

On the Change of the Legal Standards for “Public Body” in the WTO Subsidy and Countervailing Agreement

-- Take China’s Victory in WTO v. the United States as an Example

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Abstract: The WTO Agreement on Subsidies and Countervailing Measures (ASCM) defines a subsidy as having four elements, of which the "public body determination criterion" is designed to ascertain whether a state-owned enterprise (SOE) constitutes the subject of a subsidy, and is an important prerequisite for confirming the establishment of a subsidy. However, neither the WTO nor other international organizations have clearly specified this concept. In DS437, one of the points of contention was the criteria for determining a "public body". On 16 June 2019, the WTO published the Appellate Body (AB)'s report, whose explanation of the "public body" determination substantially rejects China's argument and to some extent supports U.S. claim. This ruling shows that the risk of China's SOEs being recognized as public bodies will continue to exist, leaving room for other countries' countervailing agencies to investigate. In this regard, China should further promote the "governmental authority Theory", while continuing to deepen the mixed-ownership reform of SOEs, so as to get out of the predicament of SOEs participating in international competition.

Keywords: Public Authorities; Countervailing; Government Authority Theory; State-owned Enterprise.

1. Introduction

Nowadays, China is the country most often targeted by other countries around the world for anti-dumping and countervailing practices and is also the main object of abusive trade practices by many nations, and the determination of the public body has been one of the core contentious issues in the counter-investigations of other countries against China. Under the current WTO regime, the determination of such issues is mainly governed by the rules of Article 1.1(a)(1) of the ASCM. In reality, there are a large number of cases in which WTO member countries provide subsidies to their relevant industries through SOEs, and it is therefore worthwhile to explore the issue of whether or not a country's SOEs are the "public bodies" referred to in the aforementioned article.

2. New Changes in the Criteria for Determining "Public Body" in DS437 Case

Article 1.1 of the ASCM provides that "[f]or the purposes 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 ". However, neither the WTO nor other international organizations have clarified the notion of "public body", and there has been no uniformity in the criteria for identifying a "public body". With regard to the theories related to the identification criteria of "public bodies" and relevant representative cases, the identification criteria of public bodies have mainly gone through the process from the "Governmental Control Theory" to the "Governmental Function Theory" [1], and then to the "Governmental Function Theory". In DS437, however, the legal standard for recognizing a "public body" took a new turn.

2.1. DS437 at the Trial Stage - The Pitfalls of the "Meaningful Control" Doctrine

It is worth noting that in the DS436, the AB further clarified the "meaningful control" standard by holding that this element is not in itself an exhaustive criterion for a finding, but rather is part of the evidence for the public body finding that "the entity possesses or exercises or is vested with governmental authority"[2]. In addition, The AB has ruled that whether an entity is a "public body" must be judged on a specific case-by-case basis [3], taking due account of the organization's essential nature and functions, its relationship with the government, and the legal and economic environment of the country in which the organization in question operates [4].

However, at the preliminary ruling stage in DS437, the Panel affirmed the decision of the AB in DS379 that the mere factor of " government ownership or control" is not enough to classify an enterprise as a public body. The Panel held that the investigation agency must assess the other factors together. Consequently, the Panel decided that the definition of "public body" in these 12 countervailing investigations was not in conformity with Article 1.1(a)(1) of the ASCM [5]. Nonetheless, the Panel did not accept China's view that a "public body" must itself have the power to regulate, control, supervise and restrict the behavior of others. [5] The Panel noted that such an interpretation, which was not supported by the AB in DS379, equated a "public body" with a "governmental organ". As the parties did not appeal the decision, the panel's decision became final at the trial level. Although China successfully defended the DS379 AB's interpretation, it failed to persuade the panel to further limit the scope of "public body". This ambiguous concept of "meaningful control" also provided the United States with room for misinterpretation.

2.2. The Implementation Phase of Case DS437 -- A Discussion of the Introduction of a Review of the Nature of the Entity's Behavior

During the panel stage of the enforcement action in this case, China argued that in the analysis of the definition of public body, it should be examined whether the company was performing a governmental function at the time of the relevant conduct (the possible financial contribution) within the scope of Article 1.1(a)(1) of the ASCM [5]. Meanwhile, the Chinese government believes that there should be a "clear logical connection" of governmental functions identified by the investigating authorities to specific actions. The Panel did not support China's assertion and ruled that MOFCOM had correctly applied the "meaningful control" standard and, on that basis, found that the raw material supplier had possessed, exercised, or had been delegated governmental functions [6].

