

## Report of the Appellate Body

| Short Title  | Full Case Title and Citation   |
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| <i>US – Shrimp</i>                                     | Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755  |
| <i>US – Softwood Lumber IV</i>                         | Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571   |
| <i>US – Softwood Lumber VI (Article 21.5 – Canada)</i> | Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865                                    |
| <i>US – Steel Safeguards</i>                           | Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117 |
| <i>US – Upland Cotton</i>                              | Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3  |
| <i>US – Wheat Gluten</i>                               | Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717   |
| <i>US – Zeroing (EC)</i>                               | Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417   |
| <i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>     | Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441  |

## 1. INTRODUCTION

1.1 China and the United States each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*<sup>1</sup> (Panel Report). The Panel was established to consider a complaint by China<sup>2</sup> with respect to the imposition by the United States of countervailing duties on certain products from China.

1.2 This dispute concerns countervailing duties imposed by the United States following 17 countervailing duty investigations initiated by the US Department of Commerce (USDOC) between 2007 and 2012.<sup>3</sup> Before the Panel, China

<sup>1</sup> WT/DS437/R, 14 July 2014.

<sup>2</sup> Request for the Establishment of a Panel by China, WT/DS437/2.

<sup>3</sup> In its panel request, China set forth "as applied" claims against 22 countervailing duty investigations. However, in its first written submission to the Panel, China stated that it was not

challenged several aspects of the investigations leading to the imposition of these duties, including the USDOC's application of an alleged "rebuttable presumption" to determine whether Chinese state-owned enterprises (SOEs) can be characterized as "public bodies" within the meaning of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

1.3 The 17 countervailing duty investigations at issue in this dispute concern a variety of products.<sup>4</sup> With respect to 14 of these investigations, China's claims related to the USDOC's determinations that: (i) Chinese SOEs are public bodies; (ii) the provision of certain inputs by Chinese SOEs conferred a benefit; (iii) subsidies arising from the provision of inputs for less than adequate remuneration are specific; and (iv) there was sufficient evidence with respect to the specificity of the alleged subsidies to justify the initiation of the underlying countervailing duty investigations.<sup>5</sup> With regard to seven investigations, China challenged the USDOC's determinations that subsidies in the form of the provision of land-use rights are specific. With respect to 15 of the investigations at issue, China's claims concerned the USDOC's resort to the use of "adverse" facts available. Finally, with respect to two of the investigations, China's claims related to the USDOC's initiation of investigations into export restraints and the determinations made by the USDOC that such export restraints are financial contributions.<sup>6</sup>

1.4 Australia, Brazil, Canada, the European Union, India, Japan, Korea, Norway, Russia, Saudi Arabia, Turkey, and Viet Nam notified their interest as third parties. On 4 December 2012, Canada requested the Panel to grant it enhanced third party rights. On 20 December 2012, the Panel rejected Canada's request, the reasons for which were provided in the Panel Report.<sup>7</sup>

1.5 On 14 December 2012, the United States submitted to the Panel a request for a preliminary ruling. The United States requested the Panel to find that China's panel request did not adequately identify the "instances" of the use of "facts available" that were being challenged and, therefore, failed to "plainly connect" the measures to the provisions at issue and "to present the problem clearly"<sup>8</sup>, as required under Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). On 8 February 2013, the Panel issued a Preliminary Ruling<sup>9</sup> to the parties, concluding that China's panel request was consistent with Article 6.2 of the DSU. The Panel's

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pursuing its claims with respect to five of the 22 investigations listed in its panel request. (Panel Report, para. 7.1 and footnote 9 thereto)

<sup>4</sup> The 17 countervailing duty investigations are listed in the table at p. 5 of this Report and concern the following products: thermal paper, pressure pipe, line pipe, citric acid, lawn groomers, kitchen shelving, oil country tubular goods (OCTG), wire strand, magnesia bricks, seamless pipe, print graphics, drill pipe, aluminum extrusions, steel cylinders, solar panels, wind towers, and steel sinks.

<sup>5</sup> With respect to four of these 14 investigations, China also challenged the USDOC's treatment of Chinese SOEs as public bodies for the purposes of the initiation of the relevant investigation.

<sup>6</sup> China's claims and requests for findings and recommendations are set forth in greater detail in paras. 3.1 and 3.2 of the Panel Report.

<sup>7</sup> Panel Report, paras. 1.11-1.13.

<sup>8</sup> United States' preliminary ruling request, paras. 23-25.

<sup>9</sup> WT/DS437/4.

