

**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 SECOND SUBSTANTIVE  
MEETING OF THE PANEL AND THE PARTIES**

1 August 2023

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## **I. INTRODUCTION**

1. Thank you, Madam Chair and distinguished members of the Panel.
2. In this statement, I will first address the jurisdictional issues still before this Panel, and then will turn to certain substantive issues. We also have prepared responses to your thoughtful questions and look forward to discussing them with you later today.
3. The key issues before you are straight-forward. China has alleged that three different anti-dumping duty ("AD") investigations and one countervailing duty ("CVD") investigation involving steel products – wind towers, railway wheels and stainless steel sinks – violate both the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures. Australia has demonstrated that almost all of China's claims are with respect to measures that were terminated or superseded before the time of panel establishment.<sup>1</sup> China's claims with respect to these terminated or superseded measures are thus outside the Panel's terms of reference, and the Panel should make no findings or recommendations with respect to them. Moreover, in a number of instances, China has failed to cite a legal basis for its claims in its panel request,<sup>2</sup> a minimum prerequisite required by WTO rules.<sup>3</sup> These claims are similarly not properly before this Panel.
4. Australia's significant jurisdictional challenges are not just important in framing the scope of this dispute. The Panel's decision on Australia's jurisdictional challenges will have systemic implications for how the dispute settlement system will function for all Members moving forward. As a general matter, WTO rules do not permit Members to challenge measures that are not in existence at the time of panel establishment.<sup>4</sup> Members simply did not vest the dispute settlement system with the authority to make recommendations and rulings with respect to most of the measures challenged by China in this dispute. To this end, the Dispute Settlement Understanding ("DSU") contains several procedural safeguards that explicitly define the scope of what can be brought before a panel, as well as what

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<sup>1</sup> See, e.g., Australia's Preliminary Ruling Request, filed on 16 December 2022 ("PRR"); Australia's first written submission, paras. 22-139.

<sup>2</sup> Request for establishment of a panel by China, WT/DS603/2 ("China's panel request").

<sup>3</sup> See Australia's first written submission, paras. 80-139; Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:1, p. 3, para. 124.

<sup>4</sup> 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.

recommendations and rulings can be made by the Dispute Settlement Body ("DSB"). Most of this dispute falls outside of those safeguards.

5. It bears repeating that, under Article 6.2 of the DSU, the "matter" referred to the DSB must consist of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."<sup>5</sup> As the Appellate Body found in *EC—Chicken Cuts*, "the specific measure at issue" in Article 6.2 refers to the measures as they existed at the time of panel establishment—not measures that might exist at some other point in time.<sup>6</sup> Permitting China to challenge expired or superseded measures in this dispute would dramatically expand the role of the dispute settlement system and the potential scope of future disputes between Members.

6. Such a decision would also be contrary to Article 3.2 of the DSU, which stipulates that the dispute settlement system should "clarify the existing provisions" of the covered agreements but that it cannot "add to or diminish the rights and obligations provided in the covered agreements."<sup>7</sup> To achieve the balance of clarifying provisions without adding to or diminishing Members' rights, panels must take care to avoid opining on hypothetical, expired, or otherwise non-existent measures. Unlike the role of domestic courts in some Member countries, WTO panels cannot take the place of negotiators by creating new rules, filling gaps, or expanding their own jurisdiction through advisory rulings on matters not properly before them.<sup>8</sup> Advisory opinions, including on expired measures, prejudice Members in future disputes, undermine the WTO's broader negotiating and monitoring functions, and are at odds with the WTO's unique Member-driven nature.<sup>9</sup>

7. As a consequence, Australia is deeply concerned about the deficiencies in China's panel request. Australia raised these important issues promptly (including in its request for a preliminary ruling) and has provided detailed submissions on the Panel's terms of reference.<sup>10</sup> We continue to ask the Panel to rule on Australia's request as soon as possible.

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<sup>5</sup> Article 6.2 of the DSU.

<sup>6</sup> Appellate Body Report, 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.

<sup>7</sup> Article 3.2 of the DSU.

<sup>8</sup> Appellate Body Report, Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323, p. 19.

<sup>9</sup> See, also, PRR, fn. 11.

<sup>10</sup> See, e.g., PRR; Australia's comments on China's PRR response dated 12 January 2023; Australia's first written submission, paras. 22-139, 657-666; Australia's opening statement at the first Panel meeting, paras. 15-41; Australia's closing statement at the first Panel meeting, paras. 4-14; Australia's responses to Panel questions nos. 6-10, 42-60, paras. 3-27, 106-187; Australia's second written submission, paras. 15-136.

