

United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, WT/DS257/AB/R, adopted 17 February 2004. United States, Appellant/Appellee; Canada, Appellant/Appellee; European Communities, India and Japan, Third Participants. Division: Baptista, Lockhart and Sacerdoti. **Major Topics Addressed by the Appellate Body: (i) financial contribution by providing goods under Art. 1.1(a)(1)(iii) of the SCM Agreement; (ii) determination of benefit under Art. 14 of the SCM Agreement; (iii) downstream subsidization under Arts. 10 and 32.1 of the SCM Agreement and Art. VI:3 of GATT.**

1. Abstract

This case concerned a complaint by Canada concerning countervailing duties imposed by the U.S. against imports of certain softwood lumber products from Canada. The Appellate Body rejected Canada’s argument that standing timber is not a “good” for purposes of Art. 1.1(a)(1)(iii) of the SCM Agreement. It found that there might be circumstances in which Art. 14 of the SCM Agreement would permit references to data other than prevailing market prices in the member state providing the subsidy, but was unable to complete the analysis with respect to the U.S. use of certain U.S. prices as proxies. It found that under some circumstances an analysis of the extent of “pass-through” of the subsidy on logs to producers of other products who purchase the logs at arm’s length would be required.

2. Facts

The U.S. countervailing duty in this case was levied in response to Canadian provincial government programs that the U.S. Department of Commerce found provided the right to harvest timber at less than adequate remuneration.

3. Analysis of Appellate Body Report

a. Financial Contribution by Providing Goods under Art. 1.1(a)(1)(iii) of the SCM Agreement

Canada argued that standing timber does not constitute “goods” in the sense of Art. 1.1(a)(1)(iii) of the SCM Agreement, and therefore that no financial contribution was made. Canada argued that timber is not tradable in its rooted form. The Appellate Body emphasized that municipal law classifications are not determinative.¹ After considering dictionary definitions and the French and Spanish versions of the SCM Agreement, the Appellate Body found that “goods” may include tangible

¹ Appellate Body Report, para. 56.

property like trees or other crops that are severable.² The Appellate Body also agreed with the panel that the Canadian provincial governments “provided” these goods through stumpage arrangements.³

b. Determination of Benefit under Art. 14 of the SCM Agreement

Here, the U.S. found no useable market-determined prices that could be used as a benchmark by which to determine whether provincial stumpage programs provided goods for less than adequate remuneration. Instead, the U.S. used as a benchmark certain prices in certain U.S. states bordering Canada, making adjustments. The panel agreed with Canada that the U.S. should have used private prices in Canada. On appeal, the U.S. argued that the concept of benefit in Art. 1.1 requires resort to undistorted prices in order to determine the magnitude of the benefit conferred by the subsidy. However Art. 14(d) is explicit in its reference to “prevailing market conditions . . . in the country of provision” The Appellate Body agreed with the panel that Art. 14(d) does not require undistorted market prices as a benchmark.

However, the Appellate Body found that the use of the term “guidelines” in the last sentence of the chapeau of Art. 14 indicates that its terms should not be understood as rigid rules. It found the panel’s reading of Art. 14(d) overly restrictive, frustrating the purpose of Art. 14.⁴ The Appellate Body found that Art. 14(d) does not require the use of private prices in the country of provision in every situation, but that the method selected for calculating the benefit must relate or refer to the prevailing market conditions in the country of provision”⁵

The Appellate Body recognized that where the government is the predominant provider of goods, it can affect the private pricing of goods. Under these circumstances, the Appellate Body found, Art. 14(d) permits the use of a benchmark other than private prices.⁶ The Appellate Body recognized that a variety of proxies or methods could be use, so long as the investigating authority ensures “that the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d).”⁷

The Appellate Body then reviewed the method actually used by the U.S.: reference to certain prices in the U.S. The Appellate Body pointed out that prices in one member cannot be expected to reflect market conditions in another member. However, turning to the panel’s analysis, the Appellate Body found that the panel’s ruling on this issue must be reversed, as it was predicated on the panel’s erroneous

² Appellate Body Report, para. 59.

³ Appellate Body Report, para. 75.

⁴ Appellate Body Report, paras. 95-96.

⁵ Appellate Body Report, para. 96.

⁶ Appellate Body Report, para. 101.

⁷ Appellate Body Report, para. 106.

understanding of Art. 14. The panel did not establish whether private prices in Canada were distorted. The Appellate Body found that there was insufficient information to serve as a basis for it to complete the analysis, in order to determine whether the U.S. measure complied with Art. 14.⁸

c. Downstream Subsidization under Arts. 10 and 32.1 of the SCM Agreement and Art. VI:3 of GATT

The U.S. applied its countervailing duties to certain softwood lumber that passed through independent sawmills and lumber remanufacturers—entities that did not benefit directly from the subsidy—without any analysis of the extent to which the subsidy benefited the independent sawmills and lumber remanufacturers. The question addressed by the Appellate Body was whether a member is required to analyze the extent to which a subsidy conferred on “tenured” timber harvesters or sawmills was “passed through” to other enterprises in arm’s length transactions.

The U.S. conceded that where the subsidy is received by independent harvesters—entities that do not produce softwood lumber—a pass-through analysis would be required. Therefore the question to be answered was whether a pass-through analysis is required with respect to (i) logs sold at arm’s length where a tenured timber harvester processes some of its own logs and sells some of its own logs, or (ii) lumber sold at arm’s length where a tenured timber harvester processes its logs into lumber and sells that lumber at arm’s length to a remanufacturer.

The Appellate Body found that it would not be possible to determine whether countervailing duties are levied in excess of the amount of the subsidy, without establishing the extent to which the subsidies were passed through.⁹ This perspective is also supported by the requirement to determine whether a benefit has been received.¹⁰ Thus, a pass-through analysis is required in order to levy countervailing duties on softwood lumber products produced by independent lumber producers that acquire logs from subsidized producers of logs.

The U.S. referred to Art. 19.3 of the SCM Agreement, which permits aggregate investigations, arguing that aggregate investigations are inconsistent with company-specific pass-through analyses.¹¹ Canada responded that Article VI:3 of GATT and Arts. 10 and 32.1 of the SCM Agreement do not permit subsidization to be presumed. The Appellate Body found that the U.S. argument could only apply once it is determined that a financial contribution and benefit exist.¹²

The Appellate Body therefore upheld the panel’s finding that a pass-through analysis was required in connection with sales of logs by tenured harvesters to

⁸ Appellate Body Report, para. 114-116.

⁹ Appellate Body Report, para. 141.

¹⁰ Appellate Body Report, para. 142.

¹¹ Appellate Body Report, para. 131.

¹² Appellate Body Report, para. 154.

unrelated sawmills. However, the Appellate Body reversed the panel's finding that a pass-through analysis was necessary in connection with arm's length sales of *lumber* by tenured harvesters to unrelated remanufacturers. The difference is that in the latter case, benefits have passed from producers of logs to producers of lumber. Thus, there is no need for a further pass-through analysis between producers of lumber in an investigation conducted on an aggregate basis.

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