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國際學碩士學位論文

**Chinese State Owned Enterprises as an
Unresolved Issue of the WTO System**

중국 국영기업의 WTO 규범 합치성 연구

2014 年 2 月

서울대학교 國際大學院

國際學科 國際通商專攻

李 效 眞

Chinese State Owned Enterprises as an Unresolved Issue of the WTO System

A thesis presented

by

Hyo Jin Lee

A dissertation submitted in partial fulfillment
of the requirements for the degree of Master
of International Studies in the subject
of International Commerce

Graduate School of International Studies

Seoul National University

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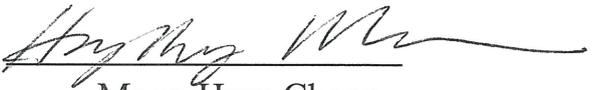
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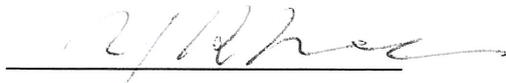
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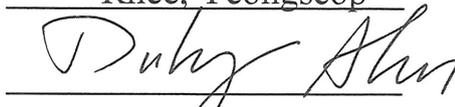
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ABSTRACT

**Chinese State Owned Enterprises as an Unresolved Issue of the
WTO System**

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Although the ratio of state owned enterprises of WTO member nations with transitional economies is high, the WTO agreement is not equipped with an explicit article that addresses state owned enterprises in transitional economies. Against this backdrop, this article analyzed WTO articles regarding Chinese state owned enterprises (SOEs) and focused on the issue of whether Chinese SOEs are consistent with the Agreement on Subsidies and Countervailing Measures (the SCM Agreement).

Since SOEs may constitute ‘public body’ of the Article 1.1 of the SCM Agreement, this article analyzed judgments of the WTO Panel and Appellate Body (AB) in <*United States Definitive Anti-dumping and Countervailing Duties on Certain Products from China Case*>. In this case, unlike the Panel, the AB narrowed the definition of ‘public body’ of this article and determined that SOEs did not constitute ‘public body’. This analysis shows that whether Chinese SOEs constitute ‘public body’ of the Article 1.1 of the SCM Agreement does not have one answer and it can be varied based on interpretations of the Panel and the AB.

In addition, this paper also studied the relationship between determinations of countervailing duties of United States’ investigation authorities and SOEs in WTO disputes of China and Vietnam against the United States. In three cases of China versus United States, the investigation authorities of the U.S. decided that Chinese state owned commercial banks were the extended agencies of the government. Therefore, they determined that SOEs constitute ‘public body’ under the Article 1.1 of the SCM Agreement. In the case of Vietnam versus United States, however, there was no relationship between SOEs and subsidies since the subsidized companies were privately-held enterprises.

Unlike market economies, there is no uniform standard that can be applied to a calculation of ‘benefits’ of non-market economies’ countervailing duties. Therefore, there is a necessity to establish the ‘non-market benchmark.’

Furthermore, considering high ratio of SOEs in WTO members with non-market economies, the introduction of a new article for 'SOEs in NMEs' is required. Efforts to reduce ambiguity of the existing WTO articles for SOEs should be accompanied.

Keywords: Chinese state owned enterprises, Non market economies, Agreement on Subsidies and Countervailing Measures (SCM Agreement), Panel, Appellate Body, WTO Regulations on SOEs

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CHAPTER I. Introduction

1. Motivation of addressing the State Owned Enterprises(SOEs) Issue

State trading is a common feature of many economies where agriculture is an important sector of trade. Thus, state trading enterprises are found in developed countries with significant agricultural trading interests, as well as in agriculturally-based developing countries. The heavy emphasis on agriculture in state trading activities would indicate governments' belief that state trading is an appropriate means of implementing agriculture-related policy objectives, such as providing price support for important agricultural products or ensuring food security. In the area of industrial goods, state trading may arise as a by-product of the nationalization of an ailing industry or as a means of pursuing government policies on products or industries considered to have strategic importance. ¹

State owned enterprises which implement state trading account for a significant ratio in the world economy. Even though the World Trade Organization pursues market liberalization, there are still a large number of SOEs not only in developing countries but also in advanced nations.

¹ Retrieved from http://www.wto.org/english/tratop_e/statra_e/statra_info_e.htm

In the sphere of international trade, there is a general presumption that state trading enterprises (State Owned Enterprises) will act on the basis of commercial considerations, and that based on theories of comparative advantage, they will expand their international trade in order to reap benefits.

However, a private firm, if it has significant power in a given market, may exercise this power in a way that distorts trade and thus can cause economic detriment, rather than benefit. Furthermore, governments can act in indirect ways to influence the world trade in an uneconomic direction; for example, they can act through firms or enterprises to provide protection against imports or to advance exports, to the detriment of foreign producers. Thus, the drafters of the General Agreement sought to place state trading enterprises in the same competitive position — with regard to governmental support or protection — as the private firm. In other words, they sought to make state traders behave as private competitive traders, and thus to remove the potential for trade distortion offered by government involvement in an enterprise's decisions and activities.² The drafters of the GATT seem to have recognized the fact that the state owned enterprises (or state trading enterprises) can act as governments' tools in order to block or hinder market access. Even with its significant ratio and its role as an impediment to market access, state owned enterprises have not been addressed in a detailed manner in terms of the WTO system. Although there are several articles that stipulate state trading enterprises in the GATT, there is no clear

² *Ibid.*

and specific definition of state trading and state trading enterprises. Therefore, this article plans to analyze whether Chinese SOEs constitute ‘public body’ regarding government’s ‘financial contribution’ in related legal cases and GATT articles that are related with SOEs. Furthermore, the two non market economies’(China, Vietnam) legal cases will be also addressed regarding the SOE issue. Unresolved issues on SOEs will be explained in the final chapter.

2. Country Selection

1) The Reason of Analyzing Chinese SOEs

The Intriguing prediction by John H. Jackson implies significance of subsidies to Chinese state-owned enterprises (SOEs).

China’s government owned, or state-operated or owned, enterprises are a big challenge to the system, and it is hard to believe this will not shape some of the thinking about subsidies...one can predict that in a couple of years some of the definitions in the subsidies code will have to be revised, if that is manageable.³

John H. Jackson,(2003)

³ John H. Jackson (2003),“The Impact of China’s Accession on the WTO”, *China and the World Trading System*,19,p.26.

The above-mentioned prediction suggests that the existence of a large number of SOEs in China has been recognized as fundamentally incompatible with the world trading system. Reform of bloated, inefficient state-owned enterprises (SOEs) was at the crux of the issues concerning China's accession to the WTO.⁴

In addition to this incompatibility, Chinese economy's significance in the world economy is another reason of selecting China as the subject of analysis. According to an IMF estimate, China ranks second in the world in terms of gross domestic product in 2012. Furthermore, China's influence on the WTO system is significant. It is clear that all other WTO members have also gained to various extents from China's membership. In 2001, China was an import market of more than USD 1.2 trillion, second only to the US market. Many WTO Members have benefited from China's economic growth, particularly among the Association of Southeast Asian nations (ASEAN) and East Asian economies, most of which have trade surpluses with China. Additionally, China's membership makes the WTO a real international organization. Without China, with its 1.3 billion people and enormous market as a major trading nation, the WTO would be incomplete. Before China joined the WTO, there was a very popular saying, 'China needs the WTO and the WTO needs China'. When one-fifth of the world's population joined the WTO

⁴ David M. Blumental(1999), "Applying GATT to Marketizing Economies : The Dilemma of WTO Accession and Reform of China's State-Owned Enterprises(SOEs) ", *Journal of International Economic Law*,.2,pp.113-115.

and observed its rules and regulations, the organization became stronger, more universal and more authoritative.⁵

Considering significance of Chinese economy in the WTO system and a large number of Chinese economy, China was regarded as an attractive country as the subject of this research.

2) The Reason of Selecting Legal Cases of the United States versus China

In 2012, with respect to gross domestic product, the United States and China rank first and second based on statistics by the IMF. These statistics show significance of both countries' economies. In addition to this significance, the United States is the country that raises the most frequent countervailing duty actions against China from 2004 to 2010. The below graph illustrates this situation.

⁵ Ricardo Meléndez-Ortiz, Christophe Bellmann and Shuaihua Cheng,(2011), "A Decade in the WTO : Implications for China and Global Trade Governance", *ICTSD Programme on Global Economic Policy and Institutions*,p.13

[Table 1] CVD Actions against China by WTO Members

	2004	2005	2006	2007	2008	2009	2010	Total
Investigation Initiation	3		2	8	11	13	5	42
	Canada (3)		Canada(1) USA(1)	Canada (1) USA (7)	Australia(2) Canada(3) South Africa(1) USA (5)	Australia(1) Canada (1) India(1) USA(10)	Canada (1) EU(2) USA(2)	
Measure		2		1	10	6	8	27
		Canada (2)		Canada (1)	Canada (3) USA (7)	Canada (1) USA(5)	Australia (1) Canada (1) USA(6)	

Source : Dukgeun Ahn and Jieun Lee(2011), "Countervailing Duty Against China : Opening a Pandora's Box in the WTO System?"

According to the above graph, the United States initiated 25 countervailing investigations against China, which amounts to almost sixty percent of the total number (42). Furthermore, it also took 18 countervailing actions against China, which is roughly seventy percent of the total countervailing measures (27). These

figures indicate the fact that analyzing United States' CVD cases against China can be the most effective method to research legal cases of advanced nations against China.

Therefore, this article focuses on the United States' countervailing duties cases against China.

CHAPTER II. Current Situation of State Owned Enterprises

1. Overview of the World's State Owned Enterprises

Recently, not only developing countries but also developed countries have large State Owned Enterprises (SOEs). Newly emerging countries such as Brazil, China, India, Indonesia and South Africa that are dubbed as “BRIICS” have a significant number of SOEs. The global importance of Brazil, China, India, Indonesia, Russia and South Africa is manifested in the number of companies from these countries that are among the largest in the world. Out of the 2000 largest companies, 260 are from the BRIICS countries, with China and India accounting for the majority of these. One hundred and twenty three companies, which account for 47% of 260 BRIICS companies, have been classified as state owned enterprises.⁶

The below table portrays SOE sales, profits, assets and market value as percentage of GNI in BRIICS countries.

⁶ Przemyslaw Kowalski, Max Buge, Monika Sztajerowska, Matias Egeland, (2013), “State Owned Enterprises : Trade effects and Policy Implications”, *OECD Trade Policy Papers* 147, pp.21-22.

[Table 2] SOE Sales, Profits, Assets and Market Value as Percentage of GNI

Country	Sales	Profit	Assets	Market Value
Brazil	12%	1.7%	51%	18%
China	26%	2.9%	145%	44%
India	16%	4.3%	75%	22%
Indonesia	3%	0.3%	19%	12%
Russia	16%	3.0%	64%	28%
South Africa	2%	1.7%	3%	1%

Note : Data from Forbes Global 2000 are for the year 2011 and data from World Development Indicators for the year 2010.

Source : Forbes Global 2000 and WDI.

Table 1 shows that the market value of SOEs amount to 32 % of GNI among all the BRIICS. In addition, SOEs control relatively large amounts of assets in the BRIICS with China, India and Russia leading the list although South Africa is an exception.

It is interesting to recognize that not only emerging countries but also developed countries have a significant number of SOEs. Table 2 shows the economic weight of global 2000 SOEs in OECD countries. This table compares SOE's sales, profits, assets and market values to their home countries' Gross National Incomes.

[Table 3] Forbes Global 2000 SOE sales, profits, assets and market value as a % GNI, OECD Countries, 2011

Country	Sales	Profits	Assets	Market value
Austria	1.1%	0.1%	3.8%	3.1%
Belgium	2.6%	0.9%	31.4%	2.9%
Czech Republic	5.6%	1.3%	15.4%	13.1%
Finland	3.3%	0.7%	11.5%	10.6%
France	7.9%	0.4%	23.0%	7.1%
Germany	0.1%	0.0%	0.3%	0.2%
Greece	5.8%	0.4%	23.2%	3.8%
Ireland	6.5%	-1.9%	133.2%	0.3%
Italy	0.4%	0.0%	0.8%	0.2%
Japan	0.5%	0.0%	0.8%	0.8%
Korea	6.8%	0.2%	48.3%	4.0%
Norway	25.0%	2.1%	32.7%	25.9%
Poland	12.4%	1.3%	27.2%	14.8%
Sweden	3.4%	0.7%	7.6%	8.1%
Switzerland	3.1%	0.6%	27.8%	7.1%
Turkey	0.7%	0.1%	0.8%	0.4%
United Kingdom	2.8%	-0.1%	96.8%	3.2%
United States	2.7%	-0.1%	38.5%	0.4%

Note : GNI data refer to 2010.

