BEFORE THE WORLD TRADE ORGANIZATION

PANEL PROCEEDINGS

AUSTRALIA — ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

(DS603)

AUSTRALIA'S FIRST WRITTEN SUBMISSION

Business Confidential Information
REDACTED

13 January 2023

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US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, p. 97
US – Zeroing (Japan) (Article 21.5 – Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/RW, adopted 31 August 2009, upheld by Appellate Body Report WT/DS322/AB/RW, DSR 2009:VIII, p. 3553
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LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
304 SS CRC	grade 304 stainless steel cold rolled coil
ADC	Anti-Dumping Commission
ADRP	Anti-Dumping Review Panel
Anti-Dumping Agreement	Agreement on the Implementation of Article VI of GATT 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201
BCI	Business Confidential Information
CBSA	Canadian Border Services Agency
CCCME	China Chamber of Commerce for Import and Export of Machinery and Electronic Products
Chunyi	Shengzhou Chunyi Electrical Appliances Co., Ltd.
Comsteel	Commonwealth Steel Company Pty Ltd
Consultations Request	Request for consultations by China, WT/DS603/1
Continuation 487	Expiry review concerning the anti-dumping measures imposed on wind towers from China and Korea
Continuation 517	Expiry review concerning the anti-dumping and countervailing measures imposed on stainless steel sinks from China
CTMS	Cost to make and sell
DSB	Dispute Settlement Body
DSU	Understanding on the Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401
FOB	Free on Board
FYP	Five-Year Plan, which lays out the Government of China's over-arching blueprint for economic and development objectives at the central and provincial levels for a five-year period.
GAAP	Generally accepted accounting principles
GATT 1994	Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994)

Abbreviation	Full Form or Description
GOA	Government of Australia
GOC	Government of China
Guangdong Metals	Guangdong Metals and Minerals Import & Export Co., Ltd
Haywards	A.C.N. 009 483 694 Pty Ltd trading as Haywards Steel Fabrication & Construction
Investigation 198	Investigation into the alleged dumping of steel plate from China and four other WTO members
Investigation 221	Investigation into the alleged dumping of wind towers from China and Korea
Investigation 238	Investigation into the alleged dumping and subsidisation of stainless steel sinks from China
Investigation 466	Investigation into the alleged dumping of railway wheels from China and France and the alleged subsidisation of railway wheels from China
Jiabaolu	Zhongshan Jiabaolu Kitchen and Bathroom Products Co., Ltd.
Jigang	Shandong Iron and Steel Company Limited, Jinan Company
Keppel Prince	Keppel Prince Engineering Pty Ltd
Masteel	Maanshan Iron & Steel Co., Ltd.
MCC	Model Control Code
MEPS	MEPS (International) Ltd, a price data agency
Milena	Milena Australia Pty Ltd
OCOT	ordinary course of trade
Panel request	Request for the establishment of a panel by China, WT/DS603/2
PRR	Australia's Preliminary Ruling Request filed on 16 December 2022
Primy	Primy Corporation Limited
Rhine Sinkwares	Rhine Sinkwares Manufacturing Ltd Hui Zhou
SASAC	State-owned Assets Supervision and Administration Commission
SBB	Steel Bulletin Board, a price data agency

Abbreviation	Full Form or Description
SCM Agreement	Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14
SEF	Statement of Essential Facts
SG&A	Selling, general and administrative
SIE	State-invested enterprise
SOE	State-owned enterprise. Any company or enterprise that is wholly or partially owned by the GOC as defined above (either through direct ownership or through association). In previous investigations and correspondence, the GOC has advised that the use of the term 'SOE' is declining in China and that these enterprises are now referred to with terms such as SIE as defined above. For the purpose of this submission, stated-owned enterprise and state-invested enterprise are together referred to as SOE.
Tasman	Tasman Sinkware Pty Ltd
TSP	Shanghai Taisheng Wind Power Equipment Co.
Valdunes	MG-Valdunes SAS
VAT	value-added tax
Win&P	Win&P Ltd
WTO	World Trade Organization
Yingao	Guangdong Yingao Kitchen Utensils Co., Ltd.
Zhuhai Grand	Zhuhai Grand Kitchenware Co. Ltd.

LIST OF EXHIBITS

Exhibit No.	Exhibit Name	Short Title
AUS-2	Email and letter from the ADC to MOFCOM, receipt of application requesting publication of dumping notice, dated 13 August (personal information redacted)	*Email and letter from the ADC to MOFCOM, dated 13 August 2013*
AUS-3	ADC letter to TSP, application for extension of time for submission, dated 27 September 2013 (public record)	*ADC letter to TSP, dated 27 September 2013*
AUS-4	ADC emails to MOFCOM, regarding initiation of investigation, dated 27 and 28 August 2013 (personal information redacted)	*ADC emails to MOFCOM, dated 27 and 28 August 2013*
AUS-5	ADC email to MOFCOM, attaching GOC questionnaire for Wind Towers Investigation 221, dated 29 October 2013 (personal information redacted)	*ADC email to MOFCOM, dated 29 October 2013*
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AUS-9	ADRP Report No. 22 – Deep Drawn Stainless Steel Sinks from the People's Republic of China – 11 September 2015 (published 11 September 2015) (public record)	*Stainless Steel Sinks Review Panel Report – No. 22*
AUS-10	*Customs Act 1901* – Notice under section 269ZZM(4) – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 12 October 2015 (published 16 October 2015)	*Stainless Steel Sinks Review 2015/22 – Public Notice – Minister's Decision*
AUS-11	*Customs Act 1901* – Part XVB – Certain Deep Drawn Stainless Steel Sinks Exported from the People's Republic of China – Notice under subsection 269ZHD(4) of the *Customs Act 1901* – 3 July 2019	*Stainless Steel Sinks Continuation 517 Initiation - ADN No. 2019/86*
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AUS-13	Stainless Steel Sinks – Komodo Hong Kong Limited, Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 1 January – 31 December 2013 (due 24 April 2014 (extended to 8 May 2014)) (published 21 May 2014) (public record)	*Stainless Steel Sinks Sinks – Komodo Questionnaire*
AUS-14	Zhuhai Grand Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 1 January – 31 December 2013 (due 24 April 2014) (published 16 May 2014) (public record)	*Stainless Steel Sinks – Zhuhai Grand Questionnaire*
AUS-15	Stainless Steel Sinks – Primy Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 1 January – 31 December 2013 (due 24 April 2014 (extended to 5 May 2014)) (published 20 May 2014) (public record)	*Stainless Steel Sinks – Primy Questionnaire*
AUS-16	Statement of Essential Facts (SEF) No. 466 – Alleged dumping of certain railway wheels exported from the `People's Republic of China and France, and alleged subsidisation of certain railway wheels exported from the People's Republic of China, 11 October 2018 (published 11 October 2018) (public record)	*Railway Wheels Investigation 466 – SEF*
AUS-17	Statement of Essential Facts (SEF) No. 238 – Alleged dumping and subsidisation of deep drawn stainless steel sinks exported from the People's Republic of China, 23 December 2014 (published 23 December 2014) (public record)	*Stainless Steel Sinks investigation 238 –SEF*
AUS-18	Government of China Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 30 December 2017 (due 25 May 2018 (extended to 11 June 2018)) (published 12 June 2018) (public record)	*Railway Wheels Investigation 466 – GOC Questionnaire*
AUS-19	Preliminary Affirmative Determination (PAD) No. 466 and imposition of securities, ADN No. 2018/99, Railway wheels exported from the People's Republic of China and France, 18 June 2018 (published 18 June 2018) (public record)	*Railway Wheels Investigation 466 – PAD*

Exhibit No.	Exhibit Name	Short Title
AUS-20	Note for File – Meeting between China Chamber of Commerce for Import and Export of Machinery and Electronic Products (CCCME), Masteel and the Anti-Dumping Commission on 4 September 2018 (public record)	*Note for File – Meeting between CCCME, Masteel and the Anti-Dumping Commission*
AUS-21	Masteel Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 31 December 2017 (due 25 May 2018), "Attachment A-4-3-2 – Maanshan Iron & Steel Company Limited – 2017 Auditors Report" (extract)	*Railway Wheels – Masteel Questionnaire*, "Attachment A-4-3-2 - Masteel - 2017 Auditors Report"
AUS-22 (BCI)	[redacted]	[redacted]
AUS-22 (BCI redacted)	Masteel Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 31 December 2017 (due 25 May 2018), "Appendix 13 – Raw Material Purchases"	*Railway Wheels – Masteel Questionnaire*, "Appendix 13 – Raw Material Purchases"
AUS-23	Government of China Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 30 December 2017 (due 25 May 2018 (extended to 11 June 2018)), "Attachment 1 – 13th Five Year Plan for the Steel Industry"	*Railway Wheels Investigation 466 – GOC Questionnaire*, "Attachment 1 – 13th Five Year Plan for the Steel Industry"
AUS-24	Government of China Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 30 December 2017 (due 25 May 2018 (extended to 11 June 2018)), "Attachment 16 – The 13th Five-Year Plan for Economic and Social Development of the People's Republic of China (2016-2020)" (extract)	*Railway Wheels Investigation 466 – GOC Questionnaire*, "Attachment 16 – The 13th Five-Year Plan for Economic and Social Development of the PRC"
AUS-25	H. Liu and L. Song, "Issues and Prospects for the Restructuring of China's Steel Industry", in L. Song et al. (ed.), *China's New Sources of Economic Growth, Reform, Resources and Climate Change Vol.1*, (ANU Press, 2016), pp. 337-358.	H. Liu and L. Song, "Issues and Prospects for the Restructuring of China's Steel Industry"

Exhibit No.	Exhibit Name	Short Title
AUS-26	European Commission (EC), *Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations* (Brussels, 20 December 2017) (extract)	EC, *Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China*
AUS-27	OECD, *OECD Economic Surveys: China 2017* (Paris, March 2017) (extract)	OECD, *OECD Economic Surveys: China 2017*
AUS-28	L. Brun, *Overcapacity in Steel – China's Role in a Global Problem*, (Center on Globalization, Governance & Competitiveness, Duke University, September 2016)	L. Brun, *Overcapacity in Steel – China's Role in a Global Problem*
AUS-29	United States Department of Commerce, *China's Status as a Non-Market Economy* (Washington D.C., 26 October 2017) (extract)	United States Department of Commerce, *China's Status as a Non-Market Economy*
AUS-30	Government of China Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 30 December 2017 (due 25 May 2018 (extended to 11 June 2018)), "Attachment 15 – 12th Five-Year Plan for National Economic and Social Development" (extract)	*Railway Wheels Investigation 466 – GOC Questionnaire*, "Attachment 15 – 12th Five-Year Plan for National Economic and Social Development"
AUS-31	Government of China Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 30 December 2017 (due 25 May 2018 (extended to 11 June 2018)), "Attachment 10 – Taxes and tariffs for railway wheels, steel billet etc. "	*Railway Wheels Investigation 466 – GOC Questionnaire*, "Attachment 10 – Taxes and tariffs for railway wheels, steel billet etc."
AUS-32	Anti-Dumping Commission, *Analysis of Steel and Aluminium Markets – Report to the Commissioner of the Anti-Dumping Commission* (Canberra, August 2016) (extract)	Anti-Dumping Commission, *Analysis of Steel and Aluminium Markets*
AUS-33	Customs Act 1901 – Part XVB – Report No. 301 – Alleged dumping of Steel Rod in Coils exported from the People's Republic of China – 29 March 2016 (published 22 April 2016) (public record) (extract)	*Steel Rod in Coils Investigation 301 Report*
AUS-34	Maanshan Iron & Steel Company – Articles of Association – 22 December 2017 (extract)	*Railway Wheels – Masteel Articles of Association 2017*

Exhibit No.	Exhibit Name	Short Title
AUS-35 (BCI)	[redacted]	[redacted]
AUS-35 (BCI redacted)	Masteel Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 31 December 2017 (due 25 May 2018), "Appendix – Ma Steel Limited – 466", tab "12-Subsidy List 2017" (extract)	*Railway Wheels – Masteel Questionnaire*, "Appendix – Ma Steel Limited – 466", tab "12-Subsidy List 2017"
AUS-36 (BCI)	[redacted]	[redacted]
AUS-36 (BCI redacted)	Masteel Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 31 December 2017 (due 25 May 2018), "Appendix – Ma Steel Limited – 466", tab "16-Income Tax" (extract)	*Railway Wheels – Masteel Questionnaire*, "Appendix – Ma Steel Limited – 466", tab "16-Income Tax"
AUS-37 (BCI)	[redacted]	[redacted]
AUS-37 (BCI redacted)	Masteel Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 31 December 2017 (due 25 May 2018), "Exhibit I-3 – Income Tax Return and Payment"	*Railway Wheels – Masteel Questionnaire,* "Exhibit I-3 – Income Tax Return and Payment"
AUS-38	Maanshan Iron & Steel Company Annual Report 2015 (extract)	*Railway Wheels – Masteel Annual Report 2015*
AUS-39 (BCI)	[redacted]	[redacted]

Exhibit No.	Exhibit Name	Short Title
AUS-39 (BCI redacted)	Masteel Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 31 December 2017 (due 25 May 2018), "Appendix 13 – Breakdown of wheel costs"	*Railway Wheels – Masteel Questionnaire*, "Appendix 13 – Breakdown of wheel costs"
AUS-40	Railway Wheels Investigation 466 – Government of China's Response to SEF – Letter to ADC dated 5 November 2018 (published 5 November 2018) (public record)	*Railway Wheels – GOC Response to SEF – Letter to ADC*
AUS-41 (BCI)	[redacted]	[redacted]
AUS-41 (BCI redacted)	Masteel Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 31 December 2017 (due 25 May 2018), "Appendix – Ma Steel Limited – 466", tab "2-Turnover"	*Railway Wheels – Masteel Questionnaire*, "Appendix – Ma Steel Limited – 466", tab "2-Turnover"
AUS-42 (BCI)	[redacted]	[redacted]
AUS-42 (BCI redacted)	Statement of Essential Facts (SEF) No. 466 – Alleged dumping of certain railway wheels exported from the People's Republic of China and France, and alleged subsidisation of certain railway wheels exported from the People's Republic of China, 11 October 2018, "Confidential Appendix 3 - Export prices, normal values and dumping margins", tab "Masteel NV" (extract)	*Railway Wheels Investigation 466 – SEF*, "Confidential Appendix 3 - Export prices, normal values and dumping margins", tab "Masteel NV"
AUS-43	Email and letter from ADC to MOFCOM, regarding initiation of sinks investigations, dated 18 March 2014 (personal information redacted)	*Email and letter from ADC to MOFCOM, dated 18 March 2014*
AUS-44	Government of China Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 1 January – 31 December 2013 (due 5 May 2014) (published 22 May 2014) (public record)	*Stainless Steel Sinks Investigation 238 – GOC Questionnaire*

Exhibit No.	Exhibit Name	Short Title
AUS-45	Email from the ADC to Corrs Chambers Westgarth, confirms MOFCOM's engagement of Corrs Chambers Westgarth and raises government questionnaire, dated 14 April 2014 (personal information redacted)	See *Email from the ADC to Corrs Chambers Westgarth, dated 14 April 2014*
AUS-46	Email from the ADC to Corrs Chambers Westgarth, request for extension granted, dated 2 May 2014 (personal information redacted)	*Email from the ADC to Corrs Chambers Westgarth, dated 2 May 2014*
AUS-47	Stainless Steel Sinks Investigation 238 – GOC Submission Response to PAD – Comments of the Government of China concerning "particular market situation" in PAD 238, 19 September 2014 (published 19 September 2014) (public record)	*Stainless Steel Sinks Investigation 238 – GOC Submission Response to PAD*
AUS-48	Preliminary Affirmative Determination (PAD) No. 238 – Report concerning Deep Drawn Stainless Steel Sinks Exported to Australia from the People's Republic of China – August 2014 (published 13 August 2014) (public record)	*Stainless Steel Sinks Investigation 238 – PAD*
AUS-49	Statement of Essential Facts (SEF) No. 238 – Report Concerning the Alleged Dumping and Subsidisation of Deep Drawn Stainless Steel Sinks Exported to Australia from the People's Republic of China – 23 December 2014 (published 23 December 2014) (public record)	*Stainless Steel Sinks Investigation 238 – SEF*
AUS-50	Canada Border Services Agency (CBSA) Statement of Reasons concerning the making of final determinations with respect to the dumping and subsidizing of certain stainless steel sinks originating in or exported from the People's Republic of China, 4214-32 AD/1392, 4218-31 CVD/129, 9 May 2012, "Non-Confidential Attachment C-1.1.1 of the application" (public record)	*Stainless Steel Sinks Investigation 238 - Domestic Industry Application – CBSA Statement of Reasons*, Certain Stainless Steel Sinks, "Non-Confidential Attachment C-1.1.1"
AUS-51	Canada Border Services Agency (CBSA), Statement of Reasons Concerning the Making of Final Determinations with respect the Dumping and Subsidizing of Certain Pup Joints Originating in or Exported from the People's Republic of China, 27 March 2012 (public record)	*Stainless Steel Sinks Investigation 238 - Domestic Industry Application – CBSA Statement of Reasons*, Certain PUP joints, "Non-Confidential Attachment C-1.1.3"

Exhibit No.	Exhibit Name	Short Title
AUS-52 (BCI)	[redacted]	[redacted]
AUS-52 (BCI redacted)	Application for the publication of dumping and/or countervailing duty notices – Certain Deep Drawn Stainless Steel Sinks – exported from China – Attachment C-1.1.4 (April 2013)	*Stainless Steel Sinks Investigation 238 - Domestic Industry Application – MetalBulletin Research Report* "Confidential Attachment C-1.1.4"
AUS-53	International Stainless Steel Forum (ISSF), *Stainless Steel in Figures* (2014)	*ISSF Stainless Steel Figures 2014 Report*
AUS-54	Stainless Steel Sinks – Elkay (China) Kitchen Solutions, Co. Ltd. Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 1 January – 31 December 2013 (due 24 April 2014) (published 20 May 2014) (public record)	*Stainless Steel Sinks Investigation 238 – Elkay (China) Kitchen Solutions Questionnaire*
AUS-55	Stainless Steel Sinks – Franke (China) Kitchen System Co., Ltd Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 1 January – 31 December 2013 (due 8 May 2014) (published 20 May 2014) (public record)	*Stainless Steel Sinks Investigation 238 – Franke (China) Kitchen System Co., Ltd Questionnaire*
AUS-56	Stainless Steel Sinks – Zhongshan Jiabaolu Kitchen & Bathroom Products Co., Ltd, Exporter Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China (4 May 2014) (published 21 May 2014) (public record)	*Stainless Steel Sinks Investigation 238 – Jiabaolu Questionnaire*
AUS-57	Stainless Steel Sinks Investigation 238 – Komodo Submission Response on PMS – "submission on particular market situation in China", 22 July 2014 (published 5 August 2014) (public record)	*Stainless Steel Sinks Investigation 238 – Komodo Submission Response to PMS*
AUS-58	Stainless Steel Sinks Investigation 238 – Komodo Submission Response to PAD – "submission on preliminary determination", 18 August 2014 (published 18 August 2014) (public record)	*Stainless Steel Sinks Investigation 238 – Komodo Submission Response to PAD*

Exhibit No.	Exhibit Name	Short Title
AUS-59	Letter from AllBright Law Offices on behalf of Zhuhai Grand Kitchenware Company., Ltd to the Anti-Dumping Commission dated 3 November 2014 (published 6 November 2014)	*Stainless Steel Sinks Investigation 238 Submission - Zhuhai Grand Kitchenware Company., Ltd re Visit Report*
AUS-60 (BCI)	[redacted]	[redacted]
AUS-60	Stainless Steel Sinks Continuation 517 Report Confidential attachment 16, Primy Domestic Sales, tab D-2 (public record) (extract)	*Stainless Steel Sinks Continuation 517 Report* – Confidential attachment 16, Primy Domestic Sales, tab D-2
AUS-61 (BCI)	[redacted]	[redacted]
AUS-61	Stainless Steel Sinks Continuation 517 Report – Primy export sales worksheet response to Exporter Questionnaire, Primy Export Sales Summary, tab B-2, revised exhibit (public record) (extract)	*Stainless Steel Sinks Continuation 517 Report* – Primy Export Sales Summary, tab B-2
AUS-62 (BCI)	[redacted]	[redacted]
AUS-62 (BCI redacted)	Stainless Steel Sinks Continuation 517 Report – Confidential attachment 16, Primy Domestic Sales, worksheet (b) Domestic CTMS Summary (extract)	*Stainless Steel Sinks Continuation 517 Report* – Confidential attachment 15, Primy Domestic Sales
AUS-63 (BCI)	[redacted]	[redacted]

Exhibit No.	Exhibit Name	Short Title
AUS-63 (BCI redacted)	Stainless Steel Sinks Continuation 517 Report – Confidential attachment 17, Primy Normal Value, tab (f) AU Accessories (extract)	*Stainless Steel Sinks Continuation 517 Report* – Confidential attachment 17, Primy Normal Value, tab (f) AU Accessories
AUS-64	Stainless Steel Sinks Investigation 238 Submission - Zhongshan Jiabaolu Kitchen and Bathroom Products Co., Ltd, 5. Profit Calculation, 12 January 2015 (published 13 January 2015)	*Stainless Steel Sinks Investigation 238 Submission - Zhongshan Jiabaolu Kitchen and Bathroom Products Co., Ltd*
AUS-65	Email from ADC to MOFCOM, requesting completion of questionnaire, dated 31 March 2014 (personal information redacted)	*Email from ADC to MOFCOM, dated 31 March 2014*
AUS-66	Email from Corrs to ADC, including China's response to the GOC questionnaire, dated 19 May 2014 (personal information redacted)	*Email from Corrs Chambers Westgarth to ADC, dated* 19 May 2014
AUS-67 (BCI)	[redacted]	[redacted]
AUS-67 (BCI redacted)	Stainless Steel Sinks – Zhuhai Grand Kitchenware Company Limited, Visit – Investigation 238 Alleged Dumping and Subsidisation of certain deep drawn stainless steel sinks exported from the People's Republic of China, Data provided by Zhuhai during visit, "Steel Purchases"	*Stainless Steel Sinks – Zhuhai Grand Verification Visit*, "Steel Purchases"
AUS-68	Email Correspondence, MOFCOM to ADC, MOFCOM to respond to countervailing duty notice for sinks during the investigation, 15 February 2014 (personal information redacted)	*Email from MOFCOM to ADC, 15 February 2014*
AUS-69	Email Correspondence, MOFCOM to ADC, MOFCOM confirm no consultations to be held before investigation initiated, sent on 24 February 2014 (personal information redacted)	*Email from MOFCOM to ADC, 24 February 2014*

Exhibit No.	Exhibit Name	Short Title
AUS-70	*Customs Act 1901* - Part XVB – Report No. 193 – Alleged subsidisation of zinc coated steel exported from the People's Republic of China – 28 June 2013 (published 5 August 2013)	*Aluminium Zinc Coated Steel Investigation 193 Report*

I. INTRODUCTORY PARTS

A. INTRODUCTION

1. Australia regrets China's decision to initiate this dispute. China's case is misconceived: the claims of error China has advanced are without merit, and much of China's case falls outside the Panel's terms of reference. The measures at issue were put in place following careful, thorough and transparent investigations, in compliance with Australia's obligations under the WTO covered Agreements. As such, China has failed to make out its claims, and Australia requests the Panel to find accordingly.

2. Most of China's case is directed at matters that are outside the scope of the Panel's terms of reference. As Australia explained in its request for a preliminary ruling, the entirety of China's claims under the SCM Agreement relate to measures that expired nearly two years prior to China's panel request.[1] Moreover, as Australia explains in Part II of this submission, the claims made under the Anti-Dumping Agreement relating to stainless steel sinks and wind towers also fall outside the Panel's terms of reference because: (i) the measures identified were superseded or were no longer in existence prior to the panel request being made; or (ii) the panel request did not specify the relevant WTO provisions that it is now evident form the basis of China's arguments.

3. It is also apparent from China's first written submission that its case is predicated on an erroneous conflation of three separate product investigations, conducted at different points in time over almost a decade and each based on different underlying evidence. This can be seen in China's approach in its first written submision in which it addressed the issues raised by claim, grouping the findings in three different investigations together. This approach disregards the specific case and factual decisions of the ADC in each investigation and the differences in the underlying evidence. It conflates distinct factual and legal findings. To assist the Panel, Australia has adopted a different structure and will set out its arguments with respect to the substance of China's claims organised by the investigation, with each of China's claims considered in order and placed in the context of that investigation.

[1] Request for the establishment of a panel by China, WT/DS603/2 (China's panel request).

4. On the substance of the claims, China's case is predicated on a fundamental misunderstanding of both Australia's domestic legal framework and the findings made by the ADC in these investigations. These misunderstandings by China have caused it to claim erroneously that the ADC's investigations and measures that followed were inconsistent with WTO rules. Australia sets out for the Panel Australia's domestic framework governing its trade remedies investigations, highlighting a system that is independent, non-discriminatory and transparent. China's allegation of discriminatory treatment of China's exporters by Australia is unjustified and entirely unfounded. China is Australia's largest trading partner, and the bilateral trade relationship has been, and remains, of significant benefit to both countries.

5. The only part of China's case that properly falls within the Panel's terms of reference is in relation to railway wheels. In the context of this investigation, China entirely misunderstands the basis of the ADC's decision to rely on information other than the exporter's records. The ADC's decision was made on the basis of an explicit finding that the circumstances were not "normal" within the meaning of Article 2.2.1.1 of the Anti-Dumping Agreement. It was not, as China submits, on the basis of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

6. The record for the railway wheels investigation shows that the ADC engaged in a careful examination of all the evidence before it, the submissions of the parties and the issues in contention. Having regard to the limits of the evidence available, the ADC then went on to make considered decisions that accorded with the requirements of the Anti-Dumping Agreement. Contrary to China's first written submission, an unbiased and objective investigating authority would have reached the same conclusions as the ADC, particularly given China's serious and pervasive levels of Government intervention in domestic steel production, capacity, technology, and supply, and resulting distortions of China's steel market.

7. In this context, the one area of contextual overlap for the three otherwise distinct product investigations is that the ADC was required to assess the existence of dumping or subsidisation in light of the clear evidence in each case of high levels of Government intervention in relevant parts of the Chinese steel and steel input markets. It is striking that, despite the breadth of its first written submission, China does not dispute that the evidence before the ADC in the investigations established structural and systemic imbalances and

distortive conditions in the Chinese steel market. The thrust of China's first written submission is that the ADC was required to use exporters' reported costs notwithstanding those imbalances. China's approach incorrectly interprets the relevant provisions of the Anti-Dumping Agreement and the SCM Agreement, would write "normally" out of the text of the Anti-Dumping Agreement and impose unreasonable standards on investigating authorities that have no basis in the Agreements. China's submission also fails to engage with the practical difficulties an investigating authority faces when a respondent government or other interested party fails to provide requested information.

8. In sum, Australia respectfully submits that the Panel should find that all of China's claims with respect to the stainless steel sinks and wind towers investigations are outside the Panel's terms of reference. With respect to China's claims on the railway wheels investigations, the Panel should find that the ADC's approach to calculating steel billet costs in that investigation was consistent with Article 2 of the Anti-Dumping Agreement. All of China's claims must therefore fail.

B. BURDEN OF PROOF

9. The burden of proof in WTO disputes lies with the complaining party to establish a *prima facie* case of a violation of a covered agreement.[2] In presenting a *prima facie* case, the complainant must put forward evidence and legal argument in relation to each of the elements of its claims.[3] It follows that a respondent's measure is to be "treated as WTO-consistent, until sufficient evidence is presented to prove the contrary."[4]

10. The nature and scope of evidence required to establish a *prima facie* case "will vary from measure to measure, provision to provision, and case to case."[5] However, the evidence must be "sufficient to raise a presumption that what is claimed is true."[6] A "mere assertion of

[2] Appellate Body Reports, *US – Carbon Steel,* para. 157; *EC – Tariff Preferences,* para. 105.
[3] Appellate Body Report, *US – Gambling*, para. 140. See also Appellate Body Report, *US – Zeroing (EC),* para. 217.
[4] Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66 (emphasis original). See also Appellate Body Report, *US – Carbon Steel,* para. 157.
[5] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[6] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14. See also Appellate Body Report, *EC – Tariff Preferences,* para. 105.

a claim" [7] is not enough. Thus, the burden of proof in this dispute falls squarely on China to establish a *prima facie* case in the first instance.

C. STANDARD OF REVIEW

11. China presents a high-level overview of the standard of review applicable to the present dispute in its first written submission in the section entitled "Standard of Review".[8] Australia does not contest the principles expressed in this overview at the level of generality at which they are expressed. However, Australia makes the following two observations about how those principles should be applied in the circumstances of the present dispute.

12. Central to these observations is the standard of review established by Article 11 of the DSU, and Articles 17.5(ii) and 17.6(i) of the Anti-Dumping Agreement. In short, this standard is whether an unbiased and objective investigating authority, in light of the evidence that was before it and the explanations provided, *could* have (not *would* have) reached the conclusions of the ADC.[9] This standard is the critical consideration[10] and most relevant to the present dispute.[11]

1. The scope of the evidentiary record

13. Under Article 17.5(ii) of the Anti-Dumping Agreement, the Panel's review is based on "the facts made available in conformity with appropriate domestic procedures to the

[7] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[8] China's first written submission, paras. 22-28.

[9] Panel Report, *US – Softwood Lumber VI,* para. 7.15. The standard of review under Article 11 of the DSU is understood in light of the obligations of the particular covered agreement to derive a more specific standard of review. In this way the standard of review under Article 11 moulds to the relevant covered agreement. See Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184 (referring to Appellate Body Reports, *US – Lamb*, para. 105 and *US – Cotton Yarn*, paras. 75-78). For Article 17.6(i), the Appellate Body has recognised the parallels with the Panel's role under Article 11 of the DSU. See Appellate Body Report, *US - Hot-Rolled Steel,* para. 55. While Article 11 of the DSU provides the standard of review for claims under the SCM Agreement, this standard also corresponds with claims under the Anti-Dumping Agreement.

[10] See, e.g. Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.28; Appellate Body Reports, *US – Clove Cigarettes*, para. 229; *EU – Biodiesel (Argentina)*, para. 6.200; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.191; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.244; *Peru – Agricultural Products*, para. 5.66; *India – Agricultural Products*, para. 5.179; *US - COOL*, para. 301.

[11] As for Article 17.6(ii) of the Anti-Dumping Agreement, where the panel finds that a relevant provision admits of more than one permissible interpretation, the relevant standard of review is that the panel should find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations. In considering their standard of review, the arbitrators in *Colombia – Frozen Fries* found that:

> … different treaty interpreters applying the same tools of the Vienna Convention may, in good faith and with solid arguments in support, reach different conclusions on the "correct" interpretation of a treaty provision. This may be particularly true for the Anti-Dumping Agreement, which was drafted with the understanding that investigating authorities employ different methodologies and approaches. Treaty interpretation is not an exact science and applying the Vienna Convention's method does not magically and inevitably lead to a single result. In most cases, treaty interpretation involves weighing, balancing, and choice (fns. omitted). [Award of the Arbitrator, *Colombia – Frozen Fries,* para. 4.14].

authorities of the importing Member".[12] This means that the Panel may not consider material that post-dates the investigation.[13] The Panel's assessment must be limited to the evidence that was before the investigating authority at the time of the investigation.

14. China's first written submission also acknowledges that the Panel's "depth of consideration is not a *de novo* review".[14] Notwithstanding, China relies repeatedly on material that came into existence after the investigation to evidence its claims about what happened during the investigation.

15. For example, in support of its claims in respect of the wind towers investigation, China frequently cites *Wind Towers Review Panel – Conference Summary*.[15] This document is dated 19 June 2019 and as such came into existence after the wind towers investigation.[16] The probative value China attributes to this document is never explained. At most, it is evidence of a subsequent explanation made by a party other than the relevant decision maker, which was provided in a conference before a different administrative body.[17]

16. The Panel should not consider such material as it undertakes its review.

2. The Panel's review must take into account the context of the ADC's investigations

17. China's arguments rely on interpretations of phrases in the ADC's final reports that are stripped of their surrounding context, failing to take into account other evidence that comprises the investigative record.[18] China's arguments also ignore the effect of information that was missing from the record, in particular information that was unavailable because of the refusals of the Government of China and certain Chinese producers/exporters to provide certain information requested by the ADC.

18. The terms of Article 11 of the DSU and Articles 17.5(ii) and 17.6(i) of the Anti-Dumping Agreement require the Panel not only to take into account the investigating authority's final

[12] Article 17.5(ii) of the Anti-Dumping Agreement.
[13] Panel Report, *US - Hot-Rolled Steel,* para. 7.7.
[14] China's first written submission, para. 27.
[15] *Wind Towers Review Panel – Conference Summary*, (Exhibit CHN-30). As discussed in Australia's first written submission, paras. 514-516, for example, China often cites *Wind Towers Review Panel – Conference Summary* (Exhibit CHN-30) in support of its claims in respect of wind towers. See, e.g. China's first written submission, paras. 77, 78, 108, 169, 172, 269, 276.
[16] *Wind Towers Review Panel – Conference Summary*, (Exhibit CHN-30), p. 1. See also Australia's first written submission, paras. 514-516.
[17] *Wind Towers Review Panel – Conference Summary*, (Exhibit CHN-30), p. 1.
[18] Australia's first written submission, paras. 353-362.

determination but also to consider the totality of the evidence, including the inferences and intermediary findings relied on by an investigating authority and reflected in the investigative record.[19]

19. The totality of the evidence, inferences and intermediary findings includes *implicit* findings, analyses, or considerations evident from the "nature and implications of the investigating authority's reasoning on a given point or to the procedural circumstances of the review".[20] Relevantly, in the present dispute:

- if an interested party does not raise a particular matter or provide evidence in respect of a particular matter, "it would be reasonable to expect only limited or implicit analysis" in the investigating authority's determination;[21] and
- an interested party's arguments could be so deficient in evidence and data such that the argument and evidence would not warrant an investigating authority's explicit consideration.[22]

20. Further, where evidence is on the record but not cited by an investigating authority, a panel may consider this uncited evidence where it corroborates the inferences, reasoning and conclusions reached by the investigating authority in its determination.[23]

21. Applying the above principles, and as demonstrated throughout this submission, the ADC's determinations were consistent with Australia's international obligations when these determinations are properly considered in their respective contexts. Australia will return to these principles in its submissions below.

[19] Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, para. 7.7; see also Panel Report, *Korea – Stainless Steel Bars*, para. 7.45, referring to see, e.g. Appellate Body Report, *Japan – DRAMs (Korea),* paras. 133 and 134, and Panel Report, *EC – Fasteners (China)*, para. 7.359.
[20] Panel Report*, Korea – Stainless Steel Bars*, para. 7.41; see also Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, paras. 7.211 and 7.219.
[21] See, e.g. regarding matters under Article 2.1(c) of the SCM Agreement: Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, paras. 7.211, 7.219, 7.221; and regarding matters under Article 3.5 of the AD Agreement: Panel Report, *EU – Fatty Alcohols (Indonesia)*, paras. 7.184, 7.196, 7.199-7.200, 7.202-7.204 (these findings were not appealed to the Appellate Body).
[22] Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.204. See also Panel Report, *EC — Countervailing Measures on DRAM Chips*, para. 7.229.
[23] Panel Report, *Korea – Stainless Steel Bars*, para. 7.40, citing Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, paras. 7.5-7.6 and fn. 196. See also Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.165. See, e.g. Australia's first written submission, para. 223.

II. CHINA'S CLAIMS CONCERNING THE STAINLESS STEEL SINKS AND WIND TOWERS ANTI-DUMPING MEASURES ARE OUTSIDE THE PANEL'S TERMS OF REFERENCE

A. OVERVIEW

22. Australia asks the Panel to find that the following claims are outside its terms of reference:

- all of China's claims contained in section B.2 of its panel request concerning "countervailing measures", as set out separately in Australia's PRR dated 16 December 2022;[24]
- China's claim under Article 2.4 of the SCM Agreement due to its failure to cite this provision in its panel request, as set out separately in Section VII below;[25]
- all of China's anti-dumping claims in respect of stainless steel sinks and wind towers original investigations that have been superseded, as set out below;[26] and
- all of China's anti-dumping claims in respect of the stainless steel sinks and wind towers to the extent they relate to expiry reviews due to China's failure to cite Article 11.3 of the Anti-Dumping Agreement in its panel request, as set out below.[27]

23. China's anti-dumping claims in respect of wind towers and stainless steel sinks are based on a fundamental misconception of the legal and factual basis for the current measures in place. The claims in China's panel request and a majority of the arguments in China's first written submission are directed at the original investigations for stainless steel sinks and wind towers. Given well over five years have transpired since those investigations, the original investigations no longer provide the legal basis for any anti-dumping duties. Pursuant to Articles 3.2, 3.4, 3.7, 6.2, 7.1 and 19.1 of the DSU, the Panel should not rule on historic measures that were superseded before the panel request was filed.

[24] Australia's PRR dated 16 December 2022.
[25] Australia's first written submission, paras. 658-667.
[26] Australia's first written submission, paras. 54-79, 131-134.
[27] Australia's first written submission, paras. 80-101, 135-136.

24. There are still anti-dumping measures in place that relate to imports of stainless steel sinks and wind towers from China, but their legal basis is the expiry reviews conducted by the ADC in accordance with Article 11.3 of the Anti-Dumping Agreement. Given China elected not to make any claims under Article 11.3 of the Anti-Dumping Agreement in its panel request, pursuant to Articles 6.2 and 7.1 of the DSU, the expiry reviews are also outside the jurisdiction of the Panel.

25. Accordingly, the way China has framed its panel request and first written submission means that there are no anti-dumping issues relating to the stainless steel sinks and wind towers measures that are within the Panel's terms of reference. If China wishes to raise issues separately relating to the current stainless steel sinks and wind towers anti-dumping measures based on the expiry reviews through the dispute settlement mechanism, the only permissible way for it to do so is to file a new request for consultations that addresses those measures. The WTO consistency of the current stainless steel sinks and wind towers measures may not be adjudicated by the present Panel given its lack of jurisdiction under Article 7.1 of the DSU.

26. Furthermore, China refers repeatedly in its first written submission to the anti-dumping duties imposed on TSP, the sole Chinese exporter during the wind towers investigation period. But, as conceded by China,[28] the anti-dumping duties on TSP were removed in 2020 following a domestic merits review. No anti-dumping duties have been imposed on TSP since that time. China's claims and arguments relating to TSP relate solely to historic findings that were no longer in force when the Panel was established. Accordingly, they should be dismissed.

27. The Panel should find that all the anti-dumping stainless steel sinks and wind towers measures outlined in China's panel request and first written submission are not within the Panel's terms of reference and are outside its jurisdiction. For the Panel, the WTO Secretariat, and parties to litigate these issues through a protracted dispute settlement proceeding would be a fruitless diversion from other important work of the WTO. The only anti-dumping measure that is within the Panel's terms of reference is the current anti-dumping measure on railway wheels, which Australia addresses in detail below.

[28] China's first written submission, para. 44.

28. Even if the Panel were prepared to review the stainless steel sinks and wind towers original anti-dumping investigations and, *arguendo*, found some error in them, there would be no utility in making recommendations to bring those historic and superseded investigations into conformity with the Anti-Dumping Agreement.

B. THE WIND TOWERS ANTI-DUMPING MEASURES ARE OUTSIDE THE SCOPE OF THE PANEL'S TERMS OF REFERENCE

29. This section begins with a factual overview of wind towers to provide context for the jurisdictional challenges and show why the wind towers expiry review has superseded the original investigation. The Panel will note that the ADC's investigations were conducted nearly a decade ago and pertain to an even older period of investigation.

1. Factual overview

(a) Application from the Australian industry

30. On 16 August 2013, Keppel Prince and Haywards lodged a written application requesting that the Minister responsible for anti-dumping publish a dumping duty notice in relation to wind towers exported to Australia from China and Korea. [29]

31. The ADC found that Keppel Prince, Haywards, E&A Contractors and RPG Aus Administration Pty Ltd constituted the Australian industry producing "like goods" as defined under Article 4 of the Anti-Dumping Agreement.[30]

32. Keppel Prince and Haywards claimed domestic selling prices for wind towers in China were artificially low due to government influence on raw material prices (i.e. plate product produced from hot rolled coil (HRC), coking coal and/or coke and scrap steel), and that domestic selling prices for wind towers were therefore unsuitable for establishing normal value, as a "particular market situation" existed in these markets.[31]

33. The applicants argued that as plate steel was the major raw material input into the production of wind towers and contributes at least 50% to the cost to make the goods, then

[29] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 5.
[30] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), pp. 13, 15-16.
[31] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 24.

domestic selling prices for wind towers in China were artificially low due to government influences on raw material input prices.[32]

34. The ADC notified the Government of China that it had received a properly documented application requesting the publication of a dumping duty notice in respect of utility scale wind towers exported to Australia from China.[33] The ADC invited the Government of China to discuss any of the matters raised in the letter by email or telephone.[34]

(b) Investigation 221

35. Investigation 221 was initiated on 28 August 2013, into alleged dumping of wind towers imported from China and Korea.[35] The investigation period for the purpose of assessing dumping was 1 January 2012 to 30 June 2013.[36] The injury analysis period for the purpose of determining whether material injury had been caused to the Australian industry was from January 2008.[37]

36. The ADC found that TSP was the sole exporter of the goods from China during the investigation period.[38] On 17 September 2013, the ADC sent TSP an initiation letter attaching the exporter questionnaire. The ADC granted TSP an extension of time until 7 November 2013[39] and TSP provided its questionnaire response on 8 November 2013.

37. Various other interested parties, including the Government of China, were individually notified in writing of the initiation of the investigation.[40] The Government of China was subsequently invited to complete a questionnaire.[41] This questionnaire provided an opportunity for the Government of China to demonstrate that the factors found to exist in previous investigations and the particular market situation found in relation to plate steel in Investigation 198 (the primary input into wind tower) – which is not one of the investigations before the Panel in this dispute – no longer existed.[42] The ADC also said that it would assume

[32] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 25.
[33] *Email and letter from the ADC to MOFCOM, dated 13 August 2013*, (Exhibit AUS-2).
[34] *Email and letter from the ADC to MOFCOM, dated 13 August 2013*, (Exhibit AUS-2).
[35] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), pp. 5-6.
[36] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 6.
[37] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 6.
[38] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 9.
[39] *ADC letter to TSP, dated 27 September 2013*, (Exhibit AUS-3).
[40] *ADC emails to MOFCOM, dated 27 and 28 August 2013*, (Exhibit AUS-4).
[41] *ADC email to MOFCOM, dated 29 October 2013*, (Exhibit AUS-5).
[42] *Wind Towers Investigation 221 – GOC Questionnaire*, (Exhibit AUS-7), p. 6.

the Government of China's detailed responses to previous relevant questionnaires remained unaltered and were applicable during the investigation period for wind towers.[43]

38. The questionnaire was sent to the Government of China on 29 October 2013 with a response due by 5 December 2013.[44] As no response was received by the due date, the ADC emailed the Government of China again on 10 December 2013 to ask whether it would respond to the questionnaire, and noted that the Government of China had not sought an extension of time.[45] The ADC did not receive any response to this email, or receive any further communication from the Government of China before the SEF, or in response to the SEF itself.[46]

39. In response to the SEF, the ADC received submissions from the Korean exporter, Government of Korea, importers, and the Australian industry.[47] Neither the Government of China nor TSP lodged a submission in response to the SEF.[48] The ADC received a total of 19 submissions during the investigation.[49] Titan Wind Energy Suzhou Co Ltd was a manufacturer of wind towers in China and made a submission advising that it was an exporter of wind towers to Australia that remained in the market, but did not export to Australia during the investigation period.[50]

40. The ADC physically visited TSP in China twice on 27-29 November 2013 and 2 December 2013 to verify the information TSP provided in its exporter questionnaire responses and to obtain further information in relation to the investigation.[51]

41. On 21 March 2014, the ADC completed the final report in relation to Investigation 221.[52] Informed by the material before it, which was limited by the Government of China's decision not to make any submissions in the course of the investigation,[53] the ADC found, relevantly, that:

[43] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 28; *Wind Towers Investigation 221 – GOC Questionnaire*, (Exhibit AUS-7), p. 6.
[44] *ADC email to MOFCOM, dated 29 October 2013*, (Exhibit AUS-5).
[45] *ADC email to MOFCOM, dated 10 December 2013*, (Exhibit AUS-6).
[46] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 28.
[47] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 10.
[48] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 10.
[49] See *EPR 221 – Wind towers from China, Korea*, (Exhibit AUS-8).
[50] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p 9.
[51] *Wind Towers Investigation 221 Visit Report – TSP*, (Exhibit CHN-45), p. 7.
[52] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4).
[53] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 28.

- the normal value for wind towers should be determined as the cost of production in the country of origin (plus reasonable amounts for selling, general and administration costs and profit) and calculated using available information from relevant previous and present investigations;[54]
- the dumping margins for wind towers exported to Australia from China were 15% for TSP and 15.6% for all other Chinese exporters;[55]
- dumped imports from China and Korea caused material injury to the Australian industry producing like goods;[56] and
- dumping and material injury will continue if the measure was not imposed on imports of wind towers from China and Korea.[57]

42. The ADC made the following recommendations, *inter alia,* to the responsible Parliamentary Secretary in relation to the products imported from China:

- the dumping of wind towers exported to Australia from China has caused material injury to the Australian industry producing like goods;[58] and
- anti-dumping duties should be imposed on wind towers exported to Australia from China.[59]

(c) Decision of the responsible Parliamentary Secretary

43. The final report containing the ADC's findings was provided to the responsible Parliamentary Secretary on 21 March 2014.

44. By way of a public notice dated 16 April 2014, the Parliamentary Secretary accepted the recommendations and reasons for the recommendations in the *Wind Towers Investigation 221 Report*, including all material findings of fact or law on which the recommendations were based, and particulars of the evidence relied on to support the findings.[60]

[54] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), pp. 33-34.
[55] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 8.
[56] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 8.
[57] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 8.
[58] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 60.
[59] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 60.
[60] *Wind Towers Investigation 221 Findings – ADN No. 2014/33*, (Exhibit CHN-6).

45. As such, the reasons and recommendations in *Wind Towers Investigation 221 Report* were the basis on which the Parliamentary Secretary decided to impose anti-dumping duties on wind towers from China for a period of five years from 16 April 2014.

(d) Continuation 487

46. Under Article 11.3 of the Anti-Dumping Agreement, anti-dumping duties expire five years after imposition unless investigating authorities determine in an expiry review that the expiry of the duties would be likely to lead to continuation or recurrence of dumping and injury.[61] The anti-dumping duties based on the *Wind Towers Investigation 221 Report* were set to expire after five years on 16 April 2019.[62]

47. An expiry review was initiated on 16 July 2018, following the ADC's consideration of an application lodged by Keppel Prince (representing the Australian industry).[63] The ADC established an inquiry period of 1 January 2017 to 30 June 2018.[64]

48. The ADC found, *inter alia*, that:

- the expiration of the anti-dumping measure applicable to wind towers exported to Australia from China would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping and material injury that the anti-dumping measure was intended to prevent (the 'wind towers likelihood determination');[65] and
- the expiration of the anti-dumping measure applicable to wind towers exported to Australia from Korea would *not* lead, or would *not* be likely to lead, to a continuation of, or a recurrence of, the dumping and the material injury that the anti-dumping measure was intended to prevent.[66]

49. As part of its overall assessment, the ADC ascertained TSP's normal value and export price.[67] The ADC found that the dumping margin had changed for all exporters of wind towers

[61] Article 11.3 of the Anti-Dumping Agreement.
[62] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), p. 6.
[63] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), p. 7.
[64] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), p. 7.
[65] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), p. 52.
[66] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), p. 52.
[67] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), p. 52-53.

from China.[68] The dumping margins were *reduced* to 6.4% for TSP and 10.9% for all other exporters from China.[69]

50. On 25 March 2019, the relevant Minister considered *Wind Towers Continuation 487 Report* and accepted the recommendations and reasons for the recommendations, including all the material findings of facts and law by the ADC.[70] The Minister decided to continue the anti-dumping measure on wind towers exported from China, but with revised rates being applied.[71] The Minister separately decided not to continue anti-dumping measures in relation to wind towers exported from Korea.[72]

51. The Minister's decision in 2019 to continue the duties was based on *Wind Towers Continuation 487 Report*. This expiry review considered different evidence from a different time-period than what was considered in the original investigation.[73] This resulted in different normal values, export prices, and dumping margins. Under Australia's domestic framework[74] and Article 11.3 of the Anti-Dumping Agreement,[75] the key legal finding on which the decision to continue the duties was based was the wind towers likelihood determination.[76]

52. Therefore, it is abundantly clear, the *Wind Towers Investigation 221 Report* provided the basis for the Minister's decision to impose anti-dumping duties on wind towers from China from 16 April 2014 to 16 April 2019. Effective 17 April 2019, the *Wind Towers Investigation 221 Report* no longer provided the basis for the anti-dumping duties on wind towers from China. The current legal basis for the anti-dumping duties on wind towers from China is *Wind Towers Continuation 487 Report*.

