

**Before the World Trade Organization**

**Panel Proceedings**

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

**AUSTRALIA’S REQUEST FOR A PRELIMINARY RULING**

**Business Confidential Information REDACTED**

16 December 2022

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<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
<i>India – Sugar and Sugarcane (Australia)</i>	Panel Report, <i>India – Measures Concerning Sugar and Sugarcane</i> , WT/DS580/R and Add.1, circulated to WTO Members 14 December 2021, appealed on 24 December 2021
<i>Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines</i> , WT/DS371/RW and Add.1, circulated to WTO Members 12 November 2018, appealed on 9 January 2019
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Certain EC Products</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373
<i>US – Gasoline</i>	Panel Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29

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<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/RW, Add.1 and Corr.1, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW, DSR 2015:X, p. 5409 and DSR 2015:XI, p. 5653
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3

**TABLE OF EXHIBITS**

<b>Exhibit No.</b>	<b>Description</b>
AU – 1 (BCI)	<i>Stainless Steel Sinks Continuation Report 517, Confidential Attachment 33 – Residual, uncooperative subsidy margin (extract).</i>

**LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS**

<b>Abbreviation</b>	<b>Full Form or Description</b>
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201
ADC	Anti-Dumping Commission
DSB	Dispute Settlement Body
DSU	Understanding on 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
FWS	First Written Submission
RFE	Request for the establishment of a panel by China, WT/DS603/2
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
WTO	World Trade Organization

## I. INTRODUCTION

1. Pursuant to Articles 3.2, 3.4, 3.7, 6.2, 7.1 and 19.1 of the Dispute Settlement Understanding ("DSU"), and paragraph 4 of the Panel's Working Procedures, Australia requests that the Panel issue a preliminary ruling that all of China's claims contained in Section B.2 of its request for the establishment of a panel ("RFE"), concerning "countervailing measures," fall outside the Panel's terms of reference.<sup>1</sup>

2. Section B.2 of China's RFE states that the legal claims, related to countervailing measures, are focused *exclusively* on "the countervailing measures... only with regard to alleged *Program 1 – Raw Materials Provided by the Government at Less than Fair Market Value*" in the *Stainless Steel Sinks investigation*. However, the countervailing measures challenged by China associated with "Program 1" were terminated on 27 March 2020—two years prior to the establishment of this Panel on 28 February 2022. For the purposes of the *Stainless Steel Sinks* expiry review in February 2020, Australia's Anti-Dumping Commission ("ADC") concluded that Program 1 was not countervailable and terminated all duties and other measures related to Program 1.

3. China's claims relate solely to measures that were terminated before the Panel's establishment. As none of the measures challenged by China under Section B.2 of its RFE existed at the time China filed its request, these claims are squarely outside the Panel's terms of reference. Australia's request of the Panel, set out below in this submission, relates to this single issue which goes to the root of the Panel's jurisdiction to adjudicate China's claims under Section B.2 of its RFE. There are no benefits to China being impaired under any of the WTO Agreements as a result of measures related to Program 1, which were terminated long before China filed its panel request. Accordingly, Australia respectfully asks the Panel to find, consistent with WTO rules and a long line of previous panel and Appellate Body decisions, that China's claims are outside of its terms of reference and issue its ruling in advance of Australia's FWS.

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<sup>1</sup> China's RFE (for clarity, Australia is requesting that the Panel exclude from its terms of reference, China's claims under Sections B.2.1 – B.2.5 of the RFE).

## II. THE LEGAL FRAMEWORK

4. Article 3.4 of the DSU specifies that "recommendations or rulings made by the Dispute Settlement Body ("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."<sup>2</sup>

5. 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 Dispute Settlement Body ("DSB"), in accordance with Article 7.1 of the DSU.<sup>3</sup> 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)."

6. 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.<sup>4</sup> 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."<sup>5</sup>

7. 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

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<sup>2</sup> Emphasis added.

