

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

5.281. I respectfully suggest that it would be beneficial for the dispute settlement system if future litigants, and panels in adherence to their mandate under Article 11 of the DSU, would continue to take into account separate opinions such as this along with relevant past Appellate Body reports, without regarding either as necessarily determinative.

6 FINDINGS AND CONCLUSIONS

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

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 the narrow sense) and a "public body" share a degree of commonality or overlap in their essential characteristics – i.e. they both possess, exercise, or are vested with governmental authority. Once it has been established that an entity is a public body, then the conduct of that entity shall be directly attributable to the Member concerned for purposes of Article 1.1(a)(1). While the conduct of an entity may constitute relevant evidence to assess its core characteristics, an investigating authority need not necessarily focus on every instance of conduct in which that relevant entity may engage, or on whether each such instance of conduct is connected to a specific "government function". The Panel was thus correct in rejecting China's reading of Article 1.1(a)(1) as requiring that an investigating authority inquire into whether an entity is exercising a government function when engaging in one of the specific conducts listed in subparagraphs (i)-(iii) and the first clause of subparagraph (iv).

- a. We therefore uphold the Panel's finding, in paragraphs 7.36 and 7.106 of the Panel Report, that the legal standard for public body determinations under Article 1.1(a)(1) of the SCM Agreement does not prescribe a connection of a particular degree or nature that must necessarily be established between an identified government function and the particular financial contribution at issue.
- b. We also uphold the Panel's conclusion, in paragraph 7.36 of the Panel Report, that "China has failed to demonstrate that the USDOC's public body determinations in the

⁸³⁷ The separate opinion of one Division member regarding public body, benefit, and specificity is set forth in section 5.5 of this Report.

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 the Panel's finding, in paragraph 7.120 of the Panel Report, that the Public Bodies Memorandum falls, "as such", within the scope of these Article 21.5 proceedings.

6.5. China's claim on appeal with respect to the WTO-consistency of the Public Bodies Memorandum "as such" is premised on China's reading of Article 1.1(a)(1) as requiring, in each case, the establishment of a "clear logical connection" between a "government function" identified by the investigating authority and the conduct alleged to give rise to a financial contribution.

- a. Having rejected this reading of Article 1.1(a)(1), we do not further address China's claim concerning the Panel's conclusion, in paragraph 8.1.b of the Panel Report, that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1).
- b. We also do not further address the participants' claims concerning the Panel's intermediate findings leading to that conclusion, namely: (i) the Panel's finding, in paragraph 7.133 of the Panel Report, that the Public Bodies Memorandum "can be challenged 'as such' as a rule or norm of general or prospective application"; and (ii) the Panel's finding, in paragraph 7.142 of the Panel Report, that "the Public Bodies Memorandum does not restrict in a material way the USDOC's discretion to act consistently with Article 1.1(a)(1)." The Panel's conclusion that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1), therefore, stands.

6.3 Articles 1.1(b) and 14(d) of the SCM Agreement

6.6. We disagree with China's proposition that the circumstances potentially justifying recourse to out-of-country prices under Article 14(d) of the SCM Agreement are limited to those in which the government effectively determines the price at which the good is sold, including more specifically, where the government sets prices administratively, is the sole supplier of the good, or possesses and exercises market power as a provider of the good so as to cause the prices of private suppliers to align with a government-determined price. Central to the inquiry under Article 14(d) in identifying an appropriate benefit benchmark is the question of whether in-country prices are distorted as a result of government intervention. What would allow an investigating authority to reject in-country prices is a finding of price distortion resulting from government intervention in the market, not the presence of government intervention itself. 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 determination of whether in-country prices are distorted must be made case by case, based on the relevant evidence in the particular investigation and taking into account the characteristics of the market being examined, and the nature, quantity, and quality of the information on the record.

- a. We therefore uphold the Panel's finding, in paragraph 7.174 of the Panel Report, that Article 14(d) does not limit the possibility of resorting to out-of-country prices to the situation in which the government effectively determines the price at which the good is sold.

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* in in-country prices for the inputs at issue deviating from a market-determined price", insofar as it clarifies that the investigating authority has to make a finding of price distortion resulting from government intervention. In sum, we do not see that the Panel required one single type of quantitative or price comparison analysis in all cases.