Source : Calculation from Authors of “State Owned Enterprises : Trade effects and Policy Implications” based on GNI from World Bank, World Development Indicators, on-line.

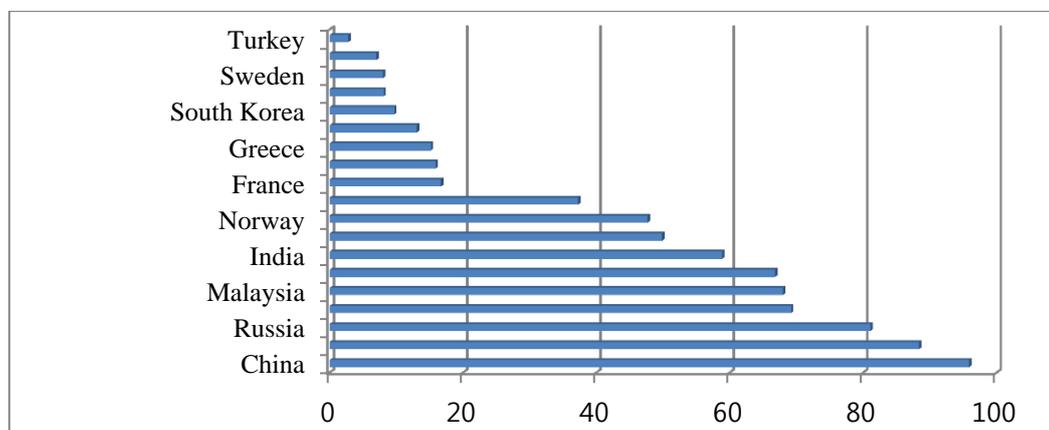
As indicated from the table 2, the scale of the SOE presence is modest in most OECD countries. However, there are a few notable exceptions. For instance, Korea has a significant volume of SOEs' assets that are equivalent to 48% of the country's GNI. Furthermore, Poland records double-digit scores in terms of sales, assets and market valuation of its SOEs. In Norway, oil and telecom SOEs' sales, assets and market values amount to one-quarter or more of annual GNI. ⁷

⁷ *Ibid*, p.21.

Comparison of several countries' SOE shares and analysis of sectoral SOE shares may have significance since they can provide us with a general picture of SOEs in the recent world. The OECD Trade Policy Paper (No.147) analyzed 38 countries that have at least ten firms on the Forbes Global 2000 list. They comprise 23 OECD countries, all six BRIICS countries and nine other countries and territories. For each of these countries a Country SOE Share (CSS) is calculated. The CSS is an equally weighted average of SOE shares of sales, assets and market values among country's top ten companies. It ranges from 0(no state ownership) to 100(all sales, assets and market value of country's ten largest companies are accounted for by SOEs).⁸ The Graph 1 illustrates selected countries' SOE shares. Twenty one out of thirty eight countries have a Country Share higher than zero.

⁸ *Ibid*, p. 22.

[Graph 1] Country SOE Share for Selected 38 Economies



Source : Calculation from Authors of “State Owned Enterprises : Trade effects and Policy Implications” based on ORBIS, Forbes Global 2000.

The above graph only portraits ten out of thirty eight countries whose shares are higher than zero. BRIICS economies except South Africa have considerably high country SOE Shares. For instance, China's CSS is the highest (95.9) and Russia (81.1), Indonesia(69.2), India(58.9) also record comparatively high CSS figures. South Africa is the only exception by recording 2.8.

The OECD countries with non-zero CSS are also listed above. Norway(47.7) ranks first among them and it is followed by France(16.7), Ireland(15.9),

Greece(15.2), Finland(13.1), South Korea(9.7), Belgium(8.1), Sweden(8), Austria(7) and Turkey(2.8).⁹

As shown from this data, China reached a record high. Its CSS amounts to 95.9, which is near 100. This indicates that almost all sales, assets and market value of China's ten largest companies are accounted for by SOEs.

Since this study mostly focuses on China's state owned enterprises and its relationship with the WTO Agreement, there is a necessity for analyzing the current status of Chinese state owned enterprises.

2. Overview of the China's State Owned Enterprises

1) Significance of China's State Owned Enterprises in the Chinese economy

In Chinese' economy, SOEs are predominant in the financial sector- particularly banking and insurance- and a considerable and increasing number of SOEs are also listed on national stock exchanges. They represent a significant part of total stock market capitalization. According to the OECD report(2010), Chinese

⁹ *Ibid*, pp.22-23.

SOE's represent three-fifths in Chinese economy. ¹⁰ In 1978, Chinese SOEs even produced 78% of total industrial output. No other type of ownership was allowed at that time. Reforms in 1980s, however, directly or indirectly have substantially weakened the role of the SOE as sources of industrial production.¹¹

In terms of subsidies, the magnitude of direct subsidies from the government to SOEs was very large. In 1990, direct subsidies to SOEs represented 4.5% of total SOE output, gradually dropping to 1% by 1998, when the last step of the SOE reforms was implemented. However, the decrease in direct subsidies did not translate into a decrease in total subsidies. As the government reduced direct subsidies, they were replaced by loans from state banks, which register around 30 to 50 percent of non-performing loans, most of them to inefficient SOEs.¹²

Furthermore, according to the report published by U.S.-China Economic and security Review Commission, it turns out that a high proportion of shareholding companies are controlled by SOEs. A review of data from the China Securities Regulation Commission, summarized in an OECD study of Chinese SOEs, indicates

¹⁰ Sarwat Aftab and Sarmad Shaikh,(2013), "Reforming State-Owned Enterprises", *Pakistan Policy Note 4*,p.1.

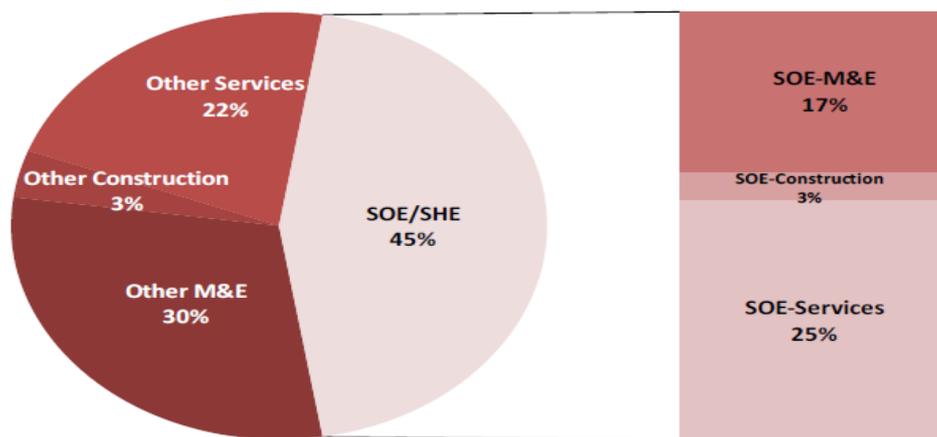
¹¹ Claustre Bajona and Tianshu Chu,(2004), "China's WTO Accession and Its Effect in State-Owned Enterprises", *Ease-West Center Working Papers 70*,p.6.

¹² *Ibid*,p.10.

that state-owned non-tradable shares amounted to about one-fifth of all shares of SOEs who had floated shares in domestic markets.¹³

According to a methodology suggested in the above-mentioned report, SOEs and state holding enterprises (SHEs) were responsible for 40 percent of China's GDP and 45 percent of non-agricultural GDP in 2007. The below table portraits this situation.

[Graph 2] Estimated SOE and SHE Share of China's non-agricultural GDP, 2007



Source : " An Analysis of State-Owned Enterprises and State Capitalism in China" written by Andrew Szamossezezi and Cole Kyle

¹³ Andrew Szamossezezi and Cole Kyle(2011), "An Analysis of State-Owned Enterprises and State Capitalism in China", *U.S.-China Economic and Security Review Commission*,p.9.

This data shows that state sector is playing a significant role in Chinese economy. Estimated GDP share of SOE services (25%) even exceeds that of other services (22%).

However, SOEs' share in production performance has declined enormously compared to that in the early period of reform. It is reported that SOEs currently account for about one-third of the production in the Chinese economy. In 1978, it was reported that SOEs represented 77.63% of overall industrial production, with virtually the entire remaining portion of industrial production assigned to collective-owned enterprises, indicating that non-public entities were rare except a small number of self-employed individuals.

In addition, SOEs received 34.1% of the short-term loan issued by the state-owned commercial banks, which is approximately analogous percentage to their contribution of GDP. The data for the industrial sector indicates that SOEs contributed 35.8% percent of industrial value-added in 2006. Based on a 43.3% contribution of industry to the GDP together with other sectoral data, it can be roughly estimated that SOEs' share in the GDP was 29.7%.¹⁴

These figures imply that SOEs' contribution to Chinese economy is still significant.

¹⁴ Junyeop Lee,(2009),“State owned enterprises in China”, *OECD Working Group on Privatization and Corporate Governance of State owned assets*,p.6.

2) China's State Owned Enterprises in Pillar Industries

On December 5, 2006, the State-owned Assets Supervision and Administration Commission (SASAC) of the State Council announced the “Guiding Opinion on Promoting the Adjustment of State-Owned Capital and the Reorganization of State-Owned Enterprises. Even though the State Council did not ratify the document, this guiding opinion provides an implication of the state’s views of key sectors. The SASAC chairman designated equipment manufacturing, auto, information technology, construction, iron and steel, non-ferrous metals, chemicals, and surveying and design to be pillar industries.¹⁵ The state would maintain a strong control position over the pillar industries.¹⁶

This is a categorization of China’s 116 large SOEs according to their industries. The list of Chinese large SOEs is posted on the SASAC’s homepage.¹⁷

¹⁵ Terrence P.Stewart.,(2009),China's Industrial Policy and Its Impact on U.S. Companies, Workers, and the American Economy.pp.4-35.

¹⁶ Absolute control is generally understood to be majority ownership while strong control reflects an ownership share of 30.to.50 percent. See (China's Industrial Policy and Its Impact on U.S. Companies, Workers, and the American Economy: Testimony of Terrence P. Stewart 2009).