<sup>3</sup> Appellate Body Report, *US – Carbon Steel*, para. 125.

<sup>4</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36, 53; see also, Panel Report, *Thailand – Cigarettes (Article 21.5 – Philippines)*, para. 5.16 (where the Panel found that "panels have the authority to determine whether they have jurisdiction in a given case and to determine the scope and limit of that jurisdiction, as defined by their terms of reference.")

<sup>5</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36.



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'."<sup>6</sup>

8. With limited exceptions, a measure that is expired, terminated, repealed, or otherwise not in existence cannot be a "measure at issue" in accordance with Article 6.2 of the DSU and, therefore, is outside of a panel's terms of reference under Article 7.1. This is particularly true for measures which have expired *prior* to the request for panel establishment. The Appellate Body has stated: "The term "specific measures at issue" in Article 6.2 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."<sup>7</sup>

9. Dating back to the GATT-era, panels have almost always found such measures to be outside their terms of reference. In *US – Gasoline*, for example, the panel observed that: "[I]t had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel's terms of reference were fixed, were not and would not become effective."<sup>8</sup> For over two decades, this interpretation has been followed by panel after panel confirming the "general rule, [that] to be within a panel's terms of reference, the measure identified in the complainant's panel request *must be in force at the time of the panel's establishment*."<sup>9</sup> The panel in *Thailand – Cigarettes (Article 21.5)* recently undertook an extensive review of previous panel and Appellate Body decisions and similarly concluded that "in respect of measures withdrawn before panel establishment, *panel practice appears to heavily lean against making any findings*."<sup>10</sup>

10. The reason why expired, terminated, repealed, or otherwise non-existent measures, that have no legal effect, must be excluded from a panel's terms of reference under Article

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<sup>6</sup> Appellate Body Report, *Australia – Apples*, paras. 423-425.

<sup>7</sup> Appellate Body, *EC – Chicken Cuts*, para. 156.

<sup>8</sup> Panel Report, *US – Gasoline*, para. 6.19.

<sup>9</sup> Panel Report, *India – Sugar and Sugar Cane (Australia)*, Annex E-1, paras. 1.9-1.10 and 1.49; see also Panel Report, *China – Agricultural Producers*, paras. 7.82-7.92.

<sup>10</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.469 (emphasis added); see also Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.104 (on appeal) (where the panel similarly found after review that, "when deciding whether to make findings on expired measures, panels have declined to make findings on challenged measures that have expired before panel establishment.")

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." 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.<sup>11</sup> 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."<sup>12</sup>

11. Similarly, the panel in *US – Tuna II (Mexico) (Article 21.5 – Mexico)* 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 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

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<sup>11</sup> 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: "The 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."

<sup>12</sup> See Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19; quoted in Panel Report, *Argentina – Textiles and Apparel*, para. 6.13.

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.<sup>13</sup>

12. Finally, expired or otherwise withdrawn measures present a further 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 existence. The Appellate Body said in *US – Certain EC Products*, 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.<sup>14</sup>

### **III. THE COUNTERVAILING MEASURES CHALLENGED BY CHINA WERE TERMINATED TWO YEARS PRIOR TO THE DATE OF THE PANEL'S ESTABLISHMENT**

13. China's only claims in Section B.2 of its RFE relate exclusively to measures associated with a single subsidy program (Program 1) in the *Stainless Steel Sinks* investigation – measures which were terminated nearly two years before the Panel was established.

14. In this dispute, China raises several 'as applied' claims with respect to the anti-dumping and countervailing measures associated with three separate determinations involving dumped and/or subsidised products from China: *Anti-Dumping Commission Report No. 238 - Alleged Dumping of Deep Drawn Stainless Steel Sinks Exported from the People's Republic of China and Alleged Subsidisation of Deep Drawn Stainless Steel Sinks* (19 February 2015) ("*Stainless Steel Sinks Investigation 238 Report*")<sup>15</sup>; *Anti-Dumping Commission Report No. 466 – Alleged Dumping of Certain Railway Wheels Exported from the People's Republic of China and France* (1 March 2019) ("*Railway Wheels Investigation 466 Report*")<sup>16</sup>; and *Anti-Dumping Commission Report No. 221 - Dumping of Wind Towers Exported from the People's Republic of China and the Republic of Korea* (21 March 2014) ("*Wind Towers Investigation 221*")

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<sup>13</sup> Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.39.