8. Before turning to Australia's substantive points, I would like to highlight two cross-cutting tactics that China has employed in advancing its arguments throughout this dispute.

9. First, Australia has been disappointed to see that, again and again, China has mischaracterised our arguments in what appears to be a deliberate attempt to confuse the Panel. China also ascribes to Australia arguments that we have never made and has alleged "facts" about Australia's domestic system that simply are not true, despite Australia's robust evidence to the contrary.<sup>11</sup> China's submissions then contain lengthy rebuttals to its own false arguments and facts.<sup>12</sup> In some cases, China even goes so far as alleging that Australia "fabricated" arguments for the purposes of this dispute.<sup>13</sup> Australia strongly rejects this allegation and objects to these litigation tactics. We note China has this morning expressed its own concerns about alleged mischaracterisations by Australia. Naturally, we disagree, and simply urge the Panel to have close regard to Australia's actual submissions rather than China's characterisations of them.

10. Second, throughout this dispute, China has sought to amend its panel request retroactively by re-defining the measures at issue and, in certain cases, the legal basis for its claims. Unfortunately for China, WTO rules do not permit a complainant to "cure" a deficient panel request through subsequent submissions.<sup>14</sup> China's repeated attempts to manipulate both the measures at issue and the legal basis for its claims are both disruptive to these proceedings and prejudice Australia's procedural rights. As Australia has stated repeatedly, the role of the panel is to evaluate a complainant's request for establishment on the basis of the text of that request.<sup>15</sup> The Appellate Body in *EC – Bananas III* observed, that "a panel request is normally not subjected to detailed scrutiny by the DSB" and that "it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU."<sup>16</sup> Australia

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<sup>11</sup> See, e.g., China's second written submission, para. 73.

<sup>12</sup> See, e.g., China's second written submission, para. 83.

<sup>13</sup> China's second written submission, para. 54.

<sup>14</sup> Panel Report, Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805, paras. 7.8-7.9.

<sup>15</sup> Panel Report, Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805, paras. 7.8-7.9.

<sup>16</sup> Appellate Body Report, 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. 142.

agrees and requests that the Panel reject any efforts by China to recast the specific measures or claims identified in its request.

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

11. All of China's claims related to the stainless steel sinks CVD investigation, and nearly all of China's claims related to the stainless steel sinks and wind towers anti-dumping investigations are outside the Panel's terms of reference. This is because these measures were superseded at the time of panel establishment. This is particularly obvious with respect to China's CVD claims, which pertain to a single subsidy program. In section B.2 of its panel request, China states clearly that all of its claims "are only with regard" to Program 1—a program Australia's investigating authority found was no longer countervailable nearly two years before the establishment of the Panel.<sup>17</sup>

12. With respect to the few AD claims that China did raise regarding the expiry reviews in stainless steel sinks and wind towers, China failed to cite the legal basis for these claims, Article 11.3 of the Anti-Dumping Agreement. As the Appellate Body has previously found, citation of the relevant provision at issue is a "minimum prerequisite" under Article 6.2 of the DSU.<sup>18</sup> China's failure to do so here means that China's claims related to the AD expiry reviews in section B.1 of its panel request are also not within the Panel's terms of reference.

13. China's response in its second written submission to these terms of reference challenges are, for the most part, repetitive of its earlier submissions and have been addressed in Australia's second written submission.<sup>19</sup> There are, however, several points that warrant further comment.

### **A. EXPIRED OR SUPERSEDED MEASURES ARE OUTSIDE THE SCOPE OF THE PANEL'S TERMS OF REFERENCE**

14. Australia first wishes to reiterate the correct legal standard at issue. In its second written submission, China continues to take the view that the *only* circumstance in which a

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<sup>17</sup> China's panel request, section B.2.

<sup>18</sup> Appellate Body Report, 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.

<sup>19</sup> Australia's second written submission, paras. 15-136.

measure is outside a panel's terms of reference is when the panel request does not *identify* the measure.<sup>20</sup> Australia disagrees with this restrictive interpretation of Article 6.2 of the DSU. As previously stated, Australia has never argued that China's panel request failed to *identify* the specific measures at issue.<sup>21</sup> Rather, according to the Appellate Body, the term "specific measures at issue" in Article 6.2 requires, as a general rule, that the measures included in a panel's terms of reference be in existence at the time of panel establishment.<sup>22</sup> Moreover, in *EC—Selected Customs Matters*, the Appellate Body explained that the role of a panel in reviewing the consistency of a challenged measure with WTO rules is to focus on the "legal instruments as they existed and were administered at the *time of panel establishment*."<sup>23</sup> As such, panels have consistently declined to make recommendations or rulings on challenged measures that have ceased to have effect or were revoked before panel establishment.<sup>24</sup> Panels are also precluded from doing so in accordance with Article 19.1 of the DSU.

