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1 ARTICLE 20

1.1 Text of Article 20

Article 20

Retroactivity

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

20.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

20.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

1.2 Anti-Dumping Agreement

1. As the text of Article 20 of the SCM Agreement largely parallels the text of Article 10 of the Anti-Dumping Agreement, see also the Section on that Article of the Anti-Dumping Agreement.

1.3 Retroactive application of countervailing duties

2. The Panel in *US – Softwood Lumber III* noted that Article 20 only provides for the exceptional retroactive application of definitive duties, but not of provisional duties:

"As its text indicates, Article 20.1 SCM Agreement provides that provisional measures and countervailing duties shall only be applied to products entering the country following the imposition of such measures, '*subject to the exceptions set out in this Article*'. While Article 20.2 and Article 20.6 SCM Agreement provide for explicit exceptions in the case of the *definitive* countervailing duties, we find no similar exceptions relating to provisional measures. Article 20.2 SCM Agreement sets forth the circumstances in which definitive countervailing duties may be applied retroactively for the period during which provisional measures were applied. Similarly, in critical circumstances, Article 20.6 SCM Agreement allows for the definitive duties to be assessed on imports which entered the country from 90 days prior to the date of application of the provisional measures.

...

... In respect of the starting-point for the application of provisional and final measures, Article 20 SCM Agreement thus establishes two exceptions to the general rule of non-retroactivity of final countervailing duties and no exceptions to the general rule of non-retroactivity of provisional measures. Nothing in Article 20 SCM Agreement provides an exception to the rules relating to the minimum period between initiation and application of provisional measures or the maximum period of application of such measures as provided for in Article 17.3 and 17.4 SCM Agreement."¹

3. On the basis of the "clear language in the SCM Agreement", the Panel in *US – Softwood Lumber III* found that "the general rule of non-retroactivity applies to provisional measures, without exceptions", and concluded that the retroactive application of the provisional measure imposed by the Member was inconsistent with Article 20.6 of the SCM Agreement.² The Panel agreed "that a Member is allowed to take measures which are necessary to preserve the right to later apply definitive duties retroactively. In our view, an effective interpretation of the right to apply definitive duties retroactively requires that a Member be allowed to take such steps as are necessary to preserve the possibility of exercising that right". The Panel considered that "what kind of measures may thus be taken by the Member concerned will have to be determined on a case-by-case basis."³

4. However, the Panel in *US – Softwood Lumber III* rejected the argument that suspension of liquidation and the posting of a cash deposit or bond are necessary for the Member's authorities to collect *definitive* duties retroactively, as is expressly permitted under Article 20.6 of the SCM Agreement. The Panel considered on the basis of "effective treaty interpretation" that the express permission in Article 20.6 to apply definitive duties retroactively up to 90 days prior to the application of the provisional measures leads to the conclusion that Article 20.3 *does not* preclude the imposition of definitive duties on entries for which no cash deposit or bond was collected. The Panel held that:

"Article 20.3 SCM Agreement states that if the amount guaranteed by the cash deposit is lower than the definitive countervailing duty, the difference shall not be collected. If the reverse is true, the excess amount shall be reimbursed and the bond released in an expeditious manner. Article 20.3 SCM Agreement thus concerns the wholly different issue of how to deal with a discrepancy between the provisional and the final rates of the countervailing duty. It does not address the retroactive imposition and collection of definitive duties for the period before the application of provisional measures. Article 20.6 SCM Agreement provides that definitive duties may in certain circumstances be assessed on imports which were entered for consumption from 90 days *prior to the date of application of provisional measures*.

¹ Panel Report *US – Softwood Lumber III*, paras. 7.93 and 7.100.

² Panel Report *US – Softwood Lumber III*, para. 7.94.

³ Panel Report *US – Softwood Lumber III*, para. 7.95.

The text thus clearly indicates that the Agreement allows for the retroactive application of definitive duties at a time when no provisional measures were in place and thus no provisional duties were collected. To accept the US argument that Article 20.3 SCM Agreement would preclude a Member from collecting definitive duties for the period prior to the date of application of provisional measures, would mean that a Member doing what Article 20.6 SCM Agreement expressly allows for, would be violating the Agreement nevertheless. We cannot accept an interpretation which leads to this contradictory result. We consider that the principle of effective treaty interpretation requires the treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously'.⁴

1.4 Relationship with other provisions

1.4.1 Articles 17.3 and 17.4 of the SCM Agreement

5. The Panel in *US – Softwood Lumber III* considered that "[n]othing in Article 20 SCM Agreement provides an exception to the rules relating to the minimum period between initiation and application of provisional measures or the maximum period of application of such measures as provided for in Articles 17.3 and 17.4 SCM Agreement".⁵

1.4.2 Article X:2 of the GATT 1994

6. In *US – Countervailing and Anti-Dumping Measures (China)*, the respondent argued that Article 20 of the SCM Agreement, and Article 10 of the Anti-Dumping Agreement, would be rendered redundant if Article X:2 were interpreted to prohibit "the enforcement of a measure in respect of events or circumstances that occurred before it was officially published".⁶ The Panel rejected this argument, explaining that:

"Articles 20 and 10 apply to provisional measures, countervailing duties and anti-dumping duties. Even assuming that such measures fall within the scope of Article X:2 (and we make no finding in this regard), we note that Articles 20 and 10 are different from Article X:2 in that unlike the latter, which talks about enforcement of a measure before that same measure has been published, Articles 20.1 and 10.1 talk about application of a measure (e.g. a countervailing duty) after the entry into force of another measure (e.g. the preliminary or final determination). Due to these differences, it is not apparent to us that Articles 20 and 10 are simply 'unnecessary' in view of Article X:2 as we interpret it. Furthermore, as the United States itself notes, Articles 20.2 and 10.2 stipulate important exceptions to permit the retroactive levying of countervailing duties and anti-dumping duties in certain situations. These provisions would not be redundant if Article X:2 also applied in the situations covered by Articles 20.2 and 10.2. This is because even if Article X:2 applied in these situations, the SCM Agreement and the Anti-Dumping Agreement would be *leges speciales* in relation to Article X:2. Consequently, it is the provisions of these agreements that would be applied rather than Article X:2. Furthermore, the fact that Articles 20.2 and 10.1 on an exceptional basis permit the retroactive levy of countervailing duties and anti-dumping duties does not support the conclusion that Article X:2 permits enforcement of a measure in respect of events or circumstances that have occurred before its official publication."⁷

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⁴ Panel Report *US – Softwood Lumber III*, paras. 7.96-7.97.

⁵ Panel Report *US – Softwood Lumber III*, para. 7.100.

⁶ Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.114.

⁷ Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.114.