

**Before the World Trade Organization
Panel Proceedings**

**AUSTRALIA – ANTI-DUMPING AND COUNTERVAILING DUTY
MEASURES ON CERTAIN PRODUCTS FROM CHINA
(DS603)**

**AUSTRALIA'S OPENING STATEMENT AT THE FIRST SUBSTANTIVE
MEETING OF THE PANEL AND THE PARTIES**

7 March 2023

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I. INTRODUCTION

1. Thank you, Madam Chair and distinguished members of the Panel.

2. In this oral statement, I will first present Australia's overarching approach to this dispute, before moving to address several important procedural and substantive issues. This is a case which is not just of commercial and economic importance Australia – it has significant implications for all WTO Members' rights under the covered agreements.

3. Madam Chair, Australia was a founding member of the GATT 1947 and is strongly committed to liberalisation and the promotion of global trade. We have demonstrated this strong commitment through our actions over many years.

4. Openness to trade has been of enormous benefit to Australia. And Australia's businesses are more than willing to compete with foreign producers on the basis that all players comply with the rules to which we have all agreed.

5. China has also significantly benefitted from the transparent and predictable access to markets that rules-based membership of the WTO offers – boosting its national income and accelerating its integration into the global economy.

6. Australia believes that adherence to market-oriented practices and policies, as well as to our rules-based multilateral system, underpins membership of the WTO.

7. All WTO Members rely on the rights and obligations agreed by Members and reflected in the WTO's covered agreements. These agreed trade rules have supported Members' economic growth and prosperity for decades. The rules protect the rights of Members regardless of their size and power.

8. This is why, when faced with injurious dumping and subsidisation, Australia is entitled to take WTO-consistent measures in response. This is precisely what occurred in all three cases now disputed by China.

9. In fact, the arguments advanced by China in this dispute, if accepted by the Panel, would diminish the rights of all WTO Members under the covered agreements, by stripping investigating authorities of the tools they need to ensure that trade remains both free and

open. No Member should be permitted to curb the authority of the rest of the Membership to address unfair practices, including dumping and subsidisation.

10. Further restrictions on the ability of Members to properly address these policies will pose challenges for the broader WTO system. This is particularly true when it comes to unfair trade practices involving China's steel sector, which has been the subject of a number of previous WTO disputes, as well as efforts within the WTO and in other international fora to address the distortive and discriminatory impacts of overcapacity and industrial subsidies.

11. Australia's respect for the WTO rules-based order and our commitment to the dispute settlement system is ironclad. That is why Australia welcomes the opportunity to resolve the issues before the Panel in accordance with the WTO rules – both substantive and procedural – upon which we are entitled to rely.

12. Australia's use of anti-dumping and countervailing measures in the cases China has challenged was legitimate and fully consistent with the WTO covered agreements. Briefly, in the challenged original investigations, which took place between 2014 and 2019, and which China waited until now to challenge, Australia imposed measures following careful, thorough, and transparent proceedings, in compliance with its WTO obligations. All three cases involve China's distorted steel industry and market, which harm not only Australian businesses and workers but other foreign companies seeking to compete.

13. Before reaching the substantive issues, Australia calls to the Panel's urgent attention the fact that all of China's claims related to stainless steel sinks and wind towers are outside the Panel's terms of reference. China's consultations request (which came two days after Australia's consultation request in the *Wine* dispute¹), and its subsequent panel request, contain significant procedural errors. For many of the claims in China's panel request, China had earlier opportunities to bring them to WTO dispute settlement, but chose not to do so.

14. Australia has requested that the Panel make no findings or recommendations in respect of these claims, and to do so as soon as possible. It follows that the only claims in China's panel request that Australia considers to be within the Panel's terms of reference are China's challenges in respect of the railway wheels anti-dumping investigation. I note, Madam

¹ *China – Anti-Dumping and Countervailing Duty Measures on Wine from Australia*, WT/DS602.

Chair, that China has spent considerable time this morning seeking to address Australia's claims in this regard. I suggest this confirms the Panel should indeed resolve these issues promptly.

