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Negotiating Group on Rules

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Revision

The following communication, dated 1 June 2006, is being circulated at the request of the Delegation of Brazil.

I. INTRODUCTION

1. In document TN/RL/GEN/101, Brazil raised some concerns regarding the existence of a benefit for the purpose of parts II and III of the SCM Agreement and the calculation of a benefit under Part V of the SCM Agreement. In this proposal, Brazil wishes to review and complement the previous submission and to clarify what guidelines authorities shall use when estimating market benchmarks.

2. In Brazil - Export Financing Programme for Aircraft, the Panel expressed the view that "although the concept of benefit is not defined in the SCM Agreement, its application in various circumstances suggests that one should examine objective benchmarks". For instance, this could involve "a comparison of the terms of the financial contribution to a market benchmark reflecting the terms under which the beneficiary of the financial contribution would be operating in the absence of the government financial contribution" (WT/DS46/R, para. 7.24, emphasis added).

3. A problem arises when there are no objective benchmarks to be examined. That is to say, there is no marketplace to assess the benefit conferred by financial contributions by governments.

II. PROPOSED TEXTUAL AMENDMENTS

4. Brazil proposes to replace the drafting suggestion contained in document TN/RL/GEN/101, regarding the amendment to Article 1.1, with the following proposed textual amendment:

Article 1

Definition of a subsidy

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

(b) a benefit is thereby conferred.^x

Amended new footnote x:

x. For the purpose of Parts II and III of the Agreement, Article 14 is relevant context for determining the existence of a benefit.

5. Under the same approach, Brazil also suggests the following revised amendments to Article 14:

Article 14

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

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained The calculation of the "benefit" shall be determined on the basis of a comparison between a financial contribution as provided under Article 1.1(a)(1) of the Agreement, and a comparable commercial benchmark, under the prevailing market conditions. If a comparable commercial benchmark is not available under the prevailing market conditions, a reasonable and unbiased estimate of a comparable commercial benchmark shall be made on the basis of positive evidence.^y Furthermore, any such method shall be consistent with the following guidelines:

- 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^z;

Amended new footnote y:

y. The absence of medium or long-term private capital markets in developing country Members shall not, for this reason alone, characterize the existence of a 'benefit' within the meaning of Article 1.1(b). The applicable benchmark to determine the existence of the 'benefit' in this case shall be a comparable commercial financial transaction taking place in the international markets.

Amended new footnote z:

z. In the case there is available public information on commercial loans which the firm could actually obtain in the domestic market, a fair comparison between a "loan by a government" and "the comparable commercial loan which the firm could actually obtain on the market" shall ensue if both loans: 1) are denominated in the same currency; 2) have similar terms and structure; 3) have implicit or explicit guarantees of a similar nature and coverage, and 4) are granted within the territory of the same Member. If one or more of the previous conditions are not met, a reasonable and unbiased estimate of a comparable commercial loan to the firm concerned shall be calculated on the basis of positive evidence.
