

**NOTIFICATION OF LAWS AND REGULATIONS UNDER
ARTICLES 18.5 AND 32.6 OF THE AGREEMENTS**

Questions Posed by JAPAN Regarding
the Notification of THE PEOPLE'S REPUBLIC OF CHINA¹

The following communication, dated 21 October 2002, has been received from the Permanent Mission of Japan.

Japan's questions with regard to China's Transitional Review Mechanism (TRM) on Subsidies and Countervailing Measures

In terms of the Protocol on the Accession of the People's Republic of China (China) and the English translation of the Regulations on Subsidies and Countervailing Measures submitted by China (G/SCM/N/1/CHN/1), Japan submits the following questions.

Japan would appreciate it if China responds to our comments in written form, and also would like to request the Government of China to provide all relevant rules on Subsidies and Countervailing Measures as early as possible. We would provide further questions if necessary.

Definition and Calculation of a Subsidy

1. Article 1.1 of the SCM Agreement stipulates that the benefits must be found to exist at the time of the investigation, stating "a subsidy shall be deemed to exist if . . . a benefit is thereby conferred". Please explain whether the use of the future tense in Article 3 of China's CVM regulations is only a translation issue. If not, please explain the consistency with the SCM Agreement.
2. Despite footnote 1 of the SCM Agreement, Article 3. (2) of China's CVM regulations does not include the provision for the exemption of an exported products from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued. Please explain consistency with the SCM Agreement.
3. Article 3 (4) of China's CVM stipulates that a financial contribution may occur when a government "entrusts or directs a private body to carry out" certain functions, but it does not mention the additional criteria provided by the SCM Agreement before financial contribution has not been identified. Please explain how China will ensure that it will apply the definition of "financial

¹ G/SCM/N/1/CHN/1.

contribution” consistently with the SCM Agreement in situations involving a government “entrusting or directing” private conduct.

4. It appears that Article 4.(2) of China’s CVM regulations seems to intended to implement Article 2.1.(b) of the SCM Agreement. However, the Agreement formulates this element of specificity by explaining that where the exporting country establishes “objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall *not* be found to exist,” provided that certain criteria are satisfied. Please confirm that this provision is intended to implement Article 2.1.(b) of the SCM Agreement. If so, please explain how China will apply its regulation to ensure that its findings of specificity will coincide with those authorized by the Agreement. If not, please explain the source of authority in the SCM Agreement for this provision of China’s CVM regulations.

5. Article 4. (3) of China’s CVM regulations coincides with Article 2.2 of the SCM Agreement, but it does not include the second sentence of that article of the Agreement, which states, “It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy” Please explain how China will implement this provision to ensure that specificity will not be determined to exist in this situation.

6. Apparently, the final paragraph of Article 4 of China’s CVM regulations is intended to implement Article 2.1. (c) of the SCM Agreement, which identifies factors that may be considered in determining whether a subsidy is specific, despite the appearance of non-specificity. However, Article 4 of China’s CVM regulations does not include all the factors listed in the Agreement for consideration in determining whether a subsidy is specific (for example, “the manner in which discretion has been exercised by the granting authority”). Please explain how China will ensure that all the factors listed in the Agreement will be considered in the determination whether a subsidy is specific.

Injury

7. As to the impact of the subsidized imports on the domestic industry, Article 8.(4) of China’s CVM regulations stipulates that the impact on “the relevant economic factors and indices of the domestic industry” shall be examined. Please explain what kind of economic factors and indices will be examined under this provision. Article 15.4 of the SCM Agreement includes a non-exhaustive list of “factors and indices having a bearing on the state of the industry, ” which includes “sales, market share, profits, productivity, return on investments, or utilization of capacity,” etc.

8. China’s CVM regulations do not identify the factors to be considered specifically in the determination of threat of material injury as opposed to the determination of material injury, although Article 8 of China’s CVM regulations identifies certain factors that are to be considered in both the material injury and threat of material injury (some of which, as noted above, should be relevant only in the context of threat determinations).

- (a) The SCM Agreement includes non-exhaustive lists of factors that are to be considered in making the material injury determination (Article 15.4), and threat of material injury (Article 15.7), respectively. Please explain how China will ensure that the appropriate factors will be considered in the two separate inquiries.
- (b) Article 15.7 of the SCM Agreement, like China’s CVM regulations, includes the phrase “determination of threat of material injury shall be based on facts and not merely on allegation, conjecture, or remote possibility.” However, the SCM

Agreement also instructs that, in making a threat determination, “[t]he change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent,” and includes a series of factors to be considered in making this determination. Please explain how China will ensure that the “clearly foreseen and imminent” standard will be implemented and the various factors set forth in Article 15.7 will be applied.

9. Article 15.5 of the SCM Agreement describes the factors that are to be considered in demonstrating the causal relationship between the subsidized imports and the injury to the domestic industry. China’s CVM regulations contain no analogous discussion of the causation factors that are to be considered, although it does note in the last paragraph of Article 8, that “injuries caused by factors other than subsidy must not be attributed to the subsidy.” Please explain what factors China will consider in order to ensure that the necessary causal relationship between the subsidized imports and the injury to the domestic industry exists.

Domestic Industry

10. China excludes from the definition of the term “domestic industry” in Article 11 those domestic producers who are “related to the exporters or importers or are themselves importers of the subsidized imports or like products.” Please explain how China will determine if a domestic producer is “related” to an exporter or importer, and how it will ensure that its determination will be consistent with Article 16.1 (footnote 48) of the SCM Agreement, which specifies the situations in which producers may be deemed related to exporters or importers.

