

# Research on the Identification Standard of Public Body in the Sense of ASCM

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## Abstract

Under the trend of economic globalization, the foreign import and export trade of all countries in the world is bound to be more prosperous in the end. More than 40 years ago, an old man overcame all the opinions and made a major historical strategic choice to implement reform and opening up. After that, China also continued to implement the "going global" strategy. However, in the foreign trade of China's state-owned enterprises, they were frequently subjected to countervailing investigations by some countries importing raw materials and products led by the United States. These countries often identify Chinese state-owned enterprises as public body in their countervailing decisions, which has greatly damaged the interests of Chinese state-owned enterprises. In the identification of subsidy measures, the identification of "public body" has become an important part, which leads to the problem of how to identify "public body". On this basis, this paper first introduces the relevant background to clarify the importance of the identification standards of "public body", then systematically explains and evaluates the relevant identification standards existing in WTO practice, and finally puts forward its own suggestions for the improvement of the existing identification standards of "public body" and Chinese Countermeasures on this basis.

**Keywords:** identification standard, government control standard and government function standard

## 1. Background

According to the provisions of ASCM, if one WTO member wants to implement countervailing measures against another member, it must do two things: one is to prove the existence of relevant subsidies, and the other is to demonstrate that the subsidies have specificity in the sense of ASCM. In subsidies, the provider of subsidies is one of its identification elements. Therefore, the importance of public body as one of the providers of subsidies stipulated by ASCM is self-evident. However, as a member, WTO covers a global intergovernmental organization of many developed and developing countries. In order to reach a balance of the interests of all parties and establish the organization smoothly, its framework document naturally has fuzziness and uncertainty in the use of terms. The term "public body" is used in Article 1.1 of ASCM, but it is not explained in various documents, resulting in many trade disputes between members due to their different understanding of the term when applying ASCM.

## 2. Theory and Evaluation of the Recognition Standard of "Public Body"

In the practice of WTO countervailing, the identification standards of "public body" can be roughly divided into two types: one is "government control standard", the other is "government function standard", which is systematically described below.

### 2.1 The "Government Control Standards"

#### 2.1.1 The Connotation of "Government Control Standard"

The standard is first reflected in the expert group report of ds273 case, in which the expert group believes that "public body" should refer to the entity controlled by the government, and the fact of government control can be derived from the majority ownership of the government, which is clear and highly indicated. At the same time, the majority ownership evidence of the government should be put in the first place, and other secondary factors such as the elements of management right should be considered. In the ds379 case, the expert group modified the standard to a certain extent. Looking at the discussion of the expert group on "public body", it seems that it

deliberately weakens or even ignores the elements of management right, and instead believes that majority ownership is roughly equivalent to government control. After the majority ownership elements are proved, the elements of management right are automatically presumed to exist.

In a word, the "government control standard" divides its identification elements into ownership and management right. The former is better than the latter. As long as the ownership elements are confirmed by the investigator, the fact of government control is presumed to exist, and then an entity is identified as a public body, unless the respondent proves the contrary and succeeds.

### 2.1.2 Evaluation of "Government Control Standard"

First of all, the "government control standard" is very unfavorable to our country. As we all know, due to the special national conditions, there are many state-owned enterprises in our country, and the government owns most of these state-owned enterprises. According to the "government control standard", almost all state-owned enterprises in China will be recognized as "public body", which will facilitate foreign countries to take countervailing measures against China.

Secondly, it should be noted that although the Appellate Body overturned the "government control standard" advocated by the expert group and adhered to the "government function standard" in ds379 case, the appellate body only supported the latter in theory and did not establish the factors to be considered to prove that "an entity performs government functions" in practice. In other words, although it is inconsistent with WTO law to determine that an entity constitutes a public body only by "the government has majority ownership in an entity", this fact can still constitute one of the factors to be considered in determining a public body.

Finally, the Argument Logic of the expert group on the "government control standard" is flawed. According to the interpretation of the expert group, adopting the "government control standard" to expand the interpretation of public body can minimize the implementation space for members to use state-owned enterprises to provide unfair subsidies, which is in line with the purpose and purpose of ASCM. However, this discussion can not stand scrutiny. First, there is no WTO document specifically indicating the purpose and purpose of ASCM, which reserves a great space for relevant entities to explain the purpose and purpose of ASCM from their own interests or their own perspective; Second, only taking "the government has the majority ownership of an entity" as the identification standard of public body is a restrictive interpretation, because it excludes other factors that may be very important, such as whether the entity has the nature of public welfare.

