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Negotiating Group on Rules

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PROPOSED AMENDMENTS TO CERTAIN PROVISIONS OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Communication from Canada

Revision*

The following communication, dated 20 April 2006, is being circulated at the request of the Delegation of Canada.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(06)/93), also be circulated as a formal document.

The following reduces to legal text, earlier substantive proposals made by Canada on the issues of “specificity” and “serious prejudice”, having regard to comments received from other Members:

A. SPECIFICITY

As indicated in Canada’s earlier paper on specificity (TN/RL/GEN/6 of 14 July 2004), a *de facto* specificity analysis should involve an assessment of the totality of the facts of a given case in recognition of the fact that circumstances beyond the control of granting authorities might explain the take-up and distribution patterns of a subsidy that is otherwise *de jure* non-specific under subparagraphs 2.1 (a) and (b) of the Agreement on Subsidies and Countervailing Measures (ASCM).

Furthermore, subparagraph 2.1(c) of the ASCM should provide for the possibility that, while the distribution of subsidy amounts may appear disproportionate when viewed in absolute terms (i.e. a strict comparison of subsidy amounts among recipient industries over a given period), such distribution may in fact be proportionate when assessed against an objective economic benchmark. (i.e., because the amounts received by the industries in question were in proportion to their share of the production value of the sector concerned).

Text Proposal

It is proposed that Article 2.1(c) be amended as follows:

2.1(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons

* This Revision corrects erroneous footnote numbering in the original document.

to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises^{2.bis}, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. **These factors shall be evaluated based on the totality of the facts, and no one or several of them can necessarily give decisive guidance.** In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

[Footnote 2.bis] Disproportionality shall be determined by reference to a relevant objective benchmark, such as the relative importance of recipient industries, in terms of production value, within the territory of the granting authority.

B. SERIOUS PREJUDICE

The following legal text proposals are based on Canada's earlier paper on "serious prejudice" (TN/RL/GEN/14 of 15 September 2004).

Text Proposals

Article 6 *Serious Prejudice*

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

- (a) the total *ad valorem* subsidization¹⁴ of a product exceeding 5 per cent¹⁵;
- (b) subsidies to cover operating losses sustained by an industry;
- (c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise^{15.1} and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;
- (d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment¹⁶;

¹⁴ The total *ad valorem* subsidization shall be calculated in accordance with the provisions of Annex IV.

¹⁵ Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft.

^{15.1} **For the purpose of this provision, "enterprise" includes any successor or affiliated enterprise.**

¹⁶ Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph.

- (e) subsidies to a firm in a start-up situation^{16.1}, if the overall rate of subsidization^{16.2} exceeds 15 per cent of the total funds invested^{16.3} during the start-up period^{16.4}.

6.2 and 6.3 [Unchanged].

6.4 For the purpose of paragraphs **3(a) and 3(b)**, the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative shares of the market" shall include any of the following situations: (a) there is an increase in the market share of the subsidized product; (b) the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; (c) the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.5 to 6.9 [Unchanged].

Article 7 Remedies

7.1 to 7.7 [Unchanged].

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.^{22.1}

7.9 and 7.10 [Unchanged].

^{16.1} 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.

^{16.2} The overall rate of subsidization includes subsidies expensed in the start-up period as well as non-recurring subsidies properly allocable over a multi-year period extending beyond the start-up period, and subsidies that have been committed but not yet disbursed.

^{16.3} Total funds invested means the total of all expenses incurred during the start-up period plus the acquisition cost of all assets, determined in accordance with generally accepted accounting principles.

^{16.4} The start-up period terminates upon commencement of normal commercial sales, regardless of whether full commercial production levels have been achieved. The start-up period shall not extend beyond the first year of production.

^{22.1} In determining appropriate steps to remove adverse effects, the benefit of subsidies that were fully disbursed prior to the expiration of the period for compliance with an adopted panel or Appellate Body report, shall be allocated over the total production of the products to which the subsidy is properly attributable under generally accepted accounting principles.

ANNEX IV

*CALCULATION OF THE TOTAL AD VALOREM SUBSIDIZATION
(PARAGRAPH 1(A) OF ARTICLE 6)⁶²*

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of **the benefit to the recipient**.
2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's⁶³ sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.⁶⁴
3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.
4. **[Now Article 6.1(e)].**
5. Where the recipient firm is located in an inflationary economy country, the value of the product shall be calculated as the recipient firm's total sales (or sales of the relevant product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the 12 months preceding the month in which the subsidy is to be given.
6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.
7. Subsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization.
8. Subsidies which are non-actionable under relevant provisions of this Agreement shall not be included in the calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6.

Finally, the above text proposals do not address the status of certain other provisions in the current ASCM that were consequentially affected by the lapsing of Article 6.1 of the Agreement (i.e., footnotes 14 to 16, Article 6.2, footnote 19, Annex IV, footnote 66, Article 27.8, and Article 27.9). These will have to be reviewed by the Group.

Canada reserves its right to offer further views on these and other issues.

⁶² An understanding among Members should be developed, as necessary, on matters which are not specified in this Annex or which need further clarification for the purposes of paragraph 1(a) of Article 6.

⁶³ The recipient firm is a firm in the territory of the subsidizing Member.

⁶⁴ In the case of tax-related subsidies the value of the product shall be calculated as the total value of the recipient firm's sales in the fiscal year in which the tax-related measure was earned.