Panel establishment in 2022. We consider this factor decisive, and we decline to issue findings or recommendations as to the expired aspects of the orders on that basis.[675]

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. **Wind towers**:

i. with respect to AD claim 3, in the expiry review, the ADC acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because there was no basis for departing from using TSP's record costs for steel plate in constructing normal value;

ii. with respect to AD claim 1, in the expiry review, the ADC acted inconsistently with the practice of an unbiased and objective investigating authority with respect to Article 2.2 of the Anti-Dumping Agreement by uplifting TSP's steel plate costs for the purpose of constructing normal value, and then transferring that methodology over onto the ADC's calculation of normal values for the uncooperative and all other exporters, without a reasoned and adequate explanation as to why the uplifted costs, without any adjustments to adapt such uplifted costs to TSP's circumstances, represented a cost of production in China for TSP;

iii. it is unnecessary to examine AD claim 5.c under Articles 2.1, 2.2, 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, because the claim is already effectively addressed under AD claims 1 and 3;

iv. with respect to AD claim 6.a, having already found violations of Articles 2.2 and 2.2.1.1, it is unnecessary to examine whether the ADC failed to conduct a fair comparison under Article 2.4 of the Anti-Dumping Agreement by making adjustments to account for the differences generated by the use of surrogate costs in constructing normal value;

v. with respect to AD claim 7.a, China has not demonstrated that the ADC acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement because it failed to make a *prima facie* case that the ADC applied a profit rate to "uplifted" cost data in the expiry review;

vi. with respect to AD claim 7.c, in the expiry review, the ADC acted inconsistently with Article 2.2 of the Anti-Dumping Agreement by determining that the domestic sales did not permit a proper comparison with export sales on the basis of a "relevance" test that has no basis in Article 2.2; and

vii. with respect to AD claim 8, to the extent that the ADC acted inconsistently with the provisions of Article 2 of the Anti-Dumping Agreement in the expiry review, the ADC also acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

b. **Stainless steel sinks**:

i. with respect to AD claims 3 and 4, China has not demonstrated that the ADC acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement, and thus acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement, by

[675] The situation with respect to the ADC's initiation decision with respect to Program 1 is somewhat unique, since our basis for that finding was that the ADC need not rely on the original initiation decision in order to investigate Program 1. See section 7.4.11.2 above. This is not technically due to the ADC's findings in the expiry review, *per se*, but due to a more general legal situation existing under Australian law. Nonetheless, we consider that the aspect expired before Panel establishment because that general legal situation existed even at the time of the expiry review.

rejecting exporters' record costs for purposes of performing the ordinary-course-of-trade test in the expiry review;

ii. with respect to AD claims 1 and 2, in the expiry review, the ADC acted inconsistently with the practice of an unbiased and objective investigating authority with respect to Article 2.2 of the Anti-Dumping Agreement by failing to provide a reasoned and adequate explanation as to why the surrogate costs, with only adjustments for delivery and slitting costs, represented a cost of production in China. Thus, the ADC also acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because it used surrogate costs that were not demonstrated to be costs of production in the country of origin in performing the ordinary-course-of-trade test;

iii. with respect to AD claim 6.a, having already found a violation of Articles 2.2 and 2.2.1, it is unnecessary to issue findings on whether the ADC acted inconsistently with Article 2.4 the Anti-Dumping Agreement by failing to make adjustment to account for the differences generated through the use of surrogate costs in applying the ordinary-course-of-trade test. Also, insofar as the claim is based on the comparison of export price and a normal value that is constructed using surrogate costs, we decline to issue findings with respect to this aspect of the order because it is expired;

iv. with respect to AD claim 6.b.i, China has not demonstrated that the ADC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in the expiry review in determining that the VAT recoverability difference between domestic and export sales affected price comparability between the normal value and export price. However, in the expiry review, the ADC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by applying a percentage to the normal value base that was flawed via the use of surrogate costs in applying the ordinary-course-of-trade test;

v. with respect to AD claim 6.b.ii, in the expiry review, the ADC acted inconsistently with the practice of an unbiased and objective investigating authority with respect to Article 2.4 of the Anti-Dumping Agreement by treating accessories purchased by Primy from third-party suppliers differently from accessories produced by Primy without an adequate and reasonable explanation. However, China has not demonstrated that the ADC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in the expiry review by using an averaging methodology in calculating the adjustments to account for differences in accessories for the exporting producer Primy;

vi. with respect to AD claim 6.b.iii, in the expiry review, the ADC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by comparing export models to export models for purposes of performing a fair comparison as between the normal value and export price for Zhuhai Grand;

vii. with respect to AD claim 7.a, the Panel declines to issue findings with respect to China's claim that the ADC acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by using the cost of production incorporating surrogate costs in its determination of profit, because this aspect of the order is expired;

viii. with respect to AD claim 8, to the extent that the ADC acted inconsistently with the provisions of Article 2 of the Anti-Dumping Agreement in the expiry review, the ADC also acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994;

ix. with respect to CVD claims 2 and 3, the Panel declines to issue findings with respect to China's claim that the ADC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by improperly rejecting in-country benchmarks and instead using a benchmark that did not relate to the prevailing market conditions

in the country of provision (i.e. China) because this aspect of the order challenged by China is expired;

x. with respect to CVD claim 4, the Panel declines to issue findings with respect to China's claim that the ADC acted inconsistently with Article 2.1(c) of the SCM Agreement by improperly determining that Program 1 was specific because this aspect of the order challenged by China is expired; and

xi. With respect to CVD claim 5, the Panel declines to issue findings with respect to China's claim that the ADC acted inconsistently with Articles 11.1, 11.2, and 11.3 of the SCM Agreement by failing to properly evaluate the sufficiency of the application for the purpose of justifying the initiation of the investigation into Program 1, because this aspect of the order challenged by China is expired.

c. **Railway wheels**:

i. with respect to AD claim 3, in the original investigation, the ADC acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because it had no basis for departing from using Masteel's record costs of production when constructing normal value;

ii. with respect to AD claim 1, in the original investigation, the ADC acted inconsistently with the practice of an unbiased and objective investigating authority with respect to Article 2.2 of the Anti-Dumping Agreement by failing to provide a reasoned and adequate explanation as to why the uplifted costs, without any adjustments to adapt such uplifted costs to Masteel's circumstances in China (other than SG&A), represented a cost of production in China for Masteel;

iii. with respect to AD claim 5.d, it is unnecessary to consider this claim under Articles 2.1, 2.2, and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because the claim is already effectively addressed under AD claims 1 and 3;

iv. with respect to AD claim 6.a, having already found violations of Articles 2.2 and 2.2.1.1, it is unnecessary to examine further whether the ADC also failed to conduct a fair comparison under Article 2.4 by failing to make any adjustments linked to such use of surrogate costs in constructing normal value;

v. with respect to AD claim 7.b, in the original investigation, the ADC acted inconsistently with Article 2.2.2(i) of the Anti-Dumping Agreement by failing to calculate profit on the basis of the actual amounts incurred and realized by Masteel in respect of "sales in the domestic market of the country of origin". The ADC also acted inconsistently with Article 2.2.2(i) of the Anti-Dumping Agreement by using surrogate costs of production in its profit determination; and

vi. with respect to AD claim 8, to the extent that the ADC acted inconsistently with the provisions of Article 2 of the Anti-Dumping Agreement in the original investigation, the ADC also acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the GATT 1994 and Anti-Dumping Agreement, they have nullified or impaired benefits accruing to China under those agreements.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that Australia bring its measures into conformity with its obligations under the GATT 1994 and the Anti-Dumping Agreement.