

# Regional Trade Remedies Workshop

Benchmarks

# Some important observations of the Appellate Body in DS 379

- The mere fact that loans are supplied by a government is not in itself sufficient to establish that such loans are not "commercial" and thus incapable of being used as benchmarks under Article 14(b) of the SCM Agreement. An investigating authority would have to establish that the government presence or influence in the market causes distortions that render interest rates unusable as benchmarks.
- Article 14(b) does not preclude the possibility of using as benchmarks interest rates on commercial loans that are not actually available in the market where the firm is located, such as, for instance, loans in other markets or constructed proxies.

## DS 379 contd./

- Under Article 14(b), the benchmark to measure benefit is "the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market", while, under Article 14(d), it is the "prevailing market conditions for the good or service in question in the country of provision or purchase".
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- In contrast to Article 14(d), which clearly connects the relevant "market" to "the country of provision or purchase", Article 14(b) does not specify expressly any geographical or national scope for what is the relevant "market" within which a comparable commercial loan should be identified.

## DS 379 contd./

- The possibility of resorting to a proxy under Article 14(b) is consistent with the use of the conditional tense: "would pay" and "could actually obtain on the market". In the absence of an actual comparable commercial loan that is available on the market, an investigating authority should be allowed to use a proxy for what "would" have been paid on a comparable commercial loan that "could" have been obtained on the market.
- In spite of the different formulations used in Article 14(b) and (d), some of the reasoning of the Appellate Body in US – Softwood Lumber IV concerning the use of out of-country benchmarks and proxies under Article 14(d) is equally applicable under Article 14(b).

## DS 379 contd./

- In particular, a certain degree of flexibility also applies under Article 14(b) in the selection of benchmarks, so that such selection can ensure a meaningful comparison for the determination of benefit.
- **At the same time, when an investigating authority resorts to a benchmark loan in another currency or to a proxy, it must ensure that such benchmark is adjusted so that it approximates the "comparable commercial loan"**. Moreover, in accordance with the chapeau of Article 14, any such method, as well as how it approximates the loan in another currency or the proxy to a "comparable commercial loan which the firm could actually obtain on the market", must be transparent and adequately explained.