Each of the Chinese and American parties has lodged an appeal against the judgement. China argued that the Panel misinterpreted the definition of a public body and that, in defining whether an entity is a "public body", the investigating authority should link the governmental functions owned, performed or delegated to the entity and the financial assistance concerned. In order to emphasize its legal standard of "clear logical connection", China asserts that the AB's statement in DS379 that "whether the functions or acts of a particular entity fall within a category of functions or acts normally classified as 'governmental' in the legal order of the country in which it is located is a relevant consideration in determining whether the particular entity is a public body" suggests that the functions or acts that are "reflective of the authority of the government" are the functions or acts of a particular entity as provided for in Article 1.1(a)(1) of the ASCM. U.S. claims that the AB should reverse its decision and recognize that the governmental authority that the public body must prove exists is the power of the body to perform those functions on behalf of the government [7], i.e., that the entity in question was exercising a governmental function when it engaged in the specific conduct under investigation pursuant to ASCM Article 1.1(a)(1)(i)- (iii) or (iv) [8].

U.S. also argues that the AB ought to overturn the Panel's decision that the Public Body Memorandum falls within the Panel's jurisdiction under Article 21.5 of the DSU and may be challenged as a measure "per se".

The AB launched a debate on legal standards for public bodies, noting that, according to the standard established in previous cases, whether or not an entity constitutes a public body needs be determined on a case-by-case basis, in the light of multiple lines of evidence, none of which is determinative. Indeed, if an entity is found to be a public body, all acts performed by it are attributable to that entity, just as all acts performed by a government department are attributable to the government. [8] Therefore, the AB considered that the link between the financial assistance in question and the functions of the government could be part of the evidence that an entity constituted a public body, but not conclusive.

The AB also disagreed with China's interpretation of the concept of "meaningful control", noting that the investigating authority did not need to prove that the government exercised significant control over the company when it provided the financial assistance referred to in Article 1.1(a)(1)(i) to (iii) of the ASCM in order to designate the company as a public body. In fact, the AB found that the legal standard relied upon by

China was more analogous to a discussion of whether a private entity is subject to direction and delegation by the government pursuant to Article 1.1(a)(1)(iv) of the ASCM, rather than to the definition of public body.

To sum up, the AB's findings provide substantial support for U.S. position that the definition of public entity does not focus on the relationship between the particular "conduct" of the entity that may constitute a financial assistance and the functions of the government, but rather on the fundamental attributes of the "entity" involved in the conducts and its association with the government.

3. The Main Changes in the Case of DS437, "Public Bodies to Determine the Standard" on the Impact of China

3.1. China Still Bears a Heavy Burden of Proof

WTO members have continued to conduct countervailing investigations into the exports of Chinese SOEs, but for a country that provides subsidies through the government through SOEs, the international subsidy rules do not regulate the risks that may exist in that form of subsidy, which creates difficulties in responding to the complaints of the government and enterprises in China.

The DSB has summarized a common procedural requirement in the various disputes: when determining the public body, all pertinent features of the subject must be assessed and duly taken into account, and all evidence that may be relevant to this assessment must be considered. China, as the Prosecuting Party, should have borne the burden of proving that the Respondent's decision to find the enterprise in question to be a public body violated WTO rules. However, when the evidence to be provided involves such sensitive contents as China's basic economic system and the status and role of the Party and the Government, the Chinese side often chooses to refuse to provide the relevant evidence on the ground of "not being able to provide", which led the U.S. Department of Commerce to take advantage of this in the DS437 enforcement action, believing that the Chinese side had unable to submit the corresponding factual evidence requested by the Chinese side in the "Public Institutions Questionnaire Survey", and then made a assumption that the Chinese SOEs involved in the case were "public bodies" in accordance with the Adverse Facts Available Principle (AFA Principle).

Subsidies provided through SOEs may be directly appealed to the WTO dispute settlement mechanism, and Chinese SOEs are government-owned enterprises, and interpreting government-owned entities as "public bodies" means that China's SOEs are eligible subsidy subjects without the need to prove that they are subject to instructions or commissions from the government or public bodies. This standard reduces the obligation of proof of the countervailing investigative body, that is to say, in disguise, China's burden of proof, which is easier for China's SOEs whether there is a violation of the subsidy investigation, and accordingly, the Chinese side wants to claim that a SOE does not constitute a "public body" will be very difficult [9].

