or restrict as to ... conditions” and then stated that “the facts must ‘demonstrate’ that the granting of a subsidy is *tied to* or *contingent upon* actual or anticipated exports”.<sup>2</sup>

6. Brazil is concerned about this interpretation of footnote 4. The Appellate Body defined “tied to” as equivalent to “contingent upon,” even though in footnote 4 the drafters explicitly chose the phrase “*tied to* actual or anticipated exportation or export earnings”, over the phrase “*contingent upon* actual or anticipated exportation or export earnings”. In effect, by reading “tied to” as interchangeable with “contingent upon”, the Appellate Body introduced additional complexity regarding how to apply footnote 4 for purposes of distinguishing between *de jure* and *de facto* export contingency.

7. In making this interpretation of footnote 4, the Appellate Body appears to raise the burden of proof parties have to meet when challenging subsidies that are *de facto* export contingent, ignoring the significant problems associated with collecting evidence that would support such challenges. In footnote 4, WTO Members expressly used the term “tied to” rather than “contingent upon” in order to highlight *strict conditionality* may be extremely difficult to demonstrate in a *de facto* case. In these cases, the subsidizing government is the source of virtually all information and can withhold or delay disclosure of critical factual information for confidentiality reasons or to further litigation tactics. This evidentiary problem, along with the tendency of WTO panels of not applying adverse inferences to enforce their information requests, entails that the Appellate Body’s interpretation of footnote 4 may considerably undermine the ability of Members to challenge prohibited subsidies that are contingent, in fact, on export.

8. One problem with characterizing *de facto* export subsidies as “contingent upon actual or anticipated exportation or export earnings” (instead of “tied to actual or anticipated exportation or export earnings”) is that under this approach, a “lump sum” export subsidy may not be viewed as a *de facto* export subsidy, because the amount of the subsidies provided may not be *dependent upon* the amount of exports. However, this approach cannot be in conformity with Article 3 and footnote 4, because it could exempt export subsidies from the disciplines set out in Article 3 depending upon the manner in which such export subsidies were disbursed, even in cases where those subsidies were conferred to an enterprise that only exports or to an enterprise for making a product that will only be exported.<sup>3</sup>

### III. PROPOSED TEXTUAL AMENDMENT

9. In light of the above considerations, Brazil would like to refer specifically to the situation in which the subsidy is only granted in order to make it possible to fill export contracts or agreements with an enterprise or government in another country. In other words, domestic sales within the territory of the granting WTO Member are never even contemplated. This is particularly problematic when WTO Members act to subsidize an enterprise within its own territory for the sale of customized products that are destined to be exported for use in the production of another product within the territory of another country.

10. In order to address its concerns and otherwise facilitate discussion, Brazil proposes the following amendment to Article 3.1(a) of the SCM Agreement:

---

<sup>1</sup> Report of the Appellate Body, *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, para. 169 (adopted 8 August 1999).

<sup>2</sup> *Id.* at para. 171.

<sup>3</sup> By this assertion, Brazil is not claiming a subsidy bestowed to an enterprise should be automatically considered a *de facto* export subsidy merely because due to competitive conditions that enterprise exports part of its production or has a high degree of export orientation.

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<sup>4</sup>, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I...

-----  
4 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. **Nevertheless, a subsidy tied to actual or anticipated exportation to a particular country granted only to enable the fulfilment of exports contracts or agreements, or similar arrangements, with an enterprise or government of another country shall be deemed to be in fact an export subsidy.**

11. Brazil reserves the right to revise and expand its views and to submit further comments and proposals on this issue.

---