Investigation Procedures

11. China’s CVM regulations use the term “interested party/ies” at several points (e.g., Articles 20, 21, 22, 23). Article 19 of China’s CVM regulations defines interested party/ies as “the applicants, the known exporters and importers, and other interested organizations and parties.”

- (a) Is this the complete definition of interested parties applicable to all references throughout the regulations?
- (b) Article 12.9 of the SCM Agreement provides a definition of the term “interested parties” and includes, in addition to the groups listed in China’s regulations, foreign producers, trade and business associations representing exporters, foreign producers and importers, domestic producers, and their trade and business associations. Please explain how China will ensure that its countervailing procedures will properly treat those parties that are recognized by the SCM Agreement as “interested parties.”
- (c) Article 12.10 of the SCM Agreement requires that the investigating authorities will provide opportunities industrial users and consumer organizations (where relevant) to provide information on subsidization, injury, and causality. China’s SCM regulations provide no analogous guarantee of access for these groups to the investigative process. Please explain how China will ensure compliance with this requirement of the Agreement.

Provisional Countervailing Measures

12. Before provisional measures may be applied, the SCM Agreement requires that the procedural prerequisites of Article 17.1(a) must be satisfied, and, under Article 17.1(c), the authorities

must judge that such measures are “necessary to prevent injury being caused during the investigation.” Neither of these prerequisites is included in China’s CVM regulations. Please explain how China will ensure that these prerequisites are satisfied before provisional measures are imposed.

Undertakings

13. Article 18.1.(b) of the SCM Agreement provides that price increases under undertakings “shall not be higher than necessary to eliminate the amount of the subsidy,” and notes that “it is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.” Analogous provisions do not exist in China’s CVM regulations. Please explain how China will ensure that its investigating authorities will consider these factors in developing price undertakings.

14. Article 43 of China’s CVM regulations stipulates that “No countervailing duties shall be levied in excess of the amount of a subsidy as established in a final determination.” The SCM Agreement, Article 19.2, notes that “[i]t is desirable . . . that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry.” Please explain whether China is considering any method by which a lesser duty could be considered and applied.

Duration and Review of Duties and Undertakings

15. Articles 47-51 of China’s CVM regulations use the term “review”, but it is not clear whether the referenced reviews are annual(administrative) reviews under Article 21.2 of the SCM Agreement, or five-year (sunset) reviews under Article 21.3, of the Agreement. Can China clarify this point in its implementing regulations?

Miscellaneous

16. Article 55 of China’s CVM does not appear to have an analogy in the SCM Agreement. Please explain the basis for China’s assertion of the authority to engage in such reciprocal measures, and how China plans to implement this provision.

List of Export Subsidies

17. Item 4 in the List of Export Subsidies attached to China’s CVM regulations replaces the quoted phrase from item d. in Annex I of the SCM Agreement with the words, “except for special circumstances.” Please confirm that this phrase will be applied in a manner consistent with the phrase in the Annex of the SCM Agreement that it replaces. If not, please explain the meaning of, and the manner in which China will apply, the phrase “except for special circumstances.”

18. A large segment of Item h. in Annex I of the SCM Agreement, describing the excessive exemption or remission of prior-stage indirect taxes on goods or services used in the production of exported products, is deleted from the analogous provision of China’s CVM regulations (Item 8), and replaced with the phrase “except for special circumstances.”

- (a) Please confirm that this phrase will be applied in a manner consistent with the phrase in the item h. in Annex I of the SCM Agreement that it replaces. If not, please explain the meaning of, and the manner in which China will apply, the phrase “except for special circumstances.”

- (b) Also, Item h. in Annex I of the SCM Agreement refers to Annex II for guidelines on the consumption of inputs in the production process. Please confirm whether China will interpret this provision of its CVM regulations in a manner consistent with Annex II of the Agreement.

19. A large segment of Item i. in Annex I of the SCM Agreement, describing the excessive remission or drawback of import charges on imported inputs used in the production of exported products, is deleted from the analogous provision of China's CVM regulations (Item 9), and replaced with the phrase "except for special circumstances."

- (a) Please confirm that this phrase will be applied in a manner consistent with the phrase in the Annex of the SCM Agreement that it replaces. If not, please explain the meaning of, and the manner in which China will apply, the phrase "except for special circumstances."
- (b) Also, Item i. in Annex I of the SCM Agreement refers to Annex II for guidelines on the consumption of inputs in the production process, and Annex III for guidelines in the determination of substitution drawback systems as export subsidies. Please confirm whether China will interpret this provision of its CVM regulations in a manner consistent with Annexes II and III of the Agreement.

20. Item 11 of the List of Export Subsidies attached to China's CVM regulations covers the grant by a government of export credits at rates "below those which are actually paid for the employment of such funds . . .". However, it does not include the phrase "(or would have to pay if they actually borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit) . . .," which is found in the analogous provision of the SCM Agreement, Item k. of Annex I. Please confirm whether China intends that this item will be interpreted to cover the same conditions as specified in the Agreement. Also, this item in China's CVM regulations deletes the second paragraph from Item k. in Annex I of the Agreement, and replaces it with the phrase "except for special circumstances." Please confirm that this phrase will be applied in a manner consistent with the phrase in the Annex of the SCM Agreement that it replaces. If not, please explain the meaning of, and the manner in which China will apply, the phrase "except for special circumstances."
