

consider that the majority's decision upholding the Panel's finding is wrong in several important respects and would, if followed, enable circumvention of the disciplines of the SCM Agreement and even discourage the transparent management of subsidies. I believe such a result is not contemplated under the SCM Agreement, was not intended by the SCM Agreement's drafters, and is not in accordance with customary principles of treaty interpretation.

#### 5.5.4 Overall summary

determinative.

## 6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.<sup>837</sup>

### 6.1 The Panel's terms of reference

6.2. The Panel correctly assessed the scope of the measures falling within its terms of reference in these Article 21.5 proceedings based on the criteria of their relationship in terms of nature, timing, and effects.

- a. We therefore uphold the Panel's findings, in paragraphs 7.320, 7.347, 8.1.g, and 8.1.h.i -ii, iv, and vi of the Panel Report, that the subsequent reviews at issue and the Final Determination in the original Solar Panels investigation fell within the Panel's terms of reference under Article 21.5 of the DSU.

### 6.2 Article 1.1(a)(1) of the SCM Agreement

6.3. The central focus of a public body inquiry under Article 1.1(a)(1) is not whether the conduct that is alleged to give rise to a financial contribution under subparagraphs (i) - (iii) or the first clause of subparagraph (iv) ±i.e. the particular transaction at issue ±is "logically connected" to an identified "government function". Rather, the relevant inquiry hinges on the entity engaging in that conduct, its core characteristics, and its relationship with government, seen in light of the legal and economic environment prevailing in the relevant Member. This comports with the fact that a "government" (in

relevant Section 129 proceedings are inconsistent with Article 1.1(a)(1) of the SCM Agreement because they are based on an improper legal standard."

- c. Having upheld the Panel's interpretive findings, we do not further address China's additional claims with respect to the Panel's findings in paragraphs 7.72, 7.103, and 7.105 -7.106 of the Panel Report.

6.4. The Panel correctly found that the Public Bodies Memorandum bears a "close relationship" to the declared "measure taken to comply", namely, the USDOC's public body determinations in the relevant Section 129 proceedings, and with the recommendations and rulings of the DSB in the original proceedings. The Panel was also correct that China could not have challenged the Public Bodies Memorandum as part of its complaint in the original proceedings.

- a. We therefore uphold

6.7. The specific type of analysis that an investigating authority must conduct for purposes of arriving at a proper benchmark under Article 14(d), as well as the types and amount of evidence that would be considered sufficient in this regard, will necessarily vary depending on a number of factors in the circumstances of the particular case. However, in all cases, the investigating authority has to establish and adequately explain how price distortion actually results from government intervention. There may be different ways to demonstrate that prices are actually distorted, including a quantitative assessment, price comparison methodology, a counterfactual, or a qualitative analysis. While evidence of direct impact of the government intervention on prices may make the finding of price distortion likely, evidence of indirect impact may also be relevant. At the same time, establishing the nexus between such indirect impact of government intervention and price distortion may require more detailed analysis and explanation. Independently of the method chosen by the investigating authority, it has to adequately take into account the arguments and evidence supplied by the petitioners and respondents, together with all other information on the record, so that its determination of how prices in the specific markets at issue are in fact distorted as a result of government intervention would be based on positive evidence. The Panel's reasoning is consonant with our interpretation of Article 14(d). We further agree with the Panel's conclusion that "[a]n investigating authority must explain how government intervention in the market results

Section 129 proceedings, how government intervention in the market resulted in domestic prices for the inputs at issue deviating from a market-determined price.

- b. In addition, we find that the United States has not established that the Panel erred in its finding that, in the Section 129 proceedings on Pressure Pipe, Line Pipe, and OCTG, the USDOC failed to consider price data on the record.
- c. Consequently, we uphold the Panel's findings, in paragraphs 7.223 - 7.224 and 8.1.c of the Panel Report, that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings.

#### 6.4 Article 2.1(c) of the SCM Agreement

6.10. As we see it, where an investigating authority makes a finding of de facto specificity based on an analysis of whether there has been "use of a subsidy programme by a limited number of certain enterprises", consideration of the length of time during which the subsidy programme has been in operation presupposes that the relevant programme has been properly identified. We therefore disagree with the United States to the extent it suggests that an investigating authority can be found to have complied with the requirement under Article 2.1(c) to consider the "duration" of a subsidy programme regardless of whether it has properly identified that programme in the first place. Nor do we agree with the United States that the Panel was required to limit its review to the USDOC's examination of the "duration" of the relevant subsidy programmes, without considering whether the USDOC had properly identified those programmes either in the context of the original investigations or in the context of the relevant Section 129 proceedings.

6.11. With respect to the Panel's interpretation and application of Article 2.1(c), we agree with the Panel that, while "evidence of 'a systematic series of actions' may be particularly relevant in the context of an unwritten programme, the mere fact that financial contributions have been provided

Signed in the original in Geneva this 1st day of July 2019 by:

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Thomas R. Graham  
Presiding Member

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Ujal Singh Bhatia  
Member

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Shree B .C. Servansing  
Member