¹⁷ Retrieved from <http://www.sasac.gov.cn/n2963340/n2971121/n4956567/4956583.html>

[Table 4] Categorization of Chinese large SOEs

Industry	SOE Name	Number of SOEs
Aerospace	China Aerospace Science and Technology Corporation	10
	China Aerospace Science and Industry Corporation	
	Aviation Industry Corporation of China	
	China National Aviation Holding Company	
	China Eastern Air Holding Company	
	China Southern Air Holding Company	
	Commercial Aircraft Corporation of China, Ltd.	
	China National Aviation Fuel Group Corporation	
	China Aviation Supplies Holding Company	
	China Travelsky Holding Company	
Shipbuilding	China State Shipbuilding Corporation	4
	China Shipbuilding Industry Corporation	
	China Ocean Shipping Company	
	China Shipping Company	

Industry	SOE Name	Number of SOEs
	China North Industries Group Corporation	
	State Development and Investment Corporation	
	China Merchants Group	
Research and Development	China Huafu Trade and Development Group Corporation	
	China Hualu Group Co.,Ltd	10
	IRICO Group Corporation	
	China XD Group	
	China Metallurgical Geology Bureau	
	China National Agricultural Development Group Co.Ltd	
	Huacheng Investment&Management Co.,Ltd	
	China Electronics Technology Group Corporation	
	China Electronics Corporation	
Electronics	Harbin Electronics Corporation	4
	Dongfang Electronic Corporation	

Industry	SOE Name	Number of SOEs
	China National Petroleum Corporation	
Petroleum	China Petrochemical Corporation	
/Petrochemical	China National Offshore Oil Corporation	5
	Zhuhai Zhenrong Company	
	Nam Kwong(Group) Company Limited	
	China Power Investment Corporation	
	State Grid Corporation of China	
	China Southern Power Grid Co.Ltd	
	China Huaneng Group	
Power	China Datong Corporation	
	China Huadian Corporation	12
	China Guodian Corporation	
	China National Nuclear Corporation	
	China Nuclear Engineering Group Corporation	
	State Nuclear Power Technology Corporation	
	Power Construction of Corporation of China	
	China Guangdong Nuclear Power Holding Corporation	

Industry	SOE Name	Number of SOEs
	China Three Georges Corporation	
	China Metallurgical Group Corporation	
	China State Construction Engineering Corporation	
Construction	China Academy of Building Research	8
	China Communications Construction Corporation Limited	
	Potevio Company Limited	
	China Railway Construction Corporation Limited	
	China Railway Group Limited	
	China Telecommunications Corporation	
	China United Network Communications Group. Co., Ltd.	
	China Mobile Communications Corporation	
Communications	Wuhan Research Institute of Post and Telecommunications	7
	China Academy of Telecommunication and Technology	
	Alcatel-Lucent Shanghai Bell Co.,Ltd.	
	China Railway Signal & Communication Corporation	

Industry	SOE Name	Number of SOEs
Manufacturing	China FAW Group Corporation(Automotive)	4
	China National Erzhong Group(Equipment)	
	COFCO Limited(Food)	
	China Grain Reserves Corporation(Food)	
Metal and Material	China Three Georges Corporation	18
	Anshan Iron and Steel Group Corporation	
	Wuhan Iron and Steel(Group)Corporation	
	Baosteel Group Corporation	
	Sinosteel Corporatoin	
	China Iron and Steel Research Institute Group	
	China Minmetals Corporation	
	China National Coal Group Corp.	
	China Coal Technology and Engineering Group Corp.	
	China National Materials Group Corporation Ltd.	
China National Building Materials Group Corporation		
China Nonferrous Metal Mining(Group) Co.,Ltd		
General Research Institute for Nonferrous Metals		

Industry	SOE Name	Number of SOEs
	China Railway Materials Commercial Corp.	
	Aluminum Corporation of China	
	Xinxing Cathay International Group Co.,Ltd.	
	Beijing General Research Institute of Mining and Metallurgy	
	China National Administration of Coal Geology	
	China National Travel Service(Tourism)	
Service	China International Consulting Engineering Consulting Corporation(Consulting)	
(Tourism,	OCT Group(Tourism)	5
Consulting,	Sinotrans and CSC Holdings Co.,Ltd.(logistics)	
logistics)	CITS Group Corporation	
	China Hengtian Group Co., Ltd	
Textile	Chinatex Corporation	2

	Shenhua Group Corporation Limited(Chemical Engineering)	
	Sinochem Group	
Chemicals	China National Chemical Corporation	5
	China National Chemical Engineering Group Corporation	
	Sinolight Corporation	
	China South Industries Group Corporation(Defense)	
	China Resources(Energy Export)	
	China Chengtong Holdings Group Ltd(Asset Management)	
	China National Silk Import and Export Corporation	
	China Forestry Group Corporation	
Others	China National Pharmaceutical Group Corporation	22
	China Poly Group Corporation(trading and real estate)	
	China National Gold Group Corporation	
	China National Cotton Reserves Corporation	
	China Printing(Group) Corporation	
	China Reform Holdings Corporation Ltd.(Restructuring)	
	China International Intellectech Corporation	
	China National Arts and Crafts Corporation	

China National Salt Industry Corporation

China Architecture Design and Research Group

China Energy Conservation and Environmental Protection Group

China General Technology(Group)Holding, Limited (Trade)

China National Machinery Industry Corporation

China Academy of Machinery Science and Technology

China North Locomotive and Rolling Stock Industry Corporation

China South Locomotive and Rolling Stock Corporation Limited

Dongfeng Motor Corporation(Automotive)

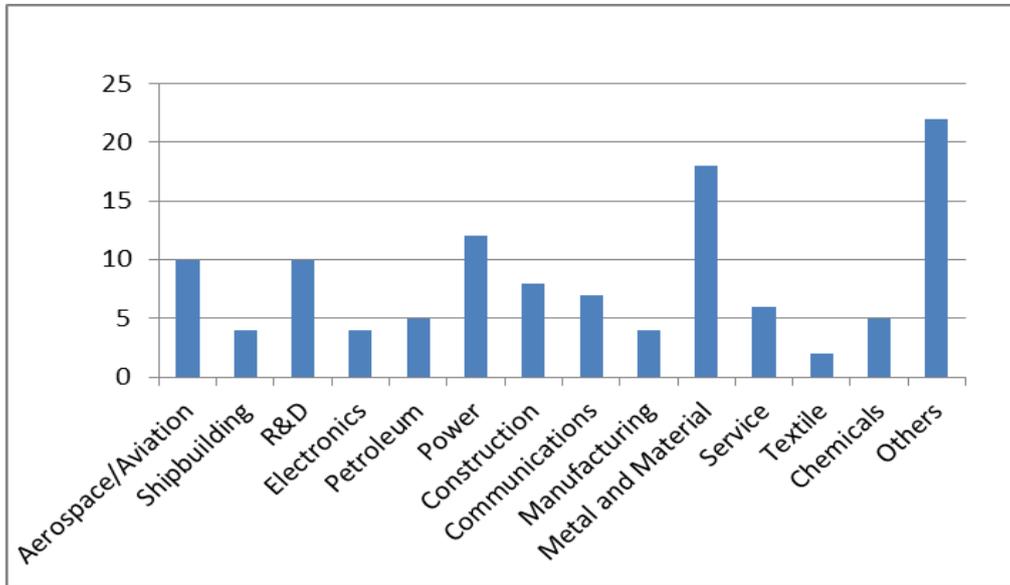
Total Number

116

Source : Author's own compilation based on the 'List of large SOEs of China' posted on the SASAC homepage

As illustrated in the upper chart and the below graph, SOEs of 'Power Industry', 'Metal and Material Industry' and 'Other Industries' amount to more than ten percent of the total SOEs. In addition, 'Aerospace and Aviation Industry' and 'Research and Development Industry', 'Construction Industry' also record significant ratios, which are slightly less than ten percent. Among these industries, 'Metal and Material Industry' and 'Construction Industry' are pillar industries that were designated by the SASAC chairman.

[Graph 3] Categorization of Chinese 116 SOEs by industry



Source : Author's own compilation based on the 'List of large SOEs of China' posted on the SASAC homepage'

In terms of protection of SOEs from market competition, the Chinese government has been still exercising its influence on SOEs. By 2006, it was obvious that the Hu government was restoring state leadership of the economy, for strategic reasons, to control macroeconomic cycles and to represent China overseas.¹⁸

¹⁸ The Heritage Foundation, (2012, March 1). *Chinese State Owned Enterprises and the US Policy on China*. Retrieved from the Heritage Foundation website: <http://www.heritage.org/research/testimony/2012/03/chinese-state-owned-enterprises-and-the-us-policy-on-china>

The ultimate protection from competition is laid down in statutes. The industries deemed strategic by the government, such as power, telecom, and shipping, are required to be state-dominated. There are additional sectors that are *de facto* state dominated, such as banking and the media. In both groups of sectors, SOE officers move freely back and forth into government positions.¹⁹

China has 61 of the Fortune 500, with the oil majors and State Grid in the top 10. National banks and telecoms are on some measures the world's largest. State-dominated steel and coal production are approaching half the world total. These firms provide massive amounts of tax revenue and employment. They are run by high-level Party cadres or their children. The below table shows Chinese state owned enterprises that were listed on Fortune 500 Ranks.

¹⁹ Zhao Huanxin (2012, February 10). *China Names Key Industries for Absolute State Control*. Retrieved From the China Daily website: http://www.chinadaily.com.cn/china/2006-12/19/content_762056.htm and Chen Jialu.(2010, August 24). *CEO Reshuffles Signal New View of Watchdog*. Retrieved From the China Daily website : http://www.chinadaily.com.cn/bizchina/2010-08/24/content_11194717.htm

[Table 5] Chinese SOEs on the List of Fortune 500 Ranks

Company Name	Rank
Sinopec	5
CNPC	6
State Grid	7
ICBC	77
China Mobile	87
China Railways	97
China Railway Construction	105
Construction Bank	108
China Life	113
Agricultural Bank	127

Source : "Global500," *CNN Money*,(2011)

The above datum shows that SOEs still have a significant influence not only on the Chinese economy but also on the world economy. These figures also highlight the importance of the SOE issue.

Chapter III. WTO Rules on State Owned Enterprises

1. The International Trade Organization Charter (Havana Charter) :

Section D, State Trading and Related Matters

Section D of Havana Charter addresses state trading and related matters. Article 29.1 (a) of section D stipulates that “each member undertakes that if it establishes or maintains a state enterprise, such enterprise shall, in its purchases and sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Charter for governmental measures affecting imports or exports by private traders.”

In addition, according to the Article 29.1 (b), state enterprises shall make any purchases or sales solely in accordance with commercial considerations and shall afford the enterprises of the other Member countries adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales. Furthermore, the Article 29.2 specifies that the provisions of paragraph 1 shall not apply to imports of products purchased for governmental purposes.

2. GATT Articles²⁰

1) Article 1.1 of the Agreement on Subsidies and Countervailing Measures(SCM Agreement)

: The Issue of "Public Body" of Government's financial contribution in the *United states – Definitive Anti-dumping and Countervailing Duties on Certain Products from China case (DS379)*

On 22th October 2010, the Panel report on this case was circulated to Members. In its report, the Panel addressed the claims raised by China regarding the USDOC's determinations on the issue of financial contribution, benefit and specificity.

In this part, the Panel report's judgment with respect to 'public body' in relation with SOEs will be analyzed. Furthermore, since the Appellate Body reversed the Panel's finding about the term 'public body', the Appellate Body's report on the meaning of this term will be also addressed in this part.

The Panel concluded that a 'public body' as that term is used in Article 1.1 of the SCM Agreement, is 'an entity controlled by a government.' From the Panel's perspective, this is the correct interpretation, which emerges from an analysis of the ordinary meaning of the term in its context and in the light of the object and purpose of

²⁰ Retrieved from http://www.wto.org/english/tratop_e/statra_e/statrad.htm

the provision and of the SCM Agreement.²¹ The Panel rejected China's argument that the USDOC's determinations were the mechanical application of a percent-of-ownership test, without regard for any other evidences or arguments. To the contrary, the Panel determined that the USDOC examined all of the evidences and arguments that were before it in reaching its conclusions that the SOEs were public bodies. In particular, in the Circular Welded Carbon Quality Line Pipe(CWP) investigation, the Panel upheld the USDOC's determination to find state-owned Hot Rolled Steel(HRS) producers to be government owned, and thus public bodies. In this investigation, the government of China had not provided the information that was needed to consider the government ownership analysis. Therefore, the USDOC had applied a rule of majority ownership. Based on facts available principle, the Panel upheld the USDOC's determinations in this investigation.²²

The Appellate Body, however, reversed this definition. First, the AB admitted that the SOEs at issue were not part of government in the narrow sense. Second, it defined 'public body' as an 'entity that possesses, exercises, or is vested with, governmental authority.'²³ Interpretations of the term 'public body' made by Panel and Appellate Body are illustrated in the below table.

²¹ World Trade Organization,(2010),United states – Definitive Anti-dumping and Countervailing Duties on Certain Products from China, Panel report, para.8.94

²² *Ibid*, para.8.128. China, Panel report, para.8.94

²³ World Trade Organization,(2011),United states – Definitive Anti-dumping and Countervailing Duties on Certain Products from China, Appellate Body report, para.317.