(e) Independent merits review

53. Subsequently, TSP applied for an independent merits review of the Minister's decision to continue duties based on *Wind Towers Continuation 487 Report* and requested that the anti-dumping measure cease to apply to TSP.[77] The ADRP recommended the removal

[68] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), p. 28.
[69] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), p. 54.
[70] *Wind Towers Continuation 487 Findings – ADN No. 2019/33*, (Exhibit CHN-8).
[71] *Wind Towers Continuation 487 Findings – ADN No. 2019/33*, (Exhibit CHN-8).
[72] *Wind Towers Continuation 487 Findings – ADN No. 2019/33*, (Exhibit CHN-8).
[73] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), p. 7.
[74] Section 269ZHF(2) of the *Customs Act 1901*, (Exhibit CHN-29), p. 175.
[75] Article 11.3 of the Anti-Dumping Agreement.
[76] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), pp. 48-49, 52.
[77] *Wind Towers Review Panel Report*, (Exhibit CHN-32), p. 5.

of the anti-dumping measure on TSP.[78] This recommendation was adopted by the responsible Minister and the anti-dumping duties on TSP were revoked on 8 July 2020, with effect from 17 April 2019.[79] No anti-dumping duties on TSP have been in effect since that date.

2. The wind towers original investigation ceased to provide the legal basis for the anti-dumping duties prior to the panel's establishment and is therefore outside the scope of the panel's terms of reference

(a) Jurisdictional questions must be addressed first

54. Australia refers to its PRR filed on 16 December 2022 and restates the relevant principles again here for ease of reference.[80] Article 3.4 of the DSU specifies that "recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements".

55. A matter is lawfully within a panel's jurisdiction if it is included in a panel's standard terms of reference, as adopted by the DSB, in accordance with Article 7.1 of the DSU.[81] Those terms of reference under Article 7.1 of the DSU are: "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document… and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

56. Where there is a question regarding a panel's jurisdiction to examine and make findings with respect to a specific matter raised by a complainant, a panel must address that issue first.[82] In *Mexico – Corn Syrup (Article 21.5 – US)*, for example, the Appellate Body found that "panels cannot simply ignore issues which go to the root of their jurisdiction—that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues—if necessary, on their own motion—to satisfy themselves that they have authority to proceed."[83]

[78] *Wind Towers Review Panel Report*, (Exhibit CHN-32), p. 36.
[79] *Wind Towers Review Panel – Public Notice – Minister's Decision*, (Exhibit CHN-10).
[80] Australia's PRR filed on 16 December 2022, paras. 4-7.
[81] Appellate Body Report, *US – Carbon Steel*, para. 125.
[82] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36, 53.
[83] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

57. Article 6.2 of the DSU requires that all requests for the establishment of the panel "shall be made in writing… indicate whether consultations were held, identify the *specific measures at issue* and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." While the DSU affords a complainant freedom in defining the scope of a dispute through its panel request, that request must meet the specific requirements in Article 6.2 to be within a panel's terms of reference under Article 7.1. In other words, as the Appellate Body found in *Australia–Apples*: "For a matter to be within a panel's terms of reference—in the sense of Articles 6.2 and 7.1 of the DSU—a complainant must identify 'the specific measures at issue' and the 'legal basis of the complaint sufficient to present the problem clearly'."[84]

(b) The original investigation had already ceased to provide the legal basis for the anti-dumping duties when the Panel was established

58. The original investigation and expiry reviews were distinct processes completed under different sections of the Anti-Dumping Agreement and Australia's domestic law. The fact that the original investigation and expiry review were subject to different obligations under the Anti-Dumping Agreement highlights that they involved the application of distinct legal standards being applied for different purposes.

59. The distinction between original investigations and expiry reviews was highlighted by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*:

> In considering the nature of a likelihood determination in a sunset review under Article 11.3, we recall our statement in *US – Carbon Steel*, in the context of the SCM Agreement, that:
>
> > … original investigations and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation.
>
> This observation applies also to original investigations and sunset reviews under the Anti-Dumping Agreement. In an original anti-dumping investigation, investigating authorities must determine whether dumping exists during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether

[84] Appellate Body Report, *Australia – Apples,* paras. 423-425.

> the expiry of the duty that was imposed at the conclusion of an original investigation would be likely to lead to continuation or recurrence of dumping.[85]

60. The practice of parties in WTO dispute settlement reflects a recognition of these differences. In *EU – Cost Adjustment Methodologies II (Russia)*, Russia challenged, among other things, certain aspects of the expiry review of the anti-dumping duties on imports of certain welded tubes and pipes and imports of ammonium nitrate.[86] The original investigations were not directly challenged. Other complainants have similarly delineated between original investigations and expiry reviews and only challenged the expiry reviews.[87]

61. The first distinct wind towers measure for the purposes of this WTO dispute settlement proceeding was the imposition of anti-dumping duties on 16 April 2014. As China identifies in its panel request, the imposition of the duties was *based* on the findings and recommendations reported to the Parliamentary Secretary in [*Wind Towers Investigation 221 Report*].[88] The first wind towers measure based on *Wind Towers Investigation 221 Report* was due to expire five years later on 16 April 2019.[89]

62. A WTO measure can be any act or omission attributable to a WTO Member.[90] The act and decision to continue the anti-dumping duties being applied to Chinese wind towers after five years was made following an expiry review that was subject to different obligations under WTO law (specifically Article 11.3 of the Anti-Dumping Agreement) than the obligations that applied to the original investigation. This was also the case under Australian domestic law.[91] The decision to continue the duties relied on new evidence gathered as part of the expiry review and was made on the basis of a different legal test (primarily the 'likelihood determination') to the original decision to impose anti-dumping duties.[92] Further, as part of the expiry review, the ADC performed a fresh calculation of the normal value and export price and as a result the anti-dumping duties were *reduced*[93] for all exporters of wind towers from China (and were later revoked for TSP following a domestic merits review).

[85] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 105-107.
[86] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 2.1-2.5.
[87] Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 3.
[88] China's panel request, p. 1.
[89] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), p. 6.
[90] Panel Report, *Saudi Arabia – IPRs*, paras. 7.48-7.49.
[91] Section 269ZHF(2)of the *Customs Act 1901*, (Exhibit CHN-29), p. 175.
[92] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), p. 52.
[93] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), p. 54.

63. This second distinct wind towers measure based on the *Wind Towers Continuation 487 Report* therefore superseded and replaced the first wind towers measure based on *Wind Towers Investigation 221 Report* on 17 April 2019. *Wind Towers Investigation 221 Report* ceased to provide the legal basis for the imposition for the anti-dumping duties on wind towers from China since 17 April 2019. Rather, the current anti-dumping duties are based on the *Wind Towers Continuation 487 Report* that underpinned the Minister's decision to continue the application of reduced anti-dumping duties applying to exports from China. In short, the *Wind Towers Investigation 221 Report* was superseded by *Wind Towers Continuation 487 Report*, which provides the current legal basis for the limited imposition of anti-dumping duties on wind towers from China (the anti-dumping duties on the only cooperating exporter, TSP, were removed in 2020).

(c) Measures that are no longer being applied or cease to have legal effect before a panel request are outside the scope of a panel's terms of reference

64. Australia refers to the legal framework of its PRR filed on 16 December 2022.[94] As set out in that submission, many Appellate Body and panel reports have affirmed the general principle that measures that are no longer being applied or which cease to have legal effect *before* the panel was established are outside the panel's terms of reference.[95]

65. In *EC—Chicken Cuts*, the Appellate Body found that "[t]he term "specific measures at issue" in Article 6.2 [of the DSU] suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[96]

66. The panel in *Japan – Film* stated:

> GATT/WTO precedent in other areas, including in respect of virtually all panel cases under Article III:1(a), confirms that it is not the practice of GATT/WTO panels to rule on measures which have expired or which have been repealed or withdrawn. In only a very small number of cases, involving very particular situations, have panels proceeded to adjudicate claims

[94] Australia's PRR filed on 16 December 2022, paras. 4-12.
[95] Panel Reports, *US – Gasoline*, para. 6.19; *Argentina – Textiles and Apparel*, paras. 6.4, 6.12-6.13. This is even almost categorically true with respect to disputes involving only 'as applied' claims, which do not involve the risk of reoccurrence.
[96] Appellate Body Report, *EC – Chicken Cuts*, para. 156.

> involving measures which no longer exist or which are no longer being applied. In those cases, the measures typically had been applied in the very recent past.[97]

67. Panels have consistently declined to make findings on challenged measures that have ceased to have effect or were revoked before panel establishment.[98] The panel in *US—Pipes and Tubes (Turkey)* declined to make findings on a final determination that had been amended and ceased to have legal effect prior to the establishment of the panel:

> We see no basis to make findings on the benefit determination in the USDOC's initial OCTG Final Determination in the context of addressing Turkey's 'as applied' claims in this dispute. We agree with the United States that the benefit determination in the initial OCTG Final Determination ceased to have legal effect under US law following the publication of the amended OCTG Final Determination on 10 March 2016. Thus, the initial OCTG Final Determination ceased to have legal effect well in advance of the Panel's establishment on 19 June 2017.[99]

68. This finding is particularly noteworthy because *US—Pipes and Tubes (Turkey)* is factually similar to the present case as it also involved 'as applied' claims regarding a measure that had been superseded under domestic legal processes prior to the establishment of the panel. After considering and rejecting Turkey's arguments (including its misplaced reliance on cases concerning measures that expired after the panel's establishment),[100] the panel decided that making findings on the superseded measures would not aid in providing a positive resolution to the dispute.[101]

69. Turkey explained that it sought an 'as applied' finding on the superseded measure to provide guidance for future determinations in the same proceeding.[102] The panel disagreed as "this is precisely why complaining WTO members bring 'as such' challenges against another Member's laws, practice or ongoing conduct: to seek to prevent that Member from continuing to apply the offending law, or conduct, in the future."[103] The panel also agreed with the United States that potential subsequent US domestic litigation or risks that the methodology would be revised in the future should not factor into their assessment of whether to make "as applied" findings on the superseded measure.[104] Likewise, having elected to pursue this

[97] Panel Report, *Japan – Film*, para. 10.58.
[98] Panel Reports, *US – Gasoline*, para. 6.19; *Argentina – Textiles and Apparel*, paras. 6.4, 6.12-6.13.
[99] Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.105.
[100] Panel Report, *US – Pipes and Tubes (Turkey)*, paras. 7.108-7.111.
[101] Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.112.
[102] Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.111.
[103] Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.111.
[104] Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.107.

dispute on the basis of "as applied" claims, China may not now pursue de facto "as such" claims by seeking to encompass superseded measures that are outside the Panel's jurisdiction.

70. The reason why expired, terminated, repealed, superseded or otherwise non-existent measures, that have no legal effect, must be excluded from a panel's terms of reference under Article 7.1 of the DSU ties back to the purpose of the WTO dispute settlement system under Article 3 of the DSU. In accordance with Article 3.2 of the DSU, the dispute settlement system should "clarify the existing provisions" of the covered agreements but cannot "add to or diminish the rights and obligations provided in the covered agreements."

71. To achieve this balance of clarifying provisions without adding to or diminishing Members' rights, panels must take care to avoid opining on hypothetical issues or non-existent fact patterns. Such advisory opinions prejudice Members in future disputes, undermine the broader negotiation and monitoring functions of the WTO, and are at odds with the unique Member-driven nature of the organisation.[105] Unlike the role of domestic courts in some Member countries, WTO dispute settlement panels cannot take the place of negotiators by creating new rules or filling gaps through advisory rulings. As the Appellate Body found in *US – Wool Shirts and Blouses*, consistent with Article 3.2, the aim of dispute settlement is not:

> to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.[106]

72. Similarly, the panel in *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II*) confirmed that a panel should limit its findings to whatever is required to resolve the immediate dispute before it:

> In this respect, we are mindful that no provision of the DSU explicitly gives panels the power to issue advisory opinions or, indeed, to make any findings other than those required to resolve the dispute before them. Indeed, a number of provisions of the DSU suggest that panels should not make findings in respect of issues that are not in dispute. For example, Article 3.7 of the DSU provides that the "aim of the dispute settlement mechanism is to secure a positive

[105] Moreover, Australia notes that Article IX of the WTO Agreements gives the Ministerial Conference and the General Council the "exclusive authority" to "adopt interpretations" of the WTO Agreements. Article 3.9 of the DSU further recognises this Member-driven function: "[t]he provisions of this Understanding are without prejudice to the rights of Members to seek *authoritative interpretation of provisions of a covered agreement* through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement."

[106] See Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19; quoted in Panel Report, *Argentina – Textiles and Apparel*, para. 6.13.

> solution to a dispute". Similarly, Article 3.4 of the DSU stipulates that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements". Additionally, Article 7.1 of the DSU charges panels with making "such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)". In our view, these provisions make clear that the purpose of the dispute settlement system is to resolve disputes between Members.[107]

73. The first wind tower measures based on the original investigation was superseded by the second wind towers measure based on the expiry review which concluded on 17 April 2019. The original investigation ceased to provide the legal basis for the imposition of the duties on this date. This was prior to the Panel's establishment on 28 February 2022 and was also prior to China's Consultations Request on 29 June 2021.[108] Pursuant to Articles 3.2, 3.4, 3.7, 6.2 and 7.1 of the DSU, the first wind towers measure based on the original investigations is therefore outside the scope of the Panel's terms of reference.

(d) Even if the measure based on the original investigation is within the Panel's jurisdiction, the Panel should nevertheless decline to make recommendations on it

74. Even if, *arguendo*, the Panel were to find that the first measure based on the wind towers original investigation is within its terms of reference, it should nevertheless decline to make recommendations in relation to it under Article 19.1 of the DSU.

75. Measures no longer in effect present a dilemma for adjudicators and litigating parties alike, as panels are precluded from making recommendations under Article 19.1 of the DSU with respect to measures that are no longer in effect. In *US-Certain EC Products*, the Appellate Body found an inconsistency between the finding of the panel that the relevant measure was no longer in existence and the subsequent recommendation of the panel that the DSB request the United States bring that measure into conformity with its WTO obligations.[109]

76. Moreover, even if the Panel were to consider China's claims with respect to the wind towers original investigation, and, *arguendo*, were to uphold China's claims, there are no meaningful recommendations that could be made given the measure has long been

[107] Panel Report, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, para. 7.39.
[108] China's Consultations Request.
[109] Appellate Body Report, *US – Certain EC Products*, paras. 79-81, 129.

superseded. In particular, given an expiry review has already superseded the original investigation, a recommendation by the Panel to the effect that Australia should bring the wind towers original investigation into conformity with the Anti-Dumping Agreement could not be given any practical effect. Moreover, recalling the function of panels under Article 11 of the DSU, Australia submits that any findings relating to the superseded measure based on the original investigation would not assist the DSB in discharging its responsibilities under the DSU.

77. Accordingly, even if the Panel were prepared to review the wind towers original investigation, it should not make any recommendations relating to it.

(e) Conclusion

78. Consistent with Articles 3.2, 3.4, 3.7, 6.2, 7.1 and 19.1 of the DSU, as well as decades of panel and Appellate Body reports, Australia respectfully requests that the Panel find that the first wind towers measure based on the original investigation is not within its terms of reference.

79. However, should the Panel decide the wind towers original investigation falls within its terms of reference, then in Australia's view the Panel should not make any recommendations relating to it as there would be no utility in doing so.[110]

3. Due to China's failure to cite Article 11.3 of the Anti-Dumping Agreement in its panel request, the wind towers measure based on the expiry review is entirely outside the scope of the Panel's terms of reference

(a) Introduction

80. Under Articles 6 and 7 of the DSU, a panel request establishes a panel's terms of reference and jurisdiction and defines the scope of the dispute.[111] Article 6.2 of the DSU requires, *inter alia*, that a panel request provide a brief summary of the legal basis of the complaint (or claim) sufficient to present the problem clearly. Identification of the treaty

[110] Appellate Body Report, *US – Certain EC Products*, paras. 79-81, 129.
[111] Appellate Body Report, *US – Carbon Steel*, paras. 124-126.

provisions claimed to have been violated is "always necessary" and "a minimum prerequisite" if the legal basis of the complaint is to be presented at all.[112]

81. It follows that a complainant's omission of a key treaty provision in its panel request constitutes a failure to provide a brief summary of the legal basis for that matter, as required by Article 6.2 of the DSU. As a result, the matter complained of is not within the scope of the dispute.[113] A faulty request may not be subsequently "cured" in a first written submission or in any other submission or statement made later in the panel proceeding.[114]

82. Here, China seeks to challenge the measures set out in the Appendix to its panel request. With respect to wind towers, the Appendix lists, *inter alia*, expiry reviews,[115] as well as related notices and instruments.[116] However, contrary to Article 6.2 of the DSU, China's panel request fails to identify the legal basis (i.e. Article 11.3 of the Anti-Dumping Agreement) for the claims now apparent from its first written submission as pertaining to the expiry reviews.

83. China's first written submission reveals apparent uncertainty in China's own understanding of its case and the legal basis for it. China describes the measures at issue under section C.[117] China states that the "directly relevant legal measures at issue in this dispute, and the relevant reports the Panel will be required to consider for the purposes of the resolution of this dispute"[118] are the legal instruments relating to the original investigation. China separately identifies the "subsequent procedures" relating to sinks and wind towers, including the expiry reviews.[119]

84. It is apparent from China's first written submission that its case goes further than claims directed at the original investigation. China states that "the Panel's focus should *largely remain* fixed on the original investigations in each of the wind tower and stainless steel sinks cases."[120] What is meant by "largely" is not explained. China then seeks to diminish the expiry

[112] Appellate Body Report, *Korea – Dairy*, para. 124.
[113] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.14-7.15.
[114] Appellate Body Report, *EC – Bananas III*, para. 143.
[115] Known as "continuation inquiries" under Australia's domestic framework and as "sunset" or "expiry" reviews under Article 11.3 of the Anti-Dumping Agreement.
[116] China's panel request, Appendix A.1, items 4-7.
[117] China's first written submission, paras. 29-35.
[118] China's first written submission, para. 30.
[119] China's first written submission, para. 32.
[120] China's first written submission, para. 35 (emphasis added).

reviews as later "branches," which "provide context for the Panel's consideration".[121] Yet, on China's own submissions, AD claims 6.b.ii and 6.b.iii relate directly to the expiry review in stainless steel sinks.[122] Further, as demonstrated throughout this submission, China has also attempted to make several other claims and allegations relating directly to the wind towers expiry review and refers to it heavily in the context of discussing the original investigation.[123]

85. China's submissions with respect to the wind towers and stainless steel sinks expiry reviews are unable to remedy the fundamental deficiency in its panel request – its failure to cite the treaty provision applicable to expiry reviews, Article 11.3 of the Anti-Dumping Agreement. China's citation of Article 11.3 in its first written submission as the legal basis for the expiry reviews[124] renders China's failure to identify Article 11.3 in its panel request even more conspicuous.

86. The consequence of China's failure to cite Article 11.3 in its panel request is that none of its complaints in respect of Australia's expiry reviews on wind towers are within the Panel's terms of reference. China's subsequent citation of Article 11.3 in its first written submission does not cure, and only serves to highlight this omission from the panel request. China has the option to challenge the current wind towers anti-dumping measure based on the expiry review but must do so through a new request for consultations that cites Article 11.3 of the Anti-Dumping Agreement and properly addresses the current measures.

87. Pursuant to Articles 6.2 and 7.1 of the DSU, Australia requests that the Panel find that the second wind towers measure based on the expiry review is not within the scope of this dispute.

(b) Original investigations and expiry reviews are distinct processes with different purposes

88. In the original investigation on wind towers[125] Australia was required to determine dumping, injury and a causal link between the two, in accordance with Articles 2 and 3 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994. The anti-dumping duties were

[121] China's first written submission, para. 35.
[122] China's first written submission, para. 35.
[123] See, e.g. China's first written submission, paras. 272-279.
[124] China's first written submission, paras. 32, 41, 56, 82, 466.
[125] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4).

then reviewed and continued, at reduced rates, following the expiry reviews,[126] which Australia conducted in accordance with Article 11.3 of the Anti-Dumping Agreement. Article 11.3 provides, in relevant part:

> … any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition… unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury…

89. Thus, unlike in the original investigations, the determination which Australia was required to make in the expiry review was that the expiry of the duty would be *likely* to lead to a continuation or recurrence of dumping and injury ('likelihood determination'). An affirmative likelihood determination was made in the wind towers expiry review.[127] This determination was factually and legally distinct from that made in the original investigation under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.

90. As set out above, the distinction between original investigations and expiry reviews was highlighted by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*.[128]

(c) China has not claimed a violation of Article 11.3 of the Anti-Dumping Agreement in its panel request

91. China's case includes complaints relating to dumping determinations and dumping margins that were made and calculated in the expiry review. That is, dumping margins were calculated on the basis of normal values and export prices calculated *for the purposes of* or *in the context of* the expiry review only and, more particularly, the wind towers likelihood determination. In fact, the dumping margin calculations were just one aspect of the broader expiry review on wind towers.[129] Yet China did not claim a violation of Article 11.3 of the Anti-Dumping Agreement in its panel request, or even include a reference to it.

92. By contrast, in *EU – Footwear (China)* where China was also the complainant, China similarly challenged dumping margin calculations made in an expiry review but premised its

[126] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31).
[127] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), pp. 40, 52.
[128] Australia's first written submission, para. 59.
[129] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), pp. 28-39.

complaint on Article 11.3 of the Anti-Dumping Agreement.[130] China maintained in its submission that the legal basis of its complaint was Article 11.3.[131] The panel then noted that:

> Given that China's claim pertains to alleged violations in the European Union's analysis and determination in the expiry review, as notified in the Review Regulation, we consider it appropriate to start our analysis by considering the most directly relevant provision of the AD Agreement, Article 11.3… [132]

93. In *EU – Footwear (China)*, the panel ultimately found that China had presented a claim of violation of Article 11.3 of the Anti-Dumping Agreement, despite presenting it as a consequence of alleged violations of other provisions of the Anti-Dumping Agreement, namely Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.8, 6.10 and 17.6(i).[133] The obvious difference between *EU – Footwear (China)* and the present case is that here, China failed to cite Article 11.3 of the Anti-Dumping Agreement in its panel request.

94. In sum, China omitted the critical treaty provision pertaining to expiry reviews (i.e., Article 11.3 of the Anti-Dumping Agreement) from its panel request. Accordingly, China has failed to present the legal basis for its complaints in respect of the expiry review on wind towers, which are thus outside the scope of this dispute and the Panel's jurisdiction.

(d) For the expiry reviews, China is precluded from claiming a violation of Article 2 independent of Article 11.3 of the Anti-Dumping Agreement

95. The manner in which China has framed its complaints in respect of the wind towers expiry review appears to reflect an erroneous view that the Panel should review Australia's determinations of dumping margins without regard to Article 11.3 of the Anti-Dumping Agreement. Confusingly, China itself states that the only claims relating to the expiry reviews are AD claims 6.b.ii and 6.b.iii in relation to the stainless steel sinks expiry review.[134] Yet

[130] Request for the establishment of a panel by China, WT/DS405/2, para. II.11:

> China considers that Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009 is inconsistent, at least, with the EU's obligations under the following provisions of the *Anti-Dumping Agreement* and the GATT 1994:
> …
> II.11 Article 11.3 of the Anti-Dumping Agreement because the EU's determination that expiry of the measure is likely to lead to a continuation of dumping and injury is based on determination of continued dumping and injury in violation of Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.8, 6.10 and 17.6(i) of the Anti-Dumping Agreement.

[131] Panel Report, *EU – Footwear (China),* para. 7.149 (fn. omitted).

[132] Panel Report, *EU – Footwear (China),* para. 7.153.

[133] Panel Report, *EU – Footwear (China),* para. 7.156.

[134] China's first written submission, para. 35.

notwithstanding this explicit statement, China has nevertheless made several other allegations and claims under Article 2 of the Anti-Dumping Agreement in relation to the wind towers expiry review.[135] China's approach is incoherent and cannot be reconciled. In Australia's view, there is no proper basis on which China can make standalone claims of alleged violations of Article 2 of the Anti-Dumping Agreement in respect of the wind towers expiry review.

96. As discussed above,[136] the panel in *EU – Footwear (China)* was only prepared to consider the question of whether there had been a violation of Article 11.3 of the Anti-Dumping Agreement *as a consequence of* an alleged violation of, *inter alia*, Article 2 of the Anti-Dumping Agreement. In other words, in respect of the expiry review, the panel only considered the alleged violation of Article 2 of the Anti-Dumping Agreement *in the context of* – not *in isolation from or independent of* – a violation of Article 11.3 of the Anti-Dumping Agreement. The corollary is that a panel can and should only consider the issue of a violation of Article 2 of the Anti-Dumping Agreement in respect of an expiry review on the basis that its jurisdiction has first been invoked under Article 11.3 of the Anti-Dumping Agreement. Australia submits this is the correct view of the law, given that, Article 11.3 of the Anti-Dumping Agreement is the starting point or "gateway" provision for expiry reviews.

97. The panel in *EU – Footwear (China)* described the subordinate nature of Article 2 (vis-à-vis Article 11.3) of the Anti-Dumping Agreement in the context of expiry reviews, as follows:

> … [I]t is clear to us that Articles 2 and 3 of the AD Agreement are not directly applicable to a determination under Article 11.3, and thus to a panel's consideration of an alleged violation of Article 11.3. Moreover, our view in this regard is not changed by the fact that an investigating authority chooses to make a determination of dumping or injury in the context of a particular expiry review. Thus, we will review the European Union's determinations in the expiry review at issue here in order to make a finding as to whether China has demonstrated that they are inconsistent with Article 11.3 of the AD Agreement, and not in order to make findings as to whether those determinations are inconsistent with Articles 2 and/or 3 per se. [137]

[135] See, e.g. China's first written submission, paras. 272-279.
[136] Australia's first written submission, para. 92-93.
[137] Panel Report, *EU—Footwear (China)*, paras. 7.157-7.158.

98. In sum, the panel in *EU – Footwear (China)* was only prepared to consider finding a violation of Article 11.3 (not Article 2) of the Anti-Dumping Agreement in respect of the determination of dumping margins in the expiry review:

> There is no dispute in this case that the Commission calculated dumping margins in the expiry review, and relied on those margins in making its determination of likelihood of continuation or recurrence of dumping. *Should we find that the Commission acted inconsistently with Article 2 in calculating dumping margins in the expiry review, and relied on such margins in making its determination of likelihood of continuation or recurrence of dumping, we will conclude that China has demonstrated a violation of Article 11.3 of the AD in that respect.* However, should we find that the Commission acted inconsistently with Article 2 in calculating dumping margins in the original investigation, we will find a violation of the provision of Article 2 in question.[138]

99. This conventional understanding of the operation of Article 11.3 is widely understood and can be seen to be reflected in the conduct of other WTO Members (including China itself) in a significant number of other WTO disputes. For example, Article 11.3 of the Anti-Dumping Agreement was correctly cited as a matter of course, together with Article 2, when challenging determinations of dumping margins in expiry reviews in the following disputes:

- *US – Corrosion-Resistant Steel Sunset Review;*[139]
- *US – Anti-Dumping Measures on Oil Country Tubular Goods;*[140]
- *US – Zeroing (Japan);*[141]
- *US – Continued Zeroing;*[142]
- *EU – Footwear (China);*[143]
- *US – Shrimp II (Viet Nam);*[144]
- *Ukraine – Ammonium Nitrate (Russia);*[145]
- *EU – Cost Adjustment Methodologies II (Russia);*[146] *and*

[138] Panel Report, *EU – Footwear (China),* paras. 7.165, (emphasis added).
[139] Request for the establishment of a panel by Japan, WT/DS244/4.
[140] Request for the establishment of a panel by Mexico, WT/DS282/2.
[141] Request for the establishment of a panel by Japan, WT/DS322/8.
[142] Request for the establishment of a panel by the European Communities, WT/DS350/6.
[143] Request for the establishment of a panel by China, WT/DS405/2.
[144] Request for the establishment of a panel by Viet Nam, WT/DS429/2/Rev.1.
[145] Request for the establishment of a panel by the Russian Federation, WT/DS493/2.
[146] Request for the establishment of a panel by the Russian Federation, WT/DS494/4.

- *Pakistan – BOPP Film (UAE).*[147]

100. Thus, in the present case, China's claims in respect of Australia's expiry review on wind towers in its panel request and its arguments in the first written submission are legally flawed.

101. Pursuant to Articles 6.2 and 7.1 of the DSU, Australia respectfully requests that the Panel find that the anti-dumping wind towers measure based on the expiry review (as well as any related notices and subsequent merits review processes arising from the expiry review) are not within the scope of its terms of reference and are outside of its jurisdiction.

4. Even if China had cited Article 11.3 of the Anti-Dumping Agreement, the anti-dumping duties on TSP and the Wind Towers Review Panel Report would be outside the scope of the Panel's terms of reference

102. Even if China had cited Article 11.3 in its panel request, the anti-dumping duties on TSP and the *Wind Towers Review Panel Report* would nevertheless still be outside the scope of the Panel's terms of reference as the former has been removed and the latter has no ongoing legal effect.

103. Following *Wind Towers Continuation 487 Report* and the Minister's decision to continue duties at reduced rates, TSP applied for an independent merits review of the Minister's decision and requested that the anti-dumping measure cease to apply to it.[148] The ADRP recommended the removal of the anti-dumping measure on TSP.[149] This recommendation was adopted by the responsible Minister and the anti-dumping measure on TSP was revoked on 8 July 2020.[150]

104. The *Wind Towers Review Panel Report* only concerned TSP's appeal. The *Wind Towers Review Panel Report* has no ongoing function as it was particular to the appeal by TSP that has now been resolved. The anti-dumping duties have been revoked insofar as they relate to TSP.

105. As outlined above,[151] measures that are no longer applied or cease to have legal effect prior to the Panel's establishment are outside the scope of the Panel's terms of

[147] Request for the establishment of a panel by the United Arab Emirates, WT/DS538/2.
[148] *Wind Towers Review Panel Report*, (Exhibit CHN-32), p. 5.
[149] *Wind Towers Review Panel Report*, (Exhibit CHN-32), p. 36.
[150] *Wind Towers Review Panel – Public Notice – Minister's Decision*, (Exhibit CHN-10).
[151] Australia's first written submission, paras. 64-72.

reference. All anti-dumping duties that related to TSP were revoked on 8 July 2020 without any new duties being imposed. This meant the anti-dumping duties on TSP and the *Wind Towers Review Panel Report* had no ongoing effect from this date following the conclusion of TSP's appeal. There were no duties on TSP in effect when the Panel and its terms of reference was established on 28 February 2022. Accordingly, China's claims and arguments as to TSP relate to entirely historic findings without continuing effect.

106. Accordingly, Australia respectfully requests that the Panel find that the anti-dumping duties on TSP and the *Wind Towers Review Panel Report* are not within its terms of reference and are outside its jurisdiction. If the Panel finds that the anti-dumping duties on TSP and the *Wind Towers Review Panel Report* are within the scope of its terms of reference, Australia requests that the Panel decline to make recommendations in relation to them.[152]

5. China's first written submission confirms the jurisdictional errors in its panel request

107. China's first written submission describes the measures at issue under section C.[153] China states that the "*directly* relevant legal measures at issue in this dispute, and the *relevant reports* the Panel will be required to consider for the purposes of the resolution of this dispute"[154] are the legal instruments relating to the original investigation. For wind towers this is *Wind Towers Investigation 221 Report*.[155] China separately identifies the "subsequent procedures" relating to wind towers, including the expiry reviews.[156]

108. In apparent recognition of the flaws in its failure to reference Article 11.3 in its requests for consultations and panel request, China states that "the Panel's focus should largely remain fixed on the original investigations in each of the wind tower and stainless steel sinks cases".[157] It seeks to diminish the expiry reviews as later "branches" that "provide context for the Panel's consideration".[158] AD claims 6.b.ii and 6.b.iii are the only claims that China makes that it considers relate directly to any expiry reviews, relevantly the stainless steel sinks expiry review.[159] Therefore, on China's own articulation of how it understands its

[152] Appellate Body Report, *US – Certain EC Products*, paras. 79-81, 129.
[153] China's first written submission, paras. 29-35.
[154] China's first written submission, para. 30 (emphasis added).
[155] China's first written submission, para 30.
[156] China's first written submission, para. 32
[157] China's first written submission, para. 35.
[158] China's first written submission, para. 35.
[159] China's first written submission, para. 35.

claims, none of China's other Article 2 claims relate to the expiry reviews in wind towers. However, China has nevertheless erroneously attempted to make several other complaints relating directly to the wind towers expiry review and refers to it heavily in the context of discussing the original investigation.[160]

109. China also incorrectly alleges that "the underlying legal foundation and reasoning for the existence of the measures maintained by the Australian investigating authorities has not changed" on the basis of subsequent expiry reviews.[161] However, as set out above,[162] the expiry reviews considered different evidence from a different time period compared to the original investigation. Moreover, the key legal findings on which the decisions to continue applying the duties were based, were fundamentally different to the basis of the legal finding in the original investigation.

110. In particular, the expiry review involved an assessment of *the likelihood* of continuation or recurrence of dumping and injury determination, which involve distinct legal standards and criteria to the legal standards and criteria required for an assessment of dumping and injury in the original investigation. There were also differences in the methodology between the original investigations and expiry reviews. For instance, with respect to wind towers, China acknowledges that in the expiry review the ADC "revised its normal value determination for the only cooperative exporter, TSP" and then lists the "*changes* of relevance" to AD claim 1.[163]

111. China also claims that "the challenged measures would not be in place, so as to be "reviewed" or "expired", were it not for the original investigations".[164] This ignores, however, that the current measure would not be in place were it not for the Article 11.3 expiry review. It is this expiry review that provide the current legal basis for the imposition of anti-dumping duties on wind towers and the original investigation has been superseded.

[160] For example, see China's first written submission, para. 272-279.
[161] China's first written submission, para. 34.
[162] Australia's first written submission, paras. 62, 88-90.
[163] China's first written submission, para. 82. (emphasis added)
[164] China's first written submission, para. 34.

6. Conclusion

112. The first wind towers measure based on the original investigation and the second wind towers measure based on the expiry review are outside the Panel's terms of reference. The first measure for the purposes of this WTO dispute settlement proceedings (based on the original investigation) had ceased to provide the legal basis for the duties imposed when the Panel and its terms of reference were established. Pursuant to Articles 3.2, 3.4, 3.7, 6.2, 7.1 and 19.1 of the DSU, the Panel should not rule on this historic measure that was superseded before the panel request was filed.

113. Pursuant to Articles 6.2 and 7.1 of the DSU, the second measure for the purposes of this WTO dispute settlement proceedings (based on the expiry review) is likewise outside the Panel's terms of reference due to China's failure to cite Article 11.3 of the Anti-Dumping Agreement in its panel request. Under Article 6.2 of the DSU identification of the treaty provisions claimed to have been violated is "always necessary" and "a minimum prerequisite" if the legal basis of the complaint is to be presented at all.[165]

114. Moreover, even if China had cited Article 11.3 of the Anti-Dumping Agreement, the anti-dumping duties on TSP were no longer being applied and the *Wind Towers Review Panel Report* was no longer relevant when the Panel's terms of reference were established. As such, they would both be outside the scope of the Panel's terms of reference even if Article 11.3 had been cited.

115. Accordingly, Australia respectfully requests that the Panel find that all of the claims in relation to wind towers anti-dumping measures are not within its terms of reference. Because these questions go directly to whether the Panel may adjudicate China's claims on these measures in their entirety, the Panel should decide them at an early stage.

C. THE STAINLESS STEEL SINKS ANTI-DUMPING MEASURES ARE OUTSIDE THE SCOPE OF THE PANEL'S TERMS OF REFERENCE

116. For the same reasons and arguments set out above in relation to wind towers, the stainless steel sinks original investigation and expiry review are also outside the scope of the Panel's terms of reference. This section begins with a factual overview of stainless steel sinks

[165] Appellate Body Report, *Korea – Dairy*, para. 124.

to provide context for the jurisdictional challenges and outline that the stainless steel sinks expiry review has superseded the original investigation.

1. Factual overview

(a) Investigation 238

117. Investigation 238 was initiated on 18 March 2014 into alleged dumping and subsidisation of stainless steel sinks imported from China.[166] The investigation period for the purposes of assessing dumping was 1 January 2013 to 31 December 2013. The injury analysis period for the purpose of determining whether material injury had been caused to the Australian industry was from 1 January 2009.[167]

118. On 19 February 2015, the ADC completed the final report in Investigation 238.[168] The report was premised on the information that was before the ADC. The evidence before the ADC did not include all of the information that the ADC had sought, in part because the Government of China failed to provide requested information during the review.[169]

119. In the final report the ADC, relevantly, found that:

- stainless steel sinks exported to Australia from China during the investigation period were dumped;[170]
- dumping and subsidisation of stainless steel sinks exported from China caused material injury to the Australian industry (Tasman) producing like goods; [171] and
- the dumping margins for stainless steel sinks exported from China ranged from 5% to 49.5%.[172]

120. The ADC made the following recommendations, *inter alia*, to the responsible Parliamentary Secretary:

[166] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 8.
[167] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 14.
[168] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 1.
[169] The Government of China provided a response to the questionnaire on 19 May 2014. However, this response was limited and incomplete. See Australia's first written submission, paras. 353-362.
[170] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 10.
[171] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 12.
[172] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 10.

- that anti-dumping duties be imposed on stainless steel sinks exported to Australia from China; [173] and
- that countervailing duties be imposed on stainless steel sinks exported to Australia from China (by all exporters other than Primy and Jiabaolu).[174]

(b) Decision of the responsible Parliamentary Secretary

121. The *Stainless Steel Sinks Investigation 238 Report* containing the ADC's findings was provided to the responsible Parliamentary Secretary on 19 February 2015.

122. By way of public notice dated 26 March 2015, the Parliamentary Secretary accepted the recommendations and reasons in the *Stainless Steel Sinks Investigation 238 Report*, including all material findings of fact and law on which the recommendations were based, and particulars of the evidence relied on to support the findings.[175]

123. As such, the reasons and recommendations in *Stainless Steel Sinks Investigation 238 Report* were the basis on which the Parliamentary Secretary decided to impose anti-dumping and countervailing duties on stainless steel sinks from China for a period of five years from 26 March 2015.

(c) Continuation 517

124. As described above, under Article 11.3 of the Anti-Dumping Agreement, anti-dumping duties expire five years after imposition unless investigating authorities determine in an expiry review that the expiry of the duties would be likely to lead to continuation or recurrence of dumping or subsidisation and injury.[176] The assessment of whether such continuation or recurrence is "likely" involves a legally distinct standard to that used for the original imposition of duties, under the Anti-Dumping Agreement and Australian domestic law.[177]

[173] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 88.
[174] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 88.
[175] *Stainless Steel Sinks Investigation 238 Findings – ADN No. 2015/41*, (Exhibit CHN-14); the original investigation was subject to domestic merits review by the ADRP (see *Stainless Steel Sinks Review Panel Report – No. 22*, (Exhibit AUS-9)) following which Minister affirmed the reviewable decision (see *Stainless Steel Sinks Review 2015/22 – Public Notice – Minister's Decision*, (Exhibit AUS-10)).
[176] Article 11.3 of the Anti-Dumping Agreement.
[177] Section 269ZHF(2) of the *Customs Act 1901*, (Exhibit CHN-29), p. 175.

125. The original measure based on *Stainless Steel Sinks Investigation 238 Report* was due to expire on 26 March 2020 five years from the date duties were originally imposed. An expiry review was initiated on 3 July 2019 following the ADC's consideration of an application lodged by Oliveri Solutions Pty Ltd (formerly trading as Tasman).[178] The ADC established an inquiry period of 1 July 2018 to 30 June 2019.[179]

126. The ADC found, *inter alia*, that the expiration of the anti-dumping measure would lead, or would be likely to lead, to a continuation of, or a recurrence of dumping and injury that the measure was intended to prevent (the "sinks likelihood determination").[180]

127. As a result of the expiry review, the ADC also found that the dumping margins changed for exporters of stainless steel sinks from China. The new dumping margins ranged from 0% to 53.9%.[181]

128. On 27 February 2020, the responsible Minister considered *Stainless Steel Sinks Continuation 517 Report* and accepted the recommendations and reasoning of the ADC.[182] The Minister decided to continue the anti-dumping and countervailing duties, but with revised rates, being applied to stainless steel sinks exported from China. The Minister adjusted anti-dumping duty rates (rates ranging from 0% (floor price) to 53.9%).

129. The continuation of the duties in 2020 by the Minister was based on the *Stainless Steel Sinks Continuation 517 Report*. This expiry review considered different evidence from a different time period compared to the original investigation.[183] In the context of Article 11.3 of the Anti-Dumping Agreement,[184] the key legal finding on which the decision to continue the duties was based was the sinks likelihood determination.[185]

130. In summary, the *Stainless Steel Sinks Investigation 238 Report* provided the legal basis for the Minister's decision to impose anti-dumping duties on stainless steel sinks from China from 26 March 2015 to 26 March 2020. However, effective 27 March 2020, the *Stainless Steel Sinks Investigation 238 Report* no longer provided the legal basis for the anti-dumping duties

[178] *Stainless Steel Sinks Continuation 517 Initiation - ADN No. 2019/86*, (Exhibit AUS-11).
[179] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 9.
[180] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 86.
[181] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 48.
[182] *Stainless Steel Sinks Continuation 517 Findings - ADN No. 2020/003*, (Exhibit CHN-52).
[183] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36).
[184] Article 11.3 of the Anti-Dumping Agreement.
[185] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 86.

on stainless steel sinks from China. The current legal basis for the anti-dumping duties on stainless steel sinks from China is the *Stainless Steel Sinks Continuation 517 Report*.

2. The stainless steel sinks original investigation ceased to provide the legal basis for the anti-dumping duties prior to the Panel's establishment and is therefore outside the scope of the Panel's terms of reference

131. The first distinct stainless steel sinks measure for the purposes of this WTO dispute settlement proceeding was the imposition of anti-dumping duties on 26 March 2015. As China's panel request records, "the imposition of the duties was *based* on the findings and recommendations reported to the Parliamentary Secretary in [*Stainless Steel Sinks Investigation 238 Report*]".[186] The first sinks measure based on *Stainless Steel Sinks Investigation 238 Report* was due to expire five years later on 26 March 2020.[187]

132. As outlined above, the decision to continue the application of anti-dumping duties to Chinese stainless steel sinks after five years was made following an expiry review that was subject to different obligations under WTO law, specifically Article 11.3 of the Anti-Dumping Agreement, and Australian domestic law.[188] This second distinct stainless steel sinks measure (based on *Stainless Steel Sinks Continuation 517 Report*) therefore superseded and replaced the first stainless steel sinks measure (based on *Stainless Steel Sinks Investigation 238 Report*) with effect from 26 March 2020.

133. *Stainless Steel Sinks Investigation 238 Report* no longer has legal relevance as it is *Stainless Steel Sinks Continuation 517 Report* that underpins the Minister's decision to continue the anti-dumping duties applying to exports of stainless steel sinks from China. Therefore, *Stainless Steel Sinks Investigation 238 Report* ceased to provide the legal basis for the imposition of anti-dumping duties on stainless steel sinks from China on 26 March 2020.

134. Accordingly, for the same reasons set out above in relation to wind towers,[189] the first stainless steel sinks measure based on the original investigation is therefore outside the scope of the Panel's terms of reference.

[186] China's panel request, p. 2.
[187] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 6.
[188] Section 269ZHF(2) of the *Customs Act 1901,* (Exhibit CHN-29), p. 175.
[189] Australia's first written submission, paras. 54-79.

3. Due to China's failure to cite Article 11.3 of the Anti-Dumping Agreement in its panel request, the stainless steel sinks anti-dumping measure based on the expiry review is entirely outside the scope of the Panel's terms of reference

135. For the same reasons set out above in relation to wind towers,[190] Australia respectfully requests that the Panel find that the anti-dumping stainless steel sinks measure based on the expiry review (as well as any related notices arising from the expiry review) are not within the scope of its terms of reference and are outside its jurisdiction. This is due to China's failure to cite Article 11.3 of the Anti-Dumping Agreement in its panel request.

136. China states that "the Panel's focus should largely remain fixed on the original investigations in each of the wind tower and stainless steel sinks cases".[191] China wrongly submits the expiry reviews are later "branches" that "provide context for the Panel's consideration".[192] However, on China's own submission, AD claims 6.b.ii and 6.b.iii relate directly to the expiry review in stainless steel sinks.[193]

4. Conclusion

137. Accordingly, Australia respectfully requests that the Panel find that all of the stainless steel sinks anti-dumping measures are not within its terms of reference and are outside its jurisdiction. Because these questions go directly to whether the Panel may adjudicate China's claims on these measures in their entirety, the Panel should decide them at an early stage.

138. Even if the Panel were prepared to review the stainless steel sinks original investigation, it should not make any recommendations relating to it for the same reasons set out above.[194]

D. CONCLUSION

139. For the reasons set out above, Australia respectfully requests that the Panel find that all of the stainless steel sinks and wind towers anti-dumping measures are not within its terms of reference and are outside its jurisdiction.

[190] Australia's first written submission, paras. 80-101.
[191] China's first written submission, para. 35.
[192] China's first written submission, para. 35.
[193] China's first written submission, para. 35.
[194] Australia's first written submission, paras. 74-77.

III. AUSTRALIA'S DOMESTIC FRAMEWORK

140. China's first written submission contains multiple errors in the description given of the Australian domestic framework for anti-dumping and countervailing duty investigations. Below Australia provides a short overview of the aspects of the framework relevant to China's claims. The specific errors made by China will be addressed in the sections that follow.

A. BACKGROUND ON ADC INVESTIGATIONS

141. The ADC is Australia's investigating authority. It was established in its current form in 2013, and is headed by an independent Commissioner. It is responsible for administering Australia's anti-dumping duty and countervailing duty systems. The ADC investigates allegations, pursuant to a duly constituted application, of dumped and/or subsidised goods that have been imported into Australia, and claims of material injury (or threat of material injury) to the Australian industry producing like goods caused by the allegedly dumped and/or subsidised goods. The organisational structure employed by Australia to adjudicate anti-dumping and countervailing proceedings is not bifurcated—that is, the ADC conducts both dumping/countervailing and injury assessments.

142. If an interested party is dissatisfied with a decision made by the ADC it may seek merits review by the Anti-Dumping Review Panel and/or judicial review[195] by a court. Separately, in certain circumstances an affected party may seek a review by the ADC of a dumping duty notice, a countervailing duty notice, or an undertaking (interim review). An interim review may concern the "variable factors"—the normal value, export price, non-injurious price, or the amount of the countervailing subsidy, and may be in relation to a particular exporter or exporters generally.

143. In any investigation, the ADC engages in an iterative analytical inquiry, shaped by the evidence before it, the submissions of interested parties, and the facts and issues under review. The reports of the ADC disclose relevant information on pertinent matters of fact and law, and explain the reasons which have led to the imposition of final measures.[196] They are drafted to provide an explanation of the decision to interested parties, and to facilitate

[195] The phrase "judicial review" is used here in a generic sense, broader than the term as used in Australian domestic law.
[196] See Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement.

domestic merits or judicial review[197] of the decision if sought by an interested party. A report may place greater emphasis on issues that are contested by interested parties.

144. The investigative process is marked by stages at which the ADC affords procedural fairness to interested parties by sharing evidence and preliminary views and inviting comments on those preliminary views. Consistent with Australia's WTO obligations, Australian law imposes reasonable time constraints on each stage, with extensions of time available. Following is an overview of these stages in the circumstances of the three investigations impugned by China:

- within 20 days of receipt of the application from Australian industry for a countervailing duty notice or dumping duty notice, the ADC must decide whether to accept or reject an application;[198]
- before reaching that decision, the ADC invited the Government of China to participate in consultations on the countervailing application in respect of stainless steel sinks and railway wheels;[199]
- following the decision to initiate the investigation, the ADC provided public notice of its decision,[200] including publication of a Consideration Report on the ADC's Electronic Public Record, which provided a brief summary of the decision;[201]
- following initiation, the ADC invited interested parties, including exporters and the Government of China, to complete a questionnaire and lodge submissions;[202]

[197] The phrase "judicial review" is used here in a generic sense, broader than the term as used in Australian law.
[198] See section 269TC of the *Customs Act 1901*, (Exhibit CHN-29), p. 64.
[199] See section 269TB(2C) of the *Customs Act 1901*, (Exhibit CHN-29), p. 63. See also, e.g. *Stainless Steel Sinks Investigation 238 Consideration Report*, (Exhibit CHN-59), p. 34.
[200] See sections 269TC(4) and (5) of the *Customs Act 1901*, (Exhibit CHN-29), pp. 66-67.
[201] See, e.g. *Stainless Steel Sinks Investigation 238 Consideration Report*, (Exhibit CHN-59).
[202] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 29-30; *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 21, 22, 77-78; *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), pp. 28, 32; *Wind Towers Investigation 221 Initiation - ADN No. 2013/68*, (Exhibit CHN-5), p. 4; *Stainless Steel Sinks Investigation 238 Initiation - ADN No. 2014/20*, (Exhibit CHN-12), pp. 4-5; *Railway Wheels Investigation 466 Initiation - ADN No. 2018/59*, (Exhibit CHN-26), pp. 4-5.