II. ALL OF THE WIND TOWERS AND STAINLESS STEEL SINKS MEASURES ARE OUTSIDE THE PANEL'S TERMS OF REFERENCE

A. THE MEASURES AT ISSUE IN THIS DISPUTE

15. I will now explain in more detail some of the high-level jurisdictional and substantive implications arising from this case that are of systemic concern to WTO Members. In particular, these relate to (1) threshold jurisdictional issues, including whether the Panel may issue advisory opinions on measures not properly before it, as now requested by China; and (2) important substantive issues, including China's request that the Panel interpret the Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement in such a way as to inappropriately tie the hands of investigating authorities.

16. Starting with Australia's jurisdictional claims, I would point out that WTO Members were careful to craft the dispute settlement system to deliver security and predictability to the multilateral trading system by providing a framework for prompt settlement of disputes concerning the provisions of the WTO covered agreements *but only as they relate to existing measures* maintained by WTO Members. Panels must avoid opining on hypothetical issues. Doing so risks undermining both the efficiency of the dispute settlement system and its careful balance between the need to clarify matters *properly before* a panel and the need to avoid adding to or diminishing the rights and obligations of Members.

B. ALL OF CHINA'S CLAIMS UNDER THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES RELATE TO MEASURES THAT NO LONGER EXIST

17. Turning now to Australia's preliminary ruling request in respect of stainless steel sinks, Australia submits that each of China's countervailing duty claims relates exclusively to measures no longer in existence. These claims, consistent with WTO rules and decades of panel and Appellate Body reports, are outside the Panel's terms of reference.

18. This matter is straight-forward. The only question before the Panel is whether the specific measures challenged by China in Section B.2 of its panel request were in existence at the time of Panel establishment. The answer is clear— they were not.

19. China’s claims under the Agreement on Subsidies and Countervailing Measures relate solely to subsidy Program 1, as identified in the original subsidisation determination by the Anti-Dumping Commission (“ADC”) with respect to stainless steel sinks. In 2015, the ADC made an affirmative countervailing duty finding with respect to Program 1 in its original determination. It found that Chinese exporters had received a benefit from Program 1 and assigned countervailing duty rates to the exporters ranging from 3.3 to 6.4 per cent stemming from Program 1.

20. In 2020, consistent with its WTO obligation to review the continuation of the countervailing duty measure after five years, Australia conducted an expiry review of that measure. The ADC determined that there was no longer a benefit associated with Program 1, and that, accordingly, Program 1 was no longer countervailable. As a result, from 27 March 2020, Australia has not imposed countervailing duties associated with Program 1.

21. China cannot challenge the 2015 original determination because its findings were superseded by the expiry review as of 27 March 2020, nearly two years before China filed its panel request. From 27 March 2020, there were no countervailing measures in place with respect to Program 1.

22. I will address in a moment China’s misplaced arguments relating to the notice.² Put simply, they are irrelevant. China’s claims relate to a measure that no longer exists. Australia considers that the Panel has everything it needs to rule on this straight-forward issue and to do so quickly.

23. As Australia has made extensive submissions on this issue already, we will highlight just a few key points today related to both the urgency of our request and the identity of the challenged measures.

² China’s Response to Australia’s Request for a Preliminary Ruling (4 January 2023) (“China’s 4 January Response”), paras. 3 and 18-24.

24. First, China's communication to the Panel of 10 February demonstrates precisely why it is so important for the Panel to rule on this issue as soon as possible.³ It is difficult—if not impossible—for Australia to respond to any of China's substantive SCM claims, in either written or oral form, without first addressing the fact that the challenged measures simply do not exist. For example, how can Australia defend the ADC's allegedly WTO-inconsistent calculation of "benefit" when the ADC already found in the expiry review that there was no benefit associated with Program 1? There are simply no findings or recommendations the Panel could make in respect of either the determination or duties associated with this program, which were terminated almost three years ago today.

25. To the extent China argues that it is inappropriate for a panel to make a preliminary ruling with respect to the existence of a challenged measure, China misunderstands Article 6.2 of the Dispute Settlement Understanding ("DSU"). Article 6.2 requires that a Member identify "the specific measure at issue" in its panel request. As outlined in Australia's preliminary ruling request and 12 January Response, a measure that does not exist cannot be a "measure at issue" in accordance with Article 6.2. Australia does not question whether the measures challenged by China would constitute "measures" for the purposes of Article 6.2 if they were still in effect. Rather, the measures challenged by China ceased to exist nearly two years prior to panel establishment, and therefore cannot be challenged through WTO dispute settlement. This goes straight to the heart of the Panel's jurisdiction to hear China's claims. As the Appellate Body found in *EC – Chicken Cuts*, 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.⁴

26. Second, as outlined extensively in Australia's preliminary ruling request, each of China's claims in Section B.2 of its panel request relates exclusively to the ADC's 2015 original determination in respect of Program 1. China reconfirmed in paragraph 53 of its 4 January Response that the challenged measure is, in fact, the 2015 original determination, by stating unambiguously "China challenges that determination."⁵

³ Communication from China regarding Australia's request for a preliminary ruling (10 February 2023).

