

determinations in the context of the investigations in OCTG, Line Pipe, Pressure Pipe, and Solar Panels. Consequently, having laid out the legal standard that applies under Article 12.7, we see limited value, for purposes of resolving the dispute between the parties, in completing the legal analysis with respect to the instances in which the USDOC used "adverse" facts available in the investigations at issue.

4.208. We further recall our finding above that the Panel acted inconsistently with Article 11 of the DSU in finding that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement. We do not consider that the participants have addressed sufficiently, in their submissions, the issues that we might need to examine if we were to complete the legal analysis in this case, including, for example, whether the USDOC's evaluation of the "facts available" was sufficient in the light of the particular circumstances of each case, including the nature, quality, and amount of the evidence and information on the record and the particular determinations to be made.<sup>821</sup> Completing the legal analysis in such circumstances would, in our view, raise due process concerns.

4.209. For all these reasons, we do not complete the legal analysis with respect to each of the 42 instances of the use of "adverse" facts available challenged by China.

#### 4.5 Articles 10 and 32.1 of the SCM Agreement – Consequential claims

4.210. In the event that we reverse the Panel's findings and complete the legal analysis with respect to any of the claims of error raised by China on appeal, China further requests that we complete the legal analysis with respect to China's claims of consequential violations under Articles 10 and 32.1 of the SCM Agreement.<sup>822</sup>

4.211. We recall our finding above that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement by rejecting in-country prices in China as benefit benchmarks in the context of the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations.<sup>823</sup> We note that the Appellate Body has treated claims under Articles 10 and 32.1 of the SCM Agreement as consequential claims in the sense that, where it has not been established that the essential elements of the subsidy within the meaning of Article 1 of the SCM Agreement are present, the right to impose a countervailing duty has not been established and, as a consequence, the countervailing duties imposed are inconsistent with Articles 10 and 32.1 of the SCM Agreement.<sup>824</sup> Accordingly, we find that the USDOC's benefit determinations in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe investigations, which we have found to be inconsistent with Article 14(d) and Article 1.1(b) of the SCM Agreement, are also inconsistent with the United States' obligations under Articles 10 and 32.1 of the SCM Agreement.

## 5 FINDINGS AND CONCLUSIONS

5.1. For the reasons set out in this Report, the Appellate Body:

- a. upholds the Panel's finding, in paragraph 5.1 of the Panel's Preliminary Ruling and paragraph 1.16 of the Panel Report, that China's panel request, as it relates to its claims under Article 12.7 of the SCM Agreement, is not inconsistent with Article 6.2 of the DSU and that China's claims under Article 12.7 were thus within the Panel's terms of reference;

<sup>821</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.421.

<sup>822</sup> China's Notice of Appeal, para. 18. In the Notice of Appeal, China requests the Appellate Body to complete the legal analysis with respect to China's claims of consequential violations under Articles 10 and 32.1 of the SCM Agreement "in respect of which the Panel exercised judicial economy". (Ibid.) We note, however, that the Panel did not exercise judicial economy with respect to China's claims of consequential violations under Articles 10 and 32.1 of the SCM Agreement. The Panel found, in paragraphs 7.413 and 8.1.x. of the Panel Report, that the United States had acted inconsistently with Articles 1, 2, and 11 of the SCM Agreement, and that, as a consequence, the United States had also acted inconsistently with Articles 10 and 32.1 of the SCM Agreement. (See Panel Report, para. 7.413)

<sup>823</sup> *Supra*, para. 4.107.

<sup>824</sup> Appellate Body Reports, *US – Softwood Lumber IV*, para. 143; *US – Anti-Dumping and Countervailing Duties (China)*, para. 358.

- b. with respect to the Panel's findings, in paragraphs 7.195, 7.197, and 8.1.iv of the Panel Report, on the USDOC's determinations of benefit in the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels countervailing duty investigations:
  - i. reverses the Panel's finding, in paragraph 7.195 of the Panel Report, upholding the USDOC's rejection of private prices as potential benchmarks in the investigations at issue on the grounds that such prices were distorted;
  - ii. reverses the Panel's finding, in paragraphs 7.197 and 8.1.iv of the Panel Report, that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country prices in China as benefit benchmarks in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations at issue; and
  - iii. completes the legal analysis and finds that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations and, consequently, with Article 10 and Article 32.1 of the SCM Agreement;
- c. with respect to the Panel's findings, in paragraphs 7.231, 7.243, 7.249, 7.258, and 8.1.v of the Panel Report, on the USDOC's determinations of *de facto* specificity under Article 2.1(c) of the SCM Agreement in respect of the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels countervailing duty investigations:
  - i. upholds the Panel's finding, in paragraphs 7.231, 7.258, and 8.1.v of the Panel Report, that the USDOC did not act inconsistently with the obligations of the United States under Article 2.1 by analysing specificity exclusively under Article 2.1(c) of the SCM Agreement;
  - ii. reverses the Panel's finding, in paragraphs 7.243, 7.258, and 8.1.v of the Panel Report, that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement by failing to identify a "subsidy programme"; and finds that it is unable to complete the legal analysis in this regard; and
  - iii. reverses the Panel's finding, in paragraphs 7.249, 7.258, and 8.1.v of the Panel Report, that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement by failing to identify a "granting authority"; and finds that it is unable to complete the legal analysis in this regard; and
- d. with respect to the Panel's findings, in paragraphs 7.325 and 8.1.vii of the Panel Report, in respect of the USDOC's use of "adverse" facts available in the Pressure Pipe, Line Pipe, Citric Acid, Lawn Groomers, OCTG, Wire Strand, Magnesia Bricks, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels countervailing duty investigations, reverses the Panel's finding that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement by not relying on facts available on the record; and finds that it is unable to complete the legal analysis in this regard.

5.2. The Appellate Body recommends that the DSB request the United States to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with its obligations under the SCM Agreement into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 12th day of December 2014 by:

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Peter Van den Bossche  
Presiding Member

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Ujal Singh Bhatia  
Member

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Seung Wha Chang  
Member