- where an exporter's questionnaire response was verified, the ADC offered the exporter an opportunity to comment on the verification report setting out the ADC's preliminary views;[203]
- within 110 days of the initiation, the ADC informed all interested parties of the essential facts under consideration before the final determination was made by publishing a Statement of Essential Facts.[204] The SEF was the basis for the recommendations to the responsible Minister regarding the application (Final Report or Investigation Report);[205]
- within 20 days of publication of the SEF on the ADC's Electronic Public Record, the ADC provided interested parties with an opportunity to provide further submissions to the ADC;[206] and
- then, within 155 days of the initiation the ADC furnished the Final Report or Investigation Report[207] (and terminated the investigation when satisfied that certain conditions prescribed in the *Customs Act 1901* were not evident[208]).

145. Finally, all evidence received by the Commissioner is provided voluntarily by interested parties. Neither the ADC nor the Commissioner is empowered with coercive information gathering powers. They are also unable to compel the cooperation of interested parties. If interested parties are not forthcoming with necessary or relevant information, then the ADC may proceed to make findings based on the information available to it.

[203] *Railway Wheels – Masteel Questionnaire*, Exhibit (AUS-12), p. 7; *Stainless Steel Sinks – Komodo Questionnaire*, (Exhibit AUS-13), pp. 7-8; *Stainless Steel Sinks – Zhuhai Grand Questionnaire*, (Exhibit AUS-14), pp. 7-8; *Stainless Steel Sinks – Primy Questionnaire*, (Exhibit AUS-15), pp. 7-8.
[204] See, e.g. *Railway Wheels Investigation 466 – SEF*, (Exhibit AUS-16); *Stainless Steel Sinks Investigation 238 – SEF*, (Exhibit AUS-49).
[205] See section 269TDAA of the *Customs Act 1901*, (Exhibit CHN-29), p. 71.
[206] See, e.g. *Railway Wheels Investigation 466 – SEF*, (Exhibit AUS-16), p. 12; *Stainless Steel Sinks Investigation 238 – SEF*, (Exhibit AUS-49), p. 12.
[207] See section 269TEA of the *Customs Act 1901*, (Exhibit CHN-29), p. 84.
[208] See section 269TDA of the *Customs Act 1901*, (Exhibit CHN-29), p. 72.

B. THE ADC'S "COMPETITIVE MARKET COSTS" FINDINGS ARE NOT THE SAME AS THE SECOND CONDITION OF ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

146. A pervasive error in China's submission is its misunderstanding of the concept of "competitive market costs," as the term is used by the ADC in its reports in the context of the Australian domestic framework. China's claims are predicated on a misunderstanding of the meaning of findings made using this phrase under regulation 180(2) of the *Customs Regulations 1926*, which was in effect at the time of the wind towers and stainless steel sinks investigations, and section 43(2) of the *Customs (International Obligations) Regulation 2015*, which was in effect at the time of the railway wheels investigation.[209]

147. China submits that the "overarching fault of the Australian investigating authority was that it examined whether the exporters costs "*reasonably reflected competitive market costs*".[210] China considers that reference to "competitive market costs" entails "a wrongful application of the second condition of the first sentence of Article 2.2.1.1 in every case".[211] This is incorrect. It is a fundamental mischaracterisation of Australia's domestic law.

148. The ADC's application of the concept of "competitive market costs" is not intended as, and does not operate as, a mirror of Article 2.2.1.1 of the Anti-Dumping Agreement. This exact issue was considered by the panel in *Australia – Anti Dumping Measures on A4 Copy Paper*. That panel identified the textual and structural differences between section 43(2) and Article 2.2.1.1, first sentence, including the inclusions of the term "competitive market costs" instead of the word "costs". The panel explained the following:

> 7.102. …Thus, the textual similarity between the second condition in the first sentence of Article 2.2.1.1 and the ADC's finding does not imply that the ADC rejected the exporters' records because it considered they did not "reasonably reflect the costs associated with the production and sale of the product under consideration" within the meaning of the second condition in the first sentence of Article 2.2.1.1.
>
> 7.103. The ADC rejected Indah Kiat's and Pindo Deli's recorded cost of pulp in reliance on subsection 43(2) of Australia's Customs (International Obligations) Regulations 2015. The text of this provision is different from the text of Article 2.2.1.1, first sentence. Subsection 43(2) is differently structured; the term "normally" is absent and the term "competitive

[209] China's first written submission, para. 162.
[210] China's first written submission, para. 9.
[211] China's first written submission, para. 9. China has not made any "as such" claim directed at either regulation 180(2) of the *Customs Regulations 2016* or section 43(2) of the *Customs (International Obligations) Regulation 2015*.

> market costs" is used instead of the word "costs". We note, moreover, that, following the issuance of the Statement of Essential Facts, certain exporters contested the ADC's interpretation of subsection 43(2)(b)(ii) arguing that it was inconsistent with the Appellate Body's interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement in *EU – Biodiesel (Argentina)*, which focused specifically on the second condition. The ADC responded by pointing out that the exporters' "interpretation of subsection 43(2)(b)(ii) fails to account for the difference between the text of Article 2.2.1.1 and the words of subsection 43(2)(b)(ii)". This supports the conclusion that the ADC engaged in an analysis that was different from that required under the second condition of Article 2.2.1.1, first sentence. [fns. removed][212]

149. Consequently, as correctly explained by the panel in *Australia – Anti Dumping Measures on Paper*, the ADC's references to competitive market costs in its determinations are not findings for purposes of the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement.[213] Rather, they were discrete assessments of whether the exporter's records must be used for the purposes of the narrow obligation set forth in regulation 180(2) and section 43(2), neither of which are measures at issue in this dispute.

[212] Panel Report, *Australia – Anti-Dumping Measures on Paper,* paras. 7.102 – 7.103.

[213] See China's first written submission, paras. 163, 203-04, citing *Customs Amendment Regulations 2005 (No 8) and Explanatory Statement*, (Exhibit CHN-38), pp. 8-9, and Australian Anti-Dumping Commission, *Dumping and Subsidy Manual* (2013), (Exhibit CNH-42), para. 43. This extrinsic material is not relevant to the interpretation of regulation 180(2) and section 43(2).

SUBSTANTIVE LEGAL CLAIMS UNDER THE ANTI-DUMPING AGREEMENT

IV. ALLEGED DUMPING OF RAILWAY WHEELS FROM CHINA

A. INTRODUCTION

150. China makes six claims with respect to the ADC's findings in the railway wheels investigation. Each of these claims is without merit. The ADC acted entirely consistently with its obligations under the GATT 1994 and the Anti-Dumping Agreement.

151. In this section, Australia addresses the six claims in the order that reflects the investigating authority's analysis in the railway wheels investigation.

152. China's claims regarding the railway wheels investigation are centred on a particular aspect of the ADC's margin calculation: the ADC's calculation of the exporter's steel billet costs.[214] China argues this component of the ADC's analysis has knock-on effects impacting various aspects of the ADC's margin calculation. The ADC's approach to calculating steel billet costs was consistent with Article 2 of the Anti-Dumping Agreement, and all of China's claims must therefore fail.

153. A brief overview of China's claims, and Australia's responses to them, are set out below in the order they are addressed later in this submission. Each of these claims is addressed in more detail in the following sections.

1. China's AD claim 3 – "exporter's record costs"

154. China's **AD claim 3** is directed at the ADC's decision to rely on information other than the exporter's records when calculating the exporter's cost of production for the purpose of constructing normal value under Article 2.2.1.1 of the Anti-Dumping Agreement. Australia addresses AD claim 3 first because the ADC's finding in this regard is relevant to, and provides context for, its other findings in conformity with Article 2 of the Anti-Dumping Agreement.

155. China's AD claim 3 is based on a significant misunderstanding of the ADC's findings and of Australia's domestic legal framework. The ADC, as an objective and unbiased authority, assessed the exporter's cost of production and found that the circumstances in which the exporter's steel billet costs were formed were not normal or ordinary. The ADC acted

[214] China's first written submission, para. 7(c).

consistently with Article 2.2.1.1 of the Anti-Dumping Agreement in its decision to rely on information other than the exporter's records when calculating the cost of production of steel billet for the purpose of constructing normal value of railway wheels.

2. China's AD claim 5 – "'cost' for cost calculation"

156. **AD claim 5** is directed at the ADC's assessment of the exporter's cost of production under Article 2.2.1.1 and calculation of the cost of production of railway wheels under Article 2.2 at the steel billet level rather than at a higher level in the production process. Australia addresses AD claim 5 second because China classifies this in the same category as AD claim 3, and the ADC's findings in this regard are relevant to and provide context for the ADC's additional findings under Article 2.

157. China's AD claim 5 is misplaced. The ADC considered and used the steel billet cost appropriately on the facts of this investigation and in a manner consistent with the Anti-Dumping Agreement.

3. China's AD claim 1 – "costs in the country of origin"

158. China's **AD claim 1** concerns the ADC's calculation of steel billet costs in China by reference to out-of-country pricing data under Article 2.2.

159. China's AD claim 1 is misplaced. The ADC used and adapted out-of-country pricing data appropriately in the circumstances of the investigation and in a manner consistent with Article 2.2.

4. China's AD claim 6.a – "due allowance"

160. China's **AD claim 6.a** is an allegation that the ADC failed to make due allowances to ensure a fair comparison between the export price and the normal value of railway wheels under Article 2.4.

161. China's AD claim 6.a is misplaced and its arguments are inconsistent with relevant WTO panel and Appellate Body reports.

5. China's AD claim 7.b – "profits"

162. China's **AD claim 7.b** suggests the ADC failed to determine a reasonable amount for profits based on actual amounts realised on the same general category of products under Article 2.2.2.

163. China's AD claim 7.b is premised on a misunderstanding of the ADC's analysis and findings. The ADC's determination of profits was reasonable and consistent with Article 2.2.2.

6. AD claim 8

164. Finally, China's **AD claim 8** contends that, as the ADC incorrectly calculated the dumping margins under Article 2, anti-dumping duties imposed exceed the dumping margins and, in turn, are inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

165. This consequential claim must fail because the ADC's calculation of the dumping margin was consistent with Article 2 of the Anti-Dumping Agreement.

B. SUMMARY OF RELEVANT ASPECTS OF THE RAILWAY WHEELS INVESTIGATION

166. Australia generally agrees with China's basic summary of the railway wheels investigation in its first written submission.[215] China has ignored, however, the ADC's extensive factual review of the significant structural and systemic imbalances in China's steel and raw material input markets. The sole Chinese respondent in that investigation, Masteel's costs were formed in these markets. Given this extensive review and its direct relevance to the findings that China challenges, they must be considered by the Panel. The ADC's findings on these structural and systemic imbalances are described in more detail below.[216]

167. The ADC undertook a rigorous investigation, considering submissions from all interested parties, properly evaluating the relevant facts and evidence, providing justifications for its factual and legal determinations, and providing China with ample opportunity to make submissions on essential facts and determinations. The ADC received and considered a total of 55 submissions from interested parties, including the following submissions from Masteel, the Government of China, and the CCCME:

Party	Number of Submissions	Submission Numbers (EPR)
Government of China	4	29, 41, 44, 73

[215] China's first written submission, paras. 61-67.
[216] Australia's first written submission, paras. 192-229.

Masteel	9	13, 14, 19, 31, 37, 38, 39, 43, 72
CCCME	11	8, 27, 54, 55, 61, 62, 66, 72, 78, 83, 85

168. In April 2018, the ADC invited Masteel, the Government of China, and other interested parties to complete detailed investigatory questionnaires. The ADC sought information it considered necessary to determine whether, and to what extent, dumping was occurring. Pertinent information sought included Masteel's railway wheels input costs, the Government of China's role in the railway wheels manufacturing sector in China, and market and industry conditions in the Chinese iron and steel industry more generally. The ADC received questionnaire responses from, *inter alios*, Masteel and the Government of China.[217]

169. In June 2018, the ADC made a Preliminary Affirmative Determination that there appeared to be sufficient grounds for the publication of a dumping duty notice.[218]

170. The ADC also visited Masteel's premises in China in June 2018 to verify information provided in Masteel's exporter questionnaire and to obtain further information in relation to the investigation.[219] The ADC subsequently presented a Visit Report to Masteel for review with information regarding the outcome of the ADC's verification visits to Masteel's facilities.[220]

171. In September 2018, the ADC also met with representatives from Masteel and the CCCME to discuss the anti-dumping investigation.[221]

172. In October 2018, the ADC placed the SEF on the public record in which it outlined its initial findings.[222] The SEF sets out in detail the ADC's findings that various plans and policies of the Government of China created serious and pervasive structural and systemic imbalances in the Chinese markets for the production of key inputs needed to make railway wheels – namely, coking coal (or coke), iron ore, and scrap steel.[223] Interested parties were provided

[217] *Railway Wheels – Masteel Questionnaire*, (Exhibit AUS-12); *Railway Wheels Investigation 466 – GOC Questionnaire*, (Exhibit AUS-18).
[218] *Railway Wheels Investigation 466 – PAD*, (Exhibit AUS-19), p. 1.
[219] *Railway Wheels Investigation 466 Visit Report – Maanshan Iron and Steel Co Ltd*, (Exhibit CHN-40).
[220] *Railway Wheels Investigation 466 Visit* Report – *Maanshan Iron and Steel Co Ltd*, (Exhibit CHN-40).
[221] *Note for File – Meeting between CCCME, Masteel and the Anti-Dumping Commission*, (Exhibit AUS-20).
[222] *Railway Wheels Investigation 466 – SEF*, (Exhibit AUS-16).
[223] *Railway Wheels Investigation 466 – SEF*, (Exhibit AUS-16), pp. 76-92.

with an opportunity to comment on and provide factual information to the ADC in response to the SEF.

173. Finally, in July 2019, the responsible Minister signed a public notice containing the findings in relation to the anti-dumping investigation.[224] The notice included the dumping margin for Masteel.[225]

174. The ADC found that Masteel had not sold like goods in China within the meaning of Article 2.2 of the Anti-Dumping Agreement during the investigation period.[226] This finding was not contested by any interested party.[227] In the absence of sales of like goods in China, the ADC determined the "normal value" of railway wheels in China by way of a constructed normal value. China does not contest the ADC's decision to employ this approach.[228] Rather, China erroneously asserts that the way the ADC constructed normal value for railway wheels in China was inconsistent with Article 2 of the Anti-Dumping Agreement.[229]

C. AUSTRALIA ACTED CONSISTENTLY WITH ITS OBLIGATIONS UNDER ARTICLE 2.2.1.1 WHEN ASSESSING MASTEEL'S RECORDS – CHINA'S AD CLAIM 3

1. Introduction

175. China alleges that Australia acted inconsistently with Articles 2.1, 2.2, and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 when assessing the exporter's records in the railway wheels investigation. China explains that its AD claim 3 "focusses on the wrongful determination made by the investigating authority in its findings concerning the relevant exporters *in all three cases* with respect to *the second condition* of the first sentence in Article 2.2.1.1."[230]

176. China's framing conflates and misstates the findings in the three separate product investigations. As is apparent from the public record of each of the investigations, the ADC's

[224] *Railway Wheels Investigation 466 Findings - ADN No. 2019/30*, (Exhibit CHN-28).
[225] *Railway Wheels Investigation 466 Findings - ADN No. 2019/30*, (Exhibit CHN-28), p. 2.
[226] *Railway Wheels Investigation 466 Visit* Report – *Maanshan Iron and Steel Co Ltd*, (Exhibit CHN-40), p. 4; *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 23.
[227] *Railway Wheels – Masteel Questionnaire*, (Exhibit AUS-12), sections C-3-C-4.
[228] China's first written submission, paras. 225-228.
[229] China's first written submission, paras. 225-228.
[230] China's first written submission, para. 186 (emphases added).

assessment of the exporter's records in the railway wheels investigation is legally and factually distinct from the approaches taken in the stainless steel sinks and wind towers investigations.

177. As it relates to the railway wheels investigation, China's AD claim 3 is based on a fundamental misunderstanding of the ADC's findings and accompanying calculation of Masteel's costs – in particular, Masteel's steel billet costs. China contends that the railway wheels investigation did not comply with the requirements under Article 2.2.1.1 of the Anti-Dumping Agreement because:

> the investigating authority wrongly examined that the exporters' records did not need to be used because it posited that the costs were not reasonable, rather than considering whether the records were a reasonable reflection of the exporter's costs…This examination was incorrect, leading to both a wrongful determination of whether the exporter's records "*reasonably reflect the costs associated with the production and sale of the product under consideration*" and a failure to determine what was required to be determined under the second condition of the first sentence of Article 2.2.1.1.[231]

178. China's assertion is wrong.[232] The ADC's constructed value methodology for Masteel did not rely on the second condition in the first sentence of Article 2.2.1.1, as China erroneously assumes. The ADC relied on the term "normally," as set forth in the first sentence of Article 2.2.1.1, when relying on information other than Masteel's records for the purpose of calculating the cost of production for steel billet. The ADC's finding in this regard was explicit in the *Railway Wheels Investigation 466 Report*:

> the circumstances [in which Masteel incurred costs in the production of railway wheels were] not *normal and ordinary* because the records of Masteel *reflect the government influence by the GOC which distorts the costs in the steel and steel input markets in China*.[233]

179. The ADC determined that the market for steel and raw material inputs in China, in which Masteel's steel billet costs were formed, reflected significant structural and systemic imbalances. These circumstances were not normal or ordinary, given the Government of China's serious and pervasive intervention in the steel market,[234] as documented by the OECD

[231] China's first written submission, para. 228 (emphasis added).
[232] China's erroneous claim hinges on the assumption that the term "reasonably reflect competitive market costs" in regulation 43(2) of the Customs (International Obligations) Regulation 2015, which was referred to in the ADC's findings in the investigation, squarely and solely reflects Australia's implementation of the second condition in the first sentence of Article 2.2.1.1 in its domestic regulations. China's argument is a misapprehension of Australia's domestic legal framework (see Australia's first written submission, paras. 146-149).
[233] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 24 (emphases added).
[234] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 24, 80, 95.

and other international organisations and in studies that the ADC considered during this investigation.

180. Article 2.2.1.1 expressly authorises an investigating authority to depart from an exporter's records in circumstances which are not "normal."

181. Therefore, Australia submits that the ADC acted consistently with Article 2.2.1.1 of the Anti-Dumping Agreement in its decision to rely on information other than Masteel's records when calculating the cost of production of steel billet for the purpose of constructing normal value of railway wheels.

2. China's interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement fails to consider the meaning and effect of the term "normally"

182. Australia concurs with China that Article 2.2.1.1 of the Anti-Dumping Agreement provides "the specific obligations that an investigating authority must discharge when deciding whether the exporter's cost record is to be the basis for the cost calculation".[235] However, China fails to give meaning and effect to the key term "normally" in the first sentence of Article 2.2.1.1. A holistic and proper interpretation of Article 2.2.1.1 must take "normally" into account.

183. The first sentence of Article 2.2.1.1 provides that:

> For the purpose of paragraph 2, costs shall *normally* be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration...

184. The meaning of the first sentence of Article 2.2.1.1 is clear from the ordinary meaning of the words used, interpreted in their context and in light of the object and purpose of the Anti-Dumping Agreement.[236] The term "normally" modifies the verb "shall… be calculated" and, thus, qualifies the obligation on the investigating authority to calculate the costs on the basis of an exporter's records.[237] This qualification of the verb "shall" by the adverb "normally" must be given meaning and effect.[238] The first sentence of Article 2.2.1.1 must not be

[235] China's first written submission, para. 156.
[236] Article 31 of the *Vienna Convention on the Law of Treaties* (1969); China's first written submission, paras. 158-159.
[237] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.111.
[238] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.111, 7.112.

interpreted, as China has done, as if the word "normally" has no function and need not be taken into account in determining the scope of an investigating authority's obligations under Article 2.2.1.1. Such an approach would render the term "normally" inutile and redundant, which would be inconsistent with the legal principle that "interpretation must give meaning and effect to all the terms of a treaty".[239]

185. Previous Appellate Body and panel reports have explained that the term "normally" means "under normal or ordinary conditions; as a rule".[240] Moreover, the Appellate Body and previous panels have consistently observed that the word "normally" has a bearing on the proper interpretation of the first sentence of Article 2.2.1.1. The panel in *China – Broiler Products*, for instance, said:

> According to the Appellate Body [in *US-Clove Cigarettes*], "the qualification of an obligation with the adverb "normally" does not, necessarily, alter the characterization of that obligation as constituting a "rule" … [r]ather, *the use of the term 'normally' … indicates that the rule … admits of a derogation under certain circumstances*." As using the respondents' books and records is the rule and declining to do so is the derogation from that rule, it is for the investigating authority to *decide to do so and to justify its decision on the record of the investigation and/or in the published determinations*.[241]

186. Similarly, the panel in *EU – Biodiesel (Argentina)* observed that:

> The term "shall" in this first sentence of Article 2.2.1.1 indicates that it establishes a mandatory rule … whereas the term "normally" suggests that this rule may be derogated from under certain conditions.[242]

187. The evident effect of the first sentence of Article 2.2.1.1 interpreted in its context and in light of the object and purpose of the Anti-Dumping Agreement, and in a way that does not render the word "normally" inutile or redundant, is that where circumstances are not normal and ordinary, the investigating authority may, in its calculation of constructed normal value, depart from the records kept by the exporter or producer under investigation, even if the first and second conditions in Article 2.2.1.1 are satisfied.[243]

[239] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.112, citing Appellate Body Report, *US – Gasoline*, p. 21.
[240] Appellate Body Report, *US – Clove Cigarettes*, para. 273 (fn. omitted); See also Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.65; Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.111.
[241] Panel Report, *China – Broiler Products*, para. 7.161 (emphases added, fn. omitted).
[242] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.227 (fns. omitted).
[243] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.115.

188. This interpretation is consistent with the Appellate Body's opinion in *EU – Biodiesel (Argentina)* that:

> …[W]e recall that Article 2.2.1.1 of the Anti-Dumping Agreement identifies the "records kept by the exporter or producer under investigation" as the preferred source for cost of production data to be used in such calculation. *We do not see, however, that the first sentence of Article 2.2.1.1 precludes information or evidence from other sources from being used in certain circumstances. Indeed, it is clear to us that, in some circumstances, the information in the records kept by the exporter or producer under investigation may need to be analysed or verified using documents, information, or evidence from other sources, including from sources outside the "country of origin".*[244]

189. In sum, an investigating authority is not precluded under Article 2.2.1.1 from relying on information other than an exporter's records in certain circumstances, including:

- where the circumstances are not normal and ordinary;
- where the records are not in accordance with the GAAP of the exporting country; and
- where the records do not reasonably reflect the costs associated with the production and sale of the product under consideration.[245]

190. While previous WTO panel and Appellate Body reports have emphasised that the term "normally" must be given meaning and effect as explained above, they have not, to date, identified the situations in which an investigating authority may invoke "normally". This Panel likewise need not provide a precise definition in this dispute for all occasions when "normally" might be invoked. A determination of whether the circumstances are not normal or ordinary is necessarily dependent on the specific facts of each case.

191. Australia submits that the Panel only needs to determine whether the ADC's assessment of the facts was unbiased and objective in respect of its findings that the circumstances in which Masteel's steel billet costs were formed were not normal or ordinary.

[244] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.71 (emphasis added, fns. omitted).
[245] This was not at issue in the railway wheels investigation, where the ADC did not find any inconsistencies with the exporter's records for the purpose of the second condition in the first sentence of Article 2.2.1.1.

3. The ADC's findings on the structural and systemic imbalances in the steel and steel raw materials markets in China

192. Australia sets out below the ADC's analysis, which China fails to address, on the structural imbalances in the Chinese steel and steel raw materials markets where Masteel participated in and incurred its costs, and which the ADC found were not "normal" or "ordinary" circumstances for the purpose of Article 2.2.1.1.

(a) The context of Masteel's cost of production for railway wheels

193. Masteel is one of the largest iron and steel producers and sellers in China,[246] and an SOE. The Magang (Group) Holding Co., Ltd (Masteel Group) is its controlling shareholder, which in turn, is supervised by the State-owned Assets Supervision and Administration Commission (SASAC) of the People's Government of Anhui Province.[247] SASAC is a government department and does not have any shareholders.[248] As its name suggests, SASAC, under the direct supervision of China's governing State Council, manages and supervises SOEs such as Masteel, among its other functions.[249] We discuss below the ADC's findings on the significance and influence of SOEs in the Chinese steel market.

194. China's first written submission correctly cites the ADC's description of Masteel's production process for railway wheels as useful context for assessing Masteel's costs.[250] Notably, Masteel is an integrated producer that undertook three major steps to produce railway wheels: (i) combining raw materials into steel billet; (ii) transforming billet into a blank/rough wheel; and (iii) finishing the blank wheel into the final product.[251]

195. For the first step of Masteel's production process, the ADC observed that direct materials accounted for the majority of Masteel's cost to manufacture steel billet.[252] It found that approximately 70% of Masteel's costs to manufacture billets arose from raw materials, and manufacturing overheads including electricity accounted for a further 25%.[253] This is

[246] *Railway Wheels – Masteel Questionnaire,* "Attachment A-4-3-2 - Masteel - 2017 Auditors Report", (Exhibit AUS-21), p. 9.
[247] *Railway Wheels – Masteel Questionnaire*, (Exhibit AUS-12), section A-3.
[248] *Railway Wheels – Masteel Questionnaire*, (Exhibit AUS-12), section A-3.
[249] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 85-86.
[250] China's first written submission, para. 284.
[251] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 81.
[252] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 94.
[253] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 94.

important context because steel billet was the primary raw material input for making railway wheels. As a consequence, distortions to the prices of raw material inputs (used to make steel billet) translated to Masteel's overall costs for producing railway wheels (primarily, on a cost basis, made from steel billets).

196. Masteel purchased its raw materials for steel billet from [[**BCI:**]][254] Masteel purchased steel scrap and particular grades of coking coal [[**BCI:**]][255] While assessing the domestic market from which Masteel purchased its raw materials, the ADC found that:

- Chinese raw materials suppliers exhibited characteristics of loss-making firms (e.g. made sales of raw materials at below cost-recovery rates);[256]
- the prevalence of the loss-making raw materials suppliers was reflective of overcapacity in the Chinese market, resulting in over-production that depreciated prices of those raw materials;[257] and
- the influence of the Government of China in these raw materials markets materially contributed to its overcapacity through a variety of mechanisms and interventions.[258]

197. The ADC made similar findings in respect of the Chinese steel manufacturing process:

- Chinese steel mills exhibited characteristics of "zombie firms" (i.e., firms which, under normal competitive market conditions, would be shut down due to either poor profitability or insolvency but were sustained as a matter of government policy);[259]
- the prevalence of unprofitable or insolvent steel mills in the Chinese market was reflective of government-driven overcapacity, which led to over-production that

[254] [[(Exhibit AUS-12 (BCI))]].
[255] [[(Exhibit AUS-12 (BCI))]]; [[(Exhibit AUS-22 (BCI))]].
[256] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 82-95.
[257] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 82-95.
[258] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 82-95.
[259] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 84.

depreciated prices of steel. That, in turn, influenced steel prices in the market as a whole;[260] and

- overcapacity could only be attributed to the influence and specific policies of the Government of China in these steel markets and the role of state planning.[261]

198. The ADC found that these combined factors led to significant systemic and structural imbalances in the Chinese steel and steel inputs market at various stages of the production process. These imbalances translated to Masteel's steel billet costs and amounted to circumstances that were not normal and ordinary for the purpose of Article 2.2.1.1.

(b) The ADC's findings on the prevalence of loss-making firms in the domestic Chinese steel and raw materials input markets

199. As mentioned in the section above, the ADC found that Chinese raw materials suppliers exhibited characteristics of loss-making firms, including for example, making sales of raw materials at below cost-recovery rates. It also found that the prevalence of the loss-making raw materials suppliers was reflective of overcapacity in the Chinese market, resulting in over-production that depreciated prices of those raw materials.[262] In other words, the prevalence of loss-making firms was a significant indicator of a systemically imbalanced steel market.

200. The ADC's finding on the prevalence of loss-making firms was based the Government of China's questionnaire response in which it recognised explicitly the prevalence of loss-making firms and "zombie enterprises" in those markets.[263] This response from the Government of China was corroborated by record evidence from other sources:

[260] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 82.
[261] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 82-95.
[262] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 82-85.
[263] *Railway Wheels Investigation 466 – GOC questionnaire*, (Exhibit AUS-18), section A.2; *Railway Wheels Investigation 466 – GOC Questionnaire*, "Attachment 1 – 13th Five Year Plan for the Steel Industry", (Exhibit AUS-23), para. IV(I). *Railway Wheels Investigation 466 – GOC Questionnaire*, "Attachment 16 – The 13th Five-Year Plan for Economic and Social Development of the PRC", (Exhibit AUS-24), Part V, Chapter 22, Section 5; See also *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 82-84, 88.

- the ADC considered an academic study that found "the share of loss-making enterprises was 51 per cent" in China's steelmaking sector in 2015.[264] According to this study, the selling costs for almost half of the enterprises in China's steelmaking industry exceeded their selling prices in 2015.[265] These firms would not have survived in "normal", market-driven economic circumstances, but they were propped up as a matter of government policy;[266]

- the ADC considered an analytical report by the European Commission on significant distortions in China's economy that found 51.43% of steelmaking enterprises in China had sustained prolonged operating losses in 2013,[267] and in 2015, that 80% of coal firms in China incurred losses;[268] and

- the ADC considered an OECD economic survey on China that stated: "[b]y 2013, around half of all steel mills and nearly half of all developers were making losses but could still obtain loans or were unable to service their interest payment obligations".[269]

201. Therefore, the evidence available to the ADC during the investigation period was that a substantial proportion of steel manufacturers and raw materials suppliers in China were selling at below cost-recovery rates. This below-cost selling was not reflective of "normal" market circumstances. As demonstrated below, it reflected the Government of China's serious and pervasive influence on the Chinese steel and steel input markets.

[264] H. Liu and L. Song, "Issues and Prospects for the Restructuring of China's Steel Industry", (Exhibit AUS-25), p. 343. This study was cited by the ADC in the *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 83-84.
[265] H. Liu and L. Song, "Issues and Prospects for the Restructuring of China's Steel Industry", (Exhibit AUS-25), p. 346.
[266] H. Liu and L. Song, "Issues and Prospects for the Restructuring of China's Steel Industry", (Exhibit AUS-25), p. 348.
[267] EC, *Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China*, (Exhibit AUS-26), p. 253. This study is cited in *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 92.
[268] EC, *Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China*, (Exhibit AUS-26), p. 232.
[269] OECD, *OECD Economic Surveys: China 2017*, (Exhibit AUS-27), p. 76. This study is cited in *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 82.

(c) The ADC found that the structural and systemic imbalances in the Chinese markets were attributed to the Government of China

202. The ADC found that the overall price of steel and steel inputs in China was strongly influenced by the selling prices of the Chinese steel firms that were sustaining prolonged operating losses.[270] Notably:

- the record demonstrated that Chinese SOEs were far more likely than private firms to be sustaining operating losses over prolonged periods;[271] and
- many SOEs "operated on non-commercial terms for extended periods, significantly impacting on supply and pricing conditions within the domestic Chinese market for steel products and raw materials used to produce steel",[272] that is, "distort[ing] the market as a whole".[273]

203. The ADC found that the prevalence of loss-making raw materials suppliers in the Chinese steel markets was attributable to the Government of China's influence through a variety of mechanisms, including:

- the role and operation of SOEs;[274]
- successive FYPs, economic policy, industry planning guidelines and directives;[275]
- the provision of direct and indirect financial support;[276] and
- taxation and tariff policies[277]

[270] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 87.
[271] EC, *Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China*, (Exhibit AUS-26), p. 253; H. Liu and L. Song, "Issues and Prospects for the Restructuring of China's Steel Industry", (Exhibit AUS-25), pp. 345, 347, 349-350; OECD, *OECD Economic Surveys: China 2017*, (Exhibit AUS-27), pp. 40-41.
[272] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 84.
[273] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 87.
[274] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 84-87.
[275] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 87-91.
[276] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 91-92.
[277] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 93.

204. The ADC assessed that "the result…[was] that the cost to make steel [was]… artificially lowered due to government influence, which result[ed] in an artificially high supply that pushes prices down."[278]

i. The role and operation of SOEs

205. The ADC examined why loss-making firms in the Chinese steel markets were unwilling or unable to either enter bankruptcy and exit the market, or to make the changes necessary to achieve profitability.[279] The ADC identified several distinctive features surrounding the incentive structures of SOEs in this regard.[280] In particular, the ADC found that various tiers of the Chinese government (i.e. local and provincial) had an interest in the continued operations of SOEs "to increase tax revenues, expand employment, and maintain social stability."[281] The ADC stated in the *Railway Wheels Investigation 466 Report*:

> The resistance of provincial and local governments to closing down mills relates to their role as major employers, sources of tax revenue and providers of social services within their respective regions. Specific examples of these issues include the reliance of their tax systems on business revenue (including production based VAT) and GDP oriented performance measures which encourage over investment in capacity.[282]

206. The ADC noted that between 2006 and 2015, Chinese steelmaking capacity more than doubled due to "a combination of state owned and privately owned steel producers," and "both types of producers have received significant assistance from the GOC";[283]

207. As part of this assessment, the ADC considered information from a variety of sources that overwhelmingly pointed to the Government of China's role in propping up or supporting loss-making SOEs in the steel sector. This information included:

- a report by the United States Department of Commerce on China's Status as a Non-Market Economy.[284] That report found that loss-making Chinese SOEs "may still drive growth in a given jurisdiction and contribute to the local tax base".[285] Among

[278] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p 82.
[279] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 84.
[280] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 84-87.
[281] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 84.
[282] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 83, citing L. Brun, *Overcapacity in Steel – China's Role in a Global Problem*, (Exhibit AUS-28), p. 38.
[283] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 82.
[284] United States Department of Commerce, *China's Status as a Non-Market Economy*, (Exhibit AUS-29). This study was cited by the ADC in the *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 86, 88.
[285] United States Department of Commerce, *China's Status as a Non-Market Economy*, (Exhibit AUS-29), p. 72 and fn. 342.

other things, maintaining SOEs is "a means to guard against large-scale layoffs", [286] with local officials concerned about the "burden of resettling laid off workers";[287]

- an academic study on Issues and Prospects for the Restructuring of China's Steel Industry.[288] The study found that the "policy of 'securing jobs' has been deeply entrenched in the running of SOEs" such that "[l]eaders of SOEs as well as local governments have tended to tolerate losses rather than risk dismissing staff, which would generate an alternative—and noisier—problem on the social front".[289]

208. Further, the ADC considered that SOEs were used by the Government of China as a vehicle to achieve broader economic objectives, with bodies like SASAC taking ultimate control of certain SOEs to "pursue state goals".[290]

209. In this regard, the ADC noted evidence that "direct intervention in the railway market is a current goal" of the Government of China,[291] with a particular "focus on the development of steel for express railway" mentioned in the material submitted by the Government of China to the ADC.[292]

ii. The Government of China used various tools to sustain loss-making firms in steel and steel input markets

210. Having identified these distinctive features of SOEs, the ADC then found that the Government of China used various tools to sustain loss-making firms in steel and steel input markets, and that the structural and systemic imbalances caused by these SOEs and loss-making firms extended to the markets for railway wheel inputs in particular.[293] These tools included:

[286] United States Department of Commerce, *China's Status as a Non-Market Economy*, (Exhibit AUS-29), p. 72 and fn. 342.
[287] United States Department of Commerce, *China's Status as a Non-Market Economy*, (Exhibit AUS-29), p. 72.
[288] H. Liu and L. Song, "Issues and Prospects for the Restructuring of China's Steel Industry", (Exhibit AUS-25).
[289] H. Liu and L. Song, "Issues and Prospects for the Restructuring of China's Steel Industry", (Exhibit AUS-25), pp. 351-352.
[290] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 86.
[291] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 92.
[292] *Railway Wheels Investigation 466 – GOC Questionnaire*, "Attachment 15 - 12th Five-Year Plan for National Economic and Social Development", (Exhibit AUS-30), p. 8.
[293] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 87.

- infusions of funds in the form of preferential loans from state-owned banks, grants and other subsidies, access to free land, and loan guarantees.[294] In this regard, the ADC cited evidence that financial institutions are instructed by the Government of China to provide support to firms identified as belonging to the Government of China's priority sectors for economic development;[295]
- regulatory measures that artificially depressed the price of inputs paid by downstream firms in priority sectors, thus lowering their cost of production and mitigating the extent of losses or improving weak profitability. In particular, the ADC noted the evidence from the Government of China that it had applied export tariffs during the investigation period on iron ore (10%), scrap steel (40%), coking coal (3%), and steel billet (15%), as well as an export quota on coking coal.[296] Measures such as this caused export markets to be less attractive, resulting in these products staying in the domestic market, increasing supply and depressing prices; [297] and
- subjecting all applicable major raw material inputs to zero refund of VAT for exports. This measure likewise deterred exports of these materials to markets outside of China and instead incentivised domestic sales into a saturated market.[298]

211. The corollary of these forms of support, based on the ADC's analysis of the information before it, was that firms receiving these kinds of support no longer "respond[ed] to price and profit signals", with "extended periods of lossmaking [being] tolerated" by the company.[299] This meant that "the normal commercial pressures for companies to operate efficiently and for poorly performing firms to cut back or cease operations" were reduced,[300]

[294] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 84, 86, 91.
[295] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 92.
[296] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 93; *Railway Wheels Investigation 466 – GOC Questionnaire*, " Attachment 10 – Taxes and tariffs for railway wheels, steel billet etc.", (Exhibit AUS-31).
[297] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 93.
[298] Iron ore, coke, coking coal and steel scrap were all subject to a non-refundable VAT rate of 17% for exports (*Railway Wheels Investigation 466 – GOC questionnaire*, "Attachment 10 – Taxes and tariffs for railway wheels, steel billet etc.", (Exhibit AUS-31).
[299] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 85.
[300] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 85; See also Anti-Dumping Commission, *Analysis of Steel and Aluminium Markets*, (Exhibit AUS-32), p. 47.

with an increase in "companies which are making losses or are unable to service their interest payment obligations but can still obtain loans".[301]

212. One academic study cited by the ADC found that "[f]or some enterprises, the losses have even exceeded the sum of depreciation, wages and interest—yet these firms have continued production",[302] and that "[t]hese enterprises can in fact operate into the long term while making continuous losses" through these forms of support.[303] Another referenced study found that "[b]ased on the annual profits of the coal and steel industries in 2015, it would take 91 and 74 years, respectively, to pay back total debts, compared with an industrial sector-wide average of around 10 years".[304]

213. Even if persistently loss-making firms wished to enter insolvency, the studies considered by the ADC indicated substantial barriers to bankruptcy. According to one study referenced by the ADC, the transfer of shares from SOEs was not valid unless approved by the SASAC.[305] This meant, in turn, that the "inability to transfer ownership results in the ability of SOEs to generate losses for a long period without fear of bankruptcy, including the ability to engage in anticompetitive practices such as below-cost pricing without fear of falling equity prices or bankruptcy".[306]

iii. The ADC properly evaluated submissions from the Government of China in making relevant findings

214. Much of the ADC's findings were based on the Government of China's own submissions during the investigation. As noted by the ADC, the Government of China itself had identified the problem of "zombie mills" in the sector,[307] and undertook measures to address issues of employee compensation and social security payments in order to remove impediments to loss-making firms entering insolvency.[308]

[301] EC, *Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China*, (Exhibit AUS-26), p. 252.
[302] H. Liu and L. Song, "Issues and Prospects for the Restructuring of China's Steel Industry", (Exhibit AUS-25), p. 346.
[303] H. Liu and L. Song, "Issues and Prospects for the Restructuring of China's Steel Industry", (Exhibit AUS-25, pp. 346, 348.
[304] EC, *Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China*, (Exhibit AUS-26), p. 249.
[305] L. Brun, *Overcapacity in Steel – China's Role in a Global Problem*, (Exhibit AUS-28), p. 26.
[306] L. Brun, *Overcapacity in Steel – China's Role in a Global Problem*, (Exhibit AUS-28), p. 26.
[307] Railway Wheels Investigation 466 – GOC Questionnaire, "Attachment 1 – 13th Five Year Plan for the Steel Industry", (Exhibit AUS-23), para. IV(I). Railway Wheels Investigation 466 – GOC Questionnaire, "Attachment 16 – The 13th Five-Year Plan for Economic and Social Development of the PRC", (Exhibit AUS-24), Part V, Chapter 22, Section 5.
[308] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 83.

215. The Government of China submitted policy documents during the investigation that indicated a recognition of the need to "move more quickly to address overcapacity in industries such as steel and coal" by addressing "debt restructuring", "bankruptcy liquidations", and "ensure that employees laid off from such enterprises are properly resettled",[309] as well as the need to "promote the disposal of zombie enterprise[s]".[310] For the ADC, these materials "demonstrate[d] that the [Government of China] [wa]s aware that, in 2016, the conditions within the domestic mineral resources sector in China was not subject to ordinary market principles".[311]

216. The ADC conducted an objective and unbiased assessment of the Government of China's evidence and information. While the ADC acknowledged the Government of China's attempts to remedy the conditions, it found that "these attempts to address existing structural imbalances have had limited success",[312] with record evidence suggesting that "local governments often intervene to pre-empt bankruptcy cases altogether, or alternatively, attempt to affect the outcome of bankruptcy proceedings by appointing government officials as trustees for insolvent enterprises".[313] Moreover, the ADC considered that the "current impact" of the Government of China's measures had perversely "been to increase production and exacerbate the existing structural imbalances".[314]

217. For the ADC, the impact of loss-making firms in the steel and steel input markets permeated across those markets. In particular, it found that "the significance and influence of SOEs in the Chinese steel market, including the sectors providing raw materials for the production of steel, has required intervention which distorts the market as a whole".[315]

[309] *Railway Wheels Investigation 466 – GOC questionnaire*, "Attachment 16 – The 13th Five-Year Plan for Economic and Social Development of the PRC", (Exhibit AUS-24), Part V, Chapter 22, Section 5.
[310] *Railway Wheels Investigation 466 – GOC questionnaire*, "Attachment 1 – 13th Five Year Plan for the Steel Industry", (Exhibit AUS-23), para. IV(I); see also OECD, *OECD Economic Surveys: China 2017*, (Exhibit AUS-27), p. 91.
[311] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 89.
[312] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 83.
[313] United States Department of Commerce, *China's Status as a Non-Market Economy*, 2017, (Exhibit AUS-29), p. 72. See also *Steel Rod in Coils Investigation 301 Report*, (Exhibit AUS-33), p. 58.
[314] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 83.
[315] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 87.

(d) The significant structural and systemic imbalances in the Chinese steel raw materials market translated to Masteel's costs

218. As detailed in the preceding sections, Masteel was sourcing raw materials like steel scrap and coking coal from a market where a substantial proportion of suppliers were loss-making and thus selling at below-cost recovery rates. The ADC considered that the significance and influence of SOEs in the Chinese steel market, including the sectors providing raw materials for the production of steel, reflected interventions that distorted the market as a whole. The structural and systemic imbalances resulted in artificially lowered costs of raw materials to produce steel billet for all companies, including Masteel.[316] These below cost rates reduced costs in China for those particular inputs,[317] creating an environment for these inputs which could not be described as "normal".

219. These market circumstances translated to Masteel's costs to make railway wheels because direct materials account for the majority – approximately 70% – of Masteel's cost to manufacture steel billet.[318] Nearly three quarters of Masteel's billet costs were represented by raw material costs, meaning that the effect of the systemic and structural imbalances in the raw material markets on Masteel's costs would have been pronounced.

220. The ADC properly evaluated the record evidence (as detailed in the analysis above) and Masteel's specific circumstances to find that the market imbalances "resulted in artificially lowered costs of raw materials to produce steel billet that do not reflect competitive market costs for all companies, including Masteel."[319] The ADC indicated to the interested parties as early as its SEF that it believed these conditions affected Masteel's costs.[320]

(e) Masteel was an important participant in the Chinese steel manufacturing market where its costs were formed

221. The ADC determined that Masteel specifically exhibited characteristics suggesting it was not operating in a market that was "normal and ordinary".[321] As an SOE and as a vertically

[316] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 87.
[317] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 87.
[318] Australia's first written submission, para. 195; *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 94.
[319] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 87.
[320] See, for example, *Railway Wheels Investigation 466 – SEF*, (Exhibit AUS-16), p. 92.
[321] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 95.

integrated steel manufacturer, the serious and pervasive influence of the Government of China in the steel and steel input markets were consolidated in Masteel's costs and operations.

222. Beginning with Masteel's corporate structure, the Government of China acknowledged in the information it provided to the ADC that the SASAC had a "supervisory" role in the Masteel/Magang group[322] and that as controlling shareholder of Masteel, SASAC might have different considerations to those of an ordinary private shareholder.[323] This was significant because the ADC found that the "Party Committee of SASAC is tasked to monitor the implementation of the principles and policies of the Party and of the State within [SOEs]".[324]

223. Masteel's questionnaire responses indicated that it had embedded the role of the Communist Party of China in its corporate governance structure.[325] For instance, Chapter 15 of Masteel's Articles of Association provides:

> Article 161 The Company shall establish a committee of the Communist Party of China of Maanshan Iron & Steel Company Limited (hereinafter referred to as the "Party Committee").
>
> Article 162 *The Party Committee shall play a core leading role and supervise the implementation of the directional policies of the Party* and the country throughout the Company, consider and discuss on major operational and management matters of the Company.
>
> The Party Committee shall comply with the laws of the country, support the Shareholders' General Meeting, Board, supervisory committee and general manager in exercising their power in accordance with the laws….
>
> To strengthen the self-construction of the Party Committee, play a leading role in the ideological and political work, the spiritual civilisation construction and the mass organizations such as the labour union and the Communist Youth League.[326]

224. The ADC found that Masteel's corporate structure indicated a high degree of government influence, indicating that Masteel's production (both railway wheels and other

[322] *Railway Wheels Investigation 466 – GOC questionnaire*, (Exhibit AUS-18), section A.2.
[323] *Railway Wheels Investigation 466 – GOC questionnaire*, (Exhibit AUS-18), section C.5(d); see also *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 86.
[324] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 86.
[325] *Railway Wheels – Masteel Questionnaire*, (Exhibit AUS-12), section H-1-4g. Masteel provided a link to all its company announcements, which included specific announcements on the changes to Masteel's Articles of Association in 2017.
[326] Railway Wheels – Masteel Articles of Association 2017, (Exhibit AUS-34), p. 54, (emphases added).

steel products) would be operated in pursuit of the Government of China's policy objectives.[327] The ADC observed:

> As SASAC is charged with creating companies that are "national champions", it is reasonable to infer that market conditions will be manipulated by the GOC to ensure that SOEs operate on a large scale and are positive contributors to the economy. Intervention in the steel market includes (but [is] not limited to) influence in the price of raw materials, access to preferential loans and preferential access to finance, all of which reduce the cost to make steel.[328]

225. As an example of Masteel's priority status as a producer of railway wheels under the Government of China's policy objectives, the ADC considered evidence that Masteel had received a 10 year loan from the National Development Bank Corporation for a high-speed wheel and axle material technology project at a rate that was below the reference rate for China.[329] The ADC found this access to preferential loans as "indicative of both the type of support received by SOEs in the steel sector and Masteel specifically".[330]

226. Noting the evidence that the Government of China's 13th FYP identified railway equipment as one specific area for support, the ADC found that any technical or financial support under the plan would "likely benefit iron ore carriage wheels produced by Masteel either directly or indirectly."[331] The ADC found that this plan would likely affect Masteel's financing and non-operational costs.[332] Masteel's questionnaire responses showed that [[**BCI:** [redacted]]], including [[**BCI:** [redacted]]].[333]

227. This access to financial infusions from the State correlated to the ADC's findings of the prevalence of loss-making enterprises in Chinese steel and steel-input markets insofar as Masteel had a history of mixed financial results, including periods of significant operating

[327] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 86.
[328] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 86.
[329] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 85; [[[redacted] (Exhibit AUS-12 (BCI)) [redacted]]]
[330] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 85.
[331] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 92.
[332] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 92.
[333] [[[redacted] (Exhibit AUS-35 (BCI))]].

losses.[334] The ADC observed from the record that Masteel specifically attributed operating losses to excess capacity and oversupply problems within the iron and steel industry,[335] which remained prevalent during the investigation period.[336] The Government of China assumed certain contingent liabilities for Masteel's debts, through Magang Group acting as guarantor of bank loans (without attached conditions),[337] and [[**BCI:** [redacted]]].[338]

228. Finally, consistent with the ADC's finding regarding the predominance of SOEs in the steel sector, the ADC identified that Masteel predominantly sourced coking coal and steel scrap – important inputs for railway wheels – [[**BCI:** [redacted]]].[339] Based on this and findings previously made by the ADC with respect to the characteristics of SOEs (as set out above), the ADC found reason to specifically interrogate whether Masteel's recorded cost for coking coal and steel scrap reflected the respective costs of coking coal and steel scrap in China. As discussed below,[340] the ADC's interrogation was constrained by the limited available information.

