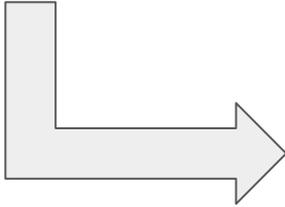


US Countervailing Measures (China)



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Context



- **Complainant:** China
- **Respondent:** United States
- **Panel Report circulated:** 14 July 2014
- **Appellate Body Report circulated:** 18 December 2014
- **Article 21.3(c) Arbitration Report circulated:** 9 October 2015
- **Article 21.5 Panel Report circulated:** 21 March 2018

Key Terms

Countervailing (CVDs) - also known as anti-subsidy duties, are trade import duties imposed under WTO rules to neutralize the negative effects of subsidies.

Public body - is commonly a corporation created by state

Export subsidies - government policy to encourage export of goods through direct payments, low-cost loans, tax relief for exporters

The main issue (DS437)

In May. 25. 2012 China requests consultation with the United States of Countervailing measures.

The products including “Thermal paper, pressure pipe, line pipe, citric acid, lawn groomers, kitchen shelving, oil country tubular goods, wire strand, magnesia bricks, seamless pipe, print graphics, drill pipe, aluminium extrusions, steel cylinders, solar panels, wind towers, and steel sinks from China.”

Case (DS437)

13 February 2015

U.S. informed the DSB that it intended to implement the DSB's recommendations it would need a reasonable period of time

2015

2016

13 May 2016

China requested consultations pursuant of the DSU, in connection with the U.S.' alleged failure to implement the recommendations

2018

26 June 2018

Appellate Body indicated that Division members it would not be possible for the Division to focus on the consideration of this appeal

26 June 2015

China requested that the reasonable period of time be determined through binding arbitration

27 April 2018

The U.S. notified the DSB of its decision to appeal to the Appellate Body

14 months, 16 days.

Case (DS437)

**ASCM Art. 1.1(a)(1)
(definition of “public
body”)**

The Panel found USDOC acted inconsistently on defining public body

2012

**ASCM Art. 2.1c
(specificity):**

The Panel found that the USDOC acted inconsistently because the evidence of “systematic activity” or “series of activities”

**ASCM Art. 11.3
(export restraints)**

The Panel found that the USDOC acted inconsistently based on solely on the existence of export restraints and their prices uppression effect

2014

**ASCM Arts. 1.1(b) and
14(d) (benefit
benchmark)**

The Panel found that the USDOC reject in-country private prices in China as benchmarks in its benefit analysis.

**ASCM Art. 12.7 (use of
“facts available”)**

The Panel found that USDOC acted inconsistently by not relying on facts available on the record

Business Context

- The export products disrupted U.S' market place
- This case corrects the US countervailing measures and guarantees fair competition in the market.

Political Context

- This case identified the differences between state-owned enterprises and the public bodies in China.
- China used the Accession Protocol to help safeguard its own interests.

United States' Position

The U.S. Department of Commerce (USDOC) began to countervailing measure on such products after 17 investigations of countervailing duties between 2007 and 2012.

The U.S. Department of Commerce's investigation of magnesia bricks and seamless pipes violates Article 11.3 of the SCM Agreement. The USDOC's misjudgement of export quotas constitutes a subsidy.

China's Position

China contradicts the allegedly from US Department of Commerce (USDOC): “majority government ownership is sufficient to treat an enterprise as a ‘public body’”.

China also declares that the following measures are inconsistent

GATT 1994: Article VI (Anti-dumping and Countervailing Duties)

SCM Agreements: Article 1.1, 2, 11.1, 11.2, 11.3, 12.7 and 14(d)

Protocol of Accession of China: Article 15

Panel Group

On August.20.2012: China requested the establishment of an expert group

On 28 September 2012: The Panel was established

Australia, Brazil, Canada, the European Union, India, Japan, Korea, Norway, Russia, Turkey, Vietnam and Saudi Arabia had joined the third-party.

Panel Decisions

The panel found that “certain Chinese state owned enterprises were “public bodies” based solely on the grounds that they were majority owned, or otherwise controlled, by the Government of China”, which is not inconsistently with USDOC’s action.

The panel supported the appeal that Initial rulings on wind towers and steel sinks are not specified in China's request for consultation, and therefore do not fall within the terms of reference of the expert group.

The Panel Group noted that SCM Article 2.1 did not specify a specific review order nor did it require the review authorities to identify the existence of subsidies on the basis of a written plan

The Panel found that USDOC did not act inconsistently with Art. 12.7 by not relying on facts available on the record.

The Panel found that the USDOC 's investigation of magnesia bricks and seamless pipes violates Article 11.3 of the SCM Agreement. The USDOC’s misjudgement of export quotas constitutes a subsidy.

Findings from Appellate body

The Appellate Body found that China did not establish that the USDOC acted inconsistently with the obligations of the United States under SCM Article 2.1 Agreement by analyzing specificity exclusively under Article 2.1(c).

The Appellate Body found that the Panel acted inconsistently with its obligations under Article 11 of the DSU in assessing China's claims under Article 12.7 of the SCM Agreement.

The Appellate Body does not consider that SCM Article 12.7 contains many different obligations. Therefore, the Appellate Body supported the panel's ruling that China's request for "facts of available" met the requirements of DSU Article 6.2.

Specific agreement and provisions

SCM Arts. 1.1(a)(1) (definition of “public body”): “For the purpose of this Agreement, a subsidy shall be deemed to exist if: (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”).”

SCM Arts. 2.1 (specifically) “In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as “certain enterprises”) within the jurisdiction of the granting authority.”

SCM Arts. 12.7 (Evidence): “In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.”

SCM Arts. 11.3 (Initiation and Subsequent Investigation): “The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.”

SCM Arts. 14 (d) (Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient): “ the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. ” **Arts. 1.1 (b)** states that this can be conferred as benefit.

Consistencies

- Article 2.1 (specificity) - US acted consistently
- Article 12.7 (use of facts available)- US acted consistently

Inconsistencies

- Article 1.1(a)(1) (definition of public body)- US acted inconsistently
- Articles 1.1(b) and 14(d) (benefit benchmark)- US acted inconsistently
- Article 11.3 (export restraints)- US acted inconsistently

Implementation

- January 2015- DSB adopted the AB and Panel Reports
- February 2015- US intention to implement the DSB's recommendation (but needs reasonable amount of time to do so)
- June 2015- China demands that a reasonable amount of time be set by the DSU (through a binding arbitration process)
- October 2015- Arbitrator assigned reasonable amount of time for implementation (14 mo, 16 days w/exp date of 04/01/2016)

Implementation Continued

- April 2016 (04/15)- China & US informed the DSB that they reached Agreed Procedures under Articles 21 & 22.
- May 2016-China returned to the WTO for consultations and to establish a compliance panel
- July 2016- Request to re-establish original panel
- September -November 2016- Request to establish new panel, new panel established
- March 2018- Compliance panel report circulated to members
- April 2018- US decides to appeal findings of compliance report
- May 2018- China decides to cross-appeal
- June 2018- 60 period expired- no action taken due to “huge backlog” and vacancies on the AB.

Observation/Proposal

1. Fill AB Vacancies
2. Get a handle on the apparent “backlog”
 3. Apply sanctions to US
 4. Revisit Article 1.1(a)(1)

