WORLD TRADE ORGANIZATION

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REPLIES TO THE QUESTIONS MADE BY THE AUSTRALIAN DELEGATION IN DOCUMENT TN/RL/W/37

Submission by Brazil

The following communication, dated 11 February 2003, has been received from the Permanent Mission of Brazil.

Brazil thanks Australia for the comments and questions put forward at the meeting of the Negotiating Group on Rules in November 2002. In order to further clarify the proposals on document TN/RL/W/19, Brazil presents below replies to the questions raised by Australia in document TN/RL/W/37.

Article 11.4

Q. Australia considers that the standing requirements for both countervailing duty and dumping investigations should be in harmony and that the approach on countervailing duty investigations should reflect what is practice under the ADA.

Brazil suggests that an application should be supported by at least more than 50 per cent of the total domestic production.

- **Does Brazil consider that the threshold of total production by that portion of the domestic industry expressing either support for or opposition to the petition should consequently also be adjusted?**

Reply

The proposal is aimed at discussing whether it should be acceptable to consider an application and initiate an investigation when the petition is supported by a small portion of the domestic industry such as 25 per cent, despite the fact that there was no clear manifestation of support by a majority of the domestic industry.

Article 11.9 and Article 19

Q. Australia raised the issue during the discussions of "tiret 80" implementation issues of whether Article 11.9 provided for termination where the amount of subsidy is *de minimis* for a specific exporter. Australia recalls that ASCM Article 11.9 reflects or parallels ADA Article 5.8. WTO jurisprudence has found that the *de minimis* test in Article 5.8 does not require a *de minimis* test in Article 9.3 duty assessment procedures and therefore cannot require Members to apply a *de minimis* standard in duty assessment procedures. The DRAMS Panel found that the

term "case" used in the first sentence of Article 5.8 encompassed at a minimum the notions of an "application" and "investigation".

- **Does Brazil consider that Article 19.4 (which provides that no countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist) has any relevance in this context?**

Reply

Brazil considers that Article 19.4 is relevant in the context of the proposal in question. Articles 11.9 and 19 should be interpreted together. The collection of countervailing duties should only occur when the investigation has been concluded and the final determination established the imposition of countervaling duties. Therefore, Brazil considers that no countervailing duties should be collected when the amount of subsidy is found to be "*de minimis*": if it is not allowed to impose duties when the amount of subsidies is "*de minimis*", it should not be allowed to collect duties in such cases.

Proposal under Article 11

Q. Brazil seeks a provision within the ASCM to define the product under investigation and provides an example relating to products destined to different market segments.

- **How does Brazil relate this to ASCM Article 16? Is there any relationship to Article 16 or should there be?**

Australia agrees that determining the scope of the "product under investigation" at the initial stage of the investigation is important. We agree that this has a bearing on what determines the "domestic industry" and the data relevant for the injury investigation and analysis.

Reply

Brazil considers that the definition of domestic industry (Article 16) is closely related to the definition of "product under investigation". The determination of the scope of "product under investigation" is directly linked to the definition of "like product" and consequently to the producers who constitute the domestic industry. A clear definition of the scope of the "product under investigation" would prevent a situation where the scope of the product under investigation is so broad that the investigating authority is able to include in the investigation products which are not produced by the importing country.

Article 12.7

Q. Australia agrees that this is an issue that merits harmonization with the ADA. As Australia noted in document TN/RL/W/22 in regard to proposals seeking more stringent and clearer rules on the use of "facts available" in the ADA, Australia considers that any consideration of clarified rules under the ADA on "facts available" should also be reflected in the ASCM.

Australia wishes to highlight some elements of Annex II of the ADA, namely paragraph 5 and paragraph 7. Paragraph 5 provides that "[e]ven though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided

the interested party has acted to the best of its ability". Paragraph 7 provides that if authorities base their findings on secondary sources, they should do so "with special circumspection".

- **Does Brazil consider that "facts available" should be used by investigating authorities in situations where a firm has provided data but the investigating authorities may not accept the adequacy of the information?**
- **Does Brazil consider that recourse to "facts available" enables the investigating authorities to reject all information provided?**

Reply

Brazil's main objective in this proposal is to further discipline the use of "best information available" in order to enhance transparency and avoid undue discretion when investigating authorities decide to disregard the information presented by the interested parties. Various factors should be taken into consideration in order to guide the use of "best information available": how the interested parties presented the information; whether the information provided was partial or complete; whether the investigating authorities have clearly formulated the questions put forward in the questionnaires; and whether the interested parties had the opportunity to present complementary information or additional explanation.

- **What constitutes "necessary information"? For example, if, by law, information cannot be revealed to third parties, would statements by interested parties constitute "necessary information"?**

Reply

Information provided on a confidential basis can be used - and considered as necessary information -, if it is included in a non-confidential summary which allows a reasonable understanding of the substance of the information submitted in confidence according to Article 12.4.

- **Brazil suggests that Members' WTO notifications could be specified as examples of "independent sources". Given that recent WTO case law has reinforced that notifications have no legal effect, does Brazil consider that the use of notifications to the Committee on Subsidies and Countervailing Measures would give legal effect to such a notification?**

Reply

Brazil considers that although the WTO notifications do not have a legal effect, they could be used as an independent source of information which would confirm the information obtained from secondary sources:for example, the information provided by the petitioner.