WORLD TRADE ORGANIZATION

TN/RL/W/193
16 November 2005

(05-5393)

Negotiating Group on Rules Original: English

BENEFIT PASS-THROUGH

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 issue of pass-through in the context of a countervailing duty investigation involving upstream subsidies, focusing on Canada's communication on benefit pass-through (TN/RL/GEN/7) which stems from existing GATT/WTO jurisprudence with respect to issues of upstream subsidies in countervailing duty investigations. We reserve the right to submit further communications on the issues in this paper.

II. COMMENTS ON CANADA'S PROPOSED AMENDMENTS

A. The Context In Which Pass-Through Is Relevant

2. In its communication, Canada proposes that a new footnote be added to current Article 1.1(b) of the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement") that codifies existing GATT/WTO jurisprudence to the effect that pass-through must be demonstrated. Brazil notes that, under existing GATT/WTO jurisprudence, the relevance of pass-through analysis is limited to the context of countervailing investigations. Therefore, Brazil understands that any proposed amendment intended to codify existing GATT/WTO jurisprudence should only affect the part of the SCM Agreement applicable to countervailing measures.

3. We recall that established GATT/WTO jurisprudence confirms that countervailing duties may be imposed on a product to offset subsidies granted with respect to its input, or upstream, product. Before imposing such duties, however, an authority must conduct a "pass-through" analysis to determine whether, and to what extent, the subsidies granted to upstream producers benefit unrelated downstream producers who purchase the subsidized upstream product at arm's length. This requirement is consistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement. Under these provisions, only the subsidy bestowed, directly or indirectly, upon the manufacture, production, or export of a product can be offset by a countervailing duty on that product. In examining these provisions, the Appellate Body noted that

> {t}he phrase "subsid[ies] bestowed … *indirectly*", as used in Article VI:3, implies that financial contributions by the government to the production of *inputs* used in manufacturing products subject to an investigation are not, in principle, excluded from the amount of

> subsidies that may be offset through the imposition of countervailing duties on the *processed* products.[1]

In this regard, a pass-through analysis is required because

> it is necessary to analyze to what extent subsidies on inputs may be included in the determination of the total amount of subsidies bestowed upon processed products, {and} it is only the subsidies determined to have been granted upon the processed products that may be offset by levying countervailing duties on those products.[2]

4. In contrast, the Appellate Body has held that a pass-through analysis is not required for a serious prejudice claim under Article 6.3(c) of the SCM Agreement with respect to actionable subsidies. The Appellate Body explained:

> As we have already noted, the requirement in Article VI:3 of the GATT 1994 and Article 19.4 of the *SCM Agreement* that countervailing duties on a product be limited to the amount of the subsidy accruing to that product finds no parallel in the provisions on actionable subsidies and pertinent remedies under Part III of the *SCM Agreement*. Therefore, the need for a "pass-through" analysis under Part V of the *SCM Agreement* is not critical for an assessment of significant price suppression under Article 6.3(c) in Part III of the *SCM Agreement*.[3]

5. Given that Canada raised the issue of pass-through in the context of countervailing duty investigations, any amendments in this regard should, accordingly, be limited to Part V of the SCM Agreement regarding countervailing measures. In this respect, the introduction of a footnote to Article 1 of the SCM Agreement, as suggested by Canada, would make unnecessary changes to the well-established definition of a subsidy and would inappropriately expand the burden associated with demonstrating pass-through to Parts II and III. Amendments related to pass-through should not affect the definition of a subsidy or the multilateral disciplines regarding prohibited and actionable subsidies under Part II and Part III of the SCM Agreement. Brazil is open to suggestions regarding the introduction of a footnote addressing pass-through effect in Part V, in line with the existing jurisprudence.

B. The Rebuttable Presumption of No Pass-Through

6. Canada's submission also proposes that an Annex VIII be added, containing two elements, one of them being a concept of "rebuttable presumption", whereby transactions conducted at arm's length "shall be subject to a rebuttable presumption that the benefit […] has not passed through". It is worth noting that such a proposal finds no support in the existing GATT/WTO jurisprudence. While panels and the Appellate Body have required that investigating authorities not presume pass-through of benefits without an analysis to this effect, they have not gone so far as to require that **authorities presume the opposite is true,** *i.e.*, that there is no pass-through of benefits. By going beyond

[1] Report of the Appellate Body, *United States - Final Countervailing Duty Determination With Respect To Certain Softwood Lumber From Canada* ("*US - Lumber CVDs Final*"), WT/DS257/AB/R, adopted 17 February 2004, para. 140 (italics original).

[2] *Id.*

[3] Report of the Appellate Body, *United States - Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, 472 (footnote omitted).

existing jurisprudence, Canada's proposal would impose a higher burden than is necessary in cases involving subsidies to upstream producers.

C. Relevant Considerations in A Pass-Through Analysis

7. As a second element in the proposed new Annex, Canada suggests that several factors "shall be considered" in determining whether any benefit has passed through. In light of the limited GATT/WTO jurisprudence in this regard, Brazil believes that, in principle, it is premature to require such specific methodologies. We observe that, in all instances where pass-through was addressed, panels and the Appellate Body focused on the issue of "**whether," rather than "how,"** the Member concerned conducted a pass-through analysis in order to determine the existence and amount of countervailable subsidies.

8. For example, while a GATT panel offered examples of the factors to be considered in a pass-through analysis, it emphasized that it was not its task to identify these factors.[4] Similarly, in *US - Lumber CVDs Final*, neither the panel nor the Appellate Body suggested any factors that must be considered in a pass-through analysis.

9. Indeed, whether and how a benefit is passed through is highly fact specific, as indicated by existing jurisprudence. We deem it would be a considerable challenge to envisage all possible factual scenarios and consequent relevant factors for pass-through determinations in all future cases. Moreover, the imposition of a set of precise methodologies may prove overly restrictive on the ability of Members to address countervailable subsidies effectively and may give rise to even more controversies in future interpretations of the SCM Agreement.

III. CONCLUSION

10. Brazil welcomes Canada's suggestion of addressing pass-through effects of subsidies within the limits of existing GATT/WTO jurisprudence.

[4] *See United States - Countervailing Duties on Fresh, Chilled and Frozen Pork From Canada*, DS7/R - 38S/30, adopted on 11 July 1991, at para. 4.9.