<sup>14</sup> Appellate Body Report, *US – Certain EC Products*, para. 81.

Where the Appellate Body found that there was an "obvious inconsistency" in the Panel's findings and therefore, "[T]he 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."

<sup>15</sup> China's RFE, Section A.2.

<sup>16</sup> China's RFE, Section A.3.

*Report*").<sup>17</sup> Only one of these determinations involves countervailing duties; that is *Stainless Steel Sinks Investigation 238 Report*.<sup>18</sup>

15. In the 2015 *Stainless Steel Sinks Investigation 238 Report* ("original determination") the ADC found that imports of stainless steel sinks were both dumped and subsidised.<sup>19</sup> The ADC concluded its report on 19 February 2015 and found that, for the period of investigation (1 January 2013 to 31 December 2013), stainless steel sinks exported to Australia from China were dumped and subsidised and that the dumping and subsidisation of stainless steel sinks caused material injury to the Australian industry producing like goods.<sup>20</sup>

16. With respect to its subsidy determination, the ADC found that Chinese exports of stainless steel sinks were subsidised through 23 separate subsidy programs and recommended the imposition of countervailing duties on imports of stainless steel sinks from China ranging from 3.3 percent to 6.4 percent.<sup>21</sup> These programs related to the provision of steel for less than adequate remuneration<sup>22</sup>, tax incentives<sup>23</sup>, and grants<sup>24</sup>. Program 1 was the only subsidy program related to the provision of goods for less than adequate remuneration.<sup>25</sup> On 26 March 2015, the Parliamentary Secretary accepted the recommendations and reasons

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<sup>17</sup> China's RFE, Section A.1.

<sup>18</sup> Australia notes that Section B.2 of China's RFE states:

The 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").

<sup>19</sup> Under sections 269TG and 269TJ of the *Customs Act 1901*, Exhibit CHN-29, pp. 100 – 105, 107 – 112.

<sup>20</sup> *Stainless Steel Sinks Investigation 238 Report*, Exhibit CHN-2, section 1.3, pp. 10 – 13.

<sup>21</sup> *Stainless Steel Sinks Investigation 238 Findings - ADN No. 2015/41*, Exhibit CHN-14; *Stainless Steel Sinks Investigation 238 Report*, Exhibit CHN-2, table 9, pp. 53-54.

<sup>22</sup> *Stainless Steel Sinks Investigation 238 Report*, Exhibit CHN-2, section 7.4, p. 53. Program 1, Raw Materials Provided by the Government at Less than Fair Market Value, related to the provision of 304 SS CRC (a type of steel input).

<sup>23</sup> *Stainless Steel Sinks Investigation 238 Report*, Exhibit CHN-2, section 7.4, pp. 53 – 54. Program 8, Tax preference available to companies that operate at a small profit; Program 24, Preferential Tax Policies for High and New Technology Enterprises.