[Table 6] The Interpretation of 'Public Body'

The Interpretation of the term 'Public Body'	
Panel	an entity controlled by a government
Appellate Body	an entity that possesses, exercises, or is vested with, governmental authority

Source: Author's compilation based on reports of Panel and Appellate Body

The Appellate Body (AB) took a narrower stance than the Panel. According to the Appellate Body report, the AB ruled that the USDOC did not comply with its duty to seek out relevant information and to evaluate it in an objective manner to ensure that its determinations were based on a sufficient factual basis. The USDOC and the Panel relied 'principally' on information about ownership. From the AB's perspective, this is insufficient because evidence of government ownership, in itself, is not evidence of meaningful control of an entity by government and cannot, without more, serve as a basis for establishing that the entity is vested with authority to perform a governmental function.

Accordingly, such evidence, alone, cannot support a finding that an entity is a public body. Therefore, the AB determined that the USDOC's approach was inconsistent with a proper understanding of the term 'public body' in Article 1.1(a) (1) of the SCM Agreement.²⁴ Therefore, the AB found that the USDOC's public body determinations in respect of SOEs in the investigations of Chinese certain products

²⁴ *Ibid*, para.346.

were inconsistent with Article 1.1(a)(1).²⁵

The AB seems to have taken a narrower stance than the Panel in defining the term ‘public body.’ According to its logic, the government ownership itself was insufficient evidence for defining certain SOEs to be public bodies.

In respect of state-owned central banks (SOCBs), however, the AB upheld the Panel’s conclusion. According to the Panel report, the USDOC discussed extensive evidences with respect to the relationship between the SOCBs and the Chinese government, including the evidence that the SOCBs are meaningfully controlled by the government in the exercise of their functions.²⁶

The Appellate Body supported the Panel’s decision stating that the USDOC’s public body determination in respect of SOCBs was supported by evidence on the record that these SOCBs exercise governmental functions on behalf of the Chinese government.²⁷

²⁵ *Ibid*, para.347.

²⁶ *Ibid*, para.355.

Overall, it can be inferred from the report of the AB that government ownership itself is not sufficient evidence for SOEs to be proven as ‘public bodies’ under the SCM Agreement. Existence of ‘governmental functions’ is an important factor for SOEs to be judged as ‘public bodies’ under the SCM Agreement. The Appellate Body seems to have used a more sophisticated logic than the Panel.

2) GATT Article XVII

Article XVII of the GATT 1994 is the principal Article dealing with state trading enterprises and their operations. It sets out that such enterprises – in their purchases or sales involving either imports or exports – are to act in accordance with the general principles of non-discrimination, and that commercial considerations are only to guide their decisions on imports and exports.

It also instructs that Members are to notify their state trading enterprises to the WTO annually. Clarification of what is considered to be a state trading enterprise, and thus notifiable, is provided in the WTO Understanding on the Interpretation of Article XVII. Paragraph 1 of this text states that Members shall notify state trading enterprises in accordance with the following working definition:

"Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."

Particularly important in this definition is the phrase "in the exercise of which they influence ... the level or direction of imports or exports", as this goes to the heart of what the regulation of state trading in the WTO is aimed at – that is, the potentially distorting effects on trade of the operations of state trading enterprises. Conversely, the WTO does not seek to prohibit or even discourage the establishment or maintenance of state trading enterprises, but merely to ensure that they are not operated in a manner inconsistent with WTO principles and rules.

According to the information from the WTO homepage, the notification requirement does not apply to what is termed “government procurement: imports of products for immediate or ultimate consumption in governmental use”. Government procurement is regulated by the “Agreement on Government Procurement.”

In this article, however, neither state trading nor state trading enterprise is clearly or specifically defined. This ambiguity hinders the proper application of this article.

3) Interpretative Notes to GATT Articles

In addition to Article XVII, a number of other GATT Articles address state trading. The Interpretative Note to Articles XI (General Elimination of Quantitative Restrictions), XII (Restrictions to Safeguard the Balance of Payments), XIII (Non-discriminatory Administration of Quantitative Restrictions), XIV (Exceptions to the Rule of Non-discrimination) and XVIII (Governmental Assistance to Economic Development) are examples of such articles. Throughout these Articles, the terms "import restrictions" or "export restrictions" include restrictions made effective through

state trading operations. Adding to the Article XVII requirement to notify, it can be seen that the thrust of the rules on state trading are two-fold: to increase the transparency of the use of state trading to implement various trade-related policies, and to ensure that the state trading enterprise is not used to implement WTO-inconsistent measures.

Furthermore, the substantive obligations of Members under the rules governing state trading can be summarized in four points : non- discrimination, which is also referred to as “most favored nation” , no quantitative restrictions, preservation of the value of tariff concessions and transparency.

3. WTO Accession Protocol of China: Protocol’s Provisions Regulating SOE Subsidies

1) Provisions regarding operations of SOEs

The China accession protocol does not explicitly include any obligation regarding privatization of SOEs in China. Instead, China is obliged by its accession protocol to operate its SOEs according to market economy principles. Report of Working Party on the accession of China that was incorporated in the Protocol provides that:

China would ensure that all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations, e.g., price, quality, marketability and availability, and that the enterprises of other WTO Members

would have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory terms and conditions. In addition, the Government of China would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement. The Working Party took note of these commitments. ²⁸

This provision seems to extend the discipline of GATT Article XVII on state trading enterprises to all state-owned and state-invested enterprises in China. According to Julia Ya Qin, the provision even exceeds the substantive requirements of Article XVII regarding the recent decision of the Appellate Body in <Canada-Wheat case>.²⁹

2) General commitments on subsidies: little special treatment

According to China's accession protocol, China received little special treatment stipulated by the SCM Agreement. Paragraph 171 of the Working Party Report points the transitional nature of China's economy as the main reason for

²⁸ World Trade Organization (2001) ,“Report of the Working Party on the Accession of China”, para.46.

²⁹ Julia Ya Qin(2004), “WTO Regulation of Subsidies to State-owned Enterprises(SOEs)- A Critical Appraisal of the China Accession Protocol ”, *Journal of International Economic law*,p.884.

disallowing China the benefit of special treatment of developing countries under Article 27 of the SCM Agreement.

In fact, China received no special treatment regarding subsidies. China's WTO accession protocol gave China obligations to eliminate all export subsidies, not to invoke developing country exceptions with respect to domestic subsidies, not to maintain any agricultural export subsidies and not to extend the transition period for transition economy members. The fact that China received little special treatment in terms of subsidies implies that China has "WTO-plus obligations", which means obligations exceeding the existing requirements of the WTO agreements.

(1) Obligation to eliminate all export subsidies upon accession

Regarding export subsidies, the representative of China confirmed, as provided in Section 10.3 of the Draft Protocol, that China would eliminate all export subsidies, within the meaning of Article 3.1(a) of the SCM Agreement, by the time of accession. To this end, China would, by accession, cease to maintain all pre-existing export subsidy programs and, upon accession, make no further payments or disbursements, nor forego revenue or confer any other benefit, under such programs.³⁰

According to Article 27.2, 27.3, 27.4 and 29 of the SCM Agreement, developing countries have at least eight years while transition economy members have

³⁰ World Trade Organization (2001), "Report of the Working Party on the Accession of China", para.167.

seven years from the entry into force of the WTO Agreement to phase out export subsidies. China's commitment to eliminate all export subsidies, however, does not grant it to adopt such transitional periods, which may be otherwise still be available to it under the SCM Agreement.

(2) Duty of not maintaining agricultural export subsidies

Paragraph 234 of the Working Party Report stipulates China's obligation of not introducing or maintaining any export subsidies on agricultural products upon accession. Undertaking of China is stricter than current requirements of all other WTO members that are stipulated by provisions of the Agreement on Agriculture. Under the Agreement on Agriculture, WTO member countries are not required to eliminate agricultural subsidies. They are only required to reduce their existing export subsidies. Article 9 of the Agreement on Agriculture provides that developed countries agreed to reduce the value of their agricultural export subsidies by 36% in six years and developing countries agreed to do so by 24% within ten years from the entry into force of the WTO Agreement.

(3) Obligation of not extending transition period for transition economy members

As mentioned above, Article 29 of the SCM Agreement allows transition economy members to have a 7-year transition period. The transition period, however, ended on 31 December 2001, shortly after China's accession to the WTO on 11 December 2001. Therefore, China virtually had no transition period that was allowed

to transition economy members. China acceded to the WTO under unfavorable and harsh conditions in comparison with other member nations.

(4) Duty of not invoking developing country exceptions regarding domestic subsidies

Paragraph 171 of the Working Party Report provides that China agreed not to invoke articles 27.8, 27.9 and 27.13 of the SCM Agreement that provide developing country members with special treatment with respect to the use of domestic subsidies. According to article 27.8 of the SCM Agreement, there shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Furthermore, under article 27.9 of the SCM Agreement, subsidies granted by a developing country member are not actionable at the WTO dispute settlement forum for causing displacement of imports in subsidizing developing country members unless the displaced imports are products covered by the tariff concessions or other obligations of the subsidizing developing country member or are otherwise found to be the result of nullification and impairment of such concessions. In addition, article 27.13 stipulates the privatization exception.³¹

³¹ World Trade Organization, “Agreement on Subsidies and Countervailing Measures”, Article 27.

(5) Special treatment allowed for China : De minimis subsidies of developing countries

Special treatment that remains available to China under the SCM Agreement is limited. The only special treatment allowed for China is calculation of de minimis subsidies of developing countries that are exempted from countervailing duties under articles 27.10, 27.11 and 27.12.

With respect to de minimis agricultural domestic subsidies, which are exempted under the Agricultural Agreement, China has received a de minimis level of 8.5% of the value of its total agricultural production during the relevant year.³² This figure is higher than de minimis level for developed country members, which is 5%, but lower than the level allowed for developing country members that is 10%.³³

³² World Trade Organization (2001) ,“Report of the Working Party on the Accession of China”, para 235.

³³ World Trade Organization, “Agreement on Agriculture”, Article 6.4.

Chapter IV. Nonmarket Economy and State Owned Enterprises

1. Legal Issues(Related Articles)

1) WTO Accession Protocol of China: Section 15 (b)

The SCM Agreement article 14 stipulates the guidelines for calculating the amount of a subsidy in terms of benefits to the recipient. These guidelines include loans, loan guarantees, provision of goods and services and equity investments, purchases of goods by the government. Except for loans and loan guarantees, article 14 defines the relevant market conditions for comparison as those prevailing in the territory of the subsidizing member.³⁴

China's accession protocol allows China to depart from the guidelines of Article 14. Section 15(b) of the Protocol provides :

³⁴ World Trade Organization, "Agreement on Subsidies and Countervailing Measures", Article 14.

In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.

This provision shares the logic of Ad Article VI, which recognizes that ‘special difficulties’ may exist in determining price comparability and that importing member may find it necessary ‘to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Additionally, section 15(b) of China’s protocol has its significance in that it is the only WTO provision that explicitly authorizes the use of non-market economy methodology, which is the alternative benchmark. This methodology is applied to all Chinese subsidies.

In terms of termination date, section 15(b) has a difference with 15(a)(ii), which authorizes the application of alternative benchmark to antidumping duties.

While section 15(d) stipulates that the provisions of subparagraph (a)(ii) shall expire within 15 years after the date of accession. Section 15(b), however, does not have an explicit expiration date. This implies that China bore harsh conditions in terms of subsidies when it acceded to the World Trade Organization.

Julia Ya Qin criticizes China's WTO Protocol arguing that at least two factors exercised their influences in shaping this WTO Protocol. The two factors can be identified: a distrust of state ownership among major WTO members (the United States in particular) and the fear of the 'China threat.' Although the WTO system is legally ownership-neutral, its norms and rules assume the conditions of a market economy that is typically dominated by private ownership. Unlike many transition economies that carried out large-scale privatization in the early stage of their reforms, China has never embraced mass privatization. Furthermore, regarding fear of the 'China threat', the phenomenal growth of the Chinese economy has caused much concern to other WTO members that are losing market share to Chinese competition. Overall, this fear of the

‘China threat’, combined with the distrust of state ownership, appears to be the main motivation behind the Protocol approach.³⁵

Since it is true that the state-owned sector still remains a major component of the Chinese economy, the argument that a distrust of state ownership among major WTO members played its significant role in giving unfavorable conditions to China in its accession protocol seems to be reasonable. Furthermore, ‘China Threat Theory’ that is based on the concepts of offensive realism with John J. Mearsheimer can support Julia Ya Qin’s argument. Setting political factors aside, however, providing unfavorable treatments to China without appropriate reasons is unfair considering the fact that the WTO agreement pursues elimination of discriminatory treatment in international trade relations.

