

10. UNITED STATES - DEFINITIVE ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN PRODUCTS FROM CHINA

A. REPORT OF THE APPELLATE BODY (WT/DS379/AB/R) AND REPORT OF THE PANEL (WT/DS379/R)

- Madame Chair, the United States first would like to thank the Panel, the Appellate Body, and the Secretariat staff assisting them for their work in this proceeding.
- Although we disagreed with several of the Panel's findings, we recognize the Panel's efforts in grappling with the numerous complex issues in this dispute, including, in particular, the use of out-of-country benchmarks to measure benefit under Article 14 of the SCM Agreement, the determination of whether a subsidy is specific within the meaning of Article 2 of the SCM Agreement, the proper interpretation of the term "public body" under Article 1 of the SCM Agreement, and China's novel claims relating to the concurrent application of countervailing duties (CVDs) and antidumping duties (ADs) calculated using a nonmarket economy (NME) methodology.
- The United States considers that the Panel's findings with respect to these four issues reflect a proper legal analysis of the SCM Agreement. On appeal, the Appellate Body upheld in part and reversed in part the findings relating to the use of out-of-country benchmarks to measure benefit, upheld the determination of specificity, and reversed the Panel's findings relating to the interpretation of the term "public body" and relating to China's claims regarding the concurrent application of CVDs and NME ADs.
- The United States is deeply disappointed with the findings in the Appellate Body report related to the interpretation of the term "public body" and China's claims related to the concurrent application of CVDs and NME ADs, and considers that the report's reasoning is based on a number of problematic assertions and assumptions.
- Today we would like to discuss a few key issues that we believe should be of serious concern to all Members.

Public Body

- The U.S. concerns with the interpretation of the term "public body" in Article 1 of the SCM Agreement extend both to the legal reasoning employed in the Appellate Body report and to its real-world ramifications.
- Under the SCM Agreement, a Member may countervail a subsidy by "a government **or any public body** within the territory of a Member".
- In the underlying investigations, the United States determined that certain state-owned enterprises were public bodies, because the Chinese Government was the majority owner of these enterprises and therefore controlled them.

- Prior panels in *Korea – Commercial Vessels* and *EC – Large Civil Aircraft*, like the Panel in this dispute, have interpreted the term “public body” as meaning an entity controlled by the government.³
- Despite acknowledging that the ordinary meaning of “public body” **can** encompass entities controlled by the government,⁴ the Appellate Body report concluded that government ownership and control does not make an entity a “public body,” but that the entity must possess, exercise, or be vested with “governmental authority” and be performing a “governmental function.”⁵
- To reach this result, the report relies in part on context, in particular a subparagraph in the definition of a subsidy that establishes that financial contributions can also be provided through private bodies when they are entrusted or directed to do so by a government or a public body. The report then asserts that **every** public body must therefore be able to entrust or direct private bodies to provide financial contributions, and concludes that public bodies must necessarily possess governmental authority in order to do so.⁶
- In the view of the United States, this conclusion is a non sequitor. While it may be the case that some public bodies have authority to entrust or direct a private body, nothing in the text of the SCM Agreement requires that all public bodies have the authority to do so. Indeed, it should be plain to all Members that not even all organs of a government will have authority to entrust or direct a private body to make a financial contribution.
- In addition, the report reasons that, because a particular action listed in the definition of a subsidy – “a decision to forego or not collect government revenue that is otherwise due” – “appears to constitute conduct inherently involving the exercise of governmental authority,” then a public body must be an entity vested with certain governmental responsibilities, or exercising certain governmental authority.⁷
- This, once again, is a non sequitor, and the report offers no explanation for why the functions other than foregoing government revenue that are identified in Article 1 of the SCM Agreement should be considered “governmental functions.”

³See *Korea – Commercial Vessels*, paras. 7.50, 7.172, 7.353, and 7.356; *EC – Large Civil Aircraft (Panel)*, para. 7.1359; Panel Report, para. 8.94.