229. The ADC concluded that the Government of China's serious and pervasive influence in the steel and upstream input markets, through myriad policies, loan programs, corporate structuring and influence, debt service, industry planning guidelines and directives, and other measures, made it such that "the circumstances [in which Masteel's costs were formed] were not normal and ordinary."[341] The ADC found further that, in light of these not normal and

[334] [[**BCI:** [redacted]] [[[redacted] (Exhibit AUS-36 (BCI))]]; [[[redacted] (Exhibit AUS-37 (BCI))]]. In addition, "the Group reported a substantial loss" for 2015 (*Railway Wheels – Masteel Annual Report 2015*, (Exhibit AUS-38), p. 12).
[335] "The iron and steel industry continued to be plagued by overcapacity problems and showed no signs of improvement." *Railway Wheels – Masteel Annual Report 2015*, (Exhibit AUS-38), p. 11.
[336] "Currently, the supply-side reform achieved initial success but the overcapacity contradicting was still highlighted." (*Railway Wheels – Masteel Questionnaire,* "Attachment A-4-3-2 - Masteel - 2017 Auditors Report", (Exhibit AUS-21), p. 10).
[337] "In 2017, the Holding had guaranteed additional certain bank loans of the Group amounting to approximately RMB1.7 billion (2016: approximately RMB0.94 billion), without attached conditions. The Holding had guaranteed part of bank loans without attached conditions amounting to approximately RMB1.927 billion as of 31 December 2017 (31 December 2016: approximately RMB2.487 billion)." (*Railway Wheels – Masteel Questionnaire, "Attachment A-4-3-2 - Masteel - 2017 Auditors Report"*, (Exhibit AUS-21), p. 272).
[338] [[[redacted] (Exhibit AUS-12 (BCI)) [redacted]]]
[339] [[[redacted] (Exhibit AUS-12 (BCI)) [redacted]]]; [[[redacted] (Exhibit AUS-22 (BCI))]].
[340] Australia's first written submission, paras. 234-243.
[341] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 24, 80, 95.

ordinary circumstances, Masteel's records evidenced the distorted costs in the steel and steel input markets in China.[342]

4. The circumstances in which Masteel's steel billet costs were formed were not normal or ordinary

230. Consistent with its obligations under Article 2.2.1.1 of the Anti-Dumping Agreement, the ADC found "the circumstances [were] not normal and ordinary" and that "the records of Masteel reflect[ed] the… influence by the [Government of China] which distort[ed] the costs in the steel and steel input markets in China".[343] As explained in the preceding section, the steel and steel input markets in China were structurally and systemically imbalanced due to several circumstances, including:

- the prevalence of loss-making raw materials suppliers reflecting overcapacity in the Chinese market, leading to over-supply that depreciated prices of those raw materials;
- Chinese steel mills exhibiting characteristics of zombie firms;
- overcapacity being attributable to the serious and pervasive influence of the Government of China in these raw materials markets through a variety of mechanisms, namely (a) the role and operation of Chinese state-owned and state-invested enterprises; (b) government-issued industry-planning guidelines and directives; (c) provision of direct and indirect financial support to market participants; and (d) taxation and tariff policies; and
- Masteel, one of the largest iron and steel producers and sellers in China, an integrated steel producer and an SOE, specifically exhibiting characteristics that suggested it was operating in a market where structural and systemic imbalances prevailed.

231. The ADC found that there were imbalances in the Chinese steel and steel raw materials markets at various stages of the production process.[344] Masteel actively participated in and incurred costs in the context of these significantly and systemically imbalanced markets

[342] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 24, 80, 95.
[343] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 24, 80-95.
[344] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 80-95.

where raw materials were being sold at below cost-recovery rates, and where steel manufacturing mills (including Masteel itself) were operating at losses leading to over-capacity, over-production, and depressed prices.[345]

232. This was compounded by the fact that Masteel was an SOE, [[**BCI:** [redacted]]].[346] The ADC found that "[t]he significant number of SOEs and SIEs in the Chinese steel market is evidence of the Government of China's influence… which has resulted in distortions to the costs associated with the production of steel used by Masteel in the production of railway wheels."[347]

233. The ADC found that these circumstances were not normal or ordinary for the purpose of Article 2.2.1.1.

5. The ADC properly evaluated the limited information available

234. China's first written submission does not include any claim relating to the ADC's determination of "normally", or otherwise advance any challenge to that determination. The adequacy and appropriateness of the ADC's finding is evident from the record, and briefly summarised below.

235. The ADC properly evaluated the facts and evidence before it, including all submissions from relevant parties and Masteel's records, in determining that the circumstances in which Masteel incurred its costs were not "normal or ordinary."

236. The ADC sought information from Masteel and the Government of China regarding the costs to make and sell the product under consideration.[348] The responses demonstrated that Masteel sourced raw material inputs from markets impacted by the significant imbalances identified by the ADC.

(a) The ADC sought relevant information from Masteel

237. The ADC specifically requested detailed information from Masteel about any inputs into railway wheels that individually accounted for 10% or more of the total production

[345] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 80-95.
[346] Australia's first written submission, para. 196.
[347] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 95.
[348] *Railway Wheels – Masteel Questionnaire*, (Exhibit AUS-12), section G-6; *Railway Wheels Investigation 466 – GOC questionnaire,* (Exhibit AUS-18), section A-4.

cost.[349] Masteel was asked to provide detailed information on the full costs of the production of major inputs being sourced as part of an integrated production process.[350] The exporter questionnaire also described that where major inputs were purchased from a related supplier, the cost data of the supplier could also be considered.[351]

238. Masteel reported its purchase price information for raw materials (coke, coking coal, iron ore, scrap steel coal etc.) applicable to the production of railway wheels and numerous other products. The data were not specific to the same category of goods as railway wheels exported to Australia[352] – noting that the production of railway wheels accounts for only a subset of Masteel's total operations.[353]

239. Masteel also provided a breakdown of the costs for the three stages of its production process described above – steel billet, blank wheels, and the finished goods.[354] This broad information did not enable the ADC to establish the specific raw materials, or suppliers of the raw materials, used to produce the specific product under consideration.

240. However, the information did reveal that Masteel's raw material purchases exhibited characteristics of structurally and systematically imbalanced markets that the ADC had been put on notice to investigate. In particular, Masteel purchased a majority of key inputs into steel billet (coking coal/coal and steel scrap) [[**BCI:** [redacted]]], including sourcing steel scrap [[**BCI:** [redacted]]].[355]

(b) The ADC sought relevant information from the Government of China

241. The ADC issued a detailed questionnaire to the Government of China regarding suppliers and prices in railway wheels manufacturing in China.[356] The Government of China was asked to outline how the selling prices of railway wheels (as well as steel billet and raw materials) were determined in the Chinese market.[357] In particular, the Government of China

[349] *Railway Wheels – Masteel Questionnaire*, (Exhibit AUS-12), section G-6.
[350] *Railway Wheels – Masteel Questionnaire*, (Exhibit AUS-12), section G-6.
[351] *Railway Wheels – Masteel Questionnaire*, (Exhibit AUS-12), section G-6.
[352] [[[redacted] (Exhibit AUS-22 (BCI))]].
[353] *Railway Wheels – Masteel Questionnaire*, (Exhibit AUS-12), section A-3.
[354] [[[redacted] (Exhibit AUS-39 (BCI))]].
[355] *Railway Wheels – Masteel Questionnaire*, (Exhibit AUS-12), section G-6.
[356] *Railway Wheels Investigation 466 – GOC questionnaire*, (Exhibit AUS-18), section A-4.
[357] *Railway Wheels Investigation 466 – GOC questionnaire*, (Exhibit AUS-18), section C-3,.

was asked to provide details about manufacturers/traders of upstream raw material inputs for the railway wheels exported to Australia, including for each business where the Government of China is a shareholder and/or there is Government of China representation in the business, copies of the most recent annual reports.[358]

242. The Government of China requested and received an extension to respond to this questionnaire. The response subsequently provided by the Government of China was incomplete. Specifically, China did not provide details for any upstream raw material manufacturers and simply dismissed the ADC's questions regarding steel billet as of "no relevance" – electing not to provide this requested information.[359] The ADC could not obtain this information unless Masteel or the Government of China provided it.

243. The ADC, therefore, assessed the information available to it, notwithstanding the Government of China's failure to provide complete responses and found that the circumstances in which Masteel's costs were formed were not normal or ordinary during the investigation period.[360]

6. The ADC was not required to calculate costs based on Masteel's records under Article 2.2.1.1 where circumstances are not normal or ordinary

244. As explained above,[361] where circumstances are *not* normal and ordinary, the investigating authority is *not* required to calculate costs on the basis of records kept by the exporter or producer under investigation, irrespective of whether the two conditions in Article 2.2.1.1 are satisfied.[362] That is, irrespective of whether the records are (a) GAAP compliant, and (b) "reasonably reflect" costs, an investigating authority may rely on data other than the records of the exporter or producer if there are not normal or ordinary circumstances affecting the exporter or producer's costs.

245. This approach is consistent with the previous panel and Appellate Body reports, which have noted that the term "normally" envisages the possibility of investigating authorities departing from exporters' records under Article 2.2.1.1 of the Anti-Dumping

[358] *Railway Wheels Investigation 466 – GOC questionnaire*, (Exhibit AUS-18), section A-4.
[359] *Railway Wheels Investigation 466 – GOC questionnaire*, (Exhibit AUS-18), section C-3.
[360] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 80-95.
[361] Australia's first written submission, paras. 182-191.
[362] Appellate Body Report, *Ukraine – Ammonium Nitrate*, paras. 6.87, 6.105 and fn. 308; Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.115.

Agreement.[363] Australia submits that the inclusion of the term "normally" must be given meaning and effect consistent with its ordinary meaning and the structure of Article 2.2.1.1.

246. The ADC found that the circumstances in which Masteel's cost of production was formed were not normal or ordinary. As such, the ADC was permitted under Article 2.2.1.1 to rely on data other than the steel billet cost component of Masteel's records to calculate the normal value of railway wheels.

7. Conclusion

247. China's AD claim 3 with respect to the railway wheels investigation must fail because it is based on a significant misunderstanding of the ADC's findings.

248. The ADC properly determined that the steel billet costs of Masteel were formed in circumstances that were not normal and ordinary. Accordingly, the ADC was not required, when determining Masteel's normal value, to use Masteel's recorded cost of steel billet.

249. Acting as an objective and unbiased authority, the ADC assessed the exporter's cost of production and made findings fully consistent with Article 2.2.1.1 of the Anti-Dumping Agreement.

D. AUSTRALIA ACTED CONSISTENTLY WITH ITS OBLIGATIONS UNDER THE ANTI-DUMPING AGREEMENT WHEN ASSESSING MASTEEL'S COSTS AT THE LEVEL OF STEEL BILLET – CHINA'S AD CLAIM 5

1. Introduction

250. China claims that the ADC acted inconsistently with its obligations under Articles 2.1, 2.2, and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 when it "considered and used a cost of an input, being a purchase cost of steel billet, where the exporter did not have such a cost in its financial records because steel billet was self-made by the exporter from raw materials including iron ore and coking coal."[364]

251. China explains that "AD claim 5.d deals with the issue of what a 'cost' is, in the records of an exporter, for the purposes of answering the question of whether the records 'reasonably

[363] Appellate Body Report, *Ukraine – Ammonium Nitrate*, paras. 6.87, 6.105 and fn. 308; Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.115.
[364] China's panel request, para. B.1.5.

reflect the costs associated with the production' of the product concerned" under Article 2.2.1.1 (i.e., the second condition in the first sentence of Article 2.2.1.1).[365] China then argues that the investigating authority's alleged failure to use the correct "cost" under Article 2.2.1.1 "infected its decision as to the proxy to use in the exporter's constructed normal value" for the purpose of Article 2.2.[366]

252. Similar to AD claim 3, China's claim 5.d is entirely predicated on a misunderstanding of the ADC's basis for relying on steel billet costs external to Masteel's records and is therefore incapable of establishing a *prima facie* case.

253. Furthermore, the ADC assessed Masteel's records and implemented its cost adjustment at the steel billet level rather than at the raw material level because an adjustment at that level of production was appropriate on the facts of this investigation. In particular:

- the ADC's investigation was guided by the information provided in Masteel's questionnaire responses;
- the ADC did not have access to verifiable and isolated raw material costs; and
- when calculating Masteel's cost of production, the ADC adjusted the reference data, being the purchase price of steel billet, to reflect the cost incurred for an integrated producer.

254. Based on the information available, the ADC found that steel billet was the appropriate point of comparison after a proper evaluation of the evidence on the record. An unbiased or objective investigating authority could have done the same.

2. AD claim 5.d lacks a clear legal basis

255. It is unclear from China's submission what it contends to be the legal basis for AD claim 5.d. China states that the measure in question was inconsistent with Articles 2.1, 2.2.1.1 and 2.2 of the Anti-Dumping Agreement.

256. China emphasises that "the relevant consideration when [the ADC is] considering a cost construction under Article 2.2, is to confine its consideration to 'the cost of production in

[365] China's first written submission, para. 308.
[366] China's first written submission, para. 312.

the country of origin.'"[367] To the extent that China's AD claim 5.d relates to Australia's obligation under Article 2.2. to assess costs "in the country of origin", Australia already addresses that obligation in the context of responding to China's AD claim 1 below.[368]

257. As for the portion of China's claim 5.d relating to Article 2.2.1.1, China argues that "AD [C]laim 5.d deals with the issue of what a 'cost' is, in the records of an exporter, *for the purposes of answering the question of whether the records 'reasonably reflect the costs associated with the production' of the product concerned*" under Article 2.2.1.1."[369] China asserts:

> [The ADC's] consideration of the second condition in the first sentence of Article 2.2.1.1 can be faulted because it did not consider the actual costs "*genuinely related to the production and sale of the product under consideration*". In this context Masteel's actual costs were the costs of raw materials for its own production of steel billet.[370]

258. This argument has no merit as it rests on the second condition of Article 2.2.1.1, which was not the basis for the ADC's decision. As Australia has demonstrated above,[371] the ADC resorted to information external to Masteel's records pursuant to a finding under the "normally" limb of Article 2.2.1.1. It did *not* do so pursuant to a finding under the second condition. China does not make any argument whatsoever (in AD claim 5.d or elsewhere) contesting the ADC's ability to adjust Masteel's costs under the "normally" component of Article 2.2.1.1.

259. Notwithstanding China's misunderstanding of the ADC's findings and a failure to set out a valid legal basis for its AD claim 5.d, Australia demonstrates below why, on the facts of the railway wheels investigation, it was appropriate to assess Masteel's records and then implement a cost adjustment at the level of steel billet.

[367] China's first written submission, para. 293.
[368] Australia's first written submission, paras. 276-312.
[369] China's first written submission, para. 308 (emphasis added).
[370] China's first written submission, para. 282.
[371] Australia's first written submission, paras. 175-181.

3. The ADC chose steel billet based on the information provided by Masteel

260. China argues that the ADC erred by assessing Masteel's records at the level of steel billet because Masteel self-produced steel billet, so Masteel never incurred a cost to purchase steel billets and such costs were not reflected in Masteel's records.[372]

261. China's argument is specious because the ADC, in deciding to assess Masteel's records at the level of steel billet, was guided by Masteel's presentation of its own cost records. Masteel provided a breakdown, on a cost basis, of the most significant production steps involved in manufacturing the finished goods as follows: (i) steel billet cost of manufacture; (ii) blank wheel cost of manufacture; and (iii) finished wheel cost of manufacture.[373] Masteel's questionnaire response specifically identified the steel billet cost for the goods exported to Australia.[374] Additionally, the steel billet cost was listed as the primary input into the finished goods.[375]

262. The exporter questionnaire issued to Masteel requested detailed cost data for upstream inputs.[376] Masteel was asked to list major raw material costs that individually accounted for 10% or more of the total production cost.[377] For each major input, Masteel was asked to: (i) identify materials sourced in-house and from associated entities; (ii) identify the supplier; and (iii) show the basis of valuing the major raw materials in the costs of production (e.g. market prices, transfer prices, or actual cost of production). Masteel was further instructed that if a major input was sourced as part of an integrated production process, the company was to provide detailed information on the full costs of production of that input.

263. Masteel's questionnaire response stated the following:

> *The product under consideration is made from blank wheel which is produced by Ma Steel using steel billet*. And steel billet is also made by Ma Steel from iron ore. Iron ore is purchased from suppliers. Information regarding raw materials, suppliers and purchases in the IP is provided in spreadsheet 13-Raw Materials Purchase.
>
> Raw materials purchased from outside are valued at the purchasing prices. During the IP, Ma Steel purchased some iron ore from [[**BCI:** [redacted]

[372] China's panel request, para. B.1.5.
[373] [[[redacted] (Exhibit AUS-39 (BCI))]].
[374] [[[redacted] (Exhibit AUS-39 (BCI))]].
[375] [[[redacted] (Exhibit AUS-39 (BCI))]].
[376] *Railway Wheels – Masteel Questionnaire*, (Exhibit AUS-12), section G-6.
[377] *Railway Wheels – Masteel Questionnaire*, (Exhibit AUS-12), section G-6.

>]]. It also purchased small amount of iron ore from [[**BCI:**]]. Steel scrap is purchased from [[**BCI:**]]. For more information, please refer to spreadsheet 13-Raw Materials Purchases. Ma Steel is a public company listed on Hong Kong Stock Exchange, hence the related party transactions between Ma Steel and suppliers must be assessed by independent financial consultant to ensure the fairness. Whether it is related or unrelated purchase of raw materials, the price of which is at fair value.
>
> *The costs of steel billets and blank wheels are the actual costs incurred.*
>
> In order to reflect detailed information regarding the production cost of the goods under consideration, three spreadsheets respectively for cost of manufacturing of steel billet, blank wheel and product under consideration are provided.[378]

264. Based on this response, Australia emphasises that:

- in Masteel's view, "[t]he costs of steel billets and blank wheels are the actual costs incurred."
- Masteel provided a spreadsheet[379] which contained a breakdown of the cost of manufacturing steel billet when it was asked to detail the costs of its major inputs for making railway wheels. [[**BCI:**]]
- Masteel's purchase prices for raw materials (coke, coking coal, iron ore, scrap steel coal etc.) were not specific to the cost of production of the railway wheels exported to Australia.

265. Thus, the ADC was guided by Masteel's presentation of its own cost records in which Masteel expressly acknowledged that "[t]he costs of steel billets and blank wheels are the actual costs incurred." After a proper evaluation of Masteel's responses and all the record evidence, the ADC found that steel billet was an appropriate point for the ADC to test whether, and to what extent, the identified circumstances that were not normal and ordinary translated to Masteel's costs, and eventually the appropriate level at which to implement a cost adjustment.

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[378] [[(Exhibit AUS-12 (BCI))]], emphases added.
[379] [[(Exhibit AUS-39 (BCI))]].

4. The ADC did not have access to verifiable and isolated upstream raw material costs

266. Masteel's questionnaire response specifically identified the steel billet cost for railway wheels exported to Australia.[380] By contrast, Masteel's reported upstream raw material costs were not specific to railway wheels exported to Australia.[381] Masteel produced other goods using the same inputs. This meant that the information provided by Masteel was not sufficiently detailed to enable the ADC to undertake a proper comparison against reported upstream raw material costs.

267. Moreover, Masteel sourced different raw materials from different suppliers, and different grades/specifications of raw material inputs from each supplier, which means the ADC was unable to directly compare purchase prices between its suppliers. This was further complicated by the fact that significant proportions of the upstream materials (coking coal and steel scrap) were all affected by SOE-involvement (as upstream input suppliers).[382] Therefore, it was not practicable for the ADC to assess costs at the level of each individual primary material input, particularly when an alternative reasonable approach – assessing Masteel's costs at the steel billet level – was possible on the basis of the existing record.

268. Similarly, as discussed above,[383] the ADC found that the steel and steel inputs markets in China were structurally and systemically imbalanced, impacting costs at various stages of the railway wheels production process. If the ADC had accepted the costs of raw materials inputs as reflected in Masteel's records, then, based on its structural and systemic imbalance findings, the ADC would have accepted distorted raw material input costs as the basis for calculating normal value. This would not have been appropriate in light of the ADC's findings, including that certain inputs were produced at below cost-recovery rates.

269. Accordingly, the ADC decided to assess Masteel's recorded costs, and in turn, adjust Masteel's cost for the purpose of constructing normal value, at the level of steel billet.[384]

[380] [[(Exhibit AUS-39 (BCI))]].
[381] [[(Exhibit AUS-22 (BCI))]].
[382] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 84-87.
[383] Australia's first written submission, paras. 192-229.
[384] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 102.

5. The ADC adjusted Valdunes' purchase price of steel billet when calculating Masteel's cost of production to reflect the cost incurred for an integrated producer

270. As part of its AD claim 5.d, China also argues that the ADC erred by using arm's length third party cost of purchased steel billet as a reference point given that Masteel was an integrated producer that self-produced steel billet, and therefore, the purchase cost of steel billet was not a part of its records. However, the ADC adequately considered this issue during the investigation and tailored its adjustments to Masteel's steel billet costs to reflect Masteel's operations.

271. The ADC assessed that it was reasonable to adjust the steel billet costs of another respondent in the ADC's investigation, Valdunes, by removing certain purchasing expenses incurred by a separate steel company, ArcelorMittal.[385] The ADC made this adjustment to reflect that Valdunes incurred costs to purchase steel billet, whereas Masteel did not (as an integrated producer). Australia explains below why, on the basis of the information available, this combination of Valdunes' and ArcelorMittal's data was the most appropriate reference point for this adjustment.[386]

272. In sum, the ADC properly evaluated the facts and evidence and determined that steel billet was the appropriate level at which to adjust Masteel's cost of production. As part of this evaluation, the ADC ensured the steel billet reference data was appropriately adjusted to reflect the fact that Masteel self-made steel billet.

6. Conclusion

273. The Panel should find that China's AD claim 5.d fails to establish a *prima facie* case as it is premised on a misunderstanding of the ADC's findings and presupposes that the ADC rejected Masteel's steel billet costs under the second condition of Article 2.2.1.1. Given that the ADC did no such thing, China's claim is misplaced and should be rejected at the outset.

274. Further, the ADC was justified in adjusting Masteel's costs at the steel billet level. In making its adjustment at this level, the ADC was guided by Masteel's presentation of its own cost records, in which Masteel elected to report its costs to the ADC on the basis of steel billet. It also would have been neither practicable nor appropriate for the ADC to assess costs at the

[385] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 99.
[386] Australia's first written submission, paras. 289-292.

level of upstream inputs, given the manner in which Masteel reported its raw material costs, and the prevalence of upstream SOE involvement.

275. The ADC therefore reasonably decided that steel billet was the appropriate point of comparison after a proper evaluation of the evidence on the record.

E. AUSTRALIA ACTED CONSISTENTLY WITH ITS OBLIGATIONS UNDER ARTICLE 2.2 BY CORRECTLY DETERMINING THE COST OF PRODUCTION IN THE COUNTRY OF ORIGIN – CHINA'S AD CLAIM 1

1. Introduction

276. China claims that Australia acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because, according to China, Australia calculated normal value in a manner that did not reflect the cost of production of railway wheels in China (the country of origin). As previously addressed, China contends that the ADC did not employ certain costs reflected in Masteel's records.[387]

277. China's claim is limited to challenging the ADC's approach to determining the cost of a single (but important) input in Masteel's production process: steel billet. China challenges the ADC's decision to use the French producer, Valdunes' purchase price of steel billets as reference data for calculating Masteel's steel billet costs. China contends that Australia failed to determine cost of production in the "country of origin" for the purpose of Article 2.2, because the ADC used out-of-country pricing data to ascertain an appropriate cost of steel billet used in Masteel's production of railway wheels.[388]

278. Australia submits that, contrary to China's claim, the ADC determined the cost of production of railway wheels in a manner consistent with its obligations under Article 2.2 of the Anti-Dumping Agreement. This is because:

- Article 2.2 does not preclude the use of out-of-country data. Indeed, the Appellate Body and prior panels have considered it permissible in certain situations to use "out-of-country" data for the purpose of determining the cost of production in the country of origin under Article 2.2;

[387] China's panel request, para. B.1.1.
[388] China's panel request, para. B.1.1.

- It was appropriate on the facts of the investigation for the ADC to calculate the cost of steel billet in China with reference to out-of-country data; and
- the ADC made necessary adjustments based on the information available to adapt the out-of-country data to Masteel's circumstances in China.

2. "Out-of-country" data may be used for the purpose of determining the cost of production in the country of origin under Article 2.2

279. Australia agrees with China's submission that Article 2.2 provides an overarching obligation relating to investigating authorities' determination of normal value.[389] Australia likewise agrees with China that it is particularly relevant that in *EU – Biodiesel (Argentina),* the Appellate Body specifically pointed out that, even though Article 2.2 "does not specify precisely to what evidence an authority may resort", an investigating authority may not "simply substitute the costs from outside the country of origin for the 'cost of production in the country of origin'".[390] The Appellate Body further observed:

> Indeed, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of the "cost of production […] in the country of origin". Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin".[391]

280. For completeness, Australia extracts below other relevant parts of the Appellate Body's report in *EU – Biodiesel (Argentina)*:

> We observe that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin. An investigating authority will naturally look for information on the cost of production "in the country of origin" from sources inside the country. *At the same time, these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country.*[392]
>
> In circumstances where the obligation in the first sentence of Article 2.2.1.1 to calculate the costs on the basis of the records kept by the exporter or producer under investigation does not apply … an investigating authority may have recourse to alternative bases to calculate some or all such costs. Yet, Article 2.2 does not specify precisely to what evidence an authority may resort. *This suggests that, in such circumstances, the authority is not prohibited*

[389] China's first written submission, para. 96(b).
[390] Appellate Body Report*, EU – Biodiesel (Argentina)*, para. 6.73.
[391] Appellate Body Report*, EU – Biodiesel (Argentina)*, para. 6.73.
[392] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.

> *from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence.*[393]

281. Thus, for the purpose of Article 2.2, both Australia and China appear to agree with the Appellate Body's observations in *EU – Biodiesel (Argentina)*. The Appellate Body opined that using out-of-country data *is* permissible, recognising that in circumstances where the obligation in the first sentence of Article 2.2.1.1 does not apply, an investigating authority may have recourse to alternative bases to calculate costs.[394]

282. The ADC's use of out-of-country reference data was, therefore, consistent with its obligations under Article 2.2, and consistent with the interpretation of those obligations by prior panels and the Appellate Body. The ADC decided to calculate the cost of steel billet with reference to out-of-country data *because* that data was suitable to determine the cost of production *in China.*[395]

283. Contrary to China's arguments, the ADC did not simply substitute the steel billet costs in Masteel's records with out-of-country data. The ADC considered a range of options and, after properly evaluating the relevant information, selected Valdunes' purchase price for steel billet. The ADC adjusted this data to reflect certain characteristics of Masteel's production operation in China precisely because the relevant data could generate an appropriate proxy for the cost of production of railway wheels in China.

3. Australia used "out-of-country" data to be able to determine the cost of production in the country of origin

284. As comprehensively addressed in relation to AD claims 3 and 5 above, the ADC determined in its investigation of Masteel's cost of production that its steel billet costs were formed in circumstances that were not normal or ordinary. The ADC determined that it could not rely on Masteel's recorded costs for this input (or the raw materials that went into this input). As such, the ADC was permitted to rely on data sources outside of China to calculate the cost of this input.

285. Consistent with Article 2.2 of the Anti-Dumping Agreement, the ADC had recourse to the information available to it and relied on the steel billet cost information submitted by

[393] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73, (emphases added).
[394] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.
[395] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 96-102.

another respondent manufacturer in the same investigation. For the purpose of constructing Masteel's normal value on this basis, the ADC stated:

> *In determining the cost of production in the country of origin*, the Commission's assessment is that the appropriate treatment for Masteel's steel input in the production of railway wheels in China, is to adjust Masteel's billet costs with reference to the difference between these costs, and the billet costs incurred by the French producer, Valdunes.
>
> The Commission then adjusted Valdunes' steel input cost by the SG&A expenses (as a proportion of total revenue) incurred by a similarly sized steel company, ArcelorMittal, as Masteel is an integrated producer and would not have incurred these expenses.[396]

286. Based on the available information, the ADC selected out-of-country data *because* they established a reasonable proxy for the cost of production for steel billet in China. This is because, *inter alia*:

- Valdunes' purchases were of the particular grade of micro alloyed steel used in the production of railway wheels exported to Australia;
- Valdunes' costs data had been verified for the exact same period of investigation; and
- Valdunes' costs did not reflect the Chinese market imbalances that impacted Masteel's costs at various stages of the production process.[397]

287. As such, Valdunes' steel billet costs were a well-tailored and appropriate proxy for Masteel's costs for the same input. Moreover, Valdunes' steel billet costs were not impacted by the structural and systemic imbalances in the Chinese markets for steel billet and related inputs, identified by the ADC and detailed in the preceding section.

288. Ultimately, the ADC relied on Valdunes' data as the reference point for calculating Masteel's steel billet cost because, after a proper evaluation of the facts available, those data were an appropriate starting point for determining the cost of steel billets consumed in the production of railway wheels in China.

[396] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 102 (emphasis added).
[397] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 102.

4. The ADC gave due consideration to adjusting Valdunes' cost data to Masteel's circumstances

(a) Adjustment to reflect the cost incurred for an integrated producer

289. As set out above,[398] the ADC took into consideration that Masteel was an integrated producer. This meant that the cost data for Valdunes, which was not an integrated producer, needed to be adjusted to reflect Masteel's production circumstances to ensure that this reference data was as accurate as feasible, based on the information available to the ADC.

290. To tailor Valdunes' data to Masteel's circumstances, the ADC adjusted Valdunes' steel billet costs to remove relevant sourcing costs, which Masteel would not have incurred as an integrated producer.[399] The ADC properly evaluated Masteel's records and assessed that it was reasonable to adjust Valdunes' steel input cost against the SG&A expenses (as a proportion of total revenue) incurred by the steel company, ArcelorMittal.[400]

291. ArcelorMittal's core business was the production and sale of steel products, and its SG&A expenses as a proportion of revenue was readily identifiable in its financial statements. By contrast, the other entities for which Masteel provided information were either more diversified businesses (in the case of Thyssenkrupp) or for which SG&A expenses were not readily identifiable in the financial statements of the entity (in the case of the Schmolz+Bickenbach group).[401]

292. The ADC also considered adjusting Valdunes' steel billet cost for an amount of profit but did not have appropriate reference data for such an adjustment.[402] The steel supplier from which Valdunes bought steel billet went into receivership during the investigation period.[403] The ADC determined that in those circumstances, it should not draw an inference that the company made profit on its billet sales.

[398] Australia's first written submission, paras. 270-272.
[399] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 99, 102.
[400] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 99.
[401] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 99.
[402] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 99.
[403] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 99.

(b) Masteel and the Government of China failed to provide sufficient information for any other adjustments to be made

293. China vaguely argues that the ADC's adjustments to account for Masteel's circumstances as an integrated producer were insufficient for the purpose of adapting out-of-country reference data "so as to be a cost of production in the country of origin".[404]

294. China's argument is misplaced because both Masteel and the Government of China failed to provide relevant information that could have enabled the ADC to undertake further adjustments despite having opportunities to do so. [405] At the time of the preliminary determination, the ADC identified that it did not have sufficient information at that stage of the investigation to make an adjustment for comparative differences.[406] Neither Masteel nor the Government of China made any subsequent submissions to address this lack of information.

295. During the investigation, the ADC considered whether Masteel enjoyed any comparative advantages that warranted a further adjustment to Valdunes' costs, stating in the SEF:

> To ensure that the costs used to establish the normal value is an amount that represents the costs of production in China, the Commission considered whether it is appropriate to adjust the steel input costs of the French manufacturer to take into account the comparative differences between the positions of the producers in China and France.[407]

296. However, the ADC found that "making of an adjustment for possible comparative advantages or disadvantages is not possible given the lack of information to quantify these advantages and disadvantages[.]"[408] The ADC did not have any information on the record that would have enabled it to isolate and quantify any distinct advantages of one producer over the other.[409]

[404] China's first written submission, para. 117.
[405] *Railway Wheels – GOC Response to SEF – Letter to ADC*, (Exhibit AUS-40).
[406] *Railway Wheels Investigation 466 – PAD*, (Exhibit AUS-19), p. 9.
[407] *Railway Wheels Investigation 466 – SEF*, (Exhibit AUS-16), p. 23.
[408] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 98.
[409] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 98.

297. In light of this, and after due consideration of the verified information available, the ADC concluded that the information available did not support any further adjustments.

5. The ADC did not "simply substitute" Masteel's records with out-of-country data

298. Contrary to China's arguments, the ADC did not "simply substitute" the steel billet component of Masteel's records with "costs from outside the country of origin" – in this case, Valdunes' purchase price of steel billet. As detailed in the preceding sections, the ADC adjusted Valdunes' cost to more narrowly reflect Masteel's production situation in China based on the information available.

299. The ADC also analysed a range of other potential adjustments in this regard, such as:

- the private domestic prices of steel billet in China;
- the import prices for steel billet in China; and
- other reference data to derive a proxy for steel billet in China.

300. The ADC did not proceed with these options because of the limitations discussed below, including the Government of China providing insufficient or incomplete information. Consequently, the ADC relied on the information that was available to it and that was appropriate to use on the facts of the investigation.

(a) Cost approach 1: private domestic prices

301. The ADC first considered whether private domestic prices within China for steel billet could be used as a reference point against which to assess the cost of steel billet recorded in Masteel's data. The ADC, however, did not employ the private domestic prices because:

- the ADC did not have access to private domestic prices for the particular grade of steel used for railway wheels exported to Australia;[410] and
- the ADC sought information from the Government of China regarding suppliers and prices of steel billet in China,[411] and the Government of China failed to

[410] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 101.
[411] *Railway Wheels Investigation 466 – GOC questionnaire*, (Exhibit AUS-18), section A-4.

provide information regarding suppliers of steel billet in China, as requested, or relevant information in relation to the selling prices of steel billet.[412]

302. The Government of China instead claimed that information requested for steel billet prices had "no relevance".[413]

303. The ADC therefore had insufficient information to proceed with this approach.

(b) Cost approach 2: import prices

304. The ADC next considered whether it could use steel billet import prices in China as a suitable reference point. In this regard, the ADC considered import data provided by the Government of China.[414] These import data, however, were high-level aggregated data based on generic tariff classifications for steel billet.[415] The data was not sufficiently specific to the grades of steel billet used in the production of railway wheels exported to Australia.

305. For context, Masteel had provided cost information for a variety of grades of steel billet and this information demonstrated that the cost to make for different grades of steel billet was substantially different. Thus, costing for a generic grade could not suitably serve as an alternative cost measure for the specialised grades of steel billet used in production of railway wheels exported to Australia.[416] Put simply, the particular micro-alloyed steel billet used by Masteel to produce the type of railway wheels exported to Australia was a specialised grade of steel, whereas the import data provided by the Government of China reflected *all* grades of imported steel billet.[417]

306. In view of the above, the ADC was unable to reasonably use import data in its calculation of Masteel's steel billet cost for purposes of constructing normal value.

[412] *Railway Wheels Investigation 466 – GOC questionnaire*, (Exhibit AUS-18), section C-3.
[413] *Railway Wheels Investigation 466 – GOC questionnaire*, (Exhibit AUS-18), section C-3.
[414] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 101.
[415] *Railway Wheels Investigation 466 – GOC questionnaire*, (Exhibit AUS-18), section B-5.
[416] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 101.
[417] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 101.

(c) Cost approach 3: external reference data to derive a proxy for steel billet in China

307. The ADC found that there was no published benchmark for the particular grades of steel consumed in the production of railway wheels exported to Australia. Accordingly, the ADC requested – and Masteel provided – a listing of all grades of semi-finished steel produced by Masteel, regardless of the end use of these semi-finished goods.[418]

308. The ADC then compared the grades and volumes of production for grades of steel produced by Masteel with grades available in price reporting services.[419] The ADC found that there was a grade of steel produced in significant quantities by Masteel during the investigation period for which pricing data was available in price reporting services. The available data reported prices for this grade in two forms: billet and slab. The ADC noted that Masteel had only produced slab in the particular grade covered by the pricing data, across the investigation period. [420] This meant that the ADC was unable to appropriately compare the cost incurred by Masteel with the published pricing data for billet.[421]

309. The ADC nevertheless compared Masteel's cost to make this grade of steel, adjusted to FOB terms using Masteel's verified inland transport costs, with Brazilian FOB prices for steel slab.[422] The ADC considered whether the difference in costs between Masteel's production of this grade of slab and the Brazilian FOB prices of the same grade of steel billet, could be used as a proxy to adjust Masteel's actual production costs of the micro-alloyed billet used in the production of the like goods.[423]

310. The ADC ultimately concluded that this approach was not preferred in the circumstances because the grade of steel to which the Brazilian FOB prices related was not used in the production of railway wheels exported to Australia.[424] The limitations in this alternative methodology were salient because the ADC had access to data (Valdunes' steel

[418] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 101.
[419] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 101.
[420] While this grade was produced by Masteel during the investigation period, it was not used in the production of wheels sold in the Australian market; *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 101-102.
[421] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 101.
[422] The ADC considered, of the available sources, that Brazil FOB prices may represent a competitive market cost for this particular grade of steel slab. These were sourced from Platts, a steel price benchmark service (*Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 101).
[423] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 101.
[424] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 101.

billet costs) that did, in fact, relate to the particular grade of steel used in the production of railway wheels exported to Australia.

311. Therefore, on balance, for all the reasons set out above, the ADC found that Valdunes' purchase price for steel billet was the most suitable proxy to assess the cost of production of railway wheels in China. Based on the information available, Valdunes' cost data were the only data that were specific to the particular grade of steel; for the same steel product, pertained to the same investigation period; and that were not affected by structural and systemic imbalances in the Chinese markets.

6. Conclusion

312. The ADC established, based on a proper evaluation of the facts, and after considering a range of options, that Valdunes' purchase price for steel billet was the most suitable reference point for calculating the cost of production of steel billet in China. The ADC adjusted that data to reflect Masteel's Chinese operation as an integrated producer of steel billet, relying on the information available. Australia therefore acted consistently with Article 2.2 of the Anti-Dumping Agreement in determining an appropriate cost of production in the country of origin.

F. AUSTRALIA ACTED CONSISTENTLY WITH ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT BY MAKING DUE ALLOWANCES TO ENSURE A FAIR COMPARISON BETWEEN THE EXPORT PRICE AND NORMAL VALUE – CHINA'S AD CLAIM 6.A

1. Introduction

313. China claims that Australia acted inconsistently with its obligations under Article 2.4 of the Anti-Dumping Agreement, with respect to all three investigations before the Panel, by failing to make due allowances to ensure a fair comparison between the export price and normal value.

314. China's AD claim 6.a is entirely, and impermissibly, premised on China's disagreement with Australia's construction of normal value, and not on any failure to make due allowances under Article 2.4.[425]

[425] China's first written submission, para. 322.

315. It is undisputed that the only provision relevant to China's AD claim 6.a is Article 2.4 of the Anti-Dumping Agreement. Australia notes China's brief commentary on the provision.[426] China appears to rely on the first and third sentences of Article 2.4 only.[427]

316. However, given China's AD claim 6.a arises exclusively from Australia's cost adjustment in its construction of normal value – which is already the subject of, *inter alia*, China's AD claim 1 and AD claim 3 under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement – China's AD claim 6.a under Article 2.4 should be rejected. As discussed below, there is no textual basis for China to challenge Australia's normal value calculation under Article 2.4.

317. In addition, the record shows that the ADC considered and applied adjustments to ensure the comparability of normal values to export prices.[428] China fails to specify what other type of adjustment(s) Australia could have made for "differences" which affect price comparability (by reference to the third sentence of Article 2.4). As such, China has failed to make out a *prima facie* claim that Australia acted inconsistently with Article 2.4.

2. AD claim 6.a lacks a legal basis

318. The crux of China's AD claim 6.a is that Australia's cost adjustment to determine constructed normal values generated disparities between normal value and export price, for which due allowances should have been made to ensure a "fair comparison" under Article 2.4 of the Anti-Dumping Agreement.[429] However, it is readily apparent that China's AD claim 6.a arises from the way in which Australia constructed normal value, as opposed to the comparison between normal value and export price.

319. Previous panels have noted the distinction between Articles 2.1 and 2.2 on the one hand and Article 2.4 on the other. They have observed that Article 2.4 is not concerned with the methodology for determining normal value:

> [I]t is evident that Article 2.4 concerns the comparison between the normal value and the export price and is not directed at what the panel in *Egypt – Steel Rebar* described as "the basis for and basic establishment of the export price and normal value", which it considered to be "addressed in detail in other provisions". Or, in the words of the *EU – Footwear (China)*

[426] China's first written submission, paras. 319-321.
[427] China's first written submission, paras. 332-334.
[428] See, for example, *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 25; China's first written submission, para. 331.
[429] China's first written submission, paras. 322, 327.

> panel: "*[n]othing in Article 2.4 suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements of the comparison to be made, that is, normal value and export price.*" Thus, the subject-matter of Article 2.4, i.e. differences affecting the comparability of the normal value and the export price, can be contrasted with that of Articles 2.1, 2.2 – including its subparagraphs – and 2.3 which pertain to the methodology for determining the normal value and the export price.[430]

320. In *EU – Biodiesel (Argentina),* Argentina's claim under Article 2.4 similarly arose from the methodology used by the EU investigating authority to determine normal value.[431] In particular, the "difference" that Argentina claimed affected price comparability between normal value and export price (such that due allowance allegedly should have been made in order to ensure a "fair comparison" under Article 2.4) arose from the decision of the EU investigating authority to replace the actual costs of soybeans in producers' records with what it considered to be an undistorted surrogate price in constructing normal value.[432] However, that decision had already been challenged by Argentina under Article 2.2.

321. The panel in that case found that Argentina had not established that the EU failed to make a "fair comparison" between the normal value and the export price, inconsistently with Article 2.4. The panel's finding was based on its view that the "difference" between normal value and export price was:

> not a "difference[] which affect[s] price comparability" within the meaning of Article 2.4 of the Anti-Dumping Agreement for which "[d]ue allowance" should have been made under that Article. It does not relate to a difference in the characteristics of the (actual or notional) domestic vs. export transactions being compared… Rather, *the alleged "difference" is one that arose exclusively from the methodology used to construct the normal value; it resulted from a methodological approach directed at remedying what the authority considered to be a distorted input cost, a matter that is primarily governed by Article 2.2 of the Anti-Dumping Agreement*.[433]

322. In the present case, there is no basis for China's allegations that Australia's cost adjustment resulted in a difference between normal value and export price that required an adjustment under Article 2.4.[434] China's argument is essentially the same as the one rejected

[430] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.296 (emphasis added, fns. omitted); Panel Report, *Egypt – Steel Rebar*, para. 7.333; Panel Report, *EU – Footwear (China)*, para. 7.263.
[431] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.300.
[432] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.300.
[433] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.301 (emphasis added). The panel further noted:
> the action of the investigating authorities that is at the heart of Argentina's Article 2.4 claim – the use of reference prices in the construction of normal value, rather than the prices actually paid by the investigated producers – is not one which was undertaken with a view to adjusting for a difference relating to some characteristic of the domestic transactions in comparison with the export transactions. (Panel Report, *EU – Biodiesel (Argentina)*, para. 7.305)

[434] China's first written submission, paras. 333-337.

by the panel in *EU – Biodiesel (Argentina)*, and the panel's reasoning in that case supports the view that no due allowance was required under Article 2.4.[435]

323. In its first written submission, China has acknowledged "views previously expressed by the Appellate Body that where the claimed Article 2.4 inconsistency stems from an incorrect determination of normal value it would be unnecessary to separately consider any non-compliance under Article 2.4."[436] Australia shares these views of the Appellate Body.

324. However, Australia does *not* agree with China's argument that, even if the Appellate Body has found it unnecessary to rule on a claim under Article 2.4, "that does not mean the failure to make such a due allowance for cost differences underlying the normal value and export price is not in itself in breach of the requirements under Article 2.4".[437] As discussed above, previous panels have rejected that Article 2.4 due allowances are required when the alleged "differences" affecting price comparability arose exclusively from the methodology applied to establish normal value. This Panel should do the same.

325. China's AD claim 6.a under Article 2.4 must accordingly be rejected.

3. The ADC properly made due allowances in the railway wheels investigation consistent with Article 2.4

326. Even if the Panel finds that the basis of China's claim under Article 2.2 is proper, China has failed to establish that Australia acted inconsistently with Article 2.4 in the railway wheels investigation.

327. First, China has already acknowledged in its first written submission that, consistent with Article 2.4, "the Australian investigating authority applied adjustments (in the sense of due allowances) for differences in packaging, logistical expenses, bank charges and credit expenses."[438] These adjustments are not challenged by China. China's claim is limited to its allegation that no allowance was made for the differences between normal value and export price generated by the use of steel billet costs from a French producer in the construction of normal value.

[435] See also Appellate Body Report, *Ukraine – Ammonium Nitrate*, fn. 419.
[436] China's first written submission, para. 336; Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.89.
[437] China's first written submission, para. 336 (fn. omitted).
[438] China's first written submission, para. 331; *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 25.

328. Second, a fair comparison in Article 2.4 logically presupposes that the elements to be compared – normal value and export price – have already been established under, *inter alia*, Article 2.2.[439] Article 2.4 is only concerned with making appropriate adjustments unrelated to the construction of normal value pursuant to Article 2.2. In the railway wheels investigation, the ADC made an adjustment under Article 2.2 to take account of the fact that Masteel was a vertically integrated steel billet producer. Specifically, the ADC accounted for the fact that Masteel would not incur any SG&A expenses in the data relied on to calculate Masteel's steel billet cost.[440] The ADC correctly made this adjustment under Article 2.2 in the context of constructing Masteel's normal value. Accordingly, China's claim that "[t]he Australian investigating authority did not make any allowances to address the differences and disparities between normal value and export price generated by the surrogated and inflated costs of production *adopted for the calculation of normal values*"[441] is both inconsistent with the law and unsupported by the facts. For this additional reason, China's challenge to this adjustment under Article 2.4 is without merit and should be rejected.

329. Third, although an investigating authority has the obligation of ensuring a "fair comparison," the exporter (i.e., the party seeking an adjustment) bears the burden of substantiating its requests for adjustments.[442] If adequate factual support or explanation is not provided by an exporter for a particular adjustment, then there is no obligation for the authority to make an adjustment. While it had the opportunity to do so, Masteel failed to specify the further type of adjustment(s) the ADC could have made to account for alleged "differences" between the constructed normal value and export price as a consequence of the ADC's decision to rely on Valdunes' cost of steel billet.

330. Finally, one of the reasons the ADC resorted to using the steel billet purchase cost incurred by Valdunes as part of its normal value calculation under Article 2.2 was because Masteel's records "reflect[ed] the government influence by the [Government of China] which distort[ed] the costs in the steel and steel input markets in China."[443] Against this background, China's argument that there should have been an adjustment under Article 2.4 for

[439] Panel report, *EU – Footwear (China)*, para. 7.263.
[440] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 99.
[441] China's first written submission, para. 327 (emphasis added).
[442] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.116.
[443] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 24-25.

"differences" in costs between the Chinese exporter and the French producer is circular, as this approach would have required the ADC to revert back to the very costs in the steel and steel input markets in China that the ADC already found to be distorted for the reasons set forth above.[444]

4. Conclusion

331. In view of the above, the Panel must reject China's AD claim 6.a under Article 2.4 as it pertains to railway wheels. Australia's cost adjustment did not result in a difference between normal value and export price that required an adjustment under Article 2.4. The ADC already considered and applied adjustments to ensure the comparability of normal values to export prices based on the evidence tendered in the railway wheels investigation. China has failed to specify what further type of adjustment(s) Australia could have made and, as such, has failed to show how Australia acted inconsistently with Article 2.4.