2) The Related GATT Article : GATT Article 29 of Agreement on Subsidies and Countervailing Measures

Article 29 of Agreement on Subsidies and Countervailing Measures (SCM Agreement) addresses ‘Transformation into a Market Economy.’ According to Article

³⁵ Julia Ya Qin(2004), “WTO Regulation of Subsidies to State-owned Enterprises(SOEs)- A Critical Appraisal of the China Accession Protocol ”, *Journal of International Economic law*,pp.915-916.

29.1 of the SCM Agreement, members in the process of transformation from a centrally-planned into a market to a free enterprise economy may apply programs and measures necessary for such a transformation. However, such members are obliged to phase out subsidy programs falling within the scope of Article 3. In such a case, Article 4 shall not apply.(Article 29.2)

The SCM Agreement seems to be granting flexibility to Members by stipulating exceptional circumstances in Article 29.4. According to this article, members with transformation into a market economy may be given departures from their notified programs and measures and their time-frame by the Committee if such departures are deemed necessary for the process of transformation.

Additionally, according to Articles 6.1(d) and 27.9, 29.2 of the SCM Agreement, in the transition period, domestic subsidies granted by such members in the form of direct forgiveness of government-held debt or grants to cover debt repayment are not actionable. Furthermore, all other forms of specific domestic subsidies are only partially actionable at the WTO.

The Article 29 exception is particularly related with the issue of State Owned Enterprises (SOEs) subsidies. Since transition economies have a large number of SOEs, which they inherit from their central-planned economies, their economic reforms inevitably include restructuring of SOEs. Various measures used by

governments to carry out such reform, however, could be deemed as specific domestic subsidies actionable under the SCM Agreement.³⁶ In other words, government's measures to restructure SOEs can constitute 'financial contribution' under the SCM agreement. For instance, governments can provide grants to cover SOEs' debts or can forgive government-held debts to them. In addition, governments can transfer SOE's shares to outside buyers or employees at a nominal or discounted price.

Furthermore, article 29 permits transition economy governments to apply measures 'necessary' for the transformation of their economies and gives limited immunity to such measures from WTO actions for a seven-year period from the date of entry into force of the WTO Agreement. The provision explicitly aims to allow transition economy members higher flexibility in granting subsidies to enterprises including SOEs even though the scope of the provisions is still unclear.

³⁶ *Ibid*, p.868.

2. Non Market Economies' Cases of Subsidies and Countervailing Duties

1) Cases of China

(1) Coated Free Sheet Paper(CFSP) Case (2008)

A. Background and Chronological Review

This case is the first United States' countervailing duties(CVD) case against China. The United States' Department of Commerce (USDOC) altered its longstanding policy of not applying the countervailing duty law to NME countries by announcing its decision to initiate CVD and Antidumping investigations against China, Indonesia and Korea regarding "coated free sheet paper".³⁷

On October 31, 2006, the NewPage Corporation of Dayton, Ohio, a U.S. manufacturer of glossy paper, filed a petition with USDOC and International Trade Commission (ITC) stating that U.S.'s industry was materially threatened or injured because of subsidized and less than fair value imports of CFSP from China, Indonesia

³⁷ United States' Department of Commerce,(2006), "Notice of Initiation of Countervailing Duty Investigations :Coated Free Sheet Paper from People's Republic of China, Indonesia and the Republic of Korea".

and Korea. According to Newpage's argument, several Chinese paper companies were recipients of government subsidies such as policy loans, grants and tax breaks.³⁸ The USDOC decided to initiate CVD and AD investigations against China, Indonesia and Korea. The Chinese government and one of Chinese exporters, however, filed a complaint with the U.S. Court for International Trade(CIT) arguing that the USDOC should cease its investigation since it lacked the legal authority to levy CVD against China.

Furthermore, on March 30, 2007, the U.S. DOC announced its preliminary decision to apply U.S. CVD law to imports from China. The preliminary decision determined that Chinese producers and exporters of coated free sheet paper received actionable subsidies that range from 10.9 to 20.35 percent.

U.S.'s Department of Commerce's final determination reaffirmed its preliminary decision. The DOC determined that Chinese producers and exporters

³⁸International Trade Administration,(2006), "Commerce Initiates Countervailing Duty Investigation on Coated Free Sheet Paper from the People's Republic of China". Retrieved from <http://enforcement.trade.gov/download/factsheets/factsheet-prc-cfsp-cvd-initiation-112006.pdf>.

received countervailable subsidies ranging from 7.40 percent to 44.25 percent, and sold CFS paper in the United States at 21.12 percent to 99.65 percent less than fair value.³⁹

The below graph illustrates CVD and AD duties on CFSP imported from China.

[Table 7] CVD and AD Duties on CFSP Imported from China

Producer/Exporter	Subsidy Rate		Dumping Rate	
	Preliminary	Final	Preliminary	Final
Gold East Paper (Jiangsu) Co. Ltd	20.35	7.40	23.19	21.12
Shandong Chenming Paper Holdings	10.90	44.25	48.07	99.65
All Others	18.16	7.40	99.65	99.65

Source : The United States' Department of Commerce

³⁹ United States' Department of Commerce,(2006), "Notice of Initiation of Countervailing Duty Investigations :Coated Free Sheet Paper from People's Republic of China, Indonesia and the Republic of Korea".

On November 20, 2007, however, United States International Trade Commission finally determined that the U.S. industry is neither materially threatened nor injured because of coated free sheet paper's imports from China, Indonesia and Korea. As a result, no antidumping or countervailing duties were imposed on imports of this product from these countries.⁴⁰

Although United States International Trade Commission made a negative final determination, the U.S. Department of Commerce's affirmative determination of the countervailing and antidumping duty investigation on CFSP can be interpreted as a signal for the U.S.'s change in attitude in terms of applying countervailing duty law to nonmarket economies.

B. Existence of Subsidies and Countervailing Duties and China's State owned enterprises

NewPage Corporation argued that 13 Chinese CFSP producers and exporters have received countervailable subsidies from the Government of China in the petition. As mandatory respondents, the DOC selected two largest of them, which were Shandong Chenming Paper Holdings, Ltd and Gold East Paper(Jiangsu) Co. Ltd. In its

⁴⁰ The US ITC, Coated Free Sheet Paper from China, Indonesia, and Korea (Investigation No. 701-TA-444-446 (Final) and 731-TA-1107-1109 (Final), USITC Publication 3965), December 2007.

preliminary determination, the DOC found that six kinds of programs among seventeen alleged subsidies were countervailable. The six programs include : government grants, tax exemption, policy loans, export refunds, equity infusion and others.

[Table 8] Countervailable Duties Determined by U.S. Department of Commerce

Types of Countervailable Subsidies	Content
Grant Programs	The DOC has identified that the State Key Technology Renovation Fund provided large-sized state-owned enterprises with countervailable subsidies
Government Policy Lending Programs	The DOC has determined that the Government of China (GOC) carried out policies* to encourage and support the development of the domestic forestry and paper industry through the provision of loans extended by GOC policy banks and State-owned Central Banks(SOCBs).

Types of Countervailable Subsidies	Content
Income Tax Programs	<p data-bbox="799 551 1318 741">According to the DOC's preliminary determination, four tax exemption programs were considered as countervailable subsidies.</p> <p data-bbox="799 792 1147 822">Four tax exemption programs</p> <ul data-bbox="855 873 1318 1193" style="list-style-type: none"> <li data-bbox="855 873 1318 902">➤ The “Two Free, Three Half” Program <li data-bbox="855 920 1318 994">➤ Reduced Income Tax Rates for FIEs Based on Location <li data-bbox="855 1016 1318 1090">➤ Local Income Tax Exemption and Reduction Program for “Productive” FIEs <li data-bbox="855 1113 1318 1187">➤ Income Tax Credits on Purchases of Domestically Produced Equipment by FIEs
VAT and Duty Exemptions	<p data-bbox="799 1249 1318 1440">According to the DOC's preliminary determination, two VAT and Duty Exemption programs were considered as countervailable subsidies</p> <ul data-bbox="855 1532 1318 1704" style="list-style-type: none"> <li data-bbox="855 1532 1318 1606">➤ VAT Rebates on Purchases of Domestically Produced Equipment <li data-bbox="855 1628 1318 1702">➤ VAT and Tariff Exemptions on Imported Equipment

Types of Countervailable Subsidies	Content
Domestic VAT Refunds for Companies located in the Hainan Economic Development zone	One of Gold East's cross-owned companies was a qualifying manufacturing enterprise in the Economic Development Zone of Hainan and DOC has determined that domestic VAT Refund for this company was countervailable subsidy.
Other Subsidies	Due to Chenming's request that the DOC treat information about four additional programs as business proprietary, the DOC determined that these four programs constitute countervailable subsidies.

Note* : Policies indicates the 10th five-year plan and 2010 Special Plan”
Source: Author's own compilation based on the World Bank Institute, “Trade Remedies and Non-Market Economies : Economic Implications of the First US Countervailing Duty Case on China, March, 2003.

As illustrated in the above table, state-owned enterprises were involved in countervailable duties that were determined by the U.S. DOC in two aspects. First, as one of grant programs, the U.S.DOC has identified that the State Key Technology Renovation Fund provided countervailable subsidies to Chinese large paper companies, which were ‘Shandong Chenming Paper Holdings company’ and ‘Gold East Paper company.’ Even though the two companies are now privately held

companies, Shandong Chenming Paper Holdings company's predecessor was Shougang state owned paper mill. Second, the DOC determined that the policies to support the development of the domestic forestry and paper industry were implemented by the central and local governments through the provision of loans extended by GOC policy banks and SOCBs. According to DOC's determination, Five-Year Plans should be considered as a central government policy or program that local government adopts and implements through SOCBs.

The two aspects suggest that state-owned enterprises are not only recipients of countervailable subsidies in some cases but also function as tools that provide loans to certain industries(in this case, domestic forestry and paper industry).

(2) U.S. Antidumping and Countervailing Duties on Certain Products From China(DS 379)

A. Background and Chronological Review

In 2007, all of the U.S's investigations of countervailing duties targeted China. On June 7 of 2007, the investigation of countervailing duties for circular welded carbon quality steel pipe industry was initiated. This initiation was started by the petition of Ad Hoc Coalition for Fair Pipe Imports from China and United Steelworkers. Subsequently, on July 5 of 2007, the U.S. Department of Commerce announced the initiation of the investigation and decided to investigate three major

steel companies of China: Weifang East Steel Pipe company, Tianjin Shuangjie Steel Pipe Group, Zhejiang Kingland Pipeline Group.

Since the USITC had a negative final determination on Chinese coated free sheet paper products, this is the first case in which the USDOC imposed countervailing duties against Chinese products.

Notably, on 5 June 2008, the USDOC had a final determination to impose countervailing duties and anti-dumping duties against Chinese four types of Products : Circular Welded Carbon Quality Steel Pipe products('CWP'); Light-Walled Rectangular Pipe and Tube Products('LWR'); Laminated Woven Sacks('LWS')products; Certain New Pneumatic Off-the-Road Tyres('OTR') products.

On 19 September 2008, China requested consultations concerning the definitive anti-dumping and countervailing duties imposed by the United States pursuant to the final anti-dumping and countervailing duty determinations and orders issued by the US Department of Commerce in several investigations. On 9 December 2008, China requested the establishment of a Panel and the Panel was established. The Panel rejected China's arguments overall but the Appellate Body reversed the Panel's findings and ruled a favorable judgment for China.

B. Types of Actionable Duties judged by the USDOC and SOEs

① Actionable Duties against Chinese Circular Welded Carbon Quality Steel Pipe Products

In this case, the USDOC determined that two factors constitute actionable duties for Chinese carbon quality steel pipe companies. The two factors include : ‘Provision of inputs for less than adequate remuneration’ and ‘other subsidies.’

