

# US – COUNTERVAILING MEASURES (CHINA)<sup>1</sup>

(DS437)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	China	GATT Art. VI SCM Arts. 1.1, 1.1(a)(1), 1.1(b), 2, 10, 11, 12.7, 14(d), 30, and 32.1 DSU Arts. 6.2 and 11	Establishment of Panel	28 September 2012
			Circulation of Panel Report	14 July 2014
Respondent	United States		Circulation of AB Report	18 December 2014
			Adoption	16 January 2015

## 1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Countervailing measures imposed by the United States.
- **Products at issue:** Thermal paper, pressure pipe, line pipe, citric acid, lawn groomers, kitchen shelving, oil country tubular goods, wire strand, magnesia bricks, seamless pipe, print graphics, drill pipe, aluminium extrusions, steel cylinders, solar panels, wind towers, and steel sinks from China.

## 2. SUMMARY OF KEY PANEL/AB FINDINGS

- **ASCM Art. 1.1(a)(1) (definition of “public body”):** The Panel found that the United States Department of Commerce (USDOC) acted inconsistently with Art. 1.1(a)(1), because it determined that certain Chinese state-owned enterprises were “public bodies” based solely on the grounds that they were majority owned, or otherwise controlled, by the Government of China. The Panel also found USDOC’s “rebuttable presumption” to determine whether a state-owned enterprise is a “public body” to be inconsistent as such with Art. 1.1(a)(1).
- **ASCM Arts. 1.1(b) and 14(d) (benefit benchmark):** The Panel found that the USDOC did not act inconsistently with Arts. 14(d) or 1.1(b) by rejecting in-country private prices in China as benchmarks in its benefit analysis. Noting that the selection of a benchmark under Art. 14(d) could not, at the outset, exclude consideration of in-country prices from any particular source, including government-related prices, the Appellate Body reversed the Panel’s finding, and found that the USDOC acted inconsistently with Arts. 14(d) and 1.1(b) by rejecting prices in China as benchmarks in its benefit analyses.
- **ASCM Art. 2.1 (specificity):** The Panel found that the USDOC did not act inconsistently with Art. 2.1 by analysing specificity exclusively under Art. 2.1(c). The Appellate Body upheld the Panel’s finding, noting that the application of the principles laid down in paras (a) and (b) of Art. 2.1 did not necessarily constitute a condition that must be met in order to consider the factors listed under para (c) of Art. 2.1. The Panel also found that the fact that the USDOC identified subsidy programmes that are not set out in a written document did not, in and of itself, render the USDOC’s specificity determinations inconsistent with Art. 2.1(c), because the evidence of “systematic activity” or “series of activities” provided an objective basis for the USDOC to sufficiently identify subsidy programmes for the purposes of the first of the “other factors” under Art. 2.1(c). The Appellate Body found, however, that the Panel erred in its application of Art. 2.1(c) because it failed to provide any case-specific discussion or references to the particular USDOC determinations of specificity challenged by China. The Appellate Body therefore reversed the Panel’s finding but was unable to complete the analysis. The Panel also found that the USDOC did not act inconsistently with Art. 2.1 by failing to identify a “granting authority” and *ergo* the relevant jurisdiction. Noting that the Panel had conducted an extremely cursory analysis, the Appellate Body reversed the Panel’s finding but did not complete the analysis regarding whether the USDOC had sufficiently identified the jurisdiction of the granting authority.
- **ASCM Art. 12.7 (use of “facts available”):** The Panel found that USDOC did not act inconsistently with Art. 12.7 by not relying on facts available on the record. The Appellate Body reversed the Panel’s finding, observing that the Panel had acted inconsistently with DSU Art. 11 because it, *inter alia*, had not undertaken a critical and in-depth examination of the USDOC’s statements. The Appellate Body was unable to complete the legal analysis.
- **ASCM Art. 11.3 (export restraints):** The Panel found that the USDOC acted inconsistently with Art. 11.3 by initiating two investigations based on applications predicated solely on the existence of export restraints and their price-suppression effect.