15. China does not engage with this legal standard. For example, despite citing it repeatedly, China misunderstands the critical temporal distinction between measures that expire before and after panel establishment.<sup>25</sup> In fact, none of the cases relied on by China address measures that expired before panel establishment. These cases are therefore not relevant to this dispute.<sup>26</sup>

## **B. CHINA HAS MISCHARACTERISED THE CVD MEASURES AT ISSUE**

16. Next, I want to address China's attempts to amend retroactively the countervailing measures challenged in B.2 of its panel request by describing the measures as an "indivisible, continuous set of measures" comprising all instruments listed in numbers 8 to 23 of the

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<sup>20</sup> China's second written submission, para. 13.

<sup>21</sup> China's second written submission, para. 15.

<sup>22</sup> Appellate Body Report, 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.

<sup>23</sup> Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791, para. 187 (emphasis added).

<sup>24</sup> See, e.g., Panel Reports, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29, para. 6.19, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033, paras. 6.4, 6.12-6.13; Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373, para. 81.

<sup>25</sup> See, e.g., China's second written submission, paras. 79, 81, 82, 84-85, 91; Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Second Recourse to Article 21.5 of the DSU by the Philippines*, WT/DS371/RW2 and Add.1, circulated to WTO Members 12 July 2019, appealed 9 September 2019, para. 7.468.

<sup>26</sup> Australia's second written submission, paras. 69-70.

Appendix.<sup>27</sup> Australia notes that at no point does China explain how these separate instruments listed in its Appendix "operate together as part of a single measure and how a single measure exists as distinct from its components."<sup>28</sup> In fact, even when asked directly by the Panel about the Appellate Body Report in *Argentina — Import Measures* relating to this issue, China failed to provide any meaningful response.<sup>29</sup>

17. As the Appellate Body has previously found, panels will not "simply assume" that different legal instruments form part of a single measure, "Otherwise, the requirement to examine whether a complainant has established the precise content of a measure may well be superfluous."<sup>30</sup> Under WTO rules, the burden is on China to demonstrate why the Panel should consider these separate CVD instruments as part of one "continuous" or "indivisible" measure. China has not met its threshold burden. The Panel should therefore not treat instruments numbers 8 to 23 of the Appendix as a single measure.

18. Moreover, with respect to China's CVD claims, the concept of an "indivisible, continuous set of measures" directly contradicts the text of section B.2 of China's panel request. Specifically, China is clear that it is challenging only one aspect of Australia's countervailing measures – that is, "the countervailing measures ... *only* with regard" to stainless steel sinks Program 1.<sup>31</sup> There is no other logical way to read this sentence, despite China's continued insistence in its second written submission to the contrary.<sup>32</sup> Moreover, each of China's challenges in sub-sections B.2.1 to B.2.5 relate only to the original determination in respect of Program 1.<sup>33</sup> This further supports the most natural reading of China's panel request as focused exclusively on the specific countervailing measures related to Program 1 (that is, those associated with the original determination). As Australia has made clear, China may regret the approach it took in drafting its panel request, but it is the panel request that sets out the Panel's terms of reference – not China's subsequent explanations.

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<sup>27</sup> China's second written submission, paras. 19-77.

<sup>28</sup> Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579, para. 5.108.

<sup>29</sup> China's response to Panel question no. 38, para. 118.

<sup>30</sup> Panel Report, *United States – Countervailing Measures on Softwood Lumber from Canada*, WT/DS533/R and Add.1, circulated to WTO Members 24 August 2020, appealed on 28 September 2020, para. 7.756.

<sup>31</sup> China's panel request, section B.2 (emphasis added).

<sup>32</sup> China's second written submission, para. 37.

<sup>33</sup> China's panel request, sections B.2.1-B.2.5.



19. Australia further notes that, in arguing for an "indivisible" and "continuous" measure in its second written submission, China tries to have it both ways. It argues that the measure at issue in section B.2 of its panel request is not the investigating authority's original findings in respect of Program 1, but rather "a particular aspect of the measures which persists and carries through to the present day".<sup>34</sup> This argument is nonsensical for several reasons.

20. First, to return to Australia's core point, no measures related to Program 1 were in existence as of the time of panel establishment. This is because the Anti-Dumping Commission ("ADC") found, before panel establishment, that Program 1 was no longer a countervailable subsidy in the expiry review—in fact, there are still no measures related to Program 1 currently in existence. Whether continuous and indivisible or not, China's challenge amounts to a request for an advisory opinion on non-existent measures.