⁴ Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157, para. 156.

⁵ China's 4 January Response, para. 53.

27. To this end, China's entire discussion of the notice (which China raises extensively in its 4 January Response) is irrelevant to the question of whether the measures challenged by China in Section B.2 of its request were in existence at the time of panel establishment. It is clear from the plain text of each of the claims under Section B.2 that none of China's claims relate to the notice at all. If China were challenging the notice, then all of China's substantive claims of breach in Section B.2 would have to relate to how the notice itself breaches Australia's substantive obligations under the Agreement on Subsidies and Countervailing Measures. China makes no attempt to do so.

28. China also makes no claims relating to the expiry review or current non-Program 1 countervailing duties. If China had intended to challenge the expiry review, it would have needed to cite to Article 21.3 of the Agreement on Subsidies and Countervailing Measures in its panel request, which it did not. China's claims in Section B.2 are singularly focused on the ADC's methodology in the 2015 original and now superseded determination.

29. Australia notes that in China's 4 January Response, China also goes so far as to ask the Panel to issue an advisory opinion on the ADC's now superseded 2015 determination, based on the possibility that at some point in the future the ADC may attempt to reconsider Program 1.⁶ Of course, WTO rules do not allow panels to issue findings in respect of future, speculative measures. WTO Members did not vest the dispute settlement system with such jurisdiction. But even if the measures associated with Program 1 could be challenged on that basis, China's burden under Article 6.2 of the DSU would relate to very different claims than those it has pursued.

30. Finally, Australia notes that, should the Panel somehow find that China's claims under Section B.2 are within its terms of reference, those claims would have to relate to the ADC's findings in respect of Program 1, as of the date of Panel establishment. In other words, a program that was found to no longer be countervailable, is not being countervailed, and is associated with no countervailable duties. China has presented no evidence with respect to how such a measure nullifies or impairs its benefits under the WTO Agreements. And, on this basis, has failed to present a *prima facie* case.

⁶ China's 4 January Response, paras. 23, 26 and 55(b).

**C. CHINA’S CLAIMS CONCERNING THE STAINLESS STEEL SINKS AND WIND TOWERS
ANTI-DUMPING MEASURES ARE LIKEWISE OUTSIDE THE SCOPE OF THE PANEL’S
TERMS OF REFERENCE**

31. All of China's anti-dumping claims in respect of stainless steel sinks and wind towers are also outside the scope of this dispute for two reasons. First, similar to China’s error with respect to its countervailing duty claims, the original determinations challenged by China have been superseded and no longer provide the legal basis for any anti-dumping duties. Second, with respect to its claims pertaining to the expiry reviews, China’s panel request failed to identify Article 11.3 of the Anti-Dumping Agreement—the key legal provision for challenging an expiry review. As such, Australia asks the Panel to find that all of China’s claims under the Anti-Dumping Agreement with respect to these two proceedings are outside its terms of reference.

1. Procedural background to the stainless steel sinks and wind towers measures

32. The anti-dumping duties on wind towers and stainless steel sinks were originally imposed on 16 April 2014 and 26 March 2015, respectively. The imposition of duties was based on the findings, reasons, and recommendations in the respective original investigation final reports.⁷

33. Article 11.3 of the Anti-Dumping Agreement provides that anti-dumping duties must expire five years after imposition unless an investigating authority determines in an expiry review that the expiry of the duties would be likely to lead to continuation or recurrence of dumping and injury. WTO Members decided in the Uruguay Round to confine the effect of an anti-dumping measure to a limited period of time. An extension of anti-dumping measures thus requires a fresh decision by an investigating authority, based on new evidence and a new period of investigation.

