IN THE WORLD TRADE ORGANISATION

United States – Countervailing Duty Measures on Certain Products from China

(AB-2014-8/WT/DS437)

Oral Statement
by
Norway as a Third Participant

Geneva
16 October 2014

Mr. Chairman, Members of the Division,

I. Introduction

1. Norway welcomes the opportunity to make a statement as a Third Participant before the Appellate Body in this appeal. Norway did not present a written submission to the Appellate Body. In this oral statement Norway will therefore briefly set out its views on certain aspects of the interpretation of Article 14 (d) of the *Agreement on Subsidies and Countervailing Measures* (hereinafter the *"SCM Agreement*").

2. The People's Republic of China (hereinafter "China") claims that the Panel erred in finding that China failed to establish that the United States acted inconsistently with Article 14 (d) and Article 1.1 (b) of the *SCM Agreement.*

3. One of the reasons for this is that the Panel upheld the rejection by the US Department of Commerce of in-country prices in China as benchmarks in the challenged determinations.[1]

4. Secondly, China argues that the same legal standard for determining what constitutes a "government" for purposes of the financial contribution analysis under Article 1.1 (a) (1) of the *SCM Agreement* should also apply when determining what constitutes a "government" for purposes of the benefit analysis under Article 14 (d) of the *SCM Agreement*. The Panel rejected this legal interpretation by China.[2]

5. Norway will address both of these issues in this oral statement.

II. The term "government" in SCM Article 14(d)

6. Turning first to the term "government" in Article 14(d) of the *SCM Agreement*.

7. Article 1.1(a)(1) of the *SCM Agreement* is the provision that provides the basis for a determination that a subsidy exists. This may be a direct subsidy by a government or a "public body". It may also be a government subsidy that is provided *indirectly,* by using

[1] Appellant Submission of China, paras. 7-60.
[2] Appellee Submission of the United States, paras. 28 and 32.

proxies such as funding mechanisms or "private entities" that are "entrusted or directed" to provide one of the subsidies referred to in that Article.

8. Article 14 serves a different purpose. Article 14 is about the *calculation* of the subsidy *once subsidisation has been established.*

9. We understand the argument of China to be that the term "government" in Article 14 should mean the same as "government" in Article 1.1(a)(1). Article 1.1(a)(1) has a definition of "government " for the purposes of the *SCM Agreement*, and includes "public bodies" in that definition – but not "private bodies" or "funding mechanisms".

10. This argument of China is in our view correct on its face, yet not dispositive for the interpretation of Article 14(d).

11. The reason for this is that subsidisation, as established under Article 1.1(a)(1), covers subsidies that are given both directly as well as indirectly by governments through funding mechanisms and private bodies. Subsidisation that is found to take place under Article 1.1(a)(1)(iv) is not *private* in character, but is considered government subsidies provided by proxy. This is because, as the Appellate Body has stated on previous occasions[3], Article 1.1(a)(1)(iv) is an anti-circumvention provision to ensure that also such *indirect subsidisation through entities that are not government entities as such* will be caught.

12. Once such "subsidisation by proxy" is established, that subsidisation is attributed to the government as an indirect government subsidy. And once such subsidisation is established, that subsidisation by proxy is included as a government subsidy for the purposes of calculating the amount of subsidy in Article 14.

13. This is also clear from GATT Article VI:3, which allows countervailing duties to be applied to indirect subsidisation.

14. A different interpretation would have as a consequence that indirect government subsidisation through a private body or funding mechanism would be caught by Article 1.1(a)(1) – but would thereafter not be part of the subsidy calculation – leading to a lesser

[3] Appellate Body report, *US – DRAMS*, para. 108.

countervailing duty. We do not believe that this would be a proper interpretation of Article 14 of the *SCM Agreement*.

III. Rejection of domestic prices for the bench-mark in Article 14

15. Turning, now, to the issue of the benchmark for the rejection of domestic prices in the benefit calculations.

16. Norway points to the Appellate Body reasoning in *US – Softwood Lumber IV*, where it discussed the rationale for the use of alternative benchmarks where *–and I quote* - "the government's role in providing the *financial contribution* is *so predominant* that it effectively determines the price at which private suppliers sell the same or similar goods".[4] The Appellate Body has found that domestic private prices can be rejected as the benchmark when the investigating authority has "established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods".[5]

17. In our view, this legal analysis requires a three-step approach: First an investigating authority will have to determine according to Article 1.1(a)(1) the scope of subsidisation.

18. Again, subsidies provided by governments or public bodies directly, or subsidies provided indirectly through funding mechanisms or private bodies, are relevant for this analysis. The entity or entities that provide the financial contribution, and the entity or entities whose predominant role in the market may distort private prices should correspond.[6] This follows logically from the structure of the *SCM Agreement*. It does not make sense to exclude a public body or a private body that has made a financial contribution from the determination of predominance and, subsequently, market distortion.

19. Second, an investigating authority should determine the extent of subsidised merchandise in comparison to non-subsidised merchandise.

[4] Appellate Body report, *US- Softwood Lumber IV*, para. 93 (emphasis added for some parts).
[5] Appellate Body report, *US – Softwood Lumber IV*, para. 103.
[6] See also the Appellant Submission of China, paras. 34-35.

20. Norway does not propose a set market share or percentage of merchandise that needs to be subsidised for each and every case. This will depend on the facts of the case. Norway just notes that the combination of the requirement of "predominance" and the requirement of distortions of private prices means that "predominance" is a high threshold.

21. In this context, Norway would like to reiterate that the Appellate Body has found that "the concept of predominance does not refer exclusively to market shares, but may also refer to market power".[7]

22. The third step is the "distortion analysis". In *US – Softwood Lumber IV*, the Appellate Body found that "prices of similar goods sold by private suppliers in the country of provision are the primary benchmark" in terms of determining the adequacy of the remuneration.[8] Furthermore, the Appellate Body underlined that "the possibility under Article 14 (d) for investigating authorities to consider a benchmark other than private prices in the country of provision is very limited".[9]

23. Being a "very limited exception to the primary benchmark", it puts a burden on investigating authorities to show with clear evidence that local non-subsidised prices are generally distorted. Distorted prices cannot be *assumed,* simply based on extrapolations from market shares or the extent of subsidisation, it has to be shown with clear evidence and analysis of price formation and pricing practices in the relevant domestic market. As the Appellate Body has stated on previous occasions, an investigating authority must reach its conclusion of price distortion "based on all the evidence that is put on the record, including evidence regarding factors other than government market share".[10]

24. It is also important, in this respect, to stress that market distortions cannot be assumed simply because prices in a third market are different. No two markets are alike, and the use of third country markets as a proxy is, as stated by the Appellate Body, just a very limited exception.

[7] Appellate Body report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 444.
[8] Appellate Body report, *US – Softwood Lumber IV*, para. 90.
[9] Appellate Body report, *US – Softwood Lumber IV*, para. 102.
[10] Appellate Body report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 443.

Mr, Chairman, Members of the Division, this concludes Norway's statement here today.

Thank you for your attention.