⁴Appellate Body Report, para. 285.

⁵Appellate Body Report, para. 317, 318.

⁶Appellate Body Report, paras. 291-297.

⁷Appellate Body Report, para. 296.

- We also note that the Appellate Body report rejects the Panel report's conclusion that the term "or" in the definition of a subsidy indicates that the terms "government" and "public body" are separate concepts with distinct meanings.⁸
- Ultimately, it appears that the interpretation in the Appellate Body report collapses the terms "government" and "public body," such that there is no purpose for the term "public body" to have been included by Members in the SCM Agreement at all. Reading terms out of an agreement is contrary to the customary rules of treaty interpretation.
- In moving away from an objective "control" standard, as adopted by this Panel and previous panels, the Appellate Body report adopts an undefined "governmental authority" standard. The test created by the Appellate Body report appears to require an additional analysis into what constitutes "governmental authority" within the domestic legal system of the exporting Member. There is, in addition, no elaboration in the report as to how to determine whether the entity in question possesses or exercises such authority.
- In a CVD case, such an analysis could place a considerable additional burden on the responding companies and governments to provide appropriate data, as well as on administering authorities to collect and analyze all of the appropriate data.
- It may be difficult in many instances to identify concrete evidence establishing that SOEs are vested with or exercising "governmental authority," despite the fact that they are owned by the government.
- Yet at the same time, governments can and do use SOEs as key instruments through which to manage national economic activity. In such cases, the pricing policies of SOEs in NMEs can be very trade distorting – primarily the provision of inputs and financing at below-market rates.
- Consequently, the Appellate Body report could make it much more difficult to address trade-distorting subsidies provided through SOEs.

Concurrent Application of CVDs and NME ADs

- The United States is similarly concerned with both the legal reasoning and the real-world implications of the findings in the Appellate Body report related to the concurrent application of CVDs and NME ADs. The United States is concerned that these findings do not appear to derive from the text of the SCM Agreement, and that the reasoning employed would not seem to support the findings in the report.

⁸Appellate Body Report, para. 289.

- The Appellate Body report finds that a Member may not concurrently impose CVDs and NME ADs without taking affirmative steps to ensure that concurrent application does not result in a so-called “double remedy.”
- It is important to bear a few things in mind when considering this result. First, no provision of either the AD or SCM Agreement restricts a Member’s ability to apply NME ADs and CVDs concurrently. Each of the two agreements disciplines a different remedy, and neither agreement conditions or limits the ability of a Member to apply a CVD on whether or not the AD is calculated using an NME approach.
- Second, the Panel report noted that a predecessor agreement, the Tokyo Round Subsidies Code, did expressly limit the ability of parties to that agreement to apply a CVD concurrently with an NME AD, but WTO Members did not agree to include such a limitation in the WTO agreements. The Appellate Body report found this irrelevant, even though in other contexts it has stated that omission of language or silence on an issue must be given some meaning.⁹ The United States is puzzled by the different approach in this dispute.
- Third, the Panel correctly noted that Article VI:5 of the GATT 1994 prohibits the application of antidumping and countervailing duties to compensate for the same situation of dumping or *export* subsidization and found it significant that no similar prohibition exists in the covered agreements with respect to *domestic* subsidization.¹⁰
- However – despite recognizing that, “in the case of domestic subsidies, an express prohibition is absent” from the text of the covered agreements¹¹ – the Appellate Body report nevertheless creates a prohibition on the imposition of a so-called “double remedy” through the concurrent application of CVDs and NME ADs.
- The conclusion in the Appellate Body report is based entirely on Article 19.3 of the SCM Agreement. This article provides that, where CVDs are imposed, they shall be levied in the “appropriate amounts in each case.”¹²
- The Appellate Body report’s expansive interpretation of the term “appropriate amounts” ignores the fact that Article 19 of the SCM Agreement is not concerned with the definition or calculation of CVDs, still less with the existence of concurrent antidumping proceedings, but rather is concerned with the “[i]mposition and [c]ollection” of CVDs.