<sup>24</sup> *Stainless Steel Sinks Investigation 238 Report*, Exhibit CHN-2, section 7.4, p. 53 – 54. Program 2, Research & Development (R&D) Assistance Grant; Program 3, Grants for Export Activities; Program 4, Allowance to pay loan interest; Program 5, International Market Fund for Export Companies; Program 6, International Market Fund for Small and Medium-sized Export Companies; Program 9, Award to top ten tax payer; Program 10, Assistance to take part in overseas trade fairs; Program 11, Grant for management certification; Program 12, Grant for certification of product patents, Program 13, Grant for inventions, utility models and designs; Program 14, Grant for international marketing; Program 15, Subsidy to electronic commerce; Program 16, Grant for overseas advertising and trademark registration; Program 17, Grant for overseas marketing or study; Program 18, Gaolan Port Subsidy; Program 19, Information development subsidy; Program 20, Foreign Trade Exhibition Activity Fund; Program 21, Zhuhai Technology Reform & Renovation Fund; Program 22, Zhuhai Support the Strong Enterprise Interests Subsidy; Program 23, Zhuhai Research & Development Assistance Fund.

<sup>25</sup> *Stainless Steel Sinks Investigation 238 Report*, Exhibit CHN-2, section 7.4, p. 53; appendix 8, pp. 155, 160 – 172.

in the *Stainless Steel Sinks Investigation 238 Report* and imposed anti-dumping and countervailing duties on stainless steel sinks from China for a period of 5 years.<sup>26</sup>

17. Consistent with Australian law<sup>27</sup> and Article 21.3 of the SCM Agreement, countervailing duties are only valid for a period of 5 years and all measures related to the determination were set to expire on 26 March 2020. In 2019, the ADC conducted an expiry review of the determinations, using a period of investigation from 1 July 2018 to 30 June 2019.<sup>28</sup> On 28 February 2020, the ADC issued the *Stainless Steel Sinks Continuation 517 Report* ("expiry review"), which found that the expiration of anti-dumping and countervailing duty measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, dumping and subsidisation and the material injury that the measures were intended to prevent.<sup>29</sup> The ADC recommended the imposition of prospective anti-dumping and countervailing duties based on both new findings and calculations.<sup>30</sup>

18. In the expiry review, the ADC found that seven subsidy programs were countervailable and further determined that none of the other programs remained countervailable.<sup>31</sup> In particular, in the expiry review, the ADC found that Program 1 did not confer a benefit with respect to any of the investigated exporters and, therefore, was not countervailable. This is outlined in the *Stainless Steel Sinks Continuation 517 Report*, which found the sampled exporters (Cresheen, Rhine and Zhuhai) had not benefited from Program 1<sup>32</sup> and in confidential attachment 33, [[REDACTED]].<sup>33</sup> The

<sup>26</sup> *Stainless Steel Sinks Investigation 238 Findings - ADN No. 2015/41*, Exhibit CHN-14.

<sup>27</sup> *Customs Act 1901*, section 269TM(1), Exhibit CHN-29, p. 117.

<sup>28</sup> *Stainless Steel Sinks Continuation 517 Report*, Exhibit CHN-36, Section 2.2, p. 9.

<sup>29</sup> *Stainless Steel Sinks Continuation 517 Report*, Exhibit CHN-36, Section 1.3, p. 7.

<sup>30</sup> *Stainless Steel Sinks Continuation 517 Report*, Exhibit CHN-36, Section 1.3, p. 7.

<sup>31</sup> *Stainless Steel Sinks Continuation 517 Report*, Exhibit CHN-36, Sections 8.11, p. 85.

<sup>32</sup> *Stainless Steel Sinks Continuation 517 Report*, Exhibit CHN-36, section 8.7.1, p. 82; section 8.8.1, p. 83.; section 8.11, p. 85.

<sup>33</sup> *Stainless Steel Sinks Continuation 517 Report*, Confidential Attachment 33 – Residual, uncooperative subsidy margin (extract), Exhibit AU – 1 (BCI).

remaining seven subsidy programs countervailed in the expiry review<sup>34</sup> were tax<sup>35</sup> or grant programs<sup>36</sup>.

