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US Countervailing Measures (China) (DS437)

Adopted by DSB	16 January 2015
Complainant	China
Respondent	United States
Third Parties	Australia; Brazil; Canada; European Union; India; Japan; Korea, Republic of; Norway; Russian Federation; Turkey; Viet Nam; Kingdom of Saudi Arabia

Measures at Issue

Various aspects of 17 countervailing duty investigations conducted by the United States' Department of Commerce (USDOC) from 2007 through 2012.

Main Adopted Findings of the Panel and Appellate Body

Terms of Reference

The Appellate Body rejected the United States' claim that the Panel erred in concluding that China's panel request, as it related to China's facts available claims under Article 12.7 of the SCM Agreement, was consistent with Article 6.2 of the DSU.[1]

Initiation of Investigations

The Panel found that the USDOC's initiation of certain countervailing duty investigations regarding certain export restraints was inconsistent with Article 11.3 of the SCM Agreement,[2] but that China had failed to demonstrate that the USDOC acted inconsistently with Article 11 of the SCM Agreement by initiating certain investigations with insufficient evidence of relevant financial contributions or specificity.[3]

Public Body

The Panel found that the USDOC's 'rebuttable presumption' that a majority government-owned (or otherwise government-controlled) entity is a 'public body' is inconsistent 'as such' with Article 1.1(a)(1) of the SCM Agreement, and that the USDOC acted inconsistently with the same article when it determined in certain countervailing duty investigations that enterprises were public bodies by virtue of their government-owned/controlled status.[4]

1 Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.28.
2 Panel Report, *US – Countervailing Measures (China)*, para. 7.406.
3 Ibid., paras. 7.155 and 7.281–7.283.
4 Panel Report, *US – Countervailing Measures (China)*, paras. 7.75 and 7.128.

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Benefit

The Appellate Body reversed the Panel's finding that China had failed to establish that the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by rejecting in-country private prices as potential benchmarks in benefit analyses on the grounds that such prices were distorted. The Appellate Body completed the analysis and found that the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by rejecting such in-country private prices in certain countervailing duty investigations.[5]

Specificity

The Appellate Body (1) upheld the Panel's finding that China did not establish that the USDOC acted inconsistently with Article 2.1 of the SCM Agreement by analyzing specificity exclusively under Article 2.1(c), rather than engaging in analyses under the subparagraphs of Article 2.1 in sequence;[6] (2) reversed the Panel's finding that China had not established that the USDOC acted inconsistently with Article 2.1 by failing to identify a 'subsidy programme' in each of the specificity determinations at issue, but declined to complete the analysis;[7] and (3) reversed the Panel's finding that China had not established that the USDOC acted inconsistently with Article 2.1 by failing to identify a 'granting authority' in each of the specificity determinations at issue, but declined to complete the analysis.[8]

The Panel found that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to take into account the two factors listed in the last sentence of Article 2.1(c) when making specificity determinations in certain countervailing duty investigations.[9] The Panel also upheld the majority of China's claims that the USDOC acted inconsistently with Article 2.2 of the SCM Agreement when making certain findings regarding regional specificity.[10]

Facts Available

The Appellate Body found that the Panel had acted inconsistently with its obligations under Article 11 of the DSU because it had inadequately assessed whether the USDOC's use of 'adverse' facts available in 42 instances was based on facts that appeared on the record of the investigations. The Appellate Body, therefore, reversed the Panel's finding that China failed to establish that the USDOC acted inconsistently with the United States' obligations under Article 12.7. The Appellate Body, however, declined to complete the analysis.[11]

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5 Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.80 and 4.107.
6 Ibid., para. 4.132.
7 Ibid., paras. 4.151 and 4.157.
8 Ibid., paras. 4.171 and 4.173.
9 Panel Report, *US – Countervailing Measures (China)*, para. 7.256.
10 Ibid., paras. 7.354–7.356.
11 Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.198 and 4.209.

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