Types of actionable duties against Chinese carbon quality steel pipe companies are illustrated on the below chart.

[Table 9] Types of Actionable Duties against Chinese Welded Steel Pipe Products

Types of Actionable Duties	Content
Provision of Inputs for Less than Adequate Remuneration	➤ Provision of hot-rolled steel products from state-owned producers of hot-rolled steel products to Zhejiang Kingland Pipeline Group was considered as actionable duties since it was financial contribution with specificity under the SCM Agreement.

	<ul style="list-style-type: none"> ➤ Weifang East Steep Pipe company, however, was not investigated by the U.S. Authority since private steel companies(not SOEs) provided hot-rolled steel products to it.
Others	<ul style="list-style-type: none"> ➤ The local government provided certain companies with grants of export assistance and R&Ds. ➤ These grants were provided to companies under the name of ‘Special Funds’ or ‘Programs.’

Source : Korea Institute for International Economic Policy, 『Research of The Recent Situation of Chinese Subsidies and Major Countries’ Responses』 , December 2011.

As illustrated on the chart, SOEs were considered as the extended agencies of the government. For the USDOC, state owned enterprises were deemed as ‘public body’ under the Article 1.1 of the SCM Agreement. This is shown by the fact that Weifang East Steep Pipe company was not investigated by the U.S. Authority since private steel companies (not SOEs) provided hot-rolled steel products to it.

② Actionable Duties against Chinese Certain New Pneumatic Off-the-road Tyres Producers and SOEs

The USDOC had affirmative preliminary and final determinations on Chinese Certain New Pneumatic Off-the-road Tyres products. Types of actionable duties determined by the USDOC are illustrated in the below chart.

[Table 10] Types of Actionable Duties against Chinese Off-the road Tyres Products

Types of Actionable Duties	Content
Provision of Inputs for Less than Adequate Remuneration	<ul style="list-style-type: none"> ➤ Provision of Land for Free ➤ Provision of natural rubber, which is a subject matter for production of tyres through state owned rubber producers
Provision of Policy Loans by the Government	<ul style="list-style-type: none"> ➤ Provision of Policy Loans from the Central Government and local governments to Tyre Producers through State Owned Commercial Banks(SOCBs) ➤ Such Provision of Policy Loans are conducted to encourage the development of the Tyre Industry through the Implementation of ‘Guizhou 10th Five-year Plan’, ‘Hebei Science Technology 11th

Five-year Plan and 2020 Long-term Plan’ and ‘Tianjin 11th Five-year Plan.’

Source : Korea Institute for International Economic Policy, 『Research of The Recent Situation of Chinese Subsidies and Major Countries’ Responses』 , December 2011.

The above chart shows that the USDOC considers SOEs as prolonged agencies of the Chinese government. Despite this tendency, however, whether SOEs constitute ‘public body’ under the Article 1.1. of the SCM Agreement and the scope of Article 17 of the GATT remains unclear.

C. Review and Evaluation of the Panel and AB’s Assessment of the Proxy Benchmark used by the USDOC to calculate the benefit from RMB-denominated SOCB loans

In the case of Non-market economies (NMEs), interest rates from a third, surrogate country are usually considered as standards for proxy benchmark to calculate the benefit of the SCM Agreement’s Article 14.

For instance, in the 1960s, the United States Department of Treasury developed and used what was known as the “surrogate country” approach for applying antidumping and countervailing law to non-market economies.⁴¹

In this case, the Panel ruled that the USDOC’s reliance on the World Bank grouping of countries in the same category as China based on GNI per capita seemed ‘not unreasonable.’ The Appellate Body, however, criticized the Panel’s approach stating that the Panel conducted a cursory review of the USDOC’s proxy benchmark. Furthermore, it argued that ‘not unreasonable’ does not necessarily answer the question of ‘whether that finding is based on positive evidence rather than conjecture or remote possibility.’⁴²

According to the Appellate Body report, the Panel could have looked at the USDOC proxy benchmark in the light of alternative proxies based, as proposed by China before the USDOC, on countries selected based on national savings rates, rather than GNI, or in the light of a benchmark based on interest rates from a third,

⁴¹Longyue Zhao and Yan Wangr,(2003),Trade Remedies and Non-Market Economies : Economic Implications of the First US Countervailing Duty Case on China. *The World Bank Institute Policy Working Paper 4560*

⁴²World Trade Organization,(2011),United States-Definitive Anti-dumping and Countervailing Duties on Certain Products from China, *Appellate Body Report*.para.521

surrogate country. Based on this argument, the AB found that the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the Dispute Settlement Understanding (DSU).

The Appellate Body took more rigorous approach in applying the proxy benchmark to the nonmarket economy country. It pointed out that ‘not unreasonable’ does not necessarily mean that there are positive and objective evidences. In addition, the AB’s argument that there was a necessity for adoption of alternative proxies seems to be more reasonable since they can reflect Chinese economy more accurately than GNI.

Longyue Zhao and Yan Wangr(2008) supported this view arguing that the USDOC should consider more than one factor in selecting ‘surrogate’ countries if the USDOC continues to reject China’s interest rates as appropriate benchmarks. According to their opinion, in addition to gross national income (GNI), other factors should be taken into account such as national savings rate and inflation, as China is a country with a high savings rate and low inflation, as compared to countries in the same income group.

This approach seems to be more comprehensive than the approach of the USDOC. In order to adopt an accurate benchmark, various factors that can reflect Chinese economy should be considered.

D. The Necessity for Introducing a ‘non market benchmark’ to the SCM Agreement

① The Necessity for preventing Discretion in Setting Market Benchmark

As mentioned above, the absence of marketplace benchmarks in NMEs has never prevented importing countries from applying antidumping and countervailing measures to imports from NMEs, despite that it is equally impossible in theory to determine whether an NME has ‘dumped’ or ‘subsidized’ its products, given that the concepts of dumping and subsidization are also based on the existence of market benchmarks.

In practice, countries have typically used a third country price or even the importing country price of a like product as the normal value of an import from an NME in determining dumping margins or amount of subsidies.⁴³ Based on not only the plain language of the SCM Agreement, but also the language of a recent Appellate Body (AB) decision, the use of what the WTO refers to as “substitute benchmarks”(which would appear to include the surrogate country methodology, as well as the factors of production, or market oriented industry approach) would in general appear to be consistent with U.S. international obligations. That being said,

⁴³ Julia Ya Qin (2004), “WTO Regulation of Subsidies to State-owned Enterprises(SOEs)- A Critical Appraisal of the China Accession Protocol ”, *Journal of International Economic law*,p.871.

however, it may be the case that a specific application of a substitute benchmark may be found to be incompatible with U.S. WTO obligations on an “as applied” basis.⁴⁴

In terms of the use of substitute benchmarks, Article 14(d) stipulates the relevant part. It provides that :

*(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision on purchase(including price, quality, availability, marketability, transportation and other conditions of purchase or sale).*⁴⁵

The SCM Agreement’s use of the phrase “any method used” would appear to encompass not only existing U.S. practice regarding the use of surrogates in the “factors of production” methodology, but also the artificial pricing method discussed above. In addition, a recent Appellate Body(AB) ruling interpreting the scope of Article 14(d) concluded that “an investigating authority may use a benchmark other than private prices of the goods in question in the country of provision, when it has

⁴⁴ Todd B. Tatelman(2007), “United States’ Trade Remedy Laws and Non-market Economies : A Legal Overview”, *Congressional Research Service*,p.13.

⁴⁵ World Trade Organization, “Agreement on Subsidies and Countervailing Measures”, Article 14(d).

been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods.”⁴⁶ In the same context, the United States’ Department of Commerce has possessed broad discretionary authority with respect to the question of whether a countervailable subsidy could exist in a non-market economy situation.

There is a need to eliminate this discretion in establishing market benchmarks for NMEs since discretionary market benchmarks can give unfavorable conditions to NMEs without reasonable justifications. Therefore, ‘non-market benchmark’ that only applies to NMEs should be established among the WTO rules.

② The Necessity for distinguishing market economies and non-market economies

The article 14(b) of the SCM Agreement stipulates as follows :

*A loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on **a comparable commercial loan which the firm could actually obtain on the market.** In this case the benefit shall be the difference between these two amounts;*

⁴⁶ Todd B. Tatelman,(2007), “United States’ Trade Remedy Laws and Non-market Economies : A Legal Overview”, *Congressional Research Service*,p.14.

The article provides that a comparable commercial loan which the firm could actually obtain on the market is the standard in calculating a benefit. In other words, ‘market price’ is the standard in calculating benefit under the SCM Agreement.

Unlike market economies, however, non-market economies do not have market prices. Therefore, it is hard to apply article 14(b) of the SCM Agreement to NMEs. Considering this situation, it is necessary to stipulate a ‘non-market benchmark’ that provides specific standards for calculating ‘benefits’ of NMEs under the SCM Agreement.

Given the fact that non-market economies have different characteristics in comparison with market economies, there is also a need to provide a separate ‘non-market benchmark’ that is only applicable to NMEs. Comparison of China and Singapore, which are respectively a typical market economy and a non-market economy illustrates difference between economies of market and a non-market economies. Global Competitive Indices of both countries shows difference of both economies. The below chart illustrates comparison of the two countries’ Global Competitive Indices.

[Table 11] Comparison of China and Singapore's Global Competitive Index
2013-2014

Factors	Singapore's Rank (out of 148)	China's Rank (out of 148)	Singapore's Score (1-7)	China's Score (1-7)
GCI 2013-2014	2	29	5.6	4.8
GCI 2012-2013(out of 144)	2	29	5.7	4.8
GCI 2011-2012(out of 142)	2	26	5.6	4.9
Basic Requirements (20%)	1	31	6.3	5.3
Institutions	3	47	6.0	4.2
Infrastructure	2	48	6.4	4.5
Macroeconomic Environment	18	10	6.0	6.3
Health and Primary Education	2	40	6.7	6.1
Efficiency Enhancers (50%)	2	31	5.6	4.6
Higher Education and Training	2	70	5.9	4.2
Goods Market Efficiency	1	61	5.6	4.3
Labor Market Efficiency	1	34	5.8	4.6
Financial Market Development	2	54	5.8	4.3
Technology Readiness	7	85	6.0	3.4
Market Size	34	2	4.7	6.9

Factors	Singapore's Rank (out of 148)	China's Rank (out of 148)	Singapore's Score (1-7)	China's Score (1-7)
Innovation and Sophistication Factors (30%)	13	34	5.1	4.1
Business Sophistication	17	45	5.1	4.3
Innovation	9	32	5.2	3.9

Source: Klaus Schwab, World Economic Forum, “The Global Competitiveness Report 2013-2014”

According to international rankings, Singapore remains one of the world’s most competitive economies. For the past five years, Singapore has been ranked among the top five economies in both the World Economic Forum Global Competitive Report and the Institute for Management Development World Competitive Yearbook. For instance, Singapore was ranked 2nd in the Global Competitive Report and 4th in the World Competitive Yearbook.⁴⁷

As the above chart illustrates, China’s ranks and scores are considerably lower than those of Singapore except in macroeconomic environment and market size.

⁴⁷ Singapore’s Ministry of Finance(2012), “The Singapore Public Sector Outcomes Review”, p.5.

The most striking difference between market and non-market economies will be economic efficiency since prices are freely determined in market economies while economic factors including prices are determined by government in non –market economies. With respect to efficiency, Singapore and China’s ranks show a significant difference. In terms of goods market efficiency and labor market efficiency, Singapore ranks first while China ranks respectively 61th and 34th among 148 countries.

These indices suggest difference between market and non-market economies. Since prices are freely determined in markets, there are less efficiency losses in market economies. On the contrary, a significant portion of economies is under state ownership and governments intervene in markets in non-market economies. Because of such intervention, efficiency losses are larger in non-market economies than those in market economies. Due to this structural difference in economies, there is a necessity to introduce a ‘non-market benchmark’ that establishes specific regulation to set out a standard to calculate the amount of a subsidy in terms of the benefit to the recipient.