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Preliminary Ruling was made "an integral part of the Panel's Final Report"<sup>10</sup>, the content of which is reproduced in Annex A-8 thereto.<sup>11</sup>

1.6 The Panel Report was circulated to Members of the World Trade Organization (WTO) on 14 July 2014.

1.7 In its Report, the Panel found that:

- a. with respect to 12 countervailing duty investigations<sup>12</sup>, the USDOC acted inconsistently with the obligations of the United States under Article 1.1(a)(1) of the SCM Agreement when it determined that SOEs are public bodies<sup>13</sup>;
- b. the USDOC's application of a "rebuttable presumption" that a majority government-owned entity is a public body is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement<sup>14</sup>;
- c. with respect to 12 countervailing duty investigations<sup>15</sup>, the USDOC acted inconsistently with the obligations of the United States under Article 2.1(c) of the SCM Agreement by failing to take into account the two factors<sup>16</sup> listed in the last sentence of Article 2.1(c) when it made "specificity" determinations<sup>17</sup>;
- d. with respect to six countervailing duty investigations<sup>18</sup>, the USDOC acted inconsistently with the obligations of the United States under Article 2.2 of the SCM Agreement by making positive determinations of regional specificity while failing to establish that the alleged subsidy was limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority<sup>19</sup>; and
- e. with respect to two countervailing duty investigations<sup>20</sup>, the USDOC acted inconsistently with the obligations of the United States under Article 11.3 of the SCM Agreement by initiating investigations in respect of certain export restraints.<sup>21</sup>

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<sup>10</sup> Panel Report, para. 1.16.

<sup>11</sup> WT/DS437/R/Add.1, pp. A-34 to A-46.

<sup>12</sup> Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels. (See table of USDOC investigations at p. 5 of this Report)

<sup>13</sup> Panel Report, para. 8.1.i.

<sup>14</sup> Panel Report, para. 8.1.ii.

<sup>15</sup> *Supra*, footnote 12.

<sup>16</sup> These two factors are: (i) "the extent of diversification of economic activities within the jurisdiction of the granting authority"; and (ii) "the length of time during which the subsidy programme has been in operation".

<sup>17</sup> Panel Report, para. 8.1.v.

<sup>18</sup> Line Pipe, Thermal Paper, Citric Acid, OCTG, Wire Strand, and Seamless Pipe. (See table of USDOC investigations at p. 5 of this Report)

<sup>19</sup> Panel Report, para. 8.1.viii.

<sup>20</sup> Magnesia Bricks and Seamless Pipe. (See table of USDOC investigations at p. 5 of this Report)

<sup>21</sup> Panel Report, para. 8.1.ix.

1.8 The Panel further found that, as a consequence of the inconsistencies of the USDOC's actions with Articles 1, 2, and 11 of the SCM Agreement, the United States also acted inconsistently with Articles 10 and 32.1 of the SCM Agreement.<sup>22</sup>

1.9 The Panel, however, rejected several of China's claims, finding that:

- a. with respect to four countervailing duty investigations<sup>23</sup>, China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 11 of the SCM Agreement by initiating the investigations without sufficient evidence of a financial contribution<sup>24</sup>;
- b. with respect to 12 countervailing duty investigations<sup>25</sup>, China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country private prices in China in its benefit analysis<sup>26</sup>;
- c. with respect to 12 countervailing duty investigations<sup>27</sup>, China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement:
  - i. by failing to apply the first of the "other factors" under Article 2.1(c) – that is, "use of a subsidy programme by a limited number of certain enterprises" – in the light of a prior "appearance of non-specificity" resulting from the application of subparagraphs (a) and (b);
  - ii. by failing to identify a "subsidy programme"; or
  - iii. by failing to identify a "granting authority"<sup>28</sup>;
- d. with respect to 14 countervailing duty investigations<sup>29</sup>, China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 11 of the SCM Agreement by initiating the investigations without sufficient evidence of specificity<sup>30</sup>;

<sup>22</sup> Panel Report, para. 8.1.x.

<sup>23</sup> Steel Cylinders, Solar Panels, Wind Towers, and Steel Sinks. (See table of USDOC investigations at p. 5 of this Report)

<sup>24</sup> Panel Report, para. 8.1.iii.

<sup>25</sup> *Supra*, footnote 12.

<sup>26</sup> Panel Report, para. 8.1.iv.

<sup>27</sup> *Supra*, footnote 12.

<sup>28</sup> Panel Report, para. 8.1.v.

<sup>29</sup> Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, Solar Panels, Wind Towers, and Steel Sinks. (See table of USDOC investigations at p. 5 of this Report)

<sup>30</sup> Panel Report, para. 8.1.vi.