G. AUSTRALIA DETERMINED AMOUNTS FOR PROFITS CONSISTENT WITH ARTICLE 2.2.2(I) OF THE ANTI-DUMPING AGREEMENT – CHINA'S AD CLAIM 7.B

1. Introduction

332. China claims that Australia acted inconsistently with Articles 2.1, 2.2 and 2.2.2 and Article VI:1 of the GATT 1994 because, in the context of constructing normal value:

a. the profit rate was allegedly not determined on the basis of the exporter's sales in the domestic market of the country of origin; and

b. the profit rate assessed on sales to all destinations was applied to an allegedly fabricated cost of production and not to the Chinese exporter's recorded cost of production in the country of origin.[445]

333. As a preliminary matter, China's second allegation that the computed profit rate was applied to an allegedly fabricated cost basis is entirely contingent on China's argument that the ADC improperly derived Masteel's costs, as addressed above in relation to China's AD claims 1 and 3. As demonstrated above, the ADC's calculation of Masteel's costs was consistent with the Anti-Dumping Agreement, and the ADC's application of the computed

[444] Australia's first written submission, paras. 192-229.
[445] China's first written submission, paras. 431-432.

profit rate (discussed in this section) was likewise consistent with Australia's Anti-Dumping Agreement obligations.

334. In relation to the ADC's determination of the profit amount for railway wheels, Australia and China agree on the following points:

a. The operative provision is Article 2.2.2 of the Anti-Dumping Agreement;[446]

b. The ADC relied on Article 2.2.2(i)[447] – being an alternative to the method provided for in the *chapeau* of Article 2.2.2[448] – to make its determination, based on the ADC's uncontested finding that Masteel did not sell like goods in China in the investigation period;[449] and

c. Under Article 2.2.2(i), Australia was required to use actual amounts incurred and realised by Masteel from the sale of the same general category of goods – other types of railway wheels – in the Chinese domestic market.[450]

335. China's allegation that the ADC's determination is inconsistent with Article 2.2.2(i) turns on an objection to the ADC's use of sales figures from Masteel's "Wheels Division", which included Masteel's sales in both the domestic and export markets. According to China, Australia should have included only domestic sales figures in its calculation.

336. No *prima facie* violation has been shown by China. The ADC used the best available verified information it could obtain from Masteel on the actual amounts it had incurred and realised from the sale of railway wheels in the Chinese domestic market.

2. The ADC determined the amount for profits based on Masteel's actual sales

337. To determine amounts for profits, the ADC requested Masteel to provide detailed cost and sales data for railway wheels sold in the domestic market. In its questionnaire response, Masteel provided a table titled "Sales Summary", which included sales figures of all railway wheels from Masteel's "Wheels Division".[451] Masteel also confirmed that, although it

[446] China's first written submission, paras. 422-423.
[447] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 25; China's first written submission, para. 430.
[448] China's first written submission, para. 423.
[449] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 23.
[450] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 25; *Railway Wheels Investigation 466 Visit Report - Maanshan Iron and Steel Co Ltd*, (Exhibit CHN-40), p. 14.
[451] [[(Exhibit AUS-41 (BCI))]].

did not sell like goods in China in the investigation period, Masteel did manufacture and sell other types of railway wheels in the Chinese domestic market.[452]

338. Subsequently, the ADC visited Masteel in China to verify the information that Masteel had provided. The ADC was satisfied that the sales figures from Masteel's "Wheels Division" were accurate.[453] The ADC then used the verified costs for sales of railway wheels in Masteel's "Wheels Division" to determine an actual percentage of profit.[454]

339. At no point during the verification process or the investigation did Masteel or the Government of China raise any concerns or objections to the method by which Australia determined amounts for profit, despite having the opportunity to do so. For example:

a. After the verification process described above, the ADC set out its profit calculations in its visit report;[455]

b. The ADC provided Masteel a copy of the preliminary dumping margin calculations for review, prior to the publication of the SEF; and

c. The ADC also referred to its method for determining amounts for profits in the SEF, which was published and provided ample time to both Masteel and China to raise methodological concerns before the ADC's final determination was due.[456]

340. Finally, the ADC set out in the *Railway Wheels Investigation 466 Report* its determination of profits for the purpose of calculating constructed normal value.[457]

341. The ADC used Masteel's actual sales data to compute the profit component of normal value using railway wheels from Masteel's "Wheels Division" as its basis. The ADC was transparent about its intent to do so with Masteel, providing several opportunities for Masteel to comment on that calculation. Masteel did not raise any concerns.

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[452] *Railway Wheels – Masteel Questionnaire*, (Exhibit AUS-12), section C-3.
[453] *Railway Wheels Investigation 466 Visit Report – Maanshan Iron and Steel Co Ltd*, (Exhibit CHN-40), pp. 9-11.
[454] [[(Exhibit CHN-48 (BCI))]].
[455] *Railway Wheels Investigation 466 Visit Report – Maanshan Iron and Steel Co Ltd*, (Exhibit CHN-40), p. 11; [[(Exhibit CHN-48 (BCI))]].
[456] *Railway Wheels Investigation 466 – SEF*, (Exhibit AUS-16), p. 25; [[(Exhibit AUS-42 (BCI))]].
[457] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 25; [[(Exhibit CHN-49 (BCI))]]; China's first written submission, para. 426.

3. The ADC determined amounts for profits consistent with Article 2.2.2(i)

342. The ADC determined amounts for profits using the best available verified information it could obtain from Masteel on the actual profits it had incurred and realised from the sale of railway wheels in China's domestic market. China's allegation that Australia did not determine amounts for profits on the basis of actual amounts incurred and realised by Masteel in China's domestic market is inconsistent with evidence on the record. China has failed to make a *prima facie* case that the ADC erred in its evaluation of the record evidence to determine the amounts for profits, or that the ADC's determination was inconsistent with Anti-Dumping Agreement Article 2.2.2(i).

343. In the alternative, China's allegation that the ADC improperly applied its calculated profit rate to the steel billet cost data is entirely contingent on China's earlier claims, in particular AD claim 1. As discussed above, the ADC properly calculated Masteel's costs under the ADA, and the ADC's application of the profit rate to those costs was likewise consistent with Australia's Anti-Dumping Agreement obligations. In short, China failed to make a *prima facie* case for China's AD claim 1 and, consequently, also failed to make a *prima facie* case for China's AD claim 7.b.

H. AUSTRALIA ACTED CONSISTENTLY WITH ITS OBLIGATIONS UNDER ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT WHEN ASSESSING MASTEEL'S COSTS AT THE LEVEL OF STEEL BILLET – CHINA'S AD CLAIM 8

344. China's claim under Article 9.3 of the Anti-Dumping Agreement is entirely dependent on the Panel finding that Australia acted inconsistently with Article 2 with respect to the ADC's determination of "normal value" for railway wheels exported by Masteel to Australia.

345. Australia has demonstrated above that the ADC's determination of "normal value" for Masteel was consistent with Article 2 of the Anti-Dumping Agreement. China's claim under Article 9.3 of the Anti-Dumping Agreement must therefore also fail.

I. CONCLUSION

346. For the foregoing reasons, Australia respectfully requests that the Panel reject China's claims under the Anti-Dumping Agreement as they pertain to the ADC's investigation of railway wheels.

V. CONDITIONAL RESPONSE TO AD CLAIMS: STAINLESS STEEL SINKS

A. INTRODUCTION

347. China makes ten claims under the GATT 1994 and the Anti-Dumping Agreement regarding Investigation 238.

348. Australia's primary submission is that neither Investigation 238, nor the subsequent interim reviews and Continuation 517, are within the Panel's terms of reference.[458] Because these jurisdictional questions go directly to whether the Panel may adjudicate China's claims on these measures in their entirety, the Panel should decide them at an early stage. As such, Australia's further submissions set forth in this section are presented in the alternative. They need only be considered if the Panel were to find, contrary to Australia's submissions, that Investigation 238, Continuation 517 or the interim reviews fall within its terms of reference.

349. Even if Investigation 238, Continuation 517 or the interim reviews were properly before the Panel, China's claims are without merit.

350. In respect of a subset of its claims, those relating to the interim reviews and Continuation 517 with respect to AD claims 1, 3, 4 and 7(a), China has not advanced any arguments in its first written submission. China makes no reference to the interim reviews or Continuation 517 at all in its first written submission on AD claims 1, 3, 4, and 7(a).[459] Further, in framing AD claims 1, 3, 4, and 7(a), China contests the use of one type of out-of-country price data as a reference point only: the MEPS-based average price for 304 SS CRC using the monthly reported MEPS North American and European prices.[460] The ADC employed this reference point only for Investigation 238. In the interim reviews and Continuation 517, the ADC employed a separate reference point: the SBB Platts Benchmark.[461]

[458] Australia's first written submission, paras. 116-134.
[459] For AD claim 1: China's first written submission, paras. 7, 86-90, 114. For AD claims 3 and 4: China's first written submission, paras. 10, 13, 174-181, 199, 208, 220-224, 229, 238, 242-245, 251-254. For AD claim 7(a): China's first written submission, paras. 16, 398-401, 417-419.
[460] China's first written submission, paras. 7, 10, 87-89, 114, 180, 243, 400.
[461] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 52-54; *Stainless Steel Sinks Review 352 Report*, (Exhibit CHN-17), p. 14; *Stainless Steel Sinks Review 459* Report, (Exhibit CHN-22), p. 15; *Stainless Steel Sinks Review 461 Report*, (Exhibit 461), p. 23.

351. Accordingly, the Panel should confine its assessment of China's AD claims 1, 3, 4, and 7(a) to Investigation 238. Where a party has not advanced any arguments in support of a claim the Panel may not uphold it.[462]

352. In this section Australia will address each of the claims in the order that reflects the ADC's analysis in Investigation 238. Australia has adopted China's numbering of its claims for ease of reference between the parties' submissions.

B. CHINA'S FACTUAL SUMMARY OMITS A KEY FACTOR

353. China's summary of Investigation 238[463] conspicuously does not mention a key factor that shaped the course of the investigation and the ADC's findings: the Government of China's failure to provide information requested by the ADC that was relevant to the ADC's decision-making in the investigation. The Government of China was provided with, but chose not to take up, opportunities to meaningfully participate in Investigation 238.

354. First, the ADC notified the Government of China of the investigation's initiation and provided details on how to access the ADC's report of its consideration of the application.[464] The ADC's consideration report stated that the application from the Australian applicant, Tasman, "provided reasonable grounds to cause it to investigate the reasonableness of the costs of cold-rolled stainless steel incurred by the exporters of deep drawn stainless steel sinks and the reasonableness of replacing these costs in determining exporters' cost to make the goods."[465] The Government of China did not respond to the ADC's notification.

355. Subsequently, the ADC issued to the Government of China a questionnaire about the topics raised in the application, including:[466]

[462] Panel Reports, *India – Additional Import Duties*, paras. 7.402-7.418; *Egypt – Steel Rebar*, para. 7.30; *US – Zeroing (Japan) (Article 21.5 – Japan)*, fn. 16; *US – Sale of Clove Cigarettes*, paras. 7.11, 7.518.
[463] China's first written submission, paras. 45-60.
[464] See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 29*; Email and letter from ADC to MOFCOM, dated 18 March 2014,* (Exhibit AUS-43) notifying the Government of China of *Stainless Steel Sinks Investigation 238 Consideration Report*, Exhibit (CHN-59). For the countervailing aspect of the application, the ADC invited the Government of China to participate in consultations. The Government of China declined to participate in consultations on the countervailing application. See *Stainless Steel Sinks Investigation 238 Consideration Report*, (Exhibit CHN-59), p. 34.
[465] *Stainless Steel Sinks Investigation 238 Consideration Report*, (Exhibit CHN-59), p. 29. See *Email and letter from ADC to MOFCOM, dated 18 March 2014,* (Exhibit AUS-43) notifying the Government of China of *Stainless Steel Sinks Investigation 238 Consideration Report*, (Exhibit CHN-59).
[466] *Stainless Steel Sinks Investigation 238 – GOC Questionnaire*, (Exhibit AUS-44).

- the nature and structure of the stainless steel sinks industry, the cold-rolled stainless steel industry in China[467] and other relevant upstream industries, including distribution channels, any vertical integration, and changes over the past 5 years such as mergers and acquisitions;[468]
- the ownership structure of the Chinese deep drawn stainless steel sinks industry and cold-rolled stainless steel industry, identifying what proportion of the industry is represented by state-invested enterprises, state-owned enterprises, foreign-invested enterprises, and Chinese domestic-owned private enterprises;[469]
- Government departments, agencies or institutions that are involved in the manufacture, sale, purchase, or acquisition of deep drawn stainless steel sinks and cold-rolled stainless steel, and the nature of their involvement;[470]
- manufacturers, importers, traders and exporters of cold-rolled stainless steel in China, including whether the Government of China is a shareholder or is represented in the business;[471]
- Government guarantees, debt or equity instruments issued by the Government of China to businesses associated with the production of stainless steel sinks;[472]
- import and export data pertaining to the volume and value of iron ore, coking coal, coke, scrap steel, chromium, cold-rolled stainless steel, and deep drawn stainless steel sinks;[473]

[467] *Stainless Steel Sinks Investigation 238 – GOC Questionnaire*, (Exhibit AUS-44), p. 9. See Section A General Questions, Questions 1 and 2.
[468] *Stainless Steel Sinks Investigation 238 – GOC Questionnaire*, (Exhibit AUS-44), p. 12. See Section B Market Situation, Question 5.
[469] *Stainless Steel Sinks Investigation 238 – GOC Questionnaire*, (Exhibit AUS-44), p. 10. See Section A General Questions, Questions 4 and 5.
[470] *Stainless Steel Sinks Investigation 238 – GOC Questionnaire*, (Exhibit AUS-44), p. 12. See Section B Market Situation, Questions 3 and 4.
[471] *Stainless Steel Sinks Investigation 238 – GOC Questionnaire*, (Exhibit AUS-44), p. 10. See Section A General Questions, Question 6.
[472] *Stainless Steel Sinks Investigation 238 – GOC Questionnaire*, (Exhibit AUS-44), p. 15. See Section B Market Situation, Questions 11 and 12.
[473] *Stainless Steel Sinks Investigation 238 – GOC Questionnaire*, (Exhibit AUS-44), pp. 12-13. See Section B Market Situation, Question 6.

- Government of China initiatives and/or policies, including the Price Law of the People's Republic of China, that affect the deep drawn stainless steel sinks industry, including raw materials such as iron ore, coking coal, coke, chromium, chromite, ferrochrome, or scrap steel;[474] and
- any key changes to the following policies/catalogues/plans of the Government of China, including:
    - the National Steel Policy;
    - A Blueprint for Steel Industry Adjustment and Revitalization;
    - Directory Catalogue on Readjustment of Industrial Structure;
    - 11th and 12th Five Year Plans for the Iron and Steel Industry.[475]

356. The above aspects of the questionnaire related to the Australian applicant's allegations that:

- "One cause of "artificially low pricing" in the Chinese deep drawn stainless steel sink market relates to the Chinese government's involvement in the domestic market which has materially distorted competitive conditions, in terms of input costs. Specifically, the Australian industry alleges that the acquisition of the key raw material input; namely, cold-rolled stainless steel sheet; from State Owned (or Invested Enterprises (SOEs or SIEs) occurs at less than fair market value. Therefore, the presence of Government owned (or invested) enterprises are distorting competitive conditions and leading to artificially low prices or prices that are not substantially the same as they would be if they were determined in a competitive market" (sic);[476]

[474] *Stainless Steel Sinks Investigation 238 – GOC Questionnaire*, (Exhibit AUS-44), pp. 15-16. See Section B Market Situation, Questions 17 and 19.
[475] *Stainless Steel Sinks Investigation 238 – GOC Questionnaire*, (Exhibit AUS-44), pp. 15-16. See Section B Market Situation, Questions 18 and 20.
[476] *Stainless Steel Sinks Investigation 238 - Domestic Industry Application*, (Exhibit CHN-11), pp. 54-55. This response was provided to all questions under the heading in the application form "B-3 Selling price (normal value) in the exporter's domestic market".

- there is an "absence of appropriate domestic benchmark prices of cold-rolled stainless steel sheet in China";[477] and
- "normal values ought properly be determined pursuant to a construction of the exporters costs of production".[478]

357. The breadth of the applicant's allegation, and the ADC's consideration report, placed the Government of China on notice that the ADC was considering both the existence of any particular market situation and whether the exporters' recorded costs reasonably reflected the cost associated with the production and sale of the product under consideration.

358. The ADC provided the Government of China with additional time to respond to its reasonable inquiries.[479] The ADC also notified China that its response to the questionnaire "must be fully complete in accordance with the requirements of the questionnaire".[480]

359. Notwithstanding this clear notice, the Government of China's response to these important inquiries was "limited and incomplete."[481] Specifically, the ADC found that the Government of China:

> … *declined to provide direct responses to the questions posed in Parts A and B*, which are considered particularly relevant to the assessment of the alleged market situation in the Chinese deep drawn stainless steel sinks market and *the assessment of the reasonableness of the cost of stainless steel incurred by Chinese exporters of the goods*.[482] The record demonstrates that the Government of China did not provide the information requested, even when the ADC notified interested parties, including the Government of China, through Preliminary Affirmative Determination 238 that "it must rely on all information reasonably available to it in order to make preliminary determinations in relation to the alleged particular market situation, as well as the preliminary assessment as to the reasonableness of the exporters' incurred costs".[483]

[477] *Stainless Steel Sinks Investigation 238 - Domestic Industry Application*, (Exhibit CHN-11), p. 56. This response was provided to all questions under the heading in the application form "B-3 Selling price (normal value) in the exporter's domestic market".
[478] *Stainless Steel Sinks Investigation 238 - Domestic Industry Application*, (Exhibit CHN-11), p. 57. This response was provided to all questions under the heading in the application form "B-3 Selling price (normal value) in the exporter's domestic market".
[479] See *Email from the ADC to Corrs Chambers Westgarth, dated 14 April 2014,* (Exhibit AUS-45); *Email from the ADC to Corrs Chambers Westgarth, dated 2 May 2014,* (Exhibit AUS-46).
[480] *Email from the ADC to Corrs Chambers Westgarth, dated 2 May 2014,* (Exhibit AUS-46).
[481] See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 30.
[482] See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 128; *Stainless Steel Sinks Investigation 238 – GOC Submission Response to PAD,* (Exhibit AUS-47).
[483] *Stainless Steel Sinks Investigation 238 – PAD,* (Exhibit AUS-48), p. 23, (emphases added). The ADC published Preliminary Affirmative Determination (PAD) 238 on the ADC Electronic Public Record on 13 August 2014.

360. After Preliminary Affirmative Determination 238, the Government of China provided further submissions to the ADC, but did not provide the omitted information.[484] Instead it asserted, amongst other things, that China "maintains a market economy and has a very competitive market for steel inputs whose prices are set by the market and not by the government and are not unduly influenced or artificially lowered by the government," and "policies and industry regulations are common and necessary in every country and are certainly legitimate and not incompatible with the operation of an undistorted market economy".[485] China referred to its submissions to the ADC in previous investigations, concerning different products and inputs.[486] This response did not address the allegations put forward by the Australian applicant concerning the Chinese cold-rolled stainless steel market. In particular, the Australian applicant neither alleged that the Government of China set prices, nor that China was a non-market economy. This response also failed to answer the questions asked by the ADC that would have assisted in determining whether the exporters' records reasonably reflected the costs associated with the production and sale of the product under consideration.

361. The Government of China again chose not to provide the requested information after the ADC issued the Statement of Essential Facts 238.[487] This was even though the ADC reiterated that, "[i]n light of the Government of China's failure to provide direct responses to Parts A and B of the Government Questionnaire, the Commission considers that it must rely on all information reasonably available to it in order to make a preliminary assessment as to the reasonableness of exporters' incurred costs, for the purposes of this [Statement of Essential Facts 238]."[488]

[484] *Stainless Steel Sinks Investigation 238 – GOC Submission Response to PAD,* (Exhibit AUS-47)
[485] *Stainless Steel Sinks Investigation 238 – GOC Submission Response to PAD,* (Exhibit AUS-47), p. 3.
[486] *Stainless Steel Sinks Investigation 238 – GOC Submission Response to PAD,* (Exhibit AUS-47), pp. 2-4.
[487] The ADC published Statement of Essential Facts 238 on the ADC Electronic Public Record on 23 December 2014.
[488] *Stainless Steel Sinks Investigation 238 – SEF*, (Exhibit AUS-49), p. 125.

C. AUSTRALIA ASSESSED EXPORTERS' RECORDED COSTS CONSISTENTLY WITH ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT – CHINA'S AD CLAIM 3

1. Introduction

362. China alleges that Australia acted inconsistently with Articles 2.1, 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 in the ADC's determination of normal value in Investigation 238. China's claim appears to be that it disagrees with the ADC's decision to reject the 304 SS CRC costs documented in the exporters' records because, in China's view, the records reasonably reflected the costs of production associated with the production and sale of the product under investigation.

363. Australia agrees with China that, in Investigation 238, the ADC examined whether the exporters' recorded costs reasonably reflected the cost associated with the production and sale of the product under consideration. The ADC determined that the exporters' records did not adequately capture the cost of 304 SS CRC, and as a result, the ADC decided to adjust the exporters' recorded costs for 304 SS CRC in order to construct normal value.[489]

364. China's AD claim 3 is unsound, however, because it is predicated on the mistaken assumption that the ADC's finding for the purposes of the second condition of Article 2.2.1.1 was made on the basis that the exporters' records did not "reasonably reflect competitive market costs". This ADC finding made was not made for purposes of the second condition of Article 2.2.1.1 but instead relates to the distinct legal test under regulation 180(2).[490]

365. The legal distinction between the two legal assessments is discussed in paragraphs 146-149 of this submission. Further, the ADC recognised and applied this distinction between the assessments. It is evident from the following observation by the ADC in *Stainless Steel Sinks Investigation 238 Report*:

> The Commissioner considers that neither Article 2.2.1.1 nor the provisions of the Regulations limit the amendment of costs submitted by an exporter, even when kept in accordance with applicable accounting principles in the ordinary course of business, where the costs as submitted/recorded do not reasonably reflect the competitive market costs associated with the manufacture and sale of like goods. *Where the Commissioner considers unreasonable elements exist in an exporter's costs, the Commissioner is able to made amendments where*

[489] China's first written submission, para. 220.
[490] China's first written submission, paras. 162, 178-180, 201-204, 220-224, 229. See also, Australia's first written submission, paras. 146-149.

> *to do so would result in the costs being more reasonably reflective of the cost to make and sell those goods.*
>
> This ability to amend costs as recorded by exporters is discussed in further detail at Sections 6.4 and 6.9 in the context of replacing costs not considered to be reasonably reflective of competitive market costs with a reasonable substitute. However, *the Commissioner does not consider this ability to amend costs is limited to situations where costs are not reasonably reflective of 'competitive market costs', but also where costs do not reasonably reflect the costs associated with the production and sale of the goods or like goods in general. In such cases, these costs do not 'reasonably reflect the costs associated with the production and sale of the product under consideration' as provided for by Article 2.2.1.1.*[491]

366. This statement demonstrated that the ADC explicitly acknowledged that it was required to consider two distinct legal assessments regarding the exporters' records: (1) whether the records reflected competitive market costs for the purposes of regulation 180(2), and (2) whether the records reasonably reflected the costs associated with the production and sale of the product under consideration for the purposes of Article 2.2.1.1. For the second assessment, which is pertinent to the Panel's evaluation of China's AD claim 3, the ADC determined that the exporters' records reflected 304 SS CRC costs that were distorted by conditions in the 304 SS CRC market in China, and were therefore inappropriate for purposes of constructing normal value. As such, the exporters' records did not fulfil the second condition of the first sentence of Article 2.2.1.1 because the records did not reasonably reflect the costs associated with the production and sale of stainless steel sinks.

367. China's first written submission focuses on the ADC's use of the descriptor "reasonableness" in the context of the costs reported in the exporters' records.[492] China's assertions ignore, however, that the ADC determined not to employ the 304 SS CRC costs in the exporters' records *not* because the *costs themselves* were unreasonable, but because the ADC had determined that the recorded costs *did not reasonably reflect the actual 304 SS CRC costs* associated with the production and sale of the product under consideration. In other words, the ADC determined under the second condition of Article 2.2.1.1 that the exporters' records did not reasonably reflect the exporters' costs because the records were not an accurate and reliable reflection of the costs actually incurred in the production and sale of stainless steel sinks.

[491] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 146, (emphases added).
[492] China's first written submission, paras. 199, 222-224.

368. As set forth below, an unbiased and objective investigating authority could have undertaken the same assessment and reached the same finding as the ADC in the Investigation 238 with respect to the exporters' records under Article 2.2.1.1 of the Anti-Dumping Agreement. That is, that the exporters' records did not fulfil the second condition of the first sentence of Article 2.2.1.1.

2. The ADC's assessment and finding is consistent with WTO law and practice

369. The Appellate Body and the panel in *EU – Biodiesel (Argentina)* have previously considered the issue of the accuracy and reliability of exporters' recorded costs. The ADC's approach to the second condition accords with both the Anti-Dumping Agreement and this previous consideration. It is clear from *EU – Biodiesel (Argentina)* that investigating authorities may consider how practices on apportioning costs between transacting parties may affect the accuracy and reliability of the exporters' records under the second condition.

370. The panel in *EU – Biodiesel (Argentina)* confirmed that it is open to investigating authorities to consider whether the exporters' records reflect non-arms-length transactions or other practices which may affect accuracy and reliability. The panel stated:

> However, we do not understand the phrase "reasonably reflect" to mean that whatever is recorded in the records of the producer or exporter must be automatically accepted. Nor does it mean, as argued by Argentina, that the words "reasonably reflect" are limited only to the "allocation" of costs. *The investigating authorities are certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters, and thus, whether those records "reasonably reflect" such costs. In particular, the investigating authorities are free to examine whether all costs incurred are captured and none has been left out; they can examine whether the actual costs incurred have been over or understated; and they can examine if the allocations made, for example for depreciation or amortization, are appropriate and in accordance with proper accounting standards. They are also free to examine non-arms-length transactions or other practices which may affect the reliability of the reported costs.* But, in our view, the examination of the records that flows from the term "reasonably reflect" in Article 2.2.1.1 does not involve an examination of the "reasonableness" of the reported costs themselves, when the actual costs recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful.[493]

371. The panel also outlined that an exporter's recorded costs may be rejected where they are not adequately reported:

[493] Panel Report, *EU – Biodiesel (Argentina)*, fn. 400, (emphases added).

> In our view the inclusion of the second condition reflects the fact that, while records might be consistent with GAAP, they may still not adequately report the actual costs incurred by the producer/exporter under investigation. *Moreover, while the costs in the records might be consistent with GAAP, they may still not accord with how they would need to be considered in the context of an anti-dumping investigation, such as in respect of the proper allocation of costs for depreciation or amortization or the relevant time periods. As another example, the specific producer/exporter under investigation might be part of a vertically-integrated group of companies in which the actual cost of production of particular inputs is spread across different companies' records, or in which transactions between such companies are not at arms-length or indicative of the actual costs involved in the production of the product under consideration*.[494]

372. Additionally, the Appellate Body in *EU – Biodiesel* stated that the records must "suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration."[495] The Appellate Body further explained that there are circumstances where information or evidence from other sources (i.e. outside of the exporters' records) may be used.[496]

373. In essence the panel and the Appellate Body's statements on non-arms-length transactions or other practices, and inputs spread across "a vertically-integrated group of companies", are examples where the exporters' records may be an unreliable depiction of the costs apportioned between transacting private parties.

3. The ADC concluded on the evidence available to it that the exporters' records did not reasonably reflect the costs associated with the production and sale of stainless steel sinks

374. A salient feature of Investigation 238, discussed above, was the Government of China's failure to provide information requested by the ADC.

375. Consequently, "in light of the GOC's failure to provide direct responses to Parts A and B of the Government Questionnaire," the ADC determined to "rely on all information reasonably available to it in order to make an assessment as to the reasonableness of exporters' incurred costs of stainless steel."[497]

376. The "information reasonably available" to the ADC to assess the "reasonableness of exporters' incurred costs of stainless steel" included submissions from the Australian industry

[494] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.232, (emphases added). See also Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.33.
[495] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.22.
[496] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.71.
[497] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 134.

and exporters, findings from previous investigations, and the limited responses of the Government of China. Specifically, the ADC cited the Government of China policies, plans and implementing measures concerning the Chinese iron and steel industry,[498] which includes the manufacture of 304 SS CRC.[499] The ADC also recalled its previous review of the National Steel Policy, the Blueprint for Steel Industry Adjustment and Revitalisation Directory Catalogue, various national and regional five year plans/guidelines, evidence of the imposition of taxes, tariffs, and export quotas, and measures on market entry criteria, mergers and restructuring.[500] The ADC further identified as relevant the findings of the Canada Border Services Agency with respect to the Chinese stainless steel industry.[501]

377. Following its consideration of "all information reasonably available", the ADC concluded:

- "304 SS CRC (also supplied in sheet form) prices in China are affected by GOC influences in the iron and steel industry";[502] and
- "GOC influences on the Chinese 304 SS CRC market have had a distorting effect on the market overall, and hence have distorted prices throughout the entire market, whether they be from SIEs or private enterprises."[503]

378. Given these uncontroverted findings of distortion with respect to stainless steel, the ADC sought to understand for the purposes of Article 2.2.1.1 of the Anti-Dumping Agreement whether the records of the exporters of stainless steel sinks reasonably reflected the costs associated with the production and sale of the product under consideration. The ADC concluded that their records do not "'reasonably reflect the costs associated with the production and sale of the product under consideration' as provided for by Article 2.2.1.1."[504]

[498] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 136.
[499] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 136.
[500] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 220. The policies, plans and measures considered during the *Certain Hollow Structural Sections 177* investigation included: the *National Steel Policy; the Blueprint for Steel Industry Adjustment and Revitalisation Directory Catalogue*; various national and regional five year plans/guidelines; evidence of the imposition of taxes, tariffs, and export quotas; and measures on market entry criteria, mergers and restructuring.
[501] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2). See *Stainless Steel Sinks Investigation 238 - Domestic Industry Application – CBSA Statement of Reasons*, "Non-Confidential Attachment C-1.1.1", (Exhibit AUS-50), p. 33; and *Stainless Steel Sinks Investigation 238 - Domestic Industry Application – CBSA Statement of Reasons*, "Non-Confidential Attachment C-1.1.3", (Exhibit AUS-51), pp. 12-14, paras. 69-70, 73, 77.
[502] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 42.
[503] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 207. The comment was made in the context of the SCM Agreement.
[504] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 146.

Indeed, the ADC explained that although an exporter may maintain its records "in accordance with applicable accounting principles in the ordinary course of business," *"[w]here the Commissioner considers unreasonable elements exist in an exporters' costs, the Commissioner is able to make amendments where to do so would result in the costs being more reasonably reflective of the cost to make and sell those goods*."[505]

379. Article 2.2.1.1 of the Anti-Dumping Agreement does not set out any criteria in determining whether the records reasonably reflected the costs associated with the production and sale of the product under consideration.[506] As such, the ADC accepted the Australian applicant's allegation that the cost of 304 SS CRC in China was distorted and thus that the costs of 304 SS CRC reported in the exporters' records could not be relied on to construct normal value.[507]

380. Finally, China's only objection under AD claim 3 is that the "reasonably reflect competitive market costs" finding under regulation 180(2) of Australian domestic law is inconsistent with the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement. China's claim is predicated entirely on its misunderstanding of Australian domestic law. The ADC's "reasonably reflect competitive market costs" finding under regulation 180(2) was separate to its finding in relation to the second condition of Article 2.2.1.1. As such, China's assertion is incorrect. As China alleges no other error under AD claim 3, China's claim is without merit.

4. Conclusion

381. Consistent with the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement and considering the ADC's findings of distortion in the Chinese steel market, the ADC found that the exporters' records did not reasonably reflect the costs to make and sell 304 SS CRC in China. Furthermore, the Government of China's refusal to participate meaningfully in Investigation 238 caused the ADC, as an objective and unbiased investigating authority, to rely on "information reasonably available" to assess whether the costs of stainless steel reported by the exporters could be employed to calculate normal value. The

[505] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 146, (emphases added).
[506] Panel Report, *US – OCTG (Korea)*, para. 7.129.
[507] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 130-131.

ADC reasonably concluded that they could not, thereby necessitating an alternative course as discussed in the following section.

D. AUSTRALIA DETERMINED THE COST OF PRODUCTION IN THE COUNTRY OF ORIGIN CONSISTENTLY WITH ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT – CHINA'S AD CLAIM 1

1. Introduction

382. China alleges that Australia acted inconsistently with Articles 2.1, 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because, in determining the dumping margin, China contends Australia calculated normal value in a manner that did not reflect the cost of production in the country of origin. China contests the ADC's decision not to use the cost of production of deep drawn stainless steel sinks in China (the country of origin) reflected in the exporters' records.

383. As addressed above with respect to *Railway Wheels Investigation 466 Report*, the use of out-of-country price data as a reference point is permissible under Article 2.2 of the Anti-Dumping Agreement.[508] Relevantly, for the present case, it is permissible where:

- the obligation in the first sentence of Article 2.2.1.1 to calculate the costs based on the exporters' records does not apply; and
- an investigating authority is not simply substituting the costs from outside the country of origin for the "cost of production in the country of origin".

384. In fact, China acknowledged in its discussion of *Stainless Steel Sinks Investigation 238 Report* that reliance on an out-of-country price data was permissible according to the Appellate Body. China endorsed the following statement from the Appellate Body report in *EU – Biodiesel (Argentina)*:

> The reference to "in the country of origin", however, indicates that, whatever information or evidence is used to determine the "cost of production", *it must be apt to or capable of yielding a cost of production in the country of origin. This, in turn, suggests that information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable to determine a "cost of production" "in the country of origin"*.[509]

[508] Australia's first written submission, paras. 279-283.
[509] Appellate Body Report*, EU – Biodiesel (Argentina)*, para. 6.70, (emphases added), cited in China's first written submission, para. 98.

385. The ADC determined, consistent with Article 2.2.1.1 of the Anti-Dumping Agreement, that it was unable to rely on the exporters' recorded costs of 304 SS CRC because the exporters' records did not reasonably reflect the costs to make and sell 304 SS CRC in China. Accordingly, the ADC decided not to use the exporters' recorded costs of 304 SS CRC.[510]

386. Contrary to China's allegation in its first written submission, once the ADC found the exporters' recorded 304 SS CRC costs unreliable, the ADC did not simply substitute the out-of-country 304 SS CRC price data for the exporters' cost data.[511] Rather, as described below, the ADC, as an unbiased and objective investigating authority, considered the conditions in China and those reflected in the alternative data and adapted that data based on the information reasonably available. The ADC reasonably concluded that it should exclude Chinese data from the alternative data to avoid reintroducing the very same distortive conditions into the alternative data that had led to the rejection of the exporter's recorded costs in the first place. The ADC's approach in this regard was consistent with Article 2.2.2 of the Anti-Dumping Agreement.

2. The ADC properly considered in-country price data

387. As discussed above in relation to China's AD claim 3, the ADC took "into account all available options" and available information to adapt the 304 SS CRC costs such that they reflected the cost of production in the country of origin (i.e. China).[512]

388. The ADC first considered whether it could use private prices from non-SOE 304 SS CRC suppliers in China or import prices of 304 SS CRC into China as potential alternative price data reference points.[513] The ADC was concerned that the distortive conditions within the 304 SS CRC market in China had affected the entire market, regardless of whether 304 SS CRC had been manufactured by a SOE or private enterprise, or was imported.[514] To assist the ADC in determining the extent of the distortive conditions evident in the 304 SS CRC market in China, the ADC asked the Government of China for information on government involvement in the stainless steel sink industry, taxation and tariff information, price data and restrictions,

[510] Australia's first written submission, paras. 363-382.
[511] China's first written submission, para. 114.
[512] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 42.
[513] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 207-208.
[514] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 207.

as well as the relevant legal regimes and government policies.[515]The Government of China did not provide this requested information.

389. The ADC also asked the Government of China for import data on the grades of stainless steel used in the production of stainless steel sinks.[516] Again, the Government of China did not provide this requested information.[517] Without verifiable import data from the Government of China, the ADC was unable to further assess whether import price data could be used as a reference point for determining the production cost of 304 SS CRC in China.

390. Further, with respect to import prices, the information available to the ADC indicated that China was a net exporter of stainless steel,[518] and that there were limited imports into the Chinese market.[519] This indicated that imported stainless steel is not common in China and, therefore, it was also likely that import prices were affected by government influence on domestic prices due to the small quantity of imports relative to domestic supply.[520]

391. Accordingly, the ADC had to resort to out-of-country price data to determine the production cost of 304 SS CRC in China.

3. The ADC properly resorted to out-of-country price data

392. The ADC considered out-of-country price data from Europe, Asia, and North America for 304 SS CRC. It did so because—initially—these regions did not appear to reflect the distortive conditions identified by the ADC. Moreover, these regions accounted for almost 96% of global stainless steel production during the investigation period.[521]

393. The ADC considered seven potential alternative price data reference points for this cost input:

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[515] *Stainless Steel Sinks Investigation 238 – GOC questionnaire,* (Exhibit AUS-44).
[516] *Stainless Steel Sinks Investigation 238 – GOC questionnaire,* (Exhibit AUS-44), pp. 12-13. The relevant question was Section B, Question 6.
[517] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 207-208.
[518] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 207-208. See also [[(Exhibit AUS-52 (BCI))]].
[519] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 207-208. See also [[(Exhibit AUS-52 (BCI))]].
[520] *Stainless Steel Sinks Investigation 238 – PAD,* (Exhibit AUS-48), p. 28; *Stainless Steel Sinks Investigation 238 – SEF*, (Exhibit AUS-49), pp. 182-183; *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 207-208.
[521] [[(Exhibit AUS-52 (BCI))]]; *ISSF Stainless Steel Figures 2014 Report*, (Exhibit AUS-53). All other markets outside of Asia, North America and Europe accounted for less than 5% of global stainless steel production during the investigation period.

- a MEPS-based monthly world composite 304 stainless steel price, determined as a weighted average of the low transaction value products in the flat and long categories in the European Union, Asia, and North America;
- a MEPS-based world average price (an average of prices from Europe, North America and Asia reported by MEPS);
- the MEPS Asian 304 SS CRC price (an average of prices from China, Chinese Taipei, Korea and Japan reported by MEPS);
- the MEPS-based Asian 304 SS CRC price calculated excluding Chinese prices (prices from Chinese Taipei, Korea and Japan reported by MEPS);
- Australian import price of Thai 304 SS CRC;
- the Australian applicant (Tasman)'s own 304 SS CRC purchase prices; and
- a MEPS-based North American and European average 304 SS CRC price.[522]

394. In considering each of the potential alternative reference points, the ADC took steps to ensure that it arrived at the most appropriate proxy for the cost of production in China. These steps included:

- ensuring the reference point was limited only to 304 SS CRC—the specific input used to manufacture deep drawn stainless steel sinks—and did not include grades of stainless steel irrelevant to the product under consideration;[523]
- excluding overly narrow reference points not suitable for deriving an average market price. For example, the ADC noted that the costs incurred by Tasman (the Australian applicant) to purchase stainless steel for its own production operations were not likely to be reasonably representative as a reference point because those costs were limited to the costs incurred by a single purchaser, sourcing the input predominantly from a single supplier;[524]

[522] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 209-217.
[523] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 213.
[524] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 215.

- ensuring the reference point was derived from independent sources. The ADC noted the chosen out-of-country price was "based on reported MEPS prices, which is a reputable independent steel pricing and forecasting service"; and[525]
- consistent with the ADC's finding under Article 2.2.1.1 of the Anti-Dumping Agreement, excluding reference points that were affected by distortive conditions in the Chinese market.[526]

395. The last step, which led the ADC to find that none of the reference points that incorporated Asian prices were suitable, was impeded by the Government of China's decision not to provide requested information. The applicant, Tasman, alleged that stainless steel prices in the broader Asian market were unsuitable due to the prevalence of 304 SS CRC from China in the broader Asian market.[527] To test this allegation, the ADC requested export data, along with other market data and information, that would have enabled the ADC to assess the volume of Chinese 304 SS CRC entering the Asian market.[528] The Government of China did not respond to this request.[529]

396. The ADC found that, on balance, the information available to it substantiated Tasman's allegation.[530] The evidence on which the ADC relied to reach this conclusion included evidence on the record that during the investigation period China accounted for most of the stainless steel production in Asia,[531] and China exported cold-rolled stainless steel.[532] The ADC concluded that distortive conditions in the Chinese market influenced:

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[525] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 216.
[526] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 213.
[527] *Stainless Steel Sinks Investigation 238 - Domestic Industry Application,* (Exhibit CHN-11), p. 56;

> Indeed, as China is the world's largest producer of stainless steel products, accounting for 45% of world production, and 64% of Asian production (refer CONFIDENTIAL ATTACHMENT B-4.2.1(b)), it is clear than any Asian based benchmark of stainless steel prices will be heavily influenced by Chinese pricing and supply behaviour. Indeed, it is submitted that other Asian stainless domestic markets are directly impacted by the size of the Chinese market.

[528] *Stainless Steel Sinks Investigation 238 – GOC questionnaire,* (Exhibit AUS-44).
[529] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 214.
[530] Australia's first written submission, paras. 353-362. See also *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 214-215.
[531] [[(Exhibit AUS-52 (BCI))]]; *ISSF Stainless Steel Figures 2014 Report*, (Exhibit AUS-53), p. 5.
[532] [[(Exhibit AUS-52 (BCI))]].

- Thai 304 SS CRC prices because Thailand did not have significant production volumes of stainless steel and was a net importer of stainless steel, including for cold rolled sheets and strips;[533] and
- prices from Chinese Taipei, Korea and Japan because of the significant volumes of imports of Chinese 304 SS CRC into these markets.[534]

397. Ultimately, the ADC determined that the last reference point, a MEPS-based North American and European average 304 SS CRC price, was the most suitable available reference point that could be used as a proxy for the exporters' costs for 304 SS CRC in China.[535]

4. The ADC adapted the selected price data

398. China's first written submission fails to engage with the fact that the Government of China's response to the ADC's information requests was limited and incomplete, and ignores the adjustments that the ADC actually made to the selected price data.

399. First, the ADC sought information from the Government of China on manufacturers, importers, traders and exporters of cold-rolled stainless steel in China, including whether the Government of China is a shareholder or is represented in the business.[536] This information was relevant to verify private prices of 304 SS CRC in the Chinese market more broadly and to consider whether private prices could be used as a reference point for determining the production cost of 304 SS CRC in China. The Government of China did not respond to the ADC's request.

400. Without that information, the ADC had to rely on the information available to it, including questionnaire responses from exporters which indicated that 304 SS CRC purchased from private enterprises was priced similarly to 304 SS CRC purchased from SOEs.[537] Based on this limited information, the ADC considered that distortive conditions in the 304 SS CRC

[533] [[(Exhibit AUS-52 (BCI))]].
[534] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 214-215.
[535] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 217.
[536] *Stainless Steel Sinks Investigation 238 – GOC questionnaire,* (Exhibit AUS-44), p. 10-11. The relevant question was Section A, Question 6.
[537] See, e.g. *Stainless Steel Sinks Investigation 238 – Elkay (China) Kitchen Solutions Questionnaire*, (Exhibit AUS-54), p. 55; *Stainless Steel Sinks Investigation 238 – Franke (China) Kitchen System Co., Ltd Questionnaire*, (Exhibit AUS-55), p. 50; *Stainless Steel Sinks Investigation 238 – Jiabaolu Questionnaire*, (Exhibit AUS-56), p. 52; *Stainless Steel Sinks Investigation 238 – Komodo Questionnaire*, (Exhibit AUS-13), p. 52.

market affected the entire market, regardless of whether the 304 SS CRC were sourced from private enterprises or SOEs.

401. Second, contrary to China's allegations[538], the ADC did not simply substitute the exporters' records with out-of-country price data.[539] Instead, the ADC actively sought to adapt the out-of-country price data to conditions in the Chinese market.[540] While the ADC did not adjust the reference point for all the factors considered, this was a consequence of the limitations in the information available, not the use of any "simple substitution" as alleged in China's first written submission.

402. The ADC's active attempts to adapt the reference point are reflected in *Stainless Steel Sinks Investigation 238 Report*. For example, the ADC considered adjusting the reference point for differences in quality, availability, or marketability between the North American and European market and the Chinese market. The ADC's ability to make any adjustment relative to these factors, however, was limited because the ADC had not received any germane material regarding potential differences in these factors from either the Government of China or the exporters. In these circumstances, there was insufficient information before the ADC to ascertain or quantify any adjustments for quality, availability, or marketability.[541]

403. Similarly, the ADC considered but was unable to ascertain or quantify any adjustments for comparative advantage, as opposed to cost advantages due to distortive conditions in the Chinese 304 SS CRC market. Moreover, no interested party provided evidence to the ADC in support of any such adjustment.[542]

404. Based on the information available, the ADC made the following specific adjustments to the selected 304 SS CRC reference point:

- incorporated the verified delivery costs of 304 SS CRC in China; and

[538] China's first written submission, para. 114.
[539] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 217.
[540] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 217-219.
[541] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 217.
[542] *Stainless Steel Sinks Investigation 238 – Komodo Submission Response to PMS*, (Exhibit AUS-57); *Stainless Steel Sinks Investigation 238 – Komodo Submission Response to PAD* (Exhibit AUS-58). *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), p. 218.

- included the verified per tonne slitting extra cost incurred by Chinese manufacturers of the goods when purchasing those raw materials.[543]

405. These adjustments ensured that the values incorporated into the ADC's constructed normal value reasonably represented the cost of production of 304 SS CRC in China. This approach was consistent with Australia's obligations under the Anti-Dumping Agreement, contrary to China's claims.

5. Conclusion

406. Considering the above, an unbiased and objective investigating authority could have reached the same determination as the ADC in the circumstances of Investigation 238. The ADC's determination of an appropriate cost of production in the country of origin was consistent with Article 2.2 of the Anti-Dumping Agreement. Therefore China's claim should be rejected by the Panel.

E. AUSTRALIA CONDUCTED THE OCOT ASSESSMENT CONSISTENTLY WITH ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT – CHINA'S AD CLAIMS 2 AND 4

407. In AD claims 2 and 4, China alleges that Australia acted inconsistently with Articles 2.1, 2.2, 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 in its below-cost OCOT assessment for stainless steel sinks. Relevantly, the OCOT assessment involves two steps:

- first, "the investigating authority must ascertain that a sale or sales have been made at prices below per unit (fixed and variable) *costs of production* plus administrative, selling and general costs";[544] and
- second, "the investigating authority must determine that such below-cost sales have been made (a) within an extended period of time, (b) in substantial quantities, and (c) at prices which do not provide for the recovery of all costs within a reasonable period of time".[545]

[543] *Stainless Steel Sinks Investigation 238 Report,* (Exhibit CHN-2), pp. 42, 219.
[544] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.129, (emphasis added).
[545] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.129.

408. China's AD claims 2 and 4 concern the first step. China argues, and Australia agrees, that the cost of production to be used for the OCOT assessment under Article 2.2.1 must meet the same disciplines as those applicable to the cost of production in the country of origin under Article 2.2 and the rules regarding the use of exporters' records in Article 2.2.1.1.[546]

409. As such, China's AD claim 4—which concerns an alleged failure to determine below cost sales in the OCOT consistently with Article 2.2.1.1—is entirely dependent on China's AD claim 3.

410. Similarly, China's AD claim 2—which concerns an alleged failure to determine below cost sales in the OCOT by reference to the cost of production in China consistently with Article 2.2—is entirely dependent on China's AD claim 1, at least with respect to Investigation 238.[547]

411. Accordingly, given that China has failed to establish that the ADC's approach for AD claims 1 and 3 is inconsistent with Article 2, China's AD claims 2 and 4 also must fail.

F. AUSTRALIA DETERMINED DUE ALLOWANCE FOR CONSTRUCTED NORMAL VALUE AND ACTUAL COST DIFFERENCE CONSISTENTLY WITH ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT – CHINA'S AD CLAIM 6.A

412. As in the case of railway wheels, China's AD claim 6.a impermissibly conflates the construction of normal value with fair comparison under Article 2.4.[548] Specifically, China alleges that Australia's use of a cost substitution methodology to determine constructed normal values generated disparities between the normal value and the export price, for which due allowances should have been made to ensure a "fair comparison" under Article 2.4.[549]

[546] China's first written submission, paras. 145-146, 236. See also Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.258.
[547] For AD claim 2, but not AD claim 1, China has pressed faintly that Australia acted inconsistently in *Stainless Steel Sinks Continuation 517 Report* (Exhibit CHN-36) as well as *Stainless Steel Sinks Investigation 238 Report* (Exhibit CHN-2). See China's first written submission, para. 137. Australia maintains its primary position discussed above that Investigation 238, the interim reviews, and Continuation 517 are outside the scope of the Panel's terms of reference—see Australia's first written submission, paras. 116-134. In the event the Panel finds that the *Continuation 517 Report* (Exhibit CHN-36) is properly before the Panel, the Panel should find that China has not established any violation of the Anti-Dumping Agreement and the GATT 1994.
[548] See Australia's first written submission, paras. 318-331 for a discussion in relation to the same claim (as it applied to the railway wheels investigation) and an expanded description of the correct legal interpretation.
[549] China's first written submission, paras. 322 and 327.