(3) United States' Countervailable Subsidization of Crystalline Silicon Photovoltaic(CSPV) Cells and Solar Cells Imported from the People's Republic of China Case(2012)

A. Background and Chronological Review⁴⁸

On October 19, 2011, a petition was filed with the Commission and Commerce by Solar World Industries America, Hillsboro, OR, alleging that an industry in the United States is materially injured or threatened with material injury by reason of less than fair value (LTFV) and subsidized imports of crystalline silicon photovoltaic cells and modules from China.

On November 8, 2011, the Department of Commerce (Commerce) initiated AD and CVD investigations of imports of solar cells from China. The petitioner for these investigations is Solar World Industries America Inc. (OR).The merchandise covered by these investigations are crystalline silicon photovoltaic cells, and modules, laminates, and Panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, Panels and building integrated materials.

⁴⁸ The United States' Department of Commerce and International Trade Commission (2011), "Fact Sheet of the U.S. Department of Commerce and the U.S. International Trade Commission's Final Determination Report of Countervailable Subsidization of Crystalline Silicon Photovoltaic Cells and Solar Cells Imported from the People's Republic of China Case".

On October 17, 2012, Commerce published a notice in the Federal Register setting forth its final affirmative determination in its countervailing duty investigation of CSPV cells and modules from China. The countervailable subsidy rates (in percent ad valorem), as reported by Commerce, are presented in the tabulation below.⁴⁹

[Table 12] The Countervailable Subsidy Rates Reported by Commerce

Foreign Producer/Exporter	Subsidy Rate (percent ad valorem)
Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science & Technology Co., Ltd. (collectively, “Trina”)	15.97
Wuxi Suntech Power Co., Ltd.	14.78
All Others	15.24

Source : The U.S. Department of Commerce

⁴⁹ The U.S. International Trade Commission, (2012), “The Final Determination of Crystalline Silicon Photovoltaic Cells and Modules From China Case”.

The foreign exporters of the above chart are China's renowned companies that produce CSPV cells and modules, solar Panels. According to companies' official homepages, the two companies(Trina Solar Energy and Wuxi Suntech Power) are not state owned enterprises. In this case, however, whether Chinese producers' easy access to credit from 'state-owned' banks was countervailable duties or not became the issue. Types of countervailable duties that were determined by the USDOC with regard to SOE issue will be analyzed in the below chapter.

B. Types of Countervailable Duties judged by the US Agencies and SOEs

According to the preliminary report of the USITC, one U.S. producer reported that Chinese companies were considered as more 'bankable' because of ease of access to credit from 'state-owned' banks, low risk of bankruptcy and ability to fulfill warranties. Subsequently, the U.S. Commerce listed the following programs alleged in the petition to have provided countervailable subsidies to producers : (1) grant programs; (2) government provision of land for Less Than Adequate Remuneration(LTAR); (3) government provision of land for LTAR; (4) policy lending to the renewable energy industry; (5)Income and Other Direct Tax Exemption and Reduction Programs; (6)Indirect Tax and Tariff Exemption Programs; (7) Export Credit Subsidy Programs; (8) Export Guarantees and Insurance for Green Technology.

The United States Department of Commerce(USDOC) determined that some of the programs were countervailable but some of the programs were not used by respondents during the period of investigation(POI) or not to provide benefits during the POI.

[Table 13] Programs that are Determined or not to be Determined as Provision of Countervailable Duties

Programs Determined to be Countervailable	Programs Determined to be Not used by the Respondents During the POI or Not to Provide Benefits During the POI
Golden Sun Demonstration Program Preferential Policy Lending Provision of Polysilicon for Less Than Adequate Remuneration('LTAR') Provision of Land for LTAR Export Credit Subsidy Programs Export Buyer's Credits Preferential Tax Program for High or New Technology Enterprises	Export Product Research and Development Fund Subsidies for Development of 'Famous Brands' and 'China World Top Brands' Special Energy Fund (Established by Shandong Province) Export Credit Subsidy Program : Export Seller's Credits Government Provision of Aluminum for LTAR

Source : The United States' Department of Commerce

With regard to the above-mentioned programs, export credit subsidy programs seem to be related with the U.S. producers' argument that Chinese exporters are provided with easiness of access to credit from state owned central banks. According to the USDOC's determination, export buyer's credits were

countervailable while export seller's credits did not provide benefits to Chinese exporters during the period of investigation.

As mentioned above, Chinese exporters that were investigated by the USDOC were not state owned enterprises. Therefore, state owned enterprises related in this case were state owned commercial banks that provided credits to Chinese exporters.

As in other cases mentioned above, state owned commercial banks (SOEs in another term) also acted as extended governmental agencies in this case.

2) Case of Vietnam: 'Countervailable Subsidization of Imports of Certain Frozen Warmwater Shrimp from Vietnam case'(2012)

(1) Background and Chronological Review

On December 28, 2012, a petition was filed with the Commission and Commerce by the Coalition of Gulf Shrimp Industries, Biloxi, MS, alleging that an industry in the United States is materially injured or threatened with material injury by reason of subsidized imports of frozen warmwater shrimp from China, Ecuador, India, Indonesia, Malaysia, Thailand, and Vietnam. Accordingly, effective December 28, 2012, the Commission instituted countervailing duty investigation Nos. 701-TA-491-497 (Preliminary).

In the preliminary determination, the United States International Trade Commission determines, pursuant to section 703(a) of the Tariff Act of 193, that there is a reasonable indication that an industry in the United States is materially injured by reason of imports from China, Ecuador, India, Indonesia, Malaysia, Thailand, and

Vietnam of frozen warmwater shrimp, provided for in subheadings 0306.17.00, 1605.21.10 and 1605.29.10 of the Harmonized Tariff Schedule of the United States, that are alleged to be subsidized by the Governments of China, Ecuador, India, Indonesia, Malaysia, Thailand, and Vietnam.⁵⁰

Along with the preliminary determination of the USITC, the US Department of Commerce (DOC), on August 13, 2013, announced its affirmative final determinations in the countervailing duty (CVD) investigations of imports of certain frozen warmwater shrimp from Vietnam, China and other related countries.

On September 20, 2013, however, the USITC, determined that the US shrimp industry was not hurt, nor threatened, by imports of frozen warmwater shrimp from China, Ecuador, India, Malaysia, and Vietnam, which the US Department of Commerce had determined as being subsidized.

Although the final determination of the USITC was negative, this case reminds countries of the fact that the United States changed its policy of not levying countervailing duties against Nonmarket economies, which include Vietnam to imposing countervailing duties against them. Whether the involved enterprises were state-owned or private will be analyzed.

⁵⁰ United States International Trade Commission, (2013), “Frozen Warmwater Shrimp from China, Ecuador, India, Indonesia, Malaysia, Thailand and Vietnam”.

(2) Whether the targeted enterprises are state-owned enterprises of Vietnam

In this case, Vietnamese producers who were considered to be granting subsidies to shrimp companies were Minh Qui Seafoods Co.Ltd and Nha Trang Seaproduct Company and others. The below graph illustrates subsidy rates of these producers

[Table 14] Targeted Producers and Subsidy Rates

Country	Exporter/Producer	Subsidy Rate
Vietnam	Minh Qui Seafoods Co.Ltd	7.88%
	Nha Trang Seaproduct Company	1.15%
	Others	4.52%

Source: US Department of Commerce, 'Fact Sheet: Commerce Finds Countervailable Subsidization of Imports of Certain Frozen Warmwater Shrimp from Vietnam'

Minh Qui Seafoods Co.Ltd and Nha Trang Seaproduct Company were found to be private enterprises. Even though state owned enterprises play a significant role

in the Vietnamese economy⁵¹, SOE's presence seems to be not so obvious in trade disputes between Vietnam and its counterparts yet.

⁵¹ According to '2011 Knowledge Sharing Program: Vietnam and Myanmar' published by Korea Development Institute, SOEs' degree of contribution to GDP of Vietnam amounts to 34.35% in 2008.

Chapter V. Unresolved Issues on State Owned Enterprises

1. The Issue of State Owned Enterprises in the Trans-Pacific Partnership (TPP) negotiation

1) The Recent Situation of the TPP Negotiation and SOEs in Member Countries

The Trans-Pacific Partnership (TPP) is a proposed regional free trade agreement (FTA) being negotiated among the United States, Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. Though the scale and the nature of SOEs' behavior differ, SOEs exist in some form in all TPP countries. For instance, the SOE presence in Vietnam is estimated to represent 40% of output.

In addition, according to the OECD report (2010), SOEs represent a fifth of total stock market capitalization in Singapore and even half in Malaysia.

2) Prospect for SOE Provisions of the TPP

Though some business groups, government officials, and labor groups have all expressed an interest in strong SOE provisions in the TPP, it remains unclear what form such provisions may take. Such measures may include provisions that seek to ensure that SOEs operate on a commercial basis, and to address potential trade and investment barriers.

In light of these concerns about fair competition, SOEs are addressed, though not extensively, in several existing U.S. FTAs. For instance, NAFTA and subsequent U.S. FTAs with Australia, Chile, Colombia, Peru, and South Korea have similar languages on SOEs. Though the specific details vary among these agreements, most contain national treatment, non-discrimination, and transparency provisions, while upholding the prerogative of countries to establish and maintain SOEs. The U.S.-Singapore FTA includes somewhat more extensive provisions on SOEs, but they largely apply only to Singapore and not the United States.⁵²

The concern over potential anti-competitive behaviors and restrictive trade caused by advantages granted to SOEs by governments has shaped texts by the United States regarding SOEs in the proposed TPP agreement. Therefore, SOE provisions of the TPP will likely seek to achieve competitive neutrality. Competitive neutrality refers to an environment in which SOEs receive no competitive advantages beyond those enjoyed by private sector companies.⁵³

The United States, which is one of leading countries in the Trans-Pacific Partnership negotiation argues that there is a necessity for introducing the concept of ‘competitive neutrality.’ According to the argument of the United States, state owned enterprises should compete with private enterprises equally without any preferential

⁵² Ian F.Fergusson, William H.Cooper (2013) ,“The Trans-Pacific Partnership Negotiations and Issues for Congress”, *Congressional Research Service*, p.47.

⁵³ *Ibid*, p.47.

treatments. Countries with high ratio of state owned enterprises (Vietnam, Malaysia, Singapore), however, expressed concerns over the introduction of the concept of ‘competitive neutrality’.⁵⁴

Furthermore, according to the article 18.2 of the Trans-Pacific Strategic Economic Partnership Agreement, nothing in this Agreement shall derogate from the existing rights and obligations of a Party under the WTO Agreement or any other multilateral or bilateral agreement to which it is a party. This article implies that the TPP is being pushed as a ‘WTO Plus approach’, which prescribes obligations exceeding the existing requirements of the WTO agreement.

The ‘WTO Plus approach’ can be understood in the same context with ‘competitive neutrality’ with regard to SOEs. As mentioned above, GATT Article 17 stipulates general principles of non-discrimination, commercial considerations that state trading enterprises should abide by. Competitive neutrality can be understood as a type of non-discrimination. In addition, if the concept of competitive neutrality becomes more sophisticated and disciplined, it may give stricter obligations to participating countries of the TPP.

Not all policy observers, however, agree on the appropriate strength or even necessity of SOE provisions in the TPP. In the United States for example, organizations such as the Federal National Mortgage Association (Fannie Mae), and

⁵⁴ Bank of Korea, (2003), “Report of International Economics”.

the U.S. Postal Service are operated by the government and provide market-oriented products. Therefore, as with most trade negotiations, the U.S. position on SOEs likely seeks to balance both U.S. defensive and offensive interests. Some observers suggest that existing regulations may already adequately temper advantages of SOEs (e.g., subsidies, financing), while others maintain that additional provisions, particularly regarding transparency, will only make existing disciplines more effective.

The United States tabled its SOE proposal last year. USTR negotiators have suggested that TPP countries generally support the idea of SOE provisions in the FTA, but all parties have not yet agreed on specific language. Some reports suggest that TPP countries may be pressing the United States to extend the coverage of its SOE proposal to include sub-federal SOEs such as those at the state and municipal level. As with government procurement, smaller countries with little activity at the sub-federal level argue that they receive little benefit from such exclusions.