34. Consistent with Article 11.3 of the Anti-Dumping Agreement, the anti-dumping duties on wind towers and stainless steel sinks established in 2014 and 2015, respectively, were due to expire on 16 April 2019 and 26 March 2020, respectively. The ADC conducted expiry

⁷ Australia's first written submission (13 January 2023), paras. 43-45 and 121-123.

reviews, at the request of Australian industry, and determined that the expiration of the anti-dumping measures 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.⁸ The ADC's affirmative findings in this regard were the foundation for the Minister's decision to continue the duties for an additional five years.

35. The expiry reviews were *de novo* assessments. The ADC considered in the expiry reviews different evidence compiled from different period of investigations, and then applied a different legal standard compared with the original investigation. For the purposes of its likelihood determinations, for example, the ADC calculated new dumping margins based on different normal values and export prices. For this reason, the dumping margins on both wind towers and stainless steel sinks changed following the expiry reviews. The decisions to continue to impose anti-dumping duties at different rates were based on the *de novo* findings, reasons, and recommendations in the expiry reviews. These expiry review findings superseded those made in the original investigations.

36. Accordingly, from 17 April 2019 and 27 March 2020, respectively, the legal bases for the anti-dumping duties on wind towers and stainless steel sinks were the expiry reviews. The Minister's decision to continue the duties on wind towers and stainless steel sinks were based on the expiry reviews. As a matter of Australian law, in accordance with Article 11.3 of the Anti-Dumping Agreement, and consistent with the practice of other WTO Members, these expiry reviews superseded the original investigations as the legal basis for the imposition of the anti-dumping duties at the time of China's panel request and still today.

2. The stainless steel sinks and wind towers original investigations and expiry reviews are outside the scope of the Panel's terms of reference

37. As I have noted, a panel request defines the scope of the dispute and establishes a panel's terms of reference. In addition to requiring that a complainant identify "the specific measures at issue" in its panel request, Article 6.2 of the DSU requires that a complainant provide a brief summary of the legal basis of the complaint (or claim) sufficient to present the problem clearly. The Appellate Body has explained that "[i]dentification of the treaty

⁸ Australia's first written submission, paras. 46-52 and 124-130.

provisions claimed to have been violated by the respondent is *always necessary* both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a *minimum prerequisite* if the legal basis of the complaint is to be presented at all.”⁹

38. Almost all of China’s claims in Section B.1 of its panel request relate exclusively to the original determinations in stainless steel sinks and wind towers. Specifically, China states: “the Panel’s focus should largely remain fixed on the original investigations in each of the wind towers and stainless steel sinks cases.”¹⁰ Indeed, all of the claims that China advances as part of its first written submission also relate to the original determinations. But the expiry reviews superseded the original investigations as the legal bases for the anti-dumping duties applied to imports of both wind towers and stainless steel sinks *before* China’s panel request. As such, these claims are outside the scope of the Panel's terms of reference.

39. Moreover, to the extent that China’s panel request did challenge the expiry reviews, there is a fundamental deficiency. China has failed to identify Article 11.3 of the Anti-Dumping Agreement in its panel request with respect to these expiry review claims. Accordingly, China has not provided a brief summary of the legal basis for its claims with respect to the two expiry reviews, as required by Article 6.2 of the DSU.

40. WTO panels and the Appellate Body have confirmed that a faulty panel request may not be subsequently “cured” in a first written submission or any other subsequent submission.¹¹ China’s belated citation to Article 11.3 of the Anti-Dumping Agreement in its first written submission does not correct its error in its panel request—in which China failed to identify the critical provision, Article 11.3 of the Anti-Dumping Agreement. That flaw was fatal and cannot be rectified. As such, pursuant to Articles 6.2 and 7.1 of the DSU, the wind towers and stainless steel sinks expiry reviews are likewise outside the Panel’s terms of reference.

41. In sum, China’s claims related to the wind towers and stainless steel sinks anti-dumping cases under Section B.1 of its panel request are not properly before the Panel. The

⁹ Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3, para. 124 (emphases added).

¹⁰ China’s first written submission, para. 35.

¹¹ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591, para. 143.

combined effect of China's decision to bring claims only against superseded measures, without making a claim against the expiry reviews, is that all of these claims are outside the Panel's terms of reference.