3.2. Highly Susceptible to Abuse by U.S. and Other Countries in Dealing with Chinese SOEs

The AB also ruled against China that, in a "public body" inquiry, the authority investigating the compensation does not have to prove a nexus between the financial subsidy and the government's functions, a standard that allows for a broader interpretation of the term of "public body". This criterion makes the meaning of "public body" has been expanded interpretation of the possibility [10], will make China's SOEs and state-owned banks in the countervailing investigation there is a greater likelihood of being interpreted as a "public body".

If SOEs are recognized as institutions of a similar nature to the government, Chinese SOEs will be subject to obligations under international economic and trade rules that should only be borne by the Chinese government, which will greatly expand the scope of China's international obligations. As in trade remedies, countervailing measures correct the distortion of the market caused by government subsidies. According to Article 1.1(a)(1) of the ASCM, if Chinese SOEs are considered to be "public institutions", then SOEs are the same as the government as the subject of subsidies. In other words, any enterprise that purchases products or raw materials from a Chinese SOE is receiving a subsidy from the Chinese Government and may be subject to a countervailing investigation when exporting its products.

4. China's Feasible Response Measures under the Future WTO Dispute Settlement Mechanism

4.1. Promote the "Government Authority Theory" of China's Advocacy

From the "China-US Countervailing Measures Case" enforcement suit, U.S. in the implementation of the award on the "meaningful control" gap in use of ownership and other standards of proof is not difficult to see, the United States in fact in the "governmental authority" standard of superficial recognition of the "governmental control" standard, "trying to detour back to the old way"[11]. The United States, with its apparent endorsement of the "governmental power" standard, "seeks to detour back to the old 'governmental control' standard".

The repeated application of the "governmental authority" standard by the AB suggests that it is likely to remain the dominant standard under the WTO framework. This also means that in future disputes over public body determinations, importing countries of Chinese exports may still rely on this standard to challenge China's SOE public body status. However, in practice, the "governmental authority" standard still has many unexplained ambiguous concepts, and the strength of proof of different concepts has not been clarified, which has led to the misuse of the public body recognition standard and the evidentiary standard therein. Therefore, China should actively promote the restrictive interpretation of "public body", promote the "governmental authority Theory" in China, and promote the WTO DSB's interpretation of the established "governmental power" standard based on the criterion of case-by-case analysis. The DSB should clarify and refine the ambiguous concepts and evidential criteria in the "governmental authority" criterion and combine the "governmental authority" criterion with the "clear logical

connection" criterion, and continue to insist on the necessity of advocating the "clear logical connection" criterion. It continued to argue for the necessity of the "clear logical connection" test and persuaded the WTO Panel and the AB through sound legal interpretations.

4.2. Continuing to Deepen the Mixed Ownership Reform of SOEs

It has to be admitted that the inadequacy of China's existing legal system is one of the reasons for the prejudice against China's SOEs by developed Western countries, represented by the United States [12]. The CCP's 19th National Congress Report clearly puts forward the necessity to improve the administration system of different types of state-owned assets, overhaul the regime of authorization, clean up and eliminate various rules and practices that hinder the single market and fair competition, and promote the vitality of various market players. Enhancing the rules of competition law related to domestic SOEs will not only help activate the vitality of the domestic market, but also improve foreign prejudice against Chinese SOEs from the source, and help Chinese SOEs receive fairer treatment in the process of participating in U.S.-China trade and even the global economy.

In terms of the criteria for determining public institutions, the "government control theory" that the U.S. insists on upholding is actually a distortion of the WTO's criteria for governmental authority. In March 2018, the WTO issued a panel report on the enforcement action in the DS437 case, which found that the U.S. failed to completely and adequately fulfil the judgement after it lost the case at the trial stage, and that the implementation measures taken by the U.S. still breached its obligations under the ASCM and damaged China's legitimate interests. The panel report notes that China's successful use of the multilateral trade system has, to some degree, constrained US protectionist trade policies, stressing that the WTO, as the most comprehensive trade policy co-ordination body, is a crucial tool for China to safeguard its justified trade interests. Thus, to further deepen the reform of mixed ownership of SOEs, to promote the separation of ownership and operation of SOEs, respect for the independence of SOEs, the creation of an independent status of the SOE industry chain at the same time also to further limit the state's intervention in the decision-making of SOEs, and improve the transparency of decision-making of SOEs to achieve fairness and openness. Only if the government reduces or even avoids interfering in the management of SOEs, and gives them the right to operate independently, it can help to get rid of the western developed countries will be China's SOEs identified as "public bodies", and frequently initiate countervailing investigations, limiting the SOEs to participate in the international competition of the predicament.

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