More recently, in the Lima round of negotiations in May 2013, Australia reportedly tabled a proposal on SOE provisions. Australia has a domestic procedure which attempts to achieve competitive neutrality between private and state-owned enterprises in its own economy. Some speculate that Australia's TPP proposal on SOEs is similar with its domestic policy and have raised it may not be effective in preventing all types of SOE benefits, such as different regulatory stand concerns that such a system would be challenging to be enforced in an international environment.

They argue that it may not be effective in preventing all types of SOE benefits, such as different regulatory standards for private and state-owned firms.⁵⁵

3) TPP Provisions of SOEs and China

Ian F. Fergusson and William H.Cooper(2013) argue that the TPP can become a template for a larger Asia-Pacific FTA or future WTO negotiations, wider applicability of these provisions to SOEs in other countries, especially China, may be envisioned.

From a different perspective, strictness of the TPP provisions regarding SOEs may hinder China's participation in the TPP negotiation. On May 31, 2013, spokesperson of China's Ministry of Commerce said that Chinese government will analyze the pros and cons and feasibility to join in TPP based on the principle of an equality and mutual benefit.⁵⁶

Regarding the large proportion of SOEs in the Chinese economy, however, strict SOE provisions of the TPP can give burdens to China, which is considering its participation in the TPP. In this case, SOE provisions of the TPP that reflect 'WTO Plus approach' may function as an invisible barrier to China.

⁵⁵ Ian F.Fergusson, William H.Cooper, (2013) ,"The Trans-Pacific Partnership Negotiations and Issues for Congress", *Congressional Research Service*, p.48.

⁵⁶ Ministry of Commerce People's Republic of China, (2013), "Spokesperson of the Ministry of Commerce Shen Danyang Gives a Joint Interview to Media on Several Hot Issues Concerning Economy and Trade".

2. The OECD Report's Principles for SOEs

The OECD report suggests six principles to build the legal and regulatory framework for state owned enterprises. The six principles are: 1) There should be a clear separation between the state's ownership function and other state functions that may influence the conditions of state-owned enterprises, with regard to market regulation; 2) Governments should strive to simplify and streamline the operational practices and the legal forms of SOEs; 3) Any obligations and responsibilities that an SOE is required to undertake in terms of public services beyond the generally accepted norm should be clearly mandated by laws and regulations; 4) SOEs should not be exempt from the application of general laws and regulations; 5) The legal and regulatory framework should allow sufficient flexibility for adjustments in the capital structure of SOEs when this is necessary for achieving company objectives; 6) SOEs should face competitive conditions regarding access to finance. The relations with state-owned banks, state-owned financial institutions and other state-owned companies should be based on purely commercial grounds.⁵⁷

Among these principles, the sixth principle seems to be sharing a context with GATT article 17.1(b) that stipulates state trading enterprises' obligation to make purchases or sales in accordance with commercial considerations. Furthermore,

⁵⁷ Organization for Economic Cooperation and Development (2005), "OECD Guidelines on Corporate Governance of State-owned enterprises", p.12.

the fifth principle can be applied to SOEs in transition economies even though it assumes SOEs in OECD member countries, which are advanced nations. As mentioned above, there is no explicit provision that assumes situations of SOEs in transition economies under the WTO system. The fifth principle that allows SOEs to have sufficient flexibility for adjustments in their capital structures can be an example for provisions regarding SOEs in transition economies. As if the article 27 of the SCM agreement allows departures from notified programs for Members with transition economies, the new clause that stipulates rights and obligations of SOEs in transition economies may provide certain flexibility to SOEs. The new article, however, should grant such flexibility under specific and clear conditions.

3. The Necessity for Sophistication of WTO Rules on SOEs

There is a necessity for sophistication of WTO rules regarding state owned enterprises since many WTO members have a significant number of SOEs. This thesis focused on the issue of SOE subsidies in China, which is a giant transition economy. In spite of significance of SOEs in transition economies, the existing WTO subsidy rules mostly focuses on conditions of typical market economies and there is no in-depth consideration for SOEs in transition economies.

GATT Article 17 is the principal Article that addresses state trading enterprises and their operations. This article stipulates that state trading enterprises shall act in accordance with the general principle of non-discrimination and that only

commercial considerations are to guide their decisions on imports and exports. Additionally, Article 29 of the SCM Agreement grants a 7-year transitional period to members with transition economies. This transitional period, however, has expired since it was only applied from 1 January 1995 to 31 December 2001. Since China acceded to the WTO on 11 December 2001, China received almost no benefits from Article 29.

The existing WTO rules that are above-mentioned lack appropriate market benchmarks for transition economies and do not specifically address the issue of SOEs in transition economies. GATT Article 17 only assumes the situation of state trading enterprises while Article 29 of the SCM Agreement only stipulates the flexibility that is provided to transition economies. The article that can be applied to ‘state owned enterprises’ in ‘transition economies’ should be introduced to the WTO system. To this end, sophistication of the WTO rule system is necessary. In other words, WTO subsidy disciplines should be varied to regulate different types of subsidies according to their purposes and trade effects.

Chapter VI. Conclusion

In spite of a significant number of state owned enterprises in members of transitional economies, the SOE issue has not been systematically analyzed in the WTO system even with existing WTO rules on SOEs. For instance, GATT Article 17 provides that state trading enterprises should act in accordance with the general principles of non-discrimination and make commercial considerations. Furthermore, it also obliges Members to notify their state trading enterprises to the WTO annually. Additionally, interpretative notes to GATT Articles are giving WTO Members obligations to increase the transparency of the use of state trading and to ensure that the state trading enterprises are not used to implement WTO-inconsistent measures. Furthermore, WTO accession protocol of China has a provision regarding operations of SOEs. This provision is considered as the article that extends the discipline of GATT Article 17 on state trading enterprises to all SOEs and state-invested enterprises in China.

The issue of SOE has a close relationship with subsidies since government's subsidies to SOEs are one of the most controversial issues in the WTO system. According to China's WTO accession protocol, China received little special treatment under the SCM Agreement.

Since transitional economies are nonmarket economies, this thesis introduced articles that are related with the NME issue. Section 15(b) of the WTO accession protocol of China explicitly authorizes the use of non-market economy methodologies

to all Chinese subsidies. This article seems to give unfavorable conditions to China because the use of NME methodologies is at Member countries' discretion. Furthermore, section 15(b) does not have an explicit expiration date. In contrast, Article 29 of the SCM agreement permits transition economy governments to apply measures 'necessary' for the transformation of their economies and gives limited immunity to such measures from WTO actions for a seven-year period from the date of entry into force of the WTO Agreement.

In addition to this, NMEs' (China, Vietnam) cases of subsidies and countervailing duties were analyzed particularly focusing the relationship between the existence of subsidies and countervailing duties and SOEs. Analysis of the U.S investigating authorities' judgments in three Chinese legal cases illustrated the fact that SOEs in NMEs were not only regarded as recipients of countervailable subsidies but also governments' tools of providing loans to certain industries. In one Vietnam case, however, the relationship between SOEs and subsidies was not explicitly revealed. In this case, the investigated enterprises were found to be private enterprises, not SOEs.

In the final chapter of this article, unresolved issues on SOEs are analyzed. The significance of the SOE issue has also been proven by the TPP negotiation. The SOE issue has been included as one of major issues of the TPP negotiation. The TPP allegedly aims for the introduction of the 'WTO Plus Approach'. In order for the TPP negotiators to introduce specific and clear provisions regarding SOEs, sophistication of the WTO rule is necessary. The new article for 'SOEs in transitional economies' should be introduced to the WTO system.

Not only introduction of new provisions but also reducing ambiguity of the WTO rules is significant and urgently needed. For instance, major concepts such as ‘state trading’ and ‘state trading enterprises’ are not specifically defined. Clear standards that can distinguish major concepts from other similar concepts should be established.

This legal sophistication should be conducted in order for SOEs in transitional economies, such as China not to act as a stumbling block to the full implementation of the WTO agreement. Furthermore, given the fact that one of the purposes of the WTO system is the realization of fair trade, SOEs in transition economies should not bear unfavorable conditions in comparison with SOEs in market economies without reasonable justifications. To this end, the new article that can clearly designate rights and obligations of SOEs in NMEs, particularly China, should be introduced to the WTO system.

Appendix

TABLE OF CITED CASES

Full Case Titles and Citations

The United States-Definitive Anti-dumping and Countervailing Duties on Certain Products from China Case(WT/DS 379/R, 2008)
Coated Free Sheet Paper from People’s Republic of China, Indonesia and the Republic of Korea Case(United States Department, “Commerce’s Notification of Initiation of Countervailing Duty Investigations” and United States International Trade Administration, “Commerce Initiates Countervailing Duty Investigation on Coated Free Sheet Paper from the People’s Republic of China”,2006)
The United States Countervailable Subsidization of Crystalline Silicon Photovoltaic(CSPV) Cells and Solar Cells Imported from the People’s Republic of China Case(The United States’ Department of Commerce and International Trade Commission, “Fact Sheet of the U.S. Department of Commerce and the U.S. International Trade Commission,” “Final Determination Report of Countervailable Subsidization of Crystalline Silicon Photovoltaic Cells and Solar Cells Imported from the People’s Republic of China Case”,2011)
Countervailable Subsidization of Imports of Certain Frozen Warmwater Shrimp from Vietnam Case(The United States International Trade Commission, “Frozen Warmwater Shrimp from China, Ecuador, India, Indonesia, Malaysia, Thailand and Vietnam”,2013)

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중국 국영기업의 WTO 규범 합치성 연구

국문초록

중국을 포함한 전환경제 회원국들의 경제에서 국영기업이 차지하는 비중은 큼에도 불구하고 WTO 협정에서는 전환경제 국가의 국영기업에 관한 규정이 부재한 상황이다. 본 논문에서는 이러한 상황에 문제 인식을 두고 전환경제국가, 그 중에서도 중국의 국영기업에 관한 WTO 규범을 알아보고 중국의 국영기업이 WTO 보조금 협정에 합치하는지 여부의 분석에 중점을 두었다.

국영기업은 WTO 보조금 및 상계조치협정 제 1 조상의 '공공기관'에 해당될 수 있는 여지가 있으므로 <미국-중국산 특정상품에 대한 확정 반덤핑관세와 상계관세사건>의 패널 및 상소기구의 판정을 평석하였다. 동 사건에서 상소기구는 패널보다 '공공기관'의 범주를 더 좁게 보아 국영기업이 동 조항 상의 '공공기관'에 해당하지 않는다고 보았다. 중국의 국영기업이 WTO 보조금 협정 제 1 조의 '공공기관'에 해당하는지 여부는 일률적이지 않고 패널 및 상소기구의 '공공기관'에 대한 해석에 따라 달라진다는 점을 알 수 있었다.

뿐만 아니라 중국과 베트남의 보조금 관련 WTO 사례에서 미국의 조사당국의 상계관세 판정과 국영기업의 관계를 분석하였다. 중국의 세 가지 사례에서 미국 조사당국은 중국의 국영상업은행을 ‘중국 정부의 연장된 기관’ 이라고 판단하여 WTO 보조금 협정 제 1 조 1 항 상의 ‘공공기관’ 이라고 보았다. 반면 베트남의 사례에서는 조사 대상 기업들이 민간 기업이었으므로 국영기업과 보조금 간의 상관관계가 나타나지 않았다.

시장경제 국가들과는 달리, 중국과 같은 비시장경제 국가들의 보조금으로 인한 혜택 산정 시 일률적으로 적용되는 기준이 없으므로 비시장경제 국가들에게만 적용 가능한 ‘비시장경제 기준’ 이 필요하다고 여겨진다. 아울러 비시장경제에 해당하는 WTO 회원국들의 경제에서 국영기업의 비중이 높다는 점을 감안할 때 ‘비시장경제의 국영기업’ 에 적용될 수 있는 조항의 입법이 요구된다. 또한 ‘전환경제의 국영기업’ 을 WTO 체제 내에 포섭하기 위해서는 현 WTO 조항을 명확하게 하는 작업이 병행되어야 한다.

주요어 : 중국 국영기업, WTO 보조금협정, 비시장경제, 중국 국영기업에 관한 WTO 규범, 패널, 상소기구

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