21. Second, China attempts to support this argument by asserting that "the same methodology and treatment of the alleged Program [1]" was repeated in the expiry review "and thus the legal problem was continued in respect of that review".<sup>35</sup> This is factually wrong. As the Panel noted in question number 90, the methodology used by the ADC in assessing Program 1 was different between the original determination and expiry review. In the original determination, for example, the ADC used an out-of-country benchmark in assessing benefit for Program 1.<sup>36</sup> In the expiry review, the ADC relied on in-country prices to find that there was no benefit associated with Program 1.<sup>37</sup> Third, if the measure is truly indivisible, how can China try to divide it by arguing that the Panel should focus on the original determination but ignore the ADC's findings in the expiry review?

22. Finally, in its second written submission, China asserts that the countervailing measures related to Program 1 still exist because "Chinese exporters face continued effects of disruption and uncertainty" due to the possibility that Program 1 could be countervailed in the future.<sup>38</sup> This argument is baseless and reflects a fundamental misunderstanding of the

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<sup>34</sup> China's second written submission, para. 39.

<sup>35</sup> China's second written submission, para. 40.

<sup>36</sup> *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), paras. 206-219.

<sup>37</sup> *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 82-83. The Report provides:

To determine whether Zhuhai Grand had received a benefit from its SIE traders through less than fair market value, the Commission compared the selling prices from its SIE traders to non-SIE traders and noted that the prices paid by Zhuhai Grand to its SIE traders were consistently higher than purchases from non-SIE traders.

<sup>38</sup> China's second written submission, para. 68.

purpose of the dispute settlement system. As Australia has already pointed out in previous submissions – including paragraph 43 of our second written submission – the mere possibility that a subsidy program could be countervailed in the future does not make it challengeable under WTO dispute settlement. Any alleged subsidy program, whether countervailed in the past or not, might be countervailed in the future. However, particularly in an "as applied" challenge, WTO rules require a Member to wait until a measure is actually imposed before challenging that measure under dispute settlement. It is only then that it would be appropriate to request consultations and, if the dispute remained unresolved, to subsequently request the establishment of a panel.

23. Australia also strongly objects to China's continued assertions that Program 1 still exists because the ADC will consider Program 1 in future CVD proceedings. Once again, China ignores Australia's prior submissions on this point and misleads the Panel. Australia will address this point more fully in response to Panel questions numbers 71 to 73.

**C. CHINA'S CLAIMS AS TO THE WIND TOWERS AND STAINLESS STEEL SINKS ANTI-DUMPING MEASURES ARE ALSO OUTSIDE THE PANEL'S TERMS OF REFERENCE**

24. I turn now to Australia's procedural challenges to China's AD claims pertaining to wind towers and stainless steel sinks. Just as in its CVD claims, China argues that the measures at issue are the imposition of anti-dumping duties pursuant to instruments numbers 1 to 7 for wind towers and numbers 8 to 23 for stainless steel sinks, as set forth in the Appendix of China's panel request.<sup>39</sup> According to China, these instruments form an "indivisible, continuous set of measures".<sup>40</sup>

25. China's case misunderstands the relationship between the original investigation and the expiry reviews in Australia's system. These are separate and distinct measures.<sup>41</sup> China has offered no evidence to demonstrate that different legal instruments and proceedings related to the same product form a single measure – no doubt because no such evidence exists.<sup>42</sup> The fact that the expiry reviews followed the original determinations in time, or would not have been conducted without an original determination, does not mean that these separate

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<sup>39</sup> China's second written submission, paras. 20-29.

<sup>40</sup> China's second written submission, para. 45.

<sup>41</sup> Australia's second written submission, paras. 73-86.

<sup>42</sup> Australia's second written submission, paras. 77-86; see also China's response to Panel question no. 38, para. 118.

measures may be considered together under WTO rules as a single measure.<sup>43</sup> This is also clear from the explicit terms of the Anti-Dumping Agreement, including the distinct treatment of expiry reviews in Article 11.3.

26. China's arguments appear to be attempting to avoid the fact that almost all of its claims are squarely directed at the original determinations and resulting duties for both wind towers and stainless steel sinks. Yet, in its first written submission, China states that the "Panel's focus should largely remain fixed on the original investigations in each of the wind towers and stainless steel sinks cases".<sup>44</sup> Any *separate* claims China now raises against the expiry reviews are also outside the scope of the Panel's terms of reference.

**1. A complainant may not make Article 2 claims against an expiry review without citing Article 11.3 in a panel request**

27. In preparing its panel request, China made a choice not to cite Article 11.3 of the Anti-Dumping Agreement. As a consequence, China failed to provide 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.