6.8. With respect to the Panel's finding, in paragraph 7.206 of the Panel Report, that "the USDOC failed to explain how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price", we understand the Panel to have rejected as insufficient and problematic the USDOC's determination that prices in the entire steel and solar-grade polysilicon sectors in China cannot be used as benefit benchmarks in the absence of a specific assessment of how government intervention had resulted in price distortion in the four input markets at issue. Furthermore, we understand the Panel to have been concerned with the focus of the USDOC's analysis in the Benchmark Memorandum on the pervasiveness of government involvement in China's SIEs' decision-making in general and in the steel sector as a whole, rather than on *how* specifically this involvement influenced pricing decisions regarding the inputs at issue and resulted in price distortion with respect to the determinations at hand. Therefore, as we see it, the Panel's analysis of the determinations at issue led it to conclude that the USDOC did not provide a reasoned and adequate explanation of how the widespread government interventions described in the Benchmark Memorandum resulted in the distortion of in-country prices in the specific input markets and regarding the specific products subject to each of the challenged USDOC determinations at issue.

6.9. With respect to the Panel's finding, in paragraph 7.220 of the Panel Report, that "the USDOC failed to adequately explain its rejection of in-country prices in light of the evidence before it", we understand the Panel to have considered that the USDOC's rejection of in-country prices was merely consequential to its findings of market distortion in the steel sector generally, which the Panel considered not to provide a reasoned and adequate explanation of how government intervention resulted in price distortion. Furthermore, although the focus of the USDOC's analysis in the Benchmark Memorandum was different from the one underlying the Ordoover Report, the alternative explanations and pricing data on the record may have nevertheless been relevant for examining whether price distortion actually existed in the input markets at issue. Yet, the USDOC determinations do not explain why, in light of the price data and alternative explanations, the conclusion it reached for the entire steel sector necessarily applies to all specific input markets. In addition, it would have been relevant for the USDOC to take into account in its analysis the input-specific Mysteel pricing data on the record and examine the extent to which it affected its conclusions of price distortion. Finally, in assessing whether it would be possible to conduct an analysis of price alignment in the Final Benchmark Determination, the USDOC dismissed the price data on the record largely on the basis of its prior conclusion that all in-country steel prices in China were distorted by government intervention, which could not in itself constitute a sufficient basis for rejecting the relevance of the Mysteel data.

- a. We therefore find that the United States has not established that the Panel erred in its interpretation and application of Article 14(d) of the SCM Agreement in finding that the USDOC failed to explain, in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe

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 to certain enterprises is not sufficient to demonstrate that such financial contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c)." The Panel's subsequent review of the USDOC's analysis properly focused on "whether the information relied upon by the USDOC supports its finding of a systematic series of actions evidencing the existence of a plan or scheme pursuant to which subsidies have been provided". Moreover, in its findings, 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". We therefore disagree with the United States insofar as it argues that the Panel erred in its articulation of the standard to be applied under Article 2.1(c). Nor do we agree with the United States that the Panel erred in its interpretation of the term "subsidy programme" by reading it to mean a "systematic subsidy programme" consisting "entirely of acts of subsidization" where *each* provision of an input by the government confers a benefit to the recipient. We also disagree with the United States to the extent it claims that the Panel's finding under Article 2.1(c) was based on an isolated reading of the USDOC's specificity analysis. Rather, we understand the Panel's concern to have been that the USDOC's reasoning and references to "subsidy programmes" were generic in nature and did not sufficiently discuss the steel sector or the provision of the inputs in the context of the specific determinations at issue. It was not for the Panel in this regard "to conduct a *de novo* review of the evidence" or "to substitute [its] own conclusions for those of the competent authorities".

- a. In light of the foregoing, we uphold the Panel's finding, in paragraphs 7.293 and 8.1.e of the Panel Report, that China has demonstrated that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels Section 129 proceedings.

6.12. 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 that Agreement.

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

Thomas R. Graham
Presiding Member

Ujal Singh Bhatia
Member

Shree B.C. Servansing
Member