413. This argument is inconsistent with the requirements of Article 2.4, as previous panels have recognised.[550] No adjustment needs to be made under Article 2.4 for alleged "differences" affecting price comparability arising solely or exclusively from the methodology applied for establishing normal value. China's proposed interpretation of Article 2.4 would require an investigating authority to reintroduce into the dumping determination the effects of the very distortions that the constructed normal value sought to exclude.

414. Accordingly, given this background, this claim must fail.

G. AUSTRALIA DETERMINED DUE ALLOWANCE FOR TAXATION CONSISTENTLY WITH ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT – CHINA'S AD CLAIM 6.B.I

415. AD claim 6.b.i focuses on the ADC's calculation of a due allowance for VAT under Article 2.4. China makes two related submissions. First, that the ADC did not provide a reasoned and adequate explanation, "as to why it considered the differences between the export VAT refund rate for the product under consideration and the VAT rate applicable for domestic sales of like products affected price comparability."[551] Second, "even if the VAT liability differences did have an impact on price comparability, then the allowance to account for that difference should have been made on its merits."[552]

416. Neither argument has merit. The ADC's approach to the due allowance for VAT was entirely consistent with Article 2.4 of the Anti-Dumping Agreement.

1. Legal Standard

417. The third sentence of Article 2.4 provides direct guidance on the obligation of investigating authorities to make due allowance for differences which affect price comparability. The third sentence states:

> […] Due allowance shall be made in each case, *on its merits, for differences which affect price comparability*, including differences in conditions and terms of sale, *taxation*, levels of trade, quantities, *physical characteristics*, and any other differences which are also demonstrated to affect price comparability (fn. omitted).

[550] Panel Report, *Egypt — Steel Rebar*, para. 7.335. See also Australia's first written submission, paras. 319-322.
[551] China's first written submission, para. 353.
[552] China's first written submission, para. 354.

(a) "price comparability"

418. Panel and Appellate Body reports have previously considered the issue of how to determine whether an alleged factor constitutes a "difference which affects price comparability" for which an allowance must be made under Article 2.4. Relevantly, given "price comparability" is not defined under Article 2.4 and the third sentence provides a non-exhaustive list of factors, the investigating authority "must, based on the facts before it, on a case-by-case basis decide whether a certain factor is demonstrated to affect price comparability"[553].

419. Furthermore, in *EC – Fasteners (China)*, the panel explained this process and, in particular, the roles of investigating authorities and exporters:

> "[U]nder Article 2.4, it is the investigating authorities, not the foreign exporters, that must ensure a fair comparison between the normal value and the export price. This does not, however, mean that the exporters have no obligation in this process. Although the obligation to make a fair comparison lies with the investigating authorities, it is for the exporters, who would be expected to have the necessary knowledge of the product in question, to make substantiated requests for adjustments in order to ensure such comparison. […]
>
> Moreover, the fair comparison obligation does not mean that the authorities must accept each request for an adjustment. The authorities 'must take steps to achieve clarity as to the adjustment claimed and then determine *whether and to what extent that adjustment is merited*'."(emphasis original)[554]

420. Thus, investigating authorities must determine based on the specific facts before them whether a particular circumstance or condition impacts price comparability, and exporters seeking such an adjustment must adequately demonstrate that the adjustment sought is warranted.

(b) "on its merits"

421. The panel in *EU – Fatty Alcohols (Indonesia),* quoting the *US – Softwood Lumber V* panel, provided specific guidance as to the meaning of making due allowances "in each case, on its merits":

> Textual elements of Article 2.4, such as the reference to due allowances being made "in each case, on its merits", and that in a given investigation, "[t]he authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison", suggest that allowances made under Article 2.4 involve a case-specific analysis of the particular evidence

[553] Panel Report, *US — Softwood Lumber V*, para. 7.357.
[554] Panel Report, *EC – Fasteners (China)*, para. 7.298.

> available in a given investigation. On that basis, the panel in *US - Softwood Lumber V* considered further that:
>
> > [T]he requirement to make due allowance for such differences, in each case on its merits, means that the authority must *at least* evaluate identified differences … with a view to determining whether or not an adjustment is required to ensure a fair comparison between normal value and export price under Article 2.4, and make an adjustment where it determines this to be necessary on the basis of its evaluation. We consider that Article 2.4 does not require that an adjustment be made automatically in all cases where a difference is found to exist, but only where - based on the merits of the case - that difference is demonstrated to affect price comparability. (emphasis original)[555]

422. The panel in *EC – Tube and Pipe Fittings* likewise considered that the investigating authority is required to make a merited evaluation of price comparability in each case. [556]

423. Therefore, in carrying out this obligation to make a due allowance on its merits under Article 2.4, there is no particular methodology or "specific rules" an investigating authority must apply.[557] It is, therefore, not for the Panel to consider the virtues of the particular methodology adopted by the ADC. Rather, the Panel is to determine whether that approach was one which an "unbiased and objective authority could have applied".[558]

2. The evidence before the ADC showed that the unrecoverable VAT amount affected price comparability

424. The purpose of the VAT adjustment was outlined by the ADC in *Stainless Steel Sinks Investigation 238 Report* as follows:

> The purpose of the adjustment is that, when making the export sales, the company is aware of the fact that it is unable to recover the full amount of VAT paid on its inputs, and that this should have an associated effect on export price whereby the export price would be raised to accommodate this extra cost. Consequently, it is logical to upwards adjust the normal value for this 8% difference in taxation.[559]

425. China wrongly contends that this finding was "not evidence-based" and was "based on nothing more than a mathematical convenience."[560]

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[555] Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.60.
[556] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.157 ("[t]he requirement to make due allowance for such differences, in each case on its merits, means that the authority must at least evaluate identified differences in taxation with a view to determining whether or not an adjustment is required to ensure a fair comparison between normal value and export price under Article 2.4 of the Anti-Dumping Agreement, and then to make an adjustment where it determines this to be necessary on the basis of this evaluation."). See also Panel Report, *US – Softwood Lumber V*, paras. 7.165-7.167.
[557] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.178.
[558] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.178.
[559] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 149.
[560] China's first written submission, para. 353 (emphasis added).

426. Previous panels have emphasised that "allowances made under Article 2.4 involve a case-specific analysis of the particular *evidence available* in a given investigation".[561] Consistent with this approach, the ADC only makes adjustments where they are supported by the evidence.

427. The evidence provided to the ADC by the relevant exporters (including Zhuhai Grand) demonstrated that there existed a situation where the difference between the VAT treatment of domestic and export transactions would likely have an impact on comparing the two types of transactions. In particular, Zhuhai Grand's records and submissions showed that exporters incurred a liability for non-recoverable VAT expenses associated with export sales.[562] The liability was not applicable to domestic sales.[563] Specifically, Zhuhai Grand informed the ADC that "[t]he VAT rebate rate applicable to deep drawn stainless steel sinks exports was 9% during the [investigation period]"[564] and explained that "its ledger includes the 8% non-refundable export VAT".[565]

428. In other words, the evidence provided by the exporters (including Zhuhai Grand) demonstrated that there was an 8% difference between the VAT liability for exports and domestic sales—a difference that would be known by any reasonably sophisticated market participant would have been aware of and incorporated into its pricing. Consistent with Article 2.4, the ADC therefore adopted an adjustment to ensure a fair comparison between products sold domestically and those exported.[566]

[561] Panel Report, *EU — Fatty Alcohols (Indonesia)*, para. 7.60 (emphasis added).
[562] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 46-48; *Stainless Steel Sinks Investigation 238 Visit Report - Zhuhai Grand Kitchenware Company Limited*, (Exhibit CHN-35), p. 19.
[563] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 46-48.
[564] *Stainless Steel Sinks – Zhuhai Grand Questionnaire*, (Exhibit AUS-14). p. 59.
[565] *Stainless Steel Sinks Investigation 238 Visit Report - Zhuhai Grand Kitchenware Company Limited*, (Exhibit CHN-35), p. 19. See also, *Stainless Steel Sinks – Zhuhai Grand Questionnaire*, (Exhibit AUS-14), p. 35 (where Zhuhai Grand states "[t]he export of the subject goods during the [investigation period] was subject to refund of VAT of 9%. The export VAT refund is calculated based on the FOB export price"); *Stainless Steel Sinks – Primy Questionnaire*, (Exhibit AUS-15), p. 38 (where Primy said "on the exportation of the subject goods during the [period of investigation] Primy was entitled to [a] refund of VAT of 9%"); *Stainless Steel Sinks Sinks – Komodo Questionnaire*, (Exhibit AUS-13), p. 15 (where Komodo Hong Kong Limited said "[d]uring the investigation period, the VAT refund rate for sink, drainer, tray and clips is 9%; for waste kit is 15%; for cutting board is 13%. Therefore Komodo GZ incurs non-refundable VAT cost (2%-8%) for those Australia sales, as compared with the domestic sales VAT exclusive price").
[566] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 149-150.

429. Before making this adjustment, the ADC engaged with Zhuhai Grand to determine the extent and precise form of the adjustment required.[567] Zhuhai Grand identified in its submissions to the ADC that there may have been an error in the formula adopted by the ADC.[568] The ADC accepted that submission from Zhuhai Grand and adjusted the formula to: *FOB normal value X 8% (the amount of VAT that is non-refundable)*.[569]

430. On the basis of the evidence on the record, the ADC determined that an adjustment was required for fair comparison purposes. The ADC set out its reasoning in *Stainless Steel Sinks Investigation 238 Report*, supported with references to Zhuhai Grand's submissions and the ADC's verification findings, explaining its basis for adopting this adjustment.[570]

431. In summary, contrary to China's argument, the due allowance made for VAT was not a mere "mathematical convenience", but was made based on a case-specific analysis of the particular evidence available to the ADC. The record evidence on the record demonstrated that an adjustment was required to address a difference affecting price comparability, namely an 8% difference in VAT-recoverability rates for domestic versus export sales.

3. The VAT due allowance was merited

432. As a secondary argument, China states if "the VAT liability differences did have an impact on price comparability", then "the allowance to account for that difference should have been made on its merits".[571] China appears to contend that the allowance was not based on the merits of the case, as "the adjustment amount misrepresented and overstated the actual extra costs associated with the VAT liability difference" because the adjustment was applied to the normal value that the ADC constructed as described above (i.e., inclusive of an uplifted 304 SS CRC cost).[572]

433. This is incorrect as the ADC explained in *Stainless Steel Sinks Investigation 238 Report*:

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[567] The engagement between the ADC and Zhuhai Grand is demonstrated in the following: *Stainless Steel Sinks – Zhuhai Grand Questionnaire*, (Exhibit AUS-14). pp. 34 – 35; *Stainless Steel Sinks Investigation 238 – PAD* (Exhibit AUS-48), p. 31; *Stainless Steel Sinks Investigation 238 Visit Report - Zhuhai Grand Kitchenware Company Limited*, (Exhibit CHN-35), p. 30; *Stainless Steel Sinks Investigation 238 Submission - Zhuhai Grand Kitchenware Company., Ltd re Visit Report* (Exhibit AUS-59); *Stainless Steel Sinks Investigation 238 –SEF*, (Exhibit AUS-17), p. 48; *Stainless Steel Sinks Investigation 238 Submission - Zhuhai Grand Kitchenware Company., Ltd*, (Exhibit CHN-55), pp. 4-5; *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 149-150.
[568] *Stainless Steel Sinks Investigation 238 Submission - Zhuhai Grand Kitchenware Company., Ltd*, (Exhibit CHN-55), pp. 4-5.
[569] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 150.
[570] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 46-48, 149-150.
[571] China's first written submission, para. 354.
[572] China's first written submission, para. 356.

> In constructing Zhuhai Grand's normal value, it is the Commission's intention to derive a normal value for the goods if they had been sold domestically, and to undertake appropriate adjustments to that normal value to account for differences between export and domestic sales of those goods if sold at that normal value. It is therefore logical that any adjustment applied to normal value for differences in VAT across markets be applied to the full constructed normal value, determining the rate of the adjustment had the goods been exported at that normal value.[573]

434. If China's submission were to be accepted, the requested adjustment would reintroduce the very same distortions excluded in the ADC's calculation of constructed normal value. This approach would incorrectly disconnect the VAT adjustment from the comparison being undertaken. As such, the ADC was correct to reject this proposed approach, and the Panel should uphold the ADC's methodology. The ADC's approach was reasonable and consistent with the Anti-Dumping Agreement, and should be upheld by the Panel.

435. In sum, Article 2.4 of the Anti-Dumping Agreement does not prescribe a particular methodology by which investigating authorities must satisfy their obligation to ensure a fair comparison.[574] Accordingly, Australia submits that the VAT adjustment made by the ADC was appropriate and consistent with Australia's obligation under Article 2.4 of the Anti-Dumping Agreement.

H. AUSTRALIA MADE DUE ALLOWANCE FOR ACCESSORIES CONSISTENTLY WITH ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT – CHINA'S AD CLAIM 6.B.II

1. China's claim is outside the Panel's terms of reference

436. China's AD claim 6.b.ii concerns one exporter (Primy) and the associated facts and circumstances that were raised and addressed in the ADC's expiry review (i.e. Continuation 517). This claim has no connection to the original investigation. Since this claim relates to the Continuation 517 and China did not make a claim under Article 11.3 of the Anti-Dumping Agreement in panel request the claim is outside the scope of the Panel's terms of reference.[575]

[573] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 150.
[574] Panel Report, *EU — Fatty Alcohols (Indonesia)*, para. 7.60.
[575] See Australia's first written submission, paras. 80-101, 135-136 for a discussion on Article 11.3 in the context of this dispute.

2. In the alternative, the ADC acted consistently with Article 2.4 in not including an amount for profit on domestic sales of the stainless steel sinks where accessories were purchased by the exporter

437. Even assuming the Panel has jurisdiction over China's AD claim 6.b.ii and in the alternative, China's claim has no merit. In AD claim 6.b.ii of its panel request, China raises concern that the ADC made a due allowance for accessories that included an amount for the exporter's profit on its domestic sales of the stainless steel sinks where the accessories were *produced* by the exporter, but did not include an amount for the exporter's profit on domestic sales of the stainless steel sinks where the accessories were *purchased* by the exporter.[576]

438. In expressing this concern, China states:

> China's submission is that the investigating authority correctly identified the need for a due allowance to account for the comparative differences between domestic and export sales of like products where different accessories formed part of the like product, but then treated the amount of the due allowance differently depending on whether the accessory concerned had been produced by the exporter or was purchased from a third party supplier.[577]

439. Further, China contends "there would seem to be no reason why different costs of production and sale of a single product would be ascribed different profit rates depending on the genesis of the item of cost that was the basis for the adjustment"[578] and that "[no] justification is offered by the investigating authority in its expiry review [for the adjustment]".[579] All China's contentions are incorrect.

440. Contrary to China's contentions, the reason for the different profit rates was fully explained by the ADC. It is a simple point: the purchase price of the third-party produced accessories was regarded as reflective of the market value of the item, and therefore already inclusive of an amount for profit.[580] On the other hand, the cost of self-produced accessories was deemed to not include an amount for profit, so an amount for profit was ascribed to those items.

441. The ADC came to this position after an extensive dialogue with the exporters and after taking their views into account. For example, in the context of discussing its "approach

[576] China's first written submission, paras. 362-363.
[577] China's first written submission, para. 365.
[578] China's first written submission, para. 371.
[579] China's first written submission, para. 372.
[580] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 59.

to adjustments for differences in product specifications", the ADC notes in *Stainless Steel Sinks Continuation 517 Report*:

> The Commission has also had regard to submission's received from Primy [fn. omitted] and Zhuhai Grand [fn. omitted] after publication of SEF 517.
>
> […] To test the claims made by Primy and Zhuhai Grand, the Commission conducted a further examination of the production cost records and product catalogues for all of the selected exporters.[581]

442. Furthermore, contrary to China's contentions, the ADC explained the reasoning for the adjustment in *Stainless Steel Sinks Continuation 517 Report* and it was repeated again in *Stainless Steel Sinks Review Panel Report*. In the latter it noted that:

> For those accessories which the Commission had identified as being produced "internally" it added a profit margin to Primy's cost of production. This margin, expressed as a percentage of costs, was what Primy had achieved on its domestic sales of like goods which were sold in the ordinary course of trade (OCOT). For those accessories which Primy sourced from external suppliers, a profit margin was not added. The reason for this differentiation was because the Commission regarded Primy's internal production of accessories as,
>
> arising from [Primy's] own production activities where a specification adjustment occurs due to features that relate to items which are sold with sinks, but are however sourced from third-party suppliers, such as accessories, the adjustments do not recognise OCOT. (fn. omitted)
>
> Stated differently, the reason the Commission gave for not including a profit margin in the calculation of the value of the adjustment for accessories was because the accessories were "sourced from third-party suppliers". The purchase price of such accessories was regarded as reflective of the market value of the item. (emphasis original)[582]

443. Accordingly, the ADC's due allowance made for self-produced accessories was recognised as relating to a feature that affected price comparability and was reasonable based on the ADC's merits determination that certain accessories were priced inclusive of profit, whereas others were not. Given this reasoned and adequate explanation and the sound logic for the ADC's approach, China's claim should be rejected by the Panel.

[581] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 58.
[582] *Stainless Steel Sinks Review Panel Report*, (Exhibit CHN-47), p. 11, para. 25 quoting *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 59.

3. The ADC did not act inconsistently with Article 2.4 in its calculation of due allowance for differences in Primy's domestic and export accessories

444. In China's second due allowance for accessories claim with respect to Continuation 517, China contends that the ADC's calculation of due allowance for differences in Primy's domestic and export accessories, was inconsistent with Article 2.4, apparently due to deductions being made at a Model Control Code (MCC) level. Once again, this claim relates to Continuation 517. Since China did not make a claim under Article 11.3 of the Anti-Dumping Agreement in its panel request, this additional claim is likewise outside the Panel's terms of reference.

445. On the merits, the ADC's findings also must be understood in context. The ADC did not propose a MCC structure at the outset of its inquiry.[583] The choice to use one was only made after it became apparent that the range of design variations relating to the stainless steel sinks was very broad. [584]

446. During Continuation 517, the ADC sought information from the exporters to develop the MCC structure[585] and aimed to ensure that key features of sinks exported to Australia and sold in China were comparable, particularly in relation to sink bowl volume and corner radius. After concerns were raised by exporters that the MCC model in the SEF was insufficient, the ADC considered further whether other sink design features, such as tap holes, drainer board patterns, mounting flange profile and variances in steel thickness, could be accounted for by adding more categories to the MCC structure.[586]

447. After duly considering the implications of these product features and characteristics, the ADC found:

> the stainless steel required to produce sinks is the main driver of both cost and price in relation to the goods and like goods, and can be linked to the following attributes of the sink:
>
> - number of bowls;
> - drainer boards; and

[583] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 17.
[584] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 19.
[585] See Australia's first written submission, para. 442.
[586] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 19.

- the total capacity of the sink.[587]

448. As this quote demonstrates, the ADC found that despite the variations between most of the sinks, the major driver of the cost and price was associated with stainless steel based on these three product specifications. In other words, these factors were key for price comparability purposes.

449. Nonetheless, to ensure a fair comparison, the ADC still undertook various adjustments for the exporters, including to address differences in accessories included with different models.

450. The evidence available to the ADC showed that the types of accessories were also numerous with [[**BCI**: [redacted]]].[589] In particular, the ADC found that the range of accessories sold with sinks on the domestic market in China were considerably larger than the range of accessories sold with sinks exported to Australia.[590] As a result, the ADC concluded that to ensure a fair comparison between the exported and domestically sold sinks, it was necessary to adjust the normal value by deducting domestic accessory amount and adding the export accessory amount.

451. In this regard, first, the ADC made downward adjustments, to remove domestic accessories from the normal value. For Primy, this was calculated at an MCC level, but importantly the calculation incorporated the accessory cost data reported by Primy for its domestic sales. Therefore, the differences in those accessories were applied. The downward adjustments ranged from [[**BCI**: [redacted]]].[591]

452. Second, the ADC made upward adjustments for Primy's accessories for its exports to Australia, to calculate a normal value for each 'MCC and accessory pack' applicable to Primy's exports to Australia. The upward adjustments for Primy's export accessories were based on Primy's costs reported for these accessory packs, ranging from [[**BCI**: [redacted]

[587] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 19-20.
[588] [[[redacted]Exhibit AUS-60 (BCI))]].
[589] [[[redacted] (Exhibit AUS-61 (BCI))]].
[590] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 20.
[591] [[[redacted] (Exhibit AUS-62 (BCI))]].

[[redacted]].[592] In this manner, the ADC adjusted normal value by removing the domestic accessories amounts and replacing them with export accessory amounts, resulting in a more similar comparison of products sold in the two markets.

453. For completeness, it is noted that China refers to *Argentina – Ceramic Tiles* and incorrectly states this panel report shows that the approach of the ADC was inconsistent with WTO law.[593] Australia disagrees. First, there are key factual differences between *Argentina – Ceramic Tiles* and this case. In particular, crucially to the Panel's decision in *Argentina – Ceramic Tiles*, the Argentinean investigating authority had failed to make an adjustment to address particular product characteristics that affected price comparability.[594] This is simply not the situation in this case. The ADC undertook the extent of the adjustments required to ensure a fair comparison; China merely disagrees with the methodology employed by the ADC to carry out its accessory adjustment.

454. Further, China fails to note that subsequent panels have emphasised that Article 2.4 does not prescribe "how adjustments are to be calculated" or include "any textual prohibition on the use of any particular methodology".[595] The obligation on an investigating authority is to "act in an unbiased, even-handed manner and must not exercise its discretion in an arbitrary manner".[596] The ADC did not act in an arbitrary manner, rather it acted as an unbiased and objective investigating authority and made adjustments that were appropriate in light of the evidence before it.

455. In summary, the adjustments for accessories incorporated Primy's data for its domestic and export accessories, was on its merits, was appropriate, and recognised difference between accessories for domestic and export sales.

[592] [[redacted (Exhibit AUS-63 (BCI))]].
[593] China's first written submission, paras. 368, 373.
[594] Panel Report, *Argentina – Ceramic Tiles*, para. 6.116.
[595] Panel Report, *EC — Tube or Pipe Fittings*, para. 7.178.
[596] Panel Report, *EC — Tube or Pipe Fittings*, para. 7.178.

I. AUSTRALIA MADE THE SPECIFICATION ADJUSTMENT CONSISTENTLY WITH ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT – CHINA'S AD CLAIM 6.B.III

456. China's AD claim 6.b.iii concerns exporter Zhuhai Grand, and facts and circumstances that were raised and addressed in Continuation 517 and the Anti-Dumping Review Panel's (ADRP) *Stainless Steel Sinks Review Panel Report*. Like China's AD claim 6.b.ii, this claim relates to Continuation 517. Since China did not make a claim under Article 11.3 of the Anti-Dumping Agreement in its panel request, it is outside the Panel's terms of reference.

457. In the alternative, even if Continuation 517 is within scope of the Panel's terms of reference, the ADC complied with Article 2.4.

458. China argues that the methodology the ADC applied:

- failed to make a due allowance for the differences between the physical characteristics of the export product and the domestic product that formed the basis of the normal value; and
- instead, applied a specification adjustment based on the cost differences between two export products.[597]

459. Essentially, China's claim represents a disagreement with the ADC's approach to computing the adjustment to account for certain product characteristics between a domestic sale and an export sale. China disagrees with the ADC's use of two export sales to determine the appropriate value adjustment.[598]

460. But, the adjustment was appropriately undertaken in light of the evidence before the ADC and its engagement with the relevant exporters. The ADC explained its reasoning in the *Stainless Steel Sinks Continuation 517 Report* in substantial detail:

> As outlined in the following sections relating to the calculation of each exporter's normal value, for certain MCCs exported to Australia there were low volumes of domestic sales of like goods with identical MCCs in OCOT or no sales in OCOT at all. Where domestic sales of like goods in OCOT for the relevant export MCC had occurred, the sales volumes of these sinks were low (below five per cent) when expressed as a proportion of the volume of exported sinks in the same MCC.

[597] China's first written submission, para. 382.
[598] China's first written submission, para. 390.

> In such instances the Commission considers it appropriate to find that the sales of these MCCs in OCOT as unsuitable for the purpose of ascertaining a normal value under section 269TAC(1). This approach is consistent with the Commission's stated practice in the Dumping and Subsidy Manual (the Manual).
>
> Accordingly, the Commission examined each exporter's domestic sales to identify suitable surrogate models based on the MCCs that were sold in sufficient volumes by considering models with the closest physical characteristics under the MCC hierarchy structure. In relying on surrogate models, the Commission considers that specification adjustments to the surrogate MCC normal value under section 269TAC(8) are warranted to ensure a proper comparison between the export MCC and surrogate domestic MCC.
>
> In determining whether such an approach was reasonable, the Commission compared and contrasted the differences between the surrogate and export MCCs for each exporter by having regard to the available technical and product catalogue information supplied by the exporters in their REQs and other publically available information. Taking this information into account the Commission is satisfied that the surrogate models selected in relation to each exporter's circumstances are suitable.
>
> In SEF 517 the Commission only selected a surrogate model with one different subcategory and made adjustments for variations between the MCCs which related to adjacent MCC sub-categories, e.g. difference between MCC subcategory A and B, within the same MCC category. However, following receipt of submissions from various interested parties, the Commission has adopted an alternative approach by selecting a surrogate MCC that is the next available model within the MCC hierarchy which has OCOT sales volumes that exceeded five per cent of the volume of the export MCC. This approach is outlined in the Manual at 14.2.
>
> To arrive at a market value for the specification difference between the export MCC and surrogate MCC, the Commission firstly worked out the difference in the cost of production reported by the exporters in relation to the relevant MCCs exported to Australia and then added to this result each exporter's profit margin (as a percentage of cost) realised on domestic sales of like goods sold in OCOT. Differences in specification related to either one or more of the following;
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> - number of drainer boards;
> - number of bowls; or
> - differences in the capacity of the sink bowls.[599]

461. In the context of computing an adjustment to account for price differences attributable to differences in product characteristics between domestic and exported products, the ADC used two foreign-sold products to devise the appropriate value by which to adjust the normal value. The ADC used this cost difference between the exported products as a tool for measuring the most appropriate adjustment to account for price differences

[599] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 56-57.

attributable to particular product characteristic difference between an export sale and a domestic sale.

462. In its submissions, China quotes extensively from the *Stainless Steel Sinks Review Panel Report*.[600] For the purposes of completeness, it is noted that China failed to indicate that the ADRP ultimately found in favour of the ADC. Specifically, the ADRP found:

> In this instance, the Commission exercised judgement on the information before it, in the exercise of a broad statutory power to effect adjustments to prices. The Commission's choice was reasonably open to it and is not weakened by the availability of other choices, which may have had a different impact upon the margin analysis. I am not satisfied that the adjustment method argued for by Zhuhai Grand is the correct or preferable method.[601]

463. As the Appellate Body in *EC – Fasteners (China)* observed "the fair comparison obligation does not mean that the authorities must accept each request for an adjustment. The authorities 'must take steps to achieve clarity as to the adjustment claimed and then determine whether and *to what extent* that adjustment is merited'." (emphasis original)[602] The ADC thus carefully considered and properly assessed the requested adjustment by Zhuhai Grand. Therefore, China's claim must fail.

J. AUSTRALIA DETERMINED AMOUNTS FOR PROFITS BASED ON ACTUAL DATA – CHINA'S AD CLAIM 7.A

1. China's claim

464. China's AD claim 7.a alleges that, in the original investigation, the ADC purportedly failed to determine the profits of exporters based on actual data pertaining to production and sales of stainless steel sinks.[603] It is premised on a misunderstanding of the ADC's findings.

2. The ADC's process of analysis and findings

465. The starting point for determining amounts for profits is Article 2.2 of the Anti-Dumping Agreement, which provides that constructed normal value is to include a "reasonable amount" for, *inter alia*, profits.[604] The Anti-Dumping Agreement does not further define what constitutes a "reasonable amount" for profits. Although the *chapeau* of

[600] See Australia's first written submission, paras. 13-16 regarding China's reliance on material that post-dates the investigation.
[601] *Stainless Steel Sinks Review Panel Report*, (Exhibit CHN-47), p. 26, para. 81.
[602] Panel Report, *EC – Fasteners (China)*, para. 7.298.
[603] China's first written submission, paras. 398-401, 417-418.
[604] China's first written submission, para. 394.

Article 2.2.2 provides that it is to be based on actual data pertaining to production and sales in the OCOT of the like product by the exporter or producer under investigation, Article 2.2.2 does not otherwise provide for any particular methodology in order to determine the amount for profits.[605]

466. In its first written submission, China omits relevant factual background to the ADC's determinations of amounts for profit for stainless steel sinks. In particular, China has failed to consider the full procedural history of Investigation 238.

467. Following visits to the three selected Chinese exporters (Jiabaolu, Primy and Zhuhai Grand) for the purposes of verifying information they had submitted to the ADC, the ADC initially calculated a profit rate for each exporter by comparing the sale or invoice price for each product with the corresponding cost to make and sell the goods at issue (CTMS).[606] The ADC then presented the preliminary profit rate calculations to the exporters for review, prior to the visit reports for each exporter being published.

468. Following review of the preliminary profit rate calculation, one of the selected Chinese exporters, Zhuhai Grand, made, *inter alia*, the following submission:

> I.2.6 The target profit rate shall be calculated on the condition that the uplift of the cost of stainless steel added
>
> Without prejudice to the submission discussed above, our client respectfully submits that the target profit rate shall be based on the condition that uplift of the cost of stainless steel added in the calculation.[607]

469. The ADC understood Zhuhai Grand's submission to mean that, "in calculating an amount for profit for use in the company's constructed normal values, the Commission should use the full CTMS of the company including the uplift applied to cold-rolled stainless steel coil, rather than the CTMS before this uplift."[608] Accordingly, the ADC accepted Zhuhai Grand's

[605] Panel Report, *US – Softwood Lumber V*, para. 7.263.
[606] *Stainless Steel Sinks Investigation 238 Visit Report - Zhuhai Grand Kitchenware Company Limited*, (Exhibit CHN-35), p. 28; *Stainless Steel Sinks Investigation 238 Visit Report - Zhongshan Jiabaolu Kitchen and Bathroom Products Co., Ltd*, (Exhibit CHN-44), p. 66; *Stainless Steel Sinks Investigation 238 Visit Report - Zhuhai Primy Kitchen & Bathroom Company Limited*, (Exhibit CHN-43), p. 30.
[607] *Stainless Steel Sinks Investigation 238 Submission - Zhuhai Grand Kitchenware Company., Ltd re Visit Report*, (Exhibit AUS-59), p. 6.
[608] *Stainless Steel Sinks Investigation 238 – SEF*, (Exhibit AUS-49), p. 37.

submission and calculated adjusted and reasonable costs in determining profit for the selected Chinese exporters.[609]

470. Following publication of the SEF for Investigation 238, one of the other selected Chinese exporters, Jiabaolu, made a submission relating, *inter alia*, to the ADC's revised calculation of amounts for profit.[610] Jiabaolu did not raise any specific objection to the ADC's use of adjusted costs, as mentioned above. Neither did the other selected Chinese exporters.[611]

471. In the absence of any objection from the selected Chinese exporters after publication of the SEF, the ADC maintained its revised profit rate calculations – namely, "a weighted average net profit on like goods sold on the domestic market in the OCOT, measured as a percentage mark-up on full CTMS, for each Chinese selected exporter" – in line with the SEF.[612] Both the initial and revised profit rate calculations were based on actual data pertaining to production and sales in the OCOT of the like product by the selected Chinese exporters under investigation.

3. Conclusion

472. Contrary to China's AD claim 7.a, the ADC determined a reasonable amount for profits based on actual data pertaining to production and sales, consistent with Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement.

473. China's allegation that the ADC applied the profit rate to adjusted cost data to arrive at an amount for profit to be used in the constructed normal value calculation is derivative of China's AD claims 1 and 3 and should be rejected for the reasons set forth in Australia's responses to those claims. Moreover, as discussed above,[613] China's AD claim 7.a should be rejected by the Panel.

[609] *Stainless Steel Sinks Investigation 238 – SEF*, (Exhibit AUS-49), p. 38.
[610] *Stainless Steel Sinks Investigation 238 Submission - Zhongshan Jiabaolu Kitchen and Bathroom Products Co., Ltd*, (Exhibit AUS-64), pp. 8-9.
[611] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 44.
[612] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 43.
[613] Australia's first written submission, paras. 465-472.

K. AUSTRALIA ACTED CONSISTENTLY WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT – CHINA'S AD CLAIM 8

474. China's AD claim 8 under Article 9.3 of the Anti-Dumping Agreement is dependent solely on the Panel's finding that Australia acted inconsistently with Article 2 in its determination of the "normal value" for stainless steel sinks in Investigation 238. China has failed to establish that the ADC's approach is inconsistent with Article 2, and so China's claim under Article 9.3 also must fail.

VI. CONDITIONAL RESPONSE TO AD CLAIMS: WIND TOWERS

A. INTRODUCTION

475. China's claims in respect of wind towers are based on a fundamental misconception of the legal and factual basis for the current measure in place.[614] The claims in China's panel request and a majority of the arguments in China's first written submission are directed at a 2014 investigation and report which ceased to provide the legal basis for the anti-dumping duties imposed in 2019, years prior to the Panel's establishment. The Panel should not rule on a historic and superseded investigation that did not provide a legal basis for the duties since 2019 which was before China's panel request and Consultations Request, particularly given China's undue delays in filing a WTO challenge.

476. While there is currently a measure in place that relates to the import of wind towers from China to which the balance of China's arguments are directed, the legal basis for that measure is an expiry review made in accordance with Article 11.3 of the Anti-Dumping Agreement. As set out above, given that China has not brought any claim in relation to Article 11.3 in its panel request, that expiry review is also outside the jurisdiction of the Panel.

477. Further, in its first written submission China also refers repeatedly to the anti-dumping duties imposed on TSP, which was the sole Chinese exporter during the original investigation period. As conceded by China,[615] the anti-dumping duties on TSP were removed in 2020 following a domestic merits review. No duties have been imposed on TSP since that time and as a result China's claims and arguments relating to TSP relate to entirely historic findings. For the Panel to engage in the lengthy legal proceeding and issue detailed findings and recommendations regarding revoked duties would be a pointless waste of the Panel's, Secretariat's, and Parties' time and resources in an "as applied" case like this one.

478. Even if the Panel were to find that any aspect of the original investigation or the expiry review is within the scope of its terms of reference, China has nevertheless failed to make a *prima facie* case that the wind towers measures are inconsistent with the Anti-Dumping Agreement. China has submitted insufficient evidence to demonstrate that the

[614] Australia's first written submission, paras. 22-139.
[615] China's first written submission, para. 44.

ADC's establishment of the facts was not proper or that the ADC's evaluation was biased or not objective.

479. Further, China's arguments are predicated on significant misunderstandings, or mischaracterisations, of key aspects of the methodology used by the ADC in the wind towers investigation. China attempts to make extensive use of material that post-dates the investigation to assert that the ADC made findings that it is clear, on the face of the original decision record, it did not. The Panel should therefore reject China's claims that Australia acted inconsistently with the Anti-Dumping Agreement in relation to the wind towers measures.

B. THE CONTEXT OF THE WIND TOWERS INVESTIGATION

480. As Australia has already emphasised, all three anti-dumping investigations raised in this dispute turn on legally and factually distinct findings and must be considered by the Panel on their own facts. China's first written submission obscures and conflates the findings made by the ADC across the three investigations.

481. The three investigations occurred at different times and concern separate products from different investigation periods and were driven by submissions from different companies both in China and Australia. The Panel should consider each investigation in isolation. Each investigation resulted in separate measures that were particular to the facts and evidence before the ADC at the time that each investigation took place.

482. The *Wind Towers Investigation 221 Report* was completed over eight years ago on 21 March 2014. It led to the imposition of duties that were to expire after five years, in 2019. As such, wind towers is the oldest investigation before the Panel. China itself notes that the original investigations "took place a *number* of years ago".[616]

483. In its first written submission China asks the Panel to focus on the original investigations as the "directly relevant legal measures at issue."[617] China's panel request also focuses on the original investigations.[618] However, the current anti-dumping duty is based on

[616] China's first written submission, para. 28.
[617] China's first written submission, para. 30 and 35.
[618] China's panel request.

findings in the 2019 expiry review, the evidence available to the ADC at the time and the findings made in light of the distinct legal standard applicable to that review.

484. The wind towers original investigation and report was also completed in 2014 well before a series of WTO panel and Appellate Body decisions on relevant provisions of the Anti-Dumping Agreement challenged by China, including Article 2.2 and Article 2.2.1.1. This line of *subsequent* decisions includes, inter alia:

- Panel Report, *EU – Biodiesel (Argentina)*, *29 March 2016*
- Appellate Body Report, *EU – Biodiesel (Argentina)*, *6 October 2016*
- Panel Report, *Ukraine – Ammonium Nitrate*, *20 July 2018*
- Appellate Body Report, *Ukraine – Ammonium Nitrate, 12 September 2019*
- Panel Report, *EU — Cost Adjustment Methodologies II (Russia)*, *24 July 2020*

485. China relies on this line of decisions heavily in its first written submission. If the Panel were to conclude that it had jurisdiction to consider China's claims, then in considering the relevance of these intervening decisions the Panel should bear in mind that the ADC cannot be expected to have used the precise words and phrases outlined in what were then future panel and Appellate Body reports. The language used reflects the terms and phrases used at the time. The conformity of the decision with the Anti-Dumping Agreement needs to be assessed in light of the Agreement itself, and not whether particular terminology was used from later Panel and Appellate Body reports.

486. Should the Panel determine that it is empowered to consider China's claims with respect to the original wind towers investigation, despite those reasons and findings having been superseded by the expiry review, the Panel having regard to the standard of review set forth in Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU,[619] must determine whether an unbiased and objective investigating authority could have come to the findings under the GATT 1994 and the Anti-Dumping Agreement which are challenged by China.

[619] Australia's first written submission, para. 12.

487. If the ADC's establishment of the facts was proper and the evaluation was unbiased and objective, that evaluation cannot be overturned even if the Panel might have reached a different conclusion.[620] Equally, it cannot be overturned even if the Panel might have preferred that different words or phrases might have been used in light of the intervening reports.

C. CHINA HAS NOT MADE A PRIMA FACIE CASE THAT THE WIND TOWERS MEASURES ARE INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

1. Introduction

488. Even if, *arguendo*, the Panel finds that Investigation 221 and/or Continuation 487 are within the scope of its terms of reference, China has nevertheless failed to make a *prima facie* case that the wind towers measures are inconsistent with the Anti-Dumping Agreement. China claims that the wind towers measures are inconsistent with Australia's obligations under Articles 2.1, 2.2, 2.2.1.1, 2.2.2, 2.4 and 9.3 of the Anti-Dumping Agreement. The Article 9.3 claim is entirely consequential on the Article 2 claims. China has failed to make a *prima facie* case for any of these claims.

489. In *EC – Hormones*, the Appellate Body specified what is meant by the term "prima facie case":

> It is also well to remember that a prima facie case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case.[621]

490. In *US – Gambling*, the Appellate Body indicated that "[a] panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case"[622] and noted that:

> A prima facie case must be based on 'evidence and legal argument' put forward by the complaining party in relation to each of the elements of the claim.[623]

[620] Article 17.6 (i) of the Anti-Dumping Agreement.
[621] Appellate Body Report, *EC – Hormones*, para. 104. This was confirmed by the Appellate Body in its Reports *Japan – Agricultural Products II*, para. 136; and *Japan – Apples*, para. 159.
[622] Appellate Body Report, *US – Gambling*, para. 139.
[623] Appellate Body Report, *US – Gambling*, para. 140. See also Appellate Body Report, *US – Zeroing (EC),* para. 217.

491. In *US – Wool Shirts and Blouses*, the Appellate Body stated that the nature and scope of evidence required to establish a *prima facie* case "will vary from measure to measure, provision to provision, and case to case."[624]

2. AD claim 3

492. Even if, *arguendo*, the Panel finds that Investigation 221 and/or Continuation 487 are within the scope of its terms of reference, China has failed to make a *prima facie* case under AD claim 3 in relation to wind towers because:

- it has mischaracterised and misunderstood Australia's domestic framework;
- relied on an incomplete interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement; and
- misunderstood the relevant factual findings made by the ADC.

493. *First*, China has mischaracterised and misunderstood the application of Regulation 180(2) of the *Customs Regulation 1926* and then section 43(2) of the *Customs (International Obligations) Regulation 2015*.[625] Regulation 180(2) was applied in *Wind Towers Investigation 221 Report* and was subsequently replaced by section 43(2) of the *Customs (International Obligations) Regulation 2015* which was applied in Continuation 487.[626] As set out in more detail above, regulation 180(2) is different to the second condition of Article 2.2.1.1.[627]

494. *Second,* as set out under both railway wheels and stainless steel sinks, China has also relied on an incomplete legal standard regarding Article 2.2.1.1.[628] *Third,* China has misunderstood the relevant findings made by the ADC.[629]

495. Australia notes that China's description of the wind towers investigation[630] and alleged wind towers non-compliance[631] primarily relates to issues regarding the calculation of the cost of production in the country of origin that is addressed under AD claim 1. For the

[624] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[625] Australia's first written submission, paras. 146-149.
[626] Australia's first written submission, para. 146.
[627] Australia's first written submission, paras. 148-149.
[628] Australia's first written submission, paras. 182-191, 370-374.
[629] Australia's first written submission, paras. 503-517.
[630] China's first written submission, paras. 166-181.
[631] China's first written submission, paras. 209-218.

reasons set out below under AD claim 1 and AD claim 5.c, Australia rejects China's assertion that the wind towers report "is scant, and was later proved to be misleading".[632]

496. Finally, the example relied on by China under this claim in its first written submission is illogical.[633] China contrasts the recommendation that TSP's costs of steel plate and flanges "do not reasonably reflect competitive market costs" with the recommendation that the Korean exporter Win&P's administrative, general and selling costs "do not reasonably reflect those costs associated with the sale of those goods".[634]

497. China omits the fact that these findings were made under different provisions of Australia's domestic framework, namely regulation 180(2)[635] and regulation 181A(7) respectively.[636] It is unremarkable that findings under different provisions of Australian law in relation to different issues would have different wording. In fact, under the very next bullet point in the report, a very similar finding is made that TSP's own records "*do not reasonably reflect* the administrative, general and selling costs associated with the sale of the like goods".[637] The comparison made by China is illogical.

498. Due to the factual and legal errors identified above, China has failed to make a *prima facie* case under AD claim 3.

3. AD claim 1.a

(a) Introduction

499. Even if, *arguendo*, the Panel finds that Investigation 221 and/or Continuation 487 are within the scope of its terms of reference, China has failed to make a *prima facie* case under AD claim 1 in relation to wind towers as it has mischaracterised and misunderstood the methodology in the original investigation.

[632] China's first written submission, para. 213.
[633] China's first written submission, para. 216.
[634] China's first written submission, para. 216.
[635] Australia notes that the *Wind Towers Investigation 221 Report,* (Exhibit CHN-4), states this recommendation was made under regulation 180(6). This was a typographical error – the relevant provision is regulation 180(2).
[636] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 60.
[637] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), pp. 60-61.

(b) ADC's findings on constructed normal value

500. A constructed normal value under Article 2.2 is the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and profits.[638] In the Wind Towers Investigation 221 the ADC constructed normal value "using the cost of production of the exported goods, plus reasonable amounts for selling, general and administration costs and profit".[639]

501. The ADC constructed the normal value on the following basis:

- "the verified cost to manufacture wind towers exported to Australia (adjusted for the steel plate and flange costs);
- the selling, general and administrative costs incurred in the domestic sale of wind towers during the investigation period excluding inland transport; and
- the profit achieved by TSP on profitable domestic sales of wind towers manufactured by TSP, sold during the investigation period."[640]

(c) China has mischaracterised the ADC's steel uplift and constructed normal value methodology

502. China's arguments are based on a mistaken understanding of the findings made in the wind towers investigation. China's assertions as to the facts appear to be based not on the record of the investigation itself, but rather by making speculative assumptions as to what occurred from material that post-dates the relevant determination.

503. China alleges that the ADC compared Chinese plate steel prices with Korean and Chinese Taipei plate steel prices to work out a percentage difference. This is simply factually incorrect. The ADC compared plate steel prices *in China* with an unadjusted normal value for plate steel *in China* from a previous investigation to work out the relevant percentage difference.

[638] See also Australia's first written submission, paras. 279-281, 384-385.
[639] *Wind Towers Investigation 221 Report,* (Exhibit CHN-4), p. 33.
[640] *Wind Towers Investigation 221 Report,* (Exhibit CHN-4), p. 34.

504. China sets out its flawed understanding of the wind towers investigation in relation to AD claim 1 in its first written submission.[641] China's conception of the relevant facts can be summarised as follows:

- based on subsequent material, including the expiry review[642] and the summary of a conference as part of domestic merits review,[643] China alleges that using information from a previous investigation, the ADC compared Chinese plate steel prices with Korean and Chinese Taipei plate steel prices to work out a percentage difference.[644] In China's view, the ADC then allegedly applied that percentage difference to the plate steel and flanges costs for TSP in Investigation 221;[645] and
- China then summarises its view of the key changes to the methodology in the Article 11.3 expiry review, including the uplift only being applied to the cost of plate steel (not flanges) and that the uplifted costs were indexed by movements in the SBB benchmark.[646] China submits that the uplifted plate steel and flange costs in the original investigation and then indexed uplifted plate steel costs in the expiry review were not Chinese costs of production.[647] Therefore, China alleges that Australia has failed to use the cost of production in the country of origin, being China.[648]

505. China's submission itself emphasises that the Panel should focus on the original investigations as the "directly relevant legal measures at issue."[649] The wind towers original investigation report itself explains the ADC's methodology and the Panel should disregard the subsequent material relied upon by China that is outside the scope of this dispute. Under Article 17.5(ii) of the Anti-Dumping Agreement, the Panel cannot consider material that post-

[641] China's first written submission, para. 76-85.
[642] *Wind Towers Continuation 487 Report*, (Exhibit CHN-31), p. 33.
[643] *Wind Towers Review Panel – Conference Summary*, (Exhibit CHN-30).
[644] China's first written submission, paras. 76-78.
[645] China's first written submission, paras. 76-78.
[646] China's first written submission, para. 82.
[647] China's first written submission, para. 85.
[648] China's first written submission, para. 85.
[649] China's first written submission, paras. 30, 35.

dates the investigation.[650] The Panel's assessment must be limited to the evidence that was before the investigating authority at the time of the investigation.[651]

506. It is apparent that China has fundamentally misunderstood the basis of the ADC's decision. As set out in the *Wind Towers Investigation 221 Report*, when constructing the normal value, the ADC took the following steps to adjust the plate steel and flange purchase costs using information from Investigation 198:[652]

- verified domestic selling prices in China for plate steel from Investigation 198 were compared to the unadjusted normal values for plate steel in China established in Investigation 198;[653] and
- the percentage differences were then applied to the cost of steel plate and flanges for TSP.[654]

507. Investigation 198 was, at the time of Investigation 221, a recent and relevant investigation into the immediate steel input into wind towers, namely plate steel.[655] Investigation 198 also had an overlapping investigation period with Investigation 221.[656] The decision made by the ADC to use information from Investigation 198 was a direct consequence of the decision made by the Government of China not to respond to the questionnaire issued to it in Investigation 221.[657] The consequence of the Government of China's failure to provide the requested necessary information meant that the ADC instead relied on pertinent information available to it from this recent and relevant investigation.[658]

508. The questionnaire was sent to the Government of China on 29 October 2013 with a response due by 5 December 2013.[659] After no response was received by the due date, the ADC emailed the Government of China again on 10 December 2013 and noted that the Government of China had not sought an extension of time.[660] In that email the ADC asked

[650] Australia's first written submission, paras. 13-16.
[651] Australia's first written submission, para. 13.
[652] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 33.
[653] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), pp. 33-34.
[654] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 34.
[655] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 25.
[656] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 29.
[657] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 28.
[658] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 28.
[659] *ADC email to MOFCOM, dated 29 October 2013*, (Exhibit AUS-5).
[660] *ADC email to MOFCOM, dated 10 December 2013*, (Exhibit AUS-6).

whether the Government of China would respond to the questionnaire. The ADC did not receive any response from the Government of China, neither before the date of the SEF (4 February 2014) or any response thereafter from the Government of China to the SEF itself.[661]

509. In the context of this investigation, where the Government of China had been asked to provide certain information but failed to respond despite repeated prompting, it was appropriate for the ADC to rely on relevant and recent information it possessed to construct the normal value for wind towers.