28. As the Appellate Body made clear in *Korea – Dairy*, 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.<sup>45</sup> There is no question here that China's panel request fails to identify Article 11.3 of the Anti-Dumping Agreement.

29. China claims in its second written submission that its failure was intentional and is excused by *US – Corrosion-Resistant Steel Sunset Review*, in which the Appellate Body found that an expiry review was inconsistent with Article 2.4 of the Anti-Dumping Agreement.<sup>46</sup> But, in that case, the complainant also explicitly challenged Article 11.3 of the Anti-Dumping Agreement in its panel request—which China failed to do here.<sup>47</sup> In fact, complainants in *all*

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<sup>43</sup> See Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3, paras. 105-107.

<sup>44</sup> China's first written submission, para. 35.

<sup>45</sup> 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.

<sup>46</sup> China's second written submission, paras. 99-100, 102-103.

<sup>47</sup> Request for the establishment of a panel by Japan, *United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*, WT/DS244/4, pp. 2-5.

of the cases cited by China explicitly raised Article 11.3 of the Anti-Dumping Agreement in their panel requests.

30. Australia is not alone in its view that WTO rules require that a complainant must cite Article 11.3 of the Anti-Dumping Agreement in order to challenge a dumping determination in an expiry review. The European Union and Japan have offered compelling support for Australia's position in their third party submissions.<sup>48</sup> In fact, in response to the European Union, China argues that "[ADA] Article 3 is not directly applicable to expiry reviews," and that "it must be raised in conjunction with Article 11.3."<sup>49</sup> But, China cannot explain why if Article 3 and Article 11.3 must be raised together with respect to an expiry review, the same is not also true with respect to Article 2 and Article 11.3.

## **2. Conclusion**

31. Australia is not making a radical argument here. Rather, we are advancing a well-understood interpretation of the Anti-Dumping Agreement that is strongly supported by third parties. By contrast, it is China who asks the Panel to allow it to challenge an expiry review without citing Article 11.3 of the Anti-Dumping Agreement. Its approach is unprecedented.

32. China's failure to cite Article 11.3 in its panel request is a fatal flaw that cannot be rectified or cured in subsequent submissions. Pursuant to Australia's previous detailed submissions and Articles 6.2 and 7.1 of the DSU, both the wind towers and stainless steel sinks expiry reviews are outside the Panel's terms of reference.<sup>50</sup>

## **3. China's claims related to the Interim Reviews are also outside the terms of reference of this dispute**

33. Finally, Australia objects to China's attempts to now challenge the interim reviews in both the stainless steel sinks and wind towers investigations.<sup>51</sup> It wasn't until after the first Panel meeting that China stated it was seeking findings with respect to these reviews. This

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<sup>48</sup> See EU third party submission, para. 25; Japan's response to Panel question no. 1, paras. 1-5.

<sup>49</sup> China's second written submission, fn. 109.

<sup>50</sup> See, e.g., Australia's first written submission, paras. 22, 24, 80-114, 116, 124-136; Australia's opening statement at the first Panel meeting, paras. 31-41; Australia's closing statement at the first Panel meeting; paras. 9-10, 12; Australia's responses to Panel questions nos. 6-10, 42-60, paras. 3-27, 106-187; Australia's second written submission, paras. 97-135.

<sup>51</sup> See, e.g., Australia's second written submission, paras. 124-135.

approach constitutes a flagrant disregard for DSU rules, the Panel's Working Procedures 3(1), and is an attempt to inappropriately expand the scope of this dispute. China's conduct has prejudiced Australia.

34. We will address this further in response to Panel questions, but note that these claims are outside the Panel's terms of reference, for the following reasons. First, the interim reviews were superseded at the time of panel establishment. Second, China failed to cite Article 11.2 of the Anti-Dumping Agreement in its panel request. Third, China has not presented a *prima facie* case and has violated the Panel's Working Procedures, as China did not present any meaningful arguments related to the interim reviews in its first written submissions.<sup>52</sup> The Panel should firmly reject China's attempts to expand the scope of this dispute at this late stage.

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

35. I now turn to the only claims that are properly within this Panel's terms of reference, China's claims under the Anti-Dumping Agreement with respect to the railway wheels investigation. Each of China's claims is without merit, and almost all are consequential on China's AD claims 3 and 1.

#### **A. CHINA'S AD CLAIM 3**

36. China's railway wheels AD claim 3 has taken several turns and now includes layers of alternative argument. I will briefly address each of China's suppositions but will then focus on where the dispute has crystallised.