## 2.2 The "Government Function Standards"

### 2.2.1 The Connotation of "Government Function Standard"

The standard was proposed after the Appellate Body overturned the "government control standard" of the expert group in ds379 case. The reasoning ideas are as follows: firstly, according to the original text of Article 1.1 of ASCM, that is, "financial assistance provided by the government or any public body in the territory of a member (collectively referred to as "government "in this Agreement)", when Article 1.1 stipulates that "government" and "any public body" are referred to as "government" in ASCM, the first "government" shall refer to the government in a narrow sense, and the latter "government" shall be used as the superior as a collective term," Any public body" and the previous "government" are used as subordinate words. Therefore, the two terms are collectively referred to as "government", which means that their basic characteristics have a sufficient degree of commonality or overlap, so that the relevant entity can be properly understood as an entity of government nature. Secondly, from item (IV) of Article 1.1 of ASCM, which refers to entrusting or instructing the implementation of the functions "usually belonging to the government" mentioned in items (I) to (III), the implementation of government functions and the exercise of government functions and powers should be the performance of the government of public body.

According to the "government function standard", "public body" refers to the body that performs or is entrusted with government authority and functions, and this fact needs to be carefully determined by the investigating authority after collecting conclusive evidence. At the same time, the Appellate Body pointed out that although state ownership is not a decisive standard, it can be used as evidence to indicate the decentralization of government power together with other factors. Then, in the ds379 case, the Appellate Body enumerated the evidence proving that an entity performs or grants government authority and functions. First, of course, the most important criterion is the core characteristics of an entity and its relationship with the government. Secondly, the evidence that an entity is systematically and continuously performing government functions can also be used as a basis for judgment. Finally, in some cases, if there is evidence that the government control over an entity is multifaceted, and there is also evidence that the control is carried out in a meaningful way, that is, "meaningful

control", this evidence may allow the inference that the entity concerned is exercising government power. It should be noted that such "meaningful control" is not the substantive standard for identifying "public body", but as an evidentiary standard.

In ds437 case, the appellate body further deepened the "government function standard", that is, according to Article 1.1 of ASCM, it is determined that the focus of the investigation center of public body is not whether the behavior of an entity that may constitute financial assistance is logically related to the determined "government function". On the contrary, the relevant investigation depends on the core characteristics of the entity engaged in the behavior and its relationship with the government.

### 2.2.2 Evaluation of "Government Function Standard"

The proposal of this standard will be conducive to the improvement of the trade rules of WTO members. On the one hand, any member can not easily provoke trade disputes based on the factor of ownership alone. At the same time, it sets higher investigation obligations for the investigators, which is objectively conducive to the disclosure and investigation of the truth, and also conducive to limiting the discriminatory policies of some European and American countries led by the United States against China and other countries with a large number of state-owned enterprises, It is in line with the security and predictability of the multilateral trading system, the goal of rapid settlement of disputes identified by public body, and more in line with the general rules of international law dealing with the relationship between government and enterprises. On the other hand, because this standard is more cautious and perfect in the identification of "public body", it will not easily avoid or omit the enterprises that should constitute "public body".

Of course, there are inevitably some deficiencies in this standard, such as what "meaningful control" referred to by the Appellate Body in ds379 and how to prove it. Although the expert group seems to have explained in ds437, its explanation seems to imply that the expert group affirms that the U.S. Department of commerce only considers "the form mark of control" in reviewing "meaningful control", That is, the essence of this "meaningful control" is no different from that of "government control".

## 3. Reflections on the Identification Standard of "Public Body"

### 3.1 Suggestions on the Improvement of the Existing Identification Standards of "Public Body"

In ds437, the appellate body held that once an entity was determined to be a public body, "all acts" of the entity should be attributed to the member concerned for the purposes of ASCM Article 1.1 (a) (1). This conclusion is unreasonable because state-owned enterprises have not only "public policy and pure competition", but also unity and multiplicity in the business field." For example, the state-owned enterprise endowed with specific government power is a special subject, which may have both commercial and non-commercial behavior". Assuming that an entity is indeed endowed with government functions, it should be recognized as a "public body" according to the "government function standard". However, if a specific behavior of the entity has nothing to do with the government functions it performs, in fact, the public body is engaged in commercial behavior under market conditions, but it is recognized as engaging in subsidy behavior in the sense of ASCM due to its status as a "public body", resulting in the risk of countervailing measures taken by the government of another member, which is obviously unreasonable and unfair, and is contrary to the fundamental purpose of WTO. Therefore, a supplementary standard should be added to the "government function standard", which constitutes "the behavior of public body" only when its specific behavior is in the performance of government functions owned or entrusted by the entity.

Adding this supplementary standard can not only absorb the reasonable part of the "government function standard", that is, an entity undertakes the government function, but also "kill all with one stick", so that "the wrongdoer bears the responsibility and the innocent is exempted", which is in line with the simple concept of legal justice.

### 3.2 Suggestions on Chinese Response Under the Existing Identification Standards of "Public Body"

There is no doubt that the Appellate Body of ds379 case has put forward a new idea of identifying "public body", namely "government function standard", which breaks through the standard of "ownership or control" consistently adopted by the United States, and is of great significance to China. However, China still cannot think that the "government function standard" has been determined as the identification standard of "public body" since then. Firstly, the WTO cases do not have the effect of case law, and there is no mandatory applicability for the handling of similar cases later. Secondly, the performance credit of some European and American countries such as the United States is worrying, because the WTO has no enforcement system, These countries often rely on their own power to refuse to fulfill the obligations stipulated in the report adopted by the

WTO dispute settlement body. Therefore, China still needs to take relevant countermeasures to improve its response capacity.