510. In Investigation 198 Jigang's normal value of plate steel was constructed with the production costs adjusted using the export price of coking coal from China.[662] In Investigation 221 the verified domestic selling prices in China for plate steel from Investigation 198 were compared to the unadjusted normal values for plate steel constructed for Jigang in Investigation 198.[663] The percentage differences were then applied to the cost of steel plate and flanges for TSP.[664]

511. In its first written submission China fails to acknowledge the parts of the *Wind Towers Investigation 221 Report* that explain the methodology in more detail, including the following extract:

> Normal values for domestic sales by JIGANG were established in accordance with s.269TAC(2)(c) using JIGANG's weighted average cost to make and sell (CTMS) data (revised for costs not considered to reflect competitive market costs).
>
> The revised costs for Jigang CTMS were related to the cost of coking coal to produce the slab. These revised costs then flowed through to the cost of producing plate steel.
>
> As noted above unadjusted normal values for plate steel established in INV 198 were compared to verified domestic selling prices with the difference applied to the cost of plate steel purchased [by] TSP.[665]

512. When reading the *Wind Towers Investigation 221 Report* as a whole, it is clear that the percentage difference was between the verified domestic selling prices of plate steel *in China* and the unadjusted normal values of plate steel for Jigang *in China* calculated in

[661] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 28.
[662] *Hot Rolled Plate Steel Investigation 198 Report,* (Exhibit CHN-33), p. 29. See also Appendix 2.3.
[663] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 33.
[664] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), pp. 33-34.
[665] *Wind Towers Investigation 221 Report*, (Exhibit CHN-4), p. 31.

Investigation 198. Korean and Chinese Taipei plate steel prices had no role in the ADC's calculation of the normal value of wind towers in Investigation 221.

513. Australia notes China's reliance on *Wind Towers Review Panel - Conference Summary.*[666] It is irrelevant as China has not challenged the expiry reviews under Article 11.3. Even if it had, TSP's appeal to the ADRP was fully resolved (with the result being that duties ceased to apply to TSP) before China's panel request was filed, and accordingly it is irrelevant to the present dispute. In accordance with Article 17.5(ii) of the Anti-Dumping Agreement, the Panel must limit its assessment to the evidence that was actually before the ADC at the time of the original investigation. The Panel cannot adopt China's approach of selectively choosing fragments from later discussions about the original investigation that were submitted in a conference before a different administrative body involving a separate process at a later date.[667]

514. In *US – Hot-Rolled Steel*, the panel found that, under Article 17.5(ii), "a panel may not, when examining a claim of violation of the AD Agreement in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, *unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation*".[668] The panel noted that its duty not to consider new evidence with respect to claims under the Anti-Dumping Agreement "flows not only from Article 17.5(ii), but also from the fact that a panel is not to perform a de novo review of the issues considered and decided by the investigating authorities".[669] Likewise, it would be wholly improper for the Panel to mix and match separate pieces of evidence or legal findings from different administrative proceedings when such evidence was never issued in the original investigation.

515. This subsequent summary of the decision in a conference that occurred five years later as part of a separate domestic merits review process related to the expiry review determination, has no probative value. That process was not only separate to the expiry

[666] *Wind Towers Review Panel - Conference Summary*, (Exhibit CHN-30); see for example China's first written submission, para. 77.
[667] Australia's first written submission, paras. 13-16.
[668] Panel Report, *US – Hot-Rolled Steel*, para. 7.6.
[669] Panel Report, *US – Hot-Rolled Steel*, para. 7.7.

review, but it was also not a review of the original investigation. The *Wind Towers Review Panel - Conference Summary* is three steps removed and many years distant from the original investigation.

516. China has mischaracterised and misunderstood the ADC's methodology when constructing the normal value of wind towers. China has therefore failed to make a *prima facie* under AD claim 1.

(d) The methodology in the expiry review is not within the Panel's terms of reference

517. AD claim 1 is yet another example of China seeking to make an Article 2 claim in relation to an Article 11.3 expiry review. Earlier in its submission, China states that only AD claims 6.b.ii and 6.b.iii relate to failures to comply with the Anti-Dumping Agreement in subsequent procedures.[670] However, under AD claim 1, China appears to make direct Article 2 claims in relation to the wind towers expiry review without any reference to Article 11.3 in its panel request. China claims that by using costs "uplifted by non-country benchmarks in later reviews of the challenged measure, Australia has failed to use the cost of production in the country of origin, being China".[671]

518. Australia requests the Panel find that *Wind Towers Continuation 487 Report* is entirely outside the scope of its terms of reference. In any event, China itself has asked the Panel to focus on the original investigations and has explicitly stated that AD claim 1 does not apply to the wind towers expiry review.[672] Accordingly, even on China's own case, the Panel should not make any findings or recommendations in relation to any alleged non-compliance in the *Wind Towers Continuation 487 Report* under AD claim 1.

(e) Conclusion

519. Due to its mischaracterisation of the ADC's methodology in the original investigation, China has failed to make even a *prima facie* case for AD claim 1 in relation to wind towers.

[670] China's first written submission, para. 35.
[671] China's first written submission, para. 85.
[672] China's first written submission, para. 35.

4. AD claim 5.c

(a) Introduction

520. Even if, *arguendo*, the Panel finds that Investigation 221 and/or Continuation 487 are within the scope of its terms of reference, China has failed to make a *prima facie* case under AD claim 5.c in relation to wind towers as it has mischaracterised and misunderstood the ADC's methodology.

521. At its core, AD claim 5.c appears to mistakenly argue that the "cost difference used for the purposes of the so-called 'uplift' was not and could never be considered to have been unbiased and objective."[673] As explained, the ADC gave the Government of China ample opportunity to provide information regarding conditions in the Chinese steel market, which is failed to do.

(b) The key part of China's legal standard is in relation to a different issue under the second condition of Article 2.2.1.1

522. The "directly relevant point that underpins China's claim 5.c"[674] is an extract from the Appellate Body in *EU-Biodiesel (Argentina)* that the "costs associated with the production and sale of the product":

> …are those costs that have a genuine relationship with the production and sale of the product under consideration. This is because these are the costs that, together with other elements, would otherwise form the basis for the price of the like product if it were sold in the ordinary course of trade in the domestic market.[675]

523. China subsequently makes a similar point and quotes again from the same section of *EU-Biodiesel (Argentina)*,[676] alleging that the investigating authority made no attempt to engage in a determination of whether the investigated wind tower exporter's cost record "suitably and sufficiently correspond[ed] to or reproduce[d] those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".[677]

[673] China's first written submission, para. 261.
[674] China's first written submission, para. 295.
[675] China's first written submission, para. 295.
[676] China's first written submission, para. 304.
[677] China's first written submission, para. 304.

524. Both of these extracts, however, relate to the second condition of Article 2.2.1.1 which is primarily challenged under China's AD claim 3. Without citing any authority, China mistakenly asserts that "One must expect that these elements for a determination required for the purposes of the second condition of the first sentence of Article 2.2.1.1, should they not be satisfied, would then carry through to the cost calculation that the investigating authority then uses in its determination of the costs of production."[678]

525. In sum, the key aspect of China's legal standard underpinning this claim relates to the issues dealt with under AD claim 3, including Article 2.2.1.1 of the Anti-Dumping Agreement.

(c) China has mischaracterised the ADC's steel uplift and constructed normal value methodology

526. Under AD claim 5.c of its first written submission,[679] China largely repeats its mischaracterised version of the ADC's methodology in Investigation 221, including:

- again alleging that the ADC compared Chinese plate steel prices with Korean and Chinese Taipei plate steel prices to calculate a percentage difference;[680]
- then changing its flawed understanding of the methodology, and alleging that the Chinese plate steel price comparison was with an amalgam of "*normal values*" of plate steel derived from Korea and Chinese Taipei;[681] and
- finally alleging that the cost difference was therefore not in the country of origin.[682]

527. These allegations are factually wrong. The second point was not included under AD claim 1 and contradicts the first point. China itself notes that "normal values are not prices".[683] This only reinforces the fact that China has clearly misunderstood the original methodology. As explained in more detail above,[684] the percentage difference was between the verified domestic selling prices of plate steel *in China* and the unadjusted normal values of plate steel for Jigang *in China* calculated in Investigation 198. Korean and Chinese Taipei plate steel prices

[678] China's first written submission, para. 304.
[679] China's first written submission, paras. 259-279.
[680] China's first written submission, paras. 269-270.
[681] China's first written submission, para. 270.
[682] China's first written submission, para. 271.
[683] China's first written submission, para. 259(c).
[684] Australia's first written submission, paras. 503-513.

or an 'amalgam' of Korean and Chinese Taipei plate steel normal values had no role in calculating the relevant percentage difference or the constructed normal value of wind towers in Investigation 221.

(d) The methodology in the expiry review is not within the Panel's terms of reference

528. AD claim 5.c is yet another example of China appearing to make Article 2 claims in relation to an Article 11.3 expiry review. There are more than three pages of allegations and claims regarding the methodology in the expiry review.[685] However, earlier in its first written submission, China states that only stainless steel sinks AD claims 6.b.ii and 6.b.iii relate to failures to comply with the Anti-Dumping Agreement in subsequent procedures.[686] However, here under AD claim 5.c, China appears to be again making direct Article 2 claims in relation to the wind towers expiry review despite not citing Article 11.3 in its panel request.

529. As set out above in the section relating to the jurisdiction of the Panel, Australia requests the Panel find that the *Wind Towers Continuation 487 Report* is outside the scope of its terms of reference. In any event, China itself has asked the Panel to focus on the original investigations and has explicitly stated that AD claim 5.c does not apply to the wind towers expiry review.[687] Accordingly, the Panel should not make any findings or recommendations in relation to any alleged non-compliance in the Wind Towers Continuation 487 under AD claim 5.c.

(e) Conclusion

530. The wind towers measures are entirely outside the scope of the Panel's terms of reference.[688] If the Panel finds that Investigation 221 and/or Continuation 487 fall within its jurisdiction, China has nonetheless failed to make a *prima facie* case under AD claim 5.c in relation to wind towers as it has mischaracterised and misunderstood the ADC's methodology in both the original investigation and expiry review. Therefore, China has not made out a *prima*

[685] China's first written submission, paras. 272-279.
[686] China's first written submission, para. 35.
[687] China's first written submission, para. 35.
[688] Australia's first written submission, paras. 22-139.

facie case that the ADC's establishment of the facts was not "unbiased and objective" under Article 17.6(i) of the Anti-Dumping Agreement, and thus its claims must fail.

5. AD claim 6.a

531. Even if, *arguendo*, the Panel finds that Investigation 221 and/or Continuation 487 are within the scope of its terms of reference, China has failed to make a *prima facie* case under AD claim 6.a in relation to wind towers.

532. Australia's Article 2.4 legal standard is set out in detail above.[689] Article 2.4 concerns the comparison between the normal value and the export price and is *not* directed at the establishment of normal value. This is acknowledged by China who says it is "mindful of views previously expressed by the Appellate Body that where the claimed Article 2.4 inconsistency stems from an incorrect determination of normal value it would be unnecessary to separately consider any non-compliance under Article 2.4."[690]

533. Despite apparently being mindful of this clear legal impediment to its claim, China's AD claim 6.a in relation to wind towers is entirely based on an alleged incorrect determination of normal value.[691] It is therefore "unnecessary" for the Panel to consider this claim any further. China appears to be basing its claim on vague and unpersuasive notions of "fairness" that have no foundation in the Anti-Dumping Agreement.[692]

534. China notes but does not directly challenge the actual adjustments made by the ADC for packaging expenses, export inland freight, credit terms and export handling charges in the wind towers investigations.[693] These are the types of adjustments contemplated by Article 2.4 as they relate to characteristics of the transactions which affect price comparability between normal value and export price.

535. China's Article 2.4 claims are based on the alleged failure of the ADC to properly calculate wind towers normal value. China's allegation is that the supposed failure to calculate properly the product's normal value resulted in a comparison between the normal value and the export price that was not "fair" (hence the alleged violation of Article 2.4). This is plainly a

[689] Australia's first written submission, paras. 318-325.
[690] China's first written submission, para. 336.
[691] China's first written submission, paras. 322-331.
[692] China's first written submission, para. 334.
[693] China's first written submission, para. 328.

challenge to the calculation of the normal value and not the "nature of the comparison" between normal value and export price.

536. For the reasons above, including the Article 2.4 legal standard set out under railway wheels,[694] China has failed to make a *prima facie* case under AD claim 6.a in relation to wind towers. The Panel should reject all of China's claims under Article 2.4 in this case, including in relation to wind towers.

6. AD claim 7.a

537. Even if, *arguendo*, the Panel finds that Investigation 221 and/or Continuation 487 are within the scope of its terms of reference, China has failed to make a *prima facie* case under AD claim 7.a in relation to wind towers.

538. China's AD claim 7.a in relation to wind towers is entirely contingent on its earlier claims, particularly AD claim 1. As outlined above, China has failed to make a *prima facie* case under AD claim 1. Therefore, China has failed to make a *prima facie* case under AD claim 7.a.

539. Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement stipulate that when an investigating authority constructs the normal value of the like product, it does so based on the "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".

540. In turn, the reasonable amount for profits must be "based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation". Importantly, the calculation under Article 2.2.2 is "[f]or the purpose of paragraph 2". Article 2.2.2 does not provide for any particular methodology in order to determine those amounts based on "actual data": only if these amounts cannot be determined on that basis does the Anti-Dumping Agreement envisage alternative methods in subparagraphs (i), (ii) and (iii) of Article 2.2.2.[695]

541. China's wind towers AD claim 7.a relates to the *chapeau* of Article 2.2.2 and not the alternative methods in subparagraphs (i), (ii) and (iii) of Article 2.2.2.[696] Australia notes the

[694] Australia's first written submission, paras. 318-325.
[695] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia),* para. 7.46.
[696] China's first written submission, para. 412.

consideration of Article 2.2.2 by previous panel and the Appellate Body reports outlined by China in its first written submission.[697]

542. China acknowledges the profit rate in wind towers "was calculated based on the exporter's actual cost data".[698] China repeats this acknowledgment in its first written submission where it states the ADC conducted its profit determination in two steps:

> (a) The first was the determination of a profit rare (or ratio) for domestic sales in the ordinary course of trade. For this purpose, the investigating used the actual cost in the records kept by the exporter concerned.
>
> (b) The second step was the multiplication of this profit ratio by the substituted and uplifted cost of production, which was not the "actual data" of the exporter under investigation, nor the cost of production in the country of origin, to arrive at an "amount" for profit.[699]

543. Therefore, China is not challenging the calculation of the rate of profit as this was based on the exporter's actual cost data. China is challenging the multiplication of this actual profit rate to the "uplifted cost of production" which was not "the cost of production in the country of origin".[700]

544. Since China has failed to make a *prima facie* under AD claim 1, then this claim must also necessarily fail. This is because if the alleged "uplifted cost of production" is the correct amount for a "cost of production in the country of origin", then applying an *uncontested actual profit rate* to that amount would result in a "reasonable amount for…profits" that would be consistent with Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement.

7. AD claim 7.c

545. Even if, *arguendo*, the Panel finds that Investigation 221 and/or Continuation 487 are within the scope of its terms of reference, China has failed to make a *prima facie* case under AD claim 7.c in relation to wind towers.

546. In TSP's verification report in the original investigation the ADC found that "there is an absence of *relevant* sales of like goods on the domestic market in China that would be

[697] China's first written submission, paras. 402-411.
[698] China's first written submission, para. 396.
[699] China's first written submission, para. 413.
[700] China's first written submission, paras. 413-416.

reasonable to be used for calculating normal values based on selling prices".[701] Importantly, during the exporter verification, "TSP agreed with this assessment".[702]

547. China incorrectly states that the ADC "reframed its position" in the expiry review.[703] As identified in China's own first written submission, the ADC found in the original investigation that "there is an absence of *relevant sales* of like goods on the domestic market in China for determining normal values".[704] The ADC finding in the expiry review that the domestic sales were not considered "relevant sales" for the purposes of determining normal value was not a reframing of its position.[705]

548. Australia notes that under section H.1.c "Non-compliance with the cited Articles and consideration in previous WTO reports" that China does not cite or discuss any previous WTO reports.[706]

549. Australia urges the Panel to make an objective assessment of whether China has made a *prima facie* case under claim 7.c that the wind towers measures breach Australia's obligations under the Anti-Dumping Agreement. China has failed to make a *prima facie* case under AD claim 7.c in relation to wind towers.

8. AD claim 8

550. Even if, *arguendo*, the Panel finds that Investigation 221 and/or Continuation 487 are within the scope of its terms of reference, China has failed to make a *prima facie* case under AD claim 8 in relation to wind towers.

551. China's AD claim 8 is that the imposition of anti-dumping duties for wind towers was inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[707] China's AD claim 8 is entirely contingent on the Panel finding that Australia acted inconsistently with Article 2 of the Anti-Dumping Agreement under its earlier claims. As outlined above, there is no basis for such a finding, as China has failed to make a *prima facie*

[701] *Wind Towers Investigation 221 Visit Report – TSP*, (Exhibit CHN-45), p. 54 (original emphasis).
[702] *Wind Towers Investigation 221 Visit Report – TSP*, (Exhibit CHN-45), p. 54.
[703] China's first written submission, para. 446.
[704] China's first written submission, para. 441 (emphasis added).
[705] China's first written submission, para. 446.
[706] China's first written submission, paras. 447-455.
[707] China's first written submission, para. 458.

case for all of its earlier AD claims relating to wind towers. Therefore, China has failed to make a *prima facie* case under AD claim 8 as well.

552. Under this section China again alleges that the dumping margin determined in the expiry review was inconsistent with Article 2 of the Anti-Dumping Agreement.[708] This is yet another example of China appearing to make a direct Article 2 claim in relation to the expiry review even though it did not cite Article 11.3 in its panel request. Further, China itself states that it is not directly challenging the expiry reviews and that the panel should focus on the original investigations.[709]

553. China also focuses on the dumping margin calculated for TSP during verification and compares it to the dumping margin following the final report.[710] Australia notes again that the anti-dumping duties on TSP were removed in 2020 and are no longer relevant.

9. China has failed to make a *prima facie* case for all of its AD claims

554. As Australia has demonstrated above, China has failed to present sufficient evidence and arguments to explain the basis for the claimed inconsistency of the wind towers measures with the various obligations under the Anti-Dumping Agreement. China has focused its claims on a superseded measure and attempted to downplay its failure to reference Article 11.3 in its panel request. China has failed to make a *prima facie* case for all of its claims.

555. The Panel's standard of review is set out above.[711] If the ADC's establishment of the facts was proper and the evaluation was unbiased and objective, that evaluation must not be overturned even if the Panel might have reached a different conclusion.[712] In *EU – Footwear (China)*, the panel said that,

> …unless a complaining party in dispute settlement demonstrates that the evidence and arguments before the investigating authority were such that an unbiased and objective investigating authority could not reach a particular conclusion, we are obliged to sustain the investigating authority's judgment, even if we would not have reached that conclusion ourselves.[713]

[708] China's first written submission, para. 467.
[709] China's first written submission, para. 35.
[710] China's first written submission, para. 468.
[711] Australia's first written submission, paras. 11-21.
[712] Article 17.6 (i) of the Anti-Dumping Agreement.
[713] Panel Report, *EU – Footwear (China)*, para. 7.485.

556. The ADC conducted a thorough and fair investigation and its findings were supported by the evidence. Its establishment and evaluation of the facts was unbiased and objective. In the absence of a response from the Government of China, the ADC's evaluation of the evidence before it, including the information from previous investigations, was unbiased and objective. It is not the ADC's fault that China failed to respond to the critical questionnaire during the original investigation. China has failed to present evidence and arguments to explain the basis for the claimed inconsistency of the wind towers measures with the various obligations under Article 2. Therefore, China has failed to make a *prima facie* case for all of its claims.

557. Article 11 of the DSU requires the Panel to make an objective assessment of the matter before it, including an objective assessment of the facts, and an objective assessment of the applicability of and conformity of those facts with the relevant covered agreements.[714] At the same time, Anti-Dumping Agreement Article 17.6 recognizes the challenges facing administering authorities in conducting antidumping investigations and sifting through large amounts of factual evidence and the conflicting legal arguments presented by the parties in order to make a series of often complex and contested findings, and cautions against second-guessing where an authority's evaluation was unbiased and objective and its establishment of the facts was proper.

558. The Panel should make an objective assessment of whether China has made a *prima facie* case that the wind towers measures breach Australia's obligations under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994. This should entail an objective assessment of the facts and the opportunities afforded China to present relevant information, as well as an objective assessment of the applicability of and conformity of those facts with the relevant covered agreements, including the Anti-Dumping Agreement.

D. CONCLUSION

559. In summary, Australia respectfully requests that the Panel find that the wind towers measures are not within its terms of reference and are entirely outside its jurisdiction. Because

[714] Article 11 of the DSU.

these jurisdictional questions go directly to whether the Panel may adjudicate China's claims on these measures in their entirety, the Panel should decide them at an early stage.

560. If the Panel finds that the Investigation 221 and/or Continuation 487 are within the scope of its terms of reference, China has nevertheless failed to make a *prima facie* case. China has submitted insufficient evidence to demonstrate that the ADC's establishment of the facts was not proper or that the ADC's evaluation was biased or not objective.

561. In Australia's view, even if the Panel were prepared to review the wind towers original investigation, it should not make any recommendations relating to it as there would be no utility in doing so.

562. For the foregoing reasons, the Panel should therefore reject China's claims that Australia acted inconsistently with the Anti-Dumping Agreement and find that China's challenges to wind towers are outside the scope of its jurisdiction or in the alternative that China failed to establish a *prima facie* case because of its misguided and incorrect characterisation of the ADC's findings and legal reasoning.

CLAIMS UNDER THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

VII. CONDITIONAL RESPONSE TO SCM CLAIMS: STAINLESS STEEL SINKS

A. INTRODUCTION

563. In its first written submission, China challenges several aspects of the ADC's determination that Chinese exporters benefited from the provision of 304 SS CRC for less than adequate remuneration (under the subsidy program described as "Program 1"). In particular, China challenges the ADC's benefit determination with respect to Program 1 under Articles 1.1(b) and 14(d), the ADC's specificity determination with respect to Program 1 under Articles 1.2 and 2.1(c), and the initiation of an investigation under Articles 11.1, 11.2 and 11.3 of the SCM Agreement.[715] As outlined below, Australia considers these claims to be without merit.

1. All of China's claims under the SCM Agreement are outside the scope of this dispute

564. For the reasons set out in Australia's PRR of 16 December 2022, and Australia's Response to China's Comments on 12 January 2023, all of China's claims under the SCM Agreement are directed at measures that were no longer in effect at the time of the Panel's establishment. Consistent with Articles 3.3, 3.4, 3.7, 6.2 and 19.1 of the DSU, Australia submits that all of these claims are outside the Panel's terms of reference.

565. Specifically, Program 1—the sole subsidy program challenged by China in its panel request[716] (and its first written submission)—was no longer countervailable from 27 March 2020, after the completion of the ADC's expiry review.[717] In other words, the countervailing

[715] In communications with Australia, China has confirmed that it will not pursue claims related to Article 1.1(a) of the SCM Agreement in its panel request (CV claim 1). Accordingly, Australia has not addressed CV claim 1 in this first written submission.

[716] China's panel request, section B.2 states that "[t]he legal claims with respect to the countervailing measures relate to the measures concerning stainless steel sinks, and only with regard to the alleged Program 1 - Raw Materials Provided by the Government at Less than Fair Market Value ('the alleged program')."

[717] [[(Exhibit AUS-1) (BCI)]]; *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 82-83, 85.
For completeness, even if, *arguendo*, Program 1 could be challenged in the future, China's burden under Article 6.2 of the DSU would be with respect to very different claims than those it pursues in sections B.2.1 to B.2.5 of its panel request. To be clear, if China were challenging Program 1 *to the extent that it remains in existence as a program that might be included in future reviews, despite that it currently is not being countervailed and is associated with no countervailable duties*, then all substantive claims of breach would have to be pursued with respect to this measure. As China has failed to raise any substantive claims with respect to such a measure in its panel request, China has not complied with the specificity requirements under Article 6.2 of the DSU and there is no matter at issue between the Parties for the Panel to resolve.

measures challenged by China associated with Program 1 were terminated nearly two years prior to the establishment of the Panel on 28 February 2022. As set out in the PRR, based on the text of the DSU and decades of prior panel and Appellate Body reports, Australia respectfully requests the Panel issue a preliminary ruling that China's claims under section B.2.1-B.2.5 of its panel request are outside the scope of this dispute.

566. In addition to these key points, Australia respectfully reminds the Panel that, as set out in the PRR, the reason why expired, terminated, repealed or otherwise non-existent measures generally should be excluded from a panel's terms of reference ties back to the purpose of the WTO dispute settlement system. In accordance with Article 3.2 of the DSU, the dispute settlement system should "clarify the existing provisions" of the covered agreements but cannot "add to or diminish the rights and obligations provided in the covered agreements."[718] To achieve this balance of clarifying provisions without adding to or diminishing Members' rights, panels should take care to avoid opining on hypothetical issues or non-existent fact patterns—so-called advisory opinions. As the Appellate Body found in *US – Wool Shirts and Blouses*, consistent with Article 3.2:

> The aim of dispute settlement is not 'to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.'[719]

567. Similarly, the compliance panel in *US – Tuna II (Mexico) (Article 21.5 – US)* noted: "[w]e are mindful that no provision of the DSU explicitly gives panels the power to issue advisory opinions or, indeed, to make any findings other than those required to resolve the dispute before them."[720]

568. Australia also observes that panels are precluded from making recommendations under Article 19.1 of the DSU with respect to measures that are no longer in existence. The

Moreover, in China's first written submission, China makes no arguments and presents no evidence with respect to how such a speculative measure nullifies or impairs its benefits under the WTO Agreements and therefore failed to make a *prima facie* case of how the measure violates any WTO rules. To the extent the Panel considers that the measures challenged by China still exist, Australia requests that the Panel reject all of China's claims in section B.2 of China's panel request in their entirety and make no recommendations with respect to these claims in accordance with Articles 6.2, 7.1, and 19.1 of the DSU, for China's failure to make any claims with respect to those measures and failure to make a *prima facie* case.

[718] Article 3.2 of the DSU.

[719] See Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19; quoted in Panel Report, *Argentina – Textiles and Apparel*, para. 6.13.

[720] Panel Report, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, para. 7.39.

Appellate Body has said that it would be inconsistent to find, on the one hand, that a measure does not exist and, on the other, to recommend that a WTO Member bring the non-existent measure into conformity with WTO rules.[721] For all of these reasons and those set forth in the PRR and Australia's Response to China's Comments on 12 January 2023, Australia submits that all of China's CV claims are outside the Panel's terms of reference.

2. The ADC acted consistently with the SCM Agreement

569. While Australia submits that China's claims under the SCM Agreement are outside the Panel's terms of reference, even if the Panel, were *arguendo*, to consider the substantive claims, the ADC's determination in the original investigation with respect to Program 1 is entirely consistent with the SCM Agreement. For the sake of completeness, Australia has briefly addressed each of China's claims in section B.2.1 through to B.2.5 of the panel request below.

B. CV CLAIMS 1 - CLAIMS RELATED TO FINANCIAL CONTRIBUTION HAVE BEEN RESOLVED

570. As noted above, in its first written submission, China has not advanced any arguments under section B.2.1 of its panel request. As China fails to advance any arguments and a *prima facie* case, the Panel cannot uphold CV claim 1.[722] China confirmed in bilateral communications with Australia that it would no longer be pursuing any claims related to financial contribution and Article 1.1(a) of the SCM Agreement. For this reason, Australia has not responded to this claim in its first written submission and asks the Panel to similarly make no findings with respect to this claim, consistent with the practice of previous panels.[723]

C. CV CLAIMS 2 AND 3 – BENEFIT AND ARTICLE 14(D)

571. In sections B.2.2 and B.2.3 of its panel request, China incorrectly asserts that the ADC's determinations of "benefit" with respect to Program 1 was inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement. As explained in Australia's PRR, during the expiry

[721] Appellate Body Report, *US – Certain EC Product*, para. 81. Where the Appellate Body found that there was an "obvious inconsistency" in the Panel's findings and therefore, "the Panel erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel has found no longer exists".
[722] Australia's first written submission, paras. 9 -10.
[723] See Panel Report, *India – Additional Import Duties*, paras. 7.402-7.418.

review (that superseded the original investigation), the ADC found that Program 1 did *not* confer a benefit. For this reason, Australia does not understand the basis of China's claims, or how the ADC's determination that Program 1 did not confer a benefit violated Articles 1.1(b) or 14(d) of the SCM Agreement. Nevertheless, even if, *arguendo*, the Panel found merit in China's claim, it is unclear what the Panel could recommend that Australia do to bring these measures into conformity with the SCM Agreement.

572. Notwithstanding the above, Australia will briefly address the following below:

- the correct legal standard;
- background and overview of the ADC's benefit determinations; and
- key flaws in China's claims and arguments.

1. Legal standard

573. Article 1.1 of the SCM Agreement sets out the circumstances in which a subsidy is deemed to exist. Specifically, Article 1.1 provides:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)1 ;
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
>
> or
>
> (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
>
> and
>
> (b) a benefit is thereby conferred

574. Relevantly, Article 1.1(b) requires that a benefit must be conferred as a result of the financial contribution.[724]

575. In order to determine whether a benefit exists, there is a close relationship between Articles 1.1(b) and 14(d) of the SCM Agreement, such that Article 14 is "relevant context" for interpreting Article 1.1(b).

576. Article 14 contains the guidelines that an investigating authority may use to calculate the amount of a subsidy in terms of benefit to the recipient. It also requires that methods for doing so be provided for in national legislation or implementing regulations and that the application of an investigating authority's methodology in a particular case be transparent and adequately explained.[725] For subsidies involving the provision of goods or services, Article 14(d) requires that:

> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).[726]

577. In other words, where an alleged subsidy program involves the provision of goods, Article 14(d) requires a comparison between the price of the goods in question and a benchmark price, which must be determined "in relation to the prevailing market conditions for the good or service in question in the country of provision".

578. The Appellate Body in *Canada – Renewable Energy* provided the following overview and summary of the interaction between Articles 1.1(b) and 14(d) of the SCM Agreement:

> The Appellate Body has stated in previous disputes that whether a benefit has been conferred should be determined by assessing whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market. Moreover, in previous disputes under both Parts II and III of the SCM Agreement, the Appellate Body has relied on Article 14 as the relevant context for the interpretation of benefit under Article 1.1(b). Article 14(d) contains guidelines for determining whether government purchases of goods make a recipient "better off" than it would otherwise be in

[724] In terms of indirect recipients of a benefit see: Appellate Body Report, *US – Softwood Lumber IV*, paras. 142-143.
[725] Article 14 of the SCM Agreement states: "[f]or the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained."
[726] Article 14(d) of the SCM Agreement.

> the marketplace. Article 14 is used in countervailing duties cases to calculate the amount of the subsidy in terms of the benefit to the recipient. Although Article 14 is in Part V of the SCM Agreement, the Panel was correct in pointing out that it is relevant context to the interpretation of Article 1.1(b) for the purpose of Part II of the SCM Agreement, and that it can be used as relevant context to determine whether a subsidy exists.[727]

579. Subsequently, the Appellate Body provided further clarification as to the purpose of Article 14(d):

> Article 14(d) relates to, inter alia, the calculation of benefit when goods are provided by the government. In particular, Article 14(d) establishes that the provision of goods by a government shall not be considered as conferring a benefit unless such provision is made for less than adequate remuneration. Thus, a benefit is conferred when a government provides goods to a recipient and, in return, receives insufficient payment or compensation for those goods. With regard to the question of how to determine whether adequate remuneration was paid for the goods provided by the government, the second sentence of Article 14(d) provides that benefit "shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase". Article 14(d) also indicates that prevailing market conditions in the country of provision include "price, quality, availability, marketability, transportation and other conditions of purchase or sale".
>
> A determination of whether the remuneration paid for a government-provided good is "less than adequate" under Article 14(d) requires the selection of a benchmark against which the price for the government-provided good must be compared.[728]

580. Accordingly, an investigating authority is required to determine whether a benefit had been conferred by assessing whether the recipient received a financial contribution on terms more favourable than was otherwise available in the marketplace. Under Article 14(d), the provision of goods by a government or public body shall not be considered as conferring a benefit unless such provision is made for "less than adequate remuneration." This is ultimately a comparative exercise between the price of the government-provided good and an appropriately selected benchmark.

(a) An investigating authority may disregard in-country prices due to distortion

581. In choosing an appropriate benchmark under Article 14(d), there may be several reasons why an investigating authority may need to disregard in-country prices in a given

[727] Appellate Body Report, *Canada – Renewable Energy*, para. 5.163.
[728] Appellate Body Report, *US — Countervailing Measures (China) (Article 21.5 – China)*, paras. 5.134-5.135.

case.[729] One such reason is where government intervention has caused domestic or "in-country" prices to be distorted, such that a comparison of the subsidised price to other distorted prices would not be meaningful.

582. The Appellate Body has emphasised that "the prices at which the same or similar goods are sold by private suppliers in arm's-length transactions in the country of provision" are "the *starting point* of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement".[730]

583. However, it is important to note the Appellate Body has also emphasised the "market orientation" of this inquiry.[731] In-country prices of the relevant good will not be appropriate where they deviate from market-determined prices as a result of government intervention in the market. Specifically, previous panels and the Appellate Body have noted that:

> The benchmark analysis begins with a consideration of in-country prices for the good in question, it would not be appropriate to rely on such prices when they are not market determined. Proposed in-country prices will not be reflective of prevailing market conditions in the country of provision when they deviate from a market-determined price as a result of governmental intervention in the market.[732]

584. An assessment of whether an investigating authority properly rejected in-country prices due to government intervention will vary from case-to-case and in light of the evidence available. For example, the Appellate Body has said:

> In conducting the necessary analysis to determine whether proposed in-country prices can be relied upon in arriving at a proper benchmark, an investigating authority may be called

[729] In China's first written submission, para. 511, Australia notes that China incorrectly asserts, "[u]se of external prices to determine a benefit benchmark may only occur in rare circumstances, being where government intervention causes distortion of prices to the extent that prices are not market determined." Australia strongly disagrees with this assertion, which is contrary to what the Appellate Body said in *US – Carbon Steel (India)*, paras. 4.185 – 4.186 where it said:

> We do not see any findings made by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* that indicate that the Appellate Body was foreclosing the possibility that there could be situations other than price distortion due to government predominance as a provider in the market, in which Article 14(d) permits the use of out-of-country prices for the purpose of determining a benchmark… In the light of the Appellate Body's findings in *US – Softwood Lumber IV* and *US – Anti-Dumping and Countervailing Duties (China)*, we are not persuaded by India's assertion that the Appellate Body has established that the only situation in which out-of-country prices may be used to determine a benchmark is where in-country prices are distorted by governmental intervention in the market. While the Appellate Body has clarified that recourse to out-of-country prices is exceptional, the Appellate Body has not, in previous disputes, addressed the issue of whether there are other circumstances in which Article 14(d) permits the use of out-of-country prices and, if so, what those other circumstances are.

While Australia notes its disagreement with China's characterisation of previous Appellate Body reports with respect to when a Member may resort to out-of-country benchmarks, Australia also notes that specific circumstances for disregarding in-country prices other than distortion are not before the Panel in this dispute.

[730] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154, (emphasis added).

[731] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151.

[732] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155.

> upon to examine various aspects of the relevant market. We further recognize that there may be circumstances in which investigating authorities cannot verify necessary market or pricing information. As we have stated previously, what an investigating authority must do in conducting the necessary analysis for the purpose of arriving at a proper benchmark will vary depending upon the circumstances of the case, the characteristics of the market being examined, and *the nature, quantity, and quality of the information supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record***.** In any event, investigating authorities have a responsibility to explain the basis for their conclusions in arriving at a proper benchmark for the purposes of Article 14(d) of the SCM Agreement.[733]

585. In other words, whether it is appropriate to reject in-country prices due to government intervention is a case-specific inquiry. The following factors can deviate on a case-by-case basis:

- the type(s) of government distortion(s) – government predominance is only one possible situation to reject domestic prices;
- the characteristics of the relevant market;
- the nature, quantity and quality of the information on record – evidence of an indirect impact may be sufficient to prove there has been price distortions; and
- the methodology to demonstrate that prices are distorted – qualitative and price comparison methods can be relied upon, among others.[734]

586. To be clear, if an investigating authority determines that in-country prices are distorted due to government intervention, recourse to out-of-country prices (including third country and world market prices) may be warranted.[735] In this regard, the Appellate Body in *US — Softwood Lumber IV* noted:

> We agree with the submissions of the participants and third party participants that alternative methods for determining the adequacy of remuneration could include proxies that take into account prices for similar goods quoted on world markets, or proxies constructed on the basis of production costs.[736]

[733] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157, (emphasis added).
[734] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157; Appellate Body Report, *US — Countervailing Measures (China) (Article 21.5 – China),* para. 6.7.
[735] Panel Report, *US — Softwood Lumber VII*, para. 7.145.
[736] Appellate Body Report, *US – Softwood Lumber IV*, para. 106.

(b) The benchmark should reflect prevailing market conditions in the country of provision

587. The Appellate Body has recognised that the second sentence of Article 14(d) requires that the chosen benchmark must relate or refer to, or be connected with, the prevailing market conditions in the relevant country, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale.[737] For example, the Appellate Body in *US – Carbon Steel (India)* stated:

> As we see it, the requirement under Article 14(d) of the SCM Agreement that the adequacy of remuneration be determined in relation to prevailing market conditions in the country of provision ensures that the comparison undertaken, for the purposes of Article 14(d), is a meaningful one that does not overstate or understate the calculation of benefit. In this regard, the inclusive list of prevailing market conditions identified in the second sentence of Article 14(d) – price, quality, availability, marketability, transportation and other conditions of purchase or sale – describe factors that may affect the comparability of the financial contribution at issue with a benchmark. Thus, if a proposed benchmark does not reflect prevailing market conditions in the country of provision, adjustments in the light of the factors listed in the second sentence of Article 14(d) are necessary to ensure comparability and, by extension, a meaningful benefit comparison.[738]

588. However, in considering this requirement, the Appellate Body has also emphasised that prevailing market conditions "in the context of Article 14(d) of the SCM Agreement, consist of generally accepted characteristics of an area of economic activity in *which the forces of supply and demand interact to determine market prices*"—once again reinforcing the need for the benchmark prices used to be market-determined.[739]

2. Background and overview of the ADC's benefit determinations

(a) The benefit determination in the expiry review

589. As set out in Australia's PRR, the measures comprising the original determination were set to expire on 26 March 2020. As part of the ADC's expiry review, which looked at the period: 1 July 2018 to 30 June 2019, the ADC found that only seven subsidy programs were countervailable.[740] The ADC further determined that none of the other programs remained countervailable, including Program 1.[741]

[737] Appellate Body Report, *US – Softwood Lumber IV*, para. 103.
[738] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.244.
[739] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150, (emphasis added).
[740] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 85.
[741] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 85.

590. Specifically, the ADC found that Program 1 did not confer a benefit during the period of investigation and, therefore, was not countervailable.[742] All countervailing duties and other measures related to Program 1 were terminated on 27 March 2020. The only countervailable subsidy programs identified in the ADC's expiry review were tax and grant programs.

(b) The benefit determination in the original investigation

591. The ADC found that Program 1—the sole subsidy program challenged by China in this case—did not confer a benefit in the expiry review. However, in the original determination, the ADC assessed a number of alleged subsidy programs in a manner consistent with the requirements of the SCM Agreement. The ADC found that 23 programs were countervailable. These programs included two tax programs, 20 grant programs, and one program—the sale of 304 SS CRC (Program 1)—related to the provision of goods for less than adequate renumeration. In assessing Program 1, specifically, the ADC sought to understand whether a benefit had been conferred by assessing whether one of the sampled exporters (Zhuhai Grand) received a financial contribution on terms more favourable than would have been the case if it was participating in a market undistorted by significant government intervention.

592. Specifically, for the period of the investigation (1 January 2013 to 31 December 2013)[743] the ADC assessed whether sales of 304 SS CRC by Guangdong Metals (an SOE) made Zhuhai Grand "better off" than it would otherwise have been in the marketplace. Since Program 1 related to the provision of a good, the ADC sought to understand whether 304 SS CRC was provided for less than adequate remuneration consistent with the guidelines in Article 14(d) of the SCM Agreement.[744]

593. The ADC sought necessary information from the Government of China to inform its assessment of Program 1. For the purposes of assessing the Chinese market for 304 SS CRC and stainless steel sinks, the ADC sought information on how each of the following is determined for all manufacturers, importers, traders and exporters of cold-rolled stainless steel in China and manufacturers of stainless steel sinks in China:

- the nature and structure of the cold-rolled stainless steel industry in China;

[742] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 82-83.
[743] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 14.
[744] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 168.

- details of any government involvement in the cold-rolled stainless steel industry, including:
    - supervision of cold-rolled stainless steel state-owned or invested enterprises senior management and administration;
    - industrial policy and guidance on the cold-rolled stainless steel; sector;
    - market entry criteria;
    - import and export regulations;
- the ownership structure of the Chinese cold-rolled stainless steel industry, identifying what proportion of the industry is represented by SOEs, foreign-invested enterprises, and Chinese domestic-owned private enterprises, including, where the Government of China is a shareholder;
    - details of ownership;
    - production output;
- an explanation of the specific roles and responsibilities of government departments, agencies or institutions, which are either directly or indirectly involved in economic policy development, economic regulation and decision-making activities with respect to the cold-rolled stainless steel industry;
- details of changes to the Chinese cold-rolled stainless steel industry during the last 5 years;
- import and export data;
- Government of China policies that affect the deep drawn stainless steel sinks industry, including raw material;
- Government of China laws, regulations or directives, concerning the regulation and monitoring of prices for cold-rolled stainless steel/raw materials used in sinks; and

- any new Government of China initiatives or changes to policies that affect cold-rolled stainless steel/raw materials.[745]

594. The Government of China did not provide a complete response. As the ADC noted in its *Stainless Steel Sinks Investigation 238 Report*, "the GOC declined to provide a full response to the Government Questionnaire, and did not provide the requested statistics or responses to relevant questions."[746]

595. As a consequence, the ADC resorted to the evidence available to it, including findings from previous investigations and other evidence on the record.

596. In light of the evidence available, the ADC determined that the Chinese market for 304 SS CRC was heavily distorted by the intervention of the Government of China and, therefore, domestic prices of 304 SS CRC were not market-determined. Accordingly, to determine whether the provision of 304 SS CRC by Guangdong Metals was made for less than adequate remuneration, the ADC had to resort to out-of-country prices in formulating an appropriate benchmark.[747]

597. The ADC, acting as an objective and unbiased investigating authority, considered several benchmarks.[748] As explained below at paragraphs 613 to 614, it was ultimately determined that an average of reported MEPS European and North American 304 SS CRC prices was the best available representation of what would be market-determined prices in China.[749]

598. The ADC took reasonable steps to ensure that the benchmark was reflective of prevailing market conditions in China. Specifically, the ADC considered whether adjustments were required for quality, availability, marketability, comparative advantage, delivery terms and slitting costs.[750] In this regard, the ADC adjusted the benchmark by:

- incorporating the verified delivery costs of 304 SS CRC in China; and

[745] *Stainless Steel Sinks Investigation 238 – GOC Questionnaire*, (Exhibit AUS-44), sections A and B.
[746] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 214. See also, *Email from ADC to MOFCOM, dated 31 March 2014,* (Exhibit AUS-65); *Email from Corrs Chambers Westgarth to ADC, dated 19 May 2014* (Exhibit AUS-66).
[747] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 207.
[748] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 209-217.
[749] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 216.
[750] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 217-219.

- including the verified per tonne slitting extra cost incurred by Chinese manufacturers of the goods when purchasing those raw materials.[751]

599. As a key purpose of the inquiry is to determine whether the price was subject to the forces of supply and demand in the relevant market, by selecting the MEPS European and North American average price for 304 SS CRC as the appropriate benchmark, the benchmark already took into account other conditions listed in the second sentence of Article 14(d).[752]

600. After comparing the price paid by Zhuhai Grand for 304 SS CRC with this benchmark, the ADC determined that the price paid was less than adequate remuneration and that, accordingly, a benefit had been conferred on Zhuhai Grand.

3. Flaws in China's panel request and first written submission

601. Australia addresses below two key flaws in China's first written submission:

- China's claims and arguments incorrectly assume that the relevant measures are in still effect; and
- even if the measures were in effect, the ADC's determination was consistent with the SCM Agreement. China's claims and arguments misunderstand both the SCM Agreement and the ADC's investigation process.

(a) China's claims ignore the fact the measure is no longer in effect

602. In sections B.2.2 and B.2.3 of its panel request, China makes two interrelated claims that Australia failed to determine, or improperly determined, that the provision of 304 SS CRC to Zhuhai Grand conferred a "benefit" and that Australia wrongly determined the provision of 304 SS CRC was made for less than adequate remuneration. Specifically, China argues that Australia acted inconsistently with:

> Article 1.1(b) of the SCM Agreement because Australia failed to determine, or improperly determined, that the alleged provision of goods conferred a "benefit" to the recipient, in circumstances where the recipient was not or was not shown to be placed in a more

[751] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 218-219.
[752] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 217-219.

> advantageous position than it would have been in the absence of the alleged financial contribution.
>
> [And]
>
> Article 14(d) of the SCM Agreement, because Australia wrongly determined that the alleged provision of cold rolled stainless steel coil was made for less than adequate remuneration and failed to determine the adequacy of remuneration for the cold rolled stainless steel coil in relation to prevailing market conditions in the country of alleged provision. [753]

603. Yet, almost two years before the date of panel establishment, Australia found that Program 1 did not confer a benefit and ceased all countervailing duties related to this program.

604. China's claim in section B.2.2 of its panel request that Australia "failed to determine, or improperly determined, that the alleged provision of goods conferred a benefit to the recipient",[754] makes little sense when the ADC already found the provision of 304 SS CRC did not confer a benefit in the expiry review.[755] For example, the ADC stated specifically in the context of Zhuhai Grand – the sampled exporter found to have received a benefit under Program 1 in the original investigation – that:

> The Commission is of the view that purchases of stainless steel via SIE traders did not result in a benefit in the form of lower prices being received by Zhuhai Grand. As such, the Commission does not consider that a benefit under this program has been conferred.[756]

605. Furthermore, China's claims in section B.2.3 of its panel request that Australia "wrongly determined that the alleged provision of cold rolled stainless steel coil was made for less than adequate remuneration" similarly makes little sense in light of the ADC's determination in the expiry review that there was no benefit. The ADC did not find that the provision of 304 SS CRC was for less than adequate remuneration – the ADC found exactly the opposite.[757]

606. Moreover, as no countervailing duties have been imposed pursuant to this program for almost three years, no benefits accruing to China under the WTO Agreements are being impaired. For these reasons, Australia has already asked the Panel to exclude these claims from its terms of reference. We repeat Australia's request that the Panel not make any

[753] China's panel request, paras. B.2.2 and B.2.3.
[754] China's panel request, para. B.2.2.
[755] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 82-83.
[756] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 83.
[757] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 82- 83.

findings with respect to China's claims in sections B.2.2 and B.2.3 of its panel request—or make any recommendations under Article 19.1 of the DSU.[758]

(b) Even if the measures were within the Panel's terms of reference, the ADC acted consistently with the SCM Agreement

607. While China's claims with respect to Program 1 are outside the Panel's terms of reference, the ADC's original benefit determination was, in any event, consistent with Articles 1.1(b) and 14(d) of the SCM Agreement. China argues, in its first written submission, that the ADC's benefit determination was "not supported by the kind of analysis the Appellate Body has cited as necessary to justify the rejection of internal country prices."[759] In particular, China appears to make much of the fact that the ADC's analysis is not "an analysis of the market for 304 SS CRC"[760] and relied on "conclusions reached in previous investigations related to different products."[761] These allegations are incorrect and are premised on a fundamental misunderstanding of both the SCM Agreement and the ADC's investigation process.

i. The ADC correctly determined that Chinese domestic prices of 304 SS CRC were distorted due to significant intervention by the Government of China

608. The ADC found itself in a situation, where the Government of China had not provided relevant information. At the same time, the material available to the ADC included substantial evidence that there was significant government intervention in the Chinese iron and steel industry, which had distorted prices for various steel outputs.[762] Noting the significant similarities in the raw materials and manufacturing processes for these steel outputs and that

[758] Panel Reports, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, para. 7.39; *Argentina – Textiles and Apparel*, para. 6.13; Appellate Body Report on *US – Wool Shirts and Blouses*, p. 19.
[759] China's first written submission, para. 512.
[760] China's first written submission, para. 515.
[761] China's first written submission, para. 518.
[762] Information available to the ADC, included information from the Australian industry, exporters, findings from previous investigations and the small amount of information provided by the Government of China. Such evidence included: (1) speciality industry reports; (2) relevant government legislation, plans and policies; (3) information submitted and findings from previous investigations by the ADC into products with similar manufacturing procedures; and (4) information submitted and findings into stainless steel sinks from China and related products by other investigating authorities.

for 304 SS CRC,[763] the ADC determined there was sufficient evidence to show that prices of 304 SS CRC were also distorted.