III. AUSTRALIA ACTED CONSISTENTLY WITH ITS OBLIGATIONS UNDER THE ANTI-DUMPING AGREEMENT AND GATT 1994 IN THE RAILWAY WHEELS INVESTIGATION

42. I now turn to the only claims that are within this Panel's terms of reference, China's claims under the Anti-Dumping Agreement with respect to the railway wheels investigation.

43. China makes six claims with respect to the ADC's findings in the railway wheels investigation. Each of these claims is without merit, and several are interrelated and co-dependent. I will address first China's claim 3 pertaining to the ADC's computation of normal value under Article 2.2.1.1 of the Anti-Dumping Agreement, then claim 1 relating to the ADC's adaptation of undistorted data as part of its normal value calculation. China's residual claims are almost exclusively built on the erroneous assumption that the ADC's calculation of constructed value was WTO inconsistent, and that this error had knock-on effects impacting the rest of the ADC's dumping analysis.¹² As this fundamental assumption is baseless, and the ADC's methodology was entirely consistent with Article 2 of the Anti-Dumping Agreement, China's other related claims must also fail.

44. I now turn to an important issue of legal interpretation raised by China's claims on the railway wheels investigation. China fails to give any meaning and effect to the key term "normally" in Article 2.2.1.1 when a proper interpretation of that article must take "normally" into account.

45. The first sentence of Article 2.2.1.1 provides that (emphasis added):

For the purpose of paragraph 2, costs shall *normally* be calculated on the basis of records kept by the exporter or producer under investigation.

46. The meaning of this sentence is clear from the ordinary meaning of the words, interpreted in context, and in light of the object and purpose of the Anti-Dumping

¹² China's first written submission, para. 7(c).

Agreement.¹³ This sentence cannot be interpreted, as China has done, as if the word "normally" has no function and need not be taken into account. Such an approach would render the term "normally" inutile and redundant, in violation of the foundational legal principle that "interpretation must give meaning and effect to all the terms of a treaty".¹⁴

47. Therefore, under a proper interpretation of Article 2.2.1.1 that gives effect to the word "normally", the situations in which an investigating authority can depart from an exporter's records include: (1) where the circumstances are not "normal or ordinary"; (2) where the exporter's records are not in accordance with the generally accepted accounting principles; or (3) where the exporter's records do not reasonably reflect the costs associated with the production and sale of the product under consideration.

48. WTO panel and Appellate Body reports have not, to date, prescribed the precise situations in which an investigating authority may invoke "normally". A determination of whether the circumstances are not normal or ordinary is to be made on a case-by-case basis, as it is necessarily dependent on the specific facts of each case.

49. In light of those observations I now turn to China's anti-dumping duty claims 3 and 1 with respect to the ADC's analysis in the railway wheels investigation.

1. China's AD claim 3

50. First, China's AD Claim 3. This claim is directed at the ADC's decision to replace a single cost item in exporter records for the purpose of constructing normal value. China claims the ADC departed from exporter records because a single cost item was not a reasonable reflection of the exporter's actual costs. China posits that the ADC therefore made an erroneous determination under the second condition of the first sentence of Article 2.2.1.1.¹⁵

51. China fundamentally misunderstands the ADC's practice and its findings in the railway wheels investigation. China's allegations as to railway wheels involve an "exception to an exception". Specifically, Australian law and ADC practice provide that, where there are domestic or home market sales available for comparison purposes under Article 2 of the Anti-

¹³ Article 31 of the *Vienna Convention on the Law of Treaties* (1969); China's first written submission, paras. 158-159.

¹⁴ Panel Report, *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/R and Add.1, adopted 28 January 2020, para. 7.112 citing Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3, p. 21.

¹⁵ China's first written submission, para. 228.

Dumping Agreement, the ADC will use those sales to calculate an exporter's dumping margin. This is the rule applied by the ADC when China is the home market in question.¹⁶ If there are no domestic or home market sales, the ADC will look to constructed value for comparison purposes.

52. The railway wheels investigation involves the unusual circumstance where the ADC needed to calculate constructed value because there were no eligible home market sales. The ADC's constructed value calculation in railway wheels employed information other than the records of the single exporter under investigation, Masteel, for the purpose of calculating the cost of steel billet in China (a key input for the production of railway wheels).