19. On 27 February 2020, the responsible Minister considered the *Stainless Steel Sinks Continuation 517 Report* and accepted the recommendations and reasoning of the ADC.<sup>37</sup> 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. Starting from 27 March 2020, the new subsidy margins ranged from 0.3 percent to 6.3 percent.<sup>38</sup> Importantly, as of 27 March 2020, all countervailing duties associated with Program 1 were terminated.<sup>39</sup> Since 27 March 2020, consistent with Australian law, the expiry review (including its legal and factual findings and resulting countervailing duties) has been the legal basis for the duties and other measures in effect related to imports of stainless steel sinks from China.

20. With respect to the present dispute, China filed a request for panel establishment on 14 January 2022, almost two years after the *Stainless Steel Sinks* expiry review superseded the original determination on 27 March 2020. Yet, China's RFE is very specific about the limited scope of its challenge regarding countervailing measures. In Section B.2 of its request, China unambiguously states that it is only challenging the countervailing measures associated with Program 1. Specifically, in the first sentence of Section B.2 China states:

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<sup>34</sup> *Stainless Steel Sinks Continuation 517 Report*, Exhibit CHN-36, sections 8.6 – 8.11 set out the ADC's subsidy assessment. All programs found to be countervailable in the inquiry period are listed in Table 22. Section 8.4 incorrectly describes that exporters received a countervailable subsidy under Program 1.

<sup>35</sup> *Stainless Steel Sinks Continuation 517 Report*, Exhibit CHN-36, section 8.11, Table 22: Program 8 - Tax preference available to companies that operate at a small profit.

<sup>36</sup> *Stainless Steel Sinks Continuation 517 Report*, Exhibit CHN-36, section 8.11, Table 22: Program 3 - Grants for Export Activities; Program 20 – Development of market projects for SMEs in foreign trade; New program 31 - Jinwan technology transformation funds; New program 34 - Sci-tech 2017 innovation promotion fund; New program 35 - Post-technical transformation award; and New program 37 - Pre-tax deduction for enterprises of R&D expenses.

<sup>37</sup> *Stainless Steel Sinks Continuation 517 Findings* - ADN No. 2020/003, Exhibit CHN-52.

<sup>38</sup> *Stainless Steel Sinks Continuation 517 Findings* - ADN No. 2020/003, Exhibit CHN-52.

<sup>39</sup> *Stainless Steel Sinks Continuation 517 Report*, Confidential Attachment 33 – Residual, uncooperative subsidy margin (extract), Exhibit AU – 1 (BCI); Australia notes that on page 80 of the *Stainless Steel Sinks Continuation 517 Report* there is a typographical error that erroneously references Program 1 in the list of countervailable programs. This was a simple typographical mistake with no practical or legal consequence. As Australia outlined, above, the ADC unequivocally found during the expiry review that there was no benefit for the sampled exporters in connection with Program 1 and, likewise did not find that Program 1 was a countervailable subsidy. Moreover, as detailed in this submission, all countervailing duties with respect to Program 1 were terminated in March 2020. *Stainless Steel Sinks Continuation 517 Report*, Confidential Attachment 33 – Residual, uncooperative subsidy margin (extract), Exhibit AU – 1 (BCI).

The 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").<sup>40</sup>

21. In subsections B.2.1 – B.2.5 of its RFE, China raise a series of ‘as applied’ claims alleging that the ADC’s determination with respect to Program 1 violates Articles 1.1(a)(1), 1.1(b), 1.2, 2.1(c), 11.1, 11.2 and 11.3 and 14(d) of the SCM Agreement.<sup>41</sup> Each of these claims relates only to Program 1 and whether the ADC correctly found that the provision of steel for less than adequate remuneration was a countervailable subsidy.