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- e. with respect to 13 countervailing duty investigations<sup>31</sup>, China had failed to establish that, in 42 instances, the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement by not relying on facts available on the record<sup>32</sup>; and
- f. with respect to one countervailing duty investigation<sup>33</sup>, China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 2.2 of the SCM Agreement by making a positive determination of regional specificity while failing to establish that the alleged subsidy was limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority.<sup>34</sup>

1.10 Noting that China had failed to present sufficient evidence and arguments in support of its claims that the USDOC acted inconsistently with the obligations of the United States under Article 2.4 of the SCM Agreement by not basing its specificity determination on positive evidence, the Panel considered that the findings it had already made were sufficient to resolve the dispute between the parties regarding the USDOC's specificity determinations.<sup>35</sup> The Panel therefore made no findings with respect to China's claims under Article 2.4 of the SCM Agreement.

1.11 Finally, with respect to two countervailing duty investigations<sup>36</sup>, and in the light of the very limited argumentation provided by China in support of its claims, the Panel declined to make findings on whether the USDOC acted inconsistently with the obligations of the United States under the SCM Agreement when it determined that export restraints constituted financial contributions.<sup>37</sup>

1.12 Having found that the United States acted inconsistently with certain provisions of the SCM Agreement, the Panel recommended, pursuant to Article 19.1 of the DSU, that the United States bring its measures into conformity with its obligations under that Agreement.<sup>38</sup>

1.13 On 22 August 2014, China notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal<sup>39</sup> and an appellant's

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<sup>31</sup> Pressure Pipe, Line Pipe, Citric Acid, Lawn Groomers, OCTG, Wire Strand, Magnesia Bricks, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels. (See table of USDOC investigations at p. 5 of this Report)

<sup>32</sup> Panel Report, para. 8.1.vii.

<sup>33</sup> Print Graphics. (See table of USDOC investigations at p. 5 of this Report)

<sup>34</sup> Panel Report, para. 8.1.viii.

<sup>35</sup> Panel Report, paras. 7.259 and 7.356.

<sup>36</sup> Magnesia Bricks and Seamless Pipe. (See table of USDOC investigations at p. 5 of this Report)

<sup>37</sup> Panel Report, para. 7.407.

<sup>38</sup> Panel Report, para. 8.3.

<sup>39</sup> WT/DS437/7 (attached as Annex 1 to this Report).

submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>40</sup> (Working Procedures). On 27 August 2014, the United States notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal<sup>41</sup> and an other appellant's submission pursuant to Rule 23 of the Working Procedures. On 9 September 2014, the United States and China each filed an appellee's submission.<sup>42</sup> On 15 September 2014, Brazil, Canada, the European Union, and Saudi Arabia each filed a third participant's submission.<sup>43</sup> Notifications of intention to appear at the oral hearing as a third participant were received from Australia, India, Japan, Korea, and Norway<sup>44</sup>, Turkey<sup>45</sup>, and Russia and Viet Nam.<sup>46</sup>

1.14 The oral hearing in this appeal was held on 16 and 17 October 2014. The participants each made an opening oral statement. Third participants Australia, Brazil, Canada, India, Korea, Norway, Saudi Arabia, and Turkey made opening oral statements. The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

1.15 By letter dated 20 October 2014, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its report in this dispute within the 60-day period or the 90-day period set out in Article 17.5 of the DSU. The Chair of the Appellate Body explained that this was due to, *inter alia*, the scheduling issues arising from the substantial workload of the Appellate Body in the second half of 2014, the overlap in the composition of the Divisions hearing the different appeals during this period, the number and complexity of the issues raised in these and concurrent appeal proceedings, as well as the additional time required for translation of the report for circulation in all three official languages. Consequently, the Chair of the Appellate Body informed the Chair of the DSB that the Appellate Body report in this appeal would be circulated no later than 18 December 2014.<sup>47</sup>

<sup>40</sup> WT/AB/WP/6, 16 August 2010.

<sup>41</sup> WT/DS437/8 (attached as Annex 2 to this Report).

<sup>42</sup> Pursuant to Rules 22 and 23(4), respectively, of the Working Procedures.

<sup>43</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>44</sup> On 15 September 2014, pursuant to Rule 24(2) of the Working Procedures.

<sup>45</sup> On 16 September 2014, pursuant to Rule 24(4) of the Working Procedures.

<sup>46</sup> On 14 October 2014, Russia and Viet Nam provided their delegation lists for the oral hearing to the Appellate Body Secretariat and the participants and third participants in these appellate proceedings. Without prejudice to rulings the Appellate Body may make in future appeals, we have interpreted Russia's and Viet Nam's actions as notifications expressing an intention to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures. While we wish to emphasize that strict compliance with Rule 24(4) of the Working Procedures requires *written* notification of such intention, we are satisfied that, in this case, the lack of strict compliance with Rule 24(4) did not raise any due process concerns.

<sup>47</sup> WT/DS437/9.