<sup>1</sup> United States – Countervailing Duty Measures on Certain Products from China

# US – COUNTERVAILING MEASURES (CHINA) (ARTICLE 21.5 – CHINA)<sup>1</sup> (DS437)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	China	ASCM Arts. 1.1(a)(1), 1.1(b), 2.1(c) and 14(d)	Referred to the Original Panel	21 July 2016
			Circulation of Panel Report	21 March 2018
Respondent	United States		Circulation of AB Report	16 July 2019
			Adoption	15 August 2019

## 1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- **Measure at issue:** (1) USDOC preliminary and final determinations to comply with recommendations and rulings of the DSB in the original proceeding; (2) the “Public Bodies Memorandum”; (3) the original USDOC final countervailing duty determination in the Solar Panels investigation; (4) subsequent periodic and sunset reviews of the countervailing duty orders identified in China’s panel request, as well as determinations subsequent to those identified; and (5) “instructions and notices” by which the U.S. imposes, assesses, and/or collects countervailing duties in the proceedings at issue, and its ongoing conduct.

## 2. SUMMARY OF KEY PANEL/AB FINDINGS

- **ASCM Art. 1.1(a)(1) (public bodies):** The Appellate Body held that a public body determination depends on an entity’s core characteristics and its relationship with government. Its conduct may constitute relevant evidence but an investigating authority need not focus on every instance of conduct in which that entity might engage, or whether each instance is connected to a specific “government function”. On this basis, the Appellate Body upheld the Panel’s finding that Art. 1.1(a)(1) does not require a connection of a particular degree or nature between an identified government function and the financial contribution at issue. The Appellate Body also upheld the Panel’s conclusion rejecting China’s claim that the USDOC’s public body determinations or the Public Bodies Memorandum “as such” were based on an improper legal standard.
- **ASCM Arts. 1.1(b) and 14(d) (benefit):** The Appellate Body considered that a central inquiry in choosing an appropriate benefit benchmark is the question of whether in-country prices are distorted as a result of government intervention. The Appellate Body found that different types of government interventions could result in price distortion, such that recourse to out-of-country prices is warranted, beyond the situation in which the government effectively determines the price at which the good is sold. The Appellate Body therefore upheld the Panel’s finding that Art. 14(d) does not limit the possibility of resorting to out-of-country prices if the government effectively determines the price of the good sold. In assessing price distortion, evidence of both direct and indirect impact of government intervention on prices may be relevant but the latter may require more detailed analysis and explanation to establish a nexus between such indirect impact and price distortion. Irrespective of the method chosen by the investigating authority, the Appellate Body found that the authority’s determination of how prices are distorted by government intervention must be based on positive evidence. The Appellate Body upheld the Panel’s finding that the USDOC had failed to explain how government intervention in the market resulted in domestic prices deviating from a market-determined price and that the USDOC failed to consider price data on the record.
- **ASCM Art. 2.1(c) (specificity):** The Appellate Body agreed with the Panel that the mere fact that financial contributions have been provided to certain enterprises is not sufficient to demonstrate that such contributions were granted pursuant to a plan or scheme for purposes of Art. 2.1(c). According to the Appellate Body, the Panel rightly contrasted the USDOC’s failure to explain systematic activity regarding the existence of an unwritten subsidy programme with information before the USDOC merely indicating repeated transactions. Thus, the Appellate Body upheld the Panel’s articulation of the legal standard under Art. 2.1(c) and its finding that the US acted inconsistently with ASCM Art. 2.1(c).

## 3. OTHER ISSUES<sup>2</sup>

- **Separate Opinion:** The Appellate Body report contains a separate opinion by one member of the Division addressing the majority’s public body, benefit and specificity analyses and findings. In his separate opinion, the Division Member considered, inter alia, that the continuing lack of clarity as to what is a “public body” represents an instance of undue emphasis on “precedent”, adding that the text of ASCM Art. 1.1(a)(1) does not elaborate on the meaning of the term “public body” and does not call for a single abstract definition for the concept of “public body”.

<sup>1</sup> United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China

<sup>2</sup> Other issues addressed: DSU Art. 21.5 (Panel’s terms of reference), measures in existence at the time of the original proceedings, Appellate Body member serving after expiration of term, role of separate opinions.