

THE EXISTENCE OF A BENEFIT

Paper from Brazil

The following communication, dated 2 March 2006, 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(06)/40), also be circulated as a formal document.

I. INTRODUCTION

1. In document TN/RL/W/19, Brazil raised some concerns regarding Article 14 of the SCM Agreement and the guidelines for calculation of the amount of a subsidy in terms of the benefit to the recipient. Besides the *legal drafting suggestions* contained in document W/19, Brazil wishes to further clarify issues related to the determination of benefit under parts II and III of the SCM Agreement.

2. In Canada — Aircraft, the Appellate Body expressed the view that “Article 14, which we have said is relevant context in interpreting Article 1.1(b), supports our view that the marketplace is an appropriate basis for comparison. The guidelines set forth in Article 14 relate to equity investments, loans, loan guarantees, the provision of goods or services by a government, and the purchase of goods by a government. A 'benefit' arises under each of the guidelines if the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market” (emphasis added) (WT/DS70/AB/R, paras. 155 and 158).

3. In United States — Upland Cotton, the Appellate Body stated that “the apparent rationale for Part III differs from that for Part V of the SCM Agreement. Under Part V, the amount of the subsidy must be calculated because, under Article 19.4 of the *SCM Agreement* and Article VI:3 of the GATT 1994, countervailing duties cannot be levied in excess of that amount. In contrast, under Part III, the remedy envisaged under Article 7.8 of the *SCM Agreement* is the withdrawal of the subsidy or the removal of the adverse effects. This remedy is not specific to individual companies. Rather, it targets the effects of the subsidy more generally” (emphasis added) (WT/DS267/AB/R, para. 464).

4. Read in conjunction, both rulings of the Appellate Body made it clear that: 1) the determination of a benefit under Parts II and III of the SCM Agreement is to be made having the marketplace as a basis for comparison; 2) since Article 14 is relevant context in interpreting Article 1.1(b), one deduces that a benefit under Parts II and III will only arise if the recipient has received a “financial contribution” on terms more favourable than those available to the recipient in the market; and 3) the fact that the recipient has received a “financial contribution” on terms more favourable than those available to the recipient in the market does not mean that a calculation of the benefit is required for Parts II and III of the SCM Agreement.


II. PROPOSED TEXTUAL AMENDMENTS

5. In order to codify this interpretation, Brazil suggests the following amendment to Article 1.1:

Article 1
Definition of a subsidy

- 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(...)
and


- (b) a benefit is thereby conferred .
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New footnote y:

- y. For the purpose of Parts II and III, the existence of a “benefit” is to be determined on the basis of a comparison between the financial contribution by a government or any public body within the territory of a Member and the prevailing market conditions. In the case of “loans by a government”, a benefit will exist only to the extent that those “loans by a government” are made at more advantageous conditions than those offered in the marketplace for loans: 1) with similar term and structure; 2) having guarantees of a similar nature and coverage; 3) denominated in the same currency; and 4) granted within the territory of the same Member.

6. Under the same approach, Brazil also suggests the following amendment to Article 14:

Article 14
Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

- (b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts .
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New footnote x:

- x. The comparison between a “loan by a government” and “the comparable commercial loan which the firm could actually obtain on the market” can only be made if both loans: 1) have similar term and structure; 2) have guarantees of a similar nature and coverage; 3) are denominated in the same currency; 4) are granted within the territory of the same Member. A fair comparison shall be made between the “loan by a government” and “the comparable commercial loan which the firm could actually obtain on the market”.
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