⁹Appellate Body Report, para. 579-581.

¹⁰Panel Report, paras. 14.117-118.

¹¹Appellate Body report, para. 567.

¹²Appellate Body Report, paras. 547-563, 582-583.

- Article 19.3 directs importing Members to impose CVDs on imports from “all sources found to be subsidized and causing injury” except producers who have renounced subsidies or entered into undertakings. The reference to assessing CVDs in “appropriate amounts” refers simply to the fact that the CVD on particular imports may vary, even though a CVD should be imposed in a non-discriminatory manner.
- The report turns this clause in Article 19.3 into an obligation concerning the amount of the CVD. In the process, the report creates a subjective standard for what is an “appropriate” amount, derived from a wide variety of unrelated provisions – *e.g.*, the “desirab[ility]” of a lesser duty rule.¹³ None of these provisions, though, addresses the concurrent application of ADs and CVDs.
- As a result, the report introduces unpredictability into the SCM Agreement. Members have no certainty in determining what will constitute an “appropriate” amount of a CVD in any given situation.
- To compound the problem, the report appears to impose the entire burden of proving that there is no “double remedy” on the importing Member. Contrary to other situations, the exporting Member seemingly does not need to demonstrate that the CVD is in excess of the “appropriate” amount. It would appear to be enough that the exporting NME Member simply demonstrate that both CVDs and NME ADs are applied concurrently.¹⁴
- Because the report imposes new obligations that do not appear to derive from the text of the covered agreements, its findings in this regard appear inconsistent with Article 19.2 of the DSU.
- The United States would also like to express its concerns with the decision to complete the analysis with respect to this claim. Despite the fact that the Panel report expressly made no findings with respect to the existence of any actual “double remedy” in any of the investigations at issue, and despite the fact that China presented no evidence regarding the existence of any specific instance of a “double remedy” in any of the investigations, the Appellate Body report nonetheless completed the analysis and found the U.S. measures inconsistent with Article 19.3.
- In doing so, the report states that USDOC dismissed the arguments of Chinese respondents and the Government of China on the ground that it had no statutory authority to make any adjustment and that USDOC “refused outright to afford any consideration to the issue.”¹⁵ The report does not cite to any findings in the Panel report to support these factual statements. What the Panel report actually says is that, in the context of the

¹³See SCM Agreement, Article 19.2.

¹⁴Appellate Body Report, paras. 602, 605-606.

¹⁵Appellate Body Report, para. 604.

antidumping investigations, the United States rejected China's suggestion that the USDOC made any broad pronouncement as to whether it lacked legal authority.¹⁶

- In addition, the United States rejects the suggestion that USDOC refused to afford any consideration to the issue in its determination. The United States explained that USDOC considered what facts and argumentation were offered. The assertions in the Appellate Body report do not accurately characterize USDOC's actions and are not the type of uncontested facts upon which the analysis has been completed in other Appellate Body reports.
- We again would note certain practical concerns that arise from these findings, which may seriously hinder Members' ability to address trade-distorting subsidies by an NME Member.
- The Appellate Body report appears to impose significant administrative burdens on Members' trade remedy administrators in the situation of concurrent application of CVDs and NME ADs.
- If required, measuring the effect of a subsidy on the export price of a good and other components of the dumping margin may involve highly complex economic and econometric analysis. The difficulties associated with such measurement may be significant.
- This raises serious questions about whether Members will be able to address trade-distorting subsidies by NME Members.

Conclusion

- We believe these findings in the Appellate Body report should be of concern to all Members, both because of the legal analysis from which they resulted, and also the potentially serious limitations they may impose on Members' ability to address trade-distorting subsidies.
- Thank you, Madame Chair, and thanks to my fellow delegates for your attention to our statement.

¹⁶Panel Report, para. 14.16.