37. At the outset, it should have been plain to China that the ADC invoked "normally" under the first sentence of Article 2.2.1.1. The Railway Wheels Investigation 466 Report contains an express finding that the "circumstances are not normal and ordinary because the

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<sup>52</sup> Panel Working Procedures, para. 3(1).

records of Masteel reflect the government influence by the [Government of China ("GOC")] which distorts the costs in the steel and steel input markets in China".<sup>53</sup>

38. Despite this express ADC finding, China contends that inclusion of the phrase "reasonably reflects competitive market costs" in the report means that the ADC actually made a finding under the second condition of Article 2.2.1.1 and applied the wrong criteria.<sup>54</sup> Australia has repeatedly explained, including in my closing statement at the Panel's first meeting, that this contention is wrong.<sup>55</sup> The phrase "reasonably reflect competitive market costs" refers in Australian law only to the narrow requirements of subsection 43(2) of the *Customs (International Obligations) Regulation 2015*.<sup>56</sup> Where the subsection 43(2) criteria are met, the records of an exporter *must* be used. The regulation says nothing about – and provides no basis for – the ADC to reject an exporter's records.

39. From Australia's perspective, railway wheels AD claim 3 has now crystallised into two issues.

40. The first is China's contention that the ADC acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by invoking "normally" without having first made affirmative findings under the first and second conditions of that Article.

41. The second is China's argument that the phrase "normally" cannot be permissibly interpreted to have meaning that is distinct from the requirements of the first and second conditions.

42. Australia notes, for completeness, that up to this point China has not contested the ADC's application of "normally" to the specific facts of the railway wheels investigation.

**1. Article 2.2.1.1 does not mandate a sequence of analysis for an investigating authority to follow**

43. Where the Anti-Dumping Agreement requires a particular order of analysis within an article, this mandate is set out expressly in the text. There is nothing in the text of the first sentence of Article 2.2.1.1 that requires an investigating authority to follow a particular

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<sup>53</sup> See, e.g., *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 80.

<sup>54</sup> China's first written submission, paras. 226-228, 248, 253.

<sup>55</sup> See, e.g., Australia's closing statement at the first Panel meeting, para. 24.

<sup>56</sup> *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 24, 80.

sequence of analysis in deciding whether to rely on an exporter's records in its cost calculations.

44. Australia submits that, to the extent the panel in *Australia — Anti-Dumping Measures on Paper* found to the contrary, that approach should not be followed.<sup>57</sup> China's response has been to assert that the panel's reasoning in *Australia – Anti-Dumping Measures on Paper* was "entirely suited to the plain text"<sup>58</sup> of the Anti-Dumping Agreement, while conspicuously, offering no support for that assertion.

45. The only new argument advanced by China in support of the alleged requirement for sequencing is its identification of a purportedly "longstanding principle that the application of a rule must first be considered before then going on to consider a derogation from the rule".<sup>59</sup> Australia rejects the assertion that this rule exists — there is no such standalone rule of treaty interpretation that mandates consideration of all conditions for the application of a rule before considering derogations. But even if it did, Australia fails to see how the rule would lead to the conclusion that there is a mandatory sequencing requirement. Article 2.2.1.1 provides that costs are, in most circumstances, to be calculated based on an exporter's books and records, but allows three bases for deviating from that rule. If the first and second conditions are characterised as conditions for application of the rule, then the same would be true of "normally".

46. Treaty text is to be interpreted in good faith, in accordance with the ordinary meaning of terms in their context and in light of the treaty's object and purpose.<sup>60</sup> It follows that whether there is a mandatory order of analysis in a treaty provision is a matter of interpretation of the specific provision in issue. Article 2.2.1.1, the specific provision in issue, is not structured or phrased in a way that suggests a mandatory order of analysis. It is framed in relevantly different terms to the GATT provisions considered in the previous decisions China

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<sup>57</sup> Australia's second written submission, paras. 161-180.

<sup>58</sup> China's second written submission, para. 203.

<sup>59</sup> China's second written submission, para. 203.

<sup>60</sup> Article 31 of the Vienna Convention on the Law of Treaties (1969); Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3, pp. 16-17.

cited in its second written submission.<sup>61</sup> The nature of "normally" and the two conditions therefore cannot be categorised as a "rule" or "derogation" in the same way.

47. Further, the previous WTO decisions cited by China for support are inapposite. The criticism made in those decisions was of a situation in which derogations were being applied to entire categories of *measures*, without first identifying the specific "measures".

48. Australia has demonstrated that, read as a whole, Article 2.2.1.1 provides an obligation for an investigating authority to use exporters records as the basis of cost calculations for the purpose of constructing normal value. This obligation only applies where:

- a) circumstances are normal;
- b) the records are in accordance with the generally accepted accounting principles ("GAAP") of the export country; and
- c) the records reasonably reflect the costs associated with the production and sale of the product under consideration.