609. The available material included detailed qualitative evidence that directly outlined the Government of China's intervention in the domestic Chinese steel market, which the evidence showed had significantly distorted prices of these steel outputs. For example, the evidence before the ADC included the findings in the *Certain Hollow Structural Sections 177* Report, where it was found:

> The GOC had exerted numerous influences on the Chinese iron and steel industry, which are likely to have materially distorted competitive conditions within that industry and affected the supply of HSS, HRC, narrow strip, and upstream products and materials.[764]

610. Given the absence of relevant information from the Government of China and the case-specific nature of an investigating authority's inquiry,[765] it was appropriate for the ADC to rely on the evidence available to it to make the finding that the intervention of the Government of China distorted prices of 304 SS CRC in China to such an extent that domestic prices could not be found to be market-determined. As the ADC outlined in the *Stainless Steel Sinks Investigation 238 Report*:

> The Commission's assessment of the Chinese stainless steel market has found the entire market for stainless steel in China to be affected by significant influence by the GOC during (and prior to) the investigation period.
>
> It is considered that these GOC influences on the Chinese 304 SS CRC market have had a distorting effect on the market overall, and hence have distorted prices throughout the entire market, whether they be from SIEs or private enterprises. For this reason, the Commissioner considers that all prices of 304 SS CRC in China (regardless of whether the material was manufactured by an SIE or not) to not be suitable in determining adequate remuneration for 304 SS CRC in China, as both private and SIE prices are distorted.
>
> The distortions observed in the Chinese 304 SS CRC market as a result of GOC influence makes private domestic prices unsuitable for determining adequate remuneration, hence providing for the use of external benchmarks. [766]

[763] See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 135.
[764] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 220. The policies, plans and measures considered during the *Certain Hollow Structural Sections 177* investigation included: the National Steel Policy; the *Blueprint for Steel Industry Adjustment and Revitalisation Directory Catalogue*; various national and regional five year plans/guidelines; evidence of the imposition of taxes, tariffs, and export quotas; and measures on market entry criteria, mergers and restructuring.
[765] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157.
[766] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 207.

ii. The ADC adopted an appropriate benchmark and adjusted it for prevailing market conditions in China

611. Given the ADC found that the Chinese market for 304 SS CRC was distorted and that domestic prices were unsuitable as an appropriate benchmark, the ADC needed to use an appropriate alternative.

612. A detailed description of the ADC's consideration of an appropriate alternative benchmark is set out above at paragraphs 393 to 406. In evaluating these potential benchmarks, the ADC was ultimately seeking to identify an "appropriate" benchmark that would have represented the market-determined price of 304 SS CRC in China.[767] In this regard, the ADC sought to:

- ensure the benchmark was only limited to 304 SS CRC prices and not other irrelevant products. Specifically, the ADC noted "in determining a reasonable benchmark for adequate remuneration for 304 SS CRC in China, it is more reasonable to use 304 SS CRC prices if available, rather than a 'composite' price that includes other stainless steel products that are not relevant to the manufacture of deep drawn stainless steel sinks."[768]
- exclude benchmarks that include Chinese prices and are therefore affected by economic distortions caused by the Government of China. The ADC noted "the Commissioner considers that any benchmark that it adopts must necessarily not include this Chinese data, as to do so would contaminate the benchmark with prices that are not considered to be reasonable for the purposes of this report, and hence any benchmark that includes the MEPS Asian average 304 SS CRC price is unsuitable."[769]
- exclude benchmarks derived from narrow datasets. For example, the ADC noted "that the prices actually incurred by Tasman in its own purchases of stainless steel for its own production are likely not to be reasonably representative of a

[767] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 216.
[768] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 213.
[769] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 213.

weighted average competitive market price, predominantly being prices from one major Asian-based supplier to one Australian customer";[770] and

- ensure the benchmark was derived from independent sources. The ADC noted the chosen benchmark "is based on reported MEPS prices, which is a reputable independent steel pricing and forecasting service."[771]

613. At the end of this process, the ADC determined "the most appropriate available benchmark for determining adequate remuneration for 304 SS CRC in China is an average of reported MEPS European and North American 304 SS CRC prices".[772]

614. As outlined above at paragraphs 599 to 600, the ADC then adjusted the benchmark for prevailing market conditions in China consistent with Article 14(d) of the SCM Agreement. In particular, the ADC made adjustments for delivery terms and slitting costs.[773] China's allegations are without merit. The ADC's determination with respect to benefit was consistent with both WTO rules and previous panel and Appellate Body reports related to the interpretation of Articles 1.1(b) and 14(d) of the SCM Agreement.

4. Conclusion

615. In summary, Australia submits CV claims 2 and 3 are premised on a fundamental misunderstanding of the facts and the SCM Agreement.

616. The subsidy program challenged by China ceased to have any legal and practical impact almost two years before the panel request. The ADC specifically found in the expiry review that a benefit was not conferred.

617. Even if these claims were within the Panel's terms of reference, China has misstated the relevant legal standard for establishing an appropriate benchmark under Article 14(d) of the SCM Agreement. China's challenges to the ADC's determination of benefit with respect to Program 1 is not supported by either the text of the SCM Agreement or previous panel and Appellate Body reports. China's claims should be rejected by the Panel.

[770] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 215.
[771] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 216.
[772] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 216.
[773] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 219.

D. CV CLAIM 4 – SPECIFICITY

618. In section B.2.4 of its panel request, China claims that Australia failed to properly determine specificity with respect to Program 1 in accordance with Articles 1.2 and 2.1(c) of the SCM Agreement.

619. China's claims under Articles 1.2 and 2.1(c) make little sense as the countervailing measures related to Program 1 were terminated almost two years before the Panel's establishment. In the expiry review, the ADC determined that Program 1 was not countervailable as it did not confer a benefit. The ADC did not find that Program 1 was specific in the expiry review.[774]

620. Australia submits the Panel should conclude that these claims are outside its terms of reference. But, assuming, *arguendo*, if the Panel were to find it could consider the claims relating to the original determination notwithstanding that it no longer has effect, these claims should be dismissed on their merits. Australia has nevertheless briefly addressed the substance of China's claims (under the original investigation) using the following structure:

- the correct legal standard;
- background and overview of the ADC's specificity determinations; and
- key flaws in China's claims and arguments.

1. Legal standard

(a) The determination of specificity under the SCM Agreement

621. Article 1.2 requires that a subsidy must be specific in order to be countervailable under the SCM Agreement:

> A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.[775]

622. Article 1.2 of the SCM Agreement, therefore, requires that an investigating authority must first identify whether a "subsidy" exists within the meaning of Article 1.1 of the SCM

[774] It is acknowledged there is an error on p. 107 of *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36).
[775] Article 1.2 of the SCM Agreement.

Agreement. This includes finding a financial contribution, by a government or public body, that confers a benefit. A subsidy will not be deemed to exist unless a benefit is conferred consistent with Articles 1.1(b) and 14 of the SCM Agreement.[776]

623. Article 2.1 of the SCM Agreement sets out the principles for how WTO Members should determine whether a subsidy is "specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as 'certain enterprises') within the jurisdiction of the granting authority." In particular:

> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
>
> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.[777]

624. The chapeau of Article 2.1 "frames the central inquiry as a determination as to whether a subsidy is specific to 'certain enterprises' within the jurisdiction of the granting authority".[778] The subparagraphs of Article 2.1 operate as "principles" which help the investigating authority determine whether a subsidy is "specific" and therefore countervailable.[779]

625. Unlike Articles 2.1(a) and 2.1(b), which are applicable to a determination of *de jure* specificity and non-specificity, respectively, Article 2.1(c) relates to the determination of *de*

[776] Article 1.1(b) of the SCM Agreement.
[777] Article 2.1 of the SCM Agreement.
[778] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366; see also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.365.
[779] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.366.

facto specificity. Broadly, this provision states that, if, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in Articles 2.1(a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors set out in Article 2.1(c) may be considered.[780]

(b) A subsidy program can be evidenced by a systematic series of actions

626. An assessment under the first factor in Article 2.1(c) allows an investigating authority to consider the "use of a subsidy programme by a limited number of certain enterprises" as an indicator of specificity. Under this factor, the Appellate Body has observed that a subsidy program can "be evidenced by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises".[781]

627. The identification of such a series of actions will vary depending on the specific facts of each investigation. Previous panels and the Appellate Body have recognised that investigating authorities have broad latitude to identify a subsidy program under this element.[782] Generally, such an analysis under Article 2.1(c) focuses on evidence other than of the kind found in written documents or express acts or pronouncements.[783]

628. The identification of a subsidy program does not need to occur separately from determining whether there is a subsidy, it can logically be part of the assessment under Article 1.1. The Appellate Body has previously noted that:

> In any event, we recall that the existence of a subsidy is to be analysed under Article 1.1 of the SCM Agreement. By contrast, Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is specific. It stands to reason, therefore, that the relevant "subsidy programme", under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1.[784]

[780] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.366-4.367. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China*), para. 368.
[781] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.
[782] See, e.g., Appellate Body Reports, *US – Countervailing Measures (China); US – Carbon Steel (India).*
[783] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.146.
[784] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144.

(c) "Use" of a subsidy program is concerned with whether the subsidy has been provided

629. In the terms of the word "use" in the phrase "use of a subsidy programme", the Appellate Body has said, "the reference to 'use of a subsidy programme' suggests that it is relevant to consider whether subsidies *have been provided* to recipients pursuant to a plan or scheme of some kind".[785]

(d) The extent of economic diversification and length of time factors can be satisfied via implicit consideration

630. Finally, the third sentence of Article 2.1(c) includes two additional factors that should be taken into account when determining *de facto* "specificity": the extent of economic diversification and the length of time.

631. While these factors need to be considered, the provision "does not prescribe a specific result or require a Member to conform to or act in accordance with a particular matter".[786] Past panels have suggested:

- "it can be sufficient for other aspects of a determination to demonstrate that 'account was taken' of the matter"; and
- "taking into account the two factors in the final sentence of Article 2.1(c) need not be done explicitly, so long as there is some indication in the determination that the factors had been considered *implicitly*".[787]

632. An "indication" that the two factors were considered "could flow from the nature and implications of the investigating authority's reasoning on a given point, or may be self-evident from the investigating authority's review of the record evidence or from the submissions of

[785] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141, (emphasis added).
[786] Panel Report, *US – Carbon Steel (India) (Article 21.5 – India),* para. 7.209. See also Panel Reports, *US- Clove Cigarettes,* paras. 7.632-7.633; *Japan – Apples*, para. 8.241.
[787] Panel Report, *US – Carbon Steel (India) (Article 21.5 – India),* paras. 7.210-7.211, (emphasis added). See also Panel Reports, *US – Softwood Lumber IV*, para. 7.124; *US – Countervailing Measures (China*), para. 7.253.

an interested party during the investigation."[788] However, ultimately this assessment is fact-dependent and, in turn, will depend on the specific circumstances.[789]

2. Background and overview of the ADC's specificity determinations

(a) As there was no subsidy identified, specificity was not considered in the expiry review

633. As detailed in Australia's PRR, on 27 March 2020, the expiry review superseded the original determination as the legal basis for the imposition of any anti-dumping and countervailing duties related to the import of stainless steel sinks from China.

634. The ADC found in the expiry review that there was no benefit with respect to Program 1 and, therefore, it was unnecessary to assess specificity.[790] Accordingly, the ADC did not find that Program 1 was specific and terminated all duties related to Program 1.

(b) The ADC's specificity determination in the original investigation

635. In its original determination, the ADC found that the provision of 304 SS CRC did amount to a specific subsidy.[791]

636. A practical challenge for the ADC in making this determination was the incomplete response of the Government of China to the ADC's questions. This directly impacted the assessment of specificity. The incomplete response provided by the Government of China did not address relevant questions, such as the nature and structure of the cold-rolled stainless steel industry in China and whether cold-rolled stainless steel suppliers were subject to restrictions with respect to their sales, including whether there were any restrictions on which entities could purchase their goods.[792]

[788] Panel Report, *US – Carbon Steel (India) (Article 21.5 – India),* para. 7.211.
[789] In terms of the "length of time", the panel in *US – Carbon Steel (India) (Article 21.5 – India)* outlined at para. 7.189 that Article 2.1(c) does not prescribe a particular method or analytical process for identifying the existence of a "subsidy programme" for the purposes of taking into account the "length of time" factor.
[790] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 82-83.
[791] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 169.
[792] *Stainless Steel Sinks Investigation 238 – GOC Questionnaire*, (Exhibit AUS-44), section A, questions 3 and 6.

637. China's first written submission mischaracterises the ADC's specificity assessment in the original investigation.[793] In the original investigation, the ADC adopted three stages of analysis to determine that subsidies under Program 1 were specific.

638. First, the ADC identified a subsidy program – Program 1. Specifically, the ADC identified a systematic series of actions that involved the granting of a financial contribution conferring a benefit (i.e. the provision of 304 SS CRC for less than adequate remuneration by Guangdong Metals) to a limited group of particular enterprises engaged in the manufacture of downstream products including stainless steel sinks (demonstrated by Zhuhai Grand from the sampled exporters).[794] The series of actions evidenced the subsidy program that the ADC described as "Program 1".

639. Second, the ADC found that Program 1 was limited to enterprises engaged in the manufacture of products (including stainless steel sinks) that use 304 SS CRC as a key input. In particular, the ADC considered substantial evidence,[795] that subsidies had been provided to certain recipients (in particular Zhuhai Grand from the sampled exporters) pursuant to Program 1.[796]

640. Third, the ADC considered both duration and economic diversification, in accordance with Article 2.1(c) of the SCM Agreement. In terms of the "length of time" factor, the ADC found that Program 1 had been in place for a significant period of time – before the commencement of the investigation. This can be seen from the following quote, where the ADC said, when discussing private prices in the domestic market, "the Commission's assessment of the Chinese stainless steel market has found the entire market for stainless steel in China to be affected by significant influence by the Government of China *during (and prior to) the investigation period*".[797]

641. The ADC's assessment of the extent of economic diversification of China was implicit in the final determination. It is unremarkable that there is no express discussion of it in the *Stainless Steel Sinks Investigation 238 Report*, given it is a well-known and uncontroversial fact

[793] China's first written submission, paras. 546-550.
[794] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 169-170.
[795] Australia's first written submission, fns. 762, 764.
[796] [[(Exhibit AUS-67) (BCI)]].
[797] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 207, (emphasis added).

that China's economy is one of the largest and most diverse economies in the world. China's cold-rolled stainless steel industry, while substantial, was (and is) still a very small fraction of its economy. The size and diversity of the Chinese economy was well-known and considered implicitly by the ADC in assessing this and other relevant investigations.[798] This assessment can be seen reflected in the ADC's statement, made in the context of assessing the first part of Article 2.1(c), that "*only* enterprises engaged in the manufacture of [downstream] products would benefit from Program 1."[799]

3. Flaws in China's panel request and first written submission

642. In response to China's claims and first written submission, Australia addresses below three key flaws:

- China's claims and arguments incorrectly assume that the relevant measures are in still in effect;
- even if, *arguendo*, the measures were in effect, Australia acted consistently with the SCM Agreement. China's claims and arguments misunderstand WTO rules; and
- China makes submissions under Article 2.4 that are outside the Panel's terms of reference.

(a) China failed to challenge a measure in existence

643. In section B.2.4 of its panel request, China alleges that Australia's countervailing measures with respect to Program 1 are inconsistent with Articles 1.2 and 2.1(c) of the SCM Agreement because "Australia failed to make a proper determination that the alleged provision of goods for less than adequate remuneration was specific to an enterprise or industry or group of enterprises or industries", including:

> a. failure to properly consider the existence or duration of a "subsidy programme", predominant use by certain enterprises, whether disproportionately large amounts of the

[798] For a similar fact situation and process of analysis see: Panel Report, *US — Softwood Lumber IV*, para. 7.124, where the panel found:

> While it is clear that the USDOC did not explicitly and as such address the extent of economic diversification in its Final Determination, we consider that in noting that 'the vast majority of companies and industries in Canada does not receive benefits under these programmes', the USDOC showed that it had taken account of the extent of economic diversification in Canada and its provinces, i.e. the publicly known fact that the Canadian economy and the Canadian provincial economies in particular are diversified economies.

[799] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 169, (emphasis added).

alleged subsidy were granted to certain enterprises, and the manner in which the alleged subsidy was granted; and

b. failure to account for the diversification of economic activities.[800]

644. China's entire claim under section B.2.4 relies on the ADC's determination associated with Program 1 in the original investigation. However, as noted above, on the 27 March 2020, the original determination ceased to be the basis for the countervailing measures related to Program 1. Instead, in the expiry review, the ADC determined Program 1 did not confer a benefit and, therefore, was not countervailable in its expiry review.[801]

645. Under Australian domestic law, consistent with the SCM Agreement, the first step in considering whether to impose countervailing duties is the identification of a "subsidy".[802] In order for a financial contribution to amount to a subsidy, the financial contribution must confer a "benefit".[803] If the ADC does not consider a financial contribution confers a benefit, then that is the end of the ADC's analysis. There is no legal basis (or practical need) for the ADC to move onto the next step and further consider whether an alleged subsidy is also "specific", consistent with Articles 1.2 and 2.1 of the SCM Agreement or subsection 269TAAC(1) of the *Customs Act 1901*.[804]

646. In the context of the expiry review, the ADC determined that the provision of 304 SS CRC did not confer a benefit for the relevant period of investigation.[805] Given there was no subsidy, there was no basis for the ADC to next consider whether Program 1 was specific.

647. Accordingly, Australia does not understand the basis for China's claims under Articles 1.2 and 2.1(c) as ADC did not make a specificity determination in respect of Program 1 in the expiry review. It did not need to. WTO law simply does not compel investigating authorities to make specificity determinations where there is no subsidy.

648. There were no countervailing duties in place associated with Program 1 at the time of panel establishment. Moreover, Australia does not maintain countervailing duties

[800] China's panel request, section B.2.4.
[801] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 82-83, 85.
[802] Section 269T of the *Customs Act 1901* (Cth), (Exhibit CHN-29), pp. 20-36.
[803] Section 269T of the *Customs Act 1901* (Cth), (Exhibit CHN-29), pp. 20-36.
[804] Subsection 269TAAC(1) of the *Customs Act 1901* (Cth), (Exhibit CHN-29) provides that "a subsidy is a countervailable subsidy if it is specific." As the phrasing of this subsection demonstrates, the starting point of the analysis is the identification of a subsidy, before considering whether such a subsidy is specific.
[805] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 82- 83.

associated with this program on imports of stainless steel sinks. There are no benefits accruing to China under the WTO Agreements that are being impaired as a result of the ADC's determination that Program 1 is not countervailable.

649. Australia also observes that it is difficult to identify what findings or recommendations China is asking the Panel to make to with respect to this claim, as there is no measure at issue. WTO law, including Article 3 of the DSU, confirmed by the weight of previous panel and Appellate Body reports, prevent panels from issuing advisory opinions.[806]

650. Given Program 1 ceased to be countervailable nearly two years before the panel request, and there was no specificity determination in the expiry review, China's claims with respect to Articles 1.2 and 2.1(c) of the SCM Agreement should fail.

(b) Even if the measures were within the Panel's scope, the ADC acted consistently with the SCM Agreement

651. Even if the countervailing measures associated with Program 1 had not been terminated in the expiry review (which Australia has demonstrated is patently not the case), the ADC's specificity determination in the original investigation was, nevertheless, consistent with Articles 1.2 and 2.1(c) of the SCM Agreement. In paragraph 552 of China's first written submission, China incorrectly argues that the ADC failed to:

- identify a subsidy program;
- consider whether the program was used by a limited number of certain enterprises (or otherwise considered another one of the four factors in Article 2.1(c)); and
- take into account the extent of diversification of economic activities within the jurisdiction of the granting authority and the length of time during which the subsidy program had been in operation.

652. In relation to the first two arguments, as explained above in paragraphs 639 to 640, the ADC identified a systematic series of actions that involved the granting of a financial contribution conferring a benefit to a limited group of particular enterprises engaged in the

[806] Panel Reports, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, para. 7.39; *Argentina – Textiles and Apparel*, para. 6.13; Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19.

manufacture of downstream products including stainless steel sinks (demonstrated by Zhuhai Grand from the sampled exporters).[807]

653. In the investigation, the ADC identified that Guangdong Metals regularly provided 304 SS CRC for less than adequate remuneration by considering relevant financial data. From this data, the ADC quantitatively identified there was a systematic pattern of 304 SS CRC being provided to Zhuhai Grand (as evidenced by [[**BCI**: [redacted]]]) at less than adequate remuneration. The ADC outlined this systematic pattern of 304 SS CRC being provided to Zhuhai Grand at less than adequate remuneration in a detailed Appendix to Zhuhai Grand's Verification Report.[808]

654. With respect to the two factors in the final sentence of Article 2.1(c), and as explained above in paragraphs 631 to 633, previous panels have emphasised that "taking into account the two factors in the final sentence of Article 2.1(c) need not be done explicitly, so long as there is some indication in the determination that the factors had been considered *implicitly*".[809]

655. As outlined above at paragraphs 641 to 642, both of these factors were taken into account by the ADC consistent with Article 2.1(c). The ADC clearly considered both factors in the context of the original investigation and the *Stainless Steel Sinks Investigation 238 Report*. China has failed to demonstrate otherwise.

656. Accordingly, given the completeness of the ADC's analysis in the original investigation, China's claims are without merit.

(c) China's claim under Article 2.4 is outside the scope of the Panel's terms of reference

657. Australia also notes that in paragraphs 19, 544, 552, and 566 of China's first written submission, it attempts to raise, for the first time in the context of its first written submission, a new challenge to the ADC's determination with respect to Program 1 under Article 2.4 of the SCM Agreement. Specifically, China alleges that the ADC failed to clearly substantiate its

[807] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 169-170.
[808] [[(Exhibit AUS-67 (BCI))]].
[809] Panel Report, *US – Carbon Steel (India) (Article 21.5 – India),* para. 7.211, (emphasis added).

determination of specificity on the basis of positive evidence as required by Article 2.4. China asserts:

> Finally the determination that Program 1 was specific was not clearly substantiated on positive evidence as is required by Article 2.4. As per the above discussion, there is no reference in the final report to evidence supporting a conclusion that Program 1 was a "subsidy programme", nor that the use of such a programme was by a limited number of certain enterprises.[810]

658. Article 6.2 of the DSU does not permit a complainant to challenge a measure without identifying a specific treaty provision at issue. WTO rules also do not allow a complainant to raise a new claim for the first time in the context of its first written submission. China does not raise a claim under Article 2.4 of the SCM Agreement in its panel request. Accordingly, China's claims with respect to Article 2.4 of the SCM Agreement fall outside the Panel's terms of reference and, in turn, the Panel should not make any findings or recommendations with respect to this claim.

i. Legal framework of Article 6.2 of the DSU

659. Article 6.2 of the DSU sets out the elements required to properly constitute a complainant's panel request.[811] Article 6.2 requires that the request: (1) be in writing; (2) indicate whether consultations have been held; (3) identify the specific measure at issue; and (4) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[812] With respect to this fourth requirement, it is "always necessary" and "a minimum prerequisite" for a complainant to identify—in its request for panel establishment—the specific treaty provisions alleged to have been violated.[813] In particular, as previous panels and the Appellate Body have found on numerous occasions:

> With respect to the requirement [in Article 6.2] that a panel request "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", the

[810] China's first written submission, para. 566, see also paras. 19, 544, 552.
[811] Article 6.2 of the DSU states:
> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

[812] Appellate Body Report, *Korea – Dairy*, para. 120; see also Panel Report, *China – Intellectual Property Rights*, para. 7.4.
[813] Appellate Body Report, *Korea – Dairy*, para. 124.

> panel request must " [a]s a minimum requirement... *list the articles(s) of the covered Agreement(s) claimed to have been violated*".[814]

660. Alleged violations of specific Articles of the WTO Agreements that were not raised in a complainant's panel request are outside the panel's terms of reference.

661. Furthermore, a complainant's subsequent submissions cannot cure a defect in a panel request, [815] nor can new claims be included because they are "interlinked" with or "dependent" on claims that were properly identified in the panel request.[816]

ii. China failed to raise a claim under Article 2.4 of the SCM Agreement in its panel request

662. In paragraphs 19, 544, 552 and 566 of China's first written submission, China alleges for the first time that Australia has violated Article 2.4 of the SCM Agreement:

> Finally the determination that Program 1 was specific was not clearly substantiated on positive evidence as is required by Article 2.4. As per the above discussion, there is no reference in the final report to evidence supporting a conclusion that Program 1 was a "subsidy programme", nor that the use of such a programme was by a limited number of certain enterprises.[817]

663. China did not make a claim under Article 2.4 of the SCM Agreement in its panel request. The panel request contains no reference to Article 2.4 of the SCM Agreement at all. The panel request provides no "summary of the legal basis" of Australia's complaint under

[814] Panel Report, *Morocco — Hot-Rolled Steel (Turkey)*, para. 7.10, (emphasis added), which footnotes Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.8 (which refers to Appellate Body Reports, *Korea – Dairy*, paras. 123-124; *Brazil – Desiccated Coconut, DSR 1997:I*, p. 186; *EC – Bananas III*, paras. 145, 147; *India – Patents (US)*, paras. 89, 92-93; *US – Carbon Steel*, para. 130), 4.17, 4.31.

[815] See Appellate Body Report, *China – Raw Materials*, para. 233, in which the Appellate Body made clear that the due process protections and pleading requirements in Article 6.2 of the DSU do not permit a complaining party to remedy a deficient panel request with arguments advanced in subsequent submissions:

> We find it troubling therefore that the Panel, having correctly recognized that a deficient panel request cannot be cured by a complaining party's subsequent written submissions, nonetheless decided to 'reserve its decision' on whether the panel requests complied with the requirements of Article 6.2 until after it had examined the parties' first written submissions and was 'more able to take fully into account China's ability to defend itself'.

See also, Appellate Body Report, *Australia – Apples*, para. 418 (where the Appellate Body stated: "[i]t is also well established that compliance with the requirements of Article 6.2 must be determined on the face of the request for the establishment of the panel and that '[d]efects [therein] cannot be 'cured' in the subsequent submissions of the parties during the panel proceedings'. Such submissions may be used only to confirm the meaning of the words used in the panel request and in assessing whether there has been prejudice to the responding Member's ability to prepare its defence").

[816] See Panel Report, *EC – Tube or Pipe Fittings*, para. 7.14 (in which the Panel found that "[t]he mere fact that a claim may be legally dependent upon another claim does not mean that it is subsumed within, or encompassed by, that claim. If a claim is not identified in the Panel request, the fact that it may be 'inter-linked' with an identified claim is not determinative").

[817] China's first written submission, para. 566, see also paras. 19, 544, 552.

Article 2.4 of the SCM Agreement, nor does it "present the alleged problem clearly" in accordance with Article 6.2 of the DSU.

664. Australia notes that in section B.2.4 of China's panel request, regarding alleged inconsistencies with Articles 1.2 and 2.1(c) of the SCM Agreement, China adds wording that is similar to the text of Article 2.4 of the SCM Agreement:[818]

> 4. Articles 1.2 and 2.1(c) of the SCM Agreement, because Australia failed to make a proper determination that the alleged provision of goods for less than adequate remuneration was specific to an enterprise or industry or group of enterprises or industries and *did not clearly substantiate its determination on the basis of positive evidence.* This includes, inter alia, Australia's:
>
> a. failure to properly consider the existence or duration of a "subsidy programme", predominant use by certain enterprises, whether disproportionately large amounts of the alleged subsidy were granted to certain enterprises, and the manner in which the alleged subsidy was granted; and
>
> b. failure to account for the diversification of economic activities.

665. However, the use of a phrase similar to Article 2.4 in the context of another claim is insufficient. Articles 2.1(c) and 2.4 of the SCM Agreement are separate provisions with separate legal requirements. If China wished to raise a claim under Article 2.4 of the SCM Agreement, it was required to identify that provision in its panel request.

iii. Relief sought

666. Australia respectfully requests the Panel find that any claims or arguments related to Article 2.4 of the SCM Agreement are outside its terms of reference and, in accordance with Articles 6.2, 7.1 and 19.1 of the DSU, make no findings or recommendations related to Article 2.4 of the SCM Agreement.

4. Conclusion

667. In summary, Australia submits CV claim 4 is premised on a fundamental misunderstanding of the relevant facts and WTO law.

668. The ADC's determination with respect to Program 1—the sole program challenged by China—ceased to have any legal or practical impact almost two years before the panel

[818] Article 2.4 of the SCM Agreement states, "[a]ny determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence", (emphasis added).

request. The ADC found in the expiry review that a benefit was not conferred and, consequently, did not find that Program 1 was specific. The countervailing measures challenged by China simply did not exist at the time China filed its request.

669. Nonetheless, even if, *arguendo*, the countervailing measures related to Program 1 had not been terminated, the ADC's specificity determination in the original investigation was fully consistent with Articles 1.2 and 2.1(c) of the SCM Agreement.

670. Given these factors, Australia submits China's claims should be rejected by the Panel.

E. CV CLAIM 5 – THE INITIATION OF THE INVESTIGATION WAS JUSTIFIED

671. In section B.2.5 of China's panel request, China challenges the ADC's decision to initiate an investigation into Program 1 in the context of the obligations in Articles 11.1, 11.2 and 11.3 of the SCM Agreement. Once again, the measures challenged by China in section B.2.5 of its panel request and its first written submission are focused *exclusively* on measures that were terminated almost two years before the Panel was established.[819] These claims are therefore outside the Panel's terms of reference for the reasons outlined in Australia's PRR.

672. To briefly reiterate Australia's views, the Panel should not consider these claims. There are no countervailing duties in place with respect to Program 1, as the ADC determined that Program 1 was not countervailable as part of its expiry review almost three years ago. Consequently, there are no recommendations the Panel could make under Article 19.1 of the DSU with respect to China's claims because there are no measures in effect for the ADC to bring into conformity with WTO law. Any findings issued by the Panel with respect to the ADC's initiation of an investigation into Program 1 back in March 2014 would effectively amount to an advisory opinion, which would be contrary to Articles 3 and 7 of the DSU, as well as previous panel and Appellate Body reports.[820]

[819] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 82-83, 85.

[820] Panel Report, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, para. 7.39, where the Panel stated:

> We are mindful that no provision of the DSU explicitly gives panels the power to issue advisory opinions or, indeed, to make any findings other than those required to resolve the dispute before them. Indeed, a number of provisions of the DSU suggest that panels should not make findings in respect of issues that are not in dispute. For example, Article 3.7 of the DSU provides that the 'aim of the dispute settlement mechanism is to secure a positive solution to a dispute'. Similarly, Article 3.4 of the DSU stipulates that ' [r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under

673. However, *arguendo*, even if the measures related to Program 1 had not been terminated, the ADC's initiation of an investigation into Program 1 was entirely consistent with Articles 11.1, 11.2 and 11.3 of the SCM Agreement. Accordingly, Australia address China's arguments below.

1. Legal standard

674. Article 11.3 requires investigating authorities to "determine whether the evidence is sufficient to justify the initiation of an investigation" and, in doing so, to "review the accuracy and adequacy of the evidence". These obligations are informed by Article 11.2. Given this connection, panels have read the obligations in Article 11.3 together with Article 11.2 and generally only make findings under Article 11.3 of the SCM Agreement.[821]

675. The relevant terms of Articles 11.2 and 11.3 are as follows:

> 11.2 An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, […]. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:
>
> […]
>
> (iii) evidence with regard to the existence, amount and nature of the subsidy in question;
>
> […]
>
> 11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

676. In initiating an investigation, an investigating authority is required to balance two competing interests: the interest of the domestic industry "in securing the initiation of an investigation" and the interest of respondents in ensuring that "investigations are not initiated on the basis of frivolous or unfounded suits".[822] The requirement of sufficient evidence is "a

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this Understanding and under the covered agreements'. Additionally, Article 7.1 of the DSU charges panels with making 'such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)'. In our view, these provisions make clear that the purpose of the dispute settlement system is to resolve disputes between Members.

See also, Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19; Panel Report, *Argentina – Textiles and Apparel*, para. 6.13.

[821] Panel Reports, *US — Countervailing Measures (China)*, paras. 7-143-7-145; *China – GOES*, para. 7.50.

[822] Panel Report, *China – GOES*, para. 7.54 citing *US – Offset Act (Byrd Amendment)*, para. 7.61 and *Guatemala – Cement I*, para. 7.52.

means by which investigating authorities filter those applications that are frivolous or unfounded".[823] Article 11 reflects the balance of these competing interests, as agreed by WTO Members.

677. Article 11.2(iii) requires "evidence with regard to the existence, amount and nature of the subsidy in question". At the initiation stage there must be evidence of all elements of a specific subsidy, including a financial contribution by a government or public body, a benefit, and specificity, to the extent that information is reasonably available to the applicant. An investigating authority must determine that there is "sufficient evidence" of all these elements to initiate an investigation.[824]

678. The panel in *US – Supercalendered Paper* elaborated on the meaning of "sufficient evidence". The word "evidence" is defined as "[f]acts or testimony in support of a conclusion, statement, or belief" and "[s]omething serving as proof".[825] The word "sufficient" is defined, relevantly, as "adequate".[826]

679. In relation to the "sufficient evidence" standard under Articles 11.2 and 11.3, Australia makes the following three points:

- in deciding whether to initiate an investigation, the investigating authority is not limited to the evidence in the application itself;[827]
- the quality and quantity of the evidence required to initiate an investigation is evidence that provides an *indication* that a subsidy exists;[828] and
- the quality and quantity of evidence required for initiation is less than what is required for a preliminary or final determination.[829]

[823] Panel Report, *US – Supercalendered Paper*, para. 7.147 (Article 11 claim not raised on appeal), citing panel reports, *China – GOES*, para. 7.55; Panel Report, *US – Countervailing Measures (China)*, fn. 184.
[824] Panel Report, *US – Supercalendered Paper*, paras. 7.148-7.149.
[825] Panel Report, *US – Supercalendered Paper*, para. 7.146 citing Shorter Oxford English Dictionary, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007),Vol. 1, p. 880.
[826] Panel Report, *US – Supercalendered Paper*, para. 7.146 citing Shorter Oxford English Dictionary, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007),Vol. 2, p. 3097.
[827] See Panel Report, *China – GOES*, paras. 7.55-7.56.
[828] See Panel Report, *China – GOES*, paras. 7.55-7.56.
[829] See Panel Report, *China – GOES*, paras. 7.54-7.56. See also, with respect to the analogous provisions of Articles 5.2 and 5.3 of the Anti-Dumping Agreement: Panel Report, *US – Softwood Lumber V*, para. 7.84.

680. Finally, it is important to note that investigating authorities do not need to justify their decisions to initiate an investigation in writing. As the panel in *US — Countervailing Measures (China)* found "the SCM Agreement does not require an investigating authority to make any findings or explain its understanding of key issues (such as the financial contribution, the benefit or specificity) when initiating an investigation, which contrasts with the requirements of preliminary or final determinations."[830]

2. Background and overview of the initiation of the investigation

681. On 31 January 2014, a written application was received from Tasman requesting the imposition of anti-dumping and countervailing duties in respect of stainless steel sinks exported to Australia from China. [831]

682. In its application, Tasman alleged Chinese producers benefited from eight countervailable subsidies. These alleged subsidies referred to programs for the provision of goods, grants, and beneficial taxation schemes.[832]

683. One of the alleged subsidies was referred to as "Program 1". Tasman contended that Program 1 involved the acquisition of cold-rolled stainless steel sheet from SOEs by exporters or producers at less than fair market value.[833]

684. Upon receiving the application, the ADC attempted to hold consultations with the Government of China in relation to the potentially countervailable subsidy programs (including Program 1). The Government of China declined, by emails on 15 February 2014 and 24 February 2014, to participate in any consultations prior to initiation of the investigation.[834] As summarised in the *Stainless Steel Sinks Investigation 238 Consideration Report*:

> In accordance with s.269TB(2C), the Commission invited the GOC for consultations during the pre-initiation phase. The purpose of the consultations was to provide an opportunity for the GOC to respond to the claims made within the application in relation to countervailable subsidies, including whether they exist and, if so, whether they are causing, or are likely to cause, material injury to an Australian industry.

[830] Panel Report, *US — Countervailing Measures (China)*, para. 7.25.
[831] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 8.
[832] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 51.
[833] *Stainless Steel Sinks Investigation 238 - Domestic Industry Application*, (Exhibit CHN-11), p. 61.
[834] *Email from MOFCOM to ADC, 15 February 2014*, (Exhibit AUS-68); *Email from MOFCOM to ADC, 24 February 2014* (Exhibit AUS-69).

> To assist in determining whether it wished to undertake consultations and what it would like to consult on, the GOC was provided with a non-confidential version of the countervailing application.
>
> The GOC advised the Commission that it did not wish to participate in consultations during the consideration phase, but that it may wish to do so if an investigation was initiated.[835]

685. The ADC then sought additional information from Tasman on 18 February 2014 – which was provided shortly thereafter.[836]

686. In addition to the information provided by Tasman, the ADC had substantial evidence before it, including findings from previous investigations of the ADC into similar steel inputs[837] and other relevant investigating authorities into the subsidisation of stainless steel sinks.[838]

687. In light of this evidence, the ADC initiated the investigation on 18 March 2014.[839]

3. The ADC acted consistently with Articles 11.2 and 11.3 of the SCM Agreement in initiating its investigation into Program 1

688. China makes two primary allegations in its first written submission with respect to the ADC's initiation. First, China alleges that the ADC did not have sufficient evidence that Program 1 was specific to initiate the investigation.[840] Second, China claims that the evidence relied upon by the ADC to initiate the investigation was "out-of-date" and did not demonstrate that stainless steel sinks were being "presently" subsidised during the relevant period of review.[841]

689. It appears, though unclear, that China makes separate claims under Article 11.2 and 11.3. As noted above, panels have read Article 11.2 and 11.3 and the sufficiency of evidence

[835] *Stainless Steel Sinks Investigation 238 Consideration Report*, (Exhibit CHN-59), p. 34.
[836] *Stainless Steel Sinks Investigation 238 Consideration Report*, (Exhibit CHN-59), p. 8.
[837] *Hot Rolled Plate Steel Investigation 198 Report*, (Exhibit CHN-33); *Aluminium Zinc Coated Steel Investigation 193 Report*, (Exhibit AUS-70).
[838] *Stainless Steel Sinks Investigation 238 Consideration Report*, (Exhibit CHN-59), p. 9 (where it was found that: "[i]n May 2012 the Canadian Border Services Agency (CBSA) imposed final dumping and countervailing duties on deep drawn stainless steel sinks exported from China. The dumping margins found ranged from 4.4% to 103.1%. The subsidy margins found ranged from 0.1% to 60.8%... In April 2013 the United States International Trade Commission (USITC) imposed final dumping and countervailing duties on deep drawn stainless steel sinks exported from China. The dumping margins found ranged from 27.1% to 76.5%. The subsidy margins found ranged from 4.8% to 12.3%.")
[839] *Stainless Steel Sinks Continuation 238 Initiation - ADN No. 2014/20*, (Exhibit CHN-12).
[840] China's first written submission, paras. 580-582, 587-588.
[841] China's first written submission, paras. 583-586, 589.

together.[842] Accordingly, consistent with previous panel decisions, Australia has responded to China's arguments through this combined lens.

(a) The ADC had sufficient evidence to prove or indicate specificity for Program 1

690. China alleges that neither the application from Australian industry nor the ADC's *Stainless Steel Sinks Investigation 238 Consideration Report* considered specificity.[843] There are two key flaws with China's argument.

691. First, in deciding whether to initiate an investigation, an investigating authority is not limited to the evidence in the application itself. As the panel noted in *China – GOES*:

> In the Panel's view, the fact that an applicant must provide such information as is "reasonably available" to it confirms that the quantity and quality of the evidence required at the stage of initiating an investigation is not of the same standard as that required for a preliminary or final determination. However, an investigation cannot be justified where, for example, there is no evidence of the existence of a subsidy before an investigating authority, even if such evidence is not "reasonably available" to the applicant. Indeed, to justify initiation under Article 11.3, an investigating authority must have "sufficient evidence" (*whether from the applicant, exporting Member or arising out its own enquiries*) and not mere assertion before it.[844]

692. In this case, the ADC had before it evidence as to whether the subsidy was specific. This evidence included previous investigations into similar subsidy programs by the ADC in which the ADC determined that these subsidies (which were variations of Program 1) were specific. This includes findings in relation to:

- aluminium zinc coated steel and galvanised steel; and
- hot rolled plate steel.[845]

693. In these two previous investigations, the ADC found that a group of entities that were downstream of the key steel input markets represented a specific group, and that the

[842] Panel Reports, *US — Countervailing Measures (China)*, paras. 7-143-7-145; *China – GOES*, para. 7.50; *US – Supercalendered Paper*, para. 7.145.
[843] China's first written submission, paras. 580-582, 587-588.
[844] See Panel Report, *China – GOES*, para. 7.56, (emphasis added).
[845] *Hot Rolled Plate Steel Investigation 198 Report*, (Exhibit CHN-33), p. 10; *Aluminium Zinc Coated Steel Investigation 193 Report*, (Exhibit AUS-70), p. 48.

requirements of Article 2.1(c) of the SCM Agreement were satisfied. For example, in the *Aluminium Zinc Coated Steel Investigation 193 Report*, the ADC found:

> Given that HRC is a key input in the manufacture of downstream products (including galvanised steel and aluminium zinc coated steel) it is clear that only enterprises engaged in the manufacture of these products would benefit from the provision of the input by the GOC at less than adequate remuneration.[846]

694. Although China asserts that the ADC failed to consider evidence of specificity, the ADC considered all evidence available to it—all of which clearly indicated the program was specific.

695. Second, on this point, China's submissions appear to ignore the panel in *US — Countervailing Measures (China)*, which noted "the SCM Agreement does not require an investigating authority to make any findings or explain its understanding of key issues (such as the financial contribution, the benefit or specificity) when initiating an investigation".[847] Accordingly, the absence of explicit references to a specificity determination in the *Stainless Steel Sinks Investigation 238 Consideration Report* is not inconsistent with the SCM Agreement.

696. Indeed, it is implicit in the *Stainless Steel Sinks Investigation 238 Consideration Report*, that the ADC did consider whether there was adequate evidence indicating specificity. The Report records the observation by the ADC that Australia's domestic legislation (section 269TAAC of the *Customs Act 1901*) "provides that, in order for a subsidy to be countervailable, it must also be specific."[848] That is, the ADC, when considering whether there was sufficient evidence, acknowledged that specificity must be considered.

697. In summary, contrary to China's submissions, Australia notes the ADC did consider specificity and the evidence was sufficient for the purposes of Articles 11.2 and 11.3.

[846] *Aluminium Zinc Coated Steel Investigation 193 Report*, (Exhibit AUS-70), p. 48.
[847] Panel Report, *US — Countervailing Measures (China)*, para. 7.25.
[848] *Stainless Steel Sinks Investigation 238 Consideration Report*, (Exhibit CHN-59), p. 34.

(b) The ADC had sufficient evidence that exporters of stainless steel sinks were being subsidised

698. China's second argument is premised on the position that the CBSA statement (which formed a part of the application) covered the period from January 2010 to 31 August 2011 and not the period the ADC investigated, namely 1 January 2013 to 31 December 2013.[849]

699. In making this argument, China fundamentally misrepresents the facts. China states "the allegation that stainless steel sinks exported to Australia were subsidised was premised wholly on the CBSA Statement."[850] The CBSA Statement was not the only evidence included in the application, let alone the only evidence before the ADC. Relevantly, the evidence also referred to in the application also relevantly included:

- speciality industry reports, including:
    - a Specialty Steel Industry of North America report released on April 2007 into "Chinese Government Subsidies to Stainless Steel Industry";
    - stainless steel price data by MEPS International and Metal Bulletin Research;
- relevant Government of China legislation and decrees, including:
    - Law of State-Owned Assets of the Enterprises;
    - Decree of the State Council of the People's Republic of China No. 378 – Interim Relations on Supervision and Management of State-owned Assets of Enterprises; and
    - Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprise Regulations of the People's Republic of China on the Implementation of the Enterprise Income Tax Law.[851]

[849] China's first written submission, paras. 583-586, 589.
[850] China's first written submission, para. 584.
[851] *Stainless Steel Sinks Investigation 238 - Domestic Industry Application*, (Exhibit CHN-11), pp. 61-68.

700. This documentation, was sufficient supporting evidence, in the ADC's view, to initiate an investigation. It covered other periods of time including the period of the investigation, not just the period from January 2010 to 31 August 2011. In any event, even if this was not the case, given the alleged subsidisation is interconnected with various industrial and economic policies and five-year plans,[852] it was open to the ADC to form the view that there was sufficient evidence that relevant exporters were being subsidised during the investigation period. The ADC acted as an objective and unbiased investigating authority in forming this view given the evidence available to it.

701. China also mistakenly relies on the panel report in *Pakistan – BOPP Film (UAE)* in advancing the argument that information used by the ADC was not sufficient for the purposes of initiating an investigation. In *Pakistan – BOPP Film (UAE)*, the panel found that a 27-month gap between the dumping data in the application and the date of initiation in that case was "quite considerable".[853] China contends that this observation applies equally to the present case, where there was a 31-month gap between the end of the period of investigation for the CBSA's findings and the date of initiation of the ADC's investigation.

702. *Pakistan – BOPP Film (UAE)* concerned a temporal gap of evidence of dumping of a particular product and injury to industry. The ADC, on the other hand, considered strong evidence of long-term, systemic subsidisation, an entirely different factual situation at issue in that dispute.

703. Moreover, China also failed to acknowledge that panel's conclusion that "the temporal gap alone is not enough to conclude that the data did not provide evidence".[854] That panel found that an investigating authority must consider the relevant circumstances surrounding the decision to initiate as well.[855] Unlike the facts presented in *Pakistan – BOPP (UAE)*, the ADC's finding was based on strong evidence of long-term, systemic subsidisation, well supported by documentation covering the relevant period.[856]

[852] Details of these various policies and plans can be found: *Stainless Steel Sinks Investigation 238 - Domestic Industry Application*, (Exhibit CHN-11), pp. 61-68; *Hot Rolled Plate Steel Investigation 198 Report*, (Exhibit CHN-33), pp. 2-3.
[853] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.37.
[854] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.37.
[855] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.38.
[856] Details of these various policies and plans can be found: *Stainless Steel Sinks Investigation 238 - Domestic Industry Application*, (Exhibit CHN-11), pp. 61-68; *Hot Rolled Plate Steel Investigation 198 Report*, (Exhibit CHN-33), pp. 2-3.

704. Accordingly, it is unreasonable to assume that a temporal gap in one piece of evidence would prevent the ADC from concluding there was sufficient evidence to initiate.

4. Conclusion

705. An objective and unbiased investigating authority could have found that the evidence before the ADC in relation to the existence and nature of Program 1 was sufficient to justify initiating an investigation into Program 1. In particular:

- the ADC had before it adequate evidence tending to indicate specificity; and
- a temporal gap between the investigation period and the investigation period of one piece of evidence does not undermine the fact that the ADC considered all the evidence available to it and had sufficient evidence to justify the initiation of an investigation into Program 1.

706. Accordingly, for the above reasons, Australia requests that the Panel reject China's claim that the ADC's initiation of the investigation into Program 1 was inconsistent with Australia's obligations under Articles 11.1, 11.2 and 11.3 of the SCM Agreement.

707. Furthermore, and overall, the Panel should reject China's claims that Australia acted inconsistently with the SCM Agreement and find that China's challenges under the SCM Agreement are outside its terms of reference or, in the alternative, that China's claims are without merit.

VIII. CONCLUSION

708. China has raised several claims relating to three separate product investigations by the ADC but few of those claims are within the Panel's terms of reference, and none of those claims have any merit. The entirety of China's claims with respect to the stainless steel sinks and wind towers investigations are outside the Panel's terms of reference.

709. China's claims with respect to the railway wheels investigation are the only ones within the Panel's terms of reference. China's claims completely lack merit. As demonstrated in this submission, the ADC acted consistently with its obligations under the Anti-Dumping Agreement in the railway wheels investigation.

710. For the foregoing reasons, Australia respectfully requests that the Panel reject China's claims in their entirety.