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SPECIFICITY

Paper from Brazil

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

I. INTRODUCTION

1. This communication addresses the "specificity" provisions of pertinent paragraphs of Article 2 of the WTO *Agreement on Subsidies and Countervailing Measures* ("ASCM"), which establish that only the subsidies that are specific to an enterprise or industry, or group of enterprises or industries, can be considered to fall within the coverage of the Agreement. The ASCM grants the necessary discretion to panels and the investigating authority in making this specificity determination in order to maintain the flexibility necessary to address the wide spectrum of factual circumstances that arise in different cases.

2. This paper, in part, comments on Canada's communication on specificity (TN/RL/GEN/6) which proposes to codify additional disciplines regarding the application of the specificity requirement. We reserve the right to submit further communications on the issues in this paper as well as other aspects of Part I of the ASCM.

II. COMMENTS ON CANADA'S PROPOSED AMENDMENTS

A. "ENTERPRISE," "INDUSTRY," AND "GROUP"

3. In its communication on specificity, Canada proposes as Amendment 1 that the phrase "in accordance with international standard industrial classification and" be added to Article 2.4 of the ASCM so that the text is amended to read as follows:

> "Any determination of specificity under the provisions of this Article shall be in accordance with international standard industrial classification and clearly substantiated on the basis of positive evidence."

4. In particular, Canada states that the added text would serve to reference the United Nations *International Standard Industrial Classification of All Economic Activities* (ISIC).

5. Brazil considers that the suggested reference could be construed as an excessively strong restriction on the ability of the investigating authority or panel to rely on the most appropriate evidence in each case to determine the scope of the enterprise or industry, or group of enterprises or industries. While it may be reasonable for an investigating authority or WTO dispute settlement panel to reference the United Nations ISIC as one evidentiary source in making the determination of enterprise or industry, such reference should not be codified and, thus, required as the sole source for assessing the wide and general availability, or not, of the subsidy.

6. More specifically, the current text already requires that the determination of specificity be "clearly substantiated on the basis of positive evidence." We think that Canada's proposed text could be interpreted as a restriction on the sources of positive evidence that may be considered.

7. Furthermore, there may be instances where an industry or enterprise, or group of enterprises or industries, does not fall clearly within one of the categories defined in the United Nations ISIC. For example, subsidies may be conferred on a range of enterprises, such as a consortium of unrelated companies, for the purpose of researching, developing, and/or producing a particular product. Depending on the product concerned, these enterprises may come from vastly different industry sectors that do not fit clearly into neighbouring United Nations ISIC classifications.

8. Finally, the United Nations ISIC classifications might not be applicable in instances where particular enterprises, industries, or groups of enterprises or industries do not fall clearly within one of the rigid United Nations ISIC classifications. It should be also discussed whether it would be appropriate to bind WTO Members to revised classifications that are adopted to address new industry sectors and activities.

9. For the reasons explained above, Brazil does not agree with the proposed amendment to the text of Article 2.4.

B. DE FACTO SPECIFICITY

1. Canada's proposed Amendment 2

10. In its communication, Canada proposes that Article 2.1(c) of the ASCM be amended to expressly confirm that the mere existence of any of the four factors does not automatically establish specificity, but rather that the "totality of the facts" must be considered. Specifically, Canada suggests that the following sentence -- "*These factors shall be evaluated based on the totality of the facts, and no one or several of them can necessarily give decisive guidance."* -- be added between the second and third sentence of Article 2.1(c).

11. Canada's proposal could be interpreted to restrain the discretion of panels and investigating authorities from making a specificity determination based on one factor alone. Nothing in the text of Article 2.1(c) requires a finding of specificity based on only one factor. Conversely, however, there may be circumstances where the existence of a single factor could be a sufficient basis upon which to base such a finding.

12. Furthermore, Article 2.1(c) provides that if there are reasons to believe the subsidy may in fact be specific, "other factors *may* be considered" (emphasis added). The use of the word "may" as opposed to "shall" indicates that a formulistic evaluation of all four factors in all cases was not intended by the drafters.

13. In fact, in applying Article 2.1(c), some panels have considered all four factors. *See, e.g.*, *European Communities - Countervailing Measures On Dynamic Random Access Memory Chips From Korea*, WT/DS299/R, Report of the Panel, adopted 3 August 2005, at para. 7.230 ("Having considered all four factors mentioned in Article 2.1 of the *SCM Agreement* for *de facto* specificity. . . .").

14. Finally, Brazil deems that Canada's proposed text could add a substantial degree of uncertainty regarding what an investigating authority or a WTO panel must consider by introducing the expression "the totality of the facts". Would the authority or panel be required to affirmatively investigate each and every fact placed before it? Brazil agrees that investigating authorities and WTO panels should consider reasonable explanations and other evidence of non-specificity, but this seems to be a clear obligation in the current text and the related provisions regarding the obligations of authorities and WTO panels in conducting their assessments.

15. In light of the reasons explained above, Brazil considers that no amendment to the text of Article 2.1(c) should be introduced.

2. Canada's proposed Amendment 3

16. Canada proposes that a footnote be added to the end of the phrase "the granting of disproportionately large amounts of subsidy to certain enterprises" in Article 2.1(c) of the ASCM requiring that disproportionality be determined with reference to a "relevant objective benchmark, such as the relative importance of recipient industries, in terms of production value, within the jurisdiction of the granting authority."

17. Although it is reasonable for panel or investigating authority to use a relevant objective benchmark to determine whether the amount of a subsidy is disproportionate, explicitly defining such benchmark would unnecessarily limit panels and investigating authorities in their assessment of the facts. There is simply no basis to assume that this enumerated test would be appropriate, much less determinative, in all factual circumstances. For instance, such a benchmark would blind the panel's or the investigating authorities' specificity analysis of cases of targeted building of a greenfield plant within a given jurisdiction.

18. Accordingly, Brazil considers that the proposed footnote to Article 2.1(c) should not be introduced.

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