49. The three circumstances are not mutually exclusive, nor are they contingent on one another.

## **2. China's *arguendo* argument regarding "normally" is internally inconsistent and lacks merit**

50. China's only engagement with the substance of Australia's "normally" arguments is on an *arguendo* basis in its second written submission, and its approach is unorthodox.<sup>62</sup> China claims there are two different "permissible interpretations" of "normally," and then claims that Australia has postulated an entirely "unbounded" interpretation of the term.<sup>63</sup> This is simply wrong and appears to be an attempt to avoid addressing the ADC's application of "normally" and the specific circumstances at issue in the railway wheels investigation.

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<sup>61</sup> China's second written submission, paras. 204-205 citing Appellate Body Reports, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3, p. 16 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755, paras. 118-119; and Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, p. 3305, para. 8.80.

<sup>62</sup> China's second written submission, paras. 211-248.

<sup>63</sup> See, e.g., China's second written submission, paras. 246-247.



51. The first interpretation that China advances of "normally" is that the term should be given no independent meaning distinct from the first and second conditions provided for in Article 2.2.1.1.<sup>64</sup> For the reasons set out in Australia's first written submission, Australia considers such an interpretation to be incompatible with the ordinary principles of treaty interpretation. China's proposal would give no meaning at all to the term "normally" (that would be distinct from the word "shall").<sup>65</sup>

52. Previous WTO panels and the Appellate Body have consistently explained that the term "normally" must be given meaning and effect.<sup>66</sup> They have not identified the precise situations in which an investigating authority may find circumstances to be not normal or ordinary, as such a determination is necessarily dependent on the specific facts of each case.<sup>67</sup>

53. The second interpretation China advances is that cost records are not required to be used where there is a "compelling reason to doubt the accuracy, completeness, faithfulness and reliability of a cost or costs kept in the records".<sup>68</sup> Despite being presented as an alternative, China's explanation of its second interpretation reveals that it is substantively identical to the first. That is, both interpretations reduce the content of "normally" to the same content as the second condition of Article 2.2.1.1. On China's account, the content of normally is limited to where there has been a "peculiarity of a reason" why the records would not already have been caught by the first and second condition.<sup>69</sup> It is entirely implausible that the parties to the Anti-Dumping Agreement deliberately included the broad term "normally" alongside the more specific first and second conditions, but intended to give "normally" no more than inutile incremental additional meaning.

54. In any event, this Panel need not provide a precise definition of "normally" or seek to delineate all circumstances when an investigating authority may invoke it. Rather, the ADC

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<sup>64</sup> China's second written submission, para. 247(a).

<sup>65</sup> Australia's first written submission, paras. 182-184.

<sup>66</sup> Australia's first written submission, paras. 185-188 citing Appellate Body Reports, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751, para. 273, *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. 6.71; Panel Reports, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041, para. 7.161, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R, DSR 2016:VI, p. 3077, para. 7.227, *European Union – Anti-Dumping Measures on Biodiesel from Indonesia*, WT/DS480/R and Add.1, adopted 28 February 2018, DSR 2018:II, p. 605, para. 7.65, *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/R and Add.1, adopted 28 January 2020, paras. 7.111, 7.115.

<sup>67</sup> Australia's first written submission, para. 190.

<sup>68</sup> China's second written submission, paras. 247(b).

<sup>69</sup> China's second written submission, para. 234.

plainly relied on "normally" in its railway wheels investigation to employ information other than the exporter's records when assessing a single cost item, steel billet. The record evidence shows that an unbiased and objective investigating authority could have made the same decision as the ADC in finding that the circumstances in which Masteel's steel billet costs were formed were not normal and ordinary. The ADC thus acted consistently with Article 2.2.1.1.

55. For these reasons, and those set forth in our written submissions, Australia requests the Panel reject the entirety of China's AD claim 3 with respect to railway wheels.

**B. CHINA'S AD CLAIM 1**

56. I will now only briefly turn to China's AD claim 1. The relevant issues have been addressed in detail in Australia's previous submissions.<sup>70</sup>

57. In AD claim 1, China argues that out-of-country data can never be used by an investigating authority to determine "cost of production in the country of origin". This proposition is inconsistent with the text of the Anti-Dumping Agreement and runs afoul of the findings of the Appellate Body.<sup>71</sup>

58. Given the facts and circumstances before the ADC in railway wheels, it was entirely consistent with the requirements of Article 2.2 of the Anti-Dumping Agreement for the ADC to rely on data external to Masteel's records as the basis for constructing steel billet costs in China. The ADC proceeded to make the necessary adjustments based on the information reasonably available to it, adapting the data sourced from outside China to Masteel's circumstances in China.