53. The ADC explicitly justified this decision in the *Railway Wheels Investigation Report* by invoking "normally" under the first sentence of Article 2.2.1.1. The ADC explained as follows:

the circumstances [were] *not normal and ordinary* because the records of Masteel reflect the government influence by the [Government of China] which distorts the costs in the steel and steel input markets in China.¹⁷

54. Notwithstanding this clear statement, China nonetheless claims that the ADC's decision was pursuant to the "second condition" of the first sentence of Article 2.2.1.1.¹⁸ This is wrong.

55. The misunderstanding appears to be based on the ADC's employ of the phrase "competitive market costs." But, China's concerns are surprising—this phrase was directly assessed by the *A4 Copy Paper* panel, which found the ADC's "competitive market costs" analysis to be "different from that required under the second condition of Article 2.2.1.1, first sentence."¹⁹

¹⁶ See, e.g., *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), para. 41:

Consequently, where sufficient relevant domestic sales of like goods have been made in the ordinary course of trade by Zhuhai Grand of exact model matches to exported models during the investigation period, the Commissioner has used these sales prices as the basis for determining normal values under s. 269TAC(1) (see Section 6.6 for further discussion).

¹⁷ *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 24 (emphases added).

¹⁸ See, e.g., China's first written submission, paras. 225-231.

¹⁹ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.103.

56. Article 2.2.1.1 permits an investigating authority to depart from an exporter's records in circumstances that are not "normal."²⁰ I refer the Panel to paragraphs 166 – 174 of Australia's first written submission that sets out in detail the specific facts in the railway wheels investigation that led to the ADC's assessment that the circumstances in which Masteel's costs were formed were not normal or ordinary. For the Panel's benefit, I will now highlight a few of the key elements of the ADC's analysis in this regard.

57. The ADC found that there were *significant* systemic and structural imbalances in the Chinese steel and steel inputs markets at various stages of the production process. Masteel actively participated and incurred costs in these markets where raw materials were being sold at below cost-recovery rates, and where steel manufacturing mills were operating at losses leading to over-capacity, over-production, and depressed prices.²¹

58. The ADC found that the systemic and structural imbalances in the Chinese steel and steel inputs market were attributable to the Government of China's serious and pervasive influence through a variety of mechanisms, including:

- the role and operation of Chinese state-owned and state-invested enterprises;²²
- government-issued industry-planning guidelines and directives;²³
- provision of direct and indirect financial support to market participants;²⁴ and
- taxation and tariff policies.²⁵

59. Specifically, the ADC found that "[t]he significant number of [state-owned enterprises and state-invested enterprises] 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."²⁶ These systemic

²⁰ Appellate Body Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WT/DS493/AB/R and Add.1, adopted 30 September 2019, DSR 2019:X, p. 5227, paras. 6.87, 6.105 and fn. 308; Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.115.

²¹ *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 80-95.

²² *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 84-87.

²³ *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 87-91.

²⁴ *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 91-92.

²⁵ *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 93.

²⁶ *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 95.

and structural imbalances were compounded by the fact that Masteel was one of the largest iron and steel producers and sellers in China²⁷ and was itself a State-Owned Enterprise.²⁸

60. The ADC, acting as an unbiased and objective investigating authority, found that the circumstances in which Masteel's costs were formed were not normal or ordinary. The ADC's decision was well-founded based on the evidentiary record before it. China's assertion that this aspect of the ADC's normal value calculation was inconsistent with obligations under Article 2.2.1.1 therefore lacks merit and must fail.

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

61. Moving on to China's AD claim 1, China challenges the ADC's decision to use the French producer Valdunes purchase price of steel billet as reference data for the purpose of 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 pricing data from outside China to ascertain cost of steel billet in Masteel's production of railway wheels.²⁹

62. China is wrong. The ADC's sourcing of data from outside China as an element of its constructed value calculation did not amount to a breach of Australia's obligations under Article 2.2 of the Anti-Dumping Agreement. The ADC properly sought to adjust the sourced data from outside China to take into account the China-specific factors impacting the exporter's costs. It did so for the purpose of identifying the costs of production in China, being the "country of origin".

63. China's strident claim ignores the highly pertinent Appellate Body report in *EU – Biodiesel (Argentina)*, which states that Article 2.2 "does not specify precisely to what evidence an authority may resort" in order to determine the cost of production in the country of origin.³⁰ In short, as the Appellate Body has explained, Article 2.2 does not preclude

²⁷ *Railway Wheels – Masteel Questionnaire*, "Attachment A-4-3-2 - Masteel - 2017 Auditors Report", (Exhibit AUS-21), p. 9.