22. China raises no challenges with respect to the other subsidy programs found by the ADC to be countervailable in the expiry review. China also makes no ‘as such’ challenges with respect to Australia’s countervailing measures (or any other measure in this dispute) nor does China challenge a particular practice by the ADC. All of China’s ‘as applied’ claims in Section B.2, as noted in paragraph 2 above, are narrowly focused on the "countervailing measures... only with regard to alleged *Program 1*."<sup>42</sup>

23. Furthermore, at the time China filed its RFE, it was clear that none of the measures challenged existed. The expiry review, which found that Program 1 was not countervailable, superseded the 2015 original determination on 27 March 2020. Moreover, beginning 27 March 2020—*nearly two years* before the panel was established by the DSB—all countervailing duties related to Program 1 were terminated.<sup>43</sup>

24. The facts of this dispute comprehensively underscore why this Panel would have no opportunity to achieve a satisfactory settlement of the matters alleged in Section B.2 of China’s RFE —further vindicating the long line of reports making clear such claims fall outside of panels’ terms of reference. For example, China alleges that the countervailing measures related to Program 1 violate "Article 1.1(b) of the SCM Agreement, because Australia failed to

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<sup>40</sup> China’s RFE, Section 2 (emphasis added). Section A.1 of China’s RFE states that "the imposition of the duties was based on the findings and recommendations reported to the Parliamentary Secretary in *Anti-Dumping Commission Report No. 221 - Dumping of Wind Towers Exported from the People’s Republic of China and the Republic of Korea (21 March 2014)*." Australia understands that, in addition to the duties, the countervailing measures challenged by China include the findings and recommendations of the ADC solely related to Program 1.

<sup>41</sup> Australia notes that in its FWS, China has abandoned its claims under Section B.2.1 related to Article 1.1(a)(1) of the SCM Agreement. In any case, the same analysis would apply with respect to China’s claims under Section B.2.1, as China nevertheless failed to challenge a measure in existence.

<sup>42</sup> China’s RFE, Section B.2.

<sup>43</sup> *Stainless Steel Sinks Continuation 517 Findings - ADN No. 2020/003*, Exhibit CHN-52; *Stainless Steel Sinks Continuation 517 Report*, Confidential Attachment 33 – Residual, uncooperative subsidy margin (extract), Exhibit AU – 1 (BCI).

determine, or improperly determined, that the alleged provision of goods conferred a "benefit" to the recipient".<sup>44</sup>

25. As noted above, two years before this Panel was established, Australia itself determined that Program 1 did not confer a benefit on any Chinese exporters and, therefore, was not countervailable in the expiry review.<sup>45</sup> There simply is no matter at issue between the parties that this Panel could resolve, nor any measure it could recommend Australia bring into compliance in accordance with Article 19.1 of the DSU as a result.

26. To be clear, Australia maintains no countervailing duties or other measures associated with the *Stainless Steel Sinks* investigation relating to any other subsidy programs involving the provision of goods for less than adequate remuneration. The countervailing duties currently in place all relate to the tax and grant programs, which were identified by the ADC in the expiry review.<sup>46</sup> China's claims in Sections B.2.1 through B.2.5 of its RFE, as well as China's arguments related to these claims in its First Written Submission ("FWS"),<sup>47</sup> do not challenge those subsidy programs either; indeed, China makes explicit that it is not challenging these measures.<sup>48</sup> There simply are no benefits accruing to China under the WTO Agreements that are being impaired as a result of measures related to Program 1.

27. The entirety of Section B.2 of China's RFE amounts to a request for an advisory opinion from the Panel. Yet, with limited exception the DSU does not permit challenges to measures that are not in effect at the time a panel is established, whether those measures are withdrawn, terminated, expired, superseded or simply imaginary to begin with.<sup>49</sup> This is

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<sup>44</sup> China's RFE, Section B.2.2.

<sup>45</sup> *Stainless Steel Sinks Continuation 517 Report*, Exhibit CHN-36, section 8.7.1, p. 82; section 8.8.1, p. 83.; section 8.11, p. 85.

<sup>46</sup> *Stainless Steel Sinks Continuation 517 Report*, Exhibit CHN-36, Sections 8. 11, p. 85.

<sup>47</sup> China's FWS, 'Claims under the SCM Agreement', sections J – L, pp. 157 – 186.