59. The sole argument of AD claim 1 made in China's second written submission is an allegation that Australia has admitted that the investigation did not comply with Article 2.<sup>72</sup> As will be obvious to the Panel, no such admission has been made. China's sole point in support of this inaccurate argument is an allegation that the ADC "expressly acknowledged the need for an adjustment and did not make the adjustment".<sup>73</sup>

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<sup>70</sup> Australia's first written submission, paras. 276-312; Australia's opening statement at the first Panel meeting, paras. 61-74; Australia's closing statement at the first Panel meeting, paras. 17-21; Australia's responses to Panel questions nos. 12-13, paras. 28-33; Australia's second written submission, paras. 192-203.

<sup>71</sup> Australia's second written submission, para. 192.

<sup>72</sup> China's second written submission, para. 143.

<sup>73</sup> China's second written submission, para. 160.

60. This argument is irreconcilable with the published report. The report records that the ADC "considered whether it would be appropriate" to make adjustments for comparative advantage or disadvantage.<sup>74</sup> No finding was made that such an adjustment was necessary. Rather, the ADC concluded that no such adjustment should be made because it would not be possible to "separate the significant involvement of the [Government of China ("GOC")] in the relevant markets from any comparative differences".<sup>75</sup>

### **C. CHINA'S AD CLAIM 5.D**

61. The legal basis for China's AD claim 5.d remains unclear to Australia. Australia raised this concern at the earliest opportunity in this proceeding, but China has failed to articulate satisfactorily the legal basis for its claim, or at least a basis that is not entirely consequential on AD claims 1 or 3.<sup>76</sup>

62. In its second written submission, China offers no clarification. Rather, China instead replicates entirely a large section of the arguments set forth in its first written submission.<sup>77</sup>

63. Despite the vagueness of China's case, Australia has done its best to engage with what appears to be the substance of its argument. As Australia set out in its second written submission, its best understanding of the case China seeks to advance is that, when an investigating authority engages in a construction of normal value, it must only, unequivocally, have regard to the precise accounting categories used in the exporter's records.<sup>78</sup> According to China, this is so *even if* the investigating authority had found that circumstances were not normal and ordinary, that those records were not GAAP compliant, or that those records did not reasonably reflect the exporter's costs. There is no basis in the Anti-Dumping Agreement for such an obligation, and it has an obvious potential to lead to nonsensical results.

### **D. CHINA'S AD CLAIM 6.A**

64. China's AD claim 6.a must fail because it is an impermissible attempt to challenge the ADC's construction of normal value under Article 2.2. Adjustments made under Article 2.4 are

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<sup>74</sup> *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 98.

<sup>75</sup> *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 98.

<sup>76</sup> Australia's first written submission, paras. 250-252, 255-259.

<sup>77</sup> China's second written submission, para. 268.

<sup>78</sup> Australia's second written submission, paras. 209-215.

designed to address price comparability issues, not to reverse the outcome of methodological choices made during the construction of normal value under Article 2.2.

**E. CHINA'S AD CLAIM 7.B**

65. On China's AD claim 7.b, Australia and China appear to agree that the ADC used Masteel's actual sales data to calculate the profit component of the constructed normal value, and did so using data that includes sales figures of all railway wheels from Masteel's "Wheels Division".<sup>79</sup>

66. The record shows that the ADC did so in circumstances where:

- a) this data was the verified information available to the ADC; and
- b) Masteel had positively submitted to the ADC that this data be used for this purpose.<sup>80</sup>

67. China's allegation that Masteel was repeatedly misled with respect to the ADC's calculation has no basis in the record. The approach taken was one adopted at Masteel's suggestion.

68. For all the above reasons, the Panel should reject China's AD claim 7.b. In the facts and circumstances of the railway wheels investigation, the approach taken by the ADC was entirely consistent with the requirements of Article 2.2.2.

**IV. CONCLUSION**

69. To conclude, Australia requests that the Panel find the entirety of China's claims with respect to the stainless steel sinks and wind towers cases outside the Panel's terms of reference, and to do so as soon as possible.

70. In any event, the ADC's findings with respect to all three cases are consistent with Australia's obligations under the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures.

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<sup>79</sup> China's second written submission, paras. 312-313.

<sup>80</sup> See *Emails from Percival Legal to ADC, dated 9 June 2018 to 11 June 2018*, (Exhibit AUS-77).

71. Australia greatly appreciates the time and consideration of the Panel and the Secretariat and looks forward to responding to any questions that you, Chair, or other Panel members may have. Thank you.