²⁸ Australia's first written submission, para. 193.

²⁹ Request for the establishment of a Panel by China, WT/DS603/2, para. B.1.1.

³⁰ Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016, DSR 2016:VI, p. 2871, para. 232.

investigating authorities from sourcing data outside the country of origin, when necessary, to construct normal value.³¹

64. In sum, the ADC's calculation of the cost of production of railway wheels in China was consistent with Australia's obligations under Article 2.2 because of the following:

- a. it was appropriate on the facts of the investigation to calculate the cost of steel billet in China with reference to data sourced from outside China; and
- b. the ADC made necessary adjustments, based on the information available, to adapt the data sourced from outside China to Masteel's circumstances in China.

65. I will now turn to each of these points very briefly.

66. As I addressed in relation to AD claim 3, the ADC determined that Masteel's steel billet costs were formed in circumstances that were not normal or ordinary. The ADC thus decided that Masteel's recorded costs for this input could not be employed in its constructed value calculation. As such, the ADC was permitted to rely on data sourced from outside China to calculate a steel billet cost for Masteel.

67. Based on the available information, the ADC selected data supplied by another exporter in the railway wheels investigation, Valdunes, as a baseline reference for these costs. The ADC selected these data as the baseline because:

- a. Valdunes purchases were of the particular micro-alloyed steel used by Masteel in the production of railway wheels exported to Australia;
- b. Valdunes costs data had been verified for the exact same period of investigation; and
- c. Valdunes costs did not reflect the Chinese market distortions that impacted Masteel's costs at various stages of the production process.³²

68. Valdunes steel billet costs were thus a well-tailored and appropriate reference for Masteel's costs for the same input, steel billet.

³¹ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.71.

³² *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 102.

69. The ADC also did not "simply substitute" Masteel's records with out-of-country data, as China erroneously claims. Rather, the ADC considered a range of options based on the information available to it, including:

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

70. Furthermore, despite being provided several opportunities to provide relevant information that could have enabled the ADC to consider other data sources or further adjustments to the selected data, both Masteel and the Government of China failed to do so.³³

71. Following its careful consideration of the record evidence and the parties' submissions, the ADC relied on Valdunes data as the starting reference point for calculating Masteel's steel billet cost. For the reasons I have already discussed, this reasonable decision employed an appropriate point of reference on the record.

72. But, the ADC did not stop there. The ADC found it was appropriate (and possible) to tailor Valdunes data further to match Masteel's circumstances as an integrated producer of railway wheels in China. That is, the ADC adjusted Valdunes' steel billet costs to remove certain costs associated with sourcing upstream inputs, which Masteel would not have incurred in its production of steel wheels in China.³⁴

73. In sum, based on a proper evaluation of the facts and after considering a range of options, the ADC established that the Valdunes purchase price for steel billet was a suitable starting reference point for calculating the cost of production of steel billet in China. The ADC then appropriately adjusted that data to reflect Masteel's operations in China as an integrated producer of steel billet, relying on the information available. The ADC's approach was thus consistent with Article 2.2 of the Anti-Dumping Agreement.

74. China's AD claim 1 is misplaced and must fail.

³³ *Railway Wheels – GOC Response to SEF – Letter to ADC*, (Exhibit AUS-40).

³⁴ *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 99, 102.

IV. CONCLUSION

75. As Australia made clear at the outset of this opening statement, China has raised several claims relating to three separate cases involving the investigations into different products that were conducted at different times.

76. Australia requests the Panel find that the entirety of China's claims with respect to the stainless steel sinks and wind towers cases are outside the Panel's terms of reference. Australia seeks a prompt decision from the Panel on these untimely claims. Even if China had properly raised these claims for the Panel's consideration, Australia acted consistently with its WTO obligations.

77. China's remaining claims with respect to the railway wheels investigation are the only ones properly within the Panel's terms of reference. The ADC's findings in the railway wheels investigation were entirely consistent with Australia's obligations under the Anti-Dumping Agreement.

78. Australia greatly appreciates the time and consideration of the Panel and the Secretariat and looks forward to responding to any questions from the Panel.