<sup>48</sup> In China's RFE at Section B.2, China states: "The 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")."

<sup>49</sup> Australia found that Program 1 was not countervailable in respect of purchases of 304 CRC SS for stainless steel sinks two years ago, and has not sought to reassess this program for Chinese exporters since. There is nothing in place that would force the ADC to reconsider this program. Therefore, it bears no resemblance to the type of recurring legislative measure "affecting the operation of a covered agreement" that the Appellate Body found was the limited exception to the general rule in *US – Upland Cotton*, para. 263.



especially true with respect to measures that were not in existence *long before* a complainant's request, where for decades panels have rejected similar requests.<sup>50</sup>

28. 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 jurisprudence on this issue, China's claims contained in Section B.2 of its RFE are outside the Panel's terms of reference. As noted above, "panels cannot simply ignore issues which go to the root of their jurisdiction"—issues of jurisdiction must be dealt with first.<sup>51</sup> Recognising that China will have an opportunity to respond to this request, the Panel will shortly have all the information it needs to rule on this issue.<sup>52</sup> Australia submits that to continue to litigate claims that are outside the scope of this dispute would unnecessarily expend considerable time and resources for the Panel and the Parties. It would be inefficient for all involved to draft submissions, argue orally, and respond to questions on substantive claims that are not actually within the Panel's terms of reference. For this reason, the Panel should exercise its authority to resolve this issue urgently, in advance of Australia's

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<sup>50</sup> Australia takes note of the recent Panel Report in *US – Pipes and Tubes (Turkey)* (report on appeal), which considered an analogous fact pattern. In that dispute, the panel found at para. 7.105:

"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" because "the initial OCTG Final Determination ceased to have legal effect well in advance of the Panel's establishment on 19 June 2017."

Similar to this case, the Panel also found it "telling" that Turkey did not raise any challenges with respect to the Final Determination, which superseded the initial determination, at para. 7.106 ("Tellingly, Turkey has not raised any Article 1.1(b) and Article 14(d) claim against the amended OCTG benefit determination that replaced the initial benchmark and benefit determinations.")

Finally, the Panel further rejected Turkey's arguments for why the panel should rule on a measure not in existence at the time of the panel's establishment related to the Appellate Body's report in *US – Upland Cotton* at para. 7.108, which the panel found involved "different" circumstance. Finally, in para. 7.111, the panel further rejected Turkey's attempts to challenge USDOC practice on the basis of an 'as applied' challenge:

In addition, in making its argument, Turkey's request for an "as applied" finding in respect of the initial OCTG Final Determination would serve as a second opportunity to challenge an alleged "practice". We disagree with Turkey that such an "as applied" finding would differ from a finding regarding Turkey's "as such" claim. The reason Turkey gives for requesting an "as applied" finding, i.e. providing guidance for future benefit determinations in the same proceeding, is precisely the reason 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. "As such" challenges by a Member also avoid the need to bring further "as applied" challenges in the future. Therefore, we are not persuaded that we should rule on the USDOC's initial OCTG Final Determination in the context of addressing Turkey's "as applied" claims under Article 1.1(b) and Article 14(d).

<sup>51</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36 and 53.

<sup>52</sup> See Appellate Body Report in *China – Raw Materials*, para. 233 (in which the Appellate Body made clear that the due process protections 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").

FWS. By ruling on a preliminary basis, the Panel will prevent itself and the Parties from having to litigate a whole case that is not before it.

#### **IV. RELIEF SOUGHT**

29. For the reasons stated above, Australia respectfully requests that the Panel find that all of China's claims contained in Section B.2 of its RFE are outside of the Panel's terms of reference. In accordance with Articles 3.2, 3.4, 3.7, 6.2, 7.1 and 19.1 of the DSU, Australia further requests that the Panel make no findings or recommendations with respect to these claims and issue a preliminary ruling on this matter urgently, in advance of Australia's FWS. Australia thanks the Panel for its consideration of this issue.