### 3.2.1 Pay Attention to the Full Preservation, Collection and Submission of Evidence

In many cases, the failure of Chinese enterprises in the WTO is not their own fault, but their failure to pay attention to the preservation and full submission of evidence. For example, in the ds437 case, the U.S. Department of commerce took advantage of this to believe that China failed to provide the corresponding factual evidence required by China in the public body questionnaire, and made a presumption that "the relevant Chinese state-owned enterprises involved in the case are public body according to the factual evidence unfavorable to China available to the U.S. Department of Commerce" in accordance with the principle of AFA. Looking at the stainless steel sheet and strip case in South Korea, South Korea was initially in a very disadvantageous passive position, but then they submitted a large number of highly targeted evidence and were adopted. At the same time, they made full reasoning around the identification standard of the U.S. Department of Commerce, so that the U.S. side had to change its previous identification facts.

### 3.2.2 Pay Attention to the Wording of Relevant Domestic Laws, Regulations and Policy Documents

When formulating relevant laws and regulations or policy documents, try to avoid using expressions such as "encouraging commercial banks to provide loans for certain industries" and "providing funds to certain industries from a macroeconomic perspective", which are obviously easy to be used as important evidence of subsidies by the countervailing investigation country.

### 3.2.3 Improve the Independence Between the Government and State-Owned Enterprises

As mentioned above, although WTO cases do not have the effect of case law, looking at similar cases after ds379 case, the expert group and appellate body basically follow the "government function standard" established in the report of appellate body of ds379 case. Basically, the identification standard of "public body" will not change in the short term. Even if there are changes, from the perspective of general rationality, the standard is indeed reasonable and there is no reason to abandon it completely. Moreover, from the practical reason why some European and American countries frequently take countervailing investigations on China - that Chinese state-owned enterprises are "too closely connected with the government and there is a situation of no separation between government and enterprises", it is necessary for China to further deepen the reform of state-owned enterprises, promote the transformation of state-owned enterprises to mixed ownership, and break the past practice that senior executives of state-owned enterprises have the administrative level of the government at the same time, And follow the market-oriented mechanism in the appointment of senior executives in state-owned enterprises.

### 3.2.4 Actively Seek to Formulate Perfect Standards for the Identification of "Public Body"

At present, there is no universally applicable standard for the identification of "public body", which is also mentioned in the report of the appellate body, that is, the "government function standard" is only applicable to individual cases, and the identification of "public body" still needs to be analyzed and demonstrated according to specific cases. Therefore, China can actively cooperate with members with common interests to explore and formulate new and perfect standards for "public body", and strive to write them into relevant documents as a generally applicable standard.

## 4. Conclusion

To sum up, the two identification standards of "public body" in WTO practice have their own shortcomings. The "government control standard" pays too much attention to the surface, has a single consideration, ignores the core characteristics of enterprises, and is very unfriendly to state-owned enterprises in countries dominated by socialist public ownership economy, so it should be abandoned. Although "government function standard" makes up for the defects of "government control standard", the so-called "meaningful control" also falls into the quagmire of formal factors because of unclear expression, so it is not substantially different from "government control". On the other hand, it is suspected of "killing all with one stick", which lacks the flexibility and flexibility required by the official documents of an international organization. Therefore, this paper tries to propose a supplementary standard. On the basis of the "government function standard", this paper considers the specific behavior of the disputed entity and examines whether its specific behavior has exercised the government function. If the result is positive, this entity can be recognized as a "public body". Finally, this paper also tries to put forward relevant countermeasures from the aspects of the full submission of evidence, paying attention to the wording of domestic laws, regulations and policy documents, especially those related to industrial policy, the

deepening reform of state-owned enterprises and the most fundamental formulation of a perfect identification standard of "public body".

### References

- Chen, W.-D. (2017). The dispute between China and the United States over the identity of subsidy providers for state-owned enterprises: focusing on WTO related cases. *Contemporary Law*, (3), 21-30.
- Hu, J.-G., & Liu, Q. (2019). Generalization and legal regulation of "public body" in American countervailing against China. *Law*, (10), 62-74.
- Shi, Y.-W. (2016). Research on the identification standard of "public body" in WTO subsidy agreement -- Taking ds379 case as an example. *Comparative Research*, (6), 135-146.
- Song, Z.-X. (2016). On the identification of public body under the SCM Agreement. *Shanghai: East China University of Political Science and Law*.
- Yang, H.-J. (2020). Research on the identification standards of public body" formed under WTO case law. Beijing: